

The NDAA for 2012: what it means for us

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Field Notes From A Battleground

By Charles R. Church

Charles R. Church has written before for *The Lakeville Journal*, on drone warfare and national security, but will now write a more regular column. Church conducts an appellate law and alternative dispute resolution practice in Salisbury with the Law Office of Charles R. Church LLC. He is a Senior Fellow at the Center for Policy and Research, Seton Hall Law School, Newark, N.J., where he consults on Guantanamo Bay and Abu Ghraib detention and related issues. He also consults on detention, torture, habeas corpus and related issues for Human Rights First, New York, N.Y., and Washington, D.C. His article “Sparks Fly Between the Supreme Court and the D.C. Circuit as Indefinite Guantanamo Detentions Continue,” appeared in the August/September 2011 issue of “Connecticut Lawyer.”

When President Barack Obama — despite his threat to veto earlier incarnations — signed the final bill for the National Defense Authorization Act for Fiscal Year 2012, Benjamin Wittes, the Brookings Fellow and well-known national security law analyst, wrote at the invaluable law blog (www.lawfareblog.com) [3], which he co-founded:

“The volume of sheer, unadulterated nonsense zipping around the Internet about the NDAA boggles the mind. There was a time — only a few months ago — when the NDAA detention provisions were the obscure province of a small group of national security law nerds. Now, however, this bill has rocketed to international notoriety.

The added attention is a good thing. It’s an important subject and warrants genuine debate and discussion. The trouble is that much of the discussion is the intellectual equivalent of the ‘death panel’ objections to the health-care bill. While certain journalists have done a good job covering the controversy, it’s much easier to get bad information than good....”

Most of us heard over recent months about the showdown that was looming as the 2012 version of the military spending authorization bill was coming together. At more than 1,000 pages, it does a great many things. Almost all the controversy about it deals with a single portion: “Subtitle D — Counterterrorism.” The subtitle contains a number of provisions related to military detention of terrorism suspects and the interaction between military detention and the operation of the criminal justice system, and President Obama was threatening to veto the measure.

Previous attempts by Congress to control such matters have not come to a good end. A provision in the Detainee Treatment Act of 2005 (DTA) sought to strip the courts of jurisdiction to hear petitions for habeas corpus filed by aliens detained at Guantanamo. Relying on this provision, the government moved to dismiss the habeas petition in *Hamdan v. Rumsfeld*, a case brought by a Yemeni national to challenge a conspiracy charge in a military commission. With Justice Stevens writing, the Supreme Court held that the jurisdiction-stripping provision of the DTA applied only to habeas petitions filed after its effective date and denied the motion. Further, the military commission convened to try Hamdan lacked power to proceed because its structure and procedures violate the Uniform Code of Military Justice and the Geneva Conventions.

Congress sought to cure the limitation imposed by Hamdan on the habeas jurisdiction-stripping of the DTA by enacting the Military Commissions Act of 2006 (MCA). The MCA made plain that courts would have no jurisdiction to entertain habeas petitions filed by Guantanamo detainees, whether pending or filed after its enactment. The Supreme Court responded by finding in *Boumediene v. Bush* that the MCA violated the Suspension Clause of the Constitution, which allows habeas suspension only “when in Cases of Rebellion or Invasion the public Safety may require it.” If the privilege of habeas corpus is to be denied to petitioners, Congress must act in accordance with the requirements of that Clause. This it failed to do.

President Obama lifted his NDAA veto threat only after some of the worst aspects of the bill had been eliminated. But as Prof. David Cole, a highly regarded human rights lawyer who teaches at Georgetown Law, wrote in “A Bill of Rights for Some” at NYR Blog on Dec. 16, Congress in the final bill created a presumption in favor of military detention for foreign al-Qaeda suspects, and imposes this presumption even for foreigners caught within the United States. While the president may waive that, the presumption is still wrong; given its inconsistency with basic principles of due process, indefinite military custody should be the last, not the first resort.

The law puts Congress’s stamp on a dubious and untested interpretation of military detention authority. And, most disturbingly, the law effectively prevents President Obama from closing Guantanamo. He can’t use any funds to build or modify a facility in the United States to house Guantanamo detainees, and he cannot transfer any Guantanamo detainee to the United States, even to face criminal trial. He cannot release any detainee to another country without meeting onerous certification requirements regarding that country’s security measures that probably cannot be met. The military, after careful review of all remaining Guantanamo detainees, has determined that more than half don’t need to be there.

This series on the 2012 NDAA will continue with four more installments. Next, Church will discuss the reactions to the president’s signing the NDAA into law.

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The NDAA for 2012: what it means for America

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Field Notes From A Battleground

By Charles R. Church

Part 2 of 5

In his last column, Church described the uproar following Barack Obama's signing of the bill for the National Defense Authorization Act, with its "Subtitle D — Counterterrorism." President Obama lifted his veto threat only after some of the worst aspects of the bill had been eliminated. Nonetheless, legitimately troubling aspects remained.

The ACLU denounced the ultimate signing of the bill in near-apocalyptic terms. "President Obama's action today is a blight on his legacy because he will forever be known as the president who signed indefinite detention without charge or trial into law," bellowed its Executive Director, Anthony Romero, at aclu.org on Dec. 31. "Any hope that the Obama administration would roll back the constitutional excesses of George Bush in the war on terror was extinguished today."

Even the New York Times editorial board on Dec. 15 thundered, under the rubric Politics Over Principle:

"This week, [President Obama] is poised to sign into law terrible new measures that will make indefinite and military trials a permanent part of American law." The Times called the signing "a complete political cave-in, one that reinforces the impression of a fumbling presidency."

The Times complained that the NDAA "ban[s]...spending any money for civilian trials for any accused terrorist ... strip[s] the F.B.I., federal prosecutors and federal courts of all or most of their power to arrest and prosecute terrorists ... and give[s] future presidents the authority to throw American citizens into prison for life without charges or trial."

Fortunately, as national security law experts Professors Martin Lederman and Stephen Vladeck wrote in "The NDAA: the Good, the Bad, and the Laws of War" at Lawfare Blog on Dec. 31, the bill signed by the president does none of those things.

The Obama administration successfully insisted that the prohibition on expenditures for criminal trials of terrorism suspects be dropped. As for the law enforcement authorities, the conferees added a provision expressly confirming that "nothing in [the bill] shall be construed to affect the existing criminal enforcement and national security authorities of the [F.B.I.] or any other domestic law enforcement agency ..."

As to the lifetime detention of U.S. persons, "the bill by its very terms...confirms what would have been the proper reading anyway—namely, that its detention authorization provision...does not '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.'" For good measure, the relevant section "states that its purported presumption of military detention 'does not extend to citizens of the United States.'"

Perhaps with tongue in cheek, well-known human rights advocate Scott Horton wrote more moderately at Harpers.org on Jan. 3: "Obama Signs the NDAA, World Does Not End (Yet)." So the NDAA, for all its

flaws, is not the disaster for human rights that some claim it to be.

With all those wildly disparate and often extravagant opinions flying around, sometimes from sources we have reason to respect, what are we mere mortals to conclude about the NDAA? I intend in this series of columns to answer that question. In doing so, I will rely primarily on a number of contributors to Lawfare Blog — like Lederman and Vladeck, whom I mention above — who are recognized experts in national security law. I have followed their work for a good while, and value their opinions very highly.

Let's look first at what Barack Obama said when he signed the measure into law. His signing statement recognized problems even with the final bill, expressing his "serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists," and lamented that "some in Congress continue to insist upon restricting the options available to our counterterrorism professionals and interfering with the very operations that have kept us safe."

However, provisions in earlier versions "that otherwise would have jeopardized the safety, security, and liberty of the American people" were revised. "Moving forward, [the Obama Administration] will interpret and implement [certain described] provisions... in a manner that best preserves the flexibility on which our safety depends and upholds the values on which this country was founded."

The next column will examine precisely what the NDAA will do.

Charles R. Church is an attorney practicing in Salisbury who for years has studied Guantanamo Bay detention, torture, habeas corpus and related issues.

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The NDAA for 2012: What it means

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Field Notes From A Battleground

By Charles R. Church

Part 3 of 5

In Part 2 of this series, Church described the mistaken denunciations of the NDAA and President Obama and more moderate criticisms raising justifiable concerns. This segment will analyze Section 1021, the most critical aspect of the NDAA.

With this background, let us examine what the NDAA will do, and what real concerns there might be:

1. Section 1021 — According to Lederman and Vladeck, the national security law experts mentioned last week (whose opinions are relied upon and sometimes quoted throughout this discussion of Section 1021), contrary to the predictions of many critics, this provision will not affect the unresolved question of whether the 2001 Authorization for Use of Military Force (AUMF) — the basis for detention authority recognized by the Supreme Court — would authorize a future president to place a U.S. citizen or resident who is apprehended in the United States into long-term military detention.

Such surely will not happen during President Obama's tenure. As the president said in his Signing Statement, "my administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation. (delete one of two periods)"

The section "affirms that the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority for the Armed Forces of the United States to detain covered persons...pending disposition under the law of war"—a disposition that may include trial of the person, or transferring him to his own nation or another country, or "[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF]."

The aforementioned New York Times editorial calls this "an unneeded expansion of the authorization for the use of military force in Afghanistan," which "make[s] indefinite detention and military trials a permanent part of American law." Happily, the section does neither. Section 1021 expressly provides that "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the [AUMF]." Detention of enemy forces until the end of hostilities and military trials are already part of our law—the NDAA will not expand or prolong those authorities, let alone make them "permanent."

Human rights lawyer Prof. David Cole, again in "A Bill of Rights for Some" at NYR Blog, raises an extremely important question about Section 1021. "Thus far, the lower federal courts have upheld detention of al Qaeda and Taliban members," but have not yet upheld the detention of "mere supporters." There is "much dispute about whether the laws of war [would] permit detention in those circumstances." He fears that "[u]nless this and future administrations construe these provisions as limited by the laws of war, they risk authorizing detention that the laws of war would not."

Lederman and Vladeck agree that the relationship between the AUMF detention authority and the laws of

war indeed has the potential to be a very important question. In fact, it's the one important substantive issue that has engendered an interpretative dispute among the judges on the D.C. Circuit, the court that decides all Guantanamo habeas cases.

In short, the Obama Administration has advanced the view that the AUMF detention authority should be construed as limited and informed by the laws of war—a reading that is supported by the rulings of most habeas judges. But two judges on the D.C. Circuit have insisted that it would be “both inapposite and inadvisable” for courts to look to the laws of war when construing the Executive’s detention authority under the AUMF—and this has caused some confusion in recent habeas cases.

But Section 1021, although it does not “limit or expand” the president’s detention authority, is best read to clarify Congress’s understanding of how the existing AUMF authority should be construed — namely as limited and informed by the laws of war, as the Supreme Court’s governing opinion in *Hamdi v. Rumsfeld* instructs and as the Executive branch has been arguing since 2009.

Section 1021 (c)(1) specifically refers to the military detention at issue as “[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF].” Section 1024(b) likewise refers to “long-term detention under the law of war pursuant to the [AUMF].” And Section 1023(b)(1), discussing the President’s “periodic review process” for GTMO detainees, refers to the detainee’s “law of war detention.” These statutory references should be sufficient to clarify Congress’s intent that the AUMF authority be construed with reference to that body of international law.

And they are bolstered by the NDAA’s legislative history, which is replete with references to military detention “under the law of war.” Lederman and Vladeck therefore conclude: “Importantly, this construction should govern not only habeas cases going forward, but also the detention practices for future administrations.” And President Obama’s Signing Statement reaffirmed that “[m]y Administration will interpret Section 1021 in a manner that ensures that any detention complies with the Constitution, the laws of war, and all other applicable law.”

The next column will examine Section 1021 further, and more aspects of what the NDAA will do.

Charles R. Church is an attorney practicing in Salisbury who for years has studied Guantanamo Bay detention, torture, habeas corpus and related issues.

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Field Notes From A Battleground

By Charles R. Church

Part 4 of 5

In Part 3 of this series, Church analyzed the critical element of the NDAA, Section 1021, which many critics see as disastrous. This week, he continues that analysis and examines other significant sections.

1. Section 1021 (continued) — As for Prof. David Cole's worry over whether the National Defense Authorization Act (NDAA) would permit detention of "mere supporters" of al-Qaeda and other enemy forces in ways not consistent with the laws of war, Lederman and Vladeck "think it is fair to assume that Congress has now ratified [the Department of Justice's] understanding that in construing the Authorization for Use of Military Force's (AUMF) detention authority, it may be necessary to look to permissible detention practices that would be 'appropriately analogous...in a traditional international armed conflict.'"

What kinds of "support" to al-Qaeda would justify military detention in light of "long-standing law-of-war principles"? The Department of Justice said in a 2009 brief that those who provide unwitting or insignificant support are not subject to AUMF detention authority. And there are likely significant detention limits with respect to persons who provide medical support to enemy forces while "permanently and exclusively engaged as a medic."

On the other hand, perhaps substantial supporters of enemy forces who are apprehended while accompanying such forces can be detained on roughly the same terms as the forces themselves, just as they can be in an international conflict. And Professor Ryan Goodman suggested in "The Detention of Civilians in Armed Conflict" for the *American Journal of International Law* that perhaps the AUMF could be construed to permit the United States to detain, in an internment capacity, civilians whose support for al-Qaeda makes such detention "absolutely necessary," or for "imperative reasons of security," akin to the permissible detentions of protected civilians in international conflicts under articles 42 and 78 of the Fourth Geneva Convention, as was done in the Iraq war. But for the most part, the "contours" of the "substantial support" basis for detention would have to be developed by the Executive branch and by the habeas courts in discrete application to concrete facts in individual cases. If any such cases arise, they "may require the identification and analysis of various analogues from traditional international armed conflicts."

Although there may be disagreement about how that approach cashes out in individual cases, "the larger point going forward is the central role that such law-of-war analysis should play...when the Executive and the courts construe what detention authority the AUMF confers upon the president."

2. Section 1022 — As Benjamin Wittes and fellow national security law analyst (and *Lawfare Blog* co-founder) Professor Robert Chesney explained last Dec. 19, this section purports not merely to authorize but to require military custody for a subset of those detainable under Section 1021. It requires that the military hold a "covered person" pending disposition under the law of war if that person is "a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-

Qaeda” and is participating in an attack against the United States or its coalition partners.

The president is allowed to waive this requirement for national security reasons. The provision exempts U.S. citizens entirely, and it applies to lawful permanent resident aliens for conduct within the United States to whatever extent the Constitution permits. And it insists that: “Nothing in this section shall be construed to affect the existing criminal enforcement and national security authorities of the [F.B.I.] or any other domestic law enforcement agency with regard to a covered person, regardless of whether such covered person is held in military custody.”

3. Section 1024 — According to Wittes and Chesney (whose opinions will be relied upon and possibly quoted throughout this treatment of NDAA sections), this mandates the creation of new and quite generous procedures for determining the status of detainees held in military custody. Regardless of where the detainee is held, the procedures provide a hearing before a military judge who will make a status determination; the detainee shall be represented by military counsel if he so chooses. These procedures can be applied as a matter of discretion where habeas is available, as in Guantanamo. For Bagram and elsewhere where habeas is not available, these provisions “seem to require a significant enhancement of process for detainees slated for long-term detention.”

4. Sections 1026 and 1027 — These prevent the use of federal funds for building detention facilities in the United States, or transferring Guantanamo detainees to domestic facilities or releasing them into the United States, effectively continuing a Congressional policy of preventing more Article III criminal trials of Guantanamo detainees and preventing the construction of alternative facilities that would enable President Obama to fulfill his promise to close Guantanamo.

5. Section 1028 — This prevents overseas transfers of Guantanamo detainees absent a rigorous certification by the Secretary of Defense that they will not pose a danger. Wittes and Chesney note that such a requirement under existing law has effectively halted efforts to resettle certain Guantanamo detainees, but the new certification requirement seems to allow slightly more flexibility.

The next column will make an overall assessment of where the NDAA leaves us. See the first parts of the series at www.tricornernews.com [3].

Charles R. Church is an attorney practicing in Salisbury who for years has studied Guantanamo Bay detention, torture, habeas corpus and related issues.

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Field Notes From A Battleground

By Charles R. Church

Part 5 of 5

In Part Four of this series, Church analyzed various sections of the National Defense Authorization Act. In this final part, he evaluates how well President Obama acquitted himself with the NDAA, and expresses his own grave concerns for when succeeding administrations take over.

So where does all this leave us? Not terribly far from where we were:

1. Detention authority — The National Defense Authorization Act for Fiscal Year 2012 (NDAA) is really a codification of the existing authority the administration claims. “It puts Congress’s stamp of approval behind that claim for the first time, and that’s no small thing. But it does not — notwithstanding the widespread belief to the contrary — expand it. Nobody who is not subject to detention today will become so when the NDAA goes into effect ...,” Wittes and Chesney say.

2. Indefinite detention of citizens — They also tell us that the NDAA does not authorize such detention, but it does not foreclose it either. Congress ultimately included language expressly designed to leave the question untouched, that is, governed by pre-existing law, which is unsettled on the question.

3. Does the NDAA mandate military detention of terrorism suspects? — “Not really, though both supporters and critics seem quite sure that it does,” say Wittes and Chesney. Rather, the NDAA sets military detention as a quasi-default position for a subset of detainable persons (members — not independent supporters — of al-Qaeda or its associated forces, but not the Taliban or its associated forces).

The government can nonetheless elect the civilian prosecution option as its preferred disposition “under the law of war,” and the statute provides a “waiver” mechanism that simply turns the mandatory detention requirement off altogether, on a written certification by the president or his designee that a waiver is in the best interests of national security. Either of these elections will be a visible, discrete act that can be the basis for political criticism.

4. Closure of Guantanamo Bay detention facility — The NDAA in Sections 1026 and 1027 does three things that makes it impossible, at least during fiscal year 2012, for President Obama to fulfill his promise to close the detention facility. It forbids him to spend any money readying an alternative site to house detainees in the United States; it forbids transfers of detainees to the United States; and it makes it difficult — though a little less difficult than it has been, note Wittes and Chesney — to transfer detainees to third countries.

5. Does it prevent civilian criminal trials of terrorism suspects? — Yes and no, Wittes and Chesney tell us. The restriction on transfer to the United States of Guantanamo detainees prevents civilian trials for anyone there. (Think, most notoriously, of Khalid Sheikh Mohammed, the alleged 9/11 mastermind). But the NDAA does not prevent civilian criminal trials for new captures, though it does authorize military detention as an alternative and in some cases as a default option.

Perhaps, given the extravagant claims about the NDAA, I should add that, no, it does not repeal the Bill of Rights, as the aforementioned Benjamin Wittes and Robert Chesney agree. To the extent that any provision is found to conflict with any provision in the Bill of Rights, it will not survive constitutional scrutiny.

And human rights groups and civil libertarians should be pleased about Section 1024, which as noted requires that people subject to long-term military detention for which habeas corpus review is not available — think of the Detention Facility in Parwan, Afghanistan — henceforth shall have the right to a military lawyer and a proceeding before a military judge to contest the factual basis for his detention.

How well did Barack Obama acquit himself? Given the final vote tallies in the Senate and the House, the two-thirds majorities in both houses required by Article I, Section 7 of the Constitution for overriding a presidential veto would have been available, absent some later vote flipping. And it is never easy to veto a defense authorization bill. Hence, doing what he did — negotiating to change the worst aspects then signing the bill — was at least a highly defensible course.

But that is not to say that the NDAA is not a cause for worry. Most vitally, presidential signing statements do not bind subsequent chief executives. When Barack Obama says that his “administration will not authorize the indefinite military detention without trial of American citizens,” I take that very seriously.

But what of the future?

As the aforementioned Scott Horton explained: “If you’ve watched any of the recent G.O.P. presidential debates, then you know that all of the contenders (excepting Ron Paul and possibly Jon Huntsman) embrace torture techniques like waterboarding, would expand Guantanamo, believe that military prisons are the alternative to an ineffective criminal justice system, would revive extraordinary renditions and CIA black sites, and generally rush to characterize anyone who thinks differently about the world as un-American or worse ... The question therefore becomes not what Barack Obama’s Justice Department would do with the NDAA, but what a Rick Santorum or Mitt Romney Justice Department would do.”

When I consider that, I tremble for the republic.

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