



Written by [Joe Wolverton, II, J.D.](#) on November 30, 2012

Feinstein-Lee NDAA Amendment Passes, But Is It Enough?

Naive. That's the word used by the [Wall Street Journal](#) to describe attempts by a handful of senators to outlaw the indefinite detention of Americans under key provisions of the National Defense Authorization Act (NDAA).



On Thursday, [by a vote of 67-29](#), the Senate agreed to such a measure, [an amendment to the NDAA co-sponsored by 18 senators including Diane Feinstein](#) (D-Calif.), Mike Lee (R-Utah), and Rand Paul (R-Ky.).

The purpose of the amendment was “to clarify that an authorization to use military force, a declaration of war, or any similar authority shall not authorize the detention without charge or trial of a citizen or lawful permanent resident of the United States.”

Speaking in support of the amendment, Senator Feinstein said:

The beauty of our Constitution is that it gives everyone in the United States basic due process rights to a trial by a jury of their peers. That is what makes this nation great. As Justice Sandra Day O'Connor wrote for the plurality in *Hamdi v. Rumsfeld*, “As critical as the government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.”

Senator Lee also promoted passage of the measure by calling upon his colleagues to recall the civil liberties that undergird the Constitution:

Senator Feinstein and I have worked closely together over the course of the past year to craft what we believe represents a very prudent course in protecting both our nation and our liberties at the same time. Security is important, and precisely because it's important, it must not be acquired at the expense of our individual liberty. It may well be said that government's most important basic responsibility is to protect the liberties of its citizens. Our nation has fought wars on American soil and around the world in defense of individual liberty. And we must not sacrifice this most fundamental right in pursuit of greater security, especially when we can achieve security without compromising liberty. The Feinstein-Lee amendment does precisely that.

We must stand behind our 225-year-old founding document as it's been amended to ensure our liberty isn't taken away from us, to give us a path to providing for our security without jeopardizing the freedom that our American citizens cherish so much and have fought so hard and so long to protect. Granting the United States government the power to deprive its own citizens of life, liberty, or property without full due process of law goes against the very nature of our nation's great constitutional values. This amendment, the Feinstein-Lee amendment, protects those values.

Not everyone agrees, however.

The [Wall Street Journal](#), for example, also invokes the *Hamdi* ruling as evidence that “citizenship of a



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member of a foreign army is irrelevant during wartime. Anyone who takes up arms against the U.S., fails to wear a uniform and targets civilians is an unlawful enemy combatant regardless of citizenship.” The explanation continues:

This question last reached the Supreme Court in the 2004 case of Louisiana-born al Qaeda terrorist Yasser Hamdi. The Court said that Hamdi deserved a habeas corpus hearing to challenge his detention, but it reasonably declined to equate his predicament with that of a domestic criminal.

With its strict rules on surveillance, the U.S. is already something of a safe haven for people who wish to kill innocents. Exempting U.S. citizens from terrorist detention procedures would exacerbate the problem by giving al Qaeda further incentive to recruit inside the U.S. Remember that al Qaeda cell in the Yemeni community near Buffalo that was exposed in 2002? The Paul-Lee-Feinstein amendment would encourage more such recruitment.

Strict rules on surveillance? Perhaps the *Wall Street Journal* is unfamiliar with the frenetic pace of the growth of the domestic surveillance state. As *The New American* has chronicled, Congress, the president, and the courts have colluded to exempt the National Security Agency (NSA), the Department of Homeland Security (DHS), and other arms of the sprawling surveillance apparatus from the Fourth Amendment’s prohibition on unwarranted searches.

Such constant surveillance by the unblinking eye of Big Brother has made the United States unsafe for “innocent Americans” as much as for anyone with nefarious goals.

[Mother Jones](#) also sees flaws in the Feinstein Amendment.

About a year ago, President Barack Obama signed the 2012 National Defense Authorization Act promising not to use Congress’ authorization of war against Al Qaeda to deny American citizens suspected of terrorism a fair trial by placing them in indefinite military detention. Senators, deadlocked over whether or not the Constitution allows such detention, agreed to adopt an amendment that left unanswered the question of whether Americans could be detained without trial. This year, Feinstein and Lee think their amendment blocking such detention for American citizens and legal permanent residents can pass.

Not all civil liberties groups however, are supporting the effort. That’s because they think anyone on American soil should be given a trial if accused of a crime, given that the Constitution protects “persons,” rather than “citizens.” The Feinstein-Lee amendment is “inconsistent with the constitutional principle that basic due process applies to everyone in the US,” says ACLU legislative counsel Chris Anders. Not only that, but Anders worries that the amendment could be construed to actually imply that the government has the constitutional authority for such detention.

Therein lies the rub. In its guarding of civil liberties, nowhere does the Constitution restrict those protections to “citizens.” As Anders accurately records, “persons” — all persons — are by their very nature afforded the same rights as individuals, regardless of nationality.

Finally, the Feinstein-Lee Amendment fails to address the most invasive aspect of the mortal malady that is the NDAA — the placement of 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). Giving the president that power 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.



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It is this last bit of Stalinist-style authoritarianism that is the NDAA's true threat to liberty. While the Feinstein Amendment buttresses the right to a trial for citizens and permanent residents, it does nothing to prevent their apprehension. Denial of habeas corpus (or a trial) comes later; it is the delirium, not the fever, in a manner of speaking.

Put simply, Americans would not need to 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 concerned about the new world order being defined by the NDAA.

While the passage of the Feinstein Amendment is laudable in that it is at least a step away from absolute totalitarianism, its restriction to "citizens and lawful permanent residents" of the Constitution's protections of civil liberties and its failure to abolish the president's right to deploy the military to arrest suspects reduces it to mere sound and fury signifying nothing but the senators' failure to show fidelity to their oath of office.

Photo of Diane Feinstein from 2009: AP Images

Joe A. Wolverton, II, J.D. is a correspondent for The New American and travels frequently nationwide speaking on topics of nullification, the NDAA, and the surveillance state. He can be reached at jwolverton@thenewamerican.com.



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