WASHINGTON
LEGISLATIVE OFFICE

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

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

The American Civil Liberties Union strongly opposes section 1031 of S. 1253,[1] 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 The indefinite detention authority was never used, and was repealed in 1971.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

[1] 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 make sure that the United States never subjected any American citizens to the kind of imprisonment without charge or trial used by the government in the internment of Japanese Americans. However, the Non-Detention Act of 1971's protections are only as good as the commitment of Congress and the president to uphold them. Section 1031 would be the first exception to the statute's protections.
- Subsection 1031(d) provides little or no protection against the indefinite detention of United States citizens and other persons present in the United States.
    - Subsection 1031(d) does not bar detention of United States citizens if the basis of the alleged conduct took place outside the United States, which is an exception to the exception that may render the entire subsection meaningless. All that would be required to imprison a United States citizen without charge or trial would be an allegation of conduct occurring outside the United States.
    - Subsection 1031(d) refers solely to "citizens or lawful resident aliens of the United States," but the standard for whom the Constitution protects is much broader. The Constitution fully protects United States citizens and persons present in the United States—regardless of whether the non-citizens are "residents" or non-residents, and regardless of whether the non-citizens have a legal status in the United States or not.
    - Even for "citizens or lawful resident aliens," subsection 1031(d)'s bar on imprisonment "on the basis of conduct taking place within the United States" would be subject to years of litigation because the subsection provides that such imprisonment is allowable under the subsection if "permitted by the Constitution." This was a question that would likely have been considered by the Supreme Court in the Padilla and al-Marri cases, but those cases were resolved (by the detainees being criminally charged) before the Supreme Court heard argument. There is a significant likelihood that the "permitted by the Constitution" clause would cause years of litigation until resolved by the Supreme Court—with any United States citizen challenging it likely being imprisoned for years, while a challenge works its way up to the Supreme Court.

Section 1031 Could Cause Cleared Naturalized United States Citizens and Cleared Immigrants to Be Sent to a Foreign Country, Even in the Absence of Any Wrongdoing

Naturalized United States citizens and immigrants (between 2000 and 2009, over thirty million temporary workers, traders, investors, and diplomats were admitted to the United States) could be sent to a foreign country—and barred from release into the United States—even if the person was cleared and there was no wrongdoing.

- The lack of any explicit provision for release of cleared persons back into the United States raises critical questions of whether naturalized American citizens and other persons present in the United States could be released only in foreign countries. Subsection 1031(c) provides four options for individuals taken into military custody: indefinite detention without charge or trial, trial before a military commission, trial before another tribunal, or transfer "to the custody or control of the person's country of origin, any other foreign country, or any other foreign

entity." But there is no option for release into the United States of someone picked up in the United States, unless the United States is the person's "country of origin."

- Unless a naturalized United States citizen or an immigrant can somehow prove that his or her country of origin is the United States, the person at least arguably could not be released into the United States. Even a person cleared of any wrongdoing, or picked up by mistake, could end up being shipped off to a foreign country, even if the person is no longer a citizen of that country.
- Moreover, innocent naturalized United States citizens or innocent immigrants with claims to protection from their country of origin, such as asylum or protection under the Convention Against Torture, would have to be kept in indefinite military detention unless a third party country will accept them.

Under Section 1031, Consequences of Any Future Domestic "Roundup" Would Be Even More Severe

In an action that prompted a strongly critical report by the Inspector General of the Department of Justice and resulted in expressions of regret by former Bush Administration officials, the federal government conducted a post-9/11 domestic "roundup" of persons with Arab and/or Muslim backgrounds living in the United States itself. The number of persons detained without charge or trial was very high; the Inspector General of DOJ reported that "within 2 months of the attacks, law enforcement authorities had detained, at least for questioning, more than 1,200 citizens and aliens nationwide." Detainees were typically held based on nothing more than rumor or suspicion, and many immigrants were held far longer, often for months without even minimal due process. As wrong as that experience was, the consequences would have been even more severe if section 1031 was law. If section 1031 was law—or if it becomes law and there is another "roundup"—the military could be used to conduct the roundup throughout the fifty states, far more United States citizens could be included in the roundup, persons could be imprisoned for years and not just months, and persons cleared of any role in terrorism could end up being barred from release into the United States, unless the person is a citizen who also was born here.

Section 1031 Does Not Require Even An Allegation that Detained Person Caused Harm or Threat of Harm to the United States or to United States Citizens

Section 1031 does not require even an allegation, much less proof beyond a reasonable doubt, that the detained person caused any harm or threat of harm to the United States or to any United States citizen. Under section 1031(b)(1), mere membership or support, even in the absence of any allegation that the person caused any harm or threat of harm to the United States or to any United States citizen can be the basis for indefinite detention without charge or trial.

Section 1031 Curtails Protections Provided by the Posse Comitatus Act of 1878 Against Using the Military for Domestic Law Enforcement

Section 1031 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:

- Without any geographical limitation on its applicability, section 1031 authorizes the President to have the military imprison without charge or trial civilians picked up on U.S. soil or who otherwise would be outside military control. The Posse Comitatus Act of 1878 and implementing regulations generally prohibit the military from carrying out law enforcement activities within the United States. However, the

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

guidance to the government or to other nations on what entities are included in the term. Similarly, by not using "forces" after "al Qaeda" or "the Taliban" in paragraph 1031(b)(2),there is an important question of whether membership in the fighting forces of those entities is the trigger or whether membership in any non-fighting part of al Qaeda or the Taliban can also be a trigger for coverage. In discussing a similarly ambiguous detention provision in the House version of the NDAA, the White House wrote, "bills that introduce new terms like 'affiliates,' without definition, raise unnecessary ambiguities and expose the United States to the charge that its critical national security designations are not meaningfully governed by the rule of law." Ambiguities in subsection 1031(b)(2) with terms such as "affiliated forces" and whether alleged membership in non-fighting components of al Qaeda or the Taliban trigger coverage raise similar concerns regarding whether the legislation is consistent with the rule of law

- Section 1031 would provide detention authority that is far broader than that currently being asserted by the Obama Administration. Even the Obama Administration, in the context of discussing a similar House provision, raised the concern that the definition (similar to paragraph 1031(b)(2)) of who can be detained is overly broad, by stating, "For example, language that extends authority to all persons who had been members or supporters of an enemy force at some point in the potentially distant past before the commencement of armed conflict, or in cases where the individual has demonstrably left the group in question prior to capture, is out of line with judicial decisions as well as the laws of war." As with the House language, section 1031(b)(2) authorizes detention based on such expired associations.

Section 1031 Provides No Guidance for the Defense Department on How to Pay for New Prison Facilities and Expanded Uniformed Personnel Capacity that Would Be Required for It to Carry Out Its Vast Detention, Arrest, and Investigatory Powers

Sections 1031 would impose an enormous financial cost on the military in building capacity to arrest, hold, and imprison civilian suspects worldwide, including within the United States itself.

- The military has the capacity and the expertise to arrest, detain, and imprison persons caught on battlefields, such as in Iraq and Afghanistan. However, the military has no capacity to carry out those activities worldwide, and certainly does not have such capacity within the United States itself.
- Sections 1031 of the NDAA would trigger at least tens of billions of dollars of new expenses to have the military duplicate existing civilian state, local, and federal functions. These expenses would be caused by the need for a new worldwide capacity for the military to have the uniformed personnel and physical infrastructure to arrest and hold suspects far from any battlefield (including within the fifty states), as well as the need for new prison construction, particularly because it is illegal under the Geneva Conventions to mix convicted criminals with prisoners of war and other persons being held without charge or trial.

Section 1031's Permanent, Worldwide Authority for the United States Military to Imprison Indefinitely Persons Seized in Any Country in the World Would Cause Significant Harm to United States Foreign Policy and to the Willingness of Other Foreign Countries to Adhere to Detention Norms

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 indefinitely persons seized in any country in the world would cause significant harm to United States foreign policy and to the willingness of other foreign countries to adhere to detention norms.

- Section 1031 has no geographical limitation. Under its terms, the President could order the military to seize and imprison without charge or trial any "covered person," within the meaning of subsection 1031(b) apprehended in any country in the world. No country or individual would be off-limits, whether ally or enemy.
- In discussing its veto threat of the new AUMF provision in the House version of the NDAA, the Obama White House wrote that that provision of the House bill "could encourage the view—held rightly or wrongly—that the United States is seeking to expand the scope of the armed conflict, make that conflict permanent, and/or claim authorities unknown to international law. Moreover, many international observers will wonder why the United States has chosen this time to reaffirm a state of armed conflict with the Taliban, given efforts to promote transition and reconciliation in Afghanistan." This argument from the White House should apply with equal force to section 1031.
- If section 1031 becomes law, the United States should expect that foreign countries, whether allies or enemies, will adopt similar indefinite detention schemes, and will use their own claims of authority to indefinitely imprison without charge or trial United States citizens and citizens of allied countries. The result would be no assurance of protection against arbitrary detention anywhere in the world.

The ACLU strongly urges the Senate to delete section 1031, along with section 1032, from the National Defense Authorization Act before bringing the bill to the Senate floor.