

## **MEMORANDUM**

**TO:** Interested Persons

**FROM:** Laura W. Murphy, Director  
Christopher E. Anders, Senior Legislative Counsel

**DATE:** October 17, 2011

**RE:** Section 1031 of S. 1253, the National Defense Authorization Act, Significantly Curtails Existing Protections Against Indefinite Detention Without Charge or Trial

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The American Civil Liberties Union strongly opposes section 1031 of S. 1253,<sup>1</sup> the National Defense Authorization Act, because it significantly curtails existing protections against indefinite detention without charge or trial, as follows:

### **Section 1031 Subjects United States Citizens and Other Persons Present in the United States to Indefinite Detention Without Charge or Trial**

Section 1031 is a sharp break from decades of legal protections against indefinite detention without charge or trial of United States citizens and other persons present in the United States itself:

- The last time that Congress authorized the indefinite detention without charge or trial of United States citizens and other persons present in the United States was during the McCarthy era. In 1950, Congress overrode the veto of President Harry Truman and enacted the Internal Security Act, which included the Emergency Detention Act that authorized the federal government to imprison without charge or trial American citizens and non-citizens present in the United States considered likely to commit espionage or sabotage. The indefinite detention authority was never used, and was repealed in 1971.
- Section 1031 of S. 1253 would be the first time that Congress creates an exception to the Non-Detention Act of 1971, which is a statute signed into law by President Richard Nixon that provides, "No citizen shall be imprisoned or otherwise

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<sup>1</sup> The ACLU also opposes section 1032 of S. 1253, as explained in a letter, opposing sections 1031 and 1032, sent by the ACLU to senators on July 1, 2011.

- detained by the United States except pursuant to an Act of Congress.” The Non-Detention Act of 1971, authored by Senator Daniel Inouye, was enacted to



Posse Comitatus Act is merely a statutory protection against the use of the military for domestic law enforcement, and is not a constitutional protection. Section 1031 would create a significant exception to the Posse Comitatus Act, which would essentially render the Posse Comitatus Act meaningless. Like the Non-Detention Act of 1971, the protections in the Posse Comitatus Act are only as good as the commitment of each Congress to uphold them.

### **Section 1031's Military Detention Authority Could Imply Authority to Both Investigate and Arrest Civilians Worldwide, Including Within the United States**

The detention authority provided to the President to use the military worldwide to imprison civilians may be significantly broader than detention alone. At least arguably, the authority to detain implies the authority to arrest, and the authority to arrest implies the authority to investigate.

- Unless explicitly limited by the legislation itself, section 1031 could arguably be read to provide unchecked authority for the President to use the military to investigate and arrest civilians, including civilian American citizens, far from any battlefield, including within the United States itself. The President could have the authority under section 1031 to supplant even domestic federal, state, and local law enforcement with the military.
- Martial law could displace important aspects of American law enforcement. The military could interrupt and take over criminal investigations now being conducted by local, state, and federal law enforcement. Anyone picked up in the United States itself and suspected of any relationship with terrorists—including American citizens—could be imprisoned up to life without any prosecutor ever being required to prove a crime beyond a reasonable doubt. Once the military has the authority or obligation to arrest, hold, and imprison civilians on American soil, it will also claim authority to take over criminal investigations domestically. The legislation would take away existing anti-terrorism authority from state, local, and federal law enforcement, and martial law would apply in its place.

### **Section 1031 is Overbroad—Goes Beyond Permissible Detention Under Laws of War, Rule of Law, and Obama Administration's Position**

Section 1031 goes beyond any detention permissible under the laws of war, its ambiguities will result in a national security regime that is not governed by the rule of law, and it includes persons who even the Obama White House states should not be subject to indefinite detention without charge or trial:

- The laws of war do not authorize the indefinite detention without charge or trial of persons apprehended outside the context of an armed conflict. Section 1031 defines “covered persons” to include persons captured without any nexus to actual hostilities or to the 9/11 attacks, and is inconsistent with law of war requirements. Mandating military detention of such persons will cause conflict between the detention authority asserted by the United States and that asserted by our allies.
- Ambiguous terms in section 1031 will mean that an important aspect of United States national security policy will not be governed by the rule of law, because there will be no set legal standard for how the United States conducts itself in detaining terrorism suspects. The rule of law is not meaningfully present if the scope of who the United States asserts it can detain is so vague that its meaning is not discernable, and it can arbitrarily be expanded without notice. The term “associated forces” in paragraph 1031(b)(2) is ambiguous and provides little



Particularly more than ten years after the 9/11 attacks, with Osama bin Laden dead, and the United States withdrawing from Iraq and Afghanistan, Congress passing permanent, worldwide authority for the military to imprison in