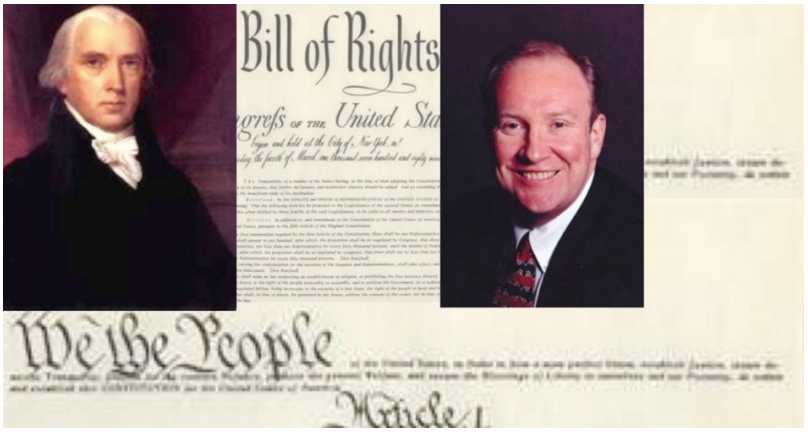
Written by **Joe Wolverton, II, J.D.** on May 22, 2012

Is The New American "Absurd" to Expose the NDAA? One Writer Says Yes



Calling an article by this author "hysteria," Andrew C. McCarthy (right in Constitution montage, opposite Madison) described the efforts by "Libertarian extremists" to defend the Constitution and the Bill of Rights as a fight for "more rights for mass murderers."

In his piece published by PJ Media, McCarthy, a former federal prosecutor and regular contributor to *National Review*, excoriates *The New American* and other constitutionalists for our exposé of the attacks on liberty posed by the extraordinary power granted the President of the United States by the NDAA.

Once again resorting to clichéd criticisms (one would expect a more robust economy of language from a "*New York Times* bestselling author"), McCarthy claims that the NDAA "did not increase the president's powers. It merely codified existing constitutional jurisprudence."

Although this is a familiar trope of the Republican Establishment and its media shills, the NDAA most certainly expands the scope of presidential authority, as well as severing the right of habeas corpus from its traditional and constitutional moorings and attaching it instead to the Authorization for the Use of Military Force (AUMF). While it is true that the AUMF is the ostensible law of the land, the danger is that by altering the standard against which civil liberties are measured, there is a gradual degradation of those liberties.

Readers will recall the words of James Madison, who warned:

> Since the general civilization of mankind, I believe there are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations.

As for the NDAA's creation *ex nihilo* of a presidential power to deploy the military to arrest Americans suspected of posing a military threat to the homeland, McCarthy argues that, "the NDAA does not authorize the military to arrest American citizens inside the United States. Instead, it codifies the pre-existing constitutional authority to hold enemy combatants in military detention. Domestic apprehensions are still done by the FBI and other law-enforcement agencies, not the armed forces."

Again, one would expect an attorney trained in the language of the law, as was Andrew McCarthy, to be a bit more capable of appreciating nuances in the text of the statutes, including the NDAA.

To aid his understanding, we suggest that McCarthy read the words of Section 1021 of the NDAA more closely. This provision says that the military is not *required* to detain American citizens. That is hardly the same as saying that the military is *forbidden* from doing so.

Congress is crawling with attorneys who were schooled in the importance of specificity of language. They know that vagary in language is contrary to good law and that innumerable statutes are struck down by courts all over the country on that very account.

The point is: if these men and women in Congress, so many of whom are trained in the law, meant expressly to forbid the military from arresting and detaining American citizens, then they could have done so. The irrefutable fact is that they chose not to. Rather, they chose to leave that option open.

More importantly, the NDAA is loaded with key terms that are so ill defined that they are ripe for the wresting and within the penumbras of these cleverly crafted provisions may be found the tools of tyranny. Wrenches that could torque anyone branded as an enemy combatant into a predetermined "terrorist" slot.

In fact, Section 1021 of the NDAA is so poorly drafted that District Court Judge Katherine Forrest recently held:

> Section 1021 lacks what are standard definitional aspects of similar legislation that define scope with specificity. It also lacks the critical component of requiring that one found to be in violation of its provisions must have acted with some amount of scienter — i.e., that an alleged violator's conduct must have been, in some fashion, "knowing." Section 1021 tries to do too much with too little — it lacks the minimal requirements of definition and scienter that could easily have been added, or could be added, to allow it to pass Constitutional muster.

She added that "Section 1021 is not merely an 'affirmation' of the AUMF [Authorization for the Use of Military Force]."

Not that a district court judge's opinion is the final arbiter of what is or is not constitutional, nevertheless her ruling is indicative of the lack of legal skill demonstrated by those who wrote the NDAA.

In fairness, there are two ways to view this statutory carelessness: either the authors purposefully left the language vague or they are inept. Regardless of which option is more accurate, the American people deserve better and have every right, and indeed obligation, to search for and support legislators who are willing to be true to their oath of office and defend the Constitution.

The laudable efforts of two of these conscientious legislators are particularly pilloried by McCarthy in his article published by PJ Media.

Although voted down by their peers on both sides of the aisle, Representatives Adam Smith (D-Wash.) and Justin Amash (R-Mich.) tried in vain last week to prevent the NDAA's executive tyranny from being perpetuated.

The rejected Smith-Amash amendment would have explicitly repealed the indefinite detention provisions of the NDAA, as well as one that would allow the transfer of prisoners from civilian to military custody.

In his review of the Smitih-Amash amendment, McCarthy, like so many other self-described "conservatives," reveals himself to be nothing more than a priest whose duty it seems to be to officiate at the sacrifice our Republic's freedom on the altar of safety.

McCarthy and the rest of his brethren attempt to frighten Americans into willingly bowing before this blood-soaked altar by invoking the various names by which the post 9/11 demon of terror is known: "terrorist," "al-Qaeda," "enemies," "mass murderers," "militants," etc.

Read McCarthy's account of the purpose and effect of the Smith-Amash amendment and take note of the number of times this specter is summoned:

> Under the Smith-Amash amendment, if al Qaeda were to dispatch the second coming of Mohamed Atta & Co. to execute another 9/11-style atrocity in the United States, but this time the FBI managed to apprehend them, they would be given the full rights of American civilian defendants. They could not be detained under the laws of war, they could not be held at Guantanamo Bay for trial by military commission. Instead, they would be treated like garden variety crooks: given Miranda warnings, quickly assigned counsel, held in a civilian prison, eligible for prompt bail hearings, entitled to the full breadth of discovery mandated by civilian due process, and given a full-blown, Grade-A civilian trial in a civilian federal court.…

For whom is due process a right? Is it a right only for McCarthy's so-called "garden variety crooks" or is it applicable to *all* those accused of crimes, no matter how reprehensible?

Is the insistence by constitutionalists (on the Left and the Right) that those charged with committing acts of terrorism be afforded the full panoply of procedural protections mere "demagoguery" as McCarthy claims?

Do they simply want to "delegitimize military responses to international terrorism and endow terrorists — the vast majority of whom are non-Americans — with greater protection"?

Our response is an emphatic *No!* Due process, habeas corpus, the right to a trial by jury, and freedom from the fear of indefinite detention based on nothing more than presidential suspicion, and indeed the rest of the American catalog of protections from despotic persecution are timeless principles of liberty and are rightly retained not by American citizens only, but by the entire human family as children of the God who is the Author of those rights, regardless of the nationality of the suspect or the despicable deeds of which that suspect is accused.

Finally, consider this declaration: "It is a universal truth that the loss of liberty at home is to be charged to the provisions against danger, real or pretended, from abroad."

That was the prescient observation made by James Madison in a letter to Thomas Jefferson written in 1798.

So, when it comes to the future of our Republic and the value of liberty, readers are free to weigh in the balance the words of James Madison against those of Andrew McCarthy and determine which is found wanting.