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*Affiliations listed for identification purposes only*

December 9, 2011

Dear Senator Levin and fellow conferees,

I am writing to you with grave concern over the National Defense Authorization Act of 2012 (NDAA). It is highly regrettable that the Senate passed the NDAA without first stripping it of dangerous provisions regarding the treatment of detainees. But it is not too late to act; as conferees, it is now your task to remove these harmful provisions before the NDAA becomes law. I strongly urge you to do so, and to preserve both our constitutional traditions and our most effective tools in the fight against terrorism.

If enacted, these detention provisions would for the first time codify authority for methods such as indefinite detention without charge and mandatory military detention, and would authorize their application – on the basis of suspicion alone – to virtually anyone picked up in anti-terrorism efforts, including those arrested on U.S. soil. In effect, the U.S. military would become the judge, jury and jailer of terrorism suspects, to the exclusion of the FBI and other law enforcement agencies.

An astounding array of individuals from across the political spectrum opposes the over-militarization of our counterterrorism efforts, and for good reason. I have attached *Beyond Guantanamo: A Bipartisan Declaration*, organized by The Constitution Project and Human Rights First, in which I joined with over 140 additional former government officials and practitioners from across the political spectrum in explaining that federal courts are the most effective mechanism for trying terrorism cases, and that indefinite detention without charge runs afoul of our Constitution and would harm U.S. interests globally. As a former federal judge, former U.S. Attorney, and former director of the FBI, I myself can attest to the competence of our nation's law enforcement officers and civilian federal courts, as well as the urgency to preserve these tools for use in our counter-terrorism efforts.

Secretary of Defense Leon Panetta similarly opposes this transfer of responsibility to the military. Indeed, virtually the entire national security establishment – including James Clapper, the director of national intelligence; Robert Mueller III, the director of the FBI; David Petraeus, the director of the CIA; White House Advisor for Counterterrorism John Brennan; Lisa Monaco, the assistant attorney

general for national security; and Jeh Johnson, general counsel for the Department of Defense – has warned that further restricting the tools at our disposal to combat terrorism is not in the best interest of our national security. I implore you to heed their warning.

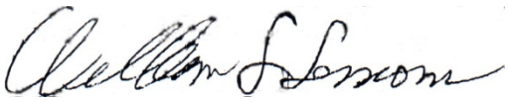
With regard specifically to Section 1031 from the Senate bill, some have argued that Section simply reiterates current law, and by doing so maintains the status quo. That is not the case. This very dangerous provision would authorize the President to subject any suspected terrorist who is captured within the United States – including U.S. citizens and U.S. persons – to indefinite detention without charge. The provision does not limit such detention authority to people captured on the battlefield. Importantly, although subsection (e) of this provision states that the provision should not be "construed to affect existing law or authorities" relating to detention of "persons who are captured or arrested in the United States," the reality is that current law on the scope of such executive authority is unsettled.

In fact, on two occasions when this issue was on track to come before the U.S. Supreme Court, the executive branch changed course so as to avoid judicial review. Specifically, in both the *Padilla* case in 2005-06 (involving a U.S. citizen) and the *al-Marri* case in 2008-09 (involving a legal permanent U.S. resident), the U.S. government claimed that the President had the authority to detain a suspected terrorist captured within the United States indefinitely without charge or trial. In both instances, however, before the Supreme Court could hear the case and evaluate this claim, the Justice Department reversed course and charged the defendant with criminal offenses to be tried in civilian court. Thus, this extreme claim of executive detention authority for people captured within the United States has never been tested, and the state of the law at present is unclear. Passage of Section 1031 would explicitly provide this authority by statute for the first time, thereby clearly, and dangerously, expanding the power for indefinite detention.

I firmly believe that the United States can best preserve its national security by maintaining the use of proven law enforcement methods and our well-tested traditional criminal justice system to combat terrorism. By contrast, enacting the NDAA without first removing the current detainee provisions could pose a genuine threat to our national security and would represent a sweeping and unnecessary departure from our constitutional tradition.

I therefore urge you, as conferees, to strip these dangerous detainee provisions from the NDAA. Thank you for your consideration.

Sincerely,



William S. Sessions

CC: All Senate Conferees