



Written by [Joe Wolverton, II, J.D.](#) on January 5, 2013

Obama Signs 2013 NDAA: May Still Arrest, Detain Citizens Without Charge

On Wednesday, January 2, 2013, President Barack Obama did what constitutionalists and civil libertarians knew he would do: [He signed into law the renewal](#) of his power to apprehend and detain Americans indefinitely on no more authority than his own suspicion of their complicity with enemies in the “War on Terror.”

With more of a whimper than a bang, the president signed the [Fiscal Year 2013 National Defense Authorization Act \(NDAA\)](#). As he did on New Year’s Eve 2011 when he signed last year’s version of the NDAA, President Obama [appended a signing statement to the act](#). This time, however, there were no promises of protecting Americans from deprivations of due process. This time, the signing statement (I would agree with Benjamin Wittes of the Lawfare blog who suggests it is more of a [“whining” statement](#)) recounts all the reasons the president had for vetoing the bill. Somehow, however, he managed to hold his nose and sign this unconstitutional, no longer unprecedented, giant leap toward statism, absolutism, and outright unapologetic tyranny.



Although President Obama [warned months ago that he would veto](#) the \$636-billion defense spending bill if it contained any restrictions on his ability to shutter the detention facility at Guantanamo Bay, Cuba (a 2008 campaign promise), he apparently decided that compared to the power to kidnap and lock up Americans according to his own whim was sufficient exchange for being “forced” to keep Gitmo going.

Leaders of human rights organizations — many of whom were counted among the winning Obama coalition in 2008 — admitted disappointment at the failure of the president to deliver the hope and change he promised.

“It’s not encouraging that the President continues to be willing to tie his own hands when it comes to closing Guantanamo,” said Dixon Osburn of Human Rights First. “The injustice of Guantanamo continues to serve as a stain on American global leadership on human rights.”

Frank Jannuzi, deputy executive director of Amnesty International USA said that “solutions for ending



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human rights violations, not excuses, must be found.”

“This law makes it harder for the President to fulfill his promise to close the Guantanamo detention facility, perpetuating a grave injustice against the detainees held without charge or fair trial,” Jannuzi added.

Fair trials are likely to soon be placed on the federally-protected endangered species list.

There were a few lawmakers, however, who tried to amend the NDAA in a way that protected that fundamental right for Americans or permanent legal residents detained under provisions of the NDAA.

On December 18, the House and Senate Armed Services Committees [completed their conference report](#) on the National Defense Authorization Act (NDAA) for Fiscal Year 2013. This was the version of the bill signed by President Obama on January 2.

At a press conference held December 20, four of the leaders of those committees announced the completion of the compromise version of the bill and pointed out some highlights of the revised bicameral measure.

“The conference report on the National Defense Authorization Act for Fiscal Year 2013, which was adopted today by the conference committee, provides well-deserved support for the men and women of the armed forces and their families and provides them with the means to accomplish their missions,” [announced Senator Carl Levin \(D-Mich.\)](#).

One controversial portion of the NDAA bill passed by the Senate on December 4 didn’t make the cut, however, after the conference committee’s negotiations.

The Feinstein-Lee Amendment, which protects Americans from indefinite detention ([passed by the Senate 67-29](#)), was stripped from the conference report, not surprising given that inveterate warmonger Senator John McCain (R-Ariz.) led the group drafting the compromise version of the bill that would be presented to both houses for their approval.

The relationship between McCain’s influence and the exclusion of the Feinstein-Lee Amendment from the conference report was not lost on Senator Rand Paul (R-Ky.), a chief co-sponsor of the Feinstein-Lee Amendment.

In [a statement released on December 19](#), Senator Paul did what few lawmakers ever do: named names. He declared:

The decision by the NDAA conference committee, led by Sen. John McCain (R-Ariz.) to strip the National Defense Authorization Act of the amendment that protects American citizens against indefinite detention now renders the entire NDAA unconstitutional.

I voted against NDAA in 2011 because it did not contain the proper constitutional protections. When my Senate colleagues voted to include those protections in the 2012 NDAA through the Feinstein-Lee Amendment last month, I supported this act.

But removing those protections now takes us back to square one and does as much violence to the Constitution as last year’s NDAA. When the government can arrest suspects without a warrant, hold them without trial, deny them access to counsel or admission of bail, we have shorn the Bill of Rights of its sanctity.

Saying that new language somehow ensures the right to habeas corpus — the right to be presented before a judge — is both questionable and not enough. Citizens must not only be formally charged



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but also receive jury trials and the other protections our Constitution guarantees. Habeas corpus is simply the beginning of due process. It is by no means the whole.

Our Bill of Rights is not something that can be cherry-picked at legislators' convenience. When I entered the United States Senate, I took an oath to uphold and defend the Constitution. It is for this reason that I will strongly oppose passage of the McCain conference report that strips the guarantee to a trial by jury.

Members of the House of Representatives were right there with their congressional colleagues in faithlessness to their oaths of office.

In a shameful display of disregard for the Constitution and for liberty, on May 18, 2012, the House of Representatives overwhelmingly voted to perpetuate the president's power to indefinitely detain American citizens.

By a vote of 238-182, members of Congress rejected an amendment offered by Representatives Adam Smith (D-Wash.) and Justin Amash (R-Mich.) that would have repealed the indefinite detention provision passed overwhelmingly last year as part of the National Defense Authorization Act of 2012.

The Fiscal Year 2013 NDAA retains the indefinite detention provisions, as well as the section permitting prisoners to be transferred from civilian jurisdiction to the custody of the military.

"The frightening thing here is that the government is claiming the power under the Afghanistan authorization for use of military force as a justification for entering American homes to grab people, indefinitely detain them and not give them a charge or trial," Representative Amash said during House debate.

In his impassioned speech supporting his amendment, Representative Smith reminded his colleagues that the NDAA granted to the president "extraordinary" powers and divested the American people of key civil liberties, as well as divesting civilian courts of their constitutional jurisdiction.

Smith pointed out that there was no need to transfer suspects into military custody, as "hundreds" of terrorists have been tried in federal courts since the attacks of September 11, 2001.

Congressmen — Republicans and Democrats — were not persuaded and they voted against Smith-Amash.

Another amendment offered by Representatives Louie Gohmert (R-Texas), Jeff Landry (R-La.), and Scott Rigell (R-Va.) passed by a vote of 243-173. The [Gohmert Amendment](#) (House Amendment 1126) states that the NDAA will not "deny the writ of habeas corpus or deny any Constitutional rights for persons detained in the United States under the AUMF who are entitled to such rights."

Again, this amendment is yet another indefensible use of vague language that would make it vulnerable to challenge in any court in any state in the Union, but somehow adds to its appeal among the Republicans in Congress.

Section 1029 of the 2013 NDAA purports to protect the rights of citizens, relying again on lazy language that would fail a legal challenge if it were a city ordinance and not a congressional act.

That section declares:

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



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ordained or established by or under Article III of the Constitution to any person inside the United States who would be entitled to the availability of such writ or to such rights in the absence of such laws.

Finally, this brief paragraph fails to address the most invasive aspect of the mortal malady that is the NDAA — the placement of the American military at the disposal of the president for the apprehension, arrest, and detention of those suspected of posing a danger to the homeland (whether inside or outside the borders of the United States and whether the suspect be a citizen or foreigner). Giving the president that power is nothing less than a de facto legislative repeal of the Posse Comitatus Act of 1878, the law forbidding the use of the military in domestic law enforcement.

It is this last bit of Stalinist-style authoritarianism that is the NDAA's true threat to liberty. While Section 1029 purports to buttress the right to a trial for citizens and permanent residents, it does nothing to prevent their apprehension. Denial of habeas corpus (or a trial) comes later; it is the delirium, not the fever, in a manner of speaking.

Put simply, Americans would not need to worry about being held without charge if the president was not authorized in the same act to deploy the armed forces to round up the "suspects" and detain them indefinitely. Being apprised of the laws one is accused of having violated is important, but it's the detention and the manner of it that must be of more immediate concern to those who are alarmed about the new world order being defined by the NDAA.

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Photo of Guantamo cell block: AP Images



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