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

Anti-NDAA Bills Worth — and Not Worth — Supporting

On Wednesday, April 18, Representative Scott Rigell (R-Virginia) along with 26 co-sponsors offered H.R. 4388, a measure given the very misleading name of the "Right to Habeas Corpus Act."

According to the language in the bill, its intent is to:

> state that nothing in the Authorization for Use of Military Force or the National Defense Authorization Act for Fiscal Year 2012 shall be construed to deny the availability of the writ of habeas corpus for any person who is detained in the United States pursuant to the Authorization for Use of Military Force in a court ordained or established by or under Article III of the Constitution.

Why, one may ask, would a constitutionalist news organization like *The New American* criticize the efforts of a cadre of elected representatives to protect the right of habeas corpus from federal eradication? For the simple reason that Congressman Rigell's bill is all bark and no bite. The suspension of habeas corpus is but a painful symptom of a much more pernicious and potentially fatal disease.

The NDAA has significantly reduced the life expectancy of the rule of law and constitutional liberty in our Republic. On New Year's Eve 2011, President Barack Obama signed this law granting himself absolute power to indefinitely detain American citizens suspected (by him) of being "belligerents." In the signing statement he appended to it, however, he assured Americans that he would never use it in an unconstitutional manner.

The President continued by explaining that to indefinitely detain American citizens without a trial on the charges laid against them "would break with our most important traditions and values as a nation."

Ironically, this very signing statement is itself violative of the Constitution, the separation of powers established therein, and ironically only serves to underline the President's proclivity for disregarding constitutional restraints on the exercise of power once those powers have been placed (albeit illegally) by a complicit Congress at his disposal.

As I have written before, once its development begins in the body politic, the muscle of tyranny never atrophies.

Supporters of the law (including President Obama) point to the "undeniable" success achieved against "suspected terrorists." Although President Obama claims that the section of the NDAA (1021) authorizing the President to detain these suspects "breaks no new ground and is unnecessary," the President's interpretation of just who inhabits the universe of likely suspects (as explained in the signing statement appended to the NDAA) includes "al-Qa'ida and its affiliates and adherents."

Since the beginning of hostilities in the wake of 9/11, the federal government has often had problems proving membership in al-Qaeda of those arrested as "enemy combatants" in the War on Terror, so imagine the difficulty they would face in presenting evidence of affiliation or adherence to that shadowy, ill-defined organization.

Perhaps the most invasive aspect of the mortal malady that is the NDAA is the fact that it places the American military at the disposal of the President for the apprehension, arrest, and detention of those suspected of posing a danger to the homeland (whether inside or outside the borders of the United States and whether the suspect be a citizen or foreigner). The endowment of such a power to the President by the Congress is nothing less than a de facto legislative repeal of the Posse Comitatus Act of 1878, the law forbidding the use of the military in domestic law enforcement.

It is this last bit of Stalinist-style authoritarianism wherein, as Shakespeare would say, lies the rub of the NDAA. The denial of habeas corpus comes later; it is the delirium, not the fever, in a manner of speaking.

Put simply, Americans would need not worry about being held without charge if the President was not authorized in the same act to deploy the armed forces to round up the “suspects” and detain them indefinitely. Being apprised of the laws one is accused of having violated is important, but it’s the detention and the manner of it that must be of more immediate concern to those who are noticing the body politic getting weak.

It is inarguable that the language of Rigell’s bill does nothing to shore up the Posse Comitatus Act or to divest the President of the (unconstitutional) power to employ the military as his own personal retinue of lictors, clearing the way for his imperial procession.

Were this bill to even address that central issue it would merit our praise and our promotion, but this measure amounts to nothing more or less than a powerless placebo distributed to the people as a palliative. It is an injection of simple saline in a body wracked with a rapidly metastasizing and deadly disorder that could otherwise have been effectively treated and eventually cured.

Fortunately, there are those in Washington who appreciate the urgency of the situation and the existence of a path back to health.

Representative Adam Smith (D-Washington) and Senator Mark Udall (D-Colorado) have introduced companion bills that are just what the doctor ordered.

H.R. 4192 and S. 2175 (both bills are aptly named the “Due Process and Military Detention Amendments Act”) would explicitly repeal Section 1022 of the NDAA, as well as ban the armed forces of the United States from participating in the detention or imprisonment of citizens who have been neither formally charge nor tried for their alleged offenses.

The precise language of the bills mandate that:

> In the case of a covered person who is detained in the United States pursuant to the Authorization for Use of Military Force, disposition under the law of war shall only mean the transfer of the person for trial and proceedings by a court established under Article III of the Constitution of the United States or by an appropriate State court. Such trial and proceedings shall have all the due process as provided for under the Constitution of the United States.

And, in Section 3:

> Section 1022 of the National Defense Authorization Act for Fiscal Year 2012 is hereby repealed.

That is just the brand of potent medicine this ailing, but otherwise healthy republic needs.

Next, given that he's a doctor it isn't surprising that another very promising weapon in the war against the cancer destroying our nation was offered in Congress by Ron Paul of Texas. Using a laconic economy of language that is typical of the Republican presidential hopeful and strict constitutionalist, Congressman Paul's H.R. 3785 calls for the repeal of Section 1021 of the NDAA.

The Smith-Udall bill and that offered by Representative Paul each attacks a separate source of the suffering, Sections 1022 and 1021 respectively. For the sake of drawing attention to these noble and necessary efforts at repeal, the relevant portions of these two sections of the NDAA are reprinted below:

Section 1021:

> Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in sub- section (b)) pending disposition under the law of war.
>
> (b) COVERED PERSONS.—A covered person under this section is any person as follows:
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> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) 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.

Section 1022:

> the Armed Forces of the United States shall hold a person described in paragraph (2) who is captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107–40) in military custody pending disposition under the law of war.
>
> (2) COVERED PERSONS.—The requirement in paragraph (1) shall apply to any person whose detention is authorized under section 1021 who is determined—
>
> (A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and
>
> (B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.

Pay special attention to the weasel words used in these provisions. Words like "necessary and appropriate," "associated force," "belligerent act," "covered person," and "acts in coordination." None of these key terms are defined in the act and that's quite an unforgivable oversight given the number of lawyers in Congress.

Finally, there are those that would point to Section 1022 (b) (1) of the NDAA as proof that American citizens are exempted from these deprivations. Read carefully the words of that subsection:

> The requirement to detain a person in military custody under this section does not extend to citizens of the United States.

No matter how you interpret it, this section does not prohibit the President from ordering the military to detain citizens. In what is likely very purposefully vague language, the paragraph printed above merely relieves the president of the "requirement" to detain citizens indefinitely. Making something optional is hardly the same as forbidding it. Even in Congress.