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Prohibit the Indefinite Detention of Americans Without Charge or Trial
Cosponsor the Smith-Amash Amendment to the NDAA

Dear Republican Colleague,

Many of us were concerned about the breadth of the President's detention authority in the National Defense Authorization Act (NDAA) that passed last year. The 2012 NDAA authorizes the President to order the indefinite detention of American citizens arrested on U.S. soil without charge or trial. We were told that hearings would be held and our concerns would be addressed after the bill passed Congress. Still, 43 Republicans voted against the final version of the NDAA.

In the last year, no hearings were held. And the "solution" that's included in this year's NDAA does nothing to address the constitutional problem of Americans being indefinitely detained without charge or trial.

This year's NDAA states that the Afghanistan Authorization for Use of Military Force (AUMF) and the 2012 NDAA do not "deny 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. The Supreme Court stated unambiguously in 2004, "All agree suspension of the writ has not occurred here." As Justice Scalia recognized, the Afghanistan AUMF "is not remotely a congressional suspension of the writ [of habeas corpus], and no one claims that it is."

Habeas corpus is available to Americans 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 Afghanistan AUMF 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.

In short, habeas is no substitute for Americans' full constitutionally protected rights.

The amendment I'm introducing with Rep. Adam Smith limits the NDAA's overbroad and dangerous detention provisions. It guarantees that persons arrested on U.S. soil under the Afghanistan AUMF or the NDAA will be charged for their wrongdoing and will receive a fair trial. The government will be required to tell people detained on U.S. soil the allegations against them. And the government will have to make its case before a judge, just as the Constitution requires.

Some say that we shouldn't worry about the indefinite detention of persons arrested in the U.S. because it happens so rarely. There have been two reported cases of persons who were caught in the U.S. and detained under the Afghanistan AUMF. 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. In a signing statement accompanying the 2012 NDAA, President Obama 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."

President Obama's promise is not binding on himself or any future president. Both the Obama and Bush administrations detained persons caught within the U.S. under the Afghanistan AUMF—at least until the Supreme Court appeared ready to rule the practice unconstitutional.

Americans' constitutionally protected rights should not depend on presidential promises or who's in charge. A free country is defined by the rule of law, not the government's whim. Americans demand that we protect their rights to a charge and trial.

Please support the Smith-Amash amendment to the 2013 NDAA. For more information or to cosponsor the amendment, contact Will Adams at 202.225.3849 or will.adams@mail.house.gov.



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