

WILLIAM J. OLSON, P.C.

ATTORNEYS AT LAW

370 MAPLE AVENUE WEST, SUITE 4

VIENNA, VIRGINIA 22180-5615

TELEPHONE (703) 356-5070

FAX (703) 356-5085

E-MAIL: wjo@mindspring.com

<http://www.lawandfreedom.com>

114 CREEKSIDE LANE
WINCHESTER, VA 22602-2429
TELEPHONE (540) 450-8777
FAX (540) 450-8771

WILLIAM J. OLSON
(D.C., VA.)
JOHN S. MILES
(D.C., MD., VA. OF COUNSEL)
HERBERT W. TITUS
(VA. OF COUNSEL)
JEREMIAH L. MORGAN
(CA ONLY)

MEMORANDUM TO: DELEGATE BOB MARSHALL

FROM: HERBERT W. TITUS

SUBJECT: H.B. 1160 — A bill to Prevent Virginia from Aiding the U.S. Military in the Detention of Virginians under the National Defense Authorization Act of 2012

DATE: APRIL 3, 2012

QUESTION PRESENTED

H.B. 1160¹ passed the Virginia General Assembly by overwhelming, bipartisan majorities in both the House of Delegates (96-4, on February 14, 2012) and the Senate (37-1, on March 8, 2012), and has been forwarded to Governor Robert F. McDonnell for signature.

You have asked us for our thoughts on the interplay between your bill, H.B. 1160, and the federal law that it addresses, the National Defense Authorization Act of 2012 (“NDAA”), Pub. L. 112-81.²

I. THE FEDERAL STATUTE

A majority of the Virginia Congressional delegation opposed NDAA. Senators Warner and Webb voted in favor of a proposal by Senator Mark Udall (D-CO) to replace the detention powers with a study.³ Six of the eleven members of the Virginia delegation voted against adoption of the conference report on NDAA. Others may have opposed the detention provisions but may have voted for the bill because of its importance to national defense.⁴

¹ <http://lis.virginia.gov/cgi-bin/legp604.exe?121+sum+HB1160>

² <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01540:>

³ http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00210

⁴ <http://clerk.house.gov/evs/2011/roll932.xml>

As passed by Congress and signed by the President on December 31, 2011, NDAA has two sections that relate to the issue of detention by the military:

SEC. 1021. AFFIRMATION OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.

(a) **IN GENERAL.**—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to **detain covered persons** (as defined in subsection (b)) pending disposition under the law of war.

(b) **COVERED PERSONS.**—A covered person under this section is any person as follows:

(1) A person who **planned, authorized, committed, or aided** the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(2) A person who was a **part of** or **substantially supported** al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a **belligerent act** or has **directly supported** such hostilities in aid of such enemy forces.

(c) **DISPOSITION UNDER LAW OF WAR.**—The disposition of a person under the law of war as described in subsection (a) may include the following:

(1) Detention under the law of war **without trial until the end of the hostilities** authorized by the Authorization for Use of Military Force.

(2) **Trial** under chapter 47A of title 10, United States Code (as amended by the **Military Commissions Act of 2009** (title XVIII of Public Law 111–84)).

(3) **Transfer** for trial by an **alternative court** or competent tribunal having lawful jurisdiction.

(4) **Transfer** to the custody or control of the **person’s country of origin**, any **other foreign country**, or any other **foreign entity**.

(d) **CONSTRUCTION.**—Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

(e) **AUTHORITIES.**—Nothing in this section shall be construed to affect existing law or authorities relating to the **detention of United States citizens**, lawful resident aliens of the United States, or any other persons who are **captured or arrested in the United States**.

(f) **REQUIREMENT FOR BRIEFINGS OF CONGRESS.**—The Secretary of Defense shall regularly brief Congress regarding the application of the authority described in this section, including the organizations, entities, and individuals

considered to be “covered persons” for purposes of subsection (b)(2).
[Emphasis added.]

SEC. 1022 MILITARY CUSTODY FOR FOREIGN AL-QAEDA TERRORISTS.

(a) CUSTODY PENDING DISPOSITION UNDER LAW OF WAR.—

(1) IN GENERAL.—Except as provided in paragraph (4), the Armed Forces of the United States **shall hold** a person described in paragraph (2) who is captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107–40) in military custody pending disposition under the law of war.

(2) COVERED PERSONS.—The requirement in paragraph (1) shall apply to any person whose detention is authorized under section 1021 who is determined—

(A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and

(B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.

(3) DISPOSITION UNDER LAW OF WAR.—For purposes of this subsection, the disposition of a person under the law of war has the meaning given in section 1021(c), except that no transfer otherwise described in paragraph (4) of that section shall be made unless consistent with the requirements of section 1028.

(4) WAIVER FOR NATIONAL SECURITY.—The President may waive the requirement of paragraph (1) if the President submits to Congress a certification in writing that such a waiver is in the national security interests of the United States.

(b) APPLICABILITY TO UNITED STATES CITIZENS AND LAWFUL RESIDENT ALIENS.—

(1) UNITED STATES CITIZENS.—The **requirement to detain** a person in military custody under this section does **not extend to citizens** of the United States.

(2) LAWFUL RESIDENT ALIENS.—The **requirement to detain** a person in military custody under this section does **not extend to a lawful resident alien** of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States.

(c) IMPLEMENTATION PROCEDURES.—

(1) IN GENERAL.—Not later than 60 days after the date of the enactment of this Act, the President shall issue, and submit to Congress, procedures for implementing this section.

(2) ELEMENTS.—The procedures for implementing this section shall include, but not be limited to, procedures as follows:

(A) Procedures designating the persons authorized to make determinations under subsection (a)(2) and the process by which such determinations are to be made.

(B) Procedures providing that the requirement for military custody under subsection (a)(1) does not require the interruption of ongoing surveillance or intelligence gathering with regard to persons not already in the custody or control of the United States.

(C) Procedures providing that a determination under subsection (a)(2) is not required to be implemented until after the conclusion of an interrogation which is ongoing at the time the determination is made and does not require the interruption of any such ongoing interrogation. [Emphasis added.]

II. PRESIDENTIAL POLICY DIRECTIVE/PPD-14

Pursuant to NDAA section 1022(c), President Obama issued a presidential order relating to NDAA: Presidential Policy Directive/PPD-14 (Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012) (Feb. 28, 2012).⁵ While PPD-14 purports to apply only to the implementation of Section 1022, it contains several sections that relate directly to the implementation of Section 1022(b)(1) and (2) which exempt U.S. citizens and lawful U.S. residents only from the mandate of “military custody pending disposition under the laws of war.”

If a person is detained pursuant the president’s authority under Section 1021 (See PPD 14, p. 1), and if the detention is effected by the **Department of Defense** in the course of hostilities, then PPD 14-deems such a person to be lawfully detained “regardless of whether there has been a final determination as to whether the individual is a covered person,” including whether the person is a U.S. citizen. *See* PPD-14, section I(D).

If a person has been arrested by the **FBI or some other federal law enforcement agency**, the FBI or other agency must have **probable cause** that the person arrested is a U.S. citizen. *See* PPD 14, sections I(A) and (B). Probable cause is **determined by the Attorney General** “as soon as practicable after sufficient information is available” to screen that person to ascertain whether he is a “covered person. PPD 14, sections III. A. and B. The Attorney General’s decision is final. PPD 14, section III.D. Even if there is no clear and convincing evidence that a person is not a U.S. citizen, such decision “shall be without prejudice to the question of whether the individual may be subject to detention under the 2001 Authorized Use of Military Force Act of 2001, as informed by the laws of war, and affirmed by NDAA section 1021. PPD 14, section VII, para. 2.

⁵ <http://www.lawfareblog.com/wp-content/uploads/2012/02/NDAA-Presidential-Policy-Directive.pdf>

III. NDAA & PDD-14 ANALYSIS

Supporters of section 1021 dispute the contention that the section authorizes the President to detain an American citizen on suspicion actions supporting acts of terrorism. Pointing to subsection (e) of Section 1021 and to a separate provision in section 1022, they insist that no American citizen is in jeopardy of being detained on any such suspicion. Section 1021 (e), however, does not point to any “existing law or authorities” that deny to federal authorities the power to detain American citizens. To the contrary, PDD 14 indicates that an American citizen may still be held pending disposition by a military commission according to the laws of war.

Additionally, the Congressional Research Service (“CRS”) issued on January 11, 2012, a report on The National Defense Authorization Act for FY 2012: Detainee Matters. This official report states flatly that:

Section 1021 does not attempt to clarify the circumstances in which a U.S. citizen, resident alien, or other person captured in the United States may be held as an enemy belligerent.... Consequently, if the executive branch decides to hold such a person under the detention authority affirmed by Section 1021, it is left to the courts to decide whether Congress meant to authorize such detention when it enacted the AUMF in 2001. [CRS Report, p. 16.]

Indeed, the CRS Report also admits that:

Section 1021 does not attempt to provide additional clarification for terms, such as, “substantial support,” “associated forces,” or “hostilities.” For that reason, it may subject to an evolving interpretation that effectively permits a broadening of the scope of the conflict. [*Id.*]

Truly, it is disingenuous for any one to suggest that the Section 1021 of the NDAA of 2012 does not authorize the preventive detention of any American citizen. To the contrary, it authorizes such detention subject only to judicial review which, as the CRS Report documents, has been “generally favorable to the legal position advanced by the government regarding the scope of detention authority under the AUMF.” *Id.* at p. 3.

As for the exemption granted to American citizens under section 1022, by its plain language, it only exempts American citizens from such detention in those cases where the President is **required** to detain a person without trial, not where, as is the case with section 1021, the President is **permitted** to exercise such powers of detention. Moreover, under PPD 14, an American citizen who is “captured in the course of hostilities” by the Defense Department, regardless of whether the capture occurred on American or foreign soil, may be detained under section 1022 regardless of citizenship. Even in the case of citizen who has been

arrested, the question whether that person is a citizen is subject to final determination by the Attorney General not by a judicial tribunal.

Additionally, supporters have assured the American people that the detention power authorized by NDAA will cease with the “end of hostilities.” As military veteran, Brian J. Trautman, has observed that the “‘war on terror’ is a war on a tactic, not on a state, [and as such] has no parameters or timetables.” In other words, the authority granted by section 1021 is “a law that can be used by authorities to detain (forever) anyone the government considers a threat to national security and stability – potentially even demonstrators and protesters exercising First Amendment rights.”⁶ Even journalists could be caught in the net spun by Section 1021.⁷

Some members of the United States Congress have voiced their opinion that it is constitutional to suspend the procedural protections of the federal Bill of Rights with respect to American citizens who are suspected of supporting the terrorism. President Obama does not agree, as he signed the NDAA into law only after issuing a statement that “my administration will not authorize the indefinite military detention without trial of American Citizens.”⁸

Since enactment of NDAA, bills have been introduced in the House (H.R. 3702, H.R. 4192)⁹ and the Senate (S.2003, S.2175)¹⁰ to re-establish due process rights of Citizens. While these bills appear inadequate to solve the problem, they do reflect the broad opposition that this bill has received across the country, despite its being virtually ignored by the main stream media.

IV. H.B. 1160 TEXT

H.B. 1160 has gone through various forms, but the form passed by the House of Delegates and the Senate and presented to the Governor is as follows:

⁶ <http://www.counterpunch.org/2012/01/18/why-the-ndaa-is-unconstitutional/>

⁷ On January 12, 2012, a challenge to NDAA has been brought by a journalist, Christopher Hedges in U.S. District Court for the Southern District of New York. <http://www.scribd.com/doc/78496151/Text-of-Hedges-Legal-Complaint-Updated>

⁸ <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>

⁹ <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.3702:> and <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.4192:>

¹⁰ <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.2003:> and <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.2175:>

§ 1. Notwithstanding any contrary provision of law, no agency of the Commonwealth as defined in § 8.01-385 of the Code of Virginia, political subdivision of the Commonwealth as defined in § 8.01-385 of the Code of Virginia, employee of either acting in his official capacity, or member of the Virginia National Guard or Virginia Defense Force, when such a member is serving in the Virginia National Guard or the Virginia Defense Force on official state duty, shall aid an agency of the armed forces of the United States in the conduct of the investigation, prosecution, or detention of any citizen pursuant to 50 U.S.C. § 1541 as provided by the National Defense Authorization Act for Fiscal Year 2012 (P.L. 112-18, § 1021) if such aid would place any state agency, political subdivision, employee of such state agency or political subdivision, or aforementioned member of the Virginia National Guard or the Virginia Defense Force in violation of the United States Constitution, the Constitution of Virginia, and provision of the Code of Virginia, any act of the General Assembly, or any regulation of the Virginia Administrative Code.

V. H.B. 1160 ANALYSIS

There should be no question about the underlying constitutional principle in assessing the Commonwealth's response to H.B. 1160 — the duty of the Commonwealth of Virginia to assess for itself the constitutionality under the United States and Virginia Constitutions of its own actions. If elected officials of the Commonwealth believe that the NDAA detention provisions are unconstitutional, the proper response is to refuse to aid the federal government, should it decide to implement the detention provisions of NDAA. By this bill, the Virginia General Assembly has acted to protect the people of Virginia by mandating that no state official “shall aid” the enforcement of Section 1021.

Just this past October term, the United States Supreme Court affirmed that the federalist structure of the United States Constitution in which the 50 States are independent and sovereign “secures the freedom of the individual”:

It allows States to respond, **through the enactment of positive law**, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that **control a remote central** power. [Bond v. United States, 131 S. Ct. 2355, 2364 (2011).]

H.B. 1160 is just such a law. It has been enacted by constitutionally conscientious lawmakers to protect the liberties of the people from the exercise of “arbitrary power.” *See* Bond, 131 S.Ct. at 2364.

It is no surprise that H.B. 1160 has received strong support from the Japanese American Citizens League. For the reasons given in support of the enactment and enforcement

of Section 1021, suspending the civil liberties of U.S. persons suspected of supporting the war on terror on American soil are reminiscent of the reasons given to support the internment of Japanese American citizens in World War II.

As Justice Hugo Black wrote in Korematsu v. United States, 323 U.S. 214, 220 (1944):

[U]nder conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.” Because of “circumstances of direst emergency and peril,” the Court in Korematsu approved the “[c]ompulsory exclusion of ... citizens from their homes,” even though such action was “inconsistent with our basic government institutions. [*Id.*]

It took several decades for the United States Government to acknowledge that what it had done to Japanese American citizens was wrong, no matter how “compelling” the reasons seemed at the time. One of the enumerated purposes of that Act of Congress was to “discourage the occurrence of similar injustices and violations of civil liberties in the future....” Pub. L. 100-383 (1988), section 1(6).¹¹ It was to accomplish the very same purpose that Congress set out that H.B. 1160 was introduced and then passed by the Virginia General Assembly. While it was terrible for Congress to have made the mistake of depriving citizens of their civil liberties during World War II, and it was even worse for Congress to have repeated that same mistake, less than 25 years after Congress admitted its mistake.

Moreover, if the United States Congress must suspend a citizen’s civil liberties guaranteed by the Constitution’s Bill of Rights to fight the war on terrorism, then it has lost that war, having lost the very purpose for which that war is being fought — to preserve the American constitutional republic.

¹¹ http://www.internmentarchives.com/showdoc.php?docid=00172&search_id=3
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VI. GOVERNOR MCDONNELL'S CONCERNS

It has been reported that Governor McDonnell has practical concerns about signing H.B. 1160.¹² Aware of ongoing investigations involving joint task forces composed of federal, state, and local officials, the apparent concern is that a rule prohibiting any activity to aid the enforcement of section 1021 would interfere with the federal-state exchange of information and other cooperation in the war on terror. However, since President Obama has issued a signing statement advising his administration that no Section 1021 investigation, prosecution or detention will be conducted during his administration, this should present no problem for the remainder of the Obama Administration, at the least.

H.B. 1160 simply takes the President at his word. It mandates that no official of this Commonwealth will aid in any "investigation, prosecution, or detention" of any citizen pursuant to Section 1021. There should, then, be no objection to a Bill that assumes that federal officials will comply with President Obama's commitment in his signing statement.

However, should the president change his mind, or if a federal agency should choose to utilize the executive power conferred by section 1021, H.B. 1160 would refuse cooperation in one narrow area only. Indeed, all that H.B. 1160 requires is that state and local officials in the Commonwealth refrain from "aiding" any federal investigation, prosecution or detention undertaken pursuant to Section 1021. There is nothing ambiguous or overly broad about that prohibition. If federal and state officials have cooperated on investigative matters for years, they should have no difficulty in avoiding the limited area of noncooperation required by the Act.

There is a potential additional complication. Appointed by President Obama, Governor McDonnell is a member of the bipartisan Council of Governors ("COG"), a federal/state body established on January 11, 2010, by the President via Executive Order 13528, pursuant to Section 1822 of the National Defense Authorization Act of 2008. According to Section 1822, Congress authorized the President to establish this bipartisan body "to advise the Secretary of Defense, the Secretary of Homeland Security, and the White House Homeland Security Council on matters related to the National Guard and civil support missions." According to Executive Order 13528, COG's main function is to "exchange views, information, or advice" with various federal officers in the Departments of Defense and Homeland Security, and

¹² See, e.g., <http://p.washingtontimes.com/news/2012/mar/8/virginia-bill-okd-bucking-us-law-on-citizen-detent/> ("While the Governor does not condone the unlawful detention of US citizens, we do have concerns about the impact, whether intended or not, this legislation would have on Joint Terrorism Task Forces of which state and local agencies are members, information sharing by and with the Virginia State Police and local law enforcement, and the impact on our Virginia National Guard personnel," McDonnell spokesman J. Tucker Martin said in a statement.)

various assistants to the President, including the Assistant to the President for Homeland Security and Counterterrorism. Included within this duty to share “information and advice” are several subjects, among which are “homeland defense” and “synchronization and integration of State and Federal military activities within the United States.”

While Governor McDonnell may not be obliged to share any information that could be used to detain American citizens, pursuant to section 1021 of the NDAA of 2012, his membership on the COG might give him pause if the occasion arose in which such information is sought by one or more federal officers with whom the governor shares membership on COG. Should the President remain true to his pledge not to use the authority granted him by section 1021, no such occasion would arise.¹³ But the President is known to be a man who changes his mind. If he does, the Governor has the option of remaining on COG to defend the constitutional rights of American citizens, or to resign should any such occasion arise.

In any event, the key issues to be resolved by the Governor are: (i) whether he agrees that Section 1012 of the NDAA is unconstitutional; and (ii) whether it is within the authority of the Commonwealth of Virginia not to cooperate with the enforcement of an unconstitutional federal law.

Since the Governor’s oath¹⁴ includes upholding the Constitutions of both the United States and the Commonwealth, and since both documents secure to the people the rights to a speedy and public trial, confrontation of witnesses, jury trial, and due process of law, it seems reasonable to expect that the Governor will sign H.B. 1160. In so doing, he would fulfil the historic role of the States as being guardians of the people from usurpations of authority from the central government. Even Alexander Hamilton, a fan of broad national power, believed that the States would serve this function:

It may safely be received as an axiom in our political system, that **the State governments will**, in all possible contingencies, **afford complete security against invasions of the public liberty by the national authority**. [A. Hamilton, Federalist No. 28 (emphasis added).]

Governor McConnell certainly has the authority to make his own assessment of the federal statute’s constitutionality now, without having to wait for a judicial decision after some

¹³ See note 8, *supra*.

¹⁴ See Virginia Constitution, Article I, Section 7. (“I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia, and that I will faithfully and impartially discharge all the duties incumbent upon me as, according to the best of my ability (so help me God).”)

person is denied the very rights that the constitution was designed to protect. Thus, it would appear that the only reason why the Governor reasonably would veto H.B. 1160 would be that he believes that NDAA is constitutional — and we certainly trust that is not the case.