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July 20, 2011

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 concern with (in order of discussion below) Sections 1032, 1033 and 1031 of S. 1253, the National Defense Authorization Act for Fiscal Year 2012 (the "NDAA"), which was marked up by the Senate Armed Services Committee on June 17, 2011.

By letter dated June 14, 2011, the Association expressed its objections to numerous provisions of the NDAA as adopted by the House of Representatives on May 26, 2011. The Senate bill is in many respects an improvement over the deeply flawed House bill, but it nevertheless contains three provisions that are of substantial concern.

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 the necessity for an effective and wise national security policy.

Section 1032: Mandatory Military Detention of Certain Terrorism Suspects

Subject to a national security waiver, Section 1032 would mandate military detention, "pending disposition under the law of war," for any person "who is determined to be" a member or part of al-Qaeda "or an affiliated entity" and who is "a participant in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners." Section 1032(a)(2). "Disposition under the law of war," in turn, is defined to include long-term detention without charge under the law of war; prosecution before a military commission; prosecution in an Article III court; or transfer to a foreign country. Section 1032(a)(3).

Section 1032 is inconsistent with our government's separation of powers and would substantially hinder the Executive Branch's ability to use the criminal justice system, one of its most powerful and effective tools for investigating, disrupting, and punishing accused terrorists. In addition, Section 1032 would result in the increased militarization of counterterrorism policy. Finally, we believe the provision would be unworkable in practice. Accordingly, we urge the full Senate to reject Section 1032 as it considers the NDAA.

Although it is not clear that Section 1032 would formally restrict the prosecution of accused terrorists in Article III courts, in practice it would tie the Executive Branch's hands by reducing or even eliminating the ability of the FBI and Department of Justice prosecutors to meaningfully participate in terrorism investigations and prosecutions. By doing so, it would deprive the Executive Branch of critical flexibility to make use of the deep, broad, and invaluable expertise of FBI and Department of Justice personnel, as well as our federal courts and the civilian defense bar. It seems clear that Section 1032 would tend to force additional individuals into the military commission system–a novel regime whose basic rules and procedures remain largely untested–or into a system of extended long-term military detention, which remains controversial and potentially unjust and should be reserved only for exceptional cases where it is permitted by law and the government cannot feasibly prosecute the detainee.

In a recent article published in the *Journal of National Security Law and Policy*, former Assistant Attorney General David S. Kris argues persuasively that the Executive Branch should retain the flexibility to use all available tools, without Congressional restrictions, in order to carry out its counterterrorism policy most effectively. David S. Kris, Law Enforcement as a Counterterrorism Tool, 5 *J. Nat'l Security L. & Policy* 1 (2011) (available at http://www.jnslp.com/2011/06/26/law-enforcement-as-a-counterterrorism-tool/). In his article, Mr. Kris compiles voluminous evidence documenting the proven effectiveness of the criminal justice system in dealing with accused terrorists. *Id.* at 13-26. Mr. Kris' paper cites example after example in which the civilian court system, and FBI and DOJ investigators, developed critical intelligence; thwarted ongoing plots; and secured credible, just convictions and severe sentences. *Id.* at 14-17 (citing prosecutions of, among others, Ouassama Kassir, Ahmed Omar Abu Ali, Zacarias Moussaoui, Iyman Faris, John Walker Lindh, Hosam Maher Husein Smadi, Najibullah Zazi, David Headley, Tahawwur Rana, Faisal Shahzad, and Ahmad Ghailani); *see also* Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008) (citing and discussing statistical data and scores of examples of successful Article III terrorism prosecutions dating back to the 1980s); Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts, 2009 Update and Recent Developments* (2009) (same). In addition, of course, our civilian justice system is justly recognized at home and abroad as a

bulwark of due process and procedural fairness and, indeed, as one of the central hallmarks of our democratic system of government.

The strengths of our current system, and the problems with Section 1032, are illustrated by the recent case of Ahmed Abudlkadir Warsame. As has been reported, the Executive Branch interrogated Warsame for some two months while he was held aboard a Navy ship (with the knowledge of the International Committee of the Red Cross) and then transferred him to Department of Justice custody to face charges that would likely not have been available in a military commission prosecution. *See* Press Release, *Accused Al Shabaab Leader Charged with Providing Material Support for Al Shabaab and Al Qaeda in the Arabian Peninsula,* United States Attorney, Southern District of New York (July 5, 2011); Indictment, *United States v. Warsame*, 11 Crim. 559 (S.D.N.Y.); Jake Tapper, *Political Punch* (interview with White House Press Secretary Jay Carney) (available at http://blogs.abcnews.com/politicalpunch/2011/07/keeping-a-suspected-terrorist-on-a-boat-for-two-months-and-the-atf-chief-testifies-todays-qs-for-os-.html) (July 6, 2011). Section 1032, if adopted, would cast doubt on the ability of the Executive Branch to undertake this sort of approach. Indeed, to the extent it would force the government to prosecute Warsame or similarly situated individuals in a military commission, Section 1032 would actually be harmful to the government's interests because of the limited jurisdiction and other substantial drawbacks of military commissions as compared to Article III courts.

We note that Section 1032(d) exempts U.S. citizens from its application, thus implying that it could apply to resident aliens or other non-citizens lawfully in the United States. For the reasons discussed below in our comments on Section 1031, we have concerns about the application of these provisions to anyone lawfully present within the United States, whether citizens or non-citizens. The use of military detention and/or military trial of such persons would be contrary to our traditions and would raise serious constitutional questions. *See Al-Marri v. Spagone*, 129 S. Ct. 680 (2008) (granting certiorari to consider legality of military detention of resident alien arrested within the United States); *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (dismissing writ of certiorari upon transfer of detainee into civilian custody pending trial).

Finally, we believe Section 1032 would be unworkable in practice. In many situations, it is not clear at the outset whether an individual is a member of al-Qaeda or whether the individual's conduct falls within the scope of Section 1032. The strictures of Section 1032 risk interfering with the judgment of interrogators and investigators and injecting needless complication into the delicate process of gathering information about a detainee to assess the individual's conduct and knowledge.

Section 1033: Restriction of the Use of Funds to Transfer Guantanamo Detainees to a Foreign Country

Section 1033 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. This provision mirrors Section 1040 of the version of the NDAA passed by the House and Section 1113 of the 2011 Department of Defense and Full-Year Continuing Appropriations Act. *See* Pub. L. No. 112-10 (Apr. 15, 2011). The Association strongly opposed both of those provisions and we believe that the Senate should drop Section 1033 as it considers the NDAA.

Section 1033 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 1033 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 1033 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 1033 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.

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).

If Section 1033 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 1033's "certification" requirement would impose. Such a scenario would be antithetical to our nation's core principles and values.

Section 1031: Detention Authority Under 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 1031 would affirm the authority of the U.S. military to detain individuals covered by the AUMF "pending disposition under the law of war," which is defined to include long-term detention under the law of war, prosecution either before a military commission or in an Article III court, or transfer to a foreign country. *See* Section 1031(c). Although Sections 1031(a) through 1031(c) conform to existing law, including judicial interpretations of the scope of the AUMF and the government's detention authority under that statute, we note that the Supreme Court has not definitively construed the scope of the AUMF's detention authority and that, therefore, the interpretations supplied by lower courts are subject to review.

More significantly, we are troubled by the inclusion of Section 1031(d), which provides that "[t]he authority to detain a person under this section does not extend to the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking place within the United States except to the extent permitted by the Constitution of the United States." So long as our civilian courts remain open, military detention of U.S. citizens or others lawfully present on U.S. soil would raise truly fundamental constitutional problems, *see Ex Parte Milligan*, 71 U.S. 2 (1866) (citizen may not be tried before military tribunal in a state where civilian courts are open and functioning); would be contrary to our tradition that, with rare exceptions, the military is not to be used to enforce the law on U.S. soil, *see* Posse Comitatus Act, 18 U.S.C.§1385; and could be subject to grave abuse. We urge the Senate to make clear that Section 1031 may not be applied to such persons except when civilian courts are no longer open and functioning.

Conclusion

In light of the foregoing, the Association urges the Senate to reject Sections 1032 and 1033, and to modify Section 1031, as it considers the NDAA.

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