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FISCAL IMPACT REPORT

ORIGINAL DATE 02/23/09

SPONSOR McCoy LAST UPDATED _____ HB 778

SHORT TITLE No Guantanamo Bay Detainees in New Mexico SB _____

ANALYST Weber

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	None		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General (AGO)

New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

House Bill 778 states that no federal department or agency shall transport any person who has been detained at the United States naval station, Guantanamo Bay, Cuba, into or through the external boundaries of the state of New Mexico. Further, no person who was detained at that facility shall be quartered or detained at any military installation or other federal property in New Mexico. The state, its political subdivisions or any private correctional facility with which the state or a political subdivision of the state contracts for the incarceration of prisoners shall not accept for quartering or detention any person who has been detained at the United States naval station, Guantanamo Bay, Cuba.

FISCAL IMPLICATIONS

There are no direct fiscal implications for the state general fund.

SIGNIFICANT ISSUES

The AGO offers the following insight related to potential conflicts with federal authority.

House Bill 778 may implicate issues of federal authority and preemption. Under art. VI, Section 1, clause 2 of the U.S. Constitution, “This Constitution and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land...” There are various U.S. Constitutional provisions implicated by this bill.

House Bill 778 prohibits the transport of detainees from Guantanamo to or through New Mexico. This prohibition presents several issues. First, it may contravene article 1, section 8, clause 3 of the U.S. Constitution, the commerce clause. Secondly, the Federal government owns the interstate highway system by which Guantanamo detainees could be transported.

House Bill 778 prohibits Guantanamo detainees from being quartered or detained at any military installation or federal property in New Mexico. This may contravene the United States Constitution. Under article 1, section 8, clause 17, the United States Congress has the power to “exercise exclusive Legislation in all Cases ... and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” The Supreme Court has said that Federal installations are subject to state regulation only when and to extent that U.S. congressional authorization is clear and unambiguous. Environmental Protection Agency v. California ex rel. State Water Resources Control Bd., 96 S.Ct. 2022 (1976). House Bill 778 would, in effect, regulate the types of persons who could be held at federal facilities within the geographical boundaries of the state. According to State ex rel. Children, Youth and Families Dept. v. Debbie F., 120 N.M. 665, 905 P.2d 205 (Ct. App 1995), when determining a State's jurisdiction over persons residing on a federal military enclave, there is recognition of a dual relationship between the state and the federal government with accommodation and cooperation as aim of that relationship. While Congress' exclusive jurisdiction over places purchased by United States with consent of state legislature is not an absolute prohibition against the application of state laws, its purpose is to protect federal government against conflicting regulations. Id.

Under the U.S. Constitution, the Congress has the power to “make Rules concerning Captures on Land and Water.” U.S. Const. art. 1, sec. 8 clause 11. The detainees at Guantanamo Bay have been designated as “enemy combatants.” See Boumediene v. Bush, 128 S.Ct. 2229 (2008). As such they are subject to the jurisdiction of the U.S. military commissions. See 10 U.S.C.A. § 948(c). According to In re Fair, C.C.Neb.1900, 100 F. 149, the wisdom, expediency, or justness of the military laws, rules, and regulations adopted and prescribed by the United States are of no concern to the states; the proper enforcement of such laws, rules, and regulations cannot be determined by state laws. In addition, the power of the federal government “to make rules for the government and regulation of the land and naval forces” is plenary and exclusive. In re Tarble, U.S.Wis.1871, 80 U.S. 397, 20 L.Ed. 597, 13 Wall. 397.

The NMCD adds other information more directly related to state law and regulation.

Generally speaking, the Department has no legal authority to house or incarcerate Guantanamo Bay detainees unless those detainees have been convicted of a New Mexico felony crime and sentenced to the Corrections Department. The possibility of a detainee being convicted or sentenced in New Mexico seems remote since most if not all of those detainees have never been to New Mexico in the first place.

Before the private prisons owners/operators in this state could house such detainees, they would have to terminate their contracts with the Department, and then allow the Department to remove its inmates from those prisons. The Department has its inmates occupying most of the private prison beds available in this state, meaning that the private prison owners/operators would not be very interested in terminating their contracts with the Department at this time.

MW/mt