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Hon. Harry Reid
Majority Leader, United States Senate
522 Hart Senate Office Building
Washington, DC 20510

Hon. Mitch McConnell
Minority Leader, United States Senate
361-A Russell Senate Office Building
Washington, DC 20510

Dear Senators Reid and McConnell:

On behalf of the Association of the Bar of the City of New York (the "Association"), we write to express our profound concern with (in order of discussion below) Sections 1039, 1046, 1040, 1036, 1035, 1038 and 1034 of the National Defense Authorization Act for Fiscal Year 2012 (the "NDAA"), which passed in the House of Representatives on May 26, 2011.

Overview and Summary

Sections 1039, 1046, and 1040

Section 1039 would prohibit the use of appropriated funds to transfer a non-citizen held by the U.S. military in a foreign country to the United States, thereby preventing Guantanamo detainees and others in Defense Department custody from being tried in Article III courts or from testifying in court or otherwise cooperating with the government on U.S. soil.

Section 1046 would require that non-citizens who commit a crime relating to a terrorist attack in the United States or against United States personnel or government property anywhere in the world must be prosecuted exclusively in a military commission, and not in an Article III court.

Section 1040 would (subject to narrow exceptions) prohibit the use of appropriated funds to transfer any Guantanamo detainee to any foreign country (including the detainee's country of origin) unless the Secretary of Defense (in consultation with the Secretary of State) submits a detailed certification to Congress thirty days before the transfer occurs. The certification requires the Secretary of Defense to state that the country to which the detainee is to be

transferred "maintains effective control over each detention facility in which an individual is to be detained," "is not, as of the date of the certification, facing a threat that is likely to substantially affect its ability to exercise control over the individual," and "has agreed to allow appropriate agencies of the United States to have access to the individual." In addition, Section 1040(a)(3) would, subject to narrow exceptions, prohibit the use of appropriated funds to effect any transfer of a Guantanamo detainee to any foreign country (even if the above-described certification is provided) if "there is a confirmed case of" even one former Guantanamo detainee "who was transferred to the foreign country . . . and subsequently engaged in any terrorist activity."

Sections 1039 and 1040 are similar to Sections 1112 and 1113 of the 2011 Department of Defense and Full-Year Continuing Appropriations Act, which provisions became law earlier this year over the objection of the Executive Branch. *See* Pub. L. No. 112-10 (Apr. 15, 2011). The Association opposed those provisions and we believe that they should not be renewed in the current NDAA.

Section 1039 is particularly objectionable, however, because it goes beyond prior appropriations bills and would effectively foreclose civilian-court prosecution not only for Guantanamo detainees, but also for any non-citizen who is "in the custody or under the effective control of the Department of Defense at a location outside the United States." NDAA § 1039(b). Section 1046, which is also new, has a similar thrust. It would ban the federal court prosecution of any non-citizen accused of an offense "relating to a terrorist attack" involving the United States or U.S. government property. This provision would have foreclosed the prosecutions of many individuals who have been convicted in federal court over the years, including, for example, Ahmed Ghailani and the other individuals convicted of planning and carrying out the 1998 East African Embassy Bombings; Richard Reid, the so-called "shoe bomber" who was prosecuted in federal court in Massachusetts; and Umar Farouk Abdulmutallab, the so-called "underwear bomber," who was prosecuted in federal court in Michigan. The sweeping and novel prohibitions reflected in Sections 1039 and 1046 are unprecedented and unwise.

Section 1036

Section 1036 would require the Secretary of Defense to establish a process to review the necessity for continued detention of Guantanamo detainees who are not subject to military commission prosecution and who have not been granted relief in *habeas corpus* proceedings. This provision conflicts with the procedures established earlier this year by the President in his Executive Order entitled "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force" (the "Executive Order"). *See* Exec. Order No. 13567, 76 Fed. Reg. 13277 (Mar. 7, 2011). Section 1036 would establish a less useful and less credible process than the one envisioned by the Executive Order because, among other things, it has only a limited role for counsel, is overly dominated by the military, and generally provides inadequate procedural protections for detainees. Accordingly, we believe Section 1036 should be eliminated or amended to conform to the Executive Order.

Sections 1035 and 1038

Section 1035 would require the Secretary of Defense to develop a "national security protocol" for each Guantanamo detainee, and to communicate such "protocols" to the Committees on

Armed Services of the House of Representatives and the Senate. As detailed in Section 1035, each "protocol" would contain granular, detainee-specific information about access to counsel, the ability to communicate with persons other than government personnel, and access to information. This Section threatens to interfere with still-evolving efforts to establish workable procedural rules regarding access to counsel for Guantanamo detainees who are facing prosecution by military commission. These critically important rules must be established with careful regard for the role of defense counsel. The approach reflected in Section 1035 is not consistent with the goal of arriving at workable procedures that will lead to credible, just results from military commission prosecutions.

Section 1038 would prohibit the use of appropriated funds to permit visitation by a family member of a Guantanamo detainee. Beyond seeming needlessly punitive, Section 1038 encroaches upon the authority of the Secretary of Defense to set the parameters of any such visitation.

Section 1034

Finally, Section 1034 seems to expand the authority conferred by the Authorization for Use of Military Force (the "AUMF"). *See* Pub. L. No. 107-40, 50 U.S.C. § 1541 (Sept. 18, 2001). It is not clear whether the drafters of Section 1034 intended to work a change in current law, but the language raises substantial concerns and, more fundamentally, there is no need for this provision at present. We urge the Senate to take Section 1034 out of the bill pending further, careful consideration of its necessity and its scope.

General Comments

The Association is a professional association of over 23,000 attorneys. Founded in 1870, it has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, the Association educates the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees. The principal lesson we have derived from our work is that full and faithful respect for the rule of law strengthens our country. Our system of justice – based on time-tested constitutional and international norms – is a source of strength, not vulnerability.

Maintaining a vibrant perception of the United States as a democracy devoted to the rule of law is not only desirable in its own right, as we strongly believe, but also as a critical national security interest. Accordingly, we have approached the proposed legislation mindful of our Association's standing advocacy for the rule of law in the American tradition as well as a view to such perceptions by critical populations at home and abroad.

When the United States urges acceptance by our coalition partners, allies, and the international community of new paradigms of the law of war permitting detention of unlawful belligerents for periods of unprecedented duration in a novel conflict, it is incumbent upon the United States to show that we have thoughtfully addressed all possible means of mitigating the severe effects of such detention, where reasonably consistent with national security interests.

Moreover, the present conflict with al Qaeda and the Taliban, and concerns with isolated jihadists even within our country and citizenry, require for strategic reasons that the United States balance the use of force (including detention) with ongoing communications with the populations from which enemies continue to be recruited in such troubling numbers. Recruitment of terrorists is still nurtured by the persistent images of past abuses at Abu Ghraib and Guantanamo Bay, and allegations (unfounded though they may be) that nothing has changed. Overcoming those images is an important and challenging national priority that is integral to our national security.

Discussion of Particular NDAA Provisions

I. Sections 1039 and 1046: Restriction on Use of Funds to Transfer Non-Citizen DOD Detainees to the United States and Mandatory Prosecution of Non-Citizens in Military Commissions

Enactment of Sections 1039 and 1046 would deprive the federal government of what has proven to be its most effective enforcement weapon to prosecute and bring suspected terrorists to justice – criminal prosecutions in the Article III courts. As adopted by the House, Section 1039 would block the use of funds for federal-court prosecutions not only of Guantanamo detainees, but more broadly of any non-citizen who is "in the custody or under the effective control of the Department of Defense at a location outside the United States." NDAA § 1039(b). Section 1046 is similar. It would require that non-citizens who commit a crime relating to a terrorist attack in the United States or against United States personnel or government property anywhere in the world must be prosecuted exclusively in a military commission, and not in an Article III court.

These provisions raise grave questions under our system of separation of powers. For Congress to dictate the means for prosecuting a specified person or group of persons may raise serious constitutional issues. In addition, the Association believes the provisions are unwise. They would tie the Executive Branch's hands and deprive it of one of its most effective, time-tested, and flexible counterterrorism tools. More broadly, they would tend to restrict the use of our federal courts, and thus to dilute or lose entirely the benefit of fair, credible, independent adjudication that is the hallmark of our system of justice. Maintaining a rigorously fair system of justice is critical for a variety of reasons, the most important of which is that it reduces the risk of injustice while upholding the traditions of fairness, restraint, and an independent check on the Executive and Legislative branches that has been enshrined in our country since its founding.

Trials in Article III courts permit prosecution under the full range of criminal laws prohibiting terrorism without limitation to the customary law of war. It is not clear whether the key offenses of conspiracy (*see Hamdan v. Rumsfeld*, 548 U.S. 557, 598-613 (2006) (plurality opinion)), murder by unlawful combatant, or material support of terrorism are chargeable under the law of war against individuals detained at Guantanamo. Indeed, the validity of conspiracy and material support charges is a key issue in the pending appeal from a military commission conviction in the *al Bahlul* case, *see United States v. Al Bahlul*, Case No. 09-001 (Ct. Mil. Comm'n Review), and after-the-fact legislation on the substantive law of war would be *ex post facto* with respect to many of the Guantanamo detainees. Thus, prosecution under the law of war may, from the government's standpoint, actually favor defendants accused of terrorism as compared with prosecutions under federal criminal law.

The Administration has objected to Section 1039 as follows:

> . . . Section 1039 is a dangerous and unprecedented challenge to critical Executive branch authority to determine when and where to prosecute detainees, based on the facts and the circumstances of each case and our national security interests. It unnecessarily constrains our Nation's counterterrorism efforts and would undermine our national security, particularly where our Federal courts are the best – or even the only – option for incapacitation of dangerous terrorists. For decades, presidents of both political parties – including Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush – have leveraged the flexibility and strength of our Federal courts to incapacitate dangerous terrorists and gather critical intelligence. The prosecution of terrorists in Federal court is an essential element of our counterterrorism efforts – a powerful tool that must remain an available option.

Statement of Administration Policy H.R. 1540 – National Defense Authorization Act for FY 2012 (Office of Management and Budget, May 24, 2011) ("Statement") at 2. The Association agrees with these views.

A. The Federal Criminal Justice System is Well-Equipped to Prosecute Terrorism Cases

In the past 20 years, federal courts have done an excellent job in handling scores of terrorism cases, including many that involved complex factual scenarios and difficult political entanglements. These federal court prosecutions have yielded just, reliable results – and in most cases severe sentences – without any demonstrated leaks of classified information, all while maintaining our commitment to the due process of law.

Existing criminal statutes proscribe a broad range of potential terrorist conduct, providing prosecutors with a "well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit." *Hamdi v. Rumsfeld*, 542 U.S. 507, 547 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in judgment). These statutes allow for prosecutions based on a wide variety of threatening behavior, including but not limited to: material support of terrorism, 18 U.S.C. §§ 2339A & B; attacks against U.S. nationals abroad, 18 U.S.C. § 2332; serious attacks "transcending national boundaries," 18 U.S.C. § 2332b; harboring or concealing terrorists, 18 U.S.C. § 2339; and the handling of an explosive or lethal device with the intent to cause death, serious injury or major economic loss, 18 U.S.C. § 2332f. Conspiracy, in particular, is a potent charge.

The federal criminal justice system has proved its ability to protect the secrecy of classified information, even in the most sensitive cases. Claims to the contrary misinterpret the extensive statutory framework created by Congress in the Classified Information Procedures Act ("CIPA") to handle classified material in a judicial setting. CIPA establishes procedures allowing judges and cleared counsel to determine, before trial, how to manage classified evidence so that the defendant receives a fair trial while secret information is protected. See 18 U.S.C. app. 3; *see also* Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, at 82-84 (2008) (summarizing CIPA's provisions). Since the late 1980s, when the statute was first used in the terrorism context, courts

have applied CIPA in a large number of terrorism cases, and we have found no documented evidence of serious breaches when CIPA procedures have been invoked. *See id.* at 8-9 (summarizing findings); *id.* at 84-86 (collecting cases). Importantly, CIPA is neither exhaustive nor exclusive with respect to the use of classified evidence, as district judges can still be relied upon "'to fashion creative and fair solutions to these problems,' *i.e.*, the problems raised by the use of classified information in trials." *United States v. Rosen*, 520 F. Supp. 2d 786, 796 (E.D. Va. 2007) (quoting S. Rep. 96-283, *reprinted in* 1980 U.S.C.C.A.N. 4294).

In case after case, involving even high-profile individuals, federal courts have effectively pursued justice against terrorists. *See* Zabel & Benjamin, at 13-20 (discussing federal prosecution of the airline hijackings of the 1980s, the first World Trade Center bombing, and the East African embassy bombings, among others); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2005) (affirming conviction of Ahmed Omar Abu Ali, who conspired with al Qaeda to hijack airplanes, blow up nuclear plants and assassinate President George W. Bush). During 2010, the Department of Justice secured criminal convictions in our Article III courts against a number of high-profile terrorism defendants including the following:

- Najibullah Zazi, a former resident of New York City who traveled to Afghanistan, was recruited by al Qaeda; received training in constructing explosives for planned attacks in the United States; was instructed on targets including subway trains in New York City; traveled to New York with explosives and other materials to build bombs; and was days away from carrying out attacks against the New York City subway system. Zazi pled guilty and is awaiting sentencing. *See* Press Release, *Najibullah Zazi Pleads Guilty To Conspiracy To Use Explosives Against Persons or Property in U.S., Conspiracy to Murder Abroad, and Providing Material Support to al-Qaeda* (Feb. 22, 2010) (U.S. Attorney's Office for the Eastern District of New York);

- Faisal Shahzad, a naturalized U.S. citizen and resident of Connecticut who traveled to Pakistan, received bomb-making training from the Taliban, and then attempted to detonate a car bomb in the middle of Times Square. Shahzad pled guilty and was sentenced to life imprisonment. *See* Press Release, *Faisal Shahzad Sentenced In Manhattan Federal Court to Life in Prison for Attempted Car Bombing in Times Square* (Oct. 5, 2010) (U.S. Attorney's Office for the Southern District of New York);

- David Headley, a U.S. citizen who attended terrorist training camps in Pakistan on five separate occasions and conducted surveillance on multiple occasions as part of the plot leading up to the deadly terrorist attacks in Mumbai, India. Headley pled guilty and is awaiting sentencing. *See* Press Release, *Chicago Resident David Coleman Headley Pleads Guilty to Role in India and Denmark Terrorism Conspiracies* (March 18, 2010) (U.S. Attorney's Office for the Northern District of Illinois); and

- Aafia Siddiqui, an MIT-educated woman who was charged with attempted murder and assault of U.S. military personnel and FBI agents in Afghanistan after she had been detained by Afghan authorities. Siddiqui was convicted by a jury and was sentenced to 86 years' imprisonment. *See* Press Release, *Aafia Siddiqui Sentenced in Manhattan Federal Court to 86 Years for Attempting to Murder U.S. Nationals in Afghanistan and Six Additional Crimes* (Sept. 23, 2010) (U.S. Attorney's Office for the Southern District of New York).

Prosecution of these vitally important cases resulted in no significant leaks of confidential information or increased threat to the American public. Moreover, in a number of terrorism cases, defendants have cooperated with the authorities and provided valuable intelligence after their respective arrests. For example, David Headley's testimony as a cooperating defendant was instrumental in the recent conviction of Tahawwur Rana, in Chicago federal court, of providing material support to the Pakistani terrorist organization Lashkar e Tayyiba and of conspiracy to provide material support to a terrorism plot aimed at a Danish newspaper. *See* Press Release, *Tahawwur Rana Guilty of Providing Material Support to Terror Group and Playing Supporting Role in Denmark Terror Conspiracy* (June 9, 2011) (U.S. Attorney's Office for the Northern District of Illinois).

Our federal courts have also successfully handled criminal prosecutions of two individuals who were previously held in military custody in the United States: Jose Padilla and Ali Saleh al-Marri. *See* Zabel & Benjamin, at 72-75 (discussing procedural history of Padilla and al-Marri); *see* Press Release, *Jose Padilla and Co-Defendants Convicted of Conspiracy to Murder Individuals Overseas, Providing Material Support to Terrorists* (Aug. 16, 2007) (U.S. Department of Justice); Press Release, *Ali Al-Marri Pleads Guilty to Conspiracy to Provide Material Support to Al-Qaeda* (Apr. 30, 2009) (U.S. Department of Justice). As outlined above, Aafia Siddiqui was also successfully prosecuted in federal court in Manhattan even though she was in military custody in Afghanistan at the time of her offense.

The prosecution of Ahmed Ghailani, indicted for his part in the deadly attack on U.S. embassies in East Africa in 1998, has been criticized in some quarters – and would have never have happened if Section 1046 had been the law – but the attacks on the *Ghailani* prosecution are ill-informed and without foundation. Ghailani was convicted of a serious offense – conspiracy to destroy property and buildings of the United States (possibly not an offense under the law of war as in effect at the time of those events) – and was sentenced to life in prison without the possibility of parole. *See* Press Release, *Ahmed Khalfan Ghailani Found Guilty in Manhattan Federal Court of Conspiring in the 1998 Destruction of Untied States Embassies in East Africa Resulting in Death* (Nov. 17, 2010) (U.S. Attorney's Office for the Southern District of New York); Transcript of Sentencing at 71, *United States v. Ghailani*, S10 98 Cr. 1023 (LAK) (No. 1098).

Contrary to dire predictions from some quarters, no significant courthouse security or business interruption issues arose during the *Ghailani* trial. The presiding judge, the Honorable Lewis A. Kaplan, fairly and conscientiously applied the law in adjudicating difficult pretrial motions arising from Ghailani's extended detention at Guantanamo and the "so-called enhanced interrogation methods" to which he was subjected while in CIA custody. *United States v. Ghailani*, S1098 Cr. 1023 (LAK), 2010 WL 4058043, at *1 (S.D.N.Y. Oct. 13, 1010). To the extent the prosecution team encountered difficulty in presenting all evidence of Ghailani's guilt, those problems stemmed largely from the coercive and since-repudiated interrogation techniques to which Ghailani was subjected as well as the delays in bringing him to trial. Moreover, as Judge Kaplan noted in his opinion, in a military commission prosecution, evidence derived from Ghailani's coercive interrogations might well have been ruled inadmissible just as it was stricken in federal court. *See id*. at *19 n.182. That the Department of Justice was able to secure a conviction of Ghailani on a serious charge, despite the obstacles resulting from his prior

treatment, demonstrates the effectiveness, credibility, and independence of our civilian justice system and its value as part of an integrated, effective counterterrorism policy.

B. Military Commissions Should Not Be the Sole Means for Prosecuting Terrorism Cases

Military commissions can be useful tools, but they were not intended to accommodate every criminal or terrorist defendant. Historically, military commissions were not intended to afford a venue for all possible grievances concerning war-related crimes. As the Administration has stated, "The prosecution of terrorists in Federal court is an essential element of our counterterrorism efforts – a powerful tool that must remain an available option." Statement at 2.

In fact, military commissions have been largely unsuccessful in reaching any final verdicts or sentences in recent years. In contrast, the federal courts have established their fairness and effectiveness through their operation over more than two hundred years, and demonstrated their specific capacity to deal with terrorism crimes over the last two decades. Indeed, since September 11, 2001, over 300 individuals charged with terrorism crimes have been successfully prosecuted and sentenced in federal court, with more than 30 convicted in 2009 alone.

Earlier this year, the Secretary of Defense rescinded his prior order suspending the filing of new military commission charges. *See* Statement by Defense Secretary Robert Gates on Resumption of Military Commission Charges (Mar. 7, 2011). In his public statement announcing this development, however, the Secretary recognized the necessity and vitality of federal court prosecutions of suspected terrorists:

> For reasons of national security, we must have available to us all the tools that exist for preventing and combating international terrorist activity, and protecting our nation. For years, our federal courts have proven to be a secure and effective means for bringing terrorists to justice. To completely foreclose this option is unwise and unnecessary.

Id. The Association agrees with the Secretary's comments, and we urge the Senate to reject Sections 1039 and 1046.

II. Section 1040: Restriction of the Use of Funds to Transfer Guantanamo Detainees to a Foreign Country

Section 1040 would complicate and undermine the Executive Branch's efforts to deal with the challenging task of transferring particular Guantanamo detainees to foreign countries. The detainees who would be affected by Section 1040 are those who have been found, after an exhaustive review process, to be neither amenable to prosecution nor sufficiently dangerous to warrant continued detention by the United States.

For a number of years, dating back to the Bush Administration, detainees have been transferred to foreign countries for release, monitoring, or continued detention as the case may be. Such transfers have been important, as they are essentially the only way the military can remove an individual from Guantanamo if it has been determined that the individual is not subject to prosecution or further detention by the United States. The transfers are matters of sensitivity

requiring careful negotiation and coordination with foreign governments around the world. Section 1040 would be an unwarranted intrusion into the discretion of the Executive Branch to discharge its responsibilities regarding Guantanamo and would undermine the Administration's efforts to adhere to a lawful system of detention and release there.

In *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), the Supreme Court held that the detention of enemy fighters "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress authorized the President to use" in the AUMF. If detention is within the Executive Branch's authority, it surely follows that decisions to release or transfer prisoners must likewise be made by the President, subject, in appropriate cases, to *habeas* review by the courts. *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (recognizing constitutional privilege of *habeas corpus* for Guantanamo detainees). By requiring the Secretary of Defense to make detailed certifications – which may be difficult or impossible in some instances – Section 1040 would impinge on the executive's authority and disrupt the delicate balance of foreign policy and national security questions that the Executive Branch is in the best position to address. Indeed, the Administration has specifically objected to the certification requirement:

> The Administration strongly objects to the provisions . . . that would legislate Executive branch processes for periodic review of detainee status and regarding prosecution of detainees. . . . The certification requirement in section 1040, restricting transfers to foreign countries, interferes with the authority of the Executive branch to make important foreign policy and national security determinations regarding whether and under what circumstances such transfers should occur. The Administration must have the ability to act swiftly and to have broad flexibility in conducting its negotiations with foreign countries.

Statement at 2.

In Executive Order 13492 on January 22, 2009, the President was careful to avoid hamstringing the Secretary of Defense in determining the appropriate disposition of Guantanamo detainees. That Executive Order vested the Secretary of Defense and other participants in the detainee review process with determining "whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release." *See* Executive Order No. 13492, 74 Fed. Reg. 4898 at § 4 (Jan. 22, 2009). The Secretary's determinations must comport with other fundamental principles of U.S. and international law, including United States policy not to involuntarily transfer persons to countries in which there are substantial grounds to believe they would be in danger of torture. *See* Foreign Affairs Reform and Restructuring Act of 1998, P. L. 105-277 at § 2242(a).

The President has stated that "restrictions on the transfer of detainees to the custody or effective control of foreign countries interfere with the authority of the executive branch to make important and consequential foreign policy and national security determinations … in the context of an ongoing armed conflict." Statement by the President on H.R. 6523 (Jan. 7, 2011) (The White House, Office of the Press Secretary). Aside from the restrictiveness of the certifications, they are also duplicative in that, "[c]onsistent with existing statute, the executive branch has kept the Congress informed about these assurances and notified the Congress prior to transfer [of

detainees]." *Id.* Such assurances currently provided by the Executive Branch include that the foreign country "will take or have taken measures reasonably designed to be effective in preventing, or ensuring against, returned detainees taking action to threaten the United States or engage in terrorist activities." *Id.*

If Section 1040 were enacted into law, there would be a very real risk that innocent individuals – persons not facing prosecution for any violation of law and not deemed by the military to be subject to ongoing detention under the AUMF – might nevertheless be held at Guantanamo for an extended period of time, and perhaps indefinitely, if the Secretary of Defense cannot jump through the hoops that Section 1040's "certification" requirement would impose. Such a scenario would be antithetical to our nation's core principles and values.

III. Section 1036: Periodic Review of the Continued Detention of Guantanamo Detainees

Section 1036 conflicts with the procedures set forth in the Administration's recently-issued Executive Order on periodic review. As the Administration has stated:

> Section 1036 undermines the periodic review established by the President's March 7, 2011, Executive Order by substituting a rigid system of review that could limit the advice and expertise of critical intelligence and law enforcement professionals, undermining the Executive branch's ability to ensure that these decisions are informed by all available information and protect the full spectrum of our national security interests. It also unnecessarily interferes with DoD's ability to manage detention operations.

The Association views the Executive Order as salutary, and is particularly troubled by Section 1036's proposal of a review system heavily dominated by the military, and one in which counsel has only a limited role.

A. The Executive Order

The Executive Order establishes regular review of each Guantanamo detainee who has been found to be subject to lawful detention under the AUMF or who has been deemed amenable to prosecution but who has not yet been prosecuted. The Executive Order does not alter the substantive standard governing who may lawfully be detained under the AUMF. That standard, as currently construed by the D.C. Circuit, allows detention of anyone who was "part of forces associated with al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners." *Al-Bihani v. Obama*, 590 F. 3d 866, 872 (D.C. Cir. 2010). Rather, the review to be conducted under the Executive Order is intended to ensure that, as time goes by, even if a detainee may lawfully be held under the AUMF, that individual's particular circumstances are "carefully evaluated and justified, consistent with the national security and foreign policy interests of the United States and the interests of justice." Executive Order at 13277. The standard to be applied in the periodic reviews is whether "[c]ontinued law of war detention . . . is necessary to protect against a significant threat to the security of the United States." *Id.* Sec. 2.

Much of the Executive Order outlines the procedural details of the periodic review. Within one year of the issuance of the Executive Order, each detainee is supposed to receive a hearing

before a Periodic Review Board ("PRB"). *Id.* Sec. 3(a). The PRB consists of six "senior" individuals, one from each of the following agencies: State Department, DOD, DOJ, DHS, Director of National Intelligence, and Chairman of the Joint Chiefs of Staff. *Id.* at 13280 Sec. 9(b). The detainee has a right to counsel at the PRB hearing and also shall be assisted by a "personal representative" provided by the government who "shall advocate on behalf of the detainee before the PRB." *Id.* at 13278 Sec. 3(a)(2). At the hearing, the PRB is supposed to consider various information about the detainee, including materials offered by the detainee. *Id.* Sec. 3(a)(3) and (a)(4). The government must provide the PRB with "all mitigating information relevant to [the] determination" of whether detention should continue under the standard established in the Executive Order. *Id.* Sec. 3(a)(4). There are provisions regarding the disclosure of classified information to the detainee's lawyer and personal representative. *Id.* Sec. 3(a)(5). The PRB is supposed to render its decisions "prompt[ly]" and in writing. *Id.* Sec. 3(a)(7). Its decisions are to be made by consensus. *Id.* If the PRB cannot reach consensus or if one of its members requests a review, then its determination is subject to review by a Review Committee consisting of the Secretaries of State, Defense, and Homeland Security; the Attorney General; the Director of National Intelligence; and the Chairman of the Joint Chiefs of Staff. *Id.* at 13279 Sec. 3(d).

Each detainee will receive a full PRB hearing once every three years. *Id.* Sec. 3(b). Every six months, each detainee's case is subject to a "file review" by the PRB. *Id.* Sec. 3(c). During the file review, the PRB will consider "any relevant new information related to the detainee compiled by the Secretary of Defense, in coordination with other relevant agencies." *Id.* The detainee may make a written submission in connection with each file review. *Id.* If the file review raises a "significant question" as to whether continued detention is appropriate, the PRB is supposed to "promptly" convene a full PRB hearing. *Id.*

If there is a "final determination" that a detainee does not meet the standard for detention, then the Secretaries of State and Defense "shall be responsible for ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee" outside the U.S. *Id.* Sec. 4. The Review Committee (consisting of agency heads) is supposed to conduct an annual review of "sufficiency and efficacy of transfer effort," including efforts to transfer individuals whose continued detention has been found unwarranted under the Executive Order or whose *habeas corpus* petition has been granted. *Id.* Sec. 5(a)(1) and (a)(2).

Section 6 of the Executive Order establishes a "continuing obligation" by the Departments of Justice and Defense to assess the feasibility of prosecuting detainees. *Id.* at 13280 Sec. 6.

B. Section 1036 Provides for Near-Exclusive Military Review of Continued Detention

Section 1036 is superficially similar to the Executive Order, but it contains a number of departures that, collectively, would undermine the effort to achieve a balanced, objective review of the appropriateness of long-term detention. To begin with, the standard under Section 1036 for continued detention is whether such detention is "necessary to protect the national security of the United States" (Section 1036(a)) – a broader standard than whether such detention is "necessary to protect against a significant threat to the security of the United States," as provided by the Executive Order (Sec. 2)).

Further, unlike the PRB under the Executive Order, Section 1036 provides for review panels consisting exclusively of military officers “with expertise in operations, intelligence, and counterterrorism matters.” Section 1036(c). Moreover, Section 1036 provides that the detainee shall be provided with a “military personal representative,” thus ensuring that everyone in the room but the detainee is a member of the military. A critical difference between the personal representative provided under the Executive Order and the military representative provided under Section 1036 is that the former is “responsible for challenging the Government’s information and introducing information on behalf of the detainee” (Executive Order at 13278 Sec. 3(a)(2)), while the latter is not required to make such a challenge on behalf of the detainee (Section 1036(d)(1)).

With respect to outside counsel, Section 1036 provides that while a detainee may retain outside counsel, such counsel’s role is limited to filing a “written submission to the military panel on the question of whether the individual represents a threat to the national security of the United States.” Section 1036(d)(5). In contrast, under the Executive Order a detainee “may be assisted in proceedings before the PRB by private counsel,” thereby permitting counsel to have a broader role consistent with counsel’s traditional function. Executive Order at 13278.

Additionally, Section 1036 does not require a “prompt determination” by the initial reviewing panel (as the Executive Order does); the only time frame provided for initial review is that it “may not take place sooner than 21 days after the individual first becomes an individual detained at Guantanamo.” Section 1036(d)(6). Under Section 1036, the role of senior officials from the Departments of State, Defense, Justice, Homeland Security and from the Joint Chiefs of Staff shall be limited to reviewing the military panel’s recommendation concerning continued detention “for clear error,” and may reject such recommendation only upon a majority vote. Section 1036(g)(3)(A). Notably, a senior official of the Office of the Director of National Intelligence shall serve solely as a “non-voting advisory member” of the interagency review board (Section 1036(g)(2)), rather than a sitting member of the PRB under the Executive Order (Sec. 9(b)). Section 1036 is silent as to any obligation on the Departments of Justice and Defense to assess the feasibility of prosecution of detainees.

Thus, Section 1036 establishes a heavily militarized review process with what is, in effect, only a limited appellate role by the Departments of State, Defense, Justice, Homeland Security and the Joint Chiefs of Staff. This, in combination with the severely restricted role for counsel and other problematic provisions, warrants amendment of Section 1036 to conform to the Executive Order’s already-established procedures or, alternatively, dropping Section 1036 altogether.

IV. Sections 1035 and 1038: A National Security Protocol for Each Detainee and Prohibition on Family Visitation

Sections 1035 and 1038 each seek to restrict a detainee’s contact with persons other than federal government or military personnel – whether with such detainee’s counsel or family members.

A. Section 1035 Threatens to Infringe Upon the Attorney-Client Relationship

Section 1035 would require the Secretary of Defense to create and submit to Congress a detailed "national security protocol" for each Guantanamo detainee concerning access to information and to persons other than federal government and military personnel. This provision would unhelpfully complicate the delicate and critically important process of developing rules for access to counsel and evidence by Guantanamo detainees facing prosecution before military commissions.

In light of the recent announcement by Attorney General Holder that Khalid Sheikh Mohammed and the other 9/11 plotters will be tried by military commission, it is imperative that the military commission system be accepted as fair, lawful, and credible. *See* Statement of the Attorney General on the Prosecution of the 9/11 Conspirators (Apr. 4, 2011). Achieving this goal will be difficult, especially in light of the controversy, false starts, and generally spotty record of the military commissions since 2001. In recent years, some progress has been made, especially as a result of the Supreme Court's decision in *Hamdan v. Rumsfeld*, 584 U.S. 557 (2006), and the constructive work of Congress and the Obama Administration on the Military Commissions Act of 2009, 10 U.S.C. § 948a et seq. (2009). At the same time, it is clear that substantial challenges remain before the nation and the world can have confidence that the military commission system is workable, fair, and legitimate. The Association has expressed the view that "if we must have military commissions, the government should avoid provisions that deviate from [standards] in federal courts or for courts martial under the Uniform Code of Military Justice." Letter from Association President Patricia M. Hynes to President-Elect Barack Obama (Nov. 25, 2008). Reasonable access to counsel and to evidence relevant to a detainee's case is fundamental to any fair and credible system of military commissions, especially ones in which capital punishment may be imposed.

Section 1035 seems intended to encourage limits and restrictions on access to counsel and evidentiary material. The very first provision in Section 1035(a)(1) mandates that the "national security protocol" must describe "[t]he authority of an individual covered by the protocol to have access to military or civilian legal representation, or both, and any limitations on such access." Section 1035(a)(1). Each "national security protocol" must further address the following factors consistently arising in attorney-client communications:

- the categories of "information" that a detainee may not discuss or include in any communications with anyone other than federal government or military personnel, including "materials" such detainee already has or creates (Section 1035(a)(3));

- types of "materials" to which a detainee is authorized to have access (and the process by which such "materials," including those created by the detainee, are reviewed) (Section 1035(a)(4));

- the "nature" of the communications a detainee may have with anyone other than federal government or military personnel (and the monitoring of such communications) (Section 1035(a)(5));

- any meetings between a detainee and anyone other than federal government or military personnel (and the monitoring of such meetings) (Section 1035(a)(6));

- the categories of "information" or "material" that may not be provided to a detainee by anyone other than federal government or military personnel, including even by such detainee's military or outside counsel or military personal representative (Section 1035(a)(7)); and

- the manner in which any "legal materials or communications . . . will be monitored for the protection of national security," while purportedly also ensuring applicable privileges (Section 1035(a)(8)).

The foregoing provisions impinge, or threaten to impinge, upon the attorney-client relationship, the attorney-client privilege, and a military commission defendant's ability to prepare for trial.

An ancient principle on which our legal system rests is the sanctity of the attorney-client privilege. *See* Geoffrey C. Hazard Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1070 (1978) (Professor Hazard dates the attorney-client privilege to the Roman Civil Code, and in this country cites its most conspicuous origins in John Adams's representation of the British soldiers charged in the Boston massacre); *see also United States v. Marrelli*, 15 C.M.R. 276, 281 (C.MA 1954) ("This [attorney-client] privilege—one of the oldest and soundest known to the common law—exists for the purpose of providing a client with assurances that he may disclose all relevant facts to his attorney safe from fear that his confidences will return to haunt him."). Any significant undermining of this bedrock privilege would inflict serious damage to the military commission system. If detainees cannot trust the privacy of their communications with counsel, the system will cease to function effectively and any judgments it renders will be viewed as illegitimate and vulnerable to appellate reversal. Moreover, Section 1035 could create ethical dilemmas for defense counsel who are governed by modern codes of professional conduct. It is difficult to see how an attorney can fulfill the obligation to zealously represent his or her detainee client, given the potential prohibitions that may be included in his or her client's "national security protocol" under Section 1035. *See* American Bar Association, Model Rules of Professional Conduct, Preamble [2] (2011).

A "national security protocol" could severely constrain or frustrate the attorney-client relationship. Where counsel would be prohibited from presenting, discussing and inquiring into critical information with his or her client – including information created by the client or even received by the government from the client – counsel will be unable to effectively test theories, set strategy and advocate zealously.

The Association is greatly troubled by the monitoring of attorney-client communications that could be required by the "national security protocol" for the client. It is axiomatic that the confidentiality of attorney-client communications is absolutely essential to the proper functioning of a fair and impartial adversarial system. While Section 1035(a)(8) speaks of "ensuring that any applicable legal privileges are maintained for purposes of litigation related to trial . . . or a petition for habeas corpus," such passing reference provides small comfort in light of the power afforded the Secretary of Defense to deny a detainee's "authority" to access counsel (Section 1035(a)(1)), and the other similarly restrictive factors that precede Section 1035(a)(8).

In sum, the requirement of a "national security protocol" for each Guantanamo detainee is unduly burdensome and would interfere with the development of sound and workable procedures for access to counsel and evidence by military commission defendants. Section 1035 should be dropped and the Executive Branch should be given the latitude to develop such procedures, with judicial review if necessary.

B. Section 1038: Prohibition on Family Visitation

Section 1038 seems unfairly punitive and unnecessary. Furthermore, if enacted, it would infringe upon the Department of Defense's jurisdiction to handle matters such as family visitation.

V. Section 1034: Modification of the AUMF

The AUMF authorized the President to use force against the "nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF Sec. 2(a). Section 1034 "affirms" that the United States is "in an armed conflict with al-Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad," and that the President's authority under the AUMF "includes the authority to detain belligerents . . . until the termination of hostilities."

Section 1034 also includes language that defines the scope of the current armed conflict in elastic, potentially broad terms. Under Section 1034(3)(A), the armed conflict is defined to include "nations, organizations, and persons who . . . are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners." Section 1034(3)(B) sweeps even more broadly, defining the conflict to encompass "nations, organizations, and persons who . . . have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A)." Taken together, this language would potentially extend the conflict to a broad, secondary layer of individuals, persons, and nations who have "supported the supporters" of al Qaeda, the Taliban, or associated forces. The breadth of this language could lead to excessive applications not intended by Congress.

It is unclear why the House thought it necessary to include Section 1034 in the NDAA; the Association is aware of no need for this provision in light of the broad construction that courts have given to the AUMF. The language of Section 1034, moreover, extends beyond that of the AUMF by removing any reference to the 9/11 attacks and expressly authorizing military force against a potentially broad group of persons, organizations, or nations around the world. This language could be read as a significant expansion of the AUMF and could result in confusion, at a minimum, or in an unintentional broadening of the scope of the current armed conflict.

The Administration has objected to Section 1034:

> The Administration strongly objects to section 1034 which, in purporting to affirm the conflict, would effectively recharacterize its scope and would risk

> creating confusion regarding applicable standards. At a minimum, this is an issue that merits more extensive consideration before possible inclusion.

Statement at 2. The Association echoes these concerns and urges the Senate to strike Section 1034 from the NDAA. If there is a perceived need for new legislation authorizing military force, it should be carefully considered and debated on a stand-alone basis with input from the Administration and other interested parties.

Conclusion

In light of the foregoing, the Association urges the Senate to reject Sections 1039, 1046, 1040, 1036, 1035, 1038 and 1034 as unwise, impractical, and inconsistent with our nation's principles of justice.

Very truly yours,

Samuel W. Seymour

cc: Hon. Daniel K. Inouye, Chairman, Senate Appropriations Committee
Hon. Thad Cochran, Vice Chairman, Senate Appropriations Committee

Hon. Carl Levin, Chairman, Senate Armed Services Committee
Hon. John McCain, Ranking Member, Senate Armed Services Committee

Hon. John F. Kerry, Chairman, Senate Foreign Relations Committee
Hon. Richard G. Lugar, Ranking Member, Senate Foreign Relations Committee

Hon. Patrick J. Leahy, Chairman, Senate Judiciary Committee
Hon. Chuck Grassley, Ranking Member, Senate Judiciary Committee

Hon. Charles E. Schumer
Hon. Kirsten E. Gillibrand