



Written by [Joe Wolverton, II, J.D.](#) on September 28, 2012

McCain Anxious for NDAA Renewal for 2013

During the overnight Senate session that resulted in the passage of a “de facto declaration of war” on Iran and a stopgap bill that funded the federal government through March, Senate Majority Leader Harry Reid (D-Nev.) tried to push through a vote on next year’s National Defense Authorization Act (NDAA), as well.

An [article published online by Government Executive magazine](#) reports that at about 1:40 a.m. Saturday, September 22, Reid worked the floor trying to get support for the latest renewal of the controversial defense funding measure before his colleagues abandoned the Capitol for their home states.



“I’ve been asked on a number of occasions by Senator [Carl] Levin, Senator [John] McCain what we’re going to do on ... the Defense Authorization bill. I ask unanimous consent that at a time to be determined by me, after consultation with the Republican leader, the Senate proceed to ... the Defense authorization bill,” Reid said, according to the Government Executive story.

[Foreign Policy blog The Cable](#) reports that upon learning of Reid’s pre-dawn parliamentary plans, “Senate Minority Jon Kyl (R-AZ) objected ... because Reid wanted unanimous consent to structure the debate with limited amendments and because Kyl couldn’t check with his caucus, as almost all senators had left the chamber.”

Senator John McCain (R-Ariz.), eager to get approval of the Fiscal Year 2013 NDAA on the books before heading back to the Grand Canyon State, accused Reid of purposely waiting until the chamber was nearly empty to start debate on the bill.

“This was nothing more than a cheap procedural ploy to divert blame for the Senate’s failure — for the first time in a half-century — to debate and pass the most important piece of national security legislation that Congress considers,” a McCain spokesman reportedly told The Cable.

Although it was [passed in May by an overwhelming majority by the House of Representatives](#), the NDAA has been stalled in the Senate. On May 18, 299 members of the House voted in favor of next year’s NDAA. The bill was then sent to the Senate, where it has been waiting floor debate ever since passing out of the Armed Services Committee later that same month.

The Cable reports that a McCain spokesman claimed that McCain had “gone to the floor time and again asking Senator Reid to bring the NDAA to the floor for debate, as has been the Senate’s practice for 50 years. For four months, Senator Reid has refused these requests.”

McCain’s urgency is evident. [In a speech on the Senate floor on July 23](#), he pushed hard for consideration of the measure, trying the familiar neocon “if you don’t support the NDAA, you don’t support the troops” gambit.



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“I remind my colleagues that consideration of the defense authorization bill is more than a simple right of this body. It is an obligation to our national defense and a fulfillment of our responsibility to the men and women in uniform that the Senate has honored for the past 50 consecutive years,” McCain said.

A charter member of the congressional chicken hawk war mongers club, it is little wonder that McCain is doing his best to fast track consideration of the NDAA. The considerable constitutional violations contained in the bills are not mentioned in either *The Cable* or *Government Executive* articles. A statement made by Representative Buck McKeon (R-Calif.) after passage of the bill on the House side is an effective springboard for a description of the threat to freedom posed by the NDAA.

McKeon declared that “every American must have his day in court.” Further, he “reaffirms the fundamental right to Habeas Corpus of any person detained in the United States pursuant to the 2001 Authorization for the Use of Military Force.”

[Section 1033 of the mark-up version](#) passed by the committee is offered as the codification of that protection. Here is the current text of that updated provision:

This section would state that nothing in the Authorization for Use of Military Force (Public Law 107-40) 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).

The double-speak contained in that paragraph is impressive even for a Capitol Hill lawyer.

Read it very closely: The new bill does nothing to prevent the indefinite detention of Americans under the 2013 NDAA; furthermore, it only reiterates that habeas corpus is a right in courts established under Article III of the Constitution. That such a right exists in the courts of the United States has never been the issue. The concern of millions of Americans from every band in the political spectrum is that Americans detained as “belligerents” under the terms of the NDAA will not be tried in Article III courts, but will be subject to military tribunals such as the one currently considering the case of the so-called “Gitmo Five.”

There is not a single syllable of the 2013 NDAA currently being considered by the [Senate Armed Service Committee](#) on Thursday that will guarantee Americans will be tried in a constitutional court and not a military commission.

Curiously, furthermore, the bill ties the fundamental right of habeas corpus not to the Constitution (or the nearly 900 years of Anglo-American law), but to the Authorization for the Use of Military Force where the protection of that right is severely diminished. Such sleight of hand should not go unnoticed, particularly when it is performed by one who flies under the “Republican” banner.

On the subject of partisanship, it is almost axiomatic that Republicans and Democrats do not agree and that “reaching across the aisle” is an unattainable goal. While such conflict is not only anticipated but is encouraged in the government established by the Constitution, the frighteningly indefinite detention provisions of the NDAA seem to be an area where bipartisanship is becoming more common.

While the broad strokes of the NDAA are by now likely familiar to readers, a brief overview is in order.

Most of what is contained in the over-500-page 2012 version of the NDAA is inimical to liberty. For example, under the provisions of the aforementioned Section 1021, the president is afforded the absolute power to arrest and detain citizens of the United States without their being informed of any



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criminal charges, without a trial on the merits of those charges, and without a scintilla of the due process safeguards protected by the Constitution of the United States.

In order to execute this immense power, the NDAA unlawfully grants the president the absolute and unquestionable authority to deploy the armed forces of the United States to apprehend and to indefinitely detain those suspected of threatening the security of the “homeland.” In the language of this legislation, these people are called “covered persons.”

Regardless of promises to the contrary, the language of the NDAA places every citizen of the United States within the universe of potential “covered persons.” Any American could one day find himself or herself branded a “belligerent” and thus subject to the complete confiscation of his or her constitutional civil liberties and nearly never-ending incarceration in a military prison.

If history is a reliable guide to the future, McCain, Kyl, and Reid will work out their differences and the Senate will pass the NDAA for Fiscal Year 2013. Then, within days the president will sign it into law. In the meantime, we will hear honeyed speeches from some lawmakers warning about the threat of “terrorism,” while others will remind voters about the NDAA’s revocation of habeas corpus and legalization of the indefinite detention of Americans in military prisons based on nothing more than presidential suspicion.

Right now, however, there is time for constitutionalists to contact their senators and remind them of the oath they took to “preserve, protect, and defend the Constitution.”

Also, Americans interested in protecting our liberty and the Tenth Amendment can contact their state representatives and encourage them to resist such unconstitutional usurpations of power by [passing nullification bills](#) that will stop the enforcement of the NDAA at the state’s border.

Photo of Sen. John McCain: AP Images



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