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April 16, 2012

**To:** Representative Mario Goico

**From:** Jill Shelley, Principal Analyst

**Re:** HR 6021 and the National Defense Authorization Act for Fiscal Year 2012

You requested information in preparation for a hearing on 2012 HR 6021, "A resolution standing in opposition to the provisions in the National Defense authorization act for fiscal year 2012 which authorize military detention and trial of United States citizens and lawful residents in direct violation of the United States Constitution and the constitution of this state." This memorandum provides summary background on the National Defense Authorization Act (NDAA), the provisions addressed by HR 6021, and related questions. (Several of these issues are complex legal issues on which many organizations have expressed opinions. This memorandum does not attempt to address all related issues and opinions.) Specifically, it provides information in answer to these questions:

- What is the National Defense Authorization Act (NDAA)?
- What are the provisions of Sections 1021 and 1022 of the NDAA?
- Do those provisions expand federal government power?
- Do any of these provisions extend any new authorities to detain U.S. Citizens?
- What is the Authorization for Use of Military Force (AUMF)?
- What does the law of war say about detention?
- HR 6021 states the NDAA violates certain provisions of the U.S. Constitution. What are those provisions?
- What is the current definition of treason?
- Have the questioned provisions of the NDAA been determined to be unconstitutional?
- What is the relationship between constitutional law and state employment?
- Can a state law preempt a federal law?
- What actions have other state legislatures taken on this issue?

Enclosed are copies of Sections 1021 and 1022 of the NDAA specifically mentioned in HR 6021 and of Public Law 107-40, the "Authorization for Use of Military Force" (AUMF), in effect since 2001, about which additional information is provided. Additional referenced documents will be provided to you as .pdf files. References to endnotes are provided in parentheses. References to notes within quotations retain the numbers of the originals; those notes are included in the memorandum's endnote for the quotation.

Laura Jurgensen, KLRD Legislative Fellow, and Julian Efird, KLRD Principal Analyst, provided valuable research assistance for this memorandum.

Please contact me with your additional questions.

### **What is the National Defense Authorization Act (NDAA)?**

The act in question is the 50th consecutive enactment of the National Defense Authorization Act. (House Armed Services Committee) Like its predecessors, H.R. 1540, 112th Cong. (2011), the “National Defense Authorization Act for Fiscal Year 2012” is an act “To authorize appropriations for fiscal year 2012 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.” It provides \$662 billion in defense funding in federal fiscal year 2012. Title X, General Provisions, includes Subtitle D—Counterterrorism.

Conference committee members were appointed December 1, 2011, by the Senate and December 7, 2011, by the House. The Conference Report for H.R. 1540 was passed by the U.S. House 283 - 136 on December 14, 2011, and by the Senate 86 - 13 on December 15. The 565-page bill was signed by President Obama on December 31, 2011, and became Public Law 112-81. (Congressional history)

### **What are the provisions of Sections 1021 and 1022 of the NDAA?**

The text of Sections 1021 and 1022 is provided on pp. 17-19.

In general, Section 1021 affirms the authority granted to the President in 2001 to detain any covered person, which it defines as a person implicated in the September 11, 2001, terrorist attacks or a person “a part of or substantially supported al-Qaeda, the Taliban, or associated forces.” The disposition of such a person may include detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force (summarized below), a military trial, transfer to an alternative court, or transfer to a foreign country or entity.

Section 1022 allows military detention pending disposition under the law of war of any covered person, which it defines as a person authorized to be detained by Section 1021 who is determined to be “a member of, or part of, al-Qaeda or an associated force” and determined to “have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.” The U.S. military “shall hold” a covered person “who is captured in the course of hostilities authorized by the Authorization for Use of Military Force” in “military custody pending disposition under the law of war.” Section 1022 states the procedures for implementing that section shall include, but not be limited to, procedures regarding how a person is determined to be a covered person, procedures to ensure ongoing surveillance or intelligence gathering is not interrupted, procedures providing that a determination of whether a person is a covered person is not required until after interrogation, procedures that the requirements for military custody do not apply when U.S. government officials are granted access to a person in the custody of a third country, and procedures

providing that a certification of national security interests to waive military custody may be granted for the purpose of transferring a covered person from a third country.

Critics contend the provisions do not include sufficient protections for U.S. citizens and lawful resident aliens. These are among the points made:

- The executive branch will determine which people meet the criteria.
- Certain terms such as “belligerent act” are not defined.
- Section 1022 requires that a certain class of terrorist receive no trial in U.S. civilian courts.

Certain critics state that, under Section 1021, a covered person who is detained must be detained without trial, tried in military court, transferred to another court, or transferred to a foreign country or entity. (Tenth Amendment Center) However, Sec. 1021(c) states “The disposition of a person under the law of war . . . **may** include” those options. [emphasis added]

### **Do those provisions expand federal government power?**

Sources from various perspectives say “yes”:

- “The Conference Report to H.R. 1540 strengthens policies and procedures to prosecute, interrogate and detain terrorists. The killing of al-Qaeda chief Osama bin Laden in Pakistan and the threats posed by al-Qaeda cells in Yemen and Africa underscore the evolving and continuing nature of the terrorist threat to the United States. The Conference Report ensures the United States will have the ability to meet this threat and neutralize terrorists from these groups and conduct effective interrogations. . . . In cases such as the Christmas Day Bomber, where a foreign terrorist is caught in a plot to attack the United States, [it] establishes a new requirement for military custody. . . . The bill strengthens policies and procedures used to detain, interrogate, and prosecute al Qaeda, the Taliban, affiliated groups, and those who substantially support them.” (House Armed Services Committee)
- “For the first time in our Nation’s history, the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81) codifies indefinite military detention without charge or trial of civilians captured far from any battlefield. . . .” (ACLU)

The President said “Section 1022 seeks to require military custody for a narrow category of non-citizen detainees who are ‘captured in the course of hostilities authorized by the Authorization for Use of Military Force.’” He said he rejects “any approach that would mandate military custody where law enforcement provides the best method of incapacitating a terrorist threat. . . .and under no circumstances will my Administration accept or adhere to a rigid across-the-board requirement for military detention.” (Presidential Signing Statement) It should be noted that signing statements “do not themselves have the force of law, nor do they modify the language of the enacted statute” and “every President, in accordance with Article II, section 3 of the U.S. Constitution, is obligated to ‘take care that the laws be faithfully executed. . . .’” (CRS, AUMF)

## Do any of these provisions extend any new authorities to detain U.S. citizens?

There appears to be limited consensus that Section 1021 does not extend new authorities to detain U.S. citizens:

- “The NDAA has not impacted the conditions under which a U.S. citizen may (or may not) be detained. In fact, section 1021 of the NDAA is explicit: The law regarding how U.S. citizens are handled, including the right to *habeas corpus*, is the same today as it was the day before it was passed.” (Heritage Foundation)
- “The legislation requires that 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. Section 1022 reaffirms to detain a person in military custody under this section does not extend to citizens of the United States and 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.” (Republican Study Committee)
- “The Conferees balance this approach with the conviction that the erosion of citizens’ civil liberties in the pursuit of security constitutes a victory by the enemy. To that end, **these provisions do not extend any new authorities to detain U.S. citizens and explicitly exempt U.S. citizens from provisions related to military custody of terrorists.**” [emphasis in the original] (House Armed Services Committee)
- “Section 1021 affirms the executive branch's authority to detain persons covered by the 2001 Authorization for Use of Military Force (AUMF) (Public Law 107-40; 50 U.S.C. 1541 note). This section breaks no new ground and is unnecessary. . . . I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation. My Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law.” (Presidential Signing Statement)
- “The potential application of [a section of the Senate version of the bill, regarding detention, trial, and transfer of prisoners] to U.S. citizens and other persons within the United States was the subject of significant floor debate. An amendment that would have expressly barred U.S. citizens from long-term military detention on account of enemy belligerent status was considered and rejected.<sup>99</sup> Ultimately, an amendment was adopted that added the following proviso to Section 1031:

“Nothing in this section shall be construed to affect existing law or authority relating to the detention of United States citizens or lawful resident aliens of the United States or any other persons who are captured or arrested in the United

States.” [This provision is included in the Conference Committee report at Sec. 1021(e).] (CRS, Detainee Provisions)

- “The ACLU does not believe that the NDAA authorizes military detention of American citizens or anyone else in the United States. Any president’s claim of domestic military detention authority under the NDAA would be unconstitutional and illegal. Nevertheless, there is substantial public debate and uncertainty around whether Sections 1021 and 1022 of the NDAA could be read even to repeal the Posse Comitatus Act and authorize indefinite military detention without charge or trial within the United States.” (ACLU)

This does not, however, mean that the law not changed is without controversy. Some argue government powers to detain individuals linked to terrorism under previous law are too extensive:

- “The offense to civil liberties is less what the bill does than what it doesn’t: deny that the president can arbitrarily detain without trial anyone he decides is al Qaeda or its helper. So when congressional leaders dismiss civil liberty concerns about the legislation by saying it 'merely codifies current law,' one response is that that’s exactly the problem. . . . Federal courts hearing cases questioning the constitutionality of war powers, including the president’s right to detain people, tend to consider whether Congress has endorsed or rejected the power in question. Judges may take all this throat-clearing as a tacit endorsement of the president’s claims, making them more likely to survive constitutional scrutiny. The question is not whether there is damage to civil liberties here, but how bad it is.” (Cato)
- “Our system of checks and balances should be restored by making sure that the 2001 Authorization for Use of Military Force cannot be used for endless war and endless indefinite detention without charge or trial. The Authorization for Use of Military Force should expire when United States combat operations in Afghanistan end.” (ACLU)

### **What is the Authorization for Use of Military Force (AUMF)?**

The AUMF, Public Law 107-40, is the primary statutory authority for the war against terrorism. Congress passed this legislation, S.J.Res. 23, on September 14, 2001, 98-0 in the Senate and 420-1 in the House, and President George W. Bush signed this legislation into law on September 18, 2001. (CRS AUMF) The text of the AUMF is included in its entirety on pp. 20-21.

Its main provision states, “[T]he 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.”

Points made about the AUMF include these:

- “A notable feature of [the AUMF] is that unlike all other major legislation authorizing the use of military force by the President, this joint resolution authorizes military force against 'organizations and persons' linked to the September 11, 2001 attacks on the United States. In its past authorizations for use of U.S. military force, Congress has permitted action against unnamed nations in specific regions of the world, or against named individual nations, but never against 'organizations or persons.’” (CRS, AUMF)
- The hostilities described in the AUMF are difficult to define. Some contend its provisions could continue indefinitely. For example, one organization suggests the AUMF “should expire at the end of the war in Afghanistan so that the government cannot continue to use the AUMF as justification for its claims that war is everywhere and anywhere and that the president can order the American military to imprison without charge or trial people picked up far from any battlefield.” (ACLU)

Law professor Stephen Vladeck is among those who have raised concerns about the AUMF. In January 2006 he wrote, “[T]he AUMF has been invoked by the Administration as providing congressional authorization for everything from domestic spying by the NSA to secret prisons abroad; from military tribunals for non-citizens to indefinite military detention in contravention of the Geneva Conventions. Put simply, the AUMF, an amorphous, ambiguous statute passed in the height of post-September 11 anxiety, has become **the** stated justification for virtually everything controversial that the President does, notwithstanding more specific congressional statutes purporting to foreclose the very authority that, according to the Administration, the AUMF provides (for example, consider *Padilla* and the Non-Detention Act).” [emphasis in the original] (Vladeck)

“Necessary and appropriate force” as used in the AUMF has not been fully defined by Congress or by the courts. The Supreme Court has provided some guidance regarding permissible detention as “necessary and appropriate force” under the AUMF. The plurality U.S. Supreme Court opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), includes these statements:

[W]e conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe. . . . The AUMF authorizes the President to use 'all necessary and appropriate force' against 'nations, organizations, or persons' associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. . . .We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use. . . . In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here. . . .To be clear, our opinion only finds legislative authority to detain under the AUMF once

it is sufficiently clear that the individual is, in fact, an enemy combatant. . . . (*Hamdi v. Rumsfeld*)

However, the issue remains unsettled:

While the Supreme Court in *Hamdi* recognized that the AUMF permitted the detention of a U.S. citizen captured while fighting U.S. coalition forces in Afghanistan, it did not address whether (or the extent to which) persons captured outside of Afghanistan could be properly detained under the AUMF. The U.S. Court of Appeals for the D.C. Circuit has apparently taken the view that the AUMF authorizes the detention of any person who is functionally part of Al Qaeda, though this view has been espoused in cases involving non-U.S. citizens who have been captured outside the United States.<sup>34</sup> In separate rulings, the U.S. Court of Appeals for the Fourth Circuit upheld the military detention of a U.S. citizen and a resident alien captured in the United States who were designated as enemy combatants by the executive branch.<sup>35</sup> In each case, the detainee was transferred to civilian law enforcement custody for criminal prosecution before the Supreme Court could consider the merits of the case. Accordingly, the circumstances in which a U.S. citizen or other person captured or arrested in the United States may be detained under the authority conferred by the AUMF remains unsettled.<sup>36</sup> (CRS, Detainee Provisions)

### **What does the law of war say about detention?**

An article from the American Society of International Law provides an overview of international humanitarian law (IHL) “principles differentiating between targeting and detention that may have become obscured by the focus of courts and policy-makers on the single set of criteria established by the AUMF.” It says this about international law regarding detention of those not clearly in military service to a state (i.e., country):

[T]he internment of civilians is contemplated in both [International Armed Conflict] IAC and [non-international armed conflict] NIAC. Internment is an exceptional, non-punitive measure of control taken to protect the security of the detaining party. In IAC, the Fourth Geneva Convention (“Geneva IV”) permits civilian internment on a State’s own territory when “the security of the Detaining Power makes it absolutely necessary” and on occupied territory “for imperative reasons of security,” subject to certain procedural safeguards necessary to prevent arbitrary detention.<sup>22</sup> According to the commentary to Geneva IV, subversive activity, direct assistance to the enemy, sabotage, and espionage are some examples of acts that might justify internment of civilians.<sup>23</sup> In NIAC, by contrast, IHL recognizes internment as a possibility, but the grounds and procedural safeguards for internment are not clearly spelled out and have been the subject of extensive discussion and debate.<sup>24</sup> Nonetheless, there seems to be growing international acceptance by experts, certain governments, and others—including the International Committee of the Red Cross—that “imperative reasons of security” is an appropriate standard for internment in NIAC.<sup>25</sup> (International Law)

## **HR 6021 states the NDAA violates certain provisions of the *U.S. Constitution*. What are those provisions?**

On p. 1, lines, 11 through 19, HR 6021 lists provisions of the *U.S. Constitution*. Each of those provisions, with its complete wording, is listed below. Extensive information on court rulings on these provisions in the Constitution is available only regarding the first, *habeas corpus*.

- Suspension of *habeas corpus* rights. *U. S. Constitution*, Article I, § 9, Clause 2: “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.” *Hamdi v. Rumsfeld* and multiple cases in lower courts regarding Guantánamo detainees have been based on claims for *habeas corpus*. Information on *Hamdi v. Rumsfeld* is provided above.
- Trial by jury. *U.S. Constitution*, Article III, § 2, Clause 2: “The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”
- Treason. *U.S. Constitution*, Article III, § 3: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of Two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”
- Republican form of government. *U.S. Constitution*, Article IV, § 4: “The United States shall guarantee to every State in This Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (When the Legislature cannot be convened) against domestic Violence.”
- Unreasonable search and seizure. *U.S. Constitution*, Amendment 4: “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.”
- Due process. *U.S. Constitution*, Amendment 5: “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 offence 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.”

- Right to a speedy trial. *U.S. Constitution*, Amendment 6. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.”
- Protection against cruel and unusual punishments. *U.S. Constitution*, Amendment 8: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
- Equal protection. *U.S. Constitution*, Amendment 14, § 1: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The text of the *Kansas Constitution's* Bill of Rights is provided on pp. 22-24.

## What is the current definition of treason?

In addition to the definition of treason in the *U.S. Constitution*, federal definitions of treasonable activities are found in the U.S. Code, Title 18:

- **§ 2381. Treason.** Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.
- **§ 2382. Misprision of treason.** Whoever, owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular State, is guilty of misprision of treason and shall be fined under this title or imprisoned not more than seven years, or both.

*Treatise on the Law of the American Rebellion* by Daniel Gardner, quoted in HR 6021, was published in 1862.

## Have the questioned provisions of the NDAA been determined to be unconstitutional?

The Supreme Court has not ruled any provision of the NDAA to be unconstitutional, nor are any cases pending before that Court based on provisions in Sections 1021 or 1022. (Remember, these provisions were signed into law December 31, 2011.)

The *U.S. Constitution* does not expressly establish judicial review, but Article III, § 2 states “The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States. . .,” and the concept of judicial review has been present in the United States since its beginning. The main U.S. Supreme Court decision on judicial review is *Marbury v. Madison*, 5 U.S. 137 (1803). In *Marbury*, the Court established that federal courts have the power to review acts of Congress to determine whether they are contrary to the U.S. Constitution and, if they are, they must be struck down: “A law repugnant to the Constitution is void.” (Judicial Review)

## What is the relationship between constitutional law and state employment?

HR 6021 states a violation of the Legislature's policy that no “officer, employee, or agent of the state will implement, enforce or otherwise support . . . any of the above noted unconstitutional provisions,” with violation to subject the person to “disciplinary action up to and including termination.”

Since 1868, officials elected or appointed in Kansas have taken an oath to uphold the *U.S. Constitution* and the *Kansas Constitution*. Since at least 1949, any person employed by the State of Kansas or a state or local government has been required to sign an oath regarding that person's allegiance to the law (Session Laws of 1949, Ch. 246, § 1). The language in place since 1968 states, “Before entering upon the duties of his or her office or employment, each person to be employed by the state or any agency thereof or by any county, city or other municipality of the state including any school, college or university supported in whole or in part by public funds collected under any tax law of the state or any municipality thereof shall be required to subscribe in writing to the oath set out in KSA 54-106.” (KSA 75-4308) “All officers elected or appointed under any law of the state of Kansas shall, before entering upon the duties of their respective offices, take and subscribe an oath or affirmation, as follows: 'I do solemnly swear [or affirm, as the case may be] that I will support the constitution of the United States and the constitution of the state of Kansas, and faithfully discharge the duties of [the person's office]. So help me God.’” (KSA 54-106) The language of the oath itself is unchanged since 1923.

The *Kansas Constitution*, Article 2, § 20, states “No law shall be enacted except by bill.” A simple resolution, such as HR 6021, not defined in Kansas law, is defined in *Black's Law Dictionary* as, “A resolution passed by one house only. It expresses the opinion or affects the internal affairs of the passing house, but it does not have the force of law.”

It appears to be untested in court whether a legislative resolution, without the force of law, can compel any state officer in the executive or judicial branches to terminate an employee or add to reasons for dismissal for employees in the classified service. An appointing authority may dismiss or demote a permanent employee in the classified service but not for “political, religious, racial or other nonmerit reasons.” (KSA 75-2949) That statute also requires certain procedures be followed and outlines appeal procedures. Grounds for dismissal are further outlined in KSA 75-2949e and KSA 75-2949f and do not presently include failure to enforce any

federal law the Kansas House of Representatives states in a resolution is unconstitutional. Employees in unclassified service do not have the same protections.

### **Can a state law preempt a federal law?**

If a state law specifically prohibited a state employee from following the federal law, Article 6, Clause 2, of the *U.S. Constitution*, the “Supremacy Clause,” would be at issue. Article 6, Clause 2, says, “This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in Every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Under the Supremacy Clause, any state law that conflicts with a federal law is preempted. *Gibbons v. Ogden*, 22 U.S. 1 (1824). A case in which a state employee is required to follow conflicting state and federal law likely would be considered conflict preemption. The conflict arises because a party (here the state employee) cannot comply with both the state law and the federal law. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963). A state law also is preempted by a federal law when the state law is an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373–74 (2000).

A private entity could file a suit in federal court against state officials in their official capacity alleging violation of this federal law. Another response, if a law with language of this type were to pass, would be for state officials to file a lawsuit against the federal government (for example, states suing the federal government to prohibit enforcement of provisions of the Affordable Care Act, the federal health insurance reform law.). In turn, federal officials could file suit against the state to prevent enforcement of the state law (for example, the U.S. Justice Department filing a lawsuit challenging Arizona’s immigration law).

### **What actions have other state legislatures taken on this issue?**

Resolutions and bills on this general topic have been considered by ten states this year (State bills and resolutions). Only those in Maine and Utah have passed as of the date of this memorandum.

- Arizona: SCR 1011, A Concurrent Resolution Opposing Sections of the National Defense Authorization Act as Being In Violation of the Limits of Federal Power; current status: in House.
- Arizona, SB 1182, An Act Amending Title 41, Arizona Revised Statutes, by Adding Chapter 51; Relating to Implementation of the National Defense Authorization Act of 2012 [to make it a crime for a “any public officer, employee or agent of this state or any employee of a corporation who provides services to this state” to participate in implementation]; currently in the House, retained in calendar.

- Maine, HP 1397, “Joint Resolution Memorializing the President of the United States and the United States Congress To Review Portions of the National Defense Authorization Act”; received concurrence from both houses.
- Maryland, House Joint Resolution 12, “For the purpose of condemning certain provisions of the National Defense Authorization Act for Fiscal Year 2012 that threaten United States citizens with unlawful detention without trial in violation of the citizens’ right to the guarantees of *habeas corpus* and due process and urging the United States Congress to reconsider and repeal certain provisions of the National Defense Authorization Act for Fiscal Year 2012”; last action was a hearing in the House Rules and Executive Nominations Committee March 12.
- Missouri, SB 819, “The state of Missouri will be prohibited from participating or providing material support for the implementation of sections 1021 and 1022 of the National Defense Authorization Act for Fiscal Year 2012”; referred to the Senate General Laws Committee.
- Oklahoma, HCR 1025, Expressing belief that the National Defense Authorization Act for Fiscal Year 2012 is unconstitutional; distribution; withdrawn from calendar, referred to Rules Committee.
- Rhode Island, House Resolution 7916, “To Preserve *Habeas Corpus* and Civil Liberties of the Citizens of Rhode Island,” referred to House Judiciary Committee, which recommended it be held for further study.
- Tennessee, SB 2669/SB 2619. “This bill declares that any federal law purporting to require local or state law enforcement agencies to act at the direction of the federal government or the United States military is beyond the authority granted to the federal government pursuant to the United States Constitution, is not recognized by this state, is specifically rejected by this state and is declared to be invalid in this state.” The House version has been re-referred to the Finance Subcommittee of the House Rules and Calendar Committee; a motion to advance the Senate bill from committee failed.
- Utah, SCR 11, “Expresses concerns over portions of the National Defense Authorization Act for Fiscal Year 2012,” third substitute signed by the Governor March 26, 2012
- Virginia, HB 1160, “Notwithstanding any contrary provision of law, no agency or political subdivision of the Commonwealth, or employee of same acting in his official capacity, shall aid an agency of the United States in the unlawful detention of any United States citizen pursuant to 50 U.S.C. § 1541 as provided by the National Defense Authorization Act for Fiscal Year 2012 (P.L. 112-81, § 1021)”; current status: passed by House and Senate, Governor has proposed a substitute bill.
- Washington, HB 2759, “Creating the Washington state preservation of liberty act condemning the unlawful detention of United States citizens and lawful resident

aliens under the national defense authorization act for fiscal year 2012,” reintroduced for the Second Special Session on April 11 (no votes to date).

- West Virginia, HB 4627, “Restricting certain aid to the Armed Forces of the United States by West Virginia agencies,” referred to House Government Organization Committee.

## Endnotes

ACLU; American Civil Liberties Union, “Indefinite Detention, Endless Worldwide War and the 2012 National Defense Authorization Act”; <http://www.aclu.org/indefinite-detention-endless-worldwide-war-and-2012-national-defense-authorization-act> and <https://www.aclu.org/national-security/toolkit-state-and-local-resolutions-opposing-2012-national-defense-authorization>, accessed 10 April 2012

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CRS, Detainee Provisions; “Detainee Provisions in the National Defense Authorization Bills,” Congressional Research Service, R41920, December 8, 2011; [www.fas.org/sgp/crs/natsec/R41920.pdf](http://www.fas.org/sgp/crs/natsec/R41920.pdf), accessed 10 April 2012. Note that the final language of the conference committee report differs from the language under consideration when the report was released.

<sup>34</sup> See *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (recognizing that government might be able to lawfully detain an Algerian citizen arrested by Bosnian authorities in 2001 and subsequently transferred to U.S. custody for detention at Guantanamo, but remanding to lower court to assess sufficiency of government’s evidence that petitioner was a member of Al Qaeda); *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010) (in assessing whether person captured in Mauritania was lawfully detained under the AUMF, “the relevant inquiry is whether [the petitioner] was ‘part of’ al-Qaida when captured”).

<sup>35</sup> *Padilla v. Hanft*, 423 F.3d 386, 390-391 (4th Cir. 2005) (holding that U.S. citizen captured in the United States could be detained pursuant to the AUMF because he had been, prior to returning to the country, “‘armed and present in a combat zone’ in Afghanistan as part of Taliban forces during the conflict there with the United States”); *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated by al-Marri v. Spagone*, 129 S.Ct. 1545 (2009).

<sup>36</sup> For analysis of historical practice relating to the wartime detention of U.S. citizens, see CRS Report RL31724, *Detention of American Citizens as Enemy Combatants*, by Jennifer K. Elsea.

<sup>99</sup> S.Amdt. 1126 (seeking to bar the long-term military detention of U.S. citizens) (not agreed to by a vote of 45-55).

CRS, AUMF: "Authorization For Use Of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History," Congressional Research Service, January 16, 2007, [www.fas.org/sgp/crs/natsec/RS22357.pdf](http://www.fas.org/sgp/crs/natsec/RS22357.pdf), accessed 11 April 2012

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<sup>22</sup> *Geneva III*, arts. 42 & 78.

<sup>23</sup> Jean S. Pictet, Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 258 (ICRC 1958), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/GC\\_1949-IV.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf).

<sup>24</sup> See AP II, *supra* note 5, art. 5.

<sup>25</sup> Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict, Chatham House & ICRC, London, Meeting Summary (Sept. 22-23, 2008), available at <http://www.icrc.org/eng/assets/files/other/security-detention-chatham-icrc-report-091209.pdf>. See also Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 858 Int. Rev. Red Cross 375

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## 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.

Public Law 107-40  
107th Congress

Joint Resolution

Sept. 18, 2001  
[S.J. Res. 23]

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and  
Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and  
Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and  
Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and  
Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

Authorization for  
Use of Military  
Force.  
50 USC 1541  
note.

**SECTION 1. SHORT TITLE.**

This joint resolution may be cited as the “Authorization for Use of Military Force”.

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

President.

(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.

(b) **WAR POWERS RESOLUTION REQUIREMENTS.**—

(1) **SPECIFIC STATUTORY AUTHORIZATION.**—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

## KANSAS BILL OF RIGHTS

§1. **Equal Rights.** All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

§2. **Political power; privileges.** All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency.

§3. **Right of peaceable assembly; petition.** The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances.

§4. **Bear arms; armies.** A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose.

§5. **Trial by jury.** The right of trial by jury shall be inviolate.

§6. **Slavery prohibited; servitude for conviction of crime.** There shall be no slavery in this state; and no involuntary servitude, except for the punishment of crime, whereof the party shall have been duly convicted.

§7. **Religious liberty; property qualification for public office.** The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any elections, nor shall any person be incompetent to testify on account of religious belief.

§8. **Habeas corpus.** The right to the writ of *habeas corpus* shall not be suspended, unless the public safety requires it in case of invasion or rebellion.

§9. **Bail; fines; cruel and unusual punishment.** All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

§10. **Trial; defense of accused; witness against self; double jeopardy.** In all prosecutions, the accused shall be allowed to appear and defend in person, or by

counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of the witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense.

§11. **Liberty of press and speech; libel.** The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted.

§12. **No forfeiture of estate for crimes.** No conviction within the state shall work a forfeiture of estate.

§13. **Treason.** Treason shall consist only in levying war against the state, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason unless on the evidence of two witnesses to the overt act, or confession in open court.

§14. **Soldiers' quarters.** No soldier shall, in time of peace, be quartered in any house without the consent of the occupant, nor in time of war, except as prescribed by law.

§15. **Search and seizure.** The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized.

§16. **Imprisonment for debt.** No person shall be imprisoned for debt, except in cases of fraud.

§17. **Property rights of citizens and aliens.** No distinction shall ever be made between citizens of the state of Kansas and the citizens of other states and territories of the United States in reference to the purchase, enjoyment or descent of property. The rights of aliens in reference to the purchase, enjoyment or descent of property may be regulated by law.

§18. **Justice without delay.** All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

§19. **Emoluments or privileges prohibited.** No hereditary emoluments, honors, or privileges shall ever be granted or conferred by the state.

§20. **Powers retained by people.** This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.