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**Testimony on Senate Bill 999**  
**Pennsylvania Senate Intergovernmental Operations Committee**  
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SB999 is really very simple: it prohibits state agents from cooperating with any federal agency attempting to kidnap people within the borders of Pennsylvania.

Now, some of you might balk at my use of the word “kidnap,” but that is essentially what sections 1021 and 1022 of the 2012 NDAA authorize. They empower the federal government to indefinitely detain people, including Americans, on American soil, without due process.

Isn't that pretty much the definition of kidnapping?

I'm sure many of you are skeptical that the NDAA actually authorizes indefinite detention without due process. After all, many members of Congress have assured it does no such thing.

But the fact of the matter is, the language in these two sections is so vague, and there has been a great deal of debate about its meaning. That in and of itself should cause you concern. Vague language is almost always construed as broadly as possible. And the fact is there is every indication that these sections DO authorize indefinite detention without due process and that its scope includes Americans right here on American soil.

You don't have to take my word for it.

Several journalists and political activists sued the federal government, challenging the constitutionality of the indefinite detention provisions in the NDAA. It's telling that when Judge Katherine Forrest questioned government lawyers during a March 2012 hearing, they would not assure the court that activities engaged in by the plaintiffs didn't potentially subject them to military detention.

*“The Government did not—and does not—generally agree or anywhere argue that activities protected by the First Amendment could not subject an individual to indefinite military detention under § 1021(b)(2).”*

Forrest went on to say that other vague terms caused constitutional problems.

*“A key question throughout these proceedings has been, however, precisely what the statute means—what and whose activities it is meant to cover. That is no small question bandied about amongst lawyers and a judge steeped in arcane questions of constitutional law; it is a question of defining an individual's core liberties. The due process rights guaranteed by the Fifth Amendment require that an individual understand what conduct might subject him or her to criminal or civil penalties. Here, the stakes get no higher: indefinite military detention—potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever. The Constitution requires specificity—and that specificity is absent from § 1021(b)(2), she wrote. “The statute's vagueness falls short of what due process requires.”*

It's pretty clear that the federal government could conceivably use sections 1021 and 1022 to justify detaining Americans for simply exercising First Amendment rights. And when we have direct evidence that people engaging in activities such as protesting war or expressing "anti-government sentiment" – whatever that means – can be considered potential "terrorists" these provisions become quite chilling.

The question then becomes: is Pennsylvania obligated to assist in the detention process?

Simply put, no! There is nothing that says the state of Pennsylvania has to help the federal government violate your rights!

In fact, under a legal principle known as the anti-commandeering doctrine, it is well established that the federal government cannot compel state actors to enforce or implement federal programs or policies. You have every right to prohibit your state agencies to stand down when it comes to indefinite detention.

This legal doctrine dates back to 1842, in a Supreme Court case centered right here in the Keystone State. In *Prigg v. Pennsylvania*, Justice Joseph Story held that while the state could not interfere with fugitive slave rendition, the federal government could not force state agents to assist with it. Since then this principle has been reinforced by three more major Supreme Court cases: *New York v. US* (1992), *Printz v. US* (1997) and *National Federation of Businesses v. Sebelius*.

In *Printz*, Justice Scalia wrote:

*"The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."*

So the question before you today isn't whether or not you CAN prohibit state agencies and employees from cooperating with indefinite detention.

There is NO QUESTION. You can!

But will you?

Do you care enough about the Constitution, civil liberties and due process to say, "No, we will aid and abet federal kidnapping."?

In the years leading up to the Civil War, northern states used this very strategy to thwart fugitive slave rendition. In fact, Pennsylvania was the leader in protecting the rights of black people living within her borders.

Five years after the *Prigg* decision Pennsylvania passed a new Personal Liberty Law. The University of Pittsburgh says, "This law provided sanctions for purchasing or removing free Blacks with the intention of reducing them to slaves; prohibited state officials from accepting jurisdiction over cases arising under

the federal Fugitive Slave Act of 1793; provided penalties for claimants seizing slaves in a violent, tumultuous, and unreasonable manner.”

Other northern states followed Pennsylvania’s lead, especially after Congress passed the even more draconian Fugitive Slave Act of 1850. Like the detention provisions in the NDAA, this act stripped away every shred of due process from a black person accused of running away from slavery. Northern states refused to comply. Michigan required a jury trial and prohibited state jails from being used to hold accused fugitives. Under Massachusetts personal liberty law, any state official cooperating with the rendition process was subject to impeachment.

These measures were as bold as they were effective, and they provide the blueprint for what you have the opportunity to do today.

Some will say, now Mike, indefinite detention will never happen here. You are overreacting.

Am I?

Because, you know, it already has.

Less than 75 years ago, more than 120,000 Japanese, German and Italian-Americans watched WWII from behind barbed wire fences. The right policy plus the requisite level of fear makes anything possible.

We can’t stop the fear, but we can ensure the policies don’t exist.

You can’t stop federal kidnapping, but you can darn sure refuse to help.

With that in mind, I urge you to pass SB999.

<http://tenthamentcenter.com/2012/09/18/ndaa-detention-powers-the-battle-continues/>