



The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
437 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Charles
Grassley
Ranking Member
Committee on the Judiciary
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OFFICERS AND DIRECTORS
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RE: Judiciary Committee Should Assert Its Jurisdiction Over Those Aspects of the Detention Authority Provisions in S. 1253, the National Defense Authorization Act for Fiscal Year 2012 (Sections 1031, 1032, and 1036), That Affect Civilians Who Are Otherwise Outside of Military Control, Including Civilians Within the United States Itself

Dear Chairman Leahy and Senator Grassley:

The American Civil Liberties Union (“ACLU”) strongly urges the Judiciary Committee to assert its jurisdiction over those aspects of the detention authority provisions in S. 1253, the National Defense Authorization Act for Fiscal Year 2012 (“NDAA”), that may apply to civilians, including some American citizens, who are otherwise outside of military control, including civilian suspects apprehended within the United States itself. Sections 1031, 1032, and 1036 of the NDAA are clearly within the jurisdiction of the Judiciary Committee because the provisions, if enacted, would:

- (1) authorize the federal government to indefinitely imprison without charge or trial civilians—including American citizens—apprehended both inside and outside the United States, including individuals who had no role in the 9/11 attacks or any actual hostilities (the bill would mark the first time since 1950 that Congress explicitly authorizes the indefinite detention without charge or trial of American citizens);
- (2) *mandate* military detention of some civilians who would otherwise be outside of military control, including civilian suspects apprehended within the United States itself; and
- (3) transfer to the Department of Defense core prosecutorial, investigative, law enforcement, penal, and custodial authority and

responsibility now held by the Department of Justice, including by the Criminal Division, the National Security Division, the various United States Attorneys, the Federal Bureau of Investigation, the Bureau of Prisons, and the Marshals Service, as well as by the state attorneys general of the fifty states.

These provisions in the NDAA are inconsistent with fundamental American values embodied in the Constitution and in the country's adherence to the rule of law. Moreover, these provisions *significantly cut back on the historic protections provided to American citizens by the Non-Detention Act of 1971 and to everyone living in the United States by the Posse Comitatus Act of 1878*. The ACLU urges the Judiciary Committee to schedule hearings on these detention sections of the NDAA, and assert its jurisdiction over these sections for purposes of markup.

Section 1031 Would Be the First Time in More than 60 Years that Congress Explicitly Authorizes Indefinite Imprisonment of Civilians Within the United States, and Would Be the First Exception to a 40-Year Old Statute Prohibiting the Detention of American Citizens Unless Authorized by Congress. Section 1031 would be a sharp and extraordinarily harmful break from decades of Congress refraining from enacting laws for the indefinite imprisonment without charge or trial of American citizens, of persons apprehended within the United States, and of civilians who had no role in actual hostilities.

The last time that Congress authorized the indefinite imprisonment of American citizens and legal residents without charge or trial within the United States itself 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 Americans and non-citizens in the United States considered likely to commit espionage or sabotage. The Emergency Detention Act was never used, but after concerns that it could be used to imprison civil rights activists during the 1960's and as the result of a campaign by the Japanese American Citizens League for its repeal, Senator Daniel Inouye led the Senate effort for repeal—with the strong support of President Richard Nixon.

In 1971, Congress repealed the Emergency Detention Act and, in its place, enacted the Non-Detention Act of 1971. For 40 years, the statute has provided, “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”

Although Subsection 1031(c) of the NDAA states that it does not apply to American citizens or lawful residents “on the basis of conduct taking place within the United States except to the extent permitted by the Constitution,” important loopholes remain for citizens who are mere suspects to be imprisoned without charge or trial. In particular, American citizens and lawful residents suspected of wrongdoing outside the United States could be indefinitely imprisoned, even if apprehended within the United States itself. The “determination” that someone can be indefinitely imprisoned would not require proof of guilt, but instead would be decided entirely by Executive Branch officials following some future agency regulations.

These American citizens and other civilians picked up in the United States, but never charged or tried, could be imprisoned “until the end of hostilities” authorized by the 2001

Authorization for Use of Military Force. These American citizens could be imprisoned along with non-citizen civilians who had no role in the 9/11 attacks or any actual hostilities, and who would not be detainable under the laws of war. The Judiciary Committee surely has jurisdiction--which it should assert--over the Non-Detention Act and other laws and legislation affecting the imprisonment of American citizens and other civilians picked up without charge in the United States itself, or picked up overseas for conduct that was not connected to the 9/11 attacks or actual hostilities.

Section 1032 Would Put Civilians Who Are Otherwise Outside of Military Control Into Military Detention, Without Charge or Trial, and Would Curtail the Protections Provided by the Posse Comitatus Act of 1878. Section 1032 requires the mandatory military detention of a subset of persons covered by the indefinite detention authority provided in Section 1031. Mandatory military detention would extend to civilians who otherwise would not be subject to military control, and would include military detention without charge or trial of civilians picked up in the United States itself.

Military detention certainly has a place, albeit limited, in federal and international law. However, the military should not be authorized to--or even worse, mandated to--imprison without charge or trial civilians picked up on U.S. soil or who otherwise would be outside military authority. Not only does Section 1032 mandate the military detention without charge or trial of civilians who otherwise would not be subject to military control, but it mandates military detention even of some civilian suspects picked up in the United States itself.

Section 1032 curtails the long-standing protections against domestic use of the military. The Posse Comitatus Act of 1878 generally prohibits the military from carrying out law enforcement activities within the United States (the statute applies to the Army and Air Force; the Navy and Marine Corps have regulations that have the same effect). The Act was passed to end the military occupation of the former Confederate states, and has subsequently served as a more general safeguard against martial law and against any president using the military to replace the authority of state and federal civilian law enforcement.

A central function of domestic state and federal civilian law enforcement is to arrest and detain suspects pending criminal charges. Under both Sections 1031 and 1032, the military would be given law enforcement authority for detention of certain persons picked up within the United States--and for the detention of persons covered by Section 1032, all state and federal law enforcement would be preempted by the military.

The Judiciary Committee has jurisdiction over whether domestic state and federal civilian law enforcement will continue to have authority over civilian suspects who are not otherwise under military control, and over whether the military may carry out the domestic law enforcement function of detaining civilian suspects picked up within the United States. The only exception to the mandatory military detention of civilians without charge or trial under Section 1032 is that the Secretary of Defense may waive his or her authority or a civilian detainee may eventually be transferred back to civilian authorities. But absent a waiver or transfer decision, state and federal civilian law enforcement will be denied all authority to detain any suspects covered by Section 1032.

Sections 1031, 1032, and 1036 transfer to the Department of Defense core prosecutorial, investigative, law enforcement, penal, and custodial authority and responsibility now held by the Department of Justice, including by the Criminal Division, the National Security Division, the various United States Attorneys, the Federal Bureau of Investigation, the Bureau of Prisons, and the Marshals Service, as well as by the state attorneys general of the fifty states.

The Justice Department, along with state and local law enforcement, has generally had the primary responsibility for enforcing the anti-terrorism laws of the United States.. The core powers of criminal prosecution, investigation, law enforcement, imprisonment, arrest, and detention are generally carried out by federal, state, and local law enforcement officials. However, the NDAA would, with respect to many civilian suspects, replace federal, state and local law enforcement with military detention. The provisions would significantly limit the role of the Justice Department, including its prosecutors, investigators, and prison officials. The Judiciary Committee should assert its jurisdiction over these provisions to ensure no infringements on civilian law enforcement against civilians who otherwise would be outside the control of the military.

The ACLU strongly urges the Judiciary Committee to hold hearings on these sections of the bill, and to assert the Committee's jurisdiction to markup sections 1031, 1032, and 1036 before the NDAA goes to the Senate floor. Please do not hesitate to contact us if you have any questions regarding this matter.

Sincerely,



Laura W. Murphy
Director

Christopher E. Anders
Senior Legislative Counsel

cc: All members of the Senate