

## Provisions in the 2012 National Defense Authorization Act (S. 1253) Would Weaken U.S. Counterterrorism Efforts

### Section 1031 - Authority to detain unprivileged enemy belligerents captured pursuant to the Authorization for Use of Military Force

#### What It Says

- ☑ Section 1031 authorizes the military to detain anyone “who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.”<sup>1</sup>

#### What It Means

- ☑ Section 1031 would authorize the imprisonment without trial of **American citizens apprehended on American soil**, solely on suspicion of terrorism-related activity. Such detention authority harkens back to the internment of Japanese American citizens during World War II.
- ☑ Section 1031 would undermine the United States' commitment to the Geneva Conventions by treating all suspected terrorists as if they are enemy combatants authorized to be held "until the end of hostilities." As legal scholars, retired military leaders, and national security experts have made clear, there is no authority in American experience or under the laws of war for treating all terrorism suspects as enemy combatants to detain them indefinitely without holding trials.<sup>2</sup>

### Section 1032 - Required military custody for members of al-Qaeda and affiliated entities.

#### What It Says

- ☑ Section 1032 requires that the military hold anyone who is “(A) a member of, or part of, al-Qaeda or an affiliated entity; and (B) a participant in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.”<sup>3</sup>

#### What It Means

- ☑ Section 1032 would force the military to take on a role that it has not asked for and does not want: exclusive jailor for a large category of terrorism suspects, including individuals apprehended on U.S. soil. Department of Defense General Counsel Jeh Johnson stated that mandatory military custody of terrorism suspects would tie the President's hands in fighting terrorism and undermine the effectiveness and credibility of military detention operations by spurring unnecessary litigation.<sup>4</sup>

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<sup>1</sup> Committee on Armed Services Report, National Defense Authorization Act of 2012 [to accompany S. 1253], S. Rep. No. 112-26, at § 1031 (1<sup>st</sup> Sess. 2011).

<sup>2</sup> See, e.g., Letter from Gen. Joseph P. Hoar, USMC (Ret.) et. al, to Sen. John McCain and Sen. Carl Levin, (June 15, 2011), available at [http://www.humanrightsfirst.org/wp-content/uploads/pdf/Letter-Levin-McCain\\_re\\_NDAA.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/Letter-Levin-McCain_re_NDAA.pdf).

<sup>3</sup> Committee on Armed Services Report, *supra* note 1, at § 1032.

<sup>4</sup> See Remarks of Jeh Johnson, House Armed Services Committee Hearing on the Law of War Detention and Guantanamo Bay Overview, March 17, 2011.

## Analysis

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- ☑ Section 1032 would disrupt the FBI and local law enforcement in their efforts to foil terrorism plots by forcing the transfer of terrorism suspects during ongoing investigations. These investigations have yielded substantial actionable intelligence<sup>5</sup> that **could be lost** if terrorism suspects are prematurely forced into military custody. Such intelligence includes telephone numbers and email addresses used by al Qaeda and other terrorist groups, al Qaeda communications methods and security protocols, al Qaeda recruiting and financing methods, the location of al Qaeda training camps and safe houses, information on al Qaeda weapons programs, the identities of operatives involved in past attacks, and information about future plots to attack U.S. interests.<sup>6</sup>
- ☑ Section 1032 would overturn significant aspects of the Posse Comitatus Act<sup>7</sup> – a law dating back to civil war reconstruction designed to ensure that the military is not used for law enforcement purposes on U.S. soil. Displacing state and local law enforcement with the military threatens states' rights under the Constitution.<sup>8</sup>

### **Section 1033 - Permanent requirements for certifications relating to the transfer of detainees at United States Naval Station, Guantánamo Bay, Cuba, to foreign countries and other foreign entities.**

#### What It Says

- ☑ Section 1033 requires the Secretary of Defense to meet stringent certification requirements prior to transferring Guantánamo detainees to foreign countries. Such requirements relate to the ability of the foreign country to manage the detainee post-transfer, and whether any released Guantánamo detainees have committed acts of terrorism in that country.<sup>9</sup>

#### What It Means

- ☑ Section 1033 would make permanent, for the first time, onerous restrictions on transferring men from Guantánamo back home or to a third country. Those who have been cleared for release from Guantánamo after exhaustive reviews should not be held.
- ☑ Section 1033 would constitute Congress second-guessing and micromanaging the Secretary of Defense and other agency and department heads in their efforts to implement workable detainee transfer policies. It would also encroach on the executive authority of the President as Commander in Chief. The Obama administration has issued a veto threat against similar transfer restrictions in the House version of the National Defense Authorization Act for FY 2012.

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<sup>5</sup> The source of 81 percent of all clues in foiled terror plots come from either the public or from state, local, and federal law enforcement. See *Building on Clues: Examining Successes and Failures in Detecting U.S. Terrorist Plots*, Institute for Homeland Security Solutions, p.12, October 2010.

<sup>6</sup> David Kris, Asst. Att'y Gen. for Nat'l Sec., Dep't of Just., Remarks at the Brookings Institution: Law Enforcement as a Counterterrorism Tool 13 (June 10, 2010), available at [http://www.brookings.edu/~media/Files/events/2010/0611\\_law\\_enforcement/20100611\\_law\\_enforcement\\_kris.pdf](http://www.brookings.edu/~media/Files/events/2010/0611_law_enforcement/20100611_law_enforcement_kris.pdf) (asserting that law enforcement has elicited crucial intelligence information from suspects including: al Qaeda communications methods and security protocols, al Qaeda recruiting methods, the location of al Qaeda training camps and safe houses, and information about future plots to attack U.S. interests).

<sup>7</sup> 18 U.S.C. § 1385 (1887).

<sup>8</sup> *C.f. Printz v. United States*, 521 U.S. 898 (1996) (striking down provisions within a federal gun regulation law for impermissibly commandeering the chief law enforcement officers of states in contravention of the 10<sup>th</sup> Amendment of the Constitution). As other Senate bills make clear, mandatory military custody would require local and state law enforcement officials to develop procedures to immediately transfer criminal suspects into military custody.

<sup>9</sup> Committee on Armed Services Report, *supra* note 1, at § 1033.