

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

House Joint Resolution 12 (Delegates McDermott and Smigiel)
Rules and Executive Nominations

**Abridgement of Federal and State Constitutional Protections in the 2012 National
Defense Authorization Act**

This joint resolution condemns Section 1021 of the National Defense Authorization Act of 2012 (NDAA) as it purports to: (1) repeal the Posse Comitatus Act and authorize the President of the United States to utilize the armed forces of the United States to police U.S. citizens and lawful resident aliens within the United States; (2) indefinitely detain U.S. citizens and lawful resident aliens captured within the United States without charge until the end of the hostilities authorized by the 2001 Authorization for Use of Military Force Against Terrorists (AUMF); and (3) subject U.S. citizens and lawful resident aliens captured within the United States to foreign jurisdictions.

Under the resolution, the General Assembly urges the U.S. Congress to reconsider and repeal Section 1021 of the NDAA. The Department of Legislative Services is to deliver a copy of the resolution to the Maryland Congressional Delegation.

Fiscal Summary

State Effect: None. The resolution does not affect State finances.

Local Effect: None.

Small Business Effect: None.

Analysis

Background: On December 31, 2011, President Obama signed the NDAA into law. Though the NDAA authorizes billions of dollars in defense spending and contains several

provisions regarding national security programs, the portions of the bill that have attracted the most attention and controversy are Sections 1021 and 1022 of the Act, which deal with counterterrorism.

Section 1021 of the NDAA affirms that the AUMF authorizes the armed forces to detain “covered persons” pending disposition under the law of war. A “covered person” is:

- a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for the attacks; or
- 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.

The specified dispositions are (1) detention under the law of war without trial until the end of the hostilities authorized by AUMF; (2) military trials; (3) transfer for trial by an alternative court or competent tribunal having lawful jurisdiction; or (4) transfer to the custody or control of the person’s country of origin, any other foreign country, or any other foreign entity.

Section 1021 also states that it must not 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 of the Act requires the armed forces to hold a person in military custody pending disposition under the law of war if the person is authorized to be detained under Section 1021 and is captured in the course of hostilities authorized by AUMF. The President may waive the requirement after submitting certification to Congress that the waiver is in the interest of national security.

The required detention applies if the person authorized to be detained under Section 1021 is determined (1) to be a member of al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and (2) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners. Section 1022 specifically exempts United States citizens from required military detention and exempts lawful resident aliens from required military detention on the basis of conduct that took place in the United States, except to the extent permitted under the federal Constitution.

The counterterrorism provisions in the NDAA generated an extensive amount of debate in Congress, particularly on the issue of whether the Act authorized the indefinite

detention of U.S. citizens. While some individuals claim that the Act merely affirms what is already authorized under law, critics of the NDAA claim that the Act can be construed to authorize the indefinite detention of anyone, including American citizens, without trial and in violation of habeas corpus and the Constitutional right to due process. Critics further contend that the indefinite detention without trial provisions can be applied to acts that take place on American soil as opposed to the battlefield, which is the typical application of the law of war.

Another concern regarding the NDAA is that it can be construed to violate the Posse Comitatus Act, a federal law enacted in 1878 that, with a few exceptions, prohibits the U.S. Army or the Air Force from directly participating in civilian law enforcement operations.

Resolutions and legislation voicing opposition and concern regarding the NDAA have been introduced in State legislatures this year. The Virginia House of Delegates passed a bill that would prevent any agency, political subdivision, employee, or member of the military of Virginia from assisting an agency of the armed forces of the United States in the conduct of the investigation, prosecution, or detention of a U.S. citizen in violation of the U.S. Constitution, the Constitution of Virginia, or any Virginia law or regulation.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): American Civil Liberties Union, Human Rights Watch, Virginia General Assembly, Black's Law Dictionary, Department of Legislative Services

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