

Rand Paul Amendment to 2013 NDAA Does Nothing

U.S. Senator Rand Paul (R-KY) is proposing to amend S. 3254, the 2013 National Defense Authorization Act (NDAA). Before we get too excited about Senator Rand Paul's amendment, due diligence must be given as to what it does and doesn't do.

Senator Paul's amendment is ineffectual for several reasons including, but not limited to:

1. It only applies to citizens, and ignores the rights of non-citizens, regardless of immigration status.
2. The use of the term "captured" implies full spectrum military operations against U.S. citizens within the United States, yet it is unclear what this authority is based upon. Does Senator Paul accept the pretense that America is part of the "battlefield," and as such, is under the "law of war" and martial law?
3. Senator Paul's amendment only references detention of U.S. citizens by the Armed Forces of the United States, but does not apply to
 - a. *"any other foreign country,"* or
 - b. *"any other foreign entity,"* (See 2012 NDAA, Section 1021(c)(4))
4. By Senator Paul tying his amendment to the AUMF, the amendment only applies to that part of the 2012 NDAA targeting profile that reaffirmed the AUMF, but does not cover the second half of the 2012 NDAA targeting profile, which is the larger of the two.

Senator Paul's proposed amendment would add the following section to the 2013 NDAA:

"SEC. 1032. PROTECTION OF 6TH AMENDMENT RIGHTS OF UNITED STATES CITIZENS CAPTURED IN THE UNITED STATES PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.

"A citizen of the United States who is captured or arrested in the United States and detained by the Armed Forces of the United States pursuant to the Authorization for Use of Military Force (Public Law 107-40) shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."



Let's look at the first part of Senator Paul's amendment.

"A citizen of the United States who is captured or arrested in the United States and detained by the Armed Forces of the United States pursuant to the Authorization for Use of Military Force (Public Law 107-40)..." (emphasis added)

As Rep. Justin Amash (R-MI) [argued](#) during the May, 2012 debate of the Smith-Amash amendment to the House version of the 2013 NDAA (H.B. 4310), the protections of the Constitution and Bill of Rights in the United States apply to all "persons," not just citizens. The 5th Amendment states, "No person" and "any person," not "citizen."

How is it that a U.S. citizen, who is "captured or arrested in the United States," comes into military custody? Often times, the terms "capture" and "arrest" are used interchangeably; however, when both terms are used together in legislation, they would be interpreted to have different meanings. In fact, the term "capture" is a term of art specifically referring to a military action. (See Black's Law Dictionary) Police "arrest;" the military "captures."

If the FBI or any other federal or state law enforcement "arrests" a citizen, let's say in Kansas City, based on a suspicion that they fall into the category of "covered persons" subject to detention under the 2001 AUMF, are they going to, instead of taking you to the local jail, deliver you to the Army brig at Ft. Leavenworth, Kansas? If Interpol (which has diplomatic immunity), or one of any number of "coalition forces" present in the United States "capture or arrest" a U.S. citizen in the United States, then the entire premise of Senator Paul's amendment to restore 6th Amendment protections to U.S. citizens is false. Since the 2012 NDAA, Section 1021(c)(4) authorizes transferring detainees "to the custody or control of... any other foreign country, or any other foreign entity," then the lack of substance of Senator Paul's proposed amendment become even more apparent.

The 2001 Authorization for Use of Military Force (AUMF) only applied to "A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks." Senator Paul's amendment doesn't address whatsoever the expansion of the targeting profile included in the 2012 NDAA, Section 1021(b)(2). Judge Katherine Forest, in *Hedges v. Obama*, acknowledged the absurdity of the government's argument that the AUMF and 2012 NDAA targeting profiles were one and the same, stating, "Frankly, that makes no sense," in her May 16, 2012 preliminary injunction against the "indefinite detention provisions," and also rejected it in her [permanent injunction](#) issued Sept. 12, 2012.



As referenced in the 2012 NDAA, [10 USC 818 – Art. 8. Jurisdiction of general courts-martial](#):

“General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.” (emphasis added)

The 2012 NDAA, [Section 1021\(a\)\(1\)](#) states:

“IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force [AUMF] (Public Law 107–40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons ...pending disposition under the law of war.” (emphasis added)

According to the 2012 NDAA, Section 1021(c)(3), Congress granted the President the authority to “*Transfer for trial by an alternative court or competent tribunal having lawful jurisdiction.*”

The 2012 NDAA, Section 1021(a) authorizes the military detention of any “covered person,” including U.S. citizens, “*pending disposition under the law of war.*” According to the April, 2010 Congressional Research Service (CRS) report, [The Military Commissions Act of 2009: Overview and Legal Issues](#), “*A military commission has jurisdiction over persons subject to ...the law of war. Military commissions are expressly authorized to determine their own jurisdiction.*” (emphasis added)

Let’s look at the second part of Senator Paul’s amendment.

“...shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

This part of Senator Paul’s amendment is essentially the 6th Amendment to the U.S. Constitution with one notable difference. The rights protected in the 6th Amendment apply to “the accused,” regardless of citizenship. Senator Paul’s amendment would only apply to citizens.

Also, according to the April, 2010 Congressional Research Service (CRS) report, [The Military Commissions Act of 2009: Overview and Legal Issues](#), “*There is no right to a speedy trial.*”



In summation, Senator Paul's amendment looks good, but does nothing. If the good Senator from Kentucky desires to offer an amendment to the 2013 NDAA that will actually move in the right direction of defending/restoring our constitutional rights, he might consider introducing the [Smith-Amash Amendment](#) that was introduced in the House earlier this year by Rep. Adam Smith, ranking member on the House Armed Services Committee.

Defending the rights of the People is the reason our constitutional republic was formed. That is "job one." Under the "color of law," the federal government has declared the whole world is the "battlefield," including the United States homeland, and placed the United States under martial law using the Military Commissions Acts of 2006 & 2009, and the 2012 National Defense Authorization Act (NDAA).

Unless We the People are vigilant guardians and watchdogs of liberty, we will soon have no rights at all and live in a totalitarian dictatorship.

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For additional analyses on the NDAA read these articles at the **Lawfare Blog: Hard National Security Choices**:

["Tweaking Senator Paul's NDAA Detention Language,"](#) by Wells Bennett

["The FY2013 NDAA and Domestic Detention – Now With More Misdirection,"](#) by Steve Vladeck

["On Amending the NDAA to Preclude Military Detention of Citizens Captured in the U.S.,"](#) by Robert Chesney

["Amicus Brief Filed in Hedges by Senators McCain, Graham, and Ayotte,"](#) by Wells Bennett

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