



April 19, 2012

RE: Oppose the Rigell Bill H.R. 4388 on the National Defense Authorization Act (NDAA) Detention Provisions; H.R. 4388 Provides No New Protections and May Cause Harm

Dear Representative:

The American Civil Liberties Union (ACLU) strongly urges you to refrain from cosponsoring--and oppose if offered--the inaccurately titled Right to Habeas Corpus Act, which Congressmen Scott Rigell has introduced as H.R. 4388. The Rigell bill is in fact useless and provides no new protections. Instead, H.R. 4388 could cause confusion over who the writ of habeas corpus protects. It also could deflect support away from better legislation that would effectively reinforce the prohibition against any president using the military to imprison persons in the United States indefinitely without charge or trial.

H.R. 4388 reflects either a misunderstanding of the concerns raised across the country during the debate on the indefinite detention provisions in last year's National Defense Authorization Act (NDAA) or a misunderstanding of the writ of habeas corpus. The result is a draft bill that does not fix anything and could cause some harm.

During the debate on sections 1021 and 1022 of the NDAA at the end of last year, particularly during the lengthy debate in the Senate, literally millions of Americans from across the political spectrum called or wrote to their members of Congress to express their opposition to any president having the power to order the military to imprison civilians indefinitely without charge or trial away from a battlefield. A particular concern raised throughout the country was whether a president could use the military for indefinite detention of persons within the United States itself. While we believe that such domestic use of indefinite detention without charge or trial would be unconstitutional and illegal, such power was claimed and exercised by the federal government against a few persons within the United States over the past decade, which resulted in imprisonment without charge or trial for several years in each case.

During the NDAA debate last year, Americans expressed to Congress their view that, particularly in the United States itself, no president should ever have the power to put civilians into prison indefinitely without charge or trial far from any battlefield. The standard instead should be conviction based on proof beyond a reasonable doubt, and not simply based on suspicions or allegations that fall short of the standard for conviction.

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But the Rigell bill does not prohibit any president from using the military to imprison civilians without charge or trial. H.R. 4388 provides, "Nothing in the Authorization for Use of Military Force [AUMF] or the [NDAA] shall be construed to deny the availability of the writ of habeas corpus in a court ordained or established by or under Article III of the Constitution for any person who is detained in the United States pursuant to the AUMF." While it superficially appears to protect important rights, it in fact does nothing helpful.

The writ of habeas corpus, on its own, does not guarantee that persons cannot be imprisoned indefinitely without charge or trial. Habeas corpus is an extraordinarily important protection, but it is solely a procedure to enforce the constitutional right to have a judge decide whether a person's imprisonment is lawful. Nothing in the Rigell bill addresses the underlying substantive question that a judge hearing a habeas petition would have to decide, namely, of whether and when a president can order the military to imprison a person indefinitely without charge or trial.

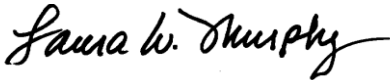
Further, there is no credible argument that the NDAA or AUMF suspended the habeas rights of anyone. The Supreme Court held in *Boumediene v. Bush*, 553 U.S. 723 (2008), that Congress cannot suspend the writ of habeas corpus unless its intent to suspend is clear, and it provides an alternative meaningful procedure to challenge the lawfulness of one's detention before a tribunal that can provide important due process protections, such as an independent review of evidence and the government's legal basis for the detention, and the power to order conditional release. Nothing in the AUMF or the NDAA shows any intent to suspend the habeas rights of any person, and, of course, there is no meaningful alternative to habeas corpus in either statute. The writ of habeas corpus was not suspended by either the NDAA or the AUMF. H.R. 4388 purports to address a problem that does not exist, and does nothing to address the concerns actually raised by Americans during consideration of the NDAA last year.

The Rigell bill also could cause confusion over whom the writ of habeas corpus protects. H.R. 4388 is limited to the habeas rights of "any person who is detained in the United States pursuant to the [AUMF]." However, the writ of habeas corpus is not limited to the United States, and is in fact available to some persons outside the United States. Certainly citizens and lawful permanent residents retain their habeas rights when traveling outside the United States, detainees at Guantanamo have habeas protection, and some others also have habeas rights outside the United States. The Rigell bill could confuse American citizens and others to conclude that their habeas protections are narrower than they actually are. While courts may not be misled by the Rigell bill, individual American citizens could be.

Finally, H.R. 4388 could deflect the focus away from legislation that meaningfully responds to the concerns raised during the NDAA debate about any power by any president to have the military indefinitely imprison persons without charge or trial. Among bills introduced in the House to date, H.R. 4192, introduced by Congressman Adam Smith, codifies a ban on the military imprisoning civilians without charge or trial or trying persons before military commissions within the United States, as well as repeals section 1022 of last year's NDAA. In addition, Congressman Ron Paul sponsored H.R. 3785, which repeals section 1021 of last year's NDAA. The Smith bill and Paul bill are both important steps towards restoring the rule of law, while the Rigell bill would be a step backwards.

For these reasons, the ACLU urges you to refrain from cosponsoring the Rigell bill H.R. 4388, and oppose it if it is offered for a vote. Please do not hesitate to contact Christopher Anders at canders@dcacclu.org or 202-675-2308, if you have any questions regarding this issue. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Laura W. Murphy". The script is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Laura W. Murphy
Director, Washington Legislative Office

A handwritten signature in black ink that reads "Christopher E. Anders". The script is cursive, with the first letters of the first and last names being capitalized and prominent.

Christopher E. Anders
Senior Legislative Counsel