Written by **Dennis Behreandt** on January 5, 2021

New York Assemblyman Nick Perry Offers Defense of Controversial Detainment Legislation

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New York Democrat Assemblyman Nick Perry has issued a statement defending controversial legislation he introduced that would give Governor Andrew Cuomo powers to detain those deemed to represent a health threat.

As *The New American* reported previously, the legislation, bill A.416, would allow governor, after having ascertained a health threat from a sick person or group of sick people, to "order the removal and/or detention of such a person or of a group of such persons by a single order, identifying such persons either by name or by a reasonably specific description of the individuals or group being detained."

In addition, the measure provides the governor with the authority to forcibly quarantine people who had not otherwise been detained, to require medical testing and examination of those thought to have been "exposed to or infected by a contagious disease," and to forcibly treat and vaccinate those though to have been exposed or infected.

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Assemblyman Perry voiced his defense of the proposed bill via Twitter. For background, he described why the measure was originally introduced during a previous legislative session.

The bill, he noted, "was initially introduced to address public health concerns related to the containment of the Ebola virus after it was discovered that Ebola infected persons had entered the United States."

He then noted that the bill did not represent any intent on his part to undermine the constitutionally protected rights of Americans.

"I am an American who understands our Constitution is sacred, and provides us with the right to agree or disagree, and hold different positions on issues that may relate to our civil and constitutional rights," Perry wrote. "There is no intent, no plan, or provisions in my bill to take away, or violate any rights, or liberties that all Americans are entitled to under our constitution, either state or federal. A proper reading of the bill would find that significant attention was paid to protect individual rights which could be affected by exercising authority granted in this bill."

> My statement on A.416. pic.twitter.com/0bIyGp9xFo
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> — N Nick Perry (@NNickPerry) January 3, 2021

The measure does contain language that purports to protect those detained. Subsection 7 of the

measure allows that a detained person may request release but notes that subsequent to this request, the governor "shall make an application for a court order authorizing such detention within three business days after such request" and that the application "shall include a request for an expedited hearing." Without that court order, the measure says, the person requesting release can not be detained "for more than five business days."

While this language sounds marginally enticing, in practice, how many people so detained will have knowledge of how to navigate these provisions? Will they have access to legal counsel? Perhaps, but as the legislation says, such counsel will be "facilitated" only "to the extent feasible under the circumstances." Moreover, what court would side against the governor in favor of average citizens so detained? The answer, most likely, is few, if any.

Under the legislation, detainees in general may be held for up to 60 days without a court order. But, it notes also that "The governor or his or her delegee shall seek further court review of such detention within ninety days following the initial court order authorizing detention and thereafter within ninety days of each subsequent court review." In other words, detainees may be held for quite some time.

As for forced treatment, near the end of the legislation's text, subsection 13 states: "The provisions of this section shall not be construed to permit or require the forcible administration of any medication without a prior court order." Again, it is necessary to ask, given the passiveness of the courts in the face of many states' coronavirus restrictions, what court would not favor the governor over the average citizen in such a case?

Further defending this measure, Assemblyman Perry argues that though the original disease that sparked the measure — Ebola — is not presently threatening the United States, future pandemics make the measure necessary: "Many learned scientists believe that the likelihood of such a deadly pandemic is still real, and somewhere in the future there maybe the need for people to be protected from a person or persons carrying a very deadly and transmittable virus, and this bill is designed to ensure that our government could lawfully act to protect all the people."

Alas, this measure appears in conflict with the Fourth Amendment, which reads: "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."

The Fourth Amendment surfaces issues particularly prickly for the New York detention legislation. Not least among these are issues of surveillance. The Perry measure hinges on the governor identifying those to be detained. How were they so identified? Were they the victims of illegal government surveillance? Writing for the *Lawfare,* University of Minnesota Associate Professor of Law Alan Z. Rozenshtein pointed out that such surveillance can run afoul of the Fourth Amendment's protections.

"A threshold question is how the government collected the information at issue," Rozenshtein wrote. "If the government required infected individuals to download a location-broadcasting app on their phones — or, in an extreme case, to wear a physical device, like a GPS bracelet — that would almost certainly trigger the Fourth Amendment."

Moreover, he continued, "If the government instead tracked the quarantined person's phone directly (for example, through IMSI catchers) or indirectly (by compelling the disclosure of location data from the cellphone provider), whether the activity was a search would likely turn on how much information

the government acquired. And whether the search was nevertheless reasonable in the absence of a warrant would turn on the intrusiveness of the search relative to its importance in enforcing quarantine. Broad, constant surveillance would likely not pass constitutional muster."

There are other important constitutional issues as well, many raised by Judge Andrew Napolitano in his syndicated column on March 19, 2020, in which he addressed the constitutionality of lockdowns. Said Napolitano:

> The Contracts Clause of the Constitution prohibits the states from interfering with lawful contracts, such as leases and employment agreements.
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> And the Due Process Clause of the Fourteenth Amendment prohibits the states from interfering with life, liberty or property without a trial at which the state must prove fault.
>
> The Takings Clause of the Fifth Amendment requires just compensation when the state meaningfully interferes with an owner's chosen lawful use of his property.
>
> Taken together, these clauses reveal the significant protections of private property in the Constitution itself. Add to this the threat of punishment that has accompanied these decrees and the fact that they are executive decrees, not legislation, and one can see the paramount rejection of basic democratic and constitutional principles in the minds and words and deeds of those who have perpetrated them.
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> Add to all this, the protection in the First Amendment of the right to associate and the judicially recognized right to travel — both of which are natural rights — and it is clear that these nanny state rules are unconstitutional, unlawful and unworthy of respect or compliance.
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> *https://www.foxnews.com/opinion/judge-andrew-napolitano-liberty-coronavirus*

Assemblyman Perry's measure, for all the likely good intent behind it, nonetheless represents a dangerous grant of power to the executive branch of state government that, likely, would be abused, or at least, improperly applied.

To his credit, Assemblyman Perry notes in his defense of the measure that he is "open to amendments that would address real concerns raised by critics and will quite happily accept suggestions that will improve the bill in regard to concerns about constitutional rights."

At the very least, that is a refreshing statement from a legislator in this time of seeming unbridgeable political polarization.