Statement on Signing the National Defense Authorization Act for Fiscal Year 2012

December 31, 2011

Today I have signed into law H.R. 1540, the "National Defense Authorization Act for Fiscal Year 2012." I have signed the Act chiefly because it authorizes funding for the defense of the United States and its interests abroad, crucial services for service members and their families, and vital national security programs that must be renewed. In hundreds of separate sections totaling over 500 pages, the Act also contains critical Administration initiatives to control the spiraling health care costs of the Department of Defense (DoD), to develop counterterrorism initiatives abroad, to build the security capacity of key partners, to modernize the force, and to boost the efficiency and effectiveness of military operations worldwide.

The fact that I support this bill as a whole does not mean I agree with everything in it. In particular, I have signed this bill despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists. Over the last several years, my Administration has developed an effective, sustainable framework for the detention, interrogation and trial of suspected terrorists that allows us to maximize both our ability to collect intelligence and to incapacitate dangerous individuals in rapidly developing situations, and the results we have achieved are undeniable. Our success against al-Qa'ida and its affiliates and adherents has derived in significant measure from providing our counterterrorism professionals with the clarity and flexibility they need to adapt to changing circumstances and to utilize whichever authorities best protect the American people, and our accomplishments have respected the values that make our country an example for the world.

Against that record of success, some in Congress continue to insist upon restricting the options available to our counterterrorism professionals and interfering with the very operations that have kept us safe. My Administration has consistently opposed such measures. Ultimately, I decided to sign this bill not only because of the critically important services it provides for our forces and their families and the national security programs it authorizes, but also because the Congress revised provisions that otherwise would have jeopardized the safety, security, and liberty of the American people. Moving forward, my Administration will interpret and implement the provisions described below in a manner that best preserves the flexibility on which our safety depends and upholds the values on which this country was founded.

Section 1021 affirms the executive branch's authority to detain persons covered by the 2001 Authorization for Use of Military Force (AUMF) (Public Law 107–40; 50 U.S.C. 1541 note). This section breaks no new ground and is unnecessary. The authority it describes was included in the 2001 AUMF, as recognized by the Supreme Court and confirmed through lower court decisions since then. Two critical limitations in section 1021 confirm that it solely codifies established authorities. First, under section 1021(d), the bill does not "limit or expand the authority of the President or the scope of the Authorization for Use of Military Force." Second, under section 1021(e), the bill may not be construed to affect any "existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States." My Administration strongly supported the inclusion of these limitations in order to make clear beyond doubt that the legislation does nothing more than confirm authorities that the Federal courts have recognized as lawful under the 2001 AUMF. Moreover, I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation. My Administration will

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law.

Section 1022 seeks to require military custody for a narrow category of non-citizen detainees who are "captured in the course of hostilities authorized by the Authorization for Use of Military Force." This section is ill-conceived and will do nothing to improve the security of the United States. The executive branch already has the authority to detain in military custody those members of al-Qa'ida who are captured in the course of hostilities authorized by the AUMF, and as Commander in Chief I have directed the military to do so where appropriate. I reject any approach that would mandate military custody where law enforcement provides the best method of incapacitating a terrorist threat. While section 1022 is unnecessary and has the potential to create uncertainty, I have signed the bill because I believe that this section can be interpreted and applied in a manner that avoids undue harm to our current operations.

I have concluded that section 1022 provides the minimally acceptable amount of flexibility to protect national security. Specifically, I have signed this bill on the understanding that section 1022 provides the executive branch with broad authority to determine how best to implement it, and with the full and unencumbered ability to waive any military custody requirement, including the option of waiving appropriate categories of cases when doing so is in the national security interests of the United States. As my Administration has made clear, the only responsible way to combat the threat al-Qa'ida poses is to remain relentlessly practical, guided by the factual and legal complexities of each case and the relative strengths and weaknesses of each system. Otherwise, investigations could be compromised, our authorities to hold dangerous individuals could be jeopardized, and intelligence could be lost. I will not tolerate that result, and under no circumstances will my Administration accept or adhere to a rigid across-the-board requirement for military detention. I will therefore interpret and implement section 1022 in the manner that best preserves the same flexible approach that has served us so well for the past 3 years and that protects the ability of law enforcement professionals to obtain the evidence and cooperation they need to protect the Nation.

My Administration will design the implementation procedures authorized by section 1022(c) to provide the maximum measure of flexibility and clarity to our counterterrorism professionals permissible under law. And I will exercise all of my constitutional authorities as Chief Executive and Commander in Chief if those procedures fall short, including but not limited to seeking the revision or repeal of provisions should they prove to be unworkable.

Sections 1023–1025 needlessly interfere with the executive branch's processes for reviewing the status of detainees. Going forward, consistent with congressional intent as detailed in the Conference Report, my Administration will interpret section 1024 as granting the Secretary of Defense broad discretion to determine what detainee status determinations in Afghanistan are subject to the requirements of this section.

Sections 1026–1028 continue unwise funding restrictions that curtail options available to the executive branch. Section 1027 renews the bar against using appropriated funds for fiscal year 2012 to transfer Guantanamo detainees into the United States for any purpose. I continue to oppose this provision, which intrudes upon critical executive branch authority to determine when and where to prosecute Guantanamo detainees, based on the facts and the circumstances of each case and our national security interests. For decades, Republican and Democratic administrations have successfully prosecuted hundreds of terrorists in Federal court. Those prosecutions are a legitimate, effective, and powerful tool in our efforts to protect the Nation. Removing that tool from the executive branch does not serve our national security. Moreover, this intrusion would, under certain circumstances, violate constitutional separation of powers principles.

Section 1028 modifies but fundamentally maintains unwarranted restrictions on the ex-

ecutive branch's authority to transfer detainees to a foreign country. This hinders the executive's ability to carry out its military, national security, and foreign relations activities and like section 1027, would, under certain circumstances, violate constitutional separation of powers principles. The executive branch must have the flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers. In the event that the statutory restrictions in sections 1027 and 1028 operate in a manner that violates constitutional separation of powers principles, my Administration will interpret them to avoid the constitutional conflict.

Section 1029 requires that the Attorney General consult with the Director of National Intelligence and Secretary of Defense prior to filing criminal charges against or seeking an indictment of certain individuals. I sign this based on the understanding that apart from detainees held by the military outside of the United States under the 2001 Authorization for Use of Military Force, the provision applies only to those individuals who have been determined to be covered persons under section 1022 before the Justice Department files charges or seeks an indictment. Notwithstanding that limitation, this provision represents an intrusion into the functions and prerogatives of the Department of Justice and offends the longstanding legal tradition that decisions regarding criminal prosecutions should be vested with the Attorney General free from outside interference. Moreover, section 1029 could impede flexibility and hinder exigent operational judgments in a manner that damages our security. My Administration will interpret and implement section 1029 in a manner that preserves the operational flexibility of our counterterrorism and law enforcement professionals, limits delays in the investigative process, ensures that critical executive branch functions are not inhibited, and preserves the integrity and independence of the Department of Justice.

Other provisions in this bill above could interfere with my constitutional foreign affairs powers. Section 1244 requires the President to submit a report to the Congress 60 days prior to sharing any U.S. classified ballistic missile defense information with Russia. Section 1244 further specifies that this report include a detailed description of the classified information to be provided. While my Administration intends to keep the Congress fully informed of the status of U.S. efforts to cooperate with the Russian Federation on ballistic missile defense, my Administration will also interpret and implement section 1244 in a manner that does not interfere with the President's constitutional authority to conduct foreign affairs and avoids the undue disclosure of sensitive diplomatic communications. Other sections pose similar problems. Sections 1231, 1240, 1241, and 1242 could be read to require the disclosure of sensitive diplomatic communications and national security secrets; and sections 1235, 1242, and 1245 would interfere with my constitutional authority to conduct foreign relations by directing the Executive to take certain positions in negotiations or discussions with foreign governments. Like section 1244, should any application of these provisions conflict with my constitutional authorities, I will treat the provisions as non-binding.

My Administration has worked tirelessly to reform or remove the provisions described above in order to facilitate the enactment of this vital legislation, but certain provisions remain concerning. My Administration will aggressively seek to mitigate those concerns through the design of implementation procedures and other authorities available to me as Chief Executive and Commander in Chief, will oppose any attempt to extend or expand them in the future, and will seek the repeal of any provisions that undermine the policies and values that have guided my Administration throughout my time in office.

BARACK OBAMA

The White House,
December 31, 2011.

NOTE: H.R. 1540, approved December 31, was assigned Public Law No. 112–81.