



Written by [Joe Wolverton, II, J.D.](#) on September 17, 2017

## Sen. Mike Lee Offers NDAA Amendment Protecting Due Process

The Senate is expected to vote Monday on next year's defense authorization, but one senator is pushing for an amendment that would prevent the denial of one of humanity's most basic rights from being included in the Pentagon's annual authorization.

Senator Mike Lee (R-Utah; shown) is the sponsor of the Due Process Guarantee Act, an amendment to the National Defense Authorization Act (NDAA). His amendment is aimed at limiting the power of the federal government to detain Americans without following the constitutional dictates of due process.



Due process is defined as that legal process government must follow before legally depriving an individual of his life, liberty, or property. The "due" part of "due process" explains why the government must go through such a process: People, as humans, possess the natural right to retain their lives, liberty, and property as a gift of their Creator.

The Fifth Amendment to the Constitution expresses this check on power, reading in relevant part, "No person shall ... be deprived of life, liberty, or property, without due process of law."

On September 14, Senator Lee spoke in the Senate, explaining why his NDAA amendment is not only timely given the current political climate — one of nearly unfettered federal power — but has been demonstrated to be historically vulnerable to executive and legislative curtail.

First, Lee rehearsed the story of the detainment of Japanese Americans during World War II:

The Constitution includes safeguards against this form of tyranny, including the right of habeas corpus and the guarantee that American citizens will not be "deprived of life, liberty, or property" by the government "without due process of law."

Our commitment to these rights is tested in times of crisis. We have not always passed these tests.

During the Second World War, President Franklin Roosevelt unilaterally authorized the internment of over 100,000 Japanese-Americans for fear they would spy against the United States.

The government presented no evidence that these Americans posed a threat to their country, because the government had no evidence. Most of the detainees were native-born citizens. Many had never visited Japan before in their lives.

Due process as a check on monarchical power was included in the Magna Carta of 1215. This list of grievances and demands codified the king's obligation to obey written laws or be punished by his subjects. Article 39 of the Magna Carta says: "No freemen shall be taken or imprisoned or disseised



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[dispossessed] or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”

Over the years, the Magna Carta was occasionally revised and amended. In 1354, the phrase “due process of law” appeared for the first time. The Magna Carta as amended in 1354 says: “No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.”

This fundamental restraint on the royal presumption of the power to lop off heads on command was incorporated by our Founders in the Bill of Rights, particularly in the Fifth Amendment that says in relevant part: “No person shall ... be deprived of life, liberty, or property, without due process of law.”

In his speech, Senator Lee cites *The Federalist Papers* in support of his proposed amendment. In *The Federalist*, No. 84, Hamilton explained:

The practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious [William] Blackstone in reference to the latter, are well worthy of recital: “To bereave a man of life, says he, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation.

Beginning with Barack Obama’s signing of the NDAA for Fiscal Year 2012 on December 31, 2011, the president has been 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 safeguards protected by the Constitution of the United States.

In his remarks, Senator Lee points particularly at the potential for using the usurpations included in the provisions of the NDAA as the motivation for his motion:

What is the Due Process Guarantee Act? In short, the amendment would raise the bar the government has to clear in order to indefinitely detain American citizens and lawful permanent residents apprehended on U.S. soil.

It would forbid the government from justifying such detentions using general authorizations of military force, such as the 2001 AUMF against the 9/11 plotters.

Instead, the government would have to obtain explicit, written approval from Congress before detaining Americans without charge, if they are captured in the United States.

The Due Process Guarantee Act is based on a simple premise: If the government wants to take the extraordinary step of apprehending Americans on U.S. soil without charge or trial, it should get extraordinary permission from Congress.

Finally, Lee uses the language of the *Federalist* to remind his colleagues that we cannot defend the Constitution and the principles of liberty upon which it is built by betraying those very principles.

“We can secure the homeland without using the ‘formidable instruments’ of tyrants,” Lee declared.

*Photo of Senator Mike Lee: By Gage Skidmore from Peoria, AZ, United States of America - Mike Lee, CC BY-SA 2.0, <https://commons.wikimedia.org/w/index.php?curid=57725267>*



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