

May 9, 2012

The Honorable Howard P. McKeon  
U.S. House of Representatives  
2184 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman McKeon:

As former government officials with significant national security experience, we write to you in support of provisions that were included in the National Defense Authorization Act (NDAA) for Fiscal Year 2012 relating to the detention of enemy combatants. As the House will soon begin consideration of the NDAA for Fiscal Year 2013, we also write to address misconceptions about the FY12 provisions and efforts by others to exploit those misconceptions.

Importantly, the FY12 NDAA included an affirmation of the detention authority provided by the 2001 Authorization for Use of Military Force (AUMF). Given the President's plan to withdraw U.S. combat forces from Afghanistan and the continuing threat posed by groups like al Qaeda in the Arabian Peninsula, this affirmation was a critical step in reinforcing the military's legal authorities to combat terror.

Some have argued that the FY 12 NDAA's affirmation of detention authority altered the status quo, and is an "expansion" of the power of the federal government. This is false.

The FY12 NDAA explicitly states that "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 persons who are captured or arrested in the United States."

As the Heritage Foundation recently wrote, "The NDAA has not impacted the conditions under which a U.S. citizen may (or may not) be detained... The law regarding how U.S. citizens are handled, including the right to habeas corpus, is the same today as it was the day before it [the NDAA] was passed." The detainee provisions of the NDAA merely codified existing case law related to detainees, period.

On September 18, 2001, Congress passed the AUMF, which authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons..."

As you are well aware, the law of armed conflict, also called the law of war, allows for a country engaged in armed conflict to detain the enemy for the duration of hostilities. That age old principle existed well before September 11, 2011 and is a right that all countries must retain during a time of war. Furthermore, the law of armed conflict does not discriminate between

enemy combatants who are citizens of the United States and those that are not. Any citizen who joins al Qaeda or its affiliates is properly classified as an unlawful enemy combatant and may be treated as such. We find the notion propagated by some, that a citizen who has nothing to do with al Qaeda could be picked up off an American street and detained by the military, to be ridiculous.

In 2004, the U.S. Supreme Court recognized in *Hamdi v. Rumsfeld* that the United States had the legal authority to detain a U.S. citizen captured fighting alongside the Taliban in Afghanistan who was later detained in the United States pursuant to the AUMF. However, the Supreme Court made it clear that such detainees must have the right to challenge the legality of their detention before a federal judge. The Court noted that “[a]bsent suspension, the writ of habeas corpus remains available to every individual detained within the United States.”

As you know, several members of Congress have introduced legislation relating to the detainee provisions in the FY12 NDAA. Representative Scott Rigell recently introduced H.R. 4388, the “Right to Habeas Corpus Act,” which would affirm the right of any person detained in the United States pursuant to the AUMF to challenge the legality of their detention in an Article III court. Representative Rigell’s bill is entirely consistent both with the FY12 NDAA and existing case law.

Unfortunately, other members of Congress have introduced proposed legislation that would instead erode the authorities provided by the AUMF and limit the military’s ability to pursue terrorists. For instance, Representative Adam Smith and Senator Mark Udall have introduced legislation that would prevent the President from ever detaining anyone, including foreign terrorists, in the United States pursuant to the AUMF. Representative John Garamendi and Senator Dianne Feinstein have introduced similar legislation that would leave it up to Congress to decide when the President has the authority to detain U.S. citizens who have joined the enemy.

It is highly questionable whether either of these proposed pieces of legislation would be constitutional as they would deprive any president of lawful options that he may need in order to fulfill his constitutional duties as commander in chief to defend the United States and protect American citizens. Rewarding terrorists with greater rights for making it to the United States would actually incentivize them to come to our shores, or to recruit from within the United States, where they pose the greatest risk to the American people. Such a result is perverse.

Although we believe the FY12 NDAA detainee provisions, read along with the AUMF and pertinent case law is clear, we understand the urge to affirm the availability of habeas corpus rights of any terrorist captured in the United States. Should that affirmation be necessary to erase doubts, we would respectfully encourage you to consider incorporating the language from Representative Rigell’s “Right to Habeas Corpus Act” in the FY13 NDAA to address misconceptions and to defend against these other attempts to undermine the critical wartime authorities provided by the AUMF.

As the House begins consideration of the NDAA for Fiscal Year 2013, we urge you to ensure that attempts to exploit misconceptions about the NDAA are not successful in harming U.S. national security.

Sincerely,

Edwin Meese III  
Former U.S. Attorney General

Michael B. Mukasey  
Former U.S. Attorney General and  
Former U.S. District Judge

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