

## **Myth vs. Fact on Detainment Authority in 2012 National Defense Authorization Act**

The 2012 National Defense Authorization Act (NDAA) passed the House on December 14, 2011. This legislation helps carry out the first job of the federal government – our national defense. The FY 12 NDAA simply ensures that the U.S. will have the ability to meet the evolving and continuing nature of terrorist threats to our country; however, there has been a fair amount of inaccurate information and misunderstanding about the final version of the NDAA.

- **What is the NDAA?**

The NDAA is the authorization for appropriations for national defense as instructed in Article, 1 section 8 of the Constitution; to “provide for the common defense.” This bill provides troop pay and benefits, funding for weapons and equipment, and for research and development.

- **Why did it pass so quickly?**

The NDAA extends vital troop pay and war-related authorities scheduled to run out in the next several weeks. Without immediate passage, troop pay and benefits could be suspended for our armed forces. Other vital authorities include enlistment and reenlistment bonuses, retention and accession pay for critical skills and pay for hazardous duties.

I believe we must remain committed to our soldiers who are serving our country and provide them with the tools they need to complete their mission and return to their families as soon and as safely as possible. We have an obligation to future generations of Americans to fight terrorism and the groups that use it. I will continue to support efforts to strengthen our national defense and support our uniformed men and women who are committed to protecting America.

- **Reasons for misunderstandings of detainee and custody provisions:**

There have been multiple versions of the bill language regarding these provisions and previous versions did not have all of the protections that were in the final bill. There has been plenty of time for the press and interest groups to report misinformation about these provisions before the final bill was ready to be voted on. In addition, some groups do not agree with current law. Some of them believe that all Al Qaeda terrorists should have the full constitutional rights of an American citizen, including the right to consult a lawyer, even on the battlefield. The final language of the bill, however, is a bipartisan effort to combat terrorist activities on the battlefield and here at home. While these debates will continue, the purpose of this bill was to put into statute the current legal standard agreed upon by two administrations and the courts.

It has become apparent that some well-intentioned people have expressed frustrations for reasons that simply do not exist.

That does not mean that Congress should not continue to examine this issue. There may be legislative improvements that need to be made. We must protect Americans from Al Qaeda and other terrorists and at the same time protect our individual rights and liberties under the Constitution. We can do both.

- **How does Congress have the power to direct these provisions?**

Congress is simply reaffirming the powers directing the 2001 Authorization for Use of Military Force (AUMF).

AUMF grants the President with the authority “to use all necessary and appropriate force” against those who planned or help orchestrate the 9/11 attacks “in order to prevent any future acts of international terrorism against the United States.”

The Obama Administration has interpreted the AUMF to include the authority to detain individuals who were part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States. This interpretation is nearly identical to the interpretation used by the Bush Administration.

1. Section 1021 of the NDAA seeks to put in statute the interpretation of both the Bush and Obama Administrations relating to the detention authority provide by the 2001 AUMF; however, section 1021 includes the following explicit language: “Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.” [SUBTITLE D. SEC. 1021. \(p. 655\)](#)
2. Section 1022 of the NDAA requires military custody for certain foreign terrorists, but includes a national security waiver for the President and explicitly exempts U.S. citizens from the requirement. [SUBTITLE D. SEC. 1022. \(p. 657\)](#)

- **Why do we need these provisions?**

Ten years after the 9/11 attacks and with the withdrawal of troops from Iraq and Afghanistan, our national security faces two challenges with respect to prosecuting the war on terror. First, the enemy is using the instruments of our free society against us, as we always knew they would. In this case, they are using our court system; trying to poke holes in the ten-year-old congressional authorization for the use of force against al Qaeda. That means judges are making decisions about who can be targeted and detained. *We must make sure that these choices aren't made by activist judges from the bench, but by commanders on the battlefield.*

Second, the Obama Administration is slipping back into the pre 9/11 mindset that says terrorism is a crime, not an act of war. The implications for this change are huge. It means that terrorists attacking America at home, like the underwear bomber or the Times Square bomber, go into civilian law enforcement custody instead of military custody. Instead of treating these

individuals like terrorists, they are treated like criminals and tried in civilian courts. *It is vital that terrorists bent on waging war against American freedom are treated according to the laws of war, not treated like simple criminals.*

- **Why are people concerned?**

Our constituents are concerned that this will give the President or the military the power to arrest or detain anyone they want, including American citizens within the U.S. if they are branded as a terrorist. That is not true. This bill makes explicit provisions that apply to neither U.S. Citizens nor legal aliens.

- **Actual language regarding U.S. citizens in the bill:**

[SUBTITLE D. SEC. 1021. \(p. 655\)](#)

(e) AUTHORITIES.—Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.

[SUBTITLE D. SEC. 1022. \(p. 657\)](#)

(b) APPLICABILITY TO UNITED STATES CITIZENS AND LAWFUL RESIDENT ALIENS.—

(1) UNITED STATES CITIZENS.—The requirement to detain a person in military custody under this section does not extend to citizens of the United States.

