



**NEW YORK
CITY BAR**

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REPORT ON LEGISLATION

S.1197

Sen. Levin

**MEMORANDUM ON SUPPORT OF SECTIONS 1031 AND 1033 OF THE PROPOSED
NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2014**

The Association of the Bar of the City of New York (the “Association”) urges you to support sections 1031 and 1033 of S.1197, the National Defense Authorization Act for FY 2014, as recently reported out by the Senate Armed Services Committee, on a bipartisan vote. Section 1031 clarifies and improves the procedures for transfer or release of Guantanamo Bay detainees to foreign countries. Section 1033 allows for the transfer of Guantanamo detainees to the United States for detention and trial. Both provisions are in the best interests of justice and fairness, the reputation of the United States in the international community, national security, and efficiency and economy.

SECTION 1031

Section 1031 establishes the procedures and guidelines for the Secretary of Defense to exercise authority to transfer or release Guantanamo detainees (1) who have been determined under periodic review procedures established by current law to be no longer a threat to national security, (2) whose transfer or release is required by an order of a court or other competent tribunal of the United States, or (3) who have been tried for conduct that also served as the basis for holding them in detention and have either been acquitted or convicted and served their sentence.

The procedures and guidelines established by Section 1031 are more practical than the existing certification procedures, some of which impose cumbersome obstacles to the Secretary’s release or transfer of detainees. They do so, moreover, without compromising national security, while retaining congressional oversight over this process.

Enactment of Section 1031 promises, among other things, to remedy the injustice and inhumanity of indefinite detention of persons cleared for transfer, in some cases by both the Bush and Obama administrations, and in many cases, who have already been held for more than eleven years. To date, only two of the 86 cleared detainees have been successfully transferred because current law unnecessarily complicates the transfer process. Section 1031 will also help provide a means of releasing additional categories of detainees: those whose petitions for habeas corpus have been granted and become final; and those who have been tried and acquitted of

conduct that was the basis for their detention, or who were convicted and have served their sentence for that conduct.

By facilitating the transfer of these detainees, Section 1031 will help further the goal of closing Guantanamo, thereby eliminating a symbol of injustice that has been used as a propaganda tool to recruit terrorists, caused friction with our allies, and undermined our nation's ability to obtain international cooperation in the fight against terrorism. Closing the prison at Guantanamo would help restore America's reputation as a leader for the protection of human rights and the rule of law. Not insignificantly, it also would eliminate an unjustifiable economic burden on the nation's financial resources; a recent Pentagon estimate indicates that approximately \$2.7 million is spent annually *per prisoner* at Guantanamo, whereas the cost per prisoner at a maximum security Bureau of Prisons facility is approximately \$34,000 per year.

SECTION 1033

Section 1033 would provide the executive with the option, where circumstances warrant, of using the federal courts as an alternative to military commissions to prosecute detainees for criminal conduct. Transfers to the United States would be permitted on the Secretary's determination that they are in the interest of national security and that precautions have been taken to protect public safety. Additionally, transfers require that the appropriate congressional committees have been given 30 days advance notice.

While military commissions would remain an option for use in appropriate circumstances, experience has shown that the federal courts have been a far more efficient and successful means of prosecuting persons accused of terrorist offenses, that they are more likely to be viewed by the world community as a fair and just process, and that such prosecutions can be carried out without compromising public safety or national security. Federal prosecutions are also not subject to the legal controversies that continue to surround military commissions.

Military commissions have not been effective in bringing accused terrorists to justice. Those believed to be principal architects of the 9/11 attacks and the 2000 attack on the USS Cole still have not been tried, and their prosecutions remain mired in procedural and legal issues that could delay them indefinitely. While military commissions have languished in a morass of controversy, federal courts have successfully prosecuted and convicted more than 400 suspected terrorists since 9/11, under long-established procedures recognized throughout the world as a model of fairness and due process, and with no harm to the safety and security of the inhabitants of the venues where the trials have occurred. In conjunction with Section 1031, the use of federal courts to prosecute Guantanamo detainees also would be an effective means of ending indefinite detention and facilitating the closure of the prison at Guantanamo. Federal prosecution, moreover, makes far more financial sense than military commissions, which have cost the United States \$600 million since 2007.

The Association therefore urges support of Sections 1031 and 1033, as reported out by the Senate Armed Services Committee, and without amendment.

December 2013