



## Feinstein Introduces Due Process Guarantee Act

The measure, entitled the [Due Process Guarantee Act of 2011](#), is an attempt by Feinstein and her co-sponsors to prevent American citizens detained under applicable provisions of the NDAA from being denied their constitutional right to the due process of law.



The stated purpose of the act is:

To clarify that an authorization to use military force, a declaration of war, or any similar authority shall not authorize the detention without charge or trial of a citizen or lawful permanent resident of the United States and for other purposes.

As Chairman of the Senate Intelligence Committee, Feinstein wields considerable power in the upper chamber of the Congress, but even that influence was incapable of attracting enough support for an amendment to similar effect proposed on behalf of herself and Senator Rand Paul during the Senate's debate on the original bill.

If approved, this newest measure would amend the [Non-Detention Act](#), originally enacted in 1971. Specifically, the bill would add language to 18 U.S.C. § 4001(b). The proposed revamped paragraph would read:

An authorization to use military force, a declaration of war, or any similar authority shall not authorize the detention without charge or trial of a citizen or lawful permanent resident of the United States apprehended in the United States, unless an Act of Congress expressly authorizes such detention.

Currently, the affected section reads:

- (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
- (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations.

Although certainly not a repeal of the NDAA, by comparing the language in the Feinstein amendment to that in the unaltered law, one discovers that the Due Process Guarantee Act serves at least as a parchment barrier to the abuses of the unconstitutional detention power given the President as authorized by the NDAA.

In a [statement](#) accompanying her introduction of the Due Process Guarantee Act, Senator Feinstein said:



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The beauty of our Constitution is that it gives every citizen the basic due process right to a trial on their charges.

Experiences over the last decade prove the country is safer now than before the 9/11 attacks. Terrorists are behind bars, dangerous plots have been thwarted. The system is working.

We must clarify U.S. law to state unequivocally that the government cannot indefinitely detain American citizens inside this country without trial or charge. I strongly believe that Constitutional due process requires U.S. citizens apprehended in the U.S. should never be held in indefinite detention. And that is what this new legislation would accomplish.

As has been previously reported [here](#) and elsewhere, the NDAA converts America into a war zone and turns every American into a potential suspected terrorist, complete with the full roster of rights typically afforded to terrorists — none.

With regard to the Due Process Guarantee Act, it was offered in response to a key component of the now-reconciled bill that delivers a frightening grant of immense and unconstitutional power to the executive branch.

Under applicable clauses of Section 1031, the President is afforded the absolute power to arrest and detain citizens of the United States without their being informed of any criminal charges, without a trial on the merits of those charges, and without a scintilla of the due process requirements mandated by the Constitution of the United States.

Given such an unsettling endowment of power in one man to rob Americans wholesale of their God-given (and constitutionally protected) freedom from despotism, it is illuminating to briefly review the Non-Detention Act of 1971 to see how the NDAA both supplants and subverts this earlier law.

As indicated earlier, in 1971, Congress passed the Non-Detention Act which provided that, “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”

It is surprising given the number of attorneys in Congress that a statute so vague and devoid of notice would be passed into law.

What, for example, is the legal definition of “an act of Congress” as intended by the authors of this law?

Moreover, the law is silent as to the answer to the question of whether or not an act of Congress may authorize the indefinite detention of an American citizen.

The decision of the Supreme Court handed down in the landmark case of *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) shed a bit of light on the murkiness of the law.

In *Hamdi*, the Court held that Yaser Esam Hamdi, a U.S. citizen being detained indefinitely as an “illegal enemy combatant,” must have the ability to challenge his enemy combatant status before an impartial judge.

However, the same decision muddied the clear waters of the Constitution by holding that the Authorization for the Use of Military Force (AUMF) satisfied the requirements of the Non-Detention Act.

Later, the issue was confused further when the Second Circuit Court of Appeals ruled in the case of *Padilla v. Rumsfeld* that the Non-Detention Act required “clear” intent on the part of Congress to authorize the apprehension and imprisonment of citizens branded as “enemy combatants” who are taken into custody within the territory of the United States.



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Both the Supreme Court decision and that of the Second Circuit (and a related holding handed down by the Fourth Circuit) assumed that any citizen or legal permanent resident detained pursuant to the AUMF would be “associated with forces hostile to the United States.” Importantly, neither the NDAA nor the Non-Detention Act contains such a qualification.

As [an article on the subject](#) published by lawfareblog.com reports:

In short, no decision before 9/11 or since supports the notion that the NDA [Non-Detention Act] can be satisfied without a clear statement for citizens who don’t fit those exceptional facts, including citizens picked up outside the U.S. but not in the context of active military operations.

For its part, the NDAA simply requires that in order to be subject to indefinite detention, a person (citizen or legal permanent resident) be suspected by the President of having committed a “belligerent act.” Inarguably, that is a much lower and much more malleable standard than set by the Non-Detention Act.

Hence, the noble effort by Senator Feinstein to re-establish and reinforce the detention threshold of the Non-Detention Act, and, more critically, the due process liberties guaranteed by the Bill of Rights.

The Due Process Guarantee Act of 2011 is co-sponsored by Senators Patrick Leahy (D-Vt.), Mike Lee (R-Utah), Mark Udall (D-Colo.), Mark Kirk (R-Ill.), Rand Paul (R-Ky.), Chris Coons (D-Del.), Dick Durbin (D-Ill.), Kirsten Gillibrand (D-N.Y.), Bill Nelson (D-Fla.), Jeanne Shaheen (D-N.H.), Al Franken (D-Minn.), Tom Udall (D-N.M.) and Claire McCaskill (D-Mo.).

*Photo of Sen. Diane Feinstein: AP Images*



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