

JUSTIN AMASH

THIRD DISTRICT OF MICHIGAN

WASHINGTON OFFICE

114 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3831

DISTRICT OFFICE

110 MICHIGAN STREET
GRAND RAPIDS, MI 49503
(616) 451-8383

Congress of the United States
House of Representatives
Washington, DC 20515

BUDGET COMMITTEE

OVERSIGHT AND GOVERNMENT
REFORM COMMITTEE

SUBCOMMITTEES

VICE CHAIRMAN

FEDERAL WORKFORCE, U.S. POSTAL
SERVICE AND LABOR POLICY

GOVERNMENT ORGANIZATION, EFFICIENCY
AND FINANCIAL MANAGEMENT

TARP, FINANCIAL SERVICES AND
BAILOUTS OF PUBLIC AND PRIVATE
PROGRAMS

JOINT ECONOMIC COMMITTEE

Gohmert-HASC & Smith-Amash: Only One Protects Americans from Indefinite Detention

Dear Colleague,

Later today or early tomorrow, the House will vote on two amendments to address the President's broad detention power granted in the 2012 NDAA: Gohmert-HASC and Smith-Amash. Only one of those amendments—Smith-Amash—protects Americans arrested on U.S. soil from indefinite military detention.

While well-intentioned, Gohmert-HASC does nothing to protect the rights of Americans arrested on U.S. soil. Steve Vladeck, Associate Dean of American University's law school, explains in an article published last night:

Just to be clear, the Gohmert Amendment **does nothing whatsoever** to address the central objections to the Chairman's Mark vis-a-vis domestic detention, which are that it (1) merely provides by statute a remedy that is already available to individuals detained within the United States; and (2) says nothing about the circumstances in which individuals might actually *be* subject to military detention when arrested within the territorial United States (that is, whether individuals using the provided-for remedy might actually prevail). Anyone within the United States who was subject to military detention before the FY2013 NDAA would be subject to it afterwards, as well, at least under the Chairman's Mark (and with or without the Gohmert Amendment).

The original Gohmert-HASC amendment states that the AUMF does not deny "habeas corpus or . . . any Constitutional rights . . . for any person who is detained in the United States . . . who is otherwise entitled to the availability of [habeas corpus] or such [Constitutional] rights."

Put simply: If you have constitutional rights . . . you have constitutional rights.

Consequently, Gohmert-HASC doesn't place a single limitation on the President's power to detain Americans caught on U.S. soil permanently without a charge or a trial.

Late last night in the Rules Committee, Gohmert-HASC was amended to include two provisions—one harmless, one potentially harmful. The harmless provision, a new subsection (b) in Sec. 1033, requires that Congress be notified within 48 hours of a person being detained on U.S. soil under the AUMF. Instead of protecting Americans, subsection (b) gives Congress a heads up when its constituents' constitutionally protected rights are violated.

+++

In contrast, Gohmert-HASC's subsection (c) has the potential to do grave harm to Americans' foundational right to habeas corpus. The new subsection (c) states that when a person is detained on U.S. soil under the AUMF, he is allowed to file a habeas petition "not later than 30 days after the date on which such person is placed in military custody."

The fatal flaw with Gohmert-HASC's new subsection (c) is that all persons on U.S. soil **already have the right to file a habeas petition the very instant they are detained** by the government.

In light of that fact, how would a court interpret Gohmert-HASC's subsection (c)? Three probable interpretations present themselves.

- (1) The new subsection does nothing. The court will disregard the provision.
- (2) The new subsection allows the government to prohibit Americans arrested on U.S. soil from filing a habeas petition for up to 30 days. A reasonable reading of the new subsection is that the government merely has to allow a detainee to file at some point within the 30 day window. Under that reading, if the government so chooses, it could hold a detainee without the historic "Great Writ" for weeks.
- (3) The new subsection prohibits detainees from filing habeas petitions after the 30 day window. The Supreme Court has held that Congress may, constitutionally, place a statute of limitations on filing a habeas petition—although that is a hotly debated topic. The statute of limitations that applies to habeas in the criminal system is one year. Given that Congress may limit the time in which a habeas petition may be filed, the amendment may be read to place a 30 day statute of limitations on detainee habeas filings. In other words, because the new subsection (c) guarantees the ability to file a habeas petition within the first 30 days of detention—a right that already exists—and yet is silent about the ability to file a petition after 30 days, a court reasonably could read the new subsection (c) as placing a 30 day statute of limitations on habeas petitions from detainees.

At best, Gohmert-HASC's new subsection (c) is substantively inconsequential. At worst, it drastically curtails the right of Americans arrested on U.S. soil to argue in court that they're being held in violation of their constitutionally protected rights.

+++

You may have heard concerns from your constituents over the last year about the NDAA's broad detention provisions—I know I have. **The only amendment that the House will vote on that answers your constituents' concerns and protects Americans is Smith-Amash.**

There is one and only one amendment that the House will consider that prohibits the President from indefinitely detaining Americans caught on U.S. soil without charge or trial. That

amendment is Smith-Amash. Voting against Smith-Amash allows the President to retain this extraordinary power.

For more information about Smith-Amash, please contact Will Adams at 5-3849 or will.adams@mail.house.gov.

A handwritten signature in blue ink, appearing to read "Justin Amash". The signature is stylized and cursive, with a long horizontal stroke extending to the right.

Justin Amash
Member of Congress