

SETTING THE RECORD STRAIGHT ON SMITH-AMASH: LET'S STOP INDEFINITE DETENTION ON U.S. SOIL

REPUBLICAN COSPONSORS: JOHN DUNCAN, GOSAR, LABRADOR, PAUL, TIPTON

MYTH: Smith-Amash incentivizes suspected terrorists to come to U.S. soil.

FACT

Of all of the hyperbole surrounding detention policy, this probably is the biggest whopper.

To believe this myth, you would have to believe that a terrorist would choose to subject himself to the federal government's full surveillance and law enforcement powers. You would have to believe that a terrorist would choose—rather than plot attacks in a foreign country, where our government has limited ability to kill, apprehend, or surveil him—to go up against the USA PATRIOT Act, the Foreign Intelligence Surveillance Act, the FBI, the National Security Agency, and state and local law enforcement.

If a terrorist were dumb enough to take that deal, here's the "benefit" he would get: the most effective and proven prosecution system in the free world. Since the September 11 attacks, our federal courts and domestic law enforcement agencies have successfully prosecuted over 400 defendants charged with crimes related to international terrorism in the United States. In fact, using the judicial system—not military detention—is the only way suspected terrorists caught or detained in the U.S. ultimately have been handled since 9/11.

Trevor Morrison, a national security law professor at Columbia, commented Monday on the absurdity of the argument:

The claim is that a policy of subjecting terrorists to Article III trials (which have an extremely high conviction rate in terrorism cases, and which generally yield very long sentences served in high security facilities subject to administrative segregation and the like) will cause Al Qaeda and other terrorists to come to the U.S. when they otherwise would not. Let's think about this a little.

By all accounts, Al Qaeda is already constantly looking for ways to get its fighters into the United States, or at least on a U.S.-bound airplane, the better to do harm to U.S. interests. And who are those fighters? Most formidably, they are suicide bombers and others prepared to lose their own lives. Given the option, many (most? all?) Al Qaeda suicide bombers would already leap at the chance to inflict their destruction within the United States. But not because of all the rights they'll be afforded in their criminal trial. They are, after all, *suicide* bombers. They're not planning on a trial. Moreover, even if a particular fighter plans an attack in which he does not anticipate dying, the factors driving the choice of location are overwhelming likely to be things like value and

accessibility of the target, and likelihood of carrying it out without getting caught — not the procedures that will apply in a trial if he does get caught.

That leaves Al Qaeda's organizational leaders, who don't themselves carry out individual operations. So are we supposed to believe that, had it been in place two years ago, the Smith Amendment would have led the likes of Osama bin Laden or Anwar al-Awlaki to enter the United States to run their operations from here? That seems extremely unlikely. Entering the United States (or even attempting to enter) would itself dramatically increase the odds of being captured. And ultimately, the goal of Al Qaeda's leadership is to continue the fight against us — not to invoke their *Miranda* rights in a federal courtroom.

MYTH: The NDAA ensures Americans' constitutionally protected rights.

FACT

The NDAA does nothing to ensure that Americans arrested on U.S. soil receive a charge and a trial. The only amendment likely to be considered on the House floor that guarantees that Americans arrested by their government in the U.S. receive a charge and trial is Smith-Amash.

The NDAA's Sec. 1033 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."

Steve Vladeck, an associate dean at American University's law school, on Tuesday pointed out the meaninglessness of Sec. 1033:

[Sec. 1033 is] completely superfluous, since it reaffirms something that is already true, *i.e.*, that individuals detained within the United States are entitled to challenge their military detention through petitions for writs of habeas corpus. That is to say, the Rigell-Landry bill [now, Sec. 1033] merely recodifies an already existing *remedy*, while saying nothing about the underlying substantive question, to wit, *can* individuals arrested within the territorial United States be subjected to potentially indefinite military detention without trial? As I wrote about the Rigell-Landry bill when it was introduced, "It's always nice to see Members of Congress trying to take habeas seriously, but . . . this bill,

however well-intentioned, is silly, utterly unnecessary, and perhaps even counterproductive.”

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 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.

MYTH: Gohmert-Rigell-Landry ensures Americans' constitutionally protected rights.

FACT

While we're sympathetic to the intent behind Gohmert-Rigell-Landry, their amendment does nothing to improve the underlying bill. The amendment states that the NDAA doesn't "deny any Constitutional rights . . . [to a person] who is otherwise entitled to . . . such rights." Put simply: if you have constitutional rights you have constitutional rights. Obviously, that doesn't protect Americans' rights or change existing law. It does nothing.

The Constitution protects the right to a charge and a trial for every person arrested in the U.S. The Supreme Court has not ruled on this issue because each time the Court appeared ready to decide the issue, the administration has transferred the detainees to the criminal justice system. The Bush administration did this in 2006 with U.S. citizen Jose Padilla—but only after holding him for more than three years in a military brig. The Obama administration did this in 2009 with Ali al-Marri. So the Supreme Court has not yet been given the opportunity to invalidate the indefinite detention of persons arrested on U.S. soil.

Like other laws that we believe are unconstitutional, we should withdraw authorization for the President to indefinitely detain persons arrested on U.S. soil.

MYTH: The Constitution doesn't apply to non-citizens when they're inside the United States.

FACT

The Founders disagreed. The Fifth Amendment applies to “person[s]” and the Sixth Amendment applies to “the accused” without respect to citizenship. Similarly, the Fourteenth Amendment, which applies due process protections to states’ actions, clearly distinguishes between privileges given to citizens and the rights of all persons in the United States: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” [emphasis added]

As James Madison, the Father of the Constitution, stated in his Report on the Virginia Resolutions: “[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.”

Even House Armed Services tacitly acknowledges that the Constitution’s protections apply to both citizens and non-citizens within the U.S. The 2013 NDAA recognizes this fact when it states that habeas is available “for any person who is detained in the United States.” [emphasis added] If House Armed Services had drafted Sec. 1033 to distinguish between citizens and non-citizens or if we had done the same, the legislation likely would have run afoul of the Constitution’s Equal Protection Clause.

MYTH: Smith-Amash applies to detainees held at Guantanamo Bay.

FACT

No, Smith-Amash does not apply to detainees held at GTMO. It applies only to persons arrested or detained “in the United States, or a territory or possession of the United States.” That means it applies to the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the other U.S. territorial islands. The Naval Station at Guantanamo Bay is leased from Cuba and is not a “territory or possession of the United States.”

MYTH: Smith-Amash prevents the deportation of illegal immigrants.

FACT

That's incorrect. Smith-Amash amends the 2012 National Defense Authorization Act, which itself amends the Authorization for Use of Military Force that enabled the war in Afghanistan. Smith-Amash affects only persons who are detained on U.S. soil pursuant to the Afghanistan AUMF. It does not affect anyone who's held under any other law or authority. It does not change the government's ability to detain, interrogate, and deport illegal immigrants.

MYTH: Smith-Amash greatly changes our ability to intercept suspected terrorists.

FACT

Since the September 11 attacks, the federal government never fully has used its authority under the NDAA and the AUMF to detain persons caught on U.S. soil indefinitely. For a time, the Bush administration put in military detention one U.S. citizen who was caught on U.S. soil. The Obama administration did the same for one student studying in Illinois. In both cases, the administrations transferred the suspects to the criminal justice system as the Supreme Court appeared ready to rule the practice unconstitutional.

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." According to President Obama, Smith-Amash would have almost no effect on current operations. Yet remember: President Obama's promise is not binding on himself or any future president.