

# THE CONSTITUTION PROJECT



*Safeguarding Liberty, Justice & the Rule of Law*

## BOARD OF DIRECTORS

**Stephen F. Hanlon - Chair**  
Holland & Knight LLP

**Mariano-Florentino Cuéllar**  
Stanford Law School

**Mickey Edwards**  
The Aspen Institute

**Armando Gomez**  
Skadden, Arps, Slate, Meagher & Flom LLP

**Phoebe Haddon**  
University of Maryland, School of Law

**Morton H. Halperin**  
Open Society Foundations

**Kristine Huskey**  
University of Texas, School of Law

**Asa Hutchinson**  
Asa Hutchinson Law Group PLC

**David Keene**  
The American Conservative Union  
Former Chair

**Timothy K. Lewis**  
Schnader Harrison Segal & Lewis LLP

**Paul C. Saunders**  
Cravath, Swaine & Moore LLP

**William S. Sessions**  
Holland & Knight LLP

**Virginia E. Sloan**  
The Constitution Project President

*Affiliations listed for  
identification purposes only*

May 20, 2011

**Congressman John Boehner**  
Speaker of the House  
United States House of  
Representatives  
Office of the Speaker  
H-232 The Capitol  
Washington, DC 20515

**Congressman Eric Cantor**  
Majority Leader  
United States House of  
Representatives  
Office of the Majority Leader  
H-329, The Capitol  
Washington, DC 20515

**Congressman Kevin McCarthy**  
Majority Whip  
United States House of  
Representatives  
326 Cannon House Office Building  
Washington, DC 20515

**Congresswoman Nancy Pelosi**  
Democratic Leader  
United States House of  
Representatives  
Office of the Democratic Leader  
H-204, US Capitol  
Washington, DC 20515

**Congressman Steny Hoyer**  
Democratic Whip  
United States House of  
Representatives  
1705 Longworth House Office  
Building  
Washington, DC 20515

**Congressman Howard P. "Buck"  
McKeon**  
Chairman, House Committee on  
Armed Services  
United States House of  
Representatives  
2120 Rayburn House Office Building  
Washington, DC 20515

**Congressman Adam Smith**  
Ranking Member, House Committee on  
Armed Services  
United States House of  
Representatives  
2120 Rayburn House Office Building  
Washington, DC 20515

**Congresswoman Ileana Ros-Lehtinen**  
Chairman, House Committee on  
Foreign Affairs  
United States House of  
Representatives  
2170 Rayburn House Office Building  
Washington, DC 20515

**Congressman Howard Berman**  
Ranking Member, House Committee on  
Foreign Affairs  
United States House of  
Representatives  
2170 Rayburn House Office Building  
Washington, DC 20515

**Congressman Harold Rogers**  
Chairman, House Committee on  
Appropriations  
United States House of  
Representatives  
H-307, The Capitol  
Washington, DC 20515

Congressman Norm Dicks  
Ranking Member, House Committee on  
Appropriations  
United States House of Representatives  
1016 Longworth House Office Building  
Washington, DC 20515

Congressman Lamar Smith  
Chairman, House Committee on the  
Judiciary  
United States House of Representatives  
2138 Rayburn House Office Building  
Washington, DC 20515

Congressman John Conyers, Jr.  
Ranking Member, House Committee on the  
Judiciary  
United States House of Representatives  
2138 Rayburn House Office Building  
Washington, DC 20515

Congressman David Dreier  
Chairman, House Committee on Rules  
United States House of Representatives  
H-312 The Capitol  
Washington, D.C. 20515

Congresswoman Louise Slaughter  
Ranking Member, House Committee on  
Rules  
United States House of Representatives  
1627 Longworth House Office Building  
Washington, DC 20515

Dear Members of Congress:

We, the undersigned Members of the War Powers Committee of the Constitution Project, write to voice our concerns over Section 1034 of the House version of the 2012 National Defense Authorization Act (NDAA). The full text of Section 1034 is attached to this letter.

The War Powers Committee of the Constitution Project was convened to study how the United States should exercise its constitutional authority under Article I Section 8 to make decisions about the use of force abroad. In our 2005 report entitled [Deciding to Use Force Abroad: War Powers in a System of Checks and Balances](#) [the “Report”], we recommended improvements to war powers decision-making designed to restore the proper roles of all three branches of government.

We are concerned that Section 1034 is being inserted into the NDAA without full consideration of the important issues it raises regarding whether and to what extent the President should be authorized to deploy military forces in a potentially open-ended counter-terrorism campaign. We urge Congress to exercise its constitutional powers and conduct a full public debate including hearings and an amendment process on the floor that would provide all Members with the ability to fully and openly debate Section 1034.

We thus call on Congress to act to closely examine whether or not Section 1034 is appropriate. It has a responsibility to the people to examine closely and consider whether

there is a need for any new authorization for the use of force, and if so, the proper scope of such legislation.

Sincerely,

**Mickey Edwards (co-chair)**, Vice President, Aspen Institute; former member of Congress (R-OK) and chairman of the House Republican Policy Committee

**David Skaggs (co-chair)**, former Member of Congress (D-CO): Member of the Appropriations Committee and Permanent Select Committee on Intelligence

**Louis Fisher**, Specialist in Constitutional Law, Law Library of Congress (ret.); Scholar in Residence, The Constitution Project

**Michael J. Glennon**, Professor of International Law, Fletcher School of Law & Diplomacy, Tufts University; author of Constitutional Diplomacy and co-author of Foreign Relations and National Security Law; former Legal Counsel, U.S. Senate Committee on Foreign Relations

**Dr. Morton H. Halperin**, Senior Advisor, Open Society Institute and Open Society Policy Center; Director of the Policy Planning Staff, Department of State, Clinton Administration

**Peter Raven-Hansen**, Glen Earl Weston Research Professor, George Washington University Law School

**Patricia McGowan Wald**, Former Judge, International Criminal Tribunal for the former Yugoslavia; former Chief Judge, United States Court of Appeals for the D.C. Circuit

**Don Wallace, Jr.**, Professor, Georgetown University Law Center; Chairman, International Law Institute

**Edwin Williamson**, Former Legal Adviser to the Department of State

Section 1034 provides:

Congress affirms that—

- (1) the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad;
- (2) the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note);
- (3) the current armed conflict includes nations, organization, and persons who—
  - (A) are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or
  - (B) have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A); and
- (4) the President’s authority pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note) includes the authority to detain belligerents, including persons described in paragraph (3), until the termination of hostilities.