



Written by [Joe Wolverton, II, J.D.](#) on December 12, 2012

Senate and House Working on Resolving Differences in NDAA

The fox has been put in charge of guarding the hen house.

Senator Joseph Lieberman (I-Conn.) — [author of the Enemy Expatriation Act](#) — is [leading the group of senators](#) and congressmen working on the conference report (final version) of the Fiscal Year 2013 National Defense Authorization Act (NDAA).

Last week, the [Senate unanimously approved S. 3254](#), their version of the 2013 defense spending bill.



In May, [the House, 299-120](#) passed [H.R. 4310](#), the companion bill on that side of the Capitol.

Now, Lieberman will lead a crew of congressman in hammering out a compromise bill that can pass both houses and be presented to the president for his signature.

Lieberman isn't the only fox put on patrol of the hens, however. He is joined on the conference committee by fellow [senatorial warmongers John McCain \(R-Ariz.\) and Lindsey Graham \(R-S.C.\)](#).

The practical effect of putting this clique in charge of the conference report means that Americans are all but guaranteed to still be considered potential suspects who could potentially be apprehended and potentially detained indefinitely under the bill's provisions.

On the Senate side, not a single senator said a single word against the unconstitutional and unconscionable power given to the president in the NDAA to deploy U.S. armed forces to nab and detain American citizens living in the the United States based on nothing more substantial than his own suspicion that the detainee poses a threat to national security.

In fairness, Senators Mike Lee (R-Utah) and Rand Paul (R-Ky.) [introduced and managed to get passed an amendment](#) to the Senate version of the NDAA that guaranteed the right to trial for any citizen or permanent resident of the United States imprisoned under the authority of the NDAA.

This proposal was met with significant criticism, however, by many writers and observers in the liberty movement.

Several articles warned that the Feinstein-Lee Amendment (co-sponsored by Senator Paul) made the situation worse by explicitly granting the president the authority he merely assumed in last year's NDAA and the [Authorization for the Use of Military Force](#) (AUMF), upon which the NDAA is based.

For example, in its story on the passage by the Senate of the 2013 NDAA, [RT writes](#):

"It might look like a fix, but it breaks things further. Feinstein's amendment says that American citizens and green-card holders in the United States cannot be put into indefinite detention in a military prison, but carves out everyone else in the United States," explains Chris Anders, an attorney with the Washington, DC legislative office of the American Civil Liberties Union.

According to Anders, the Feinstein Amendment has at least three serious faults that could pose



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problems starting next year. “It would not make America off-limits to the military being used to imprison civilians without charge or trial,” he writes, “...because its focus on protections for citizens and green-card holders implies that non-citizens could be militarily detained.”

“The goal should be to prohibit domestic use of the military entirely,” writes Anders. “That’s the protection provided to everyone in the United States by the Posse Comitatus Act. That principle would be broken if the military can find an opening to operate against civilians here at home, maybe under the guise of going after non-citizens. This is truly an instance where, when some lose their rights, all lose rights — even those who look like they are being protected.”

In a statement to *The New American*, Dan Johnson, director of [People Against the NDAA](#) (PANDA), explained his organization’s view of the Feinstein-Lee Amendment and the lack of real protections it affords:

The biggest thing about the [2012] NDAA was that you weren’t getting a trial.... Nothing in here says that you’ll make it to an Article III court so it literally does nothing. It’s a bunch of words, basically.

Bruce Afran agrees. Afran, a lawyer representing a group of journalists challenging the indefinite detention provision of the 2012 NDAA, [told Business Insider](#), “The new statute actually states that persons lawfully in the U.S. can be detained under the Authorization for the Use of Military Force [AUMF]. The original (the statute we are fighting in court) never went that far.” “Therefore, under the guise of supposedly adding protection to Americans, the new statute actually expands the AUMF to civilians in the U.S.”

Given the tenor of speeches and statements made by Lee and Paul in support of their amendment, it would seem that the inclusion of the requirement for explicit authority to detain Americans in the Feinstein-Lee Amendment was intended as a sort of poison pill that would kill the chances of the NDAA to be upheld by the courts when and if new legal challenges are filed.

That explanation will not satisfy most constitutionalists, however. The fact of the matter is that the president has demonstrated that he will gladly use his “authority” to detain American citizens based on mere suspicion of associating with enemies of the United States, regardless of whether that authority is explicit or implied.

Section 1021 of the 2012 NDAA sparked the constitutional controversy. Under that pernicious provision, the military was authorized to detain people “without trial until the end of hostilities.”

It also permits detainees to be tried by a military tribunal, transferred to a foreign holding facility, or to “an alternative court” — leaving a little window open for civilian trials.

Potential detainees, according to the act, include any person suspected of having “planned, authorized, committed, or aided” the 9/11 attacks, or having “harbored those responsible.”

The aspect of Section 1021 specifically challenged by Bruce Afran on behalf of his clients is the part that allows for the apprehension and detention of anyone who takes “part of or substantially supported” al Qaeda, the Taliban, “or associated forces that are engaged in hostilities against the U.S. and its coalition partners.”

It is hard to imagine how this language could have been any broader or any more vague.

Left equally undefined in the act is whether these provisions apply specifically to citizens of the United States.



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[According to ProPublica](#), “Congress left that [deliberately unspecified](#) last year, essentially punting the issue to the courts.”

No provision in the act explicitly permitted or prohibited the indefinite detention of U.S. citizens. Last year’s version simply said that nothing in it could affect “existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.”

Until now. The Feinstein-Lee Amendment altered the language for this year’s bill specifically granting that authority.

But, in fairness, it did exempt citizens and permanent residents from being held without trial.

That said, none of the senators or their spokesmen contacted by *The New American* could explain why not a single senator offered an amendment to cause the president to disgorge the extra-constitutional authority granted him by the NDAA. That authority, part of which is to send the Army to arrest Americans suspected of violating a law, is so vague that, were the law a city ordinance, it would be summarily thrown out by a state court.

Now Senators Lieberman, McCain, and Graham will work to correct the House’s failure to insert similar language into their version of the NDAA.

For his part, President Obama has [threatened to veto the NDAA](#), but he performed a similar pantomime last year before signing the bill just before midnight on New Year’s Eve.

The solution to the collusion of the unholy trinity of courts, Congress, and executive to deprive all people of their constitutionally protected rights is for state legislatures to reclaim their sovereign right to nullify any unconstitutional act of Congress, including the NDAA.

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