

Fact Sheet: The NDAA, Habeas Corpus, and Due Process of Law

Myth: *"The FY12 NDAA suspended habeas corpus."*

Fact: The Great Writ of Habeas Corpus is a citizen's most fundamental constitutional protection against arbitrary deprivations of liberty. It provides an important judicial check on the Executive's discretion in the realm of detentions. All U.S. citizens remain under its protection. The ACLU itself has said "there is no credible argument that the NDAA or [Authorization for Use of Military Force] suspended the habeas rights of anyone." And as the Supreme Court held in *Hamdi v. Rumsfeld*, "absent suspension, the writ of habeas corpus remains available to every individual detained within the United States."

Furthermore, the FY13 NDAA includes the Right to Habeas Corpus Act, which affirms the right of any person detained in the United States pursuant to the AUMF to challenge the legality of their detention in an Article III federal court before a federal judge.

Myth: *"The FY12 NDAA allows detention of American citizens without due process of law."*

Fact: As the Heritage Foundation has noted, "The law regarding how U.S. citizens are handled in detention is the same today as it was the day before it was passed." Section 1021 of the NDAA states, "[n]othing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens..."

The Supreme Court has been explicit on the question of due process. In *Hamdi v. Rumsfeld*, while recognizing the wartime authority of the government to detain enemy combatants, including a U.S. citizen captured in Afghanistan, the Court simultaneously "reaffirm[ed] the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law."

Myth: *"The FY12 NDAA allows American citizens to be tried by military tribunal."*

Fact: This is false. The Military Commissions Act of 2009 explicitly prohibits a U.S. citizen from being tried before a military tribunal. Any American detained pursuant to the AUMF could only be tried in a federal court.

Myth: *"The FY12 NDAA allows an American citizen who has nothing to do with Al Qaeda or the Taliban to be picked up off the street by the military and detained at the President's discretion with flimsy evidence."*

Fact: Section 1021 of the NDAA was explicit in defining covered persons. A covered person is a person with direct involvement with the 9/11 attacks or "a person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States..."

The application of the NDAA's definition of covered persons is subject to independent review and oversight by both federal courts and Congress. The Supreme Court held in *Hamdi v. Rumsfeld* that "a citizen-detainee seeking to challenge his classification as an 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." The FY12 NDAA also included a provision requiring the Secretary of Defense to "regularly brief Congress regarding the application of the authority described in [Section 1021], including the organizations, entities, and individuals considered to be 'covered persons'..."