

MYTH: “The FY13 (next year’s) NDAA continues to allow the indefinite detention of American citizens.”

FACT: *Neither the FY12 nor the FY13 NDAA allow for the indefinite detention of American citizens.*

The House of Representatives passed the FY13 NDAA on May 18, 2012 by a vote of 299-120. The bill contained language to reaffirm that every United States citizen has the right to habeas corpus, and the FY12 NDAA did not undermine this right. This language also existed as a standalone bill – H.R. 4388, the Right to Habeas Corpus Act. Congressman Lankford was an original co-sponsor of this legislation and wrote a letter to Chairman Buck McKeon (R-CA) of the House Armed Services Committee, asking him to include the language of the bill in the FY13 NDAA.

Congress must reauthorize the Department of Defense every year. Each year, Members of Congress are able to re-evaluate funding and specific provisions granted to our Department of Defense and military personnel. After the outpouring of opposition and lack of sufficient clarity in the FY12 NDAA’s indefinite detention language, the FY13 NDAA was specifically rewritten with regard to those provisions to make it as clear as possible that none of the requirements for indefinite detention apply to U.S. citizens or resident aliens. Below is language from the House-passed FY13 NDAA with regard to the corresponding sections on indefinite detention provisions.

H.R.4310

National Defense Authorization Act for Fiscal Year 2013

Union Calendar No. 335

112th CONGRESS

2d Session

H.R. 4310

[Report No. 112-479]

SEC. 1031 - FINDINGS ON DETENTION PURSUANT TO THE AUTHORIZATION FOR USE

OF MILITARY FORCE ENACTED IN 2001

Congress finds the following:

(1) In 2001, Congress passed, and the President signed, the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note)(hereinafter referred to as the “AUMF”), which authorized the President to “use all necessary and appropriate force” against those responsible for the attacks of September 11, 2001, and those who harbored them “in order to prevent any future acts of international terrorism against the United States”.

(2) In 2004, the Supreme Court held in *Hamdi v. Rumsfeld* that the AUMF authorized the President to detain individuals, including a United States citizen captured in Afghanistan and later detained in the United States, legitimately determined to be “engaged in armed conflict against the United States” until the end of hostilities, noting that “[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles”.

(3) The Court reaffirmed the long-standing principle of American law that a United States citizen may not be detained in the United States pursuant to the AUMF without due process of law, stating the following:

(A) “Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship.”.

(B) “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”.

(C) “[A] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

(D) “[A]bsent suspension, the writ of habeas corpus remains available to every individual detained within the United States.”.

(E) “All agree suspension of the writ has not occurred here.”.

(F) “[A]n enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”.

(G) “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”.

(H) “[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”.

(1) “We reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.”.

(4) In 2008, in *Boumediene v. Bush*, the Supreme Court also extended the constitutional right to habeas corpus to the foreign detainees held pursuant to the AUMF at the United States Naval Station, Guantanamo Bay, Cuba.

(5) Chapter 47A of title 10, United States Code, as originally enacted by the Military Commissions Act of 2006 (Public Law 109–366), only allows for prosecution of foreign terrorists by military commission.

(6) In 2011, with the enactment of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81), Congress and the President affirmed the authority of the Armed Forces of the United States to detain pursuant to the AUMF a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks, or 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.

(7) The interpretation of the detention authority provided by the AUMF under the National Defense Authorization Act for Fiscal Year 2012 is the same as the interpretation used by the Obama administration in its legal filings in Federal court and is nearly identical to the interpretation used by the Bush administration. This interpretation has also been upheld by the United States Court of Appeals for the District of Columbia Circuit.

(8) Such Act also requires the Secretary of Defense to regularly brief Congress regarding the application of the detention authority provided by the AUMF.

(9) Section 1021 of such Act states that “Nothing 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.” AND XMETAL5

SEC. 1032 - FINDINGS REGARDING HABEAS CORPUS RIGHTS

Congress finds the following:

(1) Article 1, section 9 of the Constitution states “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”.

(2) Regarding the Great Writ, the Supreme Court has noted “The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”.

SEC. 1033 - HABEAS CORPUS RIGHTS

Nothing in the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) 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; 50 U.S.C. 1541 note).