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A Bad Argument Against Rep. Smith's Amendment to the NDAA

By [Trevor Morrison](#)

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As Bobby [noted](#) previously, Rep. Adam Smith and others are proposing amendments to this year's NDAA that would make certain changes to the detention-related provisions implemented by last year's NDAA. Among other things, the Smith Amendment would effectively prohibit the military detention of anyone arrested or captured within the United States. Thus, in order for the USG to engage in long-term detention of terrorists apprehended domestically, it would need to prosecute and convict them in federal court.

I am inclined to think the Smith Amendment is sensible as a policy matter, but this is a difficult area and there are reasonable arguments on both sides. Some of the arguments, however, aren't reasonable at all. [This](#) story in *The Hill* provides an example:

"A Republican House aide said Smith's proposal goes too far with unintended consequences to the president's traditional war powers, including providing an incentive for terrorists to come to the U.S. because they would have more rights here."

I discuss some problems with this claim after the jump.

At a certain level of generality, the idea in the above quotation is a familiar one: federal criminal trials "give rights to the terrorists," which entails either unwarranted coddling or an invitation to lawfare in the worst sense. I don't mean to deny all possible iterations of that general idea, but the particular one on display in this quotation strikes me as really quite bad.

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.

I don't want to get carried away here. *The Hill's* story attributes the argument in question to an unnamed House aide. Maybe the reporters misunderstood the aide's point. Or maybe this was the aide's point, but the aide was only speaking for him or herself and not for anyone with any actual power, or with any influence over anyone with such power. I hope so.

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