

CITY OF COOS BAY CITY COUNCIL
Agenda Staff Report

MEETING DATE August 6, 2013	AGENDA ITEM NUMBER
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TO: Mayor Shoji and City Councilors

FROM: Nathan McClintock, City Attorney

THROUGH: Rodger Craddock, City Manager

ISSUE Should the City of Coos Bay enact a resolution calling for the repeal of the National Defense Authorization Act of 2012 (NDAA), and direct City employees not to enforce or assist in the enforcement of the Act.

BACKGROUND

A group of individuals have concerns over the constitutionality of the above Act, and they have requested that the City of Coos Bay pass a proposed resolution which would call for the repeal of the Act as well as prohibit the City through its police force from enforcing the Act or assisting others such as the Federal Government in enforcing the Act within the City.

The NDAA was passed by Congress and signed by the President in December of 2011. The Act is over 600 pages long. However, the issues raised by Mr. Taylor and others is the concern over Sections 1021 and 1022 of the Act. Those sections essentially provide for the indeterminate detention without the right to counsel of members of al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States” The concern raised is that the detention provisions of the Act apply to United States citizens and resident aliens.

As is mentioned by Mr. Taylor in his letter to the Council, a Federal District Court judge for the Southern District of New York found that the provisions of Section 1021 of the Act were unconstitutional; and she entered an injunction barring the government from enforcing that provision of the Act. That decision was premised in large part upon the Court’s conclusion that section 1021 did in fact apply to US citizens and resident aliens. Thus, the act ran afoul of various provisions of the United States Constitution including the right to counsel a speedy trial and the right to due process.

This decision was appealed to the United States Court of Appeals for the Second Circuit. That Court on July 17, 2013 overturned the lower Court’s ruling. While the Court did not comment on the Constitutionality of the Act or Section 1021, the Court made it very clear that the provisions of 1021 do not apply to citizens of the United States nor to resident aliens nor to nonresident aliens arrested in the United States. In so ruling the Court stated:

“We thus conclude, consistent with the text and buttressed in part by the legislative history, that Section 1021 [of the 2012 NDAA] means this: With respect to individuals who are not citizens, are not lawful resident aliens, and are not captured or arrested within the United States, the President’s [Authorization for Use of Military Force] authority includes the authority to detain those responsible for 9/11 as well as those who were 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—a detention authority that

Section 1021 concludes was granted by the original AUMF. But with respect to citizens, lawful resident aliens, or individuals captured or arrested in the United States, Section 1021 simply says nothing at all.”

While the Court’s focus was on subsection "e" of Section 1021 which as noted above indicates that nothing in that Section would effect "existing law or authority" pertaining to citizens and resident aliens, I also wish to point out that subsection "b" of Section 1022 states that the requirement to detain does not apply to either citizens or resident aliens.

I do not anticipate that this most recent Court decision will be the last word on Sections 1021 or 1022 of the NDAA. This issue will undoubtedly eventually find its way to the United States Supreme Court which will make the final decision as to the constitutionality of the Act and its applicability if any upon United States citizens and resident aliens. This is the process which the United States has followed for over 200 years to determine the constitutionality of any law passed by Congress. Passing a resolution will have no affect how the Supreme Court eventually rules on his matter.

I do have some concerns with regard to the scope of the proposed resolution. It does not merely speak to an opinion by the Council that the Act is unconstitutional. It restricts the City's police force from enforcing the act as well as preventing our police from cooperating with Federal authorities with regard to the latter's efforts to enforce the Act. These prohibitions could have adverse consequences to the City especially in light of the most recent Court decision noted above.

The bottom line is that this is an issue more properly dealt with at the Federal level be it a ruling by the Supreme Court or a repeal or modification of the law by Congress. This does not mean that individual Councilors should not have their own opinions with regard to the legality of the Act nor prevent anyone from writing to their elected representatives requesting the repeal and/or modification of the Act.

As the current state of the law is that the detention provisions of the Act do not apply to citizens and resident aliens, it is my recommendation that the City not pass the proposed resolution.

ADVANTAGES

Will avoid any possible liabilities which might arise from failing to enforce an Act which to date has not been found to be unconstitutional.

DISADVANTAGES

None

BUDGET

None anticipated.

RECOMMENDATION

It is staff’s recommendation the City Council not pass the proposed resolution.

From:

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Dear Mayor and City Council,

We thank the council for taking time to hear our concerns with the unsettling effects of the National Defense Authorization Act of 2012. A federal court of law has deemed some sections of this law, Section 1021 & 1022 as unconstitutional and we believe the city council of Coos Bay should pass a resolution supporting this decision. There is a broad spectrum of support for this issue in the community and we believe it is your duty to uphold the rights of the individual as decreed in the oath for office.

Oregon Senators, Senator Merkley, and Senator Wyden voted against the passage of the NDAA 2012, because of sections 1021 & 1022. The undersigned groups listed below are supporters of the attached resolution. The citizen detention provisions of the National Defense Authorization Act for fiscal year 2012 (NDAA) are of great concern for the people of Coos County.

The Effect of NDAA on Citizens' Constitutional Rights

The effect of this is that persons within the United States, including U.S. citizens, can be "arrested" or "captured" and indefinitely detained, without assistance of counsel, without seeing the evidence against them, without being able to confront witnesses against them without a civilian trial or any trial at all.

The application of the "law of war" to citizens at the sole discretion of the Executive Branch and is based upon the "mere suspicion" that the individual is "associated " or "affiliated with terrorist activity."

NDAA Citizen Detention Provisions Declared Unconstitutional

On September 12, 2012 a Federal District Judge, Katherine B. Forrest, of the Southern District

of New York, declared that §1021 of the NDAA 2012 was in violation of the First and Fifth Amendments to the U.S. Constitution. (See Hedges v Obama Case 1:12-cv-00331-KBF Document 61 Filed 09/12/12) However, the Executive Branch has indicated it will still apply these provisions.




Our Position

We believe that these provisions are in violation of "We the Peoples" fundamental inalienable Constitution rights.



The protective actions we seek are simple.

1. That you enact the resolution attached which prohibits employees under your control from cooperating with the infringement of our rights ⁱ and to the extent they have such official authority as a law enforcement officers, they protect us from such usurpations.
2. That you send the resolution to the state legislature and our federal delegation asking them to join in this protective action and to repeal the unconstitutional provisions of the NDAA, respectively.

Sincerely,
 Rob Taylor
 Connie Martin
 Tom McKirgan

	<p>Oath Keepers</p> <p>Tom McKirgan S.W. Coordinator 541-396-1326 tmckirgan@gmail.com <i>Not On Our Watch</i></p>		<p>Cottage Grove 912 Project Chair: Carol Pettit scmccp@aol.com</p>	 <p>Oregon Abigail Adams Project Donna Bleiler donnajbleiler@msn.com</p>
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	<p>Sutherland Tea Party faye fink chair campcook2010@gmail.com</p>	 <p>Coos County Watchdog Vigilance is the Price of Freedom</p> <p>Rob Taylor Phone: 541-347-9942 Email: cooscountywatchdog@hotmail.com Website: www.CoosCountyWatchdog.com</p>
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 <p>Richard D. Fry General Counsel Patriot Coalition Member Legal Team The Intolerable Acts Action Center 816-853-8718</p>	 <p>Shane Ozbun Oregon PANDA mailto:stopndaoregon@gmail.com People Against the NDAA http://www.pandaunite.org 541-870-7160</p>
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ⁱ Note: Even if for the sake of argument we say the NDAA is constitutional, the Supreme Court has repeatedly held that a state or its agents cannot be forced to pass legislation, to participate in or administrate a federal regulatory scheme or plan as such violated the principle of federalism this Republic was founded on. (See **New York vs. United States**, 505 U.S. 114 (1992)(Plurality Opinion by Justice O’Connor); **Printz v. United States** - 521 U.S. 898 (1996) (Sheriff Mack)

RESOLUTION OF THE COOS BAY CITY COUNCIL

STANDING IN OPPOSITION TO THE PROVISIONS IN THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012 WHICH AUTHORIZE MILITARY DETENTION AND TRIAL OF U.S. CITIZENS AND LAWFUL RESIDENTS IN DIRECT VIOLATION OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF OREGON.

WHEREAS, on Dec. 31, 2011, President Barack Obama signed the Conference Report to House of Representative Bill H.R. 1540, the National Defense Authorization Act (NDAA), into law,

WHEREAS, the NDAA contains provisions repugnant to, and destructive of, the constitutions and Bill of Rights of the United States of America, and this state, directly violating the U.S. Constitution's Article III, Section 2, Clause 3 [Trial by jury of all crimes except impeachment], Article III, Section 3 [Treason Clause], Article IV, Section 4 [guarantee of a Republican Form of government] the 4th Amendment [Protection against unreasonable search and seizure] 5th Amendment [Right to grand jury indictment and due process], 6th Amendment [Right to speedy and public trial], 8th Amendment [Protection against cruel and unusual punishments], and 14th Amendment [Equal protection], as well as infringes on the entirety of the Bill of Rights and basic structure of the Constitution, making *We the People* insecure in the exercise of any of our Rights and Powers.

WHEREAS, the United States Constitution and the constitution of this state are infringed and/or usurped by provisions in the NDAA which authorize the application of: military force (including assassination), indefinite military detention without trial, military trial, and rendition to foreign countries and entities of any person, including American citizens and lawful resident aliens, at the discretion of the President or a subordinate within the Department of Defense,

WHEREAS, granting the President the authority he would have over a foreign enemy on a "battlefield" for use against the American people is unconstitutional and a violation of the federal government's duty of allegiance to protect U.S. citizens anywhere in the world,

WHEREAS, *"Any person having knowledge of any treasonable project is bound to disclose it to the President, or to a United States judge, or to a Governor of a State or a State judge, or he is guilty of misprision of treason, and may be fined one thousand dollars and imprisoned for seven years."*

(Treatise on Law of the American Rebellion, [page 20, Gard. Inst., 326; 1 U.S. St. L. 112, 119.](#))

WHEREAS, pursuant to the Oath of Office, all state and federal legislative, judicial and executive officers are sworn to protect and defend the U.S. Constitution from all enemies foreign and domestic,

WHEREAS, laws not passed in "pursuance" of the Constitution are null and void from their inception,

WHEREAS, the above noted injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states, are nearly identical to many of the long train of abuses and usurpations that compelled our forefathers to take up arms and to separate from Great Britain, as enumerated in *The unanimous Declaration of the thirteen united States of America*, of July 4, 1776.

WHEREAS, the 2012 National Defense Authorization Act (NDAA) violates numerous provisions of the Constitution of the United States and the Constitution of Oregon, including, but not limited to, the following:

U.S. Constitution, Article I, Section 9, Clause 2

U.S. Constitution, Article II, Section I, Clause 8

U.S. Constitution, Article III, Section 2, Clause 3

U.S. Constitution, Article III, Section 3

U.S. Constitution, Article VI, Clause 2

U.S. Constitution, 1st Amendment

U.S. Constitution, 4th Amendment

U.S. Constitution, 5th Amendment

U.S. Constitution, 6th Amendment

U.S. Constitution, 8th Amendment

U.S. Constitution, 9th Amendment

U.S. Constitution, 10th Amendment

U.S. Constitution, 14th Amendment, Section 1

Oregon Bill of Rights, Article I, Section 1

Oregon Bill of Rights, Article I, Section 9

Oregon Bill of Rights, Article I, Section 11

Oregon Bill of Rights, Article I, Section 16

Oregon Bill of Rights, Article I, Section 23

Oregon Bill of Rights, Article I, Section 24

Oregon Constitution, Article VI, Section 5, Clause 2

*** Oath: Oregon Constitution, Article XV, Section 3**

“In matters of power, let no more be heard of the confidence in man, but bind them down from mischief with the chains of the Constitution.”

- Thomas Jefferson

THEREFORE, BE IT RESOLVED,

For the above and forgoing reasons, the City of Coos Bay within the County of Coos, Oregon, expresses its belief that the NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012 (NDAA) is unconstitutional in authorizing the President to use war powers, the “law of war,” and/or martial law in the United States and its territories over any person, including citizens or lawful resident aliens of the United States not in the military forces, and over citizens or lawful resident aliens of the United States, who are not in the military forces, anywhere in the world.

FURTHER, the Coos Bay City Council expresses its sense that all provisions of the NDAA which are unconstitutional, including as noted herein above, were and are null and void from their inception and are not enforceable in this city, and it is the express policy of the Coos Bay City Council that no officer, employee, or agent of the city will implement, enforce or otherwise support, directly or indirectly, any of the above noted unconstitutional provisions, and that a violation of such policy will be deemed a violation of their oath of office and employment agreement, and will subject them to disciplinary action up to and including termination.

FURTHER, the Coos Bay City Council recognizes its duty to interpose itself between unconstitutional usurpations by the federal government or its agents and the people of this city, as well as the duty to defend the unalienable natural rights of the people, all of which is consistent with the 9th and 10th Amendments to the Constitution of the United States, and with our oaths to defend the Constitution of the United States and the constitution of this state against all enemies, foreign and domestic.

FURTHER, the Coos Bay City Council directs the Congressional delegation of this city to commence immediately efforts to repeal the unconstitutional sections of the NDAA, to-wit, sections 1021 and 1022, and any other section or provision which will have the same or substantially the same effect on the United States, its citizens, and lawful resident aliens.

FURTHER, the Coos Bay City Council directs the Congressional delegation to introduce, support, and secure the passage of legislation which clearly states that Congress not only does not authorize, but in fact prohibits the use of military force, military detention, military trial, rendition, or any other power of the “law of war” against U.S. citizens and lawful resident aliens.

BE IT FURTHER RESOLVED, within ten (10) days from the passage hereof, a certified copy of this resolution shall be mailed, via certified mail with a return receipt, to each and every member of this state’s Congressional delegation by the [whomever it's their responsibility to send such documents], and, in compliance with federal law regarding acts of “*misprision of treason*,” ([page 20, Gard. Inst., 326; 1 U.S. St. L. 112, 119.](#)), to the governor and Supreme Court Chief Justice of this state to effect notification of a possible “conspiracy against the United States,” to wit: the attempt by Congress and the President to arbitrarily and indefinitely suspend of the Bill of Rights outside the requirement of an invasion or rebellion as required by U.S. Constitution, Article I, Section 9, Clause 3, which states: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” and by subjecting the American people to the “law of war,” including military force, detention, and trial, and/or the institution of martial law, rather than under the laws of the United States, pursuant to the detention and trial requirements of U.S. Constitution, Article III, and of the Fourth, Fifth, Sixth, and Eighth Amendments.

BE IT FURTHER RESOLVED, the Coos Bay City Council, recognizing its oath-bound duty to defend the Constitution of the United States and the constitution of this state, to secure the people’s unalienable natural rights to “Life, Liberty, and the pursuit of Happiness,” as alliterated in the Declaration of Independence of July 4, 1776, adopts this resolution, this _____ day of _____, 2013.

required by subsection (a), the Comptroller General of the United States shall submit to Congress an assessment by the Comptroller General of the report, including a determination whether or not the report complies with applicable best practices.

Subtitle D—Counterterrorism

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).

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.

(D) Procedures providing that the requirement for military custody under subsection (a)(1) does not apply when intelligence, law enforcement, or other Government officials of the United States are granted access to an individual who remains in the custody of a third country.

(E) Procedures providing that a certification of national security interests under subsection (a)(4) may be granted for the purpose of transferring a covered person from a third country if such a transfer is in the interest of the United States and could not otherwise be accomplished.

(d) **AUTHORITIES.**—Nothing in this section shall be construed to affect the existing criminal enforcement and national security authorities of the Federal Bureau of Investigation or any other domestic law enforcement agency with regard to a covered person, regardless whether such covered person is held in military custody.

(e) **EFFECTIVE DATE.**—This section shall take effect on the date that is 60 days after the date of the enactment of this Act, and shall apply with respect to persons described in subsection (a)(2) who are taken into the custody or brought under the control of the United States on or after that effective date.

SEC. 1023. PROCEDURES FOR PERIODIC DETENTION REVIEW OF INDIVIDUALS DETAINED AT UNITED STATES NAVAL STATION, GUANTANAMO BAY, CUBA.

(a) **PROCEDURES REQUIRED.**—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the appropriate committees of Congress a report setting forth procedures for implementing the periodic review process required by Executive Order No. 13567 for individuals detained at United States Naval Station, Guantanamo Bay, Cuba, pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note).

(b) **COVERED MATTERS.**—The procedures submitted under subsection (a) shall, at a minimum—

(1) clarify that the purpose of the periodic review process is not to determine the legality of any detainee's law of war detention, but to make discretionary determinations whether or not a detainee represents a continuing threat to the security of the United States;

(2) clarify that the Secretary of Defense is responsible for any final decision to release or transfer an individual detained in military custody at United States Naval Station, Guantanamo Bay, Cuba, pursuant to the Executive Order referred to in subsection (a), and that in making such a final decision, the Secretary shall consider the recommendation of a periodic review board or review committee established pursuant to such Executive Order, but shall not be bound by any such recommendation;

(3) clarify that the periodic review process applies to any individual who is detained as an unprivileged enemy belligerent at United States Naval Station, Guantanamo Bay, Cuba, at any time; and

(4) ensure that appropriate consideration is given to factors addressing the need for continued detention of the detainee, including—

(A) the likelihood the detainee will resume terrorist activity if transferred or released;