

MEMORANDUM

TO: All Members of the House Committee on Armed Services

FROM: American Civil Liberties Union
Appeal for Justice
Brave New Foundation
Center for Constitutional Rights
CREDO Action
Defending Dissent Foundation
High Road for Human Rights
Human Rights First
International Justice Network
Just Foreign Policy
Leadership Conference of Women Religious
MoveOn.org
Muslim Public Affairs Council
New Security Action
Pax Christi USA
Peace Action
Physicians for Human Rights
Psychologists for Social Responsibility
Shalom Center
Unitarian Universalist Association of Congregations
United Methodist Church, General Board of Church and Society
USAction
Win Without War

DATE: May 9, 2011

RE: Oppose Section 1034 and Any Similar New Declaration of War or New Authorization for Use of Military Force in the National Defense Authorization Act

The undersigned organizations strongly oppose the new Declaration of War, which is in Section 1034 of the Chairman's mark for the National Defense Authorization Act ("NDAA"). We urge you to oppose the provision and any other similar new Declaration of War or new Authorization for Use of Military Force ("AUMF") in the NDAA.

While we have written separately, and met with many of you and your military legislative assistants, on our concerns with other provisions of the Chairman's mark, we are writing on this new Declaration of War specifically because it is a provision that has received almost no review, despite its likely tremendous effect on almost every facet of

United States national security policy. At minimum, Congress should hold hearings and follow regular order before even considering such sweeping legislation.

This monumental legislation--with a large-scale and practically irrevocable delegation of war power from Congress to the President--could commit the United States to a worldwide war without clear enemies, without any geographical boundaries (the use of military force within the United States could be permitted), and without any boundary relating to time or specific objective to be achieved. Unlike the AUMF that authorized the Afghanistan War and the pursuit of Osama bin Laden, the proposed new Declaration of War does not cite any specific harm, such as the 9/11 attacks, or specific threat of harm to the United States. It appears to be stating that the United States is at war wherever terrorism suspects reside, regardless of whether there is any danger to the United States.

Under the guise of a “reaffirmation” of authority, Section 1034 of the Chairman’s mark for the NDAA would give the President unchecked authority--and if the section constitutes a declared “war,”¹ possibly the unchecked duty²--to use military force worldwide against or within any country in which terrorism suspects reside. The proposed new Declaration of War would be without precedent in the scope of war authority or duties transferred by Congress to the President:

- The President would be able to use this authority--or might be required to use this authority--regardless of whether there has been any harm to United States citizens, or any attack on the United States or any imminent threat of any attack. There is not even any requirement of any threat whatsoever to the national security of the United States.
- There is no geographical limitation--the new Declaration of War has no specification of countries against which military force could be used, and no specification of countries where U.S. armed forces could be deployed

¹ The most critical sentence of section 1034 of the Chairman’s mark for the NDAA is “Congress affirms that 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.” If “affirms” is replaced with the synonym “declares” and “armed conflict” is replaced with the synonym “war,” the result is “Congress declares that the United States is in a war with al-Qaeda, the Taliban, and associated forces . . .”, which is very similar to the declaration of war clauses of the eleven declarations of war made by Congress, from the War of 1812 through World War II. Since 1942, Congress has passed several authorizations for use of military force, but has not made any declarations of war.

² Although the question of whether a declaration of war imposes a duty on the President to carry out the war has only rarely come up in court decisions, at least one federal court, in comparing the legal consequences of a declaration of war with an authorization for use of military force, stated, “If war existed why empower the President to apprehend foreign enemies? *War itself placed that duty upon him* as a necessary and inherent incident of military command.” *Gray v. United States*, 21 Ct. Cl. 340, 373 (1886) (emphasis added).

with or without the permission of the host country. Military force could even be used within the United States and against American citizens.

- There is no specific objective for the new Declaration of War, which means that there is no clear criteria after which the President's authority to use military force would expire. Although the proposed new Declaration of War lists "al-Qaeda, the Taliban, and associated forces" as the "threat," there is no definition for any of these entities, which historically have been amorphous, with shifting names, memberships, and organizational relationships.
- If Congress broadly turns over to the President the power that Article I of the Constitution provides to Congress to declare war, it very likely will never get the power back. The broad terms of the proposed new Declaration of War could last for decades.
- Whether Congress realizes it or not, the proposed new Declaration of War would authorize the President to use the United States military against countries such as Somalia, Iran, or Yemen, or send the American military into any of the scores of countries where suspected terrorists reside, which include not only nearly all Middle East, African, and Asian countries, but also European countries and Canada--and of course, the United States itself. Under the expansive terms used for organizations in the proposed new Declaration of War, targets could include suspects having no connection to the 9/11 attacks or to any other specific harm or threat to the United States. The President would have the power to go to war almost anywhere, at any time, and based on the presence of suspects who do not have to pose any threat to the national security of the United States.
- If Section 1034 of the Chairman's mark for the NDAA constitutes a declaration of war--which Congress has not declared since 1942--the declaration would trigger various exemptions from federal statutes and even broader authority for the President to control more aspects of both government and private businesses. The March 17, 2011 report from the Congressional Research Service, "Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications," lists all of the statutory provisions, ranging from exemptions from budgetary limitations to new government claims over oil and mineral resources, that are triggered by a declaration of war.
- Of course, if Congress believes that there is a significant new threat to the national security of the United States that requires significant military force as a response, it can declare war or enact a new AUMF, but Congress should, at minimum, follow what it did in 2002 with the AUMF for the Iraq War, where it held fifteen hearings on the proposed war and passed an AUMF that cited specific harms, set limits, and defined a clear objective that, if met, would effectively terminate the AUMF. A specific declaration of war or a specific AUMF would better preserve the system of checks and balances and make an endless, worldwide war less likely.

To be clear, President Obama has not sought enactment of the proposed new Declaration of War. To the contrary, his Administration has made clear its position that it believes it already has all of the authority that it needs to fight terrorism. But if the proposed new Declaration of War becomes law, President Obama and all of his successors, until and unless a future Congress and future President repeal it, will have the sweeping new power to make war almost anywhere and everywhere.

Of all of the powers that Article I of the Constitution assigns to Congress, no power is more fundamental or important than the power “to declare War.” We urge you to use this power carefully, and to oppose this wholesale turnover of war power, without any checks--and without even holding a single hearing.

Thank you for your attention to this issue, and we would be pleased to meet with you or your staff to discuss our concerns further.