Written by **Joe Wolverton, II, J.D.** on May 9, 2012

Senator Carl Levin tells the CFR: the NDAA Makes Us Safer

In a letter published in *Foreign Affairs*, the official journal of the Council on Foreign Relations (CFR), Senator Carl Levin (D-Mich.) insists that the National Defense Authorization Act (NDAA) does not expose American citizens to arbitrary arrest and indefinite detention.

According to Levin, one of the law's chief architects (along with Senator John McCain of Arizona), the NDAA is nothing more noteworthy than a codification of existing law and certainly nothing akin to the onramp to authoritarianism it is portrayed as by alarmists.

Levin further claims that the target of the new law are "individuals captured in the country's fight against al Qaeda."

Is Levin right? Have leftists and libertarians, conservatives and civil liberties advocates misinterpreted the indefinite detention provisions of the law and contorted its benign enemy-punishing powers into some sort of habeas corpus killing monstrosity taking its first giant step toward tyranny?

Perhaps Senator Levin should refresh his memory of the deliberations in his own chamber regarding the detainee provisions. For example, on December 1, 2011, several senators spoke in favor of passage of the NDAA claiming that there was some critical intelligence that could only be gathered if suspected "terrorists" (and that includes American citizens so designated) were indefinitely detained and thus providing interrogators with an wide open window for obtaining "the truth" from these terrorists.

During this debate the famous transitive property of the War on Terror was formulated that equated the designation, "foreign battlefield," with the entire planet and with the United States of America — and made any "foreign foe" equivalent to an American citizen *thought* to be giving such foes aid.

Levin, and other promoters of the NDAA (including President Obama) support this supposition by pointing to the "undeniable" success achieved against "suspected terrorists." Although Senator Levin and President Obama claim 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.

Besides, is there evidence that the NDAA is not an expansion of the authority already granted the

president under existing statutes (such as the Authorization for Military Force)? No. There is, however, evidence that it greatly and dangerously enlarges the scope of the previously enacted powers.

If such was not the case, why would Senator Levin point to the amendment proposed by himself and Senator Dianne Feinstein (D-California) that specifically asserts that the NDAA in no way adds to existing law relating to the detention of American citizens?

Again, Levin's memory is failing him. The amendment cited by Levin in his letter to the CFR was Feinstein's second attempt to define the detention provisions included the NDAA; her first proposal was shot down, likely because it was a little too specific for Levin and McCain who prefer to hide their usurpations behind a thick fog of vague language.

In fact, Senator Feinstein was so concerned about the possibility of American citizens being locked up indefinitely in military prisons that she introduced legislation to prevent just such a scenario.

The measure, entitled the Due Process Guarantee Act of 2011, was an attempt by Feinstein and her co-sponsors to prevent American citizens detained under applicable provisions of the NDAA from being denied their Constitutional right to the due process of law.

The stated purpose of the act 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 and for other purposes.

As Chairman of the Senate Intelligence Committee, Feinstein wields considerable power in the upper chamber of the Congress, but even that influence was incapable of attracting enough support for the first amendment to similar effect proposed on behalf of herself and Senator Rand Paul (R-Kentucky) during the Senate's debate.

The denial of due process is only the beginning of the constitutional violations perpetrated by the NDAA. 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 were 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.

Levin is not persuaded, however. He writes in his explanation to the CFR that the passage of his clarifying amendment leaves the current state of the law intact. The facts prove otherwise.

One very important aspect of the "settled law" that is demonstrated to be anything but is presented in the Supreme Court case of *Hamdi v. Rumsfeld*.

First, a little legislative history is in order. In 1971, Congress passed the Non-Detention Act, which provided that, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

It is surprising given the number of attorneys in Congress that a statute so vague and devoid of notice would be passed into law.

What, for example, is the legal definition of "an act of Congress" as intended by the authors of this law?

Moreover, the law is silent as to the answer to the question of whether or not an act of Congress may authorize the indefinite detention of an American citizen.

The decision of the Supreme Court handed down in *Hamdi* sheds little light on the murkiness of the law.

In *Hamdi*, the Court held that Yaser Esam Hamdi, a U.S. citizen being detained indefinitely as an "illegal enemy combatant," must have the ability to challenge his enemy combatant status before an impartial judge.

However, the same decision muddied the clear waters of the Constitution by holding that the Authorization for the Use of Military Force (AUMF) satisfied the requirements of the Non-Detention Act.

Later, the issue was confused further when the Second Circuit Court of Appeals ruled in the case of *Padilla v. Rumsfeld* that the Non-Detention Act required "clear" intent on the part of Congress to authorize the apprehension and imprisonment of citizens branded as "enemy combatants" who are taken into custody within the territory of the United States.

Both the Supreme Court decision and that of the Second Circuit (and a related holding handed down by the Fourth Circuit) assumed that any citizen or legal permanent resident detained pursuant to the AUMF would be "associated with forces hostile to the United States." Importantly, neither the NDAA nor the Non-Detention Act contains such a qualification.

Simply put, neither the *Hamdi* nor the *Padilla* decisions answer the key question of whether Americans apprehended in America can be branded as "enemy combatants" and thus placed permanently in a military detention facility without trial or charge.

Sadly, despite Senator Levin's arguments to the contrary, the NDAA is not a simply restatement of pre-existing permission, but it is a grant of massive new powers to the president, making it clear that Americans may now be branded as terrorists, arrested by the American armed forces, and held indefinitely in government prisons based on nothing more than the suspicion of the president that the detainee is a threat to the national security of the homeland.

This deposit of despotic authority in the office of the president does not make America "safer," as Senator Levin says at the end of his essay. Although, in truth it wouldn't matter if it did because liberty is always destroyed when freedom is sacrificed on the altar of safety.

Photo: Senator Carl Levin announcing his opposition to the invasion of Iraq and his opposition to giving President George W. Bush such authorization.