

The bad news from last week's passage of the 2013 National Defense Authorization Act is that Americans can still be arrested on US soil and detained indefinitely without trial. Some of my colleagues would like us to believe that they fixed last year's infamous Sections 1021 and 1022 of the NDAA, which codified into law the unconstitutional notion that some Americans are not subject to the protections of the Constitution. However, nothing in this year's bill or amendments to the bill restored those constitutional rights.

Supporters of the one amendment that passed on this matter were hoping no one would notice that it did absolutely nothing. The amendment essentially stated that those entitled to habeas corpus protections are hereby granted habeas corpus protections. Thanks for nothing!

As Steve Vladeck, of American University's law school, wrote of this amendment:

"[T]he Gohmert Amendment does nothing whatsoever to address the central objections.... [I]t merely provides by statute a remedy that is already available to individuals detained within the United States; and says nothing about the circumstances in which individuals might actually be subject to military detention when arrested within the territory of United States.... Anyone within the United States who was subject to military detention before the FY2013 NDAA would be subject to it afterwards, as well..."

Actually, the amendment in question makes matters worse, as it states that anyone detained on US soil has the right to file a writ of habeas corpus "within 30 days" of arrest. In fact, persons detained on US soil already have the right to file a habeas petition immediately upon arrest!

I co-sponsored an amendment offered by Reps. Adam Smith and Justin Amash that would have repealed the unconstitutional provisions of last year's NDAA by eliminating Section 1022 on mandatory military detention and modifying Section 1021 to make it absolutely clear that no one can be apprehended on US soil and held indefinitely without trial or be held subject to a military tribunal. Our language was clear: "No person detained, captured, or arrested in the United States, or a territory or possession of the United States, may be transferred to the custody of the Armed Forces for detention under the Authorization for Use of Military Force, this Act, or the National Defense Authorization Act for Fiscal Year 2013."

The term "person" is key in our amendment, as our Founders did not make a distinction between citizens and non-citizens when determining who was entitled to Constitutional protections. As the father of the Constitution James Madison wrote, "[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."

We should not forget that our Article III court system is a strength not a weakness. The right to face our accuser, the protections against hearsay evidence, the right to a jury trial – these are designed to protect the innocent and to determine and then punish guilt. And they have been quite successful thus far. Currently there are more than 300 individuals who have been tried and convicted of terrorism-related charges serving lengthy terms in US federal prisons. Each of the six individuals tried in US civilian courts for the 1993 bombing of the World Trade Center are serving hundreds of years in prison, for example.

Last week was discouraging and disappointing to those of us who value our Constitution. That the US government asserts the legal authority to pick up Americans within the United States and hold them indefinitely and secretly without a trial should be incredibly disturbing to all of us. Americans should check how their representative voted. Politicians should not be allowed to get away with undermining our liberties in this manner.