

Is Indefinable Detainment Indefinite Detainment?

By Brian Nistler

Habeas corpus is an important aspect of the American legal system. The right to seek the writ of habeas corpus is implied through the Suspension Clause of the Constitution (Article 1, section 9 clause 2), which limits the suspension of habeas corpus to times of rebellion or invasion. Habeas corpus is the ability to seek relief from unlawful imprisonment by forcing the captors to present to the court the case against the accused. There have been times in American history when habeas corpus has been suspended, including by President Lincoln during the Civil War (see *Ex Parte Merryman*). Today, it is possible that, with the signing of the National Defense Authorization Act (NDAA) on December 31st, President Obama has also allowed for the suspension of habeas corpus of U.S. citizens suspected of terrorism, although he claims that his administration will not use it.

The primary function of the NDAA is the appropriation of the budget for military spending, which totals \$662 billion this year. The bill also includes a number of other provisions including the possibility of punishing oil firms that do business with Iran. However, it is from section 1021 that most of the controversy arises. Section 1021 allows for the detention of anyone “engaged in hostilities against the United States or its coalition partners . . . without trial until the end of hostilities.” A certain reading of the NDAA may lead one to believe that U.S. citizens may be held indefinitely without trial, an idea that goes against the very principle of the American Constitution and legal system.

The Authorization to Use Military Force (AUMF), a joint resolution by Congress signed shortly after the 9/11 attacks, governs what actions and what kind of detainment can be taken against combatants who are responsible for the September 11th attacks. The AUMF authorizes the President to use “all necessary and appropriate force” against those responsible for the September 11th attacks.” (See <http://news.findlaw.com>). Presumably this applies to al Qaeda and its associates. The NDAA makes no such distinction or limitation and instead uses the broad language of “hostilities” against the U.S. with the only limitation being the end of such hostilities. The President suggested that section 1021 in NDAA was unnecessary because it merely affirmed the power of the AUMF, however the AUMF never mentions the detainment of U.S. citizens without trial. With the NDAA as opposed to the

AUMF it is now possible to detain U.S. citizens without trial. Some believe that the problem with this is that it allows for the detainment of United States citizens without trial and potentially for an indefinite amount of time due to the phrasing “until the end of hostilities.” It is that exact phrasing that raises so many issues: what is the end of hostilities? We are not in a defined war, but a war against an idea, against terrorism. Will hostilities end when the U.S. leaves Afghanistan? When there are no more terrorist groups? The ambiguity within the phrasing is intentional, because we cannot know when the hostilities will end. However, the length that someone can be allowed to detain someone else should not be so ambiguous.

The ability of the detainment of unlawful combatants or those with suspected ties to terrorist organizations has been questioned, discussed, and narrowed by several Supreme Court decisions, including *Hamdi v. Rumsfeld* where the Court stated that, “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.” 542 U.S. 507 (2004).

In addition to the possibility of being held without trial, the NDAA also authorizes a detainee’s trial by a military tribunal, or "transfer to the custody or control of the person's country of origin," or transfer to "any other foreign country, or any other foreign entity." § 1021. The idea of extraordinary rendition also raises red flags. This provision adds to the sweeping power within the NDAA so that those detained may not have the best availability to a proper defense when they are prosecuted. Important subsections to note are sections 1021(d), and 1021(e). Section 1021(d) states that the bill does not "limit or expand the authority of the President or the scope of the Authorization for Use of Military Force." This seems contradictory considering the limitations under the AUMF that are not present in the NDAA. Also, under section 1021(e), the bill may not be construed to affect any "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.” § 1021(d).

President Obama made it clear in his signing statement on the bill that his administration would not indefinitely detain any United States citizen. The President was

quoted as saying he wanted “to make clear beyond doubt that the legislation does nothing more than confirm authorities that the Federal courts have recognized. . . . Moreover, I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens . . . [because] doing so would break with our most important traditions and values as a Nation. My Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law.” (See www.whitehouse.gov for the President’s signing statement).

The Obama administration has tried to quell disconcertment with the wording of the NDAA, however many are still nervous that Obama, or another president, may use the wording of the act to detain United States citizens indefinitely. Even if this were so, the case of *Hamdi*, and others like it, show it is unlikely that the Supreme Court would allow any major sweeping changes to the well-established principle of habeas corpus. It is likely, however, that the debate on security and freedom will continue for quite some time, and this is just the latest chapter in balancing our freedom against our need to feel safe and secure. If the administration keeps its word then the Supreme Court will not be able to review the law. Unfortunately, it would take a situation where a U.S. citizen would be detained under the NDAA for the law to be reviewed. It is highly likely that our worst fears of the NDAA will come true, however it is paramount to watch the issue and make sure that the suspension of habeas corpus does not happen.

Sources:

- <http://usgovinfo.about.com/od/rightsandfreedoms/a/habeuscorpus.htm>
- <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>
- http://www.huffingtonpost.com/duncan-quirk/a-brave-new-fahrenheit-20_b_1180420.html
- <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540rh/pdf/BILLS-112hr1540rh.pdf>
- <http://www.nytimes.com/2012/01/01/us/politics/obama-signs-military-spending-bill.html>
- *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)
- <http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html>