

The National Defense Authorization Act (NDAA) of 2012 Information for Concerned Activists

1 What does Section 1021 of the NDAA say?

Section 1021 of the 2012 National Defense Authorization Act “affirms” that the Authorization to Use Military Force (AUMF) allows the government to detain certain people, defined below, under the law of war. The AUMF was passed by Congress days after 9/11 to authorize the president to use “all necessary and appropriate force” against individuals and groups believed to be responsible for the 9/11 attacks.

This section of the NDAA applies to (1) those who planned or were otherwise involved in 9/11, as well as (2) any “person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.”

Under the NDAA people who fit into either of these two categories may be detained under the law of war, without trial, until the end of hostilities authorized by the AUMF.

2 What about Section 1022?

Section 1022 of the NDAA states that certain people captured in the course of AUMF-authorized hostilities *must* be held in military custody. This provision applies to people who are members or a part of Al Qaeda or an “associated force” that acts in coordination or under the direction of Al Qaeda, who have participated in planning or carrying out an attack or attempted attack against the United States or its coalition partners. Section 1022 explicitly exempts U.S. citizens, and may also exempt some lawful resident aliens.

3 Do these provisions apply only to Al Qaeda members, or could they be applied to U.S. activists?

While the text of the act purports to be limited to those already subject to detention under the AUMF, that authorization was explicitly linked to 9/11 and has been interpreted by the courts to apply only to those who are “part of” Al Qaeda. Section 1021 is more expansive, as it seems to authorize detention of Al Qaeda members, *as well as those who support Al Qaeda or “associated forces.”* There is no limitation requiring knowledge or intent to support Al Qaeda, and no limitation on what is meant by “associated forces.” The law could be interpreted to extend to someone who unwittingly donates money to a charity they believe supports orphans but is really an Al Qaeda front, or to members of groups which did not exist at the time of 9/11 and have no actual connection to Al Qaeda, but who the government says are inspired by (and thereby associated) with Al Qaeda.

It is unlikely that the law could be read to apply to groups with no connection or shared ideology with Al Qaeda. But the military doesn’t have to prove the Al Qaeda connection before detaining the person

in question, so theoretically, the category is extremely open to abuse by this or future administrations. Moreover, the NDAA should be very troubling to us all, as it reflects a trend on the part of Congress and the president to increasingly militarize the fight against “terrorism” both here and abroad, and it significantly expands the role of the military in domestic law enforcement operations, which in turn rolls back laws on the books since Reconstruction.

4 Does the law allow for the detention of American citizens captured in the U.S.?

Possibly. Section 1021(e) of the NDAA states that nothing in the act “shall be construed to affect existing law or authorities relating to the detention of U.S. citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.” However, existing law is not settled with respect to whether U.S. citizens captured in the United States may be indefinitely detained.¹ The answer to that question turns on whether the AUMF applies to the detention of American citizens captured in the United States. The Center for Constitutional Rights believes it does not; but the government—now or in the future—may argue it does. Moreover, an effort by Senator Diane Feinstein to include language in the NDAA clarifying that the AUMF only applies “abroad” was rejected by the Senate.

The exemption of U.S. citizens under section 1022 does not change this analysis, it simply means that military detention of qualifying U.S. citizens is *discretionary* rather than *mandatory* under the law.

5 For how long can someone be held under the NDAA?

The NDAA allows for detention until the “end of hostilities,” which in the context of a so-called global war on terror, could mean forever. And those held in indefinite detention are not necessarily afforded the fundamental rights which many take for granted in the U.S., including the right to counsel, to a trial, to confront one’s accusers, etc. These individuals would retain their habeas corpus rights (the right to challenge their detention in federal court) if captured in the U.S. or sent to Guantánamo Bay, but not if captured abroad and, for example, sent to Bagram Air Force Base. And even if they retained habeas rights, the Guantánamo detainee litigation has demonstrated such rights have been rendered largely meaningless by D.C. Circuit case law.

6 What is the impact of President Obama's signing statement?

When President Obama signed the NDAA into law, he accompanied it with a “signing statement” promising that his administration would not authorize the indefinite military detention of American citizens, and would work with Congress to “mitigate” concerns with the detainee provisions in the legislation, “oppose” attempts to expand those provisions in the future, and “seek the repeal” of those provisions.

A signing statement is nothing more than a presidential press release; it is not legally binding and has no impact or influence on the courts. It is worth noting that President Obama issued a similar signing statement with the 2011 NDAA, promising to “mitigate,” “oppose” and “seek the repeal” of the detainee transfer restrictions included in that law, but did none of those things. Even if President Obama follows through on promises in his signing statement, he will not be president forever, and the statement does not bind his successors.

¹ This issue was raised in the *Padilla* case—where the U.S. claimed authority to hold Jose Padilla, a U.S. citizen arrested in Chicago, in indefinite military detention—but it was never resolved by the Supreme Court because the government “mooted” the case by transferring Padilla back to the federal criminal courts to avoid Supreme Court review.