THE NDAA and the 6TH AMENDMENT

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Below is a copy of an internet post by a Robert Chesney, published December 1, 2011 regarding the 2012 National Defense Authorization Act (NDAA) passed into law.

Robert Chesney is not only a Law Professor at the University of Texas but also a non-resident Senior Fellow at the Brookings Institute. In case you are not familiar with the Brookings Institute, the άDrive-byέ news media almost always presents it as an American Think-tank ς leaving the impression that it is politically neutral, which the Institute purports itself to be, when in fact it is a liberal/progressive leaning Think-tank. Of course, the same media proclaims the Heritage Foundation to be everything from a conservative based Think-tank to a radical right-wing organization. One thing they never describe it as is just another Washington-based Think-tank. They consistently label organizations such as the Heritage Foundation as a άconservativeέ entity while typically refusing to put any label on a liberal/progressive entity such as the Brookings Institute.

The comments below regarding the 2012 National Defense Authorization Act are interesting, coming from a politically moderate to progressive law professor.

Does the NDAA Authorize Detention of US Citizens? By Robert Chesney

> The Senate bill was amended after my original post below, in a manner that explicitly states that the NDAA should not be read as affirming or prohibiting citizen detention. I've written this post to explain exactly what this would mean.
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> I gather that there has been some confusion as to whether S. 1867, the NDAA bill currently pending in the Senate, should be read as (i) requiring the use of military detention for US citizens in some circumstances, (ii) authorizing it but not requiring it, or (iii) precluding it. The best reading of the language currently in the bill is (ii): Section 1031 and 1032 when read in conjunction suggest that US citizens are included in the grant of detention authority contained in section 1031, while being expressly *excluded* from the language in section 1032 that appears on the surface to affirmatively requires resort to detention for a subset of the persons made detainable by section 1031.
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> Here is why this is confusing:
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> S. 1867 originally contained language to the effect that citizens are *not* subject to detention *solely* to the extent forbidden by the Constitution. Put simply, that was a backwards way of saying that citizens

are subject to detention, except of course where the constitution forbids it. That drew lots of heat, and the language was altered. Now, in the current bill, things work as follows:

First, section 1031 is the explicit grant of detention authority. It no longer says anything about US citizenship, one way or the other. It is just like the AUMF in that respect. Of course, we need to recall that the Supreme Court in *Hamdi* had no trouble concluding that insofar as the AUMF provided detention authority for persons captured in combat in Afghanistan, that authority extended to US citizens (*Hamdi* left open the question whether the AUMF provided detention authority to other contexts, and if so whether citizenship would remain irrelevant in those other contexts). In any event, against this backdrop, section 1031 as currently writtençand if examined in isolationçwould not alter the somewhat uncertain status quo regarding the availability of detention for citizens. But 1031 does not stand in isolation. Consider section 1032.

Section 1032 is the supposedly-mandatory military detention provision τ i.e., the idea that a subset of detainable persons (άcovered personsέ in the lingo of the statute) are not just detainable in theory, but affirmatively must be subject to military detention (though only until one of several disposition options, including civilian custody for criminal trial, is selected). Section 1032 then goes on, in subpart (b), to state expressly that US citizens are exempt from this ámandatory detentionέ requirement (though lawful permanent residents are not).

This obviously rules out the idea of a **mandatory** military detention for US citizens. **But** note that it tends to rule *in* the idea that the baseline grant of detention authority in 1031 does in fact extend to citizens. Otherwise there would be no need for an exclusion for citizens in section 1032, since the 1032 category is a subset of the larger 1031 category.

So, what does this mean with respect to the 6th Amendment of our primary law supposedly preventing the Federal Government from usurping our unalienable rights derived from the Creator of heaven and earth and of all mankind? This shreds the 6th Amendment just as it does the 4th and 5th Amendments. Of course, it seems almost anticlimactic in that so many of our unalienable rights have been infringed over the years that by the time Republicans passed the Patriot Act, the greatest usurpation of our unalienable rights in history, with its subsequent creation of the damnable Department of Homeland Security and the reprehensible TSA, thereby totally shredding all vestiges of the Constitutional protection of our unalienable rights, the NDAA of 2012 is just icing on the Republican cooked cake.