Written by **Joe Wolverton, II, J.D.** on May 14, 2012

NDAA 2013 Headed to Full House; Smith/Amash Amendment Offered

As we reported late last week, the House Armed Services Committee passed the latest version of the National Defense Authorization Act (NDAA).

We also informed readers that despite promises to the contrary from Committee Chairman Howard P. "Buck" McKeon (R-Calif.), the provisions of the bill permitting the indefinite detention of American citizens without charge or trial remain intact.

Sometime this week the House will begin deliberating the annual markup of the NDAA, and there is hope that there will be renewed opposition from members of Congress to the most pernicious sections of the bill — those giving the President authority to deploy the armed forces of the United States to arrest and indefinitely detain American citizens apprehended on American soil who are suspected by him of posing a military threat to the security of the homeland.

Even a cursory reading of the revamped version reveals the presence of these most unconstitutional grants of power, despite assurances that the new language is less offensive to our nearly-1,000-year history of enjoying these basic civil liberties.

For example, Section 1033 of the mark-up version passed by the committee is pointed to by McKeon as proof that habeas corpus is protected in the 2013 legislation. 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 that passed out of the House Armed Service Committee on Thursday that will guarantee Americans will be tried in a constitutional court and not a military commission.

Curiously, furthermore, McKeon's mark-up 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.

Fellow Republican and consistent constitutionalist Representative Justin Amash (Mich.) is calling McKeon (and others of his party) on the carpet for allowing such an infringement to occur on their watch.

Recently, Amash made a crucial distinction between the right to know why one is being held (habeas corpus) and the fact that one is being held in the first place.

"The problem isn't Habeas; the problem is Americans being held without charge or trial forever," Amash told The Hill.

In a laudable effort to prevent such a scenario from being perpetuated, Amash has joined forces with Democratic Representative Adam Smith (Wash.), and together they are offering an amendment to the bill that would explicitly repeal the indefinite detention provisions, as well as one that would allow the prisoners to be transferred into the custody of the military.

Currently, the Smith-Amash Amendment (officially styled the "Due Process and Military Detention Amendments Act") has 60 sponsors from both major political parties. Given the noble aim of the Smith proposal, all constitutionalists should be de facto co-sponsors of the bill, as well.

The Smith-Amash amendment identifies and closes two very large gaps still present in the NDAA.

First, the Smith-Amash Amendment explicitly forbids the indefinite detention of suspects, as well as the conducting of the trials of such suspects before military tribunals. The language in this amendment makes it clear that any individual arrested in the United States on charges stemming from the NDAA or the AUMF would be tried in a civilian court and be afforded the complete catalog of constitutional protections.

Second, the Smith-Amash Amendment repeals that section of the NDAA that foreigners suspected of committing terrorist acts be held in military custody, unless they have been granted a specific waiver from the President.

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 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.

On this point, it is important to understand that although a member of Congress would describe himself

as "conservative," that is no reason to rely on his opposition to the NDAA. Take for example the following comments from Republican Representative Jeff Landry of Louisiana when asked by The Hill about his position on the provisions in question.

"Do I believe that language and the NDAA is a perfect protection of the liberties we cherish? Probably not," Landry admitted.

"We're having this debate because there's a threat," he continued. "If the threat was eliminated there would be no need for the debate."

Later, the D.C.-based blog reports that "Landry opposes Smith's amendment" because he doesn't want to completely divest the president of power to apprehend suspected terrorists "on American soil."

Finally, Landry summarized what he assumes is the crux of the concern over the NDAA and its obliteration of constitutional civil liberties.

"What people were looking for was to ensure that there was some sort of due process when the executive detains someone," Landry said.

Congressman Landry is missing the point. It isn't "some sort of due process" that the people want before citizens can be captured and hauled away to Guantanamo. American citizens demand that the full panoply of due process rights be applied to each and every suspect before any sort of permanent imprisonment is imposed.

That is to say, there must be reasonable cause to believe someone committed a crime, there must be charges, there must access to an attorney to aid the suspect in presenting a defense to those charges, there must be a trial before an impartial judge (in a civilian court of law), and there must be a jury of one's peers considering the evidence presented at that trial. Finally, there must be a sentence imposed according to applicable guidelines and the accused must have the opportunity to appeal his conviction.

That is what the American people want.

Debate on the NDAA for Fiscal Year 2013 will begin this week, giving concerned Americans time to contact their elected representatives and inform them they will not reelect anyone who votes for the NDAA or against the Smith-Amash Amendment.

Photo: Representatives Adam Smith (left) and Justin Amash