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Smith-Amash: Three Facts to Know Before You Vote

Dear Colleague,

We've had an intense week of debate on the NDAA's indefinite detention provisions. Before you vote on Friday, there are three key facts you need to know.

1. FACT: The NDAA, Gohmert-HASC, and Smith-Amash ALL protect non-citizens

The NDAA's Sec. 1033, Gohmert-HASC, and Smith-Amash all protect non-citizens. There's not a genuine dispute over whether the Constitution protects non-citizens on U.S. soil. The underlying bill and the two amendments that address indefinite detention policy all treat citizens and non-citizens the same way. The difference between the proposals, then, is not how non-citizens are treated compared to citizens. The difference between the proposals is whether persons on U.S. soil—including American citizens—receive their full constitutionally protected rights.

The reason that every proposal treats citizens and non-citizens the same is because the Constitution requires it. The Fifth and Fourteenth Amendments, which guarantee due process, protect "persons." James Madison, the Father of the Constitution, explained when the Constitution was being written, "[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection."

To read the Constitution to protect only citizens makes little sense. Can the government force non-citizens to worship in a state-sponsored religion? Can it perform unreasonable searches of non-citizens? Can it quarter troops in non-citizens' homes? No, of course not. That's ridiculous. That's why all of the proposals apply equally to citizens and non-citizens.

2. FACT: Smith-Amash is the ONLY amendment that guarantees Americans a charge and a trial

This fact isn't in dispute. All sides agree. Smith-Amash is the only amendment that guarantees that American citizens who are caught on U.S. soil cannot be detained indefinitely by their government without charge or trial.

The NDAA's Sec. 1033 merely reaffirms that habeas corpus is available for all persons in the U.S. No one has ever disputed that fact. The Bush Administration didn't dispute that fact. The Obama Administration hasn't disputed that fact. A habeas hearing provides very little protection. The government can present hearsay. Courts are forced to presume that the government's documents are accurate. And the government isn't required to prove an accused American committed terrorism beyond a reasonable doubt. Regardless of what you think of habeas' protections, Sec. 1033 does nothing to change current law.

The Gohmert-HASC amendment—at best—does nothing. And that fact isn't much of a secret. The first half of the 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.” In other words, if you have constitutional rights, you have constitutional rights.

The second half of Gohmert-HASC allows persons held in military detention to file a habeas petition not later than 30 days after the government has arrested him. Again, under current law, a detainee is entitled to file a habeas petition the instant he's detained by the government. At best, Gohmert-HASC affirms current law; at worst, it clouds Americans' current constitutional right to the “Great Writ.”

3. FACT: Our constituents demand that we protect their right to a charge and a trial—especially after the NDAA was ruled unconstitutional this week

Over the last year, you may have heard from your constituents about the indefinite detention provisions in the 2012 NDAA—I know I have. Americans demand that Congress guarantee their right to a charge and a trial and that we fix the NDAA's expansive grant of power to the President.

On Wednesday, a federal court in New York held that the 2012 NDAA's detention provision—the very provision Smith-Amash amends—poses an unconstitutional threat to Americans' free speech and due process rights. If our constituents didn't send us a clear message, the federal court's decision certainly did: We need to fix the unconstitutional NDAA.

We have had two days to consider the Judiciary's action. We have been fully warned that the NDAA's detention provision is unconstitutional. And we know that only one amendment will make any substantive change to the detention provision. Only one amendment prohibits the government from indefinitely detaining Americans caught on U.S. soil without charge or trial.

We know the NDAA's detention provision is unconstitutional. The House will vote on one substantive solution.

Will we fix it? And if we don't, how will we explain that to our constituents?

We have a golden opportunity to fix a law that gave the President too much power. Rarely in one week does Congress receive notice that a law is unconstitutional and have a clear opportunity to act. Let's not disappoint our constituents. Let's seize this chance to right a wrong.

Vote for Smith-Amash.



Justin Amash
Member of Congress