



Written by [Joe Wolverton, II, J.D.](#) on May 11, 2012

## **NDAAs 2013 Passes out of Committee; Indefinite Detention Provisions Remain Intact**

As opposition to the National Defense Authorization Act of 2012 continues to grow, along comes the 2013 version, which promises to perpetuate the attack on liberty begun by its predecessor.

In the pre-dawn hours on Thursday, by a vote of 56-5, the House Armed Services Committee passed a slate of changes to the NDAA for the next fiscal year. Committee Chairman [Howard P. "Buck" McKeon](#) (R-Calif.) released a statement announcing the goals of the bill's latest mark-up:



I am proud of the bi-partisan way the Committee has worked together to build this bill. It rebuilds a force strained by ten years of war while restoring both fiscal and strategic sanity to the defense budget. It keeps faith with our troops and their families while keeping America ready to face the threats of the future.

In his statement, Representative McKeon declares that "every American must have his day in court." Further, he "reaffirms the fundamental right to Habeas Corpus of any person detained in the United States pursuant to the 2001 Authorization for the Use of Military Force."

Section 1033 of the mark-up version passed by the committee is offered as the codification of that protection. Here is the current text of that updated provision:

This section would state that nothing in the Authorization for Use of Military Force (Public Law 107-40) or the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81) shall be construed to deny the availability of the writ of habeas corpus in a court ordained or established by or under Article III of the Constitution for any person who is detained in the United States pursuant to the Authorization for Use of Military Force (Public Law 107-40).

The double-speak contained in that paragraph is impressive even for a Capitol Hill lawyer.

Read it very closely: The new bill does nothing to prevent the indefinite detention of Americans under the 2013 NDAA; furthermore, it only reiterates that habeas corpus is a right in courts established under Article III of the Constitution. That such a right exists in the courts of the United States has never been the issue. The concern of millions of Americans from every band in the political spectrum is that Americans detained as "belligerents" under the terms of the NDAA will not be tried in Article III courts, but will be subject to military tribunals such as the one currently considering the case of the so-called "Gitmo Five." There is not a single syllable of the 2013 NDAA that passed out of the House Armed Service Committee on Thursday that will guarantee Americans will be tried in a constitutional court and not a military commission.

Curiously, furthermore, McKeon's mark-up ties the fundamental right of habeas corpus not to the Constitution (or the nearly 900 years of Anglo-American law), but to the Authorization for the Use of



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Military Force where the protection of that right is severely diminished. Such sleight of hand should not go unnoticed, particularly when it is performed by one who flies under the “Republican” banner.

On the subject of partisanship, it is almost axiomatic that Republicans and Democrats do not agree and that “reaching across the aisle” is an unattainable goal. While such conflict is not only anticipated but is encouraged in the government established by the Constitution, the frighteningly indefinite detention provisions of the NDAA seem to be an area where bipartisanship is becoming more common.

Prior to the Armed Services Committee’s hammering out of the new NDAA, [Representative Adam Smith](#) (D-Wash.), the ranking member of that committee, announced that [he will propose an amendment to the 2013 NDAA](#) that would explicitly forbid the indefinite detention within the United States and repeal the provision of law from this year’s version that permits the transfer of some suspected of terrorism into the custody of the military.

Currently, the Smith Amendment (officially styled the “[Due Process and Military Detention Amendments Act](#)”) has 60 sponsors from both major political parties. Given the noble aim of the Smith proposal, all constitutionalists should be de facto co-sponsors of the bill, as well.

The purpose of the measure, as set forth in the text, is:

To amend the National Defense Authorization Act for Fiscal Year 2012 to provide for the trial of covered persons detained in the United States pursuant to the Authorization for Use of Military Force and to repeal the requirement for military custody.

Smith’s bill accomplishes this goal in two steps: First, it repeals the infamous Section 1022 of the 2012 NDAA. Section 1022 is the provision that empowers the President to order the military to take custody of certain “covered persons” (those branded by the President as threats to national security); next, the Due Process and Military Detention Amendments Act would revise Section 1021 of the existing act (the section authorizing the indefinite detention of American citizens classified as “belligerents”) by amending the current language to read:

Disposition of Covered Persons Detained in the United States — 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.

While the broad strokes of the NDAA are by now likely familiar to readers, a brief overview is in order.

Most of what is contained in the over-500-page 2012 version of the NDAA is inimical to liberty. For example, under the provisions of the aforementioned Section 1021, the President is afforded the absolute power to arrest and detain citizens of the United States without their being informed of any criminal charges, without a trial on the merits of those charges, and without a scintilla of the due process safeguards protected by the Constitution of the United States.

In order to execute this immense power, the NDAA unlawfully grants the President the absolute and unquestionable authority to deploy the armed forces of the United States to apprehend and to indefinitely detain those suspected of threatening the security of the “homeland.” In the language of this legislation, these people are called “covered persons.”

Regardless of promises to the contrary, the language of the NDAA places every citizen of the United



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States within the universe of potential “covered persons.” Any American could one day find himself or herself branded a “belligerent” and thus subject to the complete confiscation of his or her constitutional civil liberties and nearly never-ending incarceration in a military prison.

The NDAA for Fiscal Year 2013 will now soon come before the full body of the House of Representatives for a vote. No doubt the deliberations will feature speeches decrying the revocation of habeas corpus and the legalization of the indefinite detention of Americans in military prisons based on nothing more than presidential suspicion.

So as to prevent these denouncements from being nothing more than sound and fury signifying nothing, Americans must be actively engaged in the fight to prevent such precedents from being set. We must remember that these deviations from the strait and narrow constitutional path have placed our Republic on a trajectory toward tyranny.

*Photo: Congressman Howard “Buck” McKeon (in dark blue striped shirt) touring the Guantanamo Bay detention facility*



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