

# WebMemo



Published by The Heritage Foundation

No. 3497  
February 10, 2012

## The National Defense Authorization Act and Military Detention of U.S. Citizens

*Charles D. Stimson*

For the 50th consecutive year, the National Defense Authorization Act (NDAA) for Fiscal Year 2012 provides funding and authorities for the U.S. military. It also includes several policy provisions regarding the handling of al-Qaeda and Taliban terrorists. Although we have previously expressed concerns regarding NDAA provisions relating to transfer restrictions for foreign detainees held at Guantanamo,<sup>1</sup> section 1021 of the NDAA contains important and constructive language that strengthens America's continuing fight against terrorists. Some organizations<sup>2</sup> and individuals<sup>3</sup> have criticized section 1021, and some have claimed that this bill creates or expands federal authority to detain U.S. citizens indefinitely and without due process. Those claims are false.

**Detention Under NDAA Does Not Affect U.S. Citizens.** The NDAA has not impacted the conditions under which a U.S. citizen may (or may not) be detained. In fact, section 1021 of the NDAA is explicit: The law regarding how U.S. citizens are handled, including the right to habeas corpus, is the same today as it was the day before it was passed.

In order to understand fully why section 1021 does not create or expand authority to detain U.S. citizens, it is important to review briefly some important concepts, statutes, and case law.

Section 1021 of the NDAA states that “[n]othing in this section shall be construed to 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.*”<sup>4</sup>

Section 1021 also defines the universe of persons covered under the section and defines the universe of dispositions available to the government for each detainee.

Under the NDAA, covered persons include: (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks, and; (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

Under the law of armed conflict or the law of war, a nation engaged in armed conflict has the legal authority to detain enemies who have engaged in combatant actions, including acts of belligerence, until the end of hostilities. A nation, including the United States, may detain captured enemy fight-

This paper, in its entirety, can be found at:  
<http://report.heritage.org/wm3497>

Produced by the Center for Legal & Judicial Studies

Published by The Heritage Foundation  
214 Massachusetts Avenue, NE  
Washington, DC 20002-4999  
(202) 546-4400 • [heritage.org](http://heritage.org)

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

ers—not as punishment, but to keep them from returning to the battlefield. The law of war does not differentiate or discriminate between enemy combatants who are citizens or non-citizens. History is replete with examples of citizens who became members of the opposing forces and were subject to detention when captured. These time-honored and humane principles existed prior to 9/11, after 9/11, and were the state of the law prior to the passage of the NDAA.

As for the notion that the NDAA allows for U.S. citizens to be prosecuted under the Military Commissions Act of 2009, the Act applies only to “alien unprivileged enemy belligerents.” “Aliens” under the Act means non-citizens, and thus the Act does not allow for prosecution of U.S. citizens by military commission.

**Detention in the War Against Terrorism.** The primary statutory authority for the war against terrorism is the September 18, 2001, congressional

“Authorization for Use of Military Force” (AUMF). It authorizes the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” And although the AUMF language does not specifically include the word “detain” or “detention,” lawmakers, policymakers, the Bush and Obama<sup>5</sup> Administrations, and the courts have all interpreted the AUMF to necessarily include the ability to detain the enemy for the duration of hostilities.

In 2004, the U.S. Supreme Court held in *Hamdi v. Rumsfeld* that the AUMF provides authority for the military to detain a U.S. citizen captured overseas on the battlefield in Afghanistan on U.S. soil until the end of hostilities. However, the controlling plurality of the Court explicitly noted that “[a]ll agree that absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.”<sup>6</sup> The plurality further noted

1. Charles D. Stimson, “Common-Sense Principles for Detainee Policy,” Heritage Foundation *WebMemo* No. 3397, October 17, 2011, at <http://www.heritage.org/research/reports/2011/10/common-sense-principles-for-detainee-policy>.
2. Amanda Simon, “President Obama Signs Indefinite Detention into Law,” ACLU Blog of Rights, December 31, 2011, at <http://www.aclu.org/blog/national-security/president-obama-signs-indefinite-detention-law> (February 10, 2012); “US: Refusal to Veto Detainee Bill a Historic Tragedy for Rights,” Human Rights Watch, December 15, 2011, at <http://www.hrw.org/news/2011/12/14/us-refusal-veto-detainee-bill-historic-tragedy-rights> (February 10, 2012); and press release, “Trust Me’ Is Not Enough of a Safeguard, Says Amnesty International, as President Obama Signs the NDAA into Law,” Amnesty International, January 1, 2012, at <http://www.amnestyusa.org/news/press-releases/trust-me-is-not-enough-of-a-safeguard-says-amnesty-international-as-president-obama-signs-the-ndaa-i> (February 10, 2012).
3. See Representative Ron Paul (R–TX), floor speech regarding NDAA section 1021, January 18, 2012, at <http://www.youtube.com/watch?v=tg69QM1yXQQ> (February 10, 2012); Senator Rand Paul (R–KY), commentary on section 1021 of NDAA, at <http://www.youtube.com/watch?v=GDx062cpWKE> (February 10, 2012); Charles C. Krulak and Joseph P. Hoar, “Guantanamo Forever?” *The New York Times*, December 12, 2011, at [http://www.nytimes.com/2011/12/13/opinion/guantanamo-forever.html?\\_r=1](http://www.nytimes.com/2011/12/13/opinion/guantanamo-forever.html?_r=1) (February 10, 2012); press release, “Statement Of Senator Patrick Leahy On Final Passage Of The National Defense Authorization Act For Fiscal Year 2012,” Senator Patrick Leahy (D–VT), December 15, 2011, at [http://www.leahy.senate.gov/press/press\\_releases/release/?id=34065374-5c2c-45dd-b38c-ab68f38762dd](http://www.leahy.senate.gov/press/press_releases/release/?id=34065374-5c2c-45dd-b38c-ab68f38762dd) (February 10, 2012); and Rush Limbaugh, radio excerpt, January 3, 2012, at <http://www.youtube.com/watch?v=yTrPDicHjJQ> (February 10, 2012).
4. Pub. L. No. 112-81, 125 Stat. 1561 (2011).
5. The Obama Administration claims the authority to detain “persons the President determines planned, authorized, committed, or aided the terrorist attack that occurred on September 11, 2001, and persons who harbored those responsible for the attack. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.” Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litigation, No. 08-442 (D.D.C. March 13, 2009), at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf> (February 10, 2012).
6. *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion).

that “[a]ll agree suspension of the writ has not occurred here.”<sup>7</sup> Thus, the writ of habeas corpus remains available to any individual detained in the United States.

Not only is habeas corpus review available to both citizens and non-citizens detained in the United States, but the Supreme Court has also extended the privilege to foreign detainees held at the U.S. Naval Station in Guantanamo Bay, Cuba. U.S. military and national security professionals have been litigating Guantanamo detainee habeas cases for several years. Section 1021 reaffirms the military’s legal position on holding Guantanamo detainees who pose a threat to the United States. The Department of Justice is already citing section 1021 in its legal briefs to support the military’s detention of foreign terrorists held at Guantanamo, as well as in Afghanistan.<sup>8</sup>

**The Need for Section 1021: Continuing Hostilities.** So, why was section 1021 necessary, since it does not seem to change the status quo?

Despite the fact that the U.S. is drawing down its forces in Afghanistan, the enemy continues to engage in armed conflict against the United States and its allies. As the U.S. draws down forces, there

is a legitimate concern that American courts may begin to chip away at the military’s legal authority to detain al-Qaeda terrorists. Section 1021 essentially codifies the same detention language used by both the Bush and Obama Administrations that has been upheld by federal courts.<sup>9</sup> Ten years after passage of the AUMF, this helps ensure that the military continues to have the authority to hunt down and detain al-Qaeda terrorists wherever they may hide.

In summary, the NDAA detainee provisions do not create or expand the government’s ability to detain U.S. citizens. In no way does the NDAA negatively impact or change the constitutional rights of U.S. citizens. Instead, section 1021 strengthens the military’s authority to detain individuals who are members of or substantially supporting al-Qaeda, the Taliban, and associated forces.

Misinformation regarding the impact of section 1021 should not detract from this significant step toward reinforcing the legal underpinnings of the war against terrorists.

—*Charles D. Stimson is a Senior Legal Fellow in the Center for Legal & Judicial Studies at The Heritage Foundation and served as Deputy Assistant Secretary of Defense for Detainee Affairs (2006–2007).*

---

7. *Ibid.*

8. Resp. Notice to the Court Regarding New Statute, *Al-Maqaleh v. Panetta*, No. 1:06-CV-01669 (D.D.C. January 13, 2012); and Brief for the Respondents in Opposition to Petition for Writ of Certiorari, *Al-Madhwani v. Obama*, No. 11-7020 (U.S. Sup. Ct. January 2012).

9. If anything, the authority affirmed by section 1021 is slightly narrower than what the courts have indicated a willingness to accept. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).