

# US Defense Act 2012: Open-ended War

## Interview

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*Interview with Scott Horton, New York attorney known for his work in emerging markets and international law, an expert in the law of armed conflict, a contributing editor to Harper's Magazine where he covers legal and national security issues and writes No Comment, a widely read blog about human rights and international law. He also lectures at Columbia Law School and is a co-founder of the American University in Central Asia*

This is John Robles. I am speaking with Scott Horton, New York attorney known for his work in emerging markets and international law, especially human rights law and a law of armed conflict. He is a lecturer at Columbia Law School.

Hello, Mr. Horton. Nice to be speaking with you and thanks for agreeing to do this interview.

Great to be with you.

I'd like to ask you some questions regarding the National Defense Authorization Act for 2012. Why is a provision that would allow indefinite detention of even American citizens being pushed through in this bill?

That's an excellent question. In fact, the Obama administration has been celebrating the success of military efforts in Iraq and Afghanistan. Some of the president's senior advisors talk about a victory over Al-Qaeda, they say the number of terrorist combatants has been reduced into the hundreds. But Republicans in the Senate had been pushing quite aggressively for a measure designed to declare a forever war, basically war that has no end and to designate the American homeland itself as part of the battlefield and in that connection both of those matters are somewhat controversial but in connection with this effort they'd also introduced sections designed to give the U.S. a statutory basis to the president's authority to detain American citizens and I think that's had quite a bit of negative backlash in the United States both among conservatives and among liberals.

Why would the U.S. want an open-ended war?

There is no military reason for this and in fact most of the generals in Pentagon consider it to be not very smart. Of course, they'd rather define a war in terms that it could be won, that they could claim victory. So, this is purely a partisan political exercise, which has been driven largely by the Republicans and in this case I think they have a number of different points: one is to prevent the administration claiming victory in the current conflict; but another is to force Barack Obama to keep Guantanamo open forever to prevent him from delivering on his campaign pledge to close Guantanamo. There are whole series of

provisions designed to do this.

Who's benefiting from this endless war on terror?

The bottom-line here is people who press an idea: boundless executive power and authority at the expense of civil liberties come on top because these measures basically undermine the Bill of Rights and the protections in the Bill of Rights by elevating the role of military law and the role of the military in the criminal justice system so that bills produce a much more powerful presidency and weaken the position of the judiciary and the normal civil administration of justice.

How does this fly in the face of Habeas Corpus: the 4th Amendment regarding unreasonable seizure, the 5th Amendment, which prohibits the deprivation of liberty, the 6th Amendment, the universal declaration of human rights, etc.?

It's all basically designed to establish the precedence of military law, that is law of war, law of conflict over civil liberties, particularly the civil liberties that are found in the American Bill Of Rights but also international doctrines, international governments and international customary law.

What's really going on here?

The defenders of the legislation say they are not doing anything new, that all they are doing is stating the law that already exists and the president has the power to arrest American citizens who are fighting for the enemy. In war time, of course, during World War II in fact, there were Americans who fought on the side of the Germans and the Italians during the war who were captured and held as prisoners of war. I think they are correct about that, but the concern we have here is that this war is really rather loosely defined, it's war against terrorists, terrorist groups; groups that are associated with them are the enemy and the definition of who would be an enemy changes all the time, so I think we get a lot of borderline cases where for political reasons organizations are described suddenly as the enemy and people who had anything to do with them are described as having provided material support to them and they can be treated as an enemy in this sense. So, I think the changing definition, departures from traditional laws of war are what cause the real concern here.

So, I mean, basically they could come in with tanks and just take control of any city if they want?

That's one of the major concerns civil libertarians have raised about this legislation because at the end of the American Civil War there was a statute issued, the Posse Comitatus Act, which outlawed the use of the military as a domestic police force in the United States.

And I think these measures seem to be undermining the Posse Comitatus Act; they seem to be opening the door for the use of the military for police purposes on the territory of the United States. That's a big concern. And I think a lot of the procedures we see: American citizens being tried and others being tried before military tribunals.

If we look at examples around the world where democratic societies had deteriorated into dictatorships - in Latin America, also in Europe between the wars, and in South-East Asia and other places - it consistently follows a pattern like this when we see a termination or

suspension of civilian justice and we see the introduction of military justice procedures, so what's been done in the statute is chilling.

We are almost out of time, I am sorry. So, president Obama originally threatened to veto this bill, then apparently he changed his mind.

He objected to the limitations on his authority as commander-in-chief. There are also raised questions about some of the civil liberties issues. But the bottom-line is that this is an appropriation's bill that contains the salary for military officers, their pensions - these questions put a lot of pressure on him to find a way to accommodate and we are expecting, I think, in the next couple of days to see a signing statement issued by the president, which is going to state how he interprets it, and I think a lot of us now are expecting that he will try to address some of the concerns in the civil liberties area winning sides legislation. If not, there's going to be a lot of disappointment among his followers. The very important consideration here is Guantanamo: what's going to happen with this Guantanamo facility. We might call this statute the Guantanamo Forever Act that seems designed to force the administration to keep Guantanamo opened forever and to send new people there, which I think is very disagreeable to Barack Obama who, of course, pledged to close it but seems to be facilitating the political objectives of the Republicans.

Thank you very much, sir. I really appreciate speaking with you.

Good luck and Happy New Year.

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