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Obama Threatens Veto of NDAA 2013: Too Many Restrictions on His "Exclusive" Authority

Last week, several major news outlets reported on a Statement of Administration Policy (SAP) released by the White House regarding the Fiscal Year 2013 version of the National Defense Authorization Act (NDAA).

In the SAP, President Obama lays out 32 reasons why he is likely to veto the newest iteration of the NDAA.

The headlines announcing the President's promise to reject the NDAA are identical to those published early last December, just a couple of weeks before the President took time off from his Hawaiian vacation to sign the measure into law. Somehow, President Obama was able to set aside his issues with the act and grant himself the power to indefinitely detain Americans without charge or trial.

Recently, we reported how those very provisions — those purporting to give the President the expansive and unconstitutional powers described above — remain in this year's NDAA, despite the best efforts of a handful of constitutionally-minded representatives.

Last month, by a vote of 238-182, members of Congress rejected the amendment offered by Representatives Adam Smith (D-Wash.) and Justin Amash (R-Mich.) that would have repealed the indefinite detention provision passed overwhelmingly last year as part of the Fiscal Year 2012 NDAA.

Not only does the 2013 NDAA retain the indefinite detention provisions, but the section permitting prisoners to be transferred from civilian jurisdiction to the custody of the military persists, as well.

"The frightening thing here is that the government is claiming the power under the Afghanistan authorization for use of military force as a justification for entering American homes to grab people, indefinitely detain them and not give them a charge or trial," Representative Amash said during House debate on his amendment.

In his impassioned speech supporting his proposal, Representative Smith reminded his colleagues that the NDAA granted to the President "extraordinary" powers and divested the American people of key civil liberties, as well as divesting civilian courts of their constitutional jurisdiction.

Smith pointed out that there was no need to transfer suspects into military custody as "hundreds" of terrorists have been tried in federal courts since the attacks of September 11, 2001.

Congressmen — Republicans and Democrats — were not persuaded and they voted against Smith-Amash.

Even a cursory reading of the revamped version reveals the presence of these most unconstitutional grants of power, despite assurances that the new language is less offensive to our nearly-1,000-year history of enjoying these basic civil liberties.

For example, Section 1033 of the mark-up version passed by the committee is pointed to by Buck McKeon (R-Calif.), Chairman of the House Armed Services Committee, as proof that habeas corpus is

protected in the 2013 legislation. 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 Services Committee on Thursday that will guarantee that 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 common law), but to the Authorization for the Use of 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.

Of equal interest to constitutionalists is the fact that in the President's roster of reasons to oppose the 2013 NDAA, "Constitutional Concerns" comes at the very end.

In fairness, some might argue that although it is the last thought on President Obama's mind, at least it made the cut and at least he demonstrates some level of recognition of the preeminence of that document.

Not so much. Read for yourself the President's so-called "Constitutional Concerns":

"A number of the bill's provisions raise additional constitutional concerns, including encroachment on the President's exclusive authorities related to international negotiations."

That is President Obama's way of saying that in his opinion, the newest NDAA doesn't give him enough power.

Ironically, there is a considerable constitutional concern in the President's complaint. In that last paragraph of the SAP, the White House asserts that the President has "exclusive authorities" over international relations, apparently meaning treaties.

Article II of the Constitution explicitly gives the Senate a say in the negotiation of international agreements:

"He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur…."

As he has in so many other arenas, President Obama is actively trying to banish from the arena of authority all those (including the people's representatives in Congress) who would challenge his "right"

to absolute rule.

Next, the eight-page policy pronouncement seems to principally target two topics over which the President wants his allies in Congress to understand that he will demand unchallenged authority.

First, there is the provision of the proposed update to the NDAA that places restrictions on the President's power to implement the new START treaty and to unilaterally make the call to "retire, dismantle, or eliminate" America's nuclear arsenal. Again, in this paragraph of the Statement, the President incorrectly calls the Constitution as a witness for his case. The White House insists that the President's "authority as Commander in Chief" includes the right to "set nuclear employment policy."

Signed by President Obama and Russian President Dmitry Medvedev in April 2010, the so-called "New START Treaty" aims to reduce by half the number of strategic nuclear missile launchers and sets the permissible number of deployed strategic nuclear warheads at 1,550.

Once again, President Obama has ably performed his signature autocratic *pas de deux*. In his policy declaration, he assumes absolute power to make treaties and to unilaterally decide how these treaties will be implemented. Neither of these purported "powers" has any constitutional provenance.

Finally, when it comes to the President's self-appointed role of judge, jury, and executioner, the SAP warns that certain provisions present in the 2013 NDAA infringe upon "the Executive branch's ability to carry out its military, national security, and foreign relations activities…."

Then, as if the point wasn't fine enough, the President, seeing a potential violation of "constitutional separation of powers principles," informs Congress that if "the final bill presented to the President includes provisions that challenge critical executive branch authority, the President's senior advisors would recommend that he veto the bill."

President Obama's notion of separation of powers is novel: He sincerely believes that the Constitution separates his powers from any congressional oversight and from any legal or legislative challenge. His power to rule is absolute and exclusive. Any act to the contrary will be summarily rejected.