

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

“Stopping the Indefinite Detention of Americans”

**U.S. Rep. Justin Amash**  
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**Public Safety Committee**  
**Washington State House of Representatives**

Good morning. I would like to thank Representative Overstreet for drafting this important bill and for inviting me to speak. Thank you Chairman Goodman for holding today’s hearing. If the legislature passes H.B. 1581, the Preservation of Liberty bill, it will be at the forefront of a growing coalition of states that have refused to help the federal government exercise the unconstitutional detention powers in the National Defense Authorization Act.

In 2011, Congress passed and the President signed the National Defense Authorization Act for Fiscal Year 2012, or the 2012 NDAA. The law authorizes the indefinite detention of Americans arrested in the U.S. The government does not need to charge them with a crime or give them a trial to continue their detention. The government just needs to allege that the person being detained “substantially supported” forces that are “associated” with terrorists—even though neither of those terms is defined.

I led the fight in Congress against this overreaching and unconstitutional federal power. The bipartisan Amash amendment to the 2012 NDAA would have struck the detention provision and prevented the government from asserting this new authority within the U.S. The amendment was defeated, but in the intervening weeks between the NDAA’s initial passage and final passage, the public became more aware of the detention provision and began calling Members of Congress. After much arm-twisting, the final bill passed, but only after House leadership promised to hold hearings

and fix the NDAA in the following year. Still, 43 Republicans joined many Democrats in opposing the final bill, largely because of this issue.

In the following year, 2012, no hearings were held and no solution was enacted. Far from fixing the 2012 NDAA, the 2013 NDAA, which passed the House last May, kept the 2012 NDAA's detention authority intact. The 2013 NDAA affirmed "the availability of the writ of habeas corpus . . . for any person who is detained in the United States." That sounds like an effective solution until you realize that no one believes habeas has been suspended. The Bush and Obama administrations haven't claimed that habeas has been suspended. And the Supreme Court stated unambiguously in 2004, "All agree suspension of the writ has not occurred here."

Habeas corpus is available to persons detained on U.S. soil, but it offers very limited protection. It doesn't prevent the government from snatching Americans from their homes based on accusations that they've "substantially supported" forces "associated" with terrorists. It doesn't guarantee Americans that the government will charge them with a crime and try them in a court of law. And it does nothing to stop the government from locking them up for the rest of their lives.

Habeas simply allows Americans arrested under the NDAA to have a hearing on their status as enemy combatant suspects. The government needs to submit only minimal evidence to continue lifetime imprisonment. It can use hearsay. Courts are required to assume that the government's records are accurate. The government doesn't even need to prove beyond a reasonable doubt that the accused supported groups associated with terrorists. Americans are given no meaningful opportunity to defend their innocence. As a federal court recently held, "If only habeas review is available to those detained under [the NDAA], even U.S. citizens on U.S. soil, core constitutional rights available in criminal matters would simply be eliminated. No court can accept this proposition and adhere truthfully to its oath."

The more forthright NDAA supporters admit that the government now has unprecedented detention power within the U.S. They say that Americans shouldn't worry about this new federal power, however, because it won't be used often. There have been two reported cases of persons who were caught in the U.S. and detained under the law that authorized military operations in Afghanistan, which the 2012 NDAA purports to clarify. In both instances, the government charged the detainees with crimes in federal court shortly before the Supreme Court was likely to decide whether the indefinite detention was illegal. The Obama administration went a step further when, in a signing statement accompanying the 2012 NDAA, the President pledged that he "will not authorize the indefinite military detention without trial of American citizens," saying to do so "would break with our most important traditions and values."

The President's signing statement and the frequency of the government's use of domestic detention offer little solace for Americans who cherish their constitutionally protected rights. President Obama's promise is not binding on himself or any future president. Both the Obama and Bush administrations applied indefinite military detention to persons caught within the U.S.—at least until the Supreme Court appeared ready to rule the practice unconstitutional.

I teamed up with the leading Democrat on the House Committee on Armed Services—Washington's own Adam Smith—to amend the 2013 NDAA to ensure that persons arrested in the U.S. are charged with a crime and given a trial, as the Constitution requires. We made significant progress, but the amendment again was defeated.

Now that Congress has failed twice to secure citizens' constitutionally protected rights, courts have been forced to weigh in. So far, the reviews have not been good. A group of journalists led by Chris Hedges, a Pulitzer-prize winning author, challenged the 2012 NDAA's detention provision in New York federal court. In the course of writing about terrorist groups, Hedges regularly interviews persons who may be associated with terrorists. Because his articles are read widely in countries that are hostile to the U.S., Hedges worries that even a neutral article could be construed as

providing support for terrorists. The specter of being detained indefinitely by his own government has significantly stifled his reporting.

The federal court agreed with Hedges and struck down the law last year. The court held that the NDAA's detention provision could criminalize an individual's "core liberties" protected by the First Amendment. Moreover, even after repeated questioning from the court, the government wasn't willing to provide concrete definitions for "substantial support" and which forces are "associated" with terrorists. Due process requires that Americans be given notice of which actions are illegal before they can be imprisoned. The law's vagueness and its potential to limit free speech led the court to invalidate the detention provision.

While it's encouraging that one federal court has held the detention provision unconstitutional, the government argued before a federal circuit court earlier this month that the ruling should be overturned. Members of Congress and state Representatives swear an oath to defend the Constitution. We have an obligation to protect the rights of our constituents, whether or not a court will do the job. I will keep fighting in Congress for the constitutionally protected rights of Americans. I am grateful to know that we have partners doing the same in the Washington State House of Representatives.

Thank you for the opportunity to testify about this important bill.