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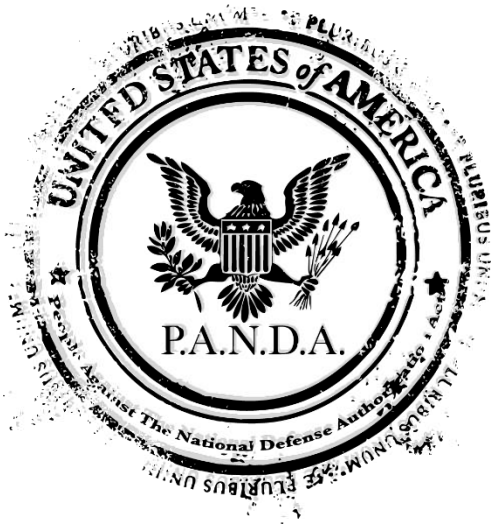
PANDA Legislative Defense Manual: *Vol. 1*



Dan Johnson and Louis Flores

People Against NDAA National

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An Introduction to this Volume

On May 2, 2012, the House Armed Services Committee (HASC) released a cute little "Myth and Fact" report on the 2012 National Defense Authorization Act (NDAA). For the average layman, this report would have left them with the impression that there was "nothing to see here." It used tactics like not quoting the entire text, employing red herrings to distract from the issue, and contained doublespeak that would have made George Orwell proud. We issued a response shortly after, but that report, with its "mythbuster" style, inspired us to put together one of our own…this time with facts, links, and sources missing from the original HASC report and many others released afterward.

So, here is the first volume in PANDA's Legislative Defense series. This particular volume is our first foray into challenging, debunking, and correcting the various myths thrown out by those with good, and evil, intentions regarding the 2012 NDAA. In this series, you will find some of the most popular, and most rare, myths you will face when educating others about the NDAA and the dangers it poses to our rights and the future of our country.

It would have been impossible without the help of the Patriot Coalition's Jeff Lewis and Richard D. Fry, and Louis Flores, our PANDA intern, to produce an authoritative piece of work. This work will stand not only the strongest Constitutional scrutiny, but any attacks leveled at it, and I cannot thank these gentlemen enough.

This series is designed to help America stand against the NDAA and restore this country to Constitutional Governance. I hope you find it useful in your fight, to combat the lies, and give you the full confidence to stand on truth and the Constitution as we bring our government back to its founding principles.

Dan Johnson

Founder, PANDA

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Myth: The 2012 NDAA Doesn't Apply to American Citizens

This is perhaps the most common myth about the 2012 National Defense Authorization Act (NDAA). Like many myths about the 2012 NDAA, it derives from the tricky language inside the law.

There are several reasons this idea is incorrect.

First of all, as the legislative history of the NDAA shows, although it was originally intended not to apply to American citizens, it was changed to broaden the definition of "covered persons" to include citizens and Congress has steadfastly defended its application to American citizens since.

When the 2012 NDAA was being drafted, according to Senator Carl Levin:

> "The language which precluded the application of section 1031* to American citizens was in the bill that we originally approved in the Armed Services Committee, and the Administration asked us to **remove the language which says that U.S. citizens and lawful residents would not be subject to this section**." (Emphasis added.)

*1031 was the section number in the Senate version, S. 1867, which eventually became Section 1021 in the final, enrolled, bill (H.R. 1540).

Senator Lindsey Graham went further:

"…and those American citizens thinking about helping Al-Qaeda, please know what will come your way: Death, detention, prosecution."

Senator Levin is right about the Administration's request. Two days before this debate on the Senate floor, on November 15th, 2011, Defense Secretary Leon Panetta sent this letter to Sen. Levin explaining the Administration's concerns with the 2012 NDAA as written:

> "We recognize your efforts to address some of our objections to section 1032. However, it continues to be the case that any advantages to the Department of Defense in particular and our national security in general in section 1032 of **requiring that certain individuals be held by the military** are, at best, unclear. This provision **restrains the Executive Branch's options to utilize, in a swift and flexible fashion**, all the counterterrorism tools that are now legally available." (Emphasis added)

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The Obama Administration dropped their veto threat shortly after Senator Levin included the flexibility to detain American citizens indefinitely. In fact, when the President signed the 2012 NDAA into law on December 31st, 2011, he claimed he would not use the power, but had it nonetheless.

Further, if the NDAA did not apply to American citizens, the House and Senate would not have spent so much time attempting to fix it.

In 2012 alone, the following amendments/bills were introduced, mostly to prevent the application of sections 1021 and 1022 (generally referred to as the "detention provisions") of the 2012 NDAA to American citizens:

The Ron Paul Bill (included Persons)
The Gohmert Amendment
The Smith-Amash Amendment (included Persons)
The Due Process Guarantee Act
The Feinstein-Lee Amendment

If American citizens were not covered by the detention provisions, there would be no need to introduce any legislation to clarify such. Yet, at least six attempts were made to fix or repeal those provisions after the 2012 NDAA was signed into law. It is very clear through these actions that Congress believes the provisions do apply to American citizens.

Section 1022 (b) (1), the clause identified by many to exclude American citizens, does nothing of the sort and reads as follows:

"(b) Applicability to United States Citizens and Lawful Resident Aliens-

(1) UNITED STATES CITIZENS- The requirement to detain a person in military custody under this section does not extend to citizens of the United States." (Emphasis added)

This section specifically refers to a "requirement" to detain a person in military custody. We can find that requirement in Section 1022 (a) (1):

"(1) IN GENERAL- Except as provided in paragraph (4), the Armed Forces of the United States **shall hold** a person described in paragraph (2) who is captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107-40) in military custody pending disposition under the law of war." (Emphasis added)

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"Shall hold" is the requirement to hold a "covered person" in military custody. The key word here is "requirement." Although Section 1022 (b) (1) removes the requirement, it does not remove the *option* for the military to detain and it doesn't prohibit the detention of an American citizen in military custody. Instead of forcing the military to detain an American citizen without charge or trial, this text now gives them the option.

If I tell your brother he is not *required* to wear a coat, can he still wear it?

Absolutely, and the very same concept applies with this section. The U.S. military is not required to hold an American citizen, but they still can.

In fact, in her injunctions against Section 1021 of the 2012 NDAA in *Hedges v. Obama*, Federal Judge Katherine Forrest first strikes down the idea that the President does not have the power, and then makes it very clear that if the detention provisions did not apply to American citizens, there would be no need to write them:

"At the time that he signed the NDAA into law, President Obama issued a signing statement with respect to § 1021 in which he stated that he would not subject American citizens to indefinite military detention "without trial." This is a carefully worded statement--it is not saying that the President will not detain American citizens under § 1021--or what type of trial (with what rights) that individual might have."

-Permanent Injunction, September 12, 2012

During preliminary injunction hearings:

> Judge Forrest, to the Department of Justice attorney: "Can you say he [American citizen Chris Hedges] will not be subject to … solitary detention?"
>
> DOJ lawyer: "I cannot say that today."
>
> Judge Forrest: "Well, why is [Hedges' fear] unreasonable: if you have an individual engaged on a regular basis with interviewing, travelling with, "associated forces" [in combat with the US] – and you can't tell us that his activities won't subject him to 1021 – why is it [Hedges' fear] unreasonable?"
>
> DOJ lawyer: "Given all the factors – looking at this case, looking at them as a whole, they sufficiently rebut reasonable fear at this stage."

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> Judge Forrest: "So the nub of it is I must agree with your position that 1021 does nothing new?"
>
> DOJ lawyer: "Yes."
>
> Judge Forrest: "And I should do this in spite of case law that asserts that Congress writes laws for a reason?"
>
> [Laughter in court.]

In summation, consider the following:

-Several senators said the detention provisions apply

-A Federal Judge rule the detention provisions apply

-The President claimed the detention provisions apply

-Congress has made numerous attempts to stop these provisions from applying to American citizens

-Many states and localities have made attempts to stop these provisions from applying to American citizens

It is continually amazing that people assert it will not.

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Myth: The 2012 NDAA Suspends Habeas Corpus

Habeas Corpus is Latin for "You have the body." It gives a person the privilege to challenge their detention. While it is clear that the 2012 NDAA's detention provisions violate this principle, they do not "suspend" Habeas Corpus. This is where proponents of the detention provisions, such as the House Armed Services Committee, attempt to trip up those fighting them.

Firstly, it is important to understand that Habeas Corpus does not equal a right to a trial or protections of any person's 5th or 6th Amendment rights. As Judge Katherine Forrest put it in her permanent injunction against Section 1021:

> "The Government also argues that, at most, the Court's role should be limited to a post-detention habeas review. See Tr. II at 118. That argument is without merit and, indeed, dangerous. Habeas petitions (which take years to be resolved following initial detention) are reviewed under a "preponderance of the evidence" standard (versus the criminal standard of "beyond a reasonable doubt") by a single judge in a civil proceeding, not a jury of twelve citizens in a criminal proceeding which can only return a guilty verdict if unanimous. **If only habeas review is available to those detained under § 1021(b)(2), even U.S. citizens on U.S. soil, core constitutional rights available in criminal matters would simply be eliminated**. No court can accept this proposition and adhere truthfully to its oath." (Emphasis added.)

Essentially, if your focus is on the 2012 NDAA violating Habeas Corpus, it is misguided, and you are chasing a red herring. Restoring Habeas review would not even come close to undoing the damage caused by the 2012 NDAA, and is used as a tool to distract those attempting to truly fix the problem.

Second, in American law, "suspending" habeas corpus is a very specific term. The U.S. Constitution, Article I, Section 9, Clause 2 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."

Since this clause is under Article I of the Constitution, it not only requires that any action taken to suspend Habeas Corpus must be taken by Congress, but also requires a case of "Rebellion or Invasion" when the public safety requires it. To suspend Habeas Corpus using Congress would be monumental and must meet a specific set of requirements. Therefore, Congress didn't "suspend" Habeas Corpus, they just violated and ignored it.

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Violating Habeas has the same effect, but requires a much different process than suspension. And, as the House Armed Services Committee has convoluted the issue, it still must be addressed here. Congress didn't "suspend" Habeas Corpus. They violated, trampled on, and eviscerated it.

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Myth: The 2012 NDAA Violates Posse Comitatus

Posse Comitatus is Latin for "power of the county" is the authority to conscript people, usually able-bodied males, into performing a law enforcement function or service. When someone refers to a "violation of Posse Comitatus," they are referring to the Posse Comitatus Act of 1878. The Act has been slightly modified since, and now the section of U.S. Code created by the Act reads as follows:

> "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both."

The Act was originally intended to prevent the use of Federal troops in elections in the Southern States, and seems to many people to be an effective barrier against the use of the military on U.S. soil. However, that is not the case, as the Posse Comitatus Act (PCA) authorizes Congress to make any exceptions it wants, rendering it useless as a protection against the military enforcing civil law.

There are currently four key exceptions to the act:

- It does not apply to the Coast Guard
- It does not apply to National Guard troops under the control of a state governor
- It does not apply in a Presidential declaration of a disaster, at the governor's request, for up to 10 days to preserve life and property
- It does not restrict the president from using the military to quell insurrections
- It has been circumvented via several other pieces of legislation to permit a variety of exceptions

A report by Gerald J. Manley at the National War College, *The Posse Comitatus Act Post 9/11, Time for a Change?*, outlined one of these exceptions in detail:

> "Additionally, the Secretary of Defense was also authorized 'to provide assistance related to the enforcement of the statutes involving biological or chemical weapons of mass destruction in an emergency situation.'"

His report goes further than exceptions however, and outlined how difficult the current PCA is to enforce:

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> "DOD Directive 5525.5, entitled DOD Cooperation with Civilian Law Enforcement Officials, is supposed to provide the seminal guidance to each of the Armed Services concerning the PCA...**in an attempt to explain what the PCA permits and prohibits, the Directive provides an eleven page convoluted mass of legalese that continuously cross references not only within itself but also to numerous criminal statutes**...guidance by the Joint Staff is not any better." (Emphasis added)

In essence, the detention provisions do not violate the Posse Comitatus Act for two reasons. Firstly, because the act itself has more loopholes than a Swiss cheese sandwich. It is difficult for enforcers to understand, and therefore difficult to implement or determine if the section would fit through a loophole. The President could claim an insurrection by "patriot" groups, declare a state of emergency, work with a state governor, or simply use the "America is a battlefield" excuse to use the military under the 2012 NDAA. Secondly, in the case of the Cordon and Search efforts in Watertown, Massachusetts in 2013, searches were led by the military and supported by Law Enforcement. Law enforcement supporting the military occurs under martial law, while the military supporting law enforcement occurs under Posse Comitatus. Under the detention provisions, the military leads the charge, not civil law enforcement, which is martial law…not a violation of Posse Comitatus.

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Myth: The 2012 NDAA is not unconstitutional until Supreme Court Says So

One of the most prevalent myths in our society revolves around the absolute "supremacy" of the Supreme Court. Many people take the word "supreme" literally, and believe the Supreme Court is the only entity that can declare a law unConstitutional, or refuse to follow and indeed block enforcement of unConstitutional orders.

This is completely false, and undermines the very principles of our Republic.

"You seem to consider the judges the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy."

-Thomas Jefferson, Letter to Mr. Jarvis, Sept. 1820

Our founding fathers designed the American system of government with several, interlocking, checks and balances designed to keep it from becoming the tyrannical government they feared. Here's just a few of them:

- Legislative Branch – Judicial Branch – Executive Branch
- State Governments – Federal Government
- State Legislative Branch – State Judicial Branch – State Executive Branch
- Oath of Office – Any Government Overreach Using Force
- Elections – Any Elected Official's Overreach

These checks and balances only work well if they are exercised. In order to posit that the Supreme Court is the final arbiter on the Constitutionality of a law, we must not only agree that it is more powerful than any other branch of government, but also assert that the Oath of Office no longer applies.

Although it varies by State, the standard Oath of Office reads much like Oath of the U.S. Senate:

> "*I do solemnly swear (or affirm) that **I will support and defend the Constitution of the United States against all enemies, foreign and domestic**; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God."*(Emphasis Added.)

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This Oath of Office requires anyone who takes it, including, according to Article VI, Clause 3, "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States" to support the Constitution.

It is impossible, then, to support something, if one can't define what they are supporting.

For example, let's say someone decides to take an Oath to have one glass of water, and only water, every day. It would be impossible for them to keep their Oath if they cannot define what "water" or "a glass" is. Is 10 ounces enough water to drink? What about 20? What if someone brings this person sparkling water (carbonated water), is it water or does it count as soda?

What if they decide the sparkling water does not count as "water," and is actually soda instead, then 9 justices in black robes tell them it is actually water? Can they drink only that, and not violate their Oath to drink only water?

Of course, to expect someone to take an Oath to drink water is a ridiculous scenario. However, it illustrates the Oath of Office very well. If any person who takes that Oath is then not allowed to define what is Constitutional, and what is not, how can they not violate it? If the Supreme Court declares the detention provisions unConstitutional, and yet a Sheriff, a city councilman, or another elected official believes it is unConstitutional, how can they still uphold their Oath of Office and yet act against that Oath and implement those provisions

Even Chief Justice Marshall, in *Marbury v. Madison,* understood the absurdity of asking someone to uphold the Oath and then not giving them the chance to determine the Constitutionality of a law for themselves:

> "Why does a judge swear to discharge his duties agreeably to the Constitution of the United States if that Constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him?
>
> If such be the real state of things, this is worse than solemn mockery. To prescribe or to take this oath becomes equally a crime."

Although Chief Justice Marshall is referring to judges in this context, the Oath of Office for elected and peace officers, to support the Constitution, is much the same. If it is true that judges must be able to determine the Constitutionality of a law due to their Oath, any person who takes an Oath to the Constitution must bear the same burden.

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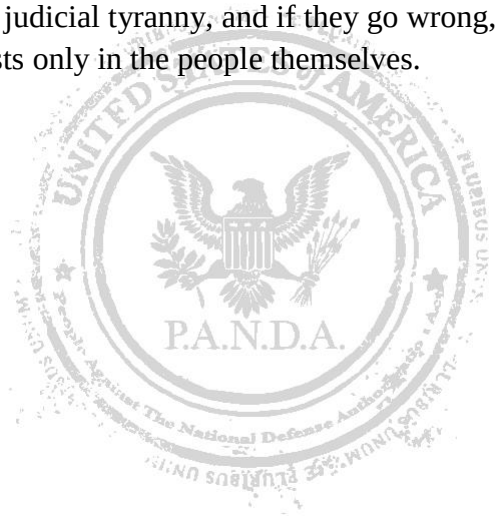
When confronted with the idea that the Court is the final arbiter of the Constitution, Thomas Jefferson further noted:

"The Constitution has elected no single tribunal. I know of no safe depository of the ultimate powers of society but the people themselves."

In reality, any person who takes an Oath of Office support the Constitution, and is therefore obligated and sworn to support it, must be able to determine the Constitutionality of a law for themselves. If they could not, it would be little more than a crime to take that oath. Further, giving the Supreme Court the ultimate power of determining the Constitutionality of a law means we are not ruled by one king, but by a despotic oligarchy of nine justices.

It is incumbent upon every person who takes an Oath to the Constitution, to preserve or support it above all things, including judicial tyranny, and if they go wrong, the responsibility of guarding the Constitution rests only in the people themselves.



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Myth: The 2012 NDAA only codifies the AUMF

This is the standard argument from nearly any Congressperson who voted for the 2012 NDAA. It stems from the misconception that Section 1021 ends at section (b) (1), and does not expand the persons covered under the AUMF. It is also incorrect. Let's take a look at the language from section 1021 (b) (1), defining a "covered person" under the 2012 NDAA:

"(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."

This language seems fairly innocuous, since it is tied to a specific past event, and indeed is nearly an exact copy of the language from the 2001 AUMF.

"(a) In General.--That the President is authorized 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

However, proponents of this myth often avoid quoting from section 1021 (b) (2), which expands the definition of a "covered person" beyond the 2001 AUMF:

"(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." (Emphasis added.)

By looking at the language in section 1021 (b) (2), we see language in the 2012 NDAA has been defined much broader than in the AUMF by expanding:

- Targeting profile (beyond AUMF)
- Countries being protected (adds coalition partners)
- Time frame (involvement in terrorist attacks of 9/11/01 not necessary)
- From a policy of retribution to a policy for a "war on terror"

Further, Federal Judge Katherine Forrest shot down the government's argument that the NDAA was merely a codification of the AUMF:

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> "Indeed the Government argues that no future administration could interpret § 1021(b)(2) or the AUMF differently because the two are so clearly the same. That frankly makes no sense, particularly in light of the Government's inability at the March and August hearings to define certain terms in--or the scope of--§ 1021(b)(2)."

To assert that the 2012 NDAA merely codifies the 2001 AUMF into law is to avoid reading the entire law. Consider this myth debunked.

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Myth: It's Not the President's Fault

This a prevalent myth put forth by supporters of the Obama Administration, who want to absolve blame for their President by placing the onus on Congress. It is also incorrect. Though Congress played a significant part in bringing the 2012 NDAA to the President's desk, it was not without some urging from the Administration.

On November 17th, 2011, President Obama issued a veto threat of the 2012 NDAA. While many might expect him to object to the detainee provisions on the grounds of protecting the Constitution, or defending our inalienable rights, that was not his objection. Instead, he was worried that the detention provisions could restrict his powers:

> "The Administration strongly objects to the military custody provision of section 1032, which would appear to mandate military custody for a certain class of terrorism suspects. **This** unnecessary, untested, and legally **controversial restriction of the President's authority** to defend the Nation from terrorist threats would tie the hands of our intelligence and law enforcement professionals." (Emphasis added)

Although the administration did note, later in the statement of administration policy, that they resist any idea that "would be inconsistent with the fundamental American principle that our military does not patrol our streets," the focus of the veto threat was still that the 2012 NDAA restricted the President's power…as promptly indicated in underlined text:

"Any bill that challenges or constrains the President's critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the Nation would prompt the President's senior advisers to recommend a veto."

Shortly after Senator Levin included American citizens in the 2012 NDAA, the Obama Administration dropped their veto threat. According to the Administration, the President now had enough flexibility to "incapacitate dangerous terrorists."

As the clearest proof that the President and his Administration wanted this power, President Obama signed the 2012 NDAA, with detention provisions intact, into law on New Year's Eve, December 31st, 2011

Several months later, the Administration continued to prove they wanted to utilize the powers in the 2012 NDAA in how vehemently the Department of Justice fought to keep the authorities in section 1021(b)(2), one of the detention provisions.

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On January 13, 2012, seven plaintiffs filed a federal lawsuit against the Obama Administration. In May, Federal Judge Katherine B. Forrest issued a temporary injunction against the 2012 NDAA's detention provisions, ruling that they were unconstitutional and her injunction was necessary to protect the "public safety. "

Instead of respecting the injunction however, the Administration was so desperate to keep this power that they construed the judge's order as "only applying to the named plaintiffs." In other words, attorneys for the Department of Justice wanted to twist the judge's order as restricting them from applying the laws of war only to the seven plaintiffs, while allowing them free reign to apply it *to anyone* else. After Judge Forrest issued her permanent injunction in September, the Obama Administration appealed within a mind blowing 24 hours, and applied for an emergency stay of the injunction.

There would be no reason for the Administration to fight so hard to maintain the indefinite detention powers authorized by 2012 NDAA if they did not actually want to use them. Further, months after signing the 2012 NDAA into law, the President was interviewed by Ben Swann, a reporter for a FOX News affiliate in Cincinnati, Ohio, who asked Obama why his lawyers were fighting to keep the authority in the 2012 NDAA.

The President's response?

"The basic principle here is, number one my first job is to keep the American people safe."

He did not say he never had the power. He did not say he did not want the power. Instead, he claimed the power in the 2012 NDAA was necessary for our safety. The President is equally, if not more, complicit in trampling our rights.

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Myth: It's Not Congress's Fault

Quite the opposite of those who blindly support the Administration, are those who are so against the current administration that they blame the President for all of America's woes. Some have even gone as far as to say the NDAA, a bill passed every year that starts in the House, was an Executive Order.

Congress played as much of a part in the 2012 NDAA as the President and his Administration did.

First of all, the NDAA has to pass Congress in order for the President to have any legal authority to sign it. The 2012 passed by a wide margin with an entirely bipartisan vote of 283-136 in the House and 93-7 in the Senate.

Then, after a lengthy debate on the detention provisions (so not a single Congressperson can use an excuse that they had not read the provisions), Congress approved the 2013 NDAA with neither Constitutional protections nor repeal of sections 1021 and 1022 of the 2012 NDAA by 315-107 in the House and 98-0 in the Senate.

At the time of this writing, that trend is set to continue. The House recently voted to pass the 2014 NDAA, while shooting down an amendment that would have repealed the detention provisions, by a vote of 315-108.

Congress is just as much at fault as the President, as they continue to stand shoulder-to-shoulder with him to eviscerate our Constitutional protections, including over half the Bill of Rights.

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Myth: The 2012 NDAA is an Executive Order

One of the places we've seen this myth is on Glenn Beck, who, in a radio broadcast about the Texas legislature taking a stand against the NDAA, said it was not a bill passed by Congress, but instead an Executive Order from the President. He could have been confusing the NDAA with the NDRP, which is an executive action, but this is an incorrect assertion.

An Executive Order is, Constitutionally, an order handed down from the President to direct an executive agency to undertake a certain task. In the past, they have also been used to dictate law throughout the country, acting as a royal decree of sorts. These orders are designed to be instructions to agencies under the Executive Branch alone, however, and as such require no oversight, vote, or motion by Congress to be implemented.

The NDAA is a law passed by Congress for almost 52 years, not an Executive Order. Congress has voted on the measure every year, and it must be signed into law by the President in order to become effective.

Claiming the 2012 NDAA is an Executive Order seems to absolve Congress of any responsibility in the matter, and is incorrect.

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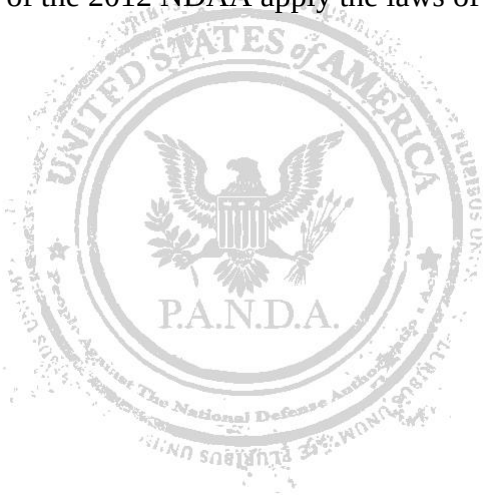
Myth: The Entire NDAA Authorizes the Application of the Law of War/Military Detention

This is a simple misconception, but easily proven wrong.

The NDAA itself does not authorize the application of the law of war on U.S. soil. In fact, the NDAA has had nothing to do with the indefinite detention of American citizens until 2012.

"NDAA" is an acronym for the National Defense Authorization Act. This bill has been introduced, passed by Congress, and signed by the President for at least 43 years. Most of the bill is dedicated to authorizing funds for the military, not trampling on our Constitutional rights.

Only sections 1021 and 1022 of the 2012 NDAA apply the laws of war to U.S. soil, not the entire 2012 NDAA.



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Myth: Judge Forrest's September 2012 Injunction Blocking the Detention Provisions is still in Effect

Unfortunately, this is incorrect. Within 24 hours after this injunction, the Obama Administration applied to Judge Forrest for an emergency stay on her order. Unsurprisingly, she declined to remove her injunction and the government's motion for a stay was rejected. The Administration then applied for a stay from the 2nd Court of Appeals, which was granted several days later. This stay took Judge Forrest's injunction out of effect.

Finally, in July, the Appeals Court placed the final nail in the coffin of her injunction by overturning her order.

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Myth: Indefinite Detention is the Main Problem with the 2012 NDAA

On September 24, 1862, President Abraham Lincoln issued Proclamation 94, to suspend the Writ of Habeas Corpus [sic], and proclaimed that:

> "all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia draft or guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States, **shall be subject to martial law**" (Emphasis added)

Over the time for which this order would remain in effect, Lincoln detained over 15,000 Northerners, and executed several.

After the Civil War ended, and the proclamation was lifted, one would think America had learned her lesson. The Supreme Court had cracked down on Lincoln's abuse of authority, saying very explicitly that the law of war could not be applied to American citizens "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" in *Ex Parte Milligan:*

> "The controlling question in the case is this: upon the facts stated in Milligan's petition and the exhibits filed, had the military commission mentioned in it jurisdiction legally to try and sentence him?
>
> …it is said that the jurisdiction is complete under the "laws and usages of war…
>
> …It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; **they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed…Congress could grant no such power**, and, to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise." (Emphasis added)

Yet even with such a strong admonition from the court, at the beginning of WWII, the Executive would again claim, and exercise, that very power.

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On February 19, 1942, President Franklin Delano Roosevelt signed Executive Order 9066, after which, in one of the blackest court decisions in American history, the Supreme Court approved the military detention of over 110,000 Japanese-Americans without charge or trial.

The order reads as follows:

> "NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such actions necessary or desirable, **to prescribe military areas in such places and of such extent as he or the appropriate Military Commanders may determine**, from which any or all persons may be excluded, and with such respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Sectary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgement of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. **The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas** by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas."

Giving the military jurisdiction over certain areas, also known as applying the laws of war to them, was the only authority used to commit this atrocity.

Much like Proclamation 94, nothing in this order stated, or even referenced, detention. Even though in both cases thousands of American citizens were detained without charge or trial, neither of these orders directly mentioned detention…the only authority needed to indefinitely detain was the law of war.

The same law of war authority is the backbone to the detention provisions of the 2012 NDAA.

Section 1022 (a) (1):

> "(1) IN GENERAL- Except as provided in paragraph (4), the Armed Forces of the United States shall hold a person described in paragraph (2) who is captured in the course of

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> hostilities authorized by the Authorization for Use of Military Force (Public Law 107-40) in military custody **pending disposition under the law of war**." (Emphasis added)

Although many may prefer to focus on the indefinite detention aspects of the 2012 NDAA, that is not the most dangerous part of this law. The most dangerous part is that final phrase "pending disposition under the law of war."

Under the US law of war, American citizens have few Constitutional protections. This one phrase is what gives the detention provisions any teeth. Under the law of war, anything the military could do to a foreign enemy in this endless "War on Terror" they could do to a person on U.S. soil.

That includes, but is not limited to, military detention without trial, rendition to a foreign country or entity, torture, trial by a military commission, and even extrajudicial execution.

The most dangerous part of the 2012 NDAA is the application of the laws of war on U.S. soil, not merely the authority to indefinitely detain. As history has proven, this authority is all that is needed to detain, torture, and even extrajudicially execute anyone, and, if we are to truly roll back the detention provisions of the 2012 NDAA, we must strike the application of the law of war from U.S. soil as well.

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Myth: The President has this Power, but He Won't Use it

Supporters of President Barack Obama often contend that, although the President has the extraordinary power in the 2012 NDAA's detention provisions, he won't use it. This belief is based on his signing statement, attached to the 2012 NDAA:

> "Moreover, I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation. My Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law."

Unfortunately, Amnesty International called it correctly when they said "'trust me' is not enough of a safeguard. There are several problems with the President's claim:

1. In 1887, Lord Acton coined the phrase "power corrupts, but absolute power corrupts absolutely." Giving any man, whether he be an angel or a saint, the power to detain, torture and kill any human being without legal repercussion is absolute power, and extremely likely to corrupt the man. No person, from the President to the dog catcher, should be trusted with such absolute power.
2. Power, once given, is eventually used. The temptation to use this power to punish those who have not harmed another, and violate the Constitution with such power, is far too great.
3. Those who do not learn from history are doomed to repeat it. Every time the Executive branch was given, or took, this power, it was used extensively. In 1862, it was 15,000 people. In 1942, it was 110,000. Today, it will be?
4. Barack Obama will not be President forever. Even if he is trusted by many, what of the next President? America has already chosen two Presidents that exercised this power, it is wishful thinking to assume we would not do it again.
5. During deliberations in *Hedges v. Obama*, attorneys for the Obama Administration were directly asked by Judge Katherine B. Forrest whether or not they were detaining anyone under the 2012 NDAA in violation of her previous order. They refused to answer the question.

   If you ask your child whether or not she stole cookies from the cookie jar, and he/she refuses to answer the question, there are more than likely cookies missing from that jar.

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When the Federal government refused to answer whether or not they are currently using the 2012 NDAA, there is a very high possibility they are already using that power.

6. During debate on the 2012 NDAA in the Senate, the Obama Administration requested that American citizens be included in the reach of the law. Since the Administration requested this power, they will most likely use it.

The Obama Administration requested this power, history shows us it will be used, they refused to answer whether or not they are currently detaining anyone under the 2012 NDAA, and, even if in the unlikely circumstance this administration does not use the power, it will remain for any future President to use at their discretion. That, in itself, is dangerous enough.

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Myth: Section 1021 (e) Protects American Citizens from the 2012 NDAA

In *Foreign Affairs* magazine, Senator Carl Levin argued that this amendment adequately protected American citizens from the detention provisions. As might be expected from a co-sponsor of one of the most dangerous pieces of legislation in history, his analysis was cunning, deft, and incorrect.

Section 1021 (e) is a beautiful piece of deception. The text is as follows:

> "(e) Authorities- 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." (Emphasis added)

This section requires two considerations, existing "**law**" and existing "**authorities**" related to the detention of U.S. citizens, and does 1021(e) protect Americans from the 2012 NDAA.

Firstly, the detention provisions do affect existing law. Section 1021 (b) (2) expands the targeting profile of whom is a "covered person" under the AUMF, it expands the scope of the authority beyond retribution for the attacks of Sept. 11, 2001, and expands whom is protected beyond the United States to include coalition partners.

1021(b)(1) = (AUMF)	1021(b)(2)
Any person who: •planned, •authorized, •committed, •aided, or •harbored the terrorists who attacked the U.S. on September 11, 2001.	Any person who was part of or supported: •Al-Qaeda, Taliban, or •associated forces, that are engaged in hostilities against: • United States, • or coalition partners, who: •committed a belligerent act, or •directly supported hostilities in aid of Al-Qaeda or Taliban * Involvement in attacks of Sept. 11, 2001 not required

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Secondly, the detention provisions can still be active without affecting any existing authorities, because the Federal government claims it already has the authority purportedly in the 2012 NDAA. When the plaintiffs in *Hedges v. Obama* brought suit to challenge the 2012 NDAA, Section 1021 (b) (1), the Obama Administration's first argument was not that they could not detain the plaintiffs. Instead, the Administration's lawyers claimed they already had the authority under the 2001 Authorization for Use of Military Force (AUMF).

Hedges v. Obama was not the only time since 9-11 the Executive branch claimed this authority either. In *Hamdi v. Rumsfeld*, the Bush Administration claimed this authority under the 2001 AUMF and Article II of the Constitution. Attorney General Eric Holder claimed this authority as the legal justification for the extrajudicial assassination of two American citizens in Yemen.

In other words, the Executive branch already believes it has the authority, so asserting that the 2012 NDAA will not affect any existing 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" does nothing to protect our rights from the authority our past presidents have already claimed.

Finally, even if this section were to have any effect, it would be considered null and void in any competent court. This section doesn't do anything to the detention provisions, because if it did, it would defeat the point of putting these detention provisions in the 2012 NDAA in the first place. Or, as Judge Katherine Forrest said:

"Judge Forrest: "So the nub of it is I must agree with your position that 1021 does nothing new?"

DOJ Attorney: "Yes."

Judge Forrest: "And I should do this in spite of case law that asserts that Congress writes laws for a reason?

[laughter in court]"

Every power granted in the 2012 NDAA have already been claimed and exercised by the Bush and Obama Administrations. Section 1021(e) claims that no existing "laws" and "authorities" are affected. It does affect existing law. It expands it. It does codify into law existing 'claimed' authorities.

Nothing in 1021(e) does anything to protect Americans from the 2012 NDAA.

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Myth: Sections 1021 and 1022 Expired, Since Indefinite Detention isn't in the 2013 NDAA

Many people think of legislation like a line of cars. When the 2013 model comes out, the 2012 model is outdated and out of production. That is not true at all with laws, as instead of replacing the previous authorization, a new bill could repeal, amend, or add to it. The NDAAs throughout history are like a stack of pancakes, not replacing the previous law, but stacking on top of one another.

In order for the 2013 NDAA to replace the 2012 NDAA, it could not modify any provisions on the 2012 law. Those provisions wouldn't exist anymore, so there would be no need to modify them. The 2013 NDAA, however, does modify several sections of the 2012 NDAA:

Section 142:

> "(b) CONFORMING AMENDMENT.—Section 132 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1320) is amended by striking subsection (c)"

Section 212:

> "(a) EXTENSION OF LIMITATION.—Subsection (a) of section 213 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1330) is amended by inserting ''or fiscal year 2013'' after ''fiscal year 2012''."

Section 322:

> "(3) Section 801(c) of the National Defense Authorization Act for Fiscal Year 2012 (125 Stat. 1483; 10 U.S.C. 2366a note) is amended by striking ''core depot-level maintenance and repair capabilities, as well as the associated logistics capabilities'' and inserting ''core logistics capabilities''."

The 2013 NDAA modifies sections of the 2012 NDAA, so it must still exist. Since the detention provisions were not repealed in the 2013 NDAA, they are alive and well. Further, the detention provisions have a conditional sunset of the "end of hostilities authorized by the 2001 Authorization for Use of Military Force." Until the 2001 AUMF is repealed, or the hostilities is authorizes are amended, sections 1021 and 1022 of the 2012 NDAA do not expire.

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Myth: The 2013 Louie Gohmert Amendment/Section 1033 Fixed the Problems with the 2012 NDAA

Congress will continue to push meaningless legislation which purportedly stops the effects of the detention provisions. Besides the Smith-Amash Amendment, every other similar Amendment to the 2013 NDAA was, and is, smoke and mirrors:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights…That to secure these rights, Governments are instituted among Men"

-Declaration of Independence, 1776

There has been a lot of talk about Section 1033 of H.R. 4310, the National Defense Authorization Act (NDAA) for Fiscal Year 2013. Some have been hailing it as bringing habeas corpus and other rights back to the U.S. This clause in the NDAA does nothing to protect our rights.

H.R. 4310, Section 1033(a) reads as follows:

"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 or to deny any Constitutional rights in a court ordained or established by or under Article III of the Constitution for any person who is lawfully in the United States when detained pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note) and who is otherwise entitled to the availability of such writ or such rights."

There are several problems with this clause, including but not limited to:

1. This clause does not explain how a person came into military detention, and does not exempt them from such detention.

2. This clause does not exempt any person in the United States, its territories, or protectorates from the targeting profile of the AUMF, or the expanded targeting profile of the 2012 NDAA.

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3. This clause fails to address the main problem with the 2012 NDAA, that the United States is a battlefield subject to the laws of war, some of which are inconsistent with the Constitution.

4. There is no guarantee a person will get a trial in an Article III Court.

5. There is no guarantee of a trial at all.

Let's break it down:

"Nothing in the AUMF or the 2012 NDAA shall be construed to deny the availability of the writ of habeas corpus or to deny any Constitutional rights **in a court ordained or established by or under Article III** of the Constitution for any person who is lawfully in the United States **when detained** pursuant to the AUMF and who is otherwise entitled to the availability of such writ or such rights,"

We emphasized certain parts of this language for a reason. Of particular note are the phrases "in a court ordained or established by or under Article III", and "when detained."

Section 1033(a)'s protections only apply IF a person is taken to an Article III Court. This does not guarantee that a person WILL go to an Article III Court. Anyone could be indefinitely detained and never tried at all, or be indefinitely detained and then taken to a Military commission/tribunal....and this is where it gets interesting.

If you are a covered person under the 2012 NDAA, you could be detained indefinitely without a trial "pending disposition under the law of war." (See 2012 NDAA, Section 1021(a).)

Section 1033(a) does not address how a person came into detention in the first place. There is nothing in this section legally protecting a person from being indefinitely detained. In fact, this Section acknowledges that a person can be detained:

"any person who is lawfully in the United States **when detained** pursuant to the AUMF"

This clause is not addressing a fundamental problem of the 2012 NDAA, and does nothing to keep the military, Interpol, or the Secret Service from bursting in anyone's house and detaining them in a military brig.

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Next, this clause does not exempt a person from the expanded targeting profile of the 2012 NDAA. Section 1021(b)(2) lays out the requirements for someone and their family to become a "covered person." It states:

"(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."

Federal Judge Katherine Forrest pressed the government lawyers for details on what constitutes "associated forces, "substantial support", or "direct support," and found out they were unable to answer. That those terms could be interpreted broadly to mean whatever the government wanted them to mean, and therefore anyone could be a covered person. In her first injunction, she wrote:

> "The Government was unable to define precisely what "direct" or "substantial" "support" means. . . .Thus, an individual could run the risk of substantially supporting or directly supporting an associated force without even being aware that he or she was doing so."

Besides acknowledging the government's right to detain anyone and failing to exempt them from the 2012 NDAA's targeting profile, Section 1033(a) does not address the main issue with the 2012 NDAA. The United States of America is now a battlefield, under the commander-in-chief, the law of war, and the jurisdiction of Military commissions, at their discretion.

Section 1021(a)(1) of the 2012 NDAA lays it out succinctly:

"IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force [AUMF] (Public Law 107–40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons ...pending disposition under the law of war." (emphasis added)

If one applies the laws of war to any territory, it is now a battlefield. In fact, Sen. Lindsey Graham said the "*The whole world is a battlefield, including the homeland.*" on the floor of the U.S. House of representatives during debate on the 2012 NDAA. Section 1033(a) of the 2013 NDAA does nothing to address that crucial issue.

Because the U.S. is a battlefield and therefore subject to the laws of war, anyone could be tried in a Military commission/tribunal. 10 USC 818 – Art. 8. Jurisdiction of general courts-martial states:

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"General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." (emphasis added)

The 2009 Military Commissions Act gave Military commissions/tribunals (also known as courts-martial) the statutory authority to choose whether or not they had jurisdiction over a certain area. In layman's terms, that means a Military commission (an Article I Court) can decide themselves whether or not they will take "jurisdiction" over cases involving AUMF/NDAA "covered persons," including those "captured or arrested" on U.S. soil, despite the fact that the internationally-recognized "laws of war" require most civilian "covered persons" be tried in the civilian court system, which in the United States is an Article III Court.

According to an April, 2010 Congressional Research Service (CRS) report, The Military Commissions Act of 2009: Overview and Legal Issues, "A military commission has jurisdiction over persons subject to …the law of war. Military commissions are expressly authorized to determine their own jurisdiction." (Emphasis added)

Referencing laws about the jurisdiction of Military commissions and referring to the fact that a person could be tried in one would be a moot point if these Military commissions were Article III Courts. **However, Section 1033(a) of the 2013 NDAA is purely smoke and mirrors, because Military commissions are NOT Article III Courts.**

Military tribunals are authorized in the enumerated powers of the federal government. The U.S. Constitution, Article I, Section 8, Clause 9 states that Congress shall have the power "To constitute Tribunals inferior to the supreme Court."

Section 1033(a) only guarantees a person his or her Constitutional rights "in a court ordained or established by or under Article III of the Constitution." This clause does not protect the rights of a person tried in a military tribunal.

This Section also fails to guarantee that any person detained will get a trial. It only states that nothing in the 2013 NDAA "shall be construed to deny the availability of the writ of habeas corpus or to deny any Constitutional rights in a court ordained or established by or under Article III of the Constitution."

This clause never, explicitly or implicitly, guarantees a trial for any person detained under the 2012 NDAA. By refusing to address this issue, the original language in Section 1021(c)(1) remains unaffected…and that Section specifically states a person detained under the NDAA may

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not get a trial:

"Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force."

Section 1033(a) of the 2013 NDAA does nothing to guarantee anyone a trial, and does not protect their rights until they are on trial in an Article III Court.

Section 1033(a) does absolutely nothing to protect our inalienable, God-given Rights. It recognizes the un-Constitutional practice of indefinite detainment as legitimate, and does not exempt any person from the targeting profile outlined in the 2012 NDAA. Since the U.S. is legally considered a battlefield subject to the laws of war, and Military commissions have jurisdiction over battlefields and cases under the laws of war, this Section can't secure the rights of persons who make it to Article III courts since they were already secured by the Constitution and Bill of Rights, but are eliminated by the fact that any detained person can be tried in a Military commission. This Section of Orwellian doublespeak does not even guarantee a detained person their right to a trial, much less a "speedy and public trial" as required by the 6th Amendment. Therefore, any person detained under the 2012 NDAA is subject to "detention without trial until the end of hostilities."

Finally, this Section does not address the fundamental concept of the 2012 NDAA; that the United States is now a battlefield, subject to the laws of war, Constitutional Rights optional. Section 1033(a) is just politics as usual on Capitol Hill. Trick the American people, strip us of our rights, and tell us to go back to sleep.

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Myth: Section 1031 and 1032 don't exist in the 2012 NDAA, So the Detention Provisions were Removed before it became Law

This is a common misconception, but it is easily debunked. Section 1031 and 1032 were in the original Senate version bill S.1867 of the 2012 NDAA, while 1021 and 1022 were in the House version, H.R. 1540, of the NDAA.

Sections 1031 & 1032 cover:

Sec. 1031. Affirmation of authority of the Armed Forces of the United States to detain covered persons pursuant to the Authorization for Use of Military Force.

Sec. 1032. Requirement for military custody

Section 1021 and 1022 cover:

Sec. 1021. Affirmation of authority of the Armed Forces of the United States to detain covered persons pursuant to the Authorization for Use of Military Force.

Sec. 1022. Military custody for foreign al-Qaeda terrorists.

Essentially, the final version of the NDAA was the House version, which had 1031 and 1032 as 1021 and 1022. The detention provisions are still there, just under a different number.

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Myth: The "end of hostilities "is an End Date, So Detainment is not Indefinite

On September 18, 2001, America officially entered its "war on terror." The **Authorization for Use of Military Force (AUMF)** authorized the President to use military force against anyone he believed was involved in the 9-11 attacks.

The problem with a war on "terror," is it can never be won. Terror is an emotional reaction and, much like a war on happiness, or a war on pain, it can never be won. It is impossible to remove all fear from the planet, or even on a neighborhood block. Although the idea of winning a war on fear sounds extremely noble, it is quite literally impossible.

The 2012 NDAA defines the end date for a detention under Section (c) (1):

(c) Disposition Under Law of War- The disposition of a person under the law of war as described in subsection (a) may include the following:

(1) **Detention under the law of war without trial until the end of the hostilities** authorized by the Authorization for Use of Military Force.

Since the detention provisions rely on the end date authorized by the AUMF, and therefore rely on the "war on terror" to end, there is no end in sight. A detention could last 2 weeks, or until the end of time. Barring a repeal of the 2001 AUMF, the "war on terror" will never end, and, at the whim of the President, there is a risk that neither will an indefinite detention under the 2012 NDAA.

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