

**CITY OF COOS BAY CITY COUNCIL**  
**Agenda Staff Report**

<b>MEETING DATE</b> September 17, 2013 Continued from August 6, 2013	<b>AGENDA ITEM NUMBER</b>
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TO: Mayor Shoji and City Councilors

FROM: Rodger Craddock, City Manager *pec*

**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**

On August 6, 2013, several individuals including Tom McKirgan (Coquille) and Rob Taylor (Bandon) made a presentation to the Council regarding their concerns over the constitutionality of the National Defense Authorization Act of 2012 (NDAA), and they have requested that the City of Coos Bay pass their 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. Attached you will find a copy of the August 6<sup>th</sup> report provided to the Council which includes the following:

1. Agenda staff report prepared by City Attorney Nathan McClintock (attachment one)
2. Letter to the Council from Rob Taylor, Connie Martin, and Tom McKirgan (attachment two)
3. Proposed resolution (attachment three)

During the presentation on August 6, 2013, Mr. McKirgan provided the following documents to the Council for their review and consideration:

1. Wikipedia article on Brandon Mayfield and his arrest in 2004. (attachment four)
2. Document titled "Myths and Deceptions about the NDAA FY2012" (attachment five)
3. Unsigned letter presumably to the Council (attachment six)

By a majority vote, the Council decided to postpone consideration of the matter to a future meeting.

On August 20, 2013, the Council received the attached email from Mr. McKirgan requesting a work session with the Council (attachment seven) along with the following attachments:

1. Letter to the Council dated August 13, 2013 requesting for a work session and identifying the substantive issue as "The Application of the "Law of War" to U.S. Citizens." (attachment eight)
2. An analysis of the August 6, 2013 agenda staff report by General Counsel Richard Fry of the Patriot Coalition. (attachment nine)

On September 12, 2013, the Council held the requested work session.

Attached you will find a copy of a resolution written by the County Council and adopted by the Coos County Commissioners on July 30, 2013 opposing the provisions of the National Defense Authorization Act of 2012. (Attachment ten)

**RECOMMENDATION:**

Consider request and advise what action, if any, you wish staff to take.

**CITY OF COOS BAY CITY COUNCIL**  
**Agenda Staff Report**

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

FROM: Nathan McClintock, City Attorney

THROUGH: Rodger Craddock, City Manager *RC*

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.

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;

**From:**

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**To:**

Mayor of Coos Bay Crystal Shoji  
Councilor Mark Daily  
Councilor Jennifer Groth  
Councilor Stephanie Kramer  
Councilor Gene Melton  
Councilor John Muenchrath  
Councilor Mike Vaughan  
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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 <sup>i</sup> 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><b>Oath Keepers</b></p> <p>Tom McKirgan        S.W. Coordinator        541-396-1326  <a href="mailto:tmckirgan@gmail.com">tmckirgan@gmail.com</a>  <i>Not On Our Watch!</i></p>		<p><b>Cottage Grove        912 Project</b>        Chair:        Carolin Pettit  <a href="mailto:scmccp@aol.com">scmccp@aol.com</a></p>	 <p><b>Oregon Abigail Adams Project</b>        Donna Bleiler  <a href="mailto:donnajbleiler@msn.com">donnajbleiler@msn.com</a></p>
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	<p><i>Sutherlin Tea Party</i>        faye fink chair  <a href="mailto:campcook2010@gmail.com">campcook2010@gmail.com</a></p>	 <p><b>Coos County Watchdog</b>        Vigilance is the Price of Freedom</p> <p>Rob Taylor        Phone: 541-347-9942        Email: <a href="mailto:cooscountvwatchdog@hotmail.com">cooscountvwatchdog@hotmail.com</a>        Website:  <a href="http://www.CoosCountyWatchdog.com">www.CoosCountyWatchdog.com</a></p>
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<sup>i</sup> 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 4<sup>th</sup> Amendment [Protection against unreasonable search and seizure] 5<sup>th</sup> Amendment [Right to grand jury indictment and due process], 6<sup>th</sup> Amendment [Right to speedy and public trial], 8<sup>th</sup> Amendment [Protection against cruel and unusual punishments], and 14<sup>th</sup> 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, 4<sup>th</sup> Amendment
- U.S. Constitution, 5th Amendment
- U.S. Constitution, 6th Amendment
- U.S. Constitution, 8th Amendment
- U.S. Constitution, 9th Amendment
- U.S. Constitution, 10<sup>th</sup> 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 9<sup>th</sup> and 10<sup>th</sup> 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.

# Brandon Mayfield

From Wikipedia, the free encyclopedia

**Brandon Mayfield** (born July 15, 1966) is an American attorney in Washington County, Oregon. He is best known for being erroneously linked to the 2004 Madrid train bombings. On May 6, 2004, the FBI arrested Mayfield as a material witness in connection with the Madrid attacks, and held him for over two weeks. Mayfield was never charged, and an FBI internal review later acknowledged serious errors in their investigation. Ensuing lawsuits have resulted in a formal apology from the U.S. government and a \$2 million settlement. An initial ruling declared some provisions of the USA PATRIOT Act unconstitutional, but the United States government appealed, and the ruling was overturned.

Mayfield's case has been referenced in numerous scientific, political, and social journals.<sup>[1]</sup>

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## Background

Mayfield was born in Coos Bay, Oregon and grew up in Halstead, Kansas. He served in the United States Army Reserve from 1985 to 1989, and then as an officer in the Army in Bitburg, Germany from 1992 to 1994. He met his wife Mona, an Egyptian national and the daughter of a college professor, on a blind date in Olympia, Washington in 1986, and converted to Islam shortly afterwards. They have lived in Beaverton, Oregon off and on since 1989.<sup>[1]</sup> Although he was a regular worshiper at a Beaverton mosque prior to his arrest, his colleagues were unaware of his religious beliefs. The imam of the mosque has described Mayfield as "very patriotic". Mayfield has four children.<sup>[1]</sup>

He studied law at Washburn University and Lewis and Clark College, receiving his law degree from Washburn in 1999, and practicing family law in Newport before moving to the Portland area. Mayfield performed work for the Modest Means Program of the Oregon State Bar, which matches attorneys who are willing to work at reduced rates for low-income clients. In 2003 he offered legal aid to Jeffrey Leon Battle, one of the Portland Seven, a group of people convicted of trying to travel to Afghanistan to help the Taliban. Battle at the time was involved in a child custody case.

## Arrest and detention

Following the March 11, 2004 attacks, Mayfield was concerned for the safety of his children and wife, and according to his father, he suspected that he was under surveillance by the federal authorities. In the

weeks before his arrest, Mayfield's family was under the impression that their house had been broken into at least twice, although nothing was stolen. According to court documents, the FBI used National Security Letters in order to wiretap his phones, bug his house, and search his house several times.<sup>[2]</sup>

Fingerprints on a bag containing detonating devices, found by Spanish authorities following the Madrid commuter train bombings, were initially identified by the FBI as belonging to Mayfield ("100% verified"). According to the court documents in judge Ann Aiken's decision, this information was largely "fabricated and concocted by the FBI and DOJ". When the FBI finally sent Mayfield's fingerprints to the Spanish authorities, they contested the matching of the fingerprints from Brandon Mayfield to the ones associated with the Madrid bombing. Further, the Spanish authorities informed the FBI they had other suspects in the case, Moroccan immigrants not linked to anyone in the USA. The FBI completely disregarded all of the information from the Spanish authorities, and proceeded to spy on Mayfield and his family further.

As was discovered during the court case, even the FBI's own records show that this fingerprint, despite the sworn testimony of FBI and DOJ agents, was in all reality not an exact match but only one of 20 "similar" prints to the ones retrieved from Madrid. Based on that list of people with "similar prints" the FBI launched an extensive investigation of all 20 individuals using Letters of National Security. The investigation included medical records, financial records, employment records, etc. on all 20 people and their families. It was during this time that Brandon Mayfield's name rose to the top of the list.

The FBI arrested Mayfield at his offices in West Slope, an unincorporated suburb of Portland. The arrest was similar to the then-recent Mike Hawash case, under a material witness warrant rather than under charge; he was held with no access to family and limited access, if any, to legal counsel. The FBI initially refused to inform either Mayfield or his family why he was being detained or where he was being held.

Later, the FBI leaked the nature of the charges to the local media and the family learned of the charges by watching the local news. He was at first held at a Multnomah County jail under a false name; he was later transferred to an unidentified location. His family protested that Mayfield had no connection with the bombings, nor had he been off the continent in over 11 to 14 years.

## Release

Before his arrest, Spanish authorities informed the FBI in a letter from April 13, that they reviewed the fingerprint on the bag as a negative match of Mayfield's fingerprint,<sup>[3]</sup> though this letter was not communicated to Mayfield's attorneys. On May 19 the Spanish authorities announced that the fingerprints actually belonged to an Algerian national, Ouhnane Daoud; Brandon Mayfield was released from prison when the international press broke the story the next day — May 20, 2004.<sup>[2]</sup> A gag order remained in force for the next few days. By May 25, the case was dismissed by the judge, who ordered the return of seized evidence and unsealing of documents pertaining to his arrest.

The FBI conducted an internal review of Mayfield's arrest and detention, concluding that although he was not arrested solely due to his religious beliefs, they may have contributed to investigator's failure to take into account the Spanish concerns over fingerprint identification.<sup>[4]</sup> The FBI issued a press release announcing the report's conclusion that they had not misused the USA PATRIOT Act in the investigation.<sup>[5]</sup> Civil libertarians and the ACLU nonetheless consider Mayfield's detention a misuse of the material witness statute.<sup>[6]</sup>

Although the FBI afterwards apologized for their acts, Mayfield filed several lawsuits over this invasion of his privacy. One sought to force the government to return or destroy copies of items seized from his home. Another, which was argued before U.S. District Court Judge Ann Aiken on July 15, 2005, challenged the law which was used against him as unconstitutional. The Federal Government filed several motions to have Mayfield's case dismissed as a matter of national security, or national secrets, but these were denied by Judge Aiken.

## Court's ruling and aftermath

The case was heard by the Ninth Circuit Court of Appeals. Among the issues on appeal was whether materials removed from Mayfield's house, including DNA samples taken from his family's personal toothbrushes, were to be destroyed or preserved. The Federal Government assumed the position that materials must be preserved so that they can be referred to, if more lawsuits are brought in the future.

On November 29, 2006, the U.S. government settled part of the lawsuit with Mayfield for a reported \$2 million. The government issued a formal apology to Mayfield as part of the settlement. The settlement allowed Mayfield to pursue a legal challenge against the Patriot Act.<sup>[7]</sup> The FBI was also cleared of wrongdoing in an earlier internal investigation.

On September 26, 2007, two provisions of the U.S. Patriot Act were declared unconstitutional. Finding in Mayfield's favor, Judge Aiken ruled that the Foreign Intelligence Surveillance Act, as amended by the Patriot Act, "now permits the executive branch of government to conduct surveillance and searches of American citizens without satisfying the probable cause requirements of the Fourth Amendment," which violates the Constitution of the United States.<sup>[8]</sup> The Federal government appealed that ruling, and Mayfield's attorney, Elden Rosenthal, argued in front of the Ninth Circuit court on February 5, 2009.<sup>[1]</sup> The ruling was overturned in December 2009 on the ground that the Court found the plaintiff, Mayfield, not to have standing.<sup>[9]</sup>

## References and notes

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- <sup>a b</sup> <http://www.ord.uscourts.gov/rulings/04-cv-1427Opinion.pdf>
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- <sup>^</sup> USDOJ Report (<http://www.usdoj.gov/oig/special/s0601/final.pdf>)
- <sup>^</sup> Fingerprint misidentification of Brandon Mayfield – Federal Bureau of Investigation (<http://www.fbi.gov/pressrel/pressrel06/mayfield010606.htm>)
- <sup>^</sup> Administration Abuses Material Witness Law – TalkLeft.com ([http://talkleft.com/new\\_archives/011225.html#011225](http://talkleft.com/new_archives/011225.html#011225))
- <sup>^</sup> Wrongly accused man settles bomb suit – news.yahoo.com ([http://news.yahoo.com/s/ap/20061129/ap\\_on\\_re\\_us/spain\\_bombings\\_fbi](http://news.yahoo.com/s/ap/20061129/ap_on_re_us/spain_bombings_fbi))
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- <sup>^</sup> "Mayfield v. US, No. 07-35865" ([http://blogs.findlaw.com/ninth\\_circuit/2009/12/mayfield-v-us-no-07-35865.html](http://blogs.findlaw.com/ninth_circuit/2009/12/mayfield-v-us-no-07-35865.html)). *FindLaw*. December 11, 2009.

## External links



- Portland Oregonian: Residue of arrest clutters Mayfield's present, future ([http://www.oregonlive.com/search/index.ssf?/base/front\\_page/108574563888130.xml?oregonian?fpfp](http://www.oregonlive.com/search/index.ssf?/base/front_page/108574563888130.xml?oregonian?fpfp))
- Portland Oregonian: Material witness law is being abused (<http://www.oregonlive.com/search/index.ssf?/base/editorial/108565895653681.xml?oregonian?edc>)
- Portland Tribune: How the FBI's arrest of suspected terrorist Brandon Mayfield unraveled (<http://www.portlandtribune.com/archview.cgi?id=24586>)
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- Judge Ann Aiken's Opinion in the Sept 26 2007 Decision ([http://www.ord.uscourts.gov/index.php?option=com\\_phocadownload&view=category&download=155%3Aopinion-and-order-in-brandon-mayfield-v-usa-04-cv-1427-aa&id=39%3Anotable-rulings&Itemid=457&lang=en](http://www.ord.uscourts.gov/index.php?option=com_phocadownload&view=category&download=155%3Aopinion-and-order-in-brandon-mayfield-v-usa-04-cv-1427-aa&id=39%3Anotable-rulings&Itemid=457&lang=en))

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Categories: 1966 births · Converts to Islam · Living people · Oregon lawyers · Fingerprints

Lewis & Clark College alumni · People from Washington County, Oregon

People from Coos Bay, Oregon · American Muslims

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## Myths and Deceptions about the NDAA FY2012

**Myth 1:** Under §1022 (b) (1) and (2) the requirement to detain a “covered persons” does not apply to U.S. Citizens and lawful resident aliens (LRA).

**False:**

(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...*

1. The “**requirement to detain**” phrase in §1022(b)(1) and (2) refers to the requirement noted in §1022(a)(1) which says:

(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.*

The “**requirement**” is that the military “**shall hold**” [a covered person] as defined in §1022(b).

Note that §1022 (a) (2) likewise refers to the “shall hold” provision by the term “**requirement**”:

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

The provision that follows the “**who is determined**” clause further qualifies or restricts the definition of “covered person” under §1021(b).

The §1022(b) provisions that the requirement, “shall hold”, “*does not extend to*” U.S. citizens and LRA means that the military is not “**required**” to “**hold**” a U.S. citizen or LRA. Note however, that the military is not prohibited from “holding” a U.S. citizen or LRA. **Thus, it is discretionary with the military whether or not they “hold” or “detain” a U.S. citizen or a LRA.**

2. By its terms §1022(b)(1)(2) only relate or restrict the provisions of §1022 and §1022(a) in particular, not §1021:

**(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...*

The section to which these qualifications, “does not extend”, relate to is §1022, and §1022(a) “shall hold” in particular, this qualification does not extend to §1021(a) and (b).

Section 1021(a) provides:

**(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.*

Thus, U.S. citizens that fit the targeting profile of §1021(b) (1) and (2) are subject to being “detain[ed]”. Note that this provision does not require that any of the covered persons be detained only that the military has the authority to do so.

Section 1022(b) provides that the military is required to “detain” “covered persons” who fall under the more restrictive targeting profile of §1022(b) unless they are U.S. citizens or LRA. If the 1022(b) modified “covered person” is a citizen or a LRA, then the military treats them as those “covered persons” in §1021(b) i.e., the military may “detain” but is not required to “detain” them. In either case it is the choice of the military to make.

Even if the restriction in §1022 prohibited the detaining of U.S. citizens and LRA it would only apply to the smaller targeting profile of 1022(b) not to all those persons in the larger targeting profile of 1021(b).

**Myth 2: The “Construction” and “Authorities” provisions of §1021 prevent U.S. citizens and LRA (Legal Resident Aliens) from being detained by the military.**

**False**

**(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.*

1. The statement in §1021(d) that there is no “inten[t] to ...expand the scope of the Authorization for Use of Military Force” (AUMF) is patently false because §1021(b) expressly and specifically expands the targeting profile of the AUMF.

The targeting profile of the AUMF of 9/18/2001 is as follows:

**SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.**

*(a) IN GENERAL. — That the President is authorized to use all necessary and appropriate force against those **nations, organizations, or persons** he determines **planned, authorized, committed, or aided** the terrorist attacks that occurred on **September 11, 2001**, or **harbored** such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.*

However, the NDAA’s targeting profile has two parts. The first is as follows:

*(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.*

Note that both the AUMF of 2001 and the 2012 NDAA §1021(b) (1) are both tied to the 9/11/2001 terrorist attacks and both are retrospective or looking backward i.e., are targeting persons involved in some aspect leading up to the attacks. This authorization seeks **retribution** against those involved in the 9/11/2001 attacks. They are both limited by the life of those involved in the attacks.

However, §1021(b)(2) is quite different. It provides:

*(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.*

Note that §1021(b) (2) is not tied to the 9/11/2001 terrorist attacks. It is forward looking and it has no time limit i.e., it could go on forever. It can involve organizations and

persons, who were not even in existence as of 9/11/2001 or not part of or associated with any of the **“nations, organizations, or persons”** targeted in the AUMF.

In essence the NDAA brings the law into compliance with the political rhetoric of our being in a “war on terror”. Since terrorism is a tactic not an entity it is absurd to target such. It would be like targeting “marching” or “infantry” movements. It is so vague and ambiguous as to include everything and nothing. It provides no parameters or guidance to those waging the war. It is subject to abuse and misuse.

As §1021(b)(2) goes beyond the targeting profile of the AUMF, the statement that this section “affirms” the authority of the AUMF is false and it is false that it does not “expand” such power. As the President derives his authority from the AUMF such also expands the Presidents’ authority.

2. The statement in §1021(e) that **“Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens”** is patently false because §1021(b) (2) went beyond the targeting profile of the AUMF.
3. One might argue that a very literal interpretation of this provision is correct in that it did not change an existing law but rather created a new law. Not the level of candor we have a right to from our “public servants”.
4. One might also argue that the NDAA did not modify a law i.e. the AUMF, but rather it **simply changed the law that was being applied** i.e., instead of applying civil / civilian law (including criminal law) it required the application of military law i.e. the “law of war”.

This is consistent with the statements made by Senator Lindsey Graham who stated:

**“Is the homeland the battlefield? You better believe it is the battlefield.”<sup>i</sup>**

would **“basically say in law for the first time that the homeland is part of the battlefield”** and people can be imprisoned without charge or trial **“American citizen or not.”<sup>ii</sup>**

**“basically say in law for the first time that the homeland is part of the battlefield”<sup>iii</sup>**

**“1031, the statement of authority to detain, does apply to American citizens and it designates the world as the battlefield, including the homeland.”<sup>iv</sup>**

5. Neither those in favor of these provisions nor those opposed to these provisions could agree on what was the current law.

- i John W. Whitehead, **America the Battlefield: The End of the Rule of Law** (12/09/2011 )  
<http://original.antiwar.com/jwhitehead/2011/12/08/america-the-battlefield-the-end-of-the-rule-of-law/>
- ii **Raven Clabough, Senate Passes Controversial Defense Bill**, The New American (02 December 2011 12:00)  
<http://thenewamerican.com/usnews/politics/10023-senate-passes-controversial-defense-bill>
- iii Chris Anders, **Senators Demand the Military Lock Up of American Citizens in a “Battlefield” They Define as Being Right Outside Your Window**, ACLU <http://www.aclu.org/blog/national-security/senators-demand-military-lock-american-citizens-battlefield-they-define-being>; Jim Kirwan, **How Did We Become A Battlefield?** Rense.com (11-30-11)  
<http://www.rense.com/general95/battle.htm>
- iv Chris Anders, **Senators Demand the Military Lock Up of American Citizens in a “Battlefield” They Define as Being Right Outside Your Window**, ACLU <http://www.aclu.org/blog/national-security/senators-demand-military-lock-american-citizens-battlefield-they-define-being>
- v **Raven Clabough, Senate Passes Controversial Defense Bill**, The New American (02 December 2011 12:00)  
<http://thenewamerican.com/usnews/politics/10023-senate-passes-controversial-defense-bill> “The final amendment to preserve current detention restrictions could turn out to be meaningless and Sens. [Carl] Levin [Michigan Democrat] and Graham made clear that they believe this power to use the military against American citizens will not be affected by the new language,” Anders said. “This bill puts military detention authority on steroids and makes it permanent. If it becomes law, American citizens and others are at real risk of being locked away by the military without charge or trial.”

We are contacting you on an issue which we feel is of grave concern, the citizen detentions provisions of the National Defense Authorization Act for fiscal year 2012 (NDAA).

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 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,

Listed below is a statewide Coalition of local, autonomous, patriot, non-partisan groups who stand united against sections 1021 of the 2012 NDAA and applying the "laws of war" to American citizens.

	<p><b>Oath Keepers</b>  <b>Tom McKirgan</b>          S.W. Coordinator          541-396-1326  <a href="mailto:tmckirgan@gmail.com">tmckirgan@gmail.com</a>  <i>"Not On Our Watch"</i></p>		<p><b>Cottage Grove 912 Project</b>  <b>Chair:</b>  <b>Carolin Pettit</b>  <a href="mailto:scmccp@aol.com">scmccp@aol.com</a></p>	 <p><b>Oregon Abigail Adams Project</b>  <b>Donna Bleiler</b>  <a href="mailto:donnajbleiler@msu.com">donnajbleiler@msu.com</a></p>
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	<p><b>Sutherlin Tea Party</b>          faye fink chair  <a href="mailto:campecook2010@gmail.com">campecook2010@gmail.com</a></p>	 <p><b>Coos County Watchdog</b>          Vigilance is the Price of Freedom</p> <p><b>Rob Taylor</b>  <b>Phone: 541-347-9942</b>  <b>Email: <a href="mailto:cooscountywatchdog@hotmail.com">cooscountywatchdog@hotmail.com</a></b>  <b>Website: <a href="http://www.CoosCountyWatchdog.com">www.CoosCountyWatchdog.com</a></b></p>
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	<p><b>Industrial Workers of the World - Lane Branch</b></p>	 <p><a href="http://www.theliberators11.org">http://www.theliberators11.org</a></p> <p>1224 NE Walnut #366          Roseburg, Oregon 97470          Co-Chair's - Loma Wharton 541-430-0894          Dennis Wharton 541-643-1918</p>
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	<p><b>Richard D. Fry</b>          General Counsel          Patriot Coalition          Member Legal Team          The Intolerable Acts Action Center          816-853-8718</p>	 <p><b>Shane Ozburn</b>  <b>Oregon PANDA</b>  <a href="mailto:stopndaaregon@gmail.com">mailto:stopndaaregon@gmail.com</a>          People Against the NDAA  <a href="http://www.pandaunite.org">http://www.pandaunite.org</a>          541-870-7160</p>
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<sup>i</sup> 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)



## **Rodger Craddock**

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**From:** Tom McKirgan <tmckirgan@gmail.com>  
**Sent:** Tuesday, August 20, 2013 5:31 PM  
**To:** shoji@uci.net; Rodger Craddock; Jackie Mickelson; markdailycb@hotmail.com; sjgroth@charter.net; stephkramer@charter.net; oldfossil137@yahoo.com; drsthuperincredible@gmail.com; dsgnInd@frontier.com; Gary McCullough  
**Subject:** Request For Work Session  
**Attachments:** Coos Bay Request for Work Session.doc; Coos Bay Analysis of City Atty letter.doc

Mayor Shoji  
Manager Craddock  
Manager assistant Mickelson  
Councilor Daily  
Councilor Groth  
Councilor Kramer  
Councilor Melton  
Councilor Muenchrath  
Councilor Vaughn  
Police Chief McCullough

### **Honorable Council members,**

On behalf of Oath Keepers, Coos County Watchdog and PANDA (People Against the NDAA), we first wish to thank you for giving us your attention on this most serious of matters, to wit: the 2012 National Defense Authorization Act. Unfortunately, we didn't have the adequate time to fully explain all of the details of this egregious Bill.

Please know that should we have a work session scheduled with you, the PANDA State Team Leader Shane Ozbun has offered to come down from Eugene with a short power point presentation on the specifics of this Bill that are of grave concern for every American.

Therefore, on behalf of the aforementioned, we kindly request a formal work session with the city council at the earliest convenience. We can

limit the time to one half hour or possibly less.

Being our elected officials, we feel it imperative that you allow us, your constituents, the Constitutional opportunity for redress of grievances so that you can make a fully informed decision before deciding how to move forward with the Restoring Constitutional Governance Resolution (RCGR) that we submitted to the city council on August 6th, 2013.

I must remind you that other venues across this country have in fact seen the NDAA for what it actually is, what it does and how it negatively effects all of us, including yourselves and your families. They took the time to explore it in great detail and decided that the security and liberty of their citizens was of utmost importance as guaranteed by the Bill of Rights.

They realized that as elected officials, they are duty bound by their oath to preserve, protect and defend the U.S. and State Constitutions. They are rightfully proactive in first protecting their citizens at the local level then progress to the State and Federal levels.

We can appreciate your wanting to accept the recommendations made by City Attorney Mr. McClintock, however, I think we can all agree that it never hurts to get a second opinion.

General counsel for The Patriot Coalition, Constitutional Attorney Richard Fry has taken the time to address in detail the matters of concern that we all share. He addresses Mr. McClintock's letter to the council and is submitting a formal request for a work session. Please see attached documents.

Due to long distance, Mr. Fry would be available to attend via teleconference to explain our position and to define and settle any misunderstandings that this Bill contains.

In closing, please feel free to contact any of us should you require anything further. Thank you for your time and sincere consideration in this very serious matter. I remain respectfully,

Yours,  
Tom McKirgan

**Tom McKirgan**  
**Oath Keeper**  
**S.W. Oregon Coordinator**  
*"Not On Our Watch"*  
<http://oathkeepers.org/oath/>

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City Council  
City of Coos Bay  
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541-269-1181

Tuesday, August 13, 2013

**RE: Request for Working Session on the RCGR NDAA Resolution**

**Dear Council Members,**

This is to request a working session on the above proposed resolution and in response to the City Attorney's assessment of the Restoring Constitutional Governance Resolution (RCGR) (the anti- 2012 NDAA resolution), which was submitted to the Council. We wish to clarify our position and clear up some miss statements which were made by the City Attorneys.

**The Substantive Issue:**  
**The Application of the "Law of War" to U.S. Citizens**

First, we wish to clarify our concern in not principally over the citizen detention provisions of the 2012 NDAA or the NDAA itself. Our primary concern is over the **application of the "law of war" to citizens** and Lawful Resident Aliens (LRA)<sup>[i]</sup>, such application having been asserted most recently by the 2012 NDAA. Authority for such application of the "law of war" has been asserted or alleged to have been asserted or authorized by various other laws including the September 18, 2001 Authorization for the Use of Military Force <sup>[ii]</sup> (AUMF) and by Presidents Bush (43) and Obama under Article II of the Constitution. <sup>[iii]</sup>

The application of the "law of war" provides for a plethora of actions some of which are specified in the 2012 NDAA. <sup>[iv]</sup> The "law of war" actions range from indefinite detention to extraordinary rendition <sup>[v]</sup> and to assassination <sup>[vi]</sup>.

All of these claimed "law of war" actions may be initiated by a warrantless arrest by the executive branch and are not based on "probable cause" with judicial oversight as required by the Fourth Amendment. <sup>[vii]</sup> Such are carried out solely by the executive branch based on mere suspicion that the targeted individual is somehow involved in terrorism. Such individuals are held *incommunicado*.

Note that constitutionally a person (any person) within the United States may not even be stopped and question by the government on a "mere suspension" they are involved shop lifting or murder or any other crime. There must be "reasonable suspicion" <sup>[viii]</sup> of a crime and that the target is involved with the crime. And, there must be a finding of "probable cause" be for such a person can be arrested. Yet, some agents of the government are claiming the authority to indefinitely detain someone, perhaps for their life, based on this "mere suspicion" standard.

Further, it is certainly possible that such "detention" could be carried out by agents of a "foreign government" or "foreign entity" <sup>[ix]</sup> such as INTERPOL. INTERPOL's "permanent "

U.S. headquarters is located in the Justice Department in Washington D.C. INTERPOL was given complete immunity for its operations in the U.S. under the International Organizations Immunities Act which among other things prohibits U.S. law enforcement from searching its property and seizing its records. [x]

The trial by a military commission, "alternative court or competent tribunal having lawful jurisdiction", all as allowed under §1021(c)(2),(3), are in disregard for the protections of the Fifth Amendment requiring that "**No person**" "**unless on a presentment or indictment of a Grand Jury, except** in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" be required to answer for a serious crime. [xi]

Of course an indictment or presentment is only returned by a Grand Jury upon a finding of "probable cause" that the suspect has committed the alleged crime. And, targeted individuals are subjected to such "trials" in spite of the fact the individual is not within the only exception to the Fifth Amendment i.e., that the alleged case occurred in "the land or naval forces, or in the Militia, when in actual service in time of War or public danger..."

As you can see the scope of our concern is much broader than the City Attorneys have comprehended.

### **Jurisdictional Issues**

The other issues which are before the City Council, and which need to be addressed before the substantive issues can be addressed, relate to the authority of the Council to:

1. Make a determination as to whether the application of the "law of war" to citizens in the City of Coos Bay is constitutional, and if so
2. The legal requirements the City has to enforce or assist in the enforcement of applying the "law of war" to citizens of Coos Bay, and if not constitutional
3. The responsibility of the Council to protect the rights of its citizens in the face of federal (or foreign) authorities attempt to apply the "law of war" to citizens of Coos Bay.

It is our belief that under our system of federalism and dual sovereignty the City Council has not only the authority but the duty to make such a determination on constitutionality. This is based upon the primary purpose of any government under our system of governance i.e., to secure the rights of its citizens, the Council members' federal oath to "support the Constitution" and the ancient sovereign principle of Allegiance and Protection.

We believe that even if the Council determines the application of the "law of war" to Coos Bay citizens is Constitutional, it must then determine if it chooses to participate, administrate or enforce such federal statute. It has been made very clear by Supreme Court holdings that under our federalist system of government the federal government cannot mandate the states, or a subdivision of the states or their respective officers to pass particular legislation, participate in or administrate a federal program or scheme.

We believe that such application is unconstitutional, but that if it were found to be constitutional, it is not in the best interest of the Republic and its citizens, including those in Coos Bay, to participate in such application.

If the Council determines that the application of the "law of war" to citizens is not constitutional then it must determine whether it has an obligation to respond to such application and the scope of any such response.

We believe that as the application of the "law of war" is unconstitutional the governments of the states have the duty to respond in a particular way to the asserted authority by the federal government to make such application. The required response is mandated by the City Council members' oath to support the Constitution and the principle of Alliance and Protection.

Due to the gravity of this situation and the apparent confusion as to what the actual issues are we believe it is imperative and prudent for the Council to conduct a working session so that it may further consider these issues. Therefore we respectfully request the City Council set up a working session so that the citizens' request for the Council to address these issues be fully and completely considered.

**Sincerely,**

**/s/ Richard D. Fry, Esq.  
Richard D. Fry  
General Counsel  
Patriot Coalition  
Legal Team  
The Intolerable Acts Action Center  
816 853 8718**

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cc: Crystal Shoji, Mayor, Rodger Craddock, City Manager, Jackie Mickelson, Executive Assist/ Assistant to City Manager, City Councilors et al.

[i] **Lawful Resident Aliens** are typically under allegiance to the Constitution of the United States (as are citizens) and therefore have the same constitutional protections as a citizens which include being under the protection of the Constitution no matter where they are in the world and have a right to the protection of the U.S. government as to foreign powers, no matter where they are in the world. This is contrasted to foreign nationals, including illegal aliens, who may have some but not all the protections of the constitution as citizens while they are in the U.S. but are not entitle to the protection of the U.S. Government once they are outside the U.S and its territories.

[ii] The **AUMF** was passed in response to the September 11, 2001 terrorist attacks in the U.S. which is what is currently being used in place of the constitutionally required Declaration of War. This provide the scope and extent of authority for the President to bring in to action the U.S. military in retaliation for the 9/11/2001 terrorist attacks including against who the President could use such force. Note this was not authority to wage a war on terrorism.

[iii] House of Representatives, Committee on the Judiciary, Hearing on "**Protecting U.S. Citizens' Constitutional Rights During the War on Terror**", Statement of Judiciary Committee Chairman Bob Goodlatte (05/22/2013) <http://judiciary.house.gov/news/2013/05222013.html>

" I support making it clear that United States citizens apprehended and detained in the United States pursuant to the AUMF or NDAA should be transferred for trial and proceedings by a court established under Article III of the Constitution or by an appropriate State court and that such trial and proceedings have all the due process as provided for under the Constitution of the United States."

[iv] 1021 (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 2 States Code (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111–4 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.

[v] **Extraordinary Retention** is the practice of placing a person in the custody or control of a government from a country not his own. One of the purposes of this is to put the individual in a position where the person may be tortured by a country not legally restricted from torturing or otherwise willing to do so.

Steve Carell and Toni Collette, Unraveling Injustice, New York Times (02/04/2009)

<HTTP://WWW.NYTIMES.COM/2009/02/05/OPINION/05THU1.HTML? R=1%5D>

"The first test comes on Monday in San Francisco, where three judges of the United States Court of Appeals for the Ninth Circuit are scheduled to hear arguments in a civil case involving kidnapping and torture. The Bush team was using one of its signature legal tactics — stretching the evidentiary rule known as the state secrets privilege — to avoid having the detainees' claims ever heard.

The five plaintiffs, victims of Mr. Bush's extraordinary rendition program, were seized and transported to secret American facilities abroad or to countries known for torturing prisoners — on flights organized by a private contractor, Jeppesen Dataplan.

One plaintiff, an Ethiopian citizen and legal resident of Britain, says he was tortured in Pakistan, Morocco and a C.I.A.-run prison outside Kabul commonly known as the "Dark Prison" before being transferred to Guantánamo, where he remains. In Morocco, according to his account, he endured routine beatings and perpetual shackling, and security agents cut him all over his body. A hot, stinging liquid was then poured into his open wounds.

[vi] Glenn Greenwald, **Chilling legal memo from Obama DOJ justifies assassination of US citizens**, The Guardian (02/05/2013) <http://www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-memo>

"The most extremist power any political leader can assert is the power to target his own citizens for execution without any charges or due process, far from any battlefield. The Obama administration has not only asserted exactly that power in theory, but has exercised it in practice."

The Power to Kill, The New York Times (03/10/2012)

[http://www.nytimes.com/2012/03/11/opinion/sunday/the-power-to-kill.html?\\_r=0](http://www.nytimes.com/2012/03/11/opinion/sunday/the-power-to-kill.html?_r=0)

"President Obama, who came to office promising transparency and adherence to the rule of law, has become the first president to claim the legal authority to order an American citizen killed without judicial involvement, real oversight or public accountability."

[vii] U.S. Constitution, **Fourth Amendment**, [http://www.usconstitution.net/xconst\\_Am4.html](http://www.usconstitution.net/xconst_Am4.html)

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon **probable cause**, supported by Oath or affirmation, and **particularly describing** the place to be searched, and the **persons or things to be seized**."

[viii] **Reasonable Suspicion** and **Probable Cause** - are legal terms of art with very particular meanings. They can be defined as follows:

**Reasonable Suspicion** "A standard used in criminal procedure, more relaxed than **probable cause** that can justify less-intrusive searches. For example, a reasonable suspicion justifies a **stop and frisk**, but not a full **search**. A reasonable suspicion exists when a reasonable person under the circumstances, would, based upon specific and articulable facts, suspect that a crime has been committed."  
[http://www.law.cornell.edu/wex/reasonable\\_suspicion](http://www.law.cornell.edu/wex/reasonable_suspicion)

"Reasonable suspicion is a step before probable cause. At the point of reasonable suspicion, it appears that a crime may have been committed. The situation escalates to probable cause when it becomes obvious that a crime has most likely been committed."

[http://www.ehow.com/facts\\_5003941\\_definitions-cause-vs\\_-reasonable-suspicion.html](http://www.ehow.com/facts_5003941_definitions-cause-vs_-reasonable-suspicion.html)

Reasonable suspicion allows a limited and brief detention to investigate. Probable Causes allows for an arrest or a seizure of property.

[ix] **2012 NDAA §1021**

(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:...

(4) Transfer to the custody or control of the 8 person's country of origin, any other foreign country, or any other foreign entity...."



[x]Anthony Martin, **INTERPOL immunity--the story that won't go away**, The Examiner (01/02/2010)

<http://www.examiner.com/article/interpol-immunity-the-story-that-won-t-go-away>

Mark Tapscott has [thoughts](#) at the *Washington Examiner*. Mark points out something I'd forgotten: "Interpol and ICC [the International Criminal Court] . . . took seriously Iran's Oct. 3, 2009, request that 25 top Israeli civilian and military officials be placed on the international 'Most Wanted' list because of their actions in Gaza against murderous Palestinian radicals."

"INTERPOL, working in conjunction with the International Criminal Court--the entity that wishes to haul in American officials to face charges of 'war crimes' and other such nonsense--made sure that *Israelis, not 'Palestinians,'* were placed on the international 'most wanted' list.

[Tapscott goes further in the Washington Examiner](#) to 'lay it on the line in plain English' what the Obama executive order means:

To begin, Obama is the **first president to give an international law enforcement organization like [Interpol](#) free rein within the territorial confines of this nation, presumably not excluding the arrest and exportation of Americans to be charged with crimes under international law.**

Put simply, this means the Constitution is no longer the supreme law of the land in America. Thanks to [Executive Order 12425](#) , which Obama signed Dec. 16 without explaining why, the supreme law of the land is now arguably whatever Interpol says it is, **most likely as directed by the International Criminal Court in The Hague, Netherlands, in conjunction with the United Nations.**

Of course this raises a plethora of new questions concerning the order to be added to the already rather large and growing list:

So tell us, Mr. President, why do you think **Interpol should operate with no accountability and no transparency in our country?** Is this what you had in mind in your [2008 presidential campaign](#)

when you said "we've got to have a civilian national security force that is just as powerful, just as strong, just as well-funded" as the U.S. military?

Pentagon generals and admirals answer to the president and Congress. Under Obama, Interpol answers to no American.

Remember, Obama himself stated more than once during the 2008 campaign that he intended to establish a 'civilian national security force' that would be every bit as powerful as the U.S. Military. The problem is, there is no Constitutional authority granted for such a civilian force within this free republic."

Kristina Wong, **Just What Did President Obama's Executive Order regarding INTERPOL Do?** ABC News (12/30/2009) <http://abcnews.go.com/blogs/politics/2009/12/just-what-did-president-obamas-executive-order-regarding-interpol-do/>

[xi] U.S. Constitution, **Fifth Amendment**, [http://www.usconstitution.net/xconst\\_Am5.html](http://www.usconstitution.net/xconst_Am5.html)

**"No person** shall be held to answer for a capital, or otherwise infamous crime, **unless on a presentment or indictment of a Grand Jury, except** in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation."

Dear Tom,

This is my analysis of the City Attorney's written assessment and recommendation to the City of Coos Bay City Council.

The City Attorney's assessment is in black and my comments are in blue.

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), i...

It is erroneously suggested that the RCGR is calling for the City Council to "repeal" the 2012 NDAA. No state or city government may "repeal " a federal bill passed by Congress and signed by the President. Only Congress and the President may jointly "repeal" such a bill enacted as a statute, even if the statute is unconstitutional. On the other hand there is no problem with a state legislature or any subdivision thereof expressing its position to Congress that the objectionable provisions of the 2012 NDA are unconstitutional and should be repealed. Such communications are healthy and should be expected in a Republic organized under the principles of federalism.

Note that I assume his use of the term "repeal" is used in its normal legal sense and he is not referring to "state nullification" which is a myth.

...and direct City employees not to enforce or assist in the enforcement of the Act.

This statement is correct.

## 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.

This is correct.

The NDAA was passed by Congress and signed by the President in December of 2011. (12/31/2011) The Act is over 600 pages long. (822 pages.) However, the issue raised by Mr. Taylor and others is the concern over Sections 1021 and 1022 of the Act.

The actual concern is over the application of the "law of war" to U.S. citizens and Lawful Resident Aliens (LRA) <sup>ii</sup> in general whether under the 2012 NDAA, the Authorization for Use of Military Forces (AUMF) of September 18, 2011 or other law or assertions of authority. The application of the "law of war" is addressed in §1022 (a)(1) of the 2012 NDAA which provides:

"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...."

Those sections essentially provide for the indeterminate (indefinite) 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 ...."

While the City Attorney's representation of the ramifications of the application of the "law of war" is technically accurate as far as it goes he does not mention the vast majority of actions that may be taken under the "law of war" which adversely impact the fundamental rights of citizens.

To the extent such ramifications are covered in the NDAA they are provided for in 1022(c)(1)-(4) which provides:

(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:

The phrase "may include" indicates that 1022(c) is not an exhaustive list of actions which may be taken. Indeed, the President has asserted the authority for "targeted assignment" which he has taken on multiple occasions.

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

This is the provision that provides for indefinite detention. As the Supreme Court noted in Hamdi an individual held as a "Taliban [enemy] combatant" may be held for the rest of his life if that is how long the "hostilities" continue.

HAMDI V. RUMSFELD 542 U.S. 507 (2004) (slip opinion pp. 12,14)

(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 111-484)).

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

This could include the U.N.'s International Court of Justice in the Hague.

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

This would allow a U.S. citizen to be transferred to a foreign country or "foreign entity". This is known as extraordinary rendition. This has been done in the past to escape U.S. laws against torture. "Foreign entity" could include INTERPOL.

The concern raised is that the detention provisions of the Act apply to United States citizens and resident aliens. See our above comments.

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.

The City Attorney is referring to *HEDGES v Obama*, 1:12-cv-00331, 2012. The District Court in fact found §1021 violated various provision of the First and the Fifth Amendments. Although the Court did not address all the issues we did, due to the nature of the plaintiffs, our analysis and the Courts on those issues it did cover were 100% in line with our analysis.

The City Attorney's characterization "that decision [District Court's] was premised in large part upon the Court's conclusion that section 1021 did in fact apply to US citizens and resident aliens..." is incorrect.

It was never disputed by the government that the application of the "law of war" provisions, including under the 2012 NDAA, could be applied to U.S. citizens or LRAs. Note that the plaintiffs comprised both citizens and foreign nationals.

The primarily issue was what constituted a "Covered Person" i.e., who could be targeted under §1021(b) (the targeting profiles) which in turn depended upon the definition of the terms "substantially supported", "associated forces", "belligerent act" and "directly supported". <sup>iii</sup>

In fact the Executive Department's consistent position in the Hedges case was that the 2012 NDAA was simply a reaffirmation of the AUMF. Federal District Court Judge Forrest addressed this single issue over twenty (20) times in her final decision.

By the time of the Hedges case the Executive Department had applied the "law of war" to numerous U.S. citizens, some of which result in law suits and some of which ended up in the U.S. Supreme Court. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) Supreme Court Justice O'Connor said:

"At this difficult time in our Nation's history, we are called upon to consider the legality of **the Government's detention of a United States citizen on United States soil** as an enemy combatant and to address the process that is constitutionally owed to one who seeks to challenge his classification as such." (Emphasis added.)

"The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because **we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.**"

"...Hamdi presumably is such a detainee, since according to the Government's own account he was taken bearing arms on the Taliban side of a field of battle in Afghanistan."

In RUMSFELD v. PADILLA 542 U S 426 (2004) Chief Justice Rehnquist said:

"Respondent Jose **Padilla is a United States citizen detained by the Department of Defense** pursuant to the President's determination that he is an "enemy combatant" who conspired with al Qaeda to carry out terrorist attacks in the United States.... Padilla flew from Pakistan to Chicago's O'Hare International Airport. As he stepped off the plane, Padilla was apprehended by federal agents..."

"... on June 9, the President issued an order to Secretary of Defense Donald H. Rumsfeld designating Padilla an "enemy combatant" and directing the Secretary to **detain him in military custody**. App. D to Brief for Petitioner 5a (June 9 Order). In support of this action, the President **invoked his authority** as "Commander in Chief of the U. S. armed forces" and **the Authorization for Use of Military Force Joint Resolution, Pub. L. 107-40, 115 Stat. 224 (AUMF)**,<sup>1</sup> enacted by Congress on September 18, 2001. June 9 Order 5a."

So in both of these 2004 cases a U.S. citizen was detained, one initially in Afghanistan and moved to the U.S., and one in Chicago, Illinois, under the AUMF by the Executive Branch. There was no question that the Executive Branch has asserted authority under the AUMF to detain U.S. citizens under the "law of war".

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.

First, the Circuit Court's holding is a "red herring" to a large extent in that the holding of an intermediate federal court is not binding on the states. <sup>iv</sup> The states have concurrent authority (jurisdiction) to interpret the Constitution, federal law and treaties and have had such authority since the beginning of the Republic. <sup>v</sup> Only holdings of the Supreme Court are binding on the states.

(Note: The information about Hedges v. Obama was provided to the Coos County Commission at their request (Comm. Cribbins) and ultimately found its way to the City Council. Apparently Commissioner Cribbins wanted a "Court case" to give her some guidance. However neither the holding at the District Court level or at the Circuit Court level is binding upon the State of Oregon, Coos County or Coos Bay. As noted above such would not be binding even if the decisions had been by courts whose territorial jurisdiction encompassed Oregon.)

Second, as the City Attorney has correctly noted the Circuit Court did not rule on the constitutionality of the NDAA. Rather the Circuit Court avoided the substantive issue by setting aside the District Court's holding based on a technicality that the Plaintiffs were not in a proper position (did not have standing) to bring the law suit.

I have read the orders / decisions of both the District Court and the Circuit Court regarding the Hedges case and I am familiar with them. The Circuit Court's decision is problematic in several regards as discussed herein.

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 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

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National Defense Authorization Act

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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."

Third, it should be noted that the Circuit Court's holding in this regard is technically correct but it is deceptively incomplete. The targeting profiles of §1021 ((b)(1) and (2)) do not expressly mention "citizen" or LRA. The first targeting profile (1021(b)(1) is virtually identical to the targeting profile of the AUMF. Indeed, the whole section is putatively to "reaffirm" the AUMF.

As we have seen per the Hamdi and Padilla cases above, the targeting profile of the AUMF, which only mentions "persons" not citizen, does apply to Citizens and by implication LRA or anyone else who is a "person", as that term is normally used.

The second targeting profile of the NDAA ((b)(2)) uses the same term "person" as does the first targeting profile and the AUMF targeting profile. Therefore, we must assume it has the same meaning and likewise encompasses citizens and anyone else who can be considered a "person".

This position of the Circuit Court is absurd and unsupportable by the facts and plain reading of both the AUMF, §1021 of the 2012 NDAA, the Congressional record including Congressional debates, specific holdings to the contrary by the U.S. Supreme Court, specific assertions by the Executive Branch in numerous law suits and elsewhere, and very recent applications of the "law of war" by the Executive Branch to U.S. citizens in the U.S. including Dzhokhar Tsarnaev<sup>vi</sup>, one of the Boston Marathon bombers who is a U.S. citizen.

The debate as to whether or not to read to Dzhokhar Tsarnaev his Miranda warning or to hold him for "intelligence" questioning was a debate on whether he would be held under the "law of war" and not be given Miranda warnings (there are no Miranda "rights") or held under civilian criminal law. Ultimately the Obama Administration decided not to declare him an "enemy combatant", such as Senator Lindsey Graham, a NDAA supporter, and others had vigorously proposed, but to proceed against him under civilian criminal law.

(The issue as to whether the Executive Branch could choose to not mirandize him under the Quarles police / public safety exception to the Miranda warnings was bogus and a mere cover which was promoted by the media including Fox News. I will not get into the technicalities of it here.)

The plain reading of the AUMF's target profiled (those whom the President had authority to use military force against) in no way excluded U.S. citizens. It reads:

"That the President is authorized to use all necessary and appropriate force against those nations, organizations, or **persons** he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or **persons.**"

AUMF (S.J. Res. 23 § 2(a) (09/18/2001) (Emphasis added.)

Note it applies to "persons". The only qualification to "persons" is that the President must determine ("he determines") such "persons" must have "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such..."

"Persons" every day meaning is "an individual human being". Under law it means "law -a living human being or a group, either or both having legal rights and responsibilities."

One must keep in mind that the AUMF was used in place of a constitutional declaration of war. As such it was understood without exception that those targeted by the AUMF would have the "law of war" applied to them i.e., war was going to be waged against them. The "law of war" is a body of international written law (treaties and conventions) as well as international common law that pertains to the lawful means a nation may use to conduct war against another nation.

The AUMF by its terms without question applied to U.S. citizens and LRAs. It may well be that many if not most in Congress believed that under the then current law in the U.S. that a citizen could not have the "law of war" applied to them and therefore could not be made a target under the AUMF. I do not recall that even being a consideration in enacting the AUMF.

Note for the first time in the history of the U.S. a declaration of war (or its surrogate i.e., AUMF) the Congress sanctioned the targeting of individuals versus another nation or nations. The Congressional Research Service characterized it as:

*" The AUMF is considered groundbreaking as it (1) empowered the President to target non-state actors, even to the individual level, as well as states, and (2) did not specify which states and non-state actors were included under the authorization. " <sup>vii</sup>*

Even if the then "current law" did not allow citizens to be targeted by the President / military such would not prevent a citizen or LRA from being arrest under civilian criminal law for the crimes that necessarily occurred during the course of the 9/11/2001 attacks such as murder, piracy, assault and battery, high jacking, unlawful use of explosives, kidnapping and perhaps treason.

For a detailed presentation of the chicanery used by the supporters of the citizen detention provision of the 2012 NDAA to deceive American citizens and other members of Congress please see [Myths and Deceptions about the NDAA FY2012.](#) <sup>viii</sup>

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.

For the detail on how these provisions were deceptive see [Myths and Deceptions about the NDAA FY2012.](#)

The bottom line is the proponents and opponents of the 2012 NDAA could not agree on what the current law was. Both cited Hamdi and Padilla to support their positions. The only thing they could agree to was that the language of the 2012 NDAA did allow the application of the "law of war" (indefinite detention) to U.S. citizens and LRAs in the U.S. I watched the Senate debates on this issue.

As to §1022(b) such is very deceptively drafted and was deceptively presented to the American people. This provision actual changed a "mandate" to detain to a discretionary act i.e., could detain. see [Myths and Deceptions about the NDAA FY2012.](#)

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.

The City Attorney is incorrect if he is suggesting that the only obligation the state and local governments have is to sit on their hands in hopes of this getting resolved by the Supreme Court. This is contrary to the principles of federalism upon which our Republic is founded.

The Founders clearly anticipated that the state and local governments would stand up to the "central" government if it attempted to infringe upon the sovereignty of the states or the fundament rights of the citizens. In fact they believed the states have a duty to be involved. (See Declaration of Independence, Federalist No. 28, Virginia Resolves of 1798.)



There are also numerous Supreme Court case that recognize the principle of Allegiance and Protection<sup>ix</sup> whereby the government is obligated to protect the fundamental rights of its citizens from all infringers.

Passing a resolution will have no affect how the Supreme Court eventually rules on his matter.

First, this is pure speculation on his part. If half the local governments of the Republic actively supported this I cannot believe the Court would not take notice. Perhaps he is simply saying he does not believe we will get adequate support to influence the Supreme Court. Second, with sufficient support from state and local government we can influence a political change via Congress. Third, we do the right thing because it is the right thing to do not because we are certain of an outcome. If our Founding Fathers had this attitude we would still be speaking with a British accent.

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.

Does he understand under federalist principles long recognized by the Supreme Court the states and local governments do not have to enforce federal laws or participate in federal programs. I will be addressing this in more detail in [The Truth About: The States' Obligation to Enforce Federal Law A Myth Dispelled.](#)

Does he believe the police have a duty or can consistent with their Oath to Support the Constitution blindly follow and enforce any law the federal government hands down regardless of whether it is constitutional or not? I will be covering this in more detail in [The Truth About: The Oath to Support the U.S. Constitution \(Article VI Clause 3\).](#)

These prohibitions could have adverse consequences to the City especially in light of the most recent Court decision noted above.

As we both understand there is no down side risk in not enforcing the application of the " law of war" to U.S. citizen including in the U.S. However, there is a very big downside to enforcing unconstitutional laws which infringe on a person's fundamental rights.

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.

The real issue is what is their duty in a political capacity and as a representative of the people? They have a duty to take a stance!

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.

As shown above the City Attorney's opinion is absolutely wrong, is harmful to the Republic and our Liberty and is a violation of his oath to support the Constitution.

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.

As noted this increases the exposure to law enforcement and the City. It absolutely does not reduce the City's exposure.

#### DISADVANTAGES

None

Incorrect as noted above..

#### BUDGET

None anticipated.

#### RECOMMENDATION

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

He is recommending the City Council not uphold their Oath to Support the Constitution (while giving this issue no consideration) and not be responsive to the requests of the citizens. I think this approach is always a bad idea.

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<sup>1</sup> Text of the AUMF is below:

#### **Addendum NDAA FOR FISCAL YEAR 2012: SECTIONS 1021, 1022, AND 1023**

*Note: The following sections 1021, 1022, and 1023 are copied directly from the H.R. 1540 Conference Report as passed by both Houses of Congress and signed into law by President Obama on Dec. 31, 2011. Page numbers and section titles are highlighted for ease of reading purposes only.*

*For purposes of cross-referencing the sections of the 2012 NDAA included in this addendum with the actual statute, line numbers within the respective pages below are preserved as they originally appear in the complete NDAA for fiscal year 2012 law.*

#### **PAGE 653**

19 **Subtitle D—Counterterrorism**

20 **SEC. 1021. AFFIRMATION OF AUTHORITY OF THE ARMED**

21 **FORCES OF THE UNITED STATES TO DETAIN**

22 **COVERED PERSONS PURSUANT TO THE AU**

23 **THORIZATION FOR USE OF MILITARY FORCE.**

24 (a) IN GENERAL.—Congress affirms that the author  
25 ity of the President to use all necessary and appropriate

#### **PAGE 654**

1 force pursuant to the Authorization for Use of Military  
2 Force (Public Law 107–40; 50 U.S.C. 1541 note) includes  
3 the authority for the Armed Forces of the United States

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4 to detain covered persons (as defined in subsection (b))  
5 pending disposition under the law of war.

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

8 (1) A person who planned, authorized, com  
9 mitted, or aided the terrorist attacks that occurred  
10 on September 11, 2001, or harbored those respon  
11 sible for those attacks.

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

19 (c) DISPOSITION UNDER LAW OF WAR.—The dis  
20 position of a person under the law of war as described  
21 in subsection (a) may include the following:

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

## **PAGE 655**

1 (2) Trial under chapter 47A of title 10, United  
2 States Code (as amended by the Military Commis  
3 sions Act of 2009 (title XVIII of Public Law 111–  
4 84)).

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

7 (4) Transfer to the custody or control of the  
8 person’s country of origin, any other foreign coun  
9 try, or any other foreign entity.

10 (d) CONSTRUCTION.—Nothing in this section is in  
11 tended to limit or expand the authority of the President  
12 or the scope of the Authorization for Use of Military  
13 Force.

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

19 (f) REQUIREMENT FOR BRIEFINGS OF CONGRESS.—  
20 The Secretary of Defense shall regularly brief Congress  
21 regarding the application of the authority described in this  
22 section, including the organizations, entities, and individ  
23 uals considered to be “covered persons” for purposes of  
24 subsection (b)(2).

**1 SEC. 1022. MILITARY CUSTODY FOR FOREIGN AL-QAEDA  
2 TERRORISTS.**

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

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

12 (2) **COVERED PERSONS.**—The requirement in  
13 paragraph (1) shall apply to any person whose de  
14 tention is authorized under section 1021 who is de  
15 terminated—

16 (A) to be a member of, or part of, al-  
17 Qaeda or an associated force that acts in co  
18 ordination with or pursuant to the direction of  
19 al-Qaeda; and

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

24 (3) DISPOSITION UNDER LAW OF WAR.—For  
25 purposes of this subsection, the disposition of a per  
26 son under the law of war has the meaning given in

1 section 1021(c), except that no transfer otherwise  
2 described in paragraph (4) of that section shall be  
3 made unless consistent with the requirements of sec  
4 tion 1028.

5 (4) WAIVER FOR NATIONAL SECURITY.—The  
6 President may waive the requirement of paragraph  
7 (1) if the President submits to Congress a certify  
8 cation in writing that such a waiver is in the na  
9 tional security interests of the United States.

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

12 (1) UNITED STATES CITIZENS.—The require  
13 ment to detain a person in military custody under  
14 this section does not extend to citizens of the United  
15 States.

16 (2) LAWFUL RESIDENT ALIENS.—The require  
17 ment to detain a person in military custody under  
18 this section does not extend to a lawful resident  
19 alien of the United States on the basis of conduct  
20 taking place within the United States, except to the

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21 extent permitted by the Constitution of the United  
22 States.

23 (c) IMPLEMENTATION PROCEDURES.—

24 (1) IN GENERAL.—Not later than 60 days after  
25 the date of the enactment of this Act, the President

**PAGE 658**

1 shall issue, and submit to Congress, procedures for  
2 implementing this section.

3 (2) ELEMENTS.—The procedures for imple  
4 menting this section shall include, but not be limited  
5 to, procedures as follows:

6 (A) Procedures designating the persons au  
7 thorized to make determinations under sub  
8 section (a)(2) and the process by which such  
9 determinations are to be made.

10 (B) Procedures providing that the require  
11 ment for military custody under subsection  
12 (a)(1) does not require the interruption of ongo  
13 ing surveillance or intelligence gathering with  
14 regard to persons not already in the custody or  
15 control of the United States.

16 (C) Procedures providing that a determina  
17 tion under subsection (a)(2) is not required to  
18 be implemented until after the conclusion of an  
19 interrogation which is ongoing at the time the  
20 determination is made and does not require the  
21 interruption of any such ongoing interrogation.

22 (D) Procedures providing that the require  
23 ment for military custody under subsection  
24 (a)(1) does not apply when intelligence, law en  
25 forcement, or other Government officials of the

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1 United States are granted access to an indi  
2 vidual who remains in the custody of a third  
3 country.

4 (E) Procedures providing that a certify  
5 cation of national security interests under sub  
6 section (a)(4) may be granted for the purpose  
7 of transferring a covered person from a third  
8 country if such a transfer is in the interest of  
9 the United States and could not otherwise be  
10 accomplished.

11 (d) AUTHORITIES.—Nothing in this section shall be  
12 construed to affect the existing criminal enforcement and  
13 national security authorities of the Federal Bureau of In  
14 vestigation or any other domestic law enforcement agency  
15 with regard to a covered person, regardless whether such

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16 covered person is held in military custody.  
17 (e) EFFECTIVE DATE.—This section shall take effect  
18 on the date that is 60 days after the date of the enactment  
19 of this Act, and shall apply with respect to persons de  
20 scribed in subsection (a)(2) who are taken into the custody  
21 or brought under the control of the United States on or  
22 after that effective date.

**PAGE 660**

**1 SEC. 1023. PROCEDURES FOR PERIODIC DETENTION RE  
2 VIEW OF INDIVIDUALS DETAINED AT UNITED  
3 STATES NAVAL STATION, GUANTANAMO BAY,  
4 CUBA.**

5 (a) PROCEDURES REQUIRED.—Not later than 180  
6 days after the date of the enactment of this Act, the Sec  
7 retary of Defense shall submit to the appropriate commit  
8 tees of Congress a report setting forth procedures for im  
9 plementing the periodic review process required by Execu  
10 tive Order No. 13567 for individuals detained at United  
11 States Naval Station, Guantanamo Bay, Cuba, pursuant  
12 to the Authorization for Use of Military Force (Public  
13 Law 107-40; 50 U.S.C. 1541 note).

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

16 (1) clarify that the purpose of the periodic re  
17 view process is not to determine the legality of any  
18 detainee's law of war detention, but to make discre  
19 tionary determinations whether or not a detainee  
20 represents a continuing threat to the security of the  
21 United States;

22 (2) clarify that the Secretary of Defense is re  
23 sponsible for any final decision to release or transfer  
24 an individual detained in military custody at United  
25 States Naval Station, Guantanamo Bay, Cuba, pur  
26 suant to the Executive Order referred to in sub-

**PAGE 661**

1 section (a), and that in making such a final decision,  
2 the Secretary shall consider the recommendation of  
3 a periodic review board or review committee estab  
4 lished pursuant to such Executive Order, but shall  
5 not be bound by any such recommendation;

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

11 (4) ensure that appropriate consideration is  
12 given to factors addressing the need for continued

13 detention of the detainee, including—  
14 (A) the likelihood the detainee will resume  
15 terrorist activity if transferred or released;  
16 (B) the likelihood the detainee will reestab  
17 lish ties with al-Qaeda, the Taliban, or associ  
18 ated forces that are engaged in hostilities  
19 against the United States or its coalition part  
20 ners if transferred or released;  
21 (C) the likelihood of family, tribal, or gov  
22 ernment rehabilitation or support for the de  
23 tainee if transferred or released;  
24 (D) the likelihood the detainee may be sub  
25 ject to trial by military commission; and

**PAGE 662**

1 (E) any law enforcement interest in the de  
2 tainee.  
3 (c) APPROPRIATE COMMITTEES OF CONGRESS DE  
4 FINED.—In this section, the term “appropriate commit  
5 tees of Congress” means—  
6 (1) the Committee on Armed Services and the  
7 Select Committee on Intelligence of the Senate; and  
8 (2) the Committee on Armed Services and the  
9 Permanent Select Committee on Intelligence of the  
10 House of Representatives.

<sup>11</sup> Unless otherwise noted, as used in this analysis "Citizen" includes Lawful Permanent Resident who have the same basic constitutional protections as a "citizen".

<sup>12</sup> Hedges v. Obama, 12-cv-00331-KBF Doc. 61 Opinion and Order (9/12/2012)

p.9 "the Government argues that even in the absence of its proffered assurance, plaintiffs cannot have standing since § 1021 is simply a reaffirmation of the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (the "AUMF")--.... The Court rejects that argument.

The AUMF and § 1021 have significant differences, discussed below. Those differences can be traced to the legislative history and case law surrounding the AUMF. Section 1021 appears to be a legislative attempt at an ex post facto "fix": to provide the President (in 2012) with broader detention authority than was provided in the AUMF in 2001 and to try to ratify past detentions which may have occurred under an overly-broad interpretation of the AUMF. That attempt at a "fix" is obscured by language in the new statute (e.g., "reaffirmation") that makes it appear as if this broader detention authority had always been part of the original grant. It had not. "

P10-11

"Indeed the **Government argues that no future administration could interpret § 1021(b)(2) or the AUMF differently because the two are so clearly the same. That frankly makes no sense**, particularly in light of the Government's inability at the March and August hearings to define certain terms in--or the scope of-- ... Accordingly, the Government cannot point to a lack of detention pursuant to the AUMF as eliminating the reasonable basis for plaintiffs' stated fears regarding § 1021(b)(2)...."

p.33

"This proceeding directly implicates both the AUMF, signed into law on September 18, 2001, and § 1021(b)(2) of the NDAA because the Government's central challenge to plaintiffs' standing is that their fears of detention cannot be reasonable **since § 1021(b)(2) is simply a reaffirmation of the AUMF**. In other words, the Government contends § 1021 does nothing new.... Repeatedly throughout this litigation, the

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**Government has argued that the AUMF is coextensive with § 1021(b)(2). The Court preliminarily rejected that position in its May 16 Opinion, and does so again now.**

**p.34**

**"The text of § 1021 clearly both restates the original AUMF detention authorization, and expands its coverage to persons other than those originally intended. It also directly incorporates, for the first time, the law of war...." The Government's position that the AUMF and § 1021(b)(2) are coextensive is wrong as a matter of law and fact. By relying so heavily on that argument, the Government itself has chosen to require judicial determination of the question of whether the AUMF and § 1021(b)(2) are in fact the same or different;**

**p.35**

**"The statutes are, in fact, strikingly different in language and, as a result, scope. Careful tracing of the AUMF and case law discussing the President's detention authority under the AUMF demonstrate an evolutionary process: the AUMF set forth detention authority tied directly and only to September 11, 2001;**

**p.38**

**"Even without looking at § 1021(b)(2), § 1021 adds a new element not previously set forth in the AUMF (although the Government has argued that it is implicit in the AUMF): the addition of the "law of war" language...."**

**p.40**

**"Based upon the Court's review of the AUMF and the NDAA, as well as other relevant statutes, and controlling law, calling § 1021 a "reaffirmation" implies a type of retroactive fix to what was by then a developed problem of executive branch usage encountering judicial resistance...."**

**p42-43**

**"the face of cases ruling that the law of war does not provide for the expansive detention authority the Government... the inclusion of the "law of war" in § 1021 appears to have been intended as a legislative gap-filler, a "fix."**

**Section 1021(b)(2) differs from the AUMF in another, independent way. At the August hearing, the Government conceded that § 1021(b)(2) does not require that a "Covered Person's" actions be--in any way--connected to the attacks of September 11, 2001, or that a "Covered Person" be on the field of battle or even carrying arms...**

**NDAA § 1021(b)(2). This provision contains concepts well beyond a direct involvement in the attacks of September 11, 2001--or even harboring those responsible for those attacks, as contemplated in the AUMF. It adds significant scope in its use of the phrases "substantially supported," "associated forces that are engaged in hostilities against the United States or its coalition partners," and "directly supported"--none of which are defined in their own right, as discussed throughout this Opinion."**

**p.44**

**"Section 1021 is, therefore, significantly different in scope and language from the AUMF. The expansion of detention authority to include persons unconnected to the events of September 11, 2001, unconnected to any battlefield or to the carrying of arms, is, for the first time, codified in § 1021. The same is true for the codification of the disposition of the law of war in § 1021.'**

**p.45**

**"Since there was no congressional authorization for such broad detention authority prior to the passage of § 1021, since on its face the AUMF does not encompass detention for individuals other than those directly linked to the events of September 11, 2001, and since the reasons for individual detention decisions are not publicly reported, it is entirely reasonable and logical for plaintiffs to have understood that § 1021 presents a new scope for military detention. "**

<sup>iv</sup> **Lockhart v. Fretwell (91-1393), 506 U.S. 364 (1993)(J. Thomas, concurring.)**

**"The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation**



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**of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."**

**Steffel v. Thompson**, 415 U.S. 452, 482 (1974)( J. Rehnquist, **C.J.** , concurring.)

"State authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties."

**485 fn 2/3**

"...I do note that the federal decision would not be accorded the stare decisis effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction. **Although the state court would not be compelled to follow the federal holding, the opinion might, of course, be viewed as highly persuasive...."**

**Perez v. Ledesma**, 401 U.S. 82, 125 (1971)(JJ. Brennan, White and Marshall, concurring in part dissenting in part)

"Even where a declaration of unconstitutionality is not reviewed by this Court, the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The **persuasive force** of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute."

**Yellow Freight Syst. v. Donnelly**, 494 U.S. 820,823 (1990)

"To give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction."

**Tafflin v. Levitt**, 493 U.S. 455,458-459 (1990)

"We begin with the axiom that, **under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.** Under this system of **dual sovereignty**, we have consistently **held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States....**'if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.' " (Cites omitted.)

**P.459**

" '[i]t is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.' "(Cites omitted.)

**P.466**

"To hold otherwise would not only denigrate the respect accorded co-equal sovereigns, but would also ignore our 'consistent history of hospitable acceptance of concurrent jurisdiction,' "

**P.470**

" '[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two [Page 493 U. S. 470] together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other. . . .' " (Cites omitted.)

**Claffin v. Houseman**, 93 U.S. 130,136 (1876)

"The general question **whether state courts can exercise concurrent jurisdiction with the federal courts in cases arising under the Constitution, laws, and treaties of the United States** has been elaborately discussed both on the bench and in published treatises -- sometimes with a leaning in one direction and sometimes in the other -- **but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case....** **The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are.** The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state -- **concurrent as to place and persons, though distinct as to subject matter.**"

<sup>vi</sup> Christina Ng, **Boston Bomb Suspect Became a U.S. Citizen on 9/11 Last Year**, ABC News (04/19/2013)  
[http://www.zimbio.com/Tom+Cruise+and+Katie+Holmes+Relationship+Timeline/?utm\\_source=outb&utm\\_medium=cpc&utm\\_campaign=Z-Specials-2](http://www.zimbio.com/Tom+Cruise+and+Katie+Holmes+Relationship+Timeline/?utm_source=outb&utm_medium=cpc&utm_campaign=Z-Specials-2)

<sup>vii</sup> Mathew Weed, The 2001 Authorization for Use of Military Force: Background in Brief, Congressional Research Service (07/10/2013)

Note: The **Congressional Research Service** (CRS) is a federal governmental body tasked with conducting research for and at the request of the U.S. Congress.

I want more cites on first time to target individuals

<sup>viii</sup> **Myths and Deceptions about the NDAA FY2012**

**Myth 1: Under §1022 (b) (1) and (2) the requirement to detain a “covered persons” does not apply to U.S. Citizens and lawful resident aliens (LRA).**

**False:**

(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...*

1. The “**requirement to detain**” phrase in §1022(b)(1) and (2) refers to the requirement noted in §1022(a)(1) which says:

(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.*

The “**requirement**” is that the military “**shall hold**” [a covered person] as defined in §1022(b).

Note that §1022 (a) (2) likewise refers to the “shall hold” provision by the term “requirement”:

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

The provision that follows the “**who is determined**” clause further qualifies or restricts the definition of “covered person” under §1021(b).

The §1022(b) provisions that the requirement “shall hold” “does not extend to” U.S. citizens and LRA means that the military is not “**required**” to “**hold**” a U.S. citizen or LRA. Note however, that the military is not prohibited from “holding” a U.S. citizen or LRA. **Thus, it is discretionary with the military whether or not they “hold” or “detain” a U.S. citizen or a LRA.**

2. By its terms §1022(b)(1)(2) only relate or restrict the provisions of §1022 and §1022(a) in particular, not §1021:

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(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...*

The section to which these qualifications, “does not extend”, relate to is §1022, and §1022(a) “shall hold” in particular, this qualification does not extend to §1021(a) and (b).

Section 1021(a) provides:

(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.*

Thus, U.S. citizens that fit the targeting profile of §1021(b) (1) and (2) are subject to being “detain[ed]”. Note that this provision does not require that any of the covered persons be detained only that the military has the authority to do so.

Section 1022(b) provides that the military is required to “detain” “covered persons” who fall under the more restrictive targeting profile of §1022(b) unless they are U.S. citizens or LRA. If the 1022(b) modified “covered person” is a citizen or a LRA, then the military treats them as those “covered persons” in §1021(b) i.e., the military may “detain” but is not required to “detain” them. In either case it is the choice of the military to make.

Even if the restriction in §1022 prohibited the detaining of U.S. citizens and LRA it would only apply to the smaller targeting profile of 1022(b) not to all those persons in the larger targeting profile of 1021(b).

**Myth 2: The “Construction” and “Authorities” provisions of §1021 prevent U.S. citizens and LRA from being detained by the military.**

**False**

(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.*

1. The statement in §1021(d) that there is no “inten[t] to ...expand the scope of the Authorization for Use of Military Force” (AUMF) is patently false because §1021(b) expressly and specifically expands the targeting profile of the AUMF.

The targeting profile of the AUMF of 9/18/2001 is as follows:

**SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.**

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(a) *IN GENERAL.* — That the President is authorized to use all necessary and appropriate force against those **nations, organizations, or persons** he determines **planned, authorized, committed, or aided** the terrorist attacks that occurred on **September 11, 2001**, or **harbored** such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

However, the NDAA's targeting profile has two parts. The first is as follows:

(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.

Note that both the AUMF of 2001 and the 2012 NDAA §1021(b) (1) are both tied to the 9/11/2001 terrorist attacks and both are retrospective or looking backward i.e., are targeting persons involved in some aspect leading up to the attacks. This authorization seeks **retribution** against those involved in the 9/11/2001 attacks. They are both limited by the life of those involved in the attacks.

However, §1021(b)(2) is quite different. It provides:

(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**.

Note that §1021(b) (2) is not tied to the 9/11/2001 terrorist attacks. It is forward looking and it has no time limit i.e., it could go on forever. It can involve organizations and persons, who were not even in existence as of 9/11/2001 or not part of or associated with any of the "**nations, organizations, or persons**" targeted in the AUMF.

In essence the NDAA brings the law into compliance with the political rhetoric of our being in a "war on terror". Since terrorism is a tactic not an entity it is absurd to target such. It would be like targeting "marching" or "infantry" movements. It is so vague and ambiguous as to include everything and nothing. It provides no parameters or guidance to those waging the war. It is subject to abuse and misuse.

As §1021(b)(2) goes beyond the targeting profile of the AUMF, the statement that this section "affirms" the authority of the AUMF is false and it is false that it does not "expand" such power. As the President derives his authority from the AUMF such also expands the Presidents' authority.

2. The statement in §1021(e) that "**Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens**" is **patently false** because §1021(b) (2) went beyond the targeting profile of the AUMF.
3. One might argue that a very literal interpretation of this provision is correct in that it did not change an existing law but rather created a new law. Not the level of candor we have a right to from our "public servants".
4. One might also argue that the NDAA did not modify a law i.e. the AUMF, but rather it **simply changed the law that was being applied** i.e., instead of applying civil / civilian law (including criminal law) it required the application of military law i.e. the "law of war".

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This is consistent with the statements made by Senator Lindsey Graham who stated:

"Is the homeland the battlefield? You better believe it is the battlefield."<sup>viii</sup>

would “**basically say in law for the first time that the homeland is part of the battlefield**” and people can be imprisoned without charge or trial “**American citizen or not.**”<sup>viii</sup>

“**basically say in law for the first time that the homeland is part of the battlefield**”<sup>viii</sup>

“**1031, the statement of authority to detain, does apply to American citizens and it designates the world as the battlefield, including the homeland.**”<sup>viii</sup>

5. Neither those in favor of these provisions nor those opposed to these provisions could agree on what was the current law.

Both proponents and opponents cited the same cases to support their position. The proponents said the NDAA did not change existing law, which did allow for indefinite detention without trial of U.S. citizens. The opponents said the NDAA was expanding the current law such that under the NDAA U.S. citizens could be held indefinitely in detention without trial. The only thing this debate accomplished was to establish an unequivocally congressional record that all of Congress believed the bill called for indefinite detention without trial of U.S. citizens even if they were “captured” in the U.S. Congressional intent is clear even if some tried to say they did not like the result. This was part of the controlled opposition in passing the bill.

6. Both §1021(d) and 1021(e), due to the internal inconsistency of changing the law when saying they do not, will be subject to judicial interpretation which will in essence nullify what they were represented to do.

If a court is called upon to interpret these sections of the NDAA it will likely apply three rules. First, it will give preference to specific provisions (§1021(b)) over general provisions (§1021(d) and (e)). Second, it will give each provision some meaning if at all possible. Third, it will construe all the provisions to be consistent if at all possible. The ending result of such will likely be for the court to deem §1021(d) and (e) to say:

*(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 [unless otherwise specifically provide for herein.]*

*(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 [Force [unless otherwise specifically provide for herein.]*

Of course §1021(b) (2) does specifically provide for such.

Senator Graham expressed his believe such explanatory language would not affect the bill.<sup>viii</sup>

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Note the President has asserted the right to assassinate U.S. citizens even when not on a battlefield under the AUMF or under his independent power. In fact President Obama has assassinated three U.S. citizens under such circumstances. You should be aware that legally the three U.S. citizens assassinated are no different than you.

<sup>x</sup> **Houston v. Moore:** 18 U.S. 1, 5 Wheat. 1, at 33 (1820) (concurring opinion of Justice Johnson ).

“ . . . Every citizen of a State owes a **double allegiance; he enjoys the protection and participates in the government of both the State and the United States.**”

**United States v. Percheman,** 32 U.S. 51, 7 Peters 51, at 86 thru 87 (1833).

" It may not be unworthy or remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their **allegiance**; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed."

**Moore v. State of Illinois,** 55 U.S. (Howard 14) 13, at 20 (1852).

“ . . . Every citizen of the United States is also a citizen of a state . . . . He may be said to **owe allegiance to two sovereigns**, and may be liable to punishment for an infraction of the laws of either.”

**Bradwell v. State of Illinois:** 83 U.S. 130, at 138 (1873)

“The fourteenth Amendment declares **that citizens of the United States are citizens of the State** within which they reside; therefore the plaintiff was, at the time of making her application, a citizen of the United States and a citizen of the State of Illinois.”

**United States v. Cruikshank,** 92 U.S. 542, at 549 (1875)

“We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and **each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect.**”

**p.550**

“The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes **allegiance to the two departments**, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, **he can demand protection from each within its own jurisdiction.**”

**Elk v. Wilkins,** 112 U.S. 94, at 101 thru 102 (1884)

"The persons declared to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' *The evident meaning of these last words is, not merely subject in some respect or degree to the (territorial) jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them **direct and immediate allegiance.*** And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired."

**Talbot v. Jansen,** 3 U.S. 133, 153; 3 Dall. 133 (1795)

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"Ballard was and still is a citizen of the United States unless perchance he should be a citizen of the world. The latter is a **creature of the imagination**, and far too refined for any republic of ancient or modern times. If, however, he be a citizen of the world, the character bespeaks universal benevolence, and breathes peace on earth and good will to man; it forbids roving on the ocean in quest of plunder, and implies amenability to every tribunal."

Dan Goodman , **Citizenship and Allegiance: Before and After the Fourteenth Amendment (2010)**

"It has been shown that a citizen owes allegiance to a sovereign. And in return the citizen can demand protection from the sovereign. This relationship is termed political jurisdiction.

In the United States of America, the United States government is a sovereign and has political jurisdiction, while each individual State of the Union is also a sovereign (*dual sovereignty*) and has political jurisdiction (*United States v. Cruikshank*). In each State of the Union there are two state citizens; a citizen of the United States, under Section 1 of the Fourteenth Amendment; and a citizen of the several States, under Article IV, Section 2, Clause 1 of the Constitution of the United States (of America).

At present there is no formal requirement for a citizen of the United States or a citizen of the several States to take a pledge of allegiance in any individual State of the Union... However, a naturalized citizen of the United States is required under 8 U.S.C. 1448 to take an oath of allegiance to the "Constitution and laws of the United States of America."

1 BOARD OF COMMISSIONERS

2 COUNTY OF COOS

3 STATE OF OREGON

4  
5 In the Matter of Declaring Opposition to Provisions ) RESOLUTION  
6 of the National Defense Authorization Act of 2012 } 13-06-086L

7 NOW BEFORE THE Board of Commissioners sitting for the transaction of County  
8 business on the 30<sup>th</sup> day of July, 2013 is the matter of declaring opposition to provisions of the  
9 National Defense Authorization Act for Fiscal Year 2012 (NDAA); and

10 WHEREAS it appears to the Board of Commissioners that subsections 1021 and 1022 of  
11 Title X, Subtitle D of the NDAA authorize the indefinite military detention of persons the U.S.  
12 government suspects of involvement with terrorism, including U.S. citizens on American soil;

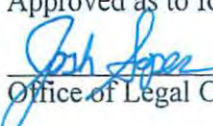
13  
14 NOW, THEREFORE, IT IS HEREBY RESOLVED that the Board of Commissioners  
15 opposes the above-described provisions of the NDAA;

16 AND IT IS FURTHER RESOLVED that the Board of Commissioners respectfully asks  
17 the Sheriff of this County to develop and implement a policy consistent with this resolution.

18 Dated this 30<sup>th</sup> day of July, 2013.

19  
20 BOARD OF COMMISSIONERS

21 Approved as to form:


22   
Office of Legal Counsel

23   
John Sweet, Chair

24   
Melissa Cribbins, Commissioner

25   
Robert "Bob" Main, Commissioner

26 SHERIFF

27   
Craig Zanni

Resolution 13-06-086L