



Written by [Joe Wolverton, II, J.D.](#) on May 18, 2012

## Smith-Amash Amendment Rejected: Indefinite Detention Still the Law

In a shameful display of disregard for the Constitution and for liberty, on Friday, 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(D-Washington) and Justin Amash (R-Michigan) (left and right, respectively in photo montage at left) that would have repealed the indefinite detention provision passed overwhelmingly last year as part of the National Defense Authorization Act (NDAA) of 2012.



The Fiscal Year 2013 NDAA 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.

Debate on [the Smith-Amash Amendment](#), as well as about 140 others began in the early, pre-dawn hours Friday morning.

In his impassioned speech supporting 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.

Congressmen — Republicans and Democrats — were not persuaded and they voted against Smith-Amash.

Another amendment offered by Representatives Louie Gohmert (R-Texas), Jeff Landry (R-Louisiana), and Scott Rigell (R-Virginia) 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.”

Again, this amendment is yet another 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.



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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 Rep. Allen West](#) (R-Florida). "If we extend that to them, this war on terror, now it's a criminal action."

The real crime is that Allen West and so many of his fellow Republican lawmakers have betrayed not only the Constitution, but their oaths of office to "preserve, protect, and defend" it from all enemies.

Of course, one can hardly expect 243 members of Congress to vote to declare themselves enemies of the Republic as to do such might expose them to arrest and indefinite detention per the terms of the NDAA passed by such a large majority.

It is remarkable that so many on the Right have promoted this hostile and open assault on the Constitution and freedom. Take for example this [opinion posted by the Heritage Foundation](#) on its website:

The Smith-Amash amendment would force the government to send any al-Qaeda member captured in the United States directly to federal court. If this amendment becomes law, it would limit a President's flexibility and take off the table lawful military detention and lawful interrogation for intelligence purposes. For these and other reasons, the proposal is unwise.

Despite over-the-top claims to the contrary, last year's National Defense Authorization Act (NDAA) does not impact the conditions under which a U.S. citizen may (or may not) be detained. In fact, section 1021 of the NDAA is explicit: The law regarding how U.S. citizens are handled, including the right to habeas corpus, is the same today as it was the day before it was passed.

Describing as "over-the-top" the claim that the NDAA authorizes the indefinite detention of American citizens is both irresponsible and inaccurate.

One would reasonably expect the scholars at the Heritage Foundation to have a bit of a better grip on the nuance of language used in the NDAA.

Perhaps these experts should read the words of Section 1021 more closely. This provision 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 vagary in language is contrary to good law. In fact, innumerable laws are struck down by courts for being too vague.



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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.

More importantly, these key terms so ill-defined that they are ripe for the wresting and within the penumbras of these cleverly crafted provisions could be found lurking the tools of tyranny. Wrenches that one day could force anyone branded as an enemy into a predetermined “terrorist” slot.

It is apropos to recall the timely words written by James Madison in a letter writing to Thomas Jefferson in 1798:

“It is a universal truth that the loss of liberty at home is to be charged to the provisions against danger, real or pretended, from abroad.”

Representative Gohmert, Representative Allen West, the Heritage Foundation and others are likely unaware that they are the very fulfillment of Madison’s observation-cum-prophecy.

Each of these freedom-phobes invoked the specter of terror (in one way or another: “terrorist,” “al-Qaeda,” “enemies”) to justify the abolition of constitutionally guaranteed civil liberties.

Seemingly, those promoting these provisions would offer Americans as sacrifices on the altar of safety, the fires of which are fed by the kindling of the Constitution.

Despite the denigrating description offered by the Heritage Foundation, what the Smith-Amash Amendment actually did was identify and attempt to close two very large gaps still present in the 2013 NDAA.

First, the Smith-Amash Amendment explicitly forbids the indefinite detention of suspects, as well as the conducting of the trials of such suspects before military tribunals. The language in this amendment makes it clear that any individual arrested in the United States on charges stemming from the NDAA or the AUMF would be tried in a civilian court and be afforded the complete catalog of constitutional protections.

Second, the Smith-Amash Amendment would have absolutely repealed that section of the NDAA which provides that foreigners suspected of committing terrorist acts be held in military custody, unless they have been granted a specific waiver from the President.

Likely, it is that commendable clarity of language and intent that doomed the amendment from the beginning.

Ron Paul, Republican Presidential hopeful and Congressman from Texas, made a rare appearance on the floor of the House to voice his support for the Smith-Amash Amendment:

“I do not believe a republic can exist if you permit the military to arrest American citizens and put them in secret prisons and be denied a trial,” Paul said.



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