STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU
LEGISLATIVE BUILDING
401 S. CARSON STREET
CARSON CITY, NEVADA 89701-4747
Fax No.: (775) 684-6600

RICK COMBS, *Director*
(775) 684-6800

LEGISLATIVE COMMISSION (775) 684-6800
MARILYN K. KIRKPATRICK, *Assemblywoman, Chairman*
Rick Combs, *Director, Secretary*

INTERIM FINANCE COMMITTEE (775) 684-6821
PAUL ANDERSON, *Assemblyman, Chairman*
Cindy Jones, *Fiscal Analyst*
Mark Krmpotic, *Fiscal Analyst*

BRENDA J. ERDOES, *Legislative Counsel* (775) 684-6830
PAUL V. TOWNSEND, *Legislative Auditor* (775) 684-6815
H. PEPPER STURM, *Interim Research Director* (775) 684-6825

March 27, 2015

Speaker John Hambrick
Assembly Chambers

Dear Speaker Hambrick:

You have asked to be informed when we have identified constitutional problems with a particular bill during the drafting process. This letter is to notify you that, based on the authorities and analysis provided in this letter, it is the opinion of this office that Senate Bill No. 352 presents such constitutional problems. SB 352 declares certain provisions of the federal National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, to be invalid and illegal in this State and provides for criminal penalties on state and federal actors who implement or enforce those challenged provisions or attempt to do so. For the reasons set forth below, it is the opinion of this office that, if enacted into law in its current form, the bill would be found unconstitutional.

DISCUSSION

Of the 507 sections of the federal National Defense Authorization Act for Fiscal Year 2012, all but 14 sections concern routine matters of military pay and benefits and funding levels for the United States Department of Defense. Sections 1021 and 1022 of the Act authorize the Armed Forces of the United States to detain and hold in custody certain persons who: (1) planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored those persons responsible for those attacks; or (2) were a part of or substantially supported certain terrorist organizations that are engaged in hostilities against the United States. Upon the signature of the President of the United States, the Act became federal law. We will now address whether the State of Nevada may enact a statute declaring that sections 1021 and 1022 of the Act violate certain provisions of the Nevada Constitution, the United States Constitution and federal law and imposing criminal penalties on state and federal officials who enforce those sections in this State.

I. Nullification

The first constitutional question presented by SB 352 is whether a state legislature retains the power under the United States Constitution to determine the validity of a federal law. The answer to this question has been a settled part of constitutional jurisprudence since 1803, when Chief Justice John Marshall writing for a unanimous United States Supreme Court declared that:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Marbury v. Madison, 5 U.S. 137, 177-178 (1803). Over 150 years later, the United States Supreme Court stated that the decision in Marbury "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." Cooper v. Aaron, 358 U.S. 1, 18 (1958).

The Nevada Constitution also provides that in the State of Nevada, the judicial branch is the branch of government with the power to interpret the constitutional provisions. The Nevada Constitution divides state government "into three separate departments,—the Legislative,—the Executive and the Judicial;" and expressly prohibits any person "charged with the exercise of powers properly belonging to one of these departments [from exercising] any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Nev. Const. art. 3, § 1. Following the principle set forth in Marbury v. Madison, the Nevada Supreme Court has concluded that "[a] well-established tenet of our legal system is that the judiciary is endowed with the duty of constitutional interpretation. Nevadans for Nevada v. Beers, 122 Nev. 930, 943 n. 20 (2006) (citing Marbury, 5 U.S. at 177-78 (1803) (stating that "it is emphatically the province and duty of the judicial department to say what the law is"). Because it is the duty of the courts of the State of Nevada to interpret the Nevada Constitution, no other branch of state government may exercise that function.

Accordingly, it is the opinion of this office that under the United States Constitution and the Nevada Constitution, the judiciary is the branch of government responsible for determining the constitutionality of a federal or state law. It is the further opinion of this office that to the extent that SB 352 purports to enact a statute declaring that sections 1021 and 1022 of the federal

Act violate the Nevada Constitution, United States Constitution and federal law, the bill draft, if enacted into law, would be unconstitutional.

II. Preemption

The relation between state and federal laws is set forth in Article VI of the United States Constitution, commonly known as the Supremacy Clause, which declares that "[the United States Constitution], and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The practical consequence of this provision is that "acts of the State Legislatures . . . [that] interfere with, or are contrary to the laws of Congress [are to be invalidated because] [i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." Gibbons v. Ogden, 22 U.S. 1, 211 (1824). (Marshall, C.J.) Modern courts have moved beyond the general proposition concerning supremacy relied on in Gibbons to determine when a state law must yield to federal law. The United States Supreme Court has developed an interpretive canon known as the "preemption doctrine," The Supreme Court summarized the doctrine of preemption in Crosby v. National Foreign Trade Council:

> A fundamental principle of the Constitution is that Congress has the power to preempt state law. Art. VI, cl. 2 .Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. We will find preemption where it is impossible for a private party to comply with both state and federal law, and where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

530 U.S. 363, 372-73 (2000) (internal citations, quotations and brackets omitted.)

It is the opinion of this office that SB 352, if enacted, would likely be preempted under each of the following recognized preemption categories.

A. "When Congress intends federal law to 'occupy the field,' state law in that area is preempted."

The authority under which Congress enacted the National Defense Authorization Act for Fiscal Year 2012 would seem to place that Act within the field of military and foreign affairs that is intended to be fully occupied by the federal government and which leaves no room for even

complementary state legislation. As noted previously, the bulk of its provisions relate to matters of military pay and benefits and defense funding generally. Those are matters that section 8 of Article I of the United States Constitution has expressly reserved to Congress: "The Congress shall have Power to . . . provide for the common Defence . . . raise and support Armies . . . provide and maintain a Navy . . . make Rules for the Government and Regulation of the land and naval Forces." Other express sources of constitutional authority have been suggested for those sections of the National Defense Authorization Act concerning the detention, interrogation, and prosecution of suspected terrorists. These include Congress's powers to "define and punish . . . Offences against the Law of Nations" and "declare War . . . and make rules concerning Captures on Land and Water." Furthermore, Congress has the power under section 8: "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers." The President also maintains that the Constitution vests him with considerable independent authority over military and foreign affairs and matters of national security.

B. "And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute."

The provisions of SB 352 create a direct conflict between state and federal law. Subsections 7 and 8 of section 3 of the bill declare certain sections of federal law invalid. Subsection 1 of section 4 of the bill declares that it is "unlawful to implement or enforce or attempt to implement or enforce" those provisions of the federal law or to "comply with any other statute, rule, regulation or order that has the effect of implementing or enforcing" those provisions. Thus, if enacted, this bill would create a direct conflict between state and federal law. Were your requested bill to be enacted, a federal or state officer who in his or her official capacity is required to carry out within this State a duty under section 1021 or 1022 of the National Defense Authorization Act would be forbidden to do so. Thus, because it is impossible for a person to comply with both the federal law and the state law, the two laws are in direct conflict. In that situation, the bill, if enacted, would be unconstiutional.

Moreover, it is well established that an officer of the United States cannot be held in violation of state law while simultaneously executing his duties as prescribed by federal law. An act cannot simultaneously be necessary to the execution of a duty under the laws of the United States and an offense under the laws of a state. In re Neagle, 135 U.S. 1 (1890).

C. "[The United States Supreme Court] will find preemption where . . . the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The full purposes and objectives of Congress in enacting sections 1021 and 1022 of the National Defense Authorization Act include its uniform enforcement throughout the United States and places subject to its jurisdiction. Any state law that interferes with such enforcement would be "invalid under the Supremacy Clause . . . owing to its threat of frustrating federal statutory objectives." *Crosby,* 530 U.S., at 379.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Bryan Fernley
Principal Deputy Legislative Counsel

Brenda J. Erdoes
Legislative Counsel

WBD:dtm\