



**Testimony for the
House Health and Government Operations Committee
February 21, 2013**

HB 558 – Maryland Liberty Preservation Act

SUPPORT

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OF MARYLAND

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The ACLU of Maryland supports HB 558, which would prohibit an agency, county or employee of the state, and others, from knowingly aiding in the detention of a person under §§ 1021 and 1022 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81) (NDAA).¹

HB 558 responds to concerns raised by the NDAA's codification of indefinite military detention of civilians captured far from any battlefield - without charge or trial - for the first time in American history.

Section 1021 allows for indefinite detention without trial. It affirms the President's authority "to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force" including "the authority for the Armed Forces of the United States to detain covered persons ... pending disposition under the law of war." "A covered person is any 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." "The disposition of a person under the law of war ... may include...[d]etention under the law of war without trial until the end of the hostilities...."

Section 1022 refers to the detention by the Armed Forces of those whose detention is authorized under §1021.

There are many problems with §§1021 and 1022. They are not limited to people captured in an actual armed conflict, as required by the laws of war. They allow for American citizens to be taken from American soil and detained without trial. They allow for people to be locked up indefinitely based on mere suspicion. Section 1021's sweeping definition would cover someone who "substantially supported" "associated forces that are engaged in hostilities against" United States' "coalition partners." This could cover anyone from a journalist to someone who donated to an organization that, unbeknownst to the donor, has ties to an organization that is engaged in hostilities to a United States coalition partner.

The breadth of the NDAA's worldwide detention authority violates at least the 5th and 6th Amendments to the United States Constitution, as well as Article III of the Constitution. In fact, just this past fall, the District Court for the Southern District of New York held that §1021 of NDAA was facially overbroad in violation of the First Amendment and impermissibly vague in violation of the Fifth Amendment. *Hedges v. Obama*, 2012 WL 3999839 (S.D.N.Y. Sept. 12, 2012)(journalists sought preliminary and permanent injunctive relief, alleging §1021 already had an impact on their associational and expressive activities, and that it was "vague to such an extent as to

¹ The full text of §§ 1021 and 1022 are attached hereto as Appendix A.

provoke fear that certain of their associational and expressive activities could subject them to indefinite or prolonged military detention”).

Furthermore, the provisions of the NDAA authorizing the indefinite military detention of civilians violate the laws of war by which the United States is bound and which it helped to establish, because it is not limited to people captured in the context of an actual armed conflict. As such, it harms our Nation’s reputation for upholding the rule of law and democratic values; these civilians should be prosecuted in our federal courts if there is evidence of wrongdoing, not detained without charge or trial.

Although President Obama issued a signing statement saying he had “serious reservations” about the NDAA’s detention provisions, the statement only applies to how his administration would use them, and would not affect how the law is interpreted by subsequent administrations. The provisions are inconsistent with fundamental American values.

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The ACLU has been working with communities across the country to ensure that the community’s state and local law enforcement agents, National Guard members, and government employees are never used to assist any U.S. military detention without charge or trial of individuals in the United States. In passing this bill, Maryland will be joining an expanding list of cities, counties, towns, and states that have passed resolutions urging Congress to repeal the problematic provisions in the NDAA: Arizona; Hawaii; Maine; Virginia; Utah; the Michigan House of Representatives; the Rhode Island House of Representatives; Berkley, CA; Fairfax, CA; Santa Cruz, CA; El Paso County, CO; Fremont County, CO.; Moffat County, CO; Weld County, CO; Cherokee County, KS; Takoma Park, MD; Northampton, MA; Allegan County, MI; Oakland County, MI; Alleghany County, NC; Macomb, NY; Elk County, PA; Fulton County, PA; and New Shoreham, RI.²

This bill will send a strong message from the State of Maryland to Congress that the indefinite military detention provisions of the NDAA should be repealed.

For these reasons, the ACLU of Maryland urges a favorable report on HB 558.

² “One Thing Maine, Virginia, and Arizona Have in Common: Opposition to the NDAA,” <http://www.aclu.org/blog/national-security/one-thing-maine-virginia-and-arizona-have-common-opposition-ndaa>, 4/27/2012; <http://constitutioncampaign.org/campaigns/dueprocess/maps.php> (last viewed 2/13/13); <http://www.aclu.org/blog/national-security/hey-congress-listen-hawaii>; http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/50leg/2r/bills/scr1011o.asp&Session_ID=107.

APPENDIX A

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 sub-section (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).

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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.