



Written by [Joe Wolverton, II, J.D.](#) on November 23, 2012

Rand Paul's NDAA Amendment: Does It Go Far Enough?

[Benjamin Wittes of Lawfare blog reports](#) that a source sent him a copy of an e-mail “apparently from Senator Rand Paul’s office” meant for Republican Senate legislative directors regarding an amendment Paul may propose to this year’s version of the National Defense Authorization Act (NDAA). According to the text of the e-mail, the Paul amendment would curtail the president’s power to indefinitely detain American citizens granted under provisions of last year’s law.



Below is the content of the e-mail as published on Lawfare:

From: Henderson, William (Paul)
Sent: Thursday, November 15, 2012 4:54 PM
Subject: Paul amendment to DOD Authorization

GOP LD’s,

It is my understanding that some or all of your offices are being whipped on whether your boss would support a Paul amendment to DOD Authorization concerning the detention of US citizens apprehended on US soil and held by the US military. The proposed text of the amendment is below for your convenience. As your boss is considering the amendment, I wanted to point out that the language of the amendment is derived from the 6th Amendment to the US Constitution (http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html), and we would ask that your boss support the 6th Amendment rights of American citizens.

Text of proposed Paul amendment:

A citizen of the United States captured or arrested in the United States and detained by the Armed Forces of the United States pursuant to the Authorization for Use of Military Force (Public Law 107-40) shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Since Witte’s story was published, [Senator Paul’s amendment](#) has been offered and the language of the measure is identical to the version leaked to Witte, including the British spelling of defense, as was used in the Constitution.

According to Senator Paul’s office, the amendment would “affirm the [Sixth Amendment of the Constitution](#) and limit the indefinite detention of Americans.”

Before breaking for Thanksgiving, Senate leaders on both sides of the aisle had hoped to push through the annual renewal of the NDAA. Majority Leader Harry Reid (D-Nev.) [reported to The Hill](#) that he had worked out an agreement with his Republican counterparts to do just that.



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Reportedly, Senators John McCain (R-Ariz.) and Carl Levin (D-Mich.) committed to Reid that they would block any “non-germane amendments” from reaching the floor.

Apparently, Senator Paul didn’t get the memo.

As reported in *The Hill’s* article, Paul is filibustering the vote on the Fiscal Year 2013 NDAA until his vote is brought up for consideration.

This prompted Reid to chime in with the predictable partisan tone.

“[Republicans] say they want to move to the defense authorization bill, so I said yesterday, fine, let’s move to it,” Reid said on the floor Thursday. “But my friends can’t take ‘yes’ for an answer.

“[Democrats are] not the cause for why the defense authorization bill is not being brought to the floor.”

When it comes to the fact that a majority of representatives and senators passed a law permitting the president of the United States to deploy federal troops to apprehend and American citizens within the United States and detain them in military prisons until the end of the war on terror, there is plenty of blame to go around.

Understanding that stark, stupefying, and arguably treasonous reality does not explain, however, why a self-avowed constitutionalist such as Rand Paul would offer an amendment that doesn’t absolute strike all such offensive language from the rest of the defense authorization act.

Senator Paul’s amendment — for all the good that it does — doesn’t go far enough. Read the text of the proposal again. There is not one word of repeal or abolition or revocation of the indefinite detention of Americans from the NDAA.

Why?

In fact, of all the various amendments that have been offered and all the speeches decrying such constitutional deprivations, only one has explicitly sought to excise the offensive language from the bill.

In May of this year, in a shameful display of disregard for the Constitution and for liberty, the House of Representatives voted to perpetuate the president’s power to indefinitely detain American citizens.

By a vote of 238-182, members of Congress rejected the [amendment offered by Representatives Adam Smith \(D-Wash.\) and Justin Amash \(R-Mich.\)](#) that would have repealed the indefinite detention provision of the NDAA. The Fiscal Year 2013 NDAA yet retains the indefinite detention provisions, as well as the section permitting prisoners to be transferred from civilian jurisdiction to the custody of the military.

“The frightening thing here is that the government is claiming the power under the Afghanistan authorization for use of military force as a justification for entering American homes to grab people, indefinitely detain them and not give them a charge or trial,” Representative Amash said during House debate.

Speaking in support of his amendment, Representative Smith reminded his colleagues that the NDAA granted to the president “extraordinary” powers and divested the American people of key civil liberties, as well as divesting civilian courts of their constitutional jurisdiction.

Smith pointed out that there was no need to transfer suspects into military custody as “hundreds” of terrorists have been tried in federal courts since the attacks of September 11, 2001.

Another amendment was offered in the House earlier this year by Representatives Louie Gohmert (R-



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Texas), Jeff Landry (R-La.), and Scott Rigell (R-Va.) that passed by a vote of 243-173. The [Gohmert Amendment](#) (House Amendment 1126) states that the NDAA will not “deny the writ of habeas corpus or deny any Constitutional rights for persons detained in the United States under the AUMF who are entitled to such rights.”

This amendment, like the one offered by Senator Paul last week, displays an indefensible use of vague language that would make it vulnerable to challenge in any court in any state in the Union, but somehow adds to its appeal among the Republicans in Congress.

Smith and those supporting his amendment claimed that Gohmert’s Amendment was unnecessary as it does nothing of any value other than restate what is already settled law: viz., that Americans have the right to ask for a writ of habeas corpus.

Smith called Gohmert’s amendment “a smokescreen,” arguing that “It doesn’t protect any rights whatsoever.”

But supporters of indefinite detention suggested that the Smith-Amash amendment would incentivize terrorists to come to the United States, because they would receive more rights on U.S. soil than outside the country.

In response to these allegations, Gohmert said that terrorists “supported” Smith’s amendment.

Another influential Republican added to Gohmert’s misrepresentation of the Smith-Amash Amendment:

“We cannot look to guarantee those who seek to harm the U.S. the constitutional rights granted to Americans,” [said \(now former\) Representative Allen West](#) (R-Fla.). “If we extend that to them, this war on terror, now it’s a criminal action.”

The real crime is that lawmakers have betrayed not only the Constitution, but their oaths of office to “preserve, protect, and defend” it from all enemies.

Of course, perhaps congressmen are reluctant to openly defend the Constitution because they know that to do such might expose them to arrest and indefinite detention per the terms of the NDAA.

One of the most dangerous provisions of the NDAA is Section 1021. This section says that the military is not “required” to detain American citizens. That is hardly the same as saying that the military is “forbidden” from detaining American citizens.

Congress is full of attorneys who know the importance of specificity of language. They know that vagueness in language is contrary to good law. In fact, every day in court rooms around the country, laws are struck down for being too vague.

The point is: If these men and women in Congress, so many of whom are trained in the law, meant to forbid the military from arresting and detaining American citizens, then it could have done so. They chose not to. They chose to leave that option open.

Again, why is there not found in Congress a single senator who will demand that work in that body come to a grinding halt until every word in the NDAA that could be used to justify the kidnapping and detention of American citizens be stricken and repealed?

There is yet time for someone to stand for the Constitution. Senator Reid said the Senate will resume efforts to avoid the impasse when Congress returns to work on Monday, November 26.

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Photo of Sen. Rand Paul: AP Images



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