

# THE CONSTITUTION PROJECT



*Safeguarding Liberty, Justice & the Rule of Law*

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June 2, 2011

The Honorable Carl Levin  
Chairman  
Armed Services Committee  
United States Senate  
Washington, D.C. 20510

The Honorable John McCain  
Ranking Member  
Armed Services Committee  
United States Senate  
Washington, D.C. 20510

Dear Chairman Levin and Ranking Member McCain:

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 was inserted into the House version of 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 counterterrorism campaign. We urge the Senate to exercise its constitutional powers and conduct a full public debate including hearings.

We thus call on the Senate Armed Services Committee to act to closely examine whether or not Section 1034 is appropriate. Congress 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

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

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

cc: Senator John Kerry, Chairman, Senate Committee on Foreign Relations  
Senator Richard Lugar, Ranking Member, Senate Committee on Foreign Relations  
Senator Harry Reid, Majority Leader  
Senator Mitch McConnell, Minority Leader  
Members of the Senate Armed Services Committee

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.