

## The Smith-Amash Amendment: What it Says and Means

*Next week, the House of Representatives will consider an amendment, sponsored by Representatives Adam Smith (D-WA) and Justin Amash (R-MI), which would modify the detainee provisions in the Fiscal Year 2012 National Defense Authorization Act ("FY 2012 NDAA"). This analysis is based on a draft version of that amendment released by Representative Adam Smith on Monday, May 7, 2012.*

### Summary of the Smith-Amash Amendment

- ☑ **What it would do:** The Smith-Amash amendment would resolve two key questions that were left open during the last year's NDAA debate on the detention of individuals suspected of involvement with terrorism. First, the Smith-Amash Amendment would ban indefinite military detention and military commission trials in the United States, making clear that individuals apprehended on U.S. soil who are suspected of terror-related activities can only be tried in a civilian court with all the corresponding constitutional protections. Second, the amendment would repeal a provision in the FY 2012 NDAA that requires that a category of foreign terrorism suspects be held in military custody, absent a presidential waiver.

### A Closer Look

- ☑ **What it says:** "In the case of a covered person who is detained in the United States, or a territory or possession of the United States, pursuant to the Authorization for Use of Military Force, [the National Defense Authorization Act for Fiscal 2012], or the National Defense Authorization Act for Fiscal Year 2013, disposition under the law of war shall occur immediately upon the person coming into custody of the Federal Government and shall only mean the immediate transfer of the person for trial and proceedings by a court established under Article III of the Constitution of the United States or by an appropriate State court. Such trial and proceedings shall have all the due process as provided for under the Constitution of the United States. 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, [the National Defense Authorization Act for Fiscal 2012], or the National Defense Authorization Act for Fiscal Year 2013."<sup>1</sup>
- ☑ **What it would do:** During the debate of the detainee provisions in the FY 2012 NDAA, there was considerable concern over the prospect that individuals in the United States thought to be involved with terrorism could be held indefinitely in military custody without ever facing charges or trial. The above subsections of the Smith-Amash amendment, if passed into law, would prohibit transfer of these individuals into military custody and require that any trials be in civilian court with all the corresponding constitutional protections; under the above subsections, these individuals may not be held indefinitely without charge or trial, or tried by military commissions. Because the ban on indefinite detention and military commission trials only applies within the United States, the Smith-Amash amendment would not alter the status quo for detainees held at Guantanamo or anywhere else outside of the United States.

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<sup>1</sup> Smith-Amash Amendment, subsection (b) (amending Section 1021 of the National Defense Authorization Act for the Fiscal Year of 2012 by adding a new subsection (g)).

## ANALYSIS

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- ✓ **What it says:** “This section shall not be construed to authorize the detention of a person within the United States, or a territory or possession of the United States, under the Authorization for Use of Military Force, [the National Defense Authorization Act for Fiscal 2012], or the National Defense Authorization Act for Fiscal Year 2013.”<sup>2</sup>
- ✓ **What it would do:** Though some proponents of the 2012 NDAA detainee provisions sought to codify authority to indefinitely detain individuals picked up within the United States, Congress ultimately agreed on a provision that made clear that the NDAA shall not be construed to “affect existing law or authorities” with respect to the detention of individuals captured or arrested in the United States.<sup>3</sup> However, “existing law” is unsettled on the question, and the Bush administration on two occasions held individuals – José Padilla (a U.S. citizen)<sup>4</sup> and Ali al-Marri (a legal resident)<sup>5</sup> – in military custody for years without charge or trial, with questionable-at-best legal justification. The above subsection makes clear that although the Smith-Amash amendment prohibits indefinite detention if a future President seeks to claim this extraordinary authority to use the military to detain individuals in the United States, the amendment is not authorizing any such detention.
- ✓ **What it says:** “Repeal of Requirement for Military Custody—Section 1022 of the National Defense Authorization Act for Fiscal Year 2012 is hereby repealed.”<sup>6</sup>
- ✓ **What it would do:** In addition to codifying the authority of the military to indefinitely detain terrorism suspects without charge or trial, the FY 2012 NDAA, in section 1022,<sup>7</sup> *requires* that a category of foreign terrorism suspects be initially held in military custody, absent a presidential waiver. Though the President issued a Presidential Policy Directive<sup>8</sup> limiting the instances in which mandatory military custody applies, future Presidents are not bound by this directive. The above subsection of the Smith-Amash amendment would repeal the FY 2012 NDAA mandatory military custody provision altogether.

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<sup>2</sup> Smith-Amash Amendment, subsection (b) (amending Section 1021 of the National Defense Authorization Act for the Fiscal Year of 2012 by adding a new subsection (h)).

<sup>3</sup> National Defense Authorization Act for the Fiscal Year of 2012, Section 1021(e).

<sup>4</sup> José Padilla webpage, The New York Times, *available at* [http://topics.nytimes.com/top/reference/timestopics/people/p/jose\\_padilla/index.html](http://topics.nytimes.com/top/reference/timestopics/people/p/jose_padilla/index.html).

<sup>5</sup> Ali Saleh Kahlah al-Marri webpage, The New York Times, *available at* [http://topics.nytimes.com/top/reference/timestopics/people/m/ali\\_saleh\\_kahlah\\_al\\_marri/index.html](http://topics.nytimes.com/top/reference/timestopics/people/m/ali_saleh_kahlah_al_marri/index.html).

<sup>6</sup> Smith-Amash Amendment, subsection (c).

<sup>7</sup> National Defense Authorization Act for the Fiscal Year of 2012, Section 1022.

<sup>8</sup> Presidential Policy Directive: Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012, *available at*

<http://www.whitehouse.gov/the-press-office/2012/02/28/presidential-policy-directive-requirements-national-defense-authorizatio>