



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
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(Senate)

STATEMENT OF ADMINISTRATION POLICY

S. 3001 – National Defense Authorization Act for Fiscal Year 2009

(Sen. Levin (D) MI)

The top priorities of the Administration include (1) full support for the Armed Forces as they carry out their missions, (2) strengthening the capabilities of the armed forces to defend America and American interests around the globe, and (3) improving the quality of life for the members of the Armed Forces and their families. In making their recommendations to the President on whether to sign the bill, the President's senior advisors will take into account both the cumulative impact of this bill to determine if it advances these priorities effectively and the possible detrimental effect to operations of the Department of Defense. If S. 3001 were presented to the President, his senior advisers would recommend that he veto the bill, especially if the bill includes the following provisions:

- Private Security Contractors in Combat Zones: The Administration strongly opposes section 841, which defines most security functions in a combat zone as "inherently governmental" and restricts the use of contractor personnel for those functions. This provision would significantly increase the reliance on already stretched military forces and reduce the options for providing security for non-military personnel, which could impede the ability to provide humanitarian and reconstruction relief in combat zones. Furthermore, the Departments of State and Defense have significantly improved the policy and guidelines governing the activities of private security contractors. These improvements ensure that private security contractors operate under strict rules for the use of force that are defensive in nature, carefully supervised, and allow the use of deadly force only as a last resort in response to imminent threats and in the exercise of the inherent individual right of self-defense.
- Prohibition on Interrogation of Detainees by Contractor Personnel: The Administration strongly objects to requirements that would prevent the Department of Defense (DoD) from conducting lawful interrogations in the most effective manner by restricting the process solely to government personnel; in some cases, a contract interrogator may possess the best combination of skills to obtain the needed information. Such a provision would unduly limit the United States' ability to obtain intelligence needed to protect Americans from attack.
- Competitive Sourcing: The Administration strongly opposes section 1101(f), which would prohibit the Department from considering public-private competition until workforce gaps are filled. DoD is actively working to address workforce performance, and it is inappropriate and unnecessary to tie these efforts to the use of public-private competition. The Department determines where and when competitive sourcing is appropriate and when it is in the best interest to cancel a competition. A moratorium on

competitive sourcing would interfere with DoD's ability to manage its resources in the most effective and efficient manner. Through the reasoned and responsible use of competition, the Department saved taxpayers over \$7 billion between FY 2001 and FY 2007, and it expects these savings to grow to over \$10 billion after completion of all planned competitions initiated in FY 2008.

- Defense Intelligence Matters: The Administration strongly opposes sections 921, 922, and 923, which interfere with Executive Branch authorities and responsibilities. Section 921 interferes with the President's authority to supervise and manage the Executive Branch by requiring that active duty military officers, not civilians, serve as the Deputies to the intelligence chiefs of the military departments, thus inappropriately and unnecessarily limiting the pool of individuals from which the President may select the senior military advisers in question. Section 921 could also, if the new qualifications it imposes are applied to existing officeholders, usurp the President's exclusive authority to remove Executive Branch officers by rendering the existing office holders unqualified for their offices and thus attempting a constitutionally improper de facto legislative removal of the existing officers. Section 922 reorganizes elements of the Secretary of Defense's senior staff and eliminates Undersecretary of Defense for Intelligence (USD(I)) authorities to execute technology and acquisition programs or provide operational support to combatant commands. Section 923 would intrude on the President's constitutional authority to control and regulate access to classified national security information by requiring that the Department carry out the Advanced Sensor Applications Program, by specifying which organizations will execute and oversee the program, and by purporting legislatively to mandate that particular individuals with program authority shall have "complete access" and "current" updates on specific types of military and foreign intelligence information. Together, these provisions interfere with staff-level Executive Branch assignments and prevent USD(I) from carrying out the activities for which it was created.
- Potential Amendments:
 - Intelligence Interrogations: The Administration strongly opposes any amendment that would impose a requirement to video-record all intelligence interrogations, which is impractical, burdensome, and runs the risk of significant unintended consequences in current and future military operations. Further, the Administration strongly opposes any amendment that would prevent the Intelligence Community from conducting lawful interrogations in the most effective manner by restricting the process solely to Government personnel; as noted above, in some cases, a contract interrogator may possess the best combination of skills to obtain the needed information.
 - Iraq: The Administration strongly opposes any amendment that would set an arbitrary date for beginning the withdrawal of American troops from Iraq without regard to conditions on the ground or the recommendations of commanders. Precipitous withdrawal from Iraq would not bring peace to the region or make our people safer here at home.

While the Administration has, since February 2008, committed to keeping the relevant congressional oversight committees regularly informed on the status of

negotiations, the Administration strongly opposes any amendment that would attempt to determine the legal effect or content of diplomatic agreements with Iraq before they are negotiated. In that regard, the Administration opposes any attempt to change long-standing legal traditions governing whether certain types of agreements may be concluded as executive agreements rather than as ratified treaties. Similarly, the Administration opposes any amendment that would establish a statutory policy that a Status of Forces Agreement (SOFA) between the United States and Iraq must include measures requiring the Iraqi Government to provide financial or other types of support for U.S. Armed Forces stationed in Iraq. Under the Constitution, the President has the discretion to initiate and conduct diplomatic negotiations. Congress cannot by statute establish the policy of the United States in a manner that would infringe upon this authority by preemptively dictating or restricting the substance of the President's diplomatic negotiations with foreign nations on particular issues. Indeed, in this case, such a policy would threaten the ability of the United States to engage in dynamic talks with the Government of Iraq and would risk the timely completion of the SOFA – and securing the protections and privileges for our troops contained within – prior to the anticipated expiration of United Nations Security Council Resolution 1790.

- Iran: The Administration also strongly opposes any amendments that would restrict the ability of the United States to deal effectively with the threats to regional security posed by the conduct of Iran.

Other Issues:

Iran – Other Possible Amendments: The Administration strongly opposes proposed Iran sanctions legislation recently reported out of both the Senate Finance and Banking Committees. Most objectionable are certain provisions in the bill reported out of the former committee that would ban completely, until conditions are fulfilled, nuclear cooperation under proposed agreements for cooperation. The Administration has firmly and consistently maintained that conforming nuclear cooperation agreements should be dealt with only in accordance with existing provisions of section 123 of the Atomic Energy Act. The bills would also serve, if enacted, to divide the multilateral coalition that has come together to oppose Iran's nuclear programs, by requiring the Administration to submit "blacklists" of foreign companies investing in Iran's energy sector and determine whether each reported investment qualifies a sanctionable offense under the Iran Sanctions Act. The Administration continues to stress with our international partners that "business as usual" with Iran is ill-advised. As a result of our pressure and that of our international partners, several foreign firms have announced they will not be making further investments in Iran's energy sector.

Earmark Spending: The Administration strongly opposes section 1002, which purports to incorporate by reference into the bill most of the earmarks included in the committee report. Both section 1002 and the earmarks in the report should be removed. The provision appears intended in part to respond to Executive Order 13457 "Protecting American Taxpayers from Government Spending on Wasteful Earmarks," but contains ambiguities and inconsistencies, as well as potential questions under Article I, section 7 of the U.S. Constitution, and hence may not meet all of the requirements laid out by the Administration for full transparency. Moreover, the Administration would be called upon to reconcile the text of subsection 1002(a), which references cryptic or deliberately targeted earmarks, with the text of subsection 1002(b), which

proclaims support for “authorized, transparent, statutory criteria, and merit-based decision-making,” and with subsection 1002(b)’s references to sections 2304(k) and 2374 of title 10, United States Code. In his State of the Union Address the President pledged to veto FY 2009 spending bills that do not cut the number and cost of earmarks in half from FY 2008 levels and will act accordingly when presented with final appropriations bills.

Military Pay: The Administration strongly opposes section 601 of the bill, which provides an additional 0.5 percent increase in 2009 above the President’s 3.4 percent across-the-board pay increase. As the 10th Quadrennial Review of Military Compensation recently reaffirmed, the overall military benefit package provides a good quality of life for service members and their families. While the Administration agrees that military pay must be kept competitive, the 3.4 percent raise, equal to the increase in the Employment Cost Index, will do that. The cost of increasing the FY 2009 military pay raise by an additional 0.5 percent is \$293 million in FY 2009 and \$2.5 billion from FY 2009 to FY 2014.

Contractor Conduct Database: The Administration strongly opposes section 831, which would require the development of an unwieldy new database of information on improper conduct and questionable behavior by contractors. Much information on contractor conduct and performance is already collected by DoD. Collections of additional information on administrative agreements, State and local actions, civil proceedings, and individual non-responsibility determinations will increase the likelihood that contractors will be improperly excluded from federal business opportunities without due process of law. It would also hamper agencies’ abilities to resolve disputes with contractors in manners that provide the most effective protection for the government.

Iraq and Afghan Security Forces: The Administration strongly opposes cuts in the magnitude of \$1.8 billion for Iraq (out of a total request of \$2.0 billion) and \$666 million for Afghanistan (out of a total request of \$3.7 billion) for training and equipping forces in Iraq and Afghanistan. The Administration urges the Senate to incorporate its full request for these authorities. While Iraq is assuming a greater burden of the cost to train and equip its forces, these cuts would slow U.S. efforts to improve the Iraqi and Afghan Governments’ indigenous security capabilities and therefore delay the transition of full responsibility for security in their countries.

Defense Nuclear Waste Disposal: The Administration opposes the reduction of \$50 million. This reduction would severely hinder progress on seeking authorization from the Nuclear Regulatory Commission to construct the Nation’s first repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain. Fully funding this project is vital to ensuring the expanded use of nuclear power in the coming decades to meet our national and energy security needs.

Defense Health Issues: The Administration appreciates the inclusion of section 721, which would repeal the existing prohibition on military-to-civilian conversions in the medical care system. However, the Administration is disappointed that the Committee did not adopt proposals related to TRICARE health fees and payments for retired military beneficiaries under age 65 consistent with recommendations of the Task Force on the Future of Military Health Care. The Administration’s suggested cost adjustments would make high-quality military health care more sustainable in the future by largely capturing the inflation increases that have occurred since cost sharing was first established in 1996. Not allowing the DoD to proceed with these changes will add \$1.2 billion in cost in FY 2009 and \$15.9 billion from FY 2009 to FY 2013.

Contractor Payroll Tax Avoidance: The Administration opposes section 823, which would require the Department to make corporate structure determinations in reviewing and selecting contractors with international subsidiaries, which the Department is not equipped to do. As written, section 823 would delay acquisitions and increase costs to the Department and inhibit the Department's ability to conduct fair source selections. Further, enforcement of this provision would be impractical and subject to legal challenge since the Department would be required to ascertain the purpose of any corporate structure that uses offshore entities without having the means to make such determination.

Limitation on Use of Funds: The Administration opposes sections 1515 and 1615, which would prohibit DoD from obligating funds for Afghanistan or Iraq, respectively, until 15 days after the Secretary of Defense has transmitted to the congressional defense committees a report setting forth the proposed allocation of such amounts at the program, project, or activity level. The requirement would inhibit the timely action required in a war zone, and Congress should not micromanage military commanders as they make decisions on operations.

Iraq Infrastructure Projects: Section 1616 would limit the availability of funds for various large-scale infrastructure projects in Iraq and appears to apply to military construction projects, including projects to support our forces under the Contingency Construction Authority. If this interpretation is correct, this provision places at risk those projects for operations and force protection.

F-35 Joint Strike Fighter Alternate Engine Program: The Administration opposes the addition of \$430 million to develop an alternative engine for the F-35 Joint Strike Fighter. Future savings are insufficient to offset the high up-front costs of this project and the additional burden of maintaining two logistical systems.

B-52 Program: The Administration opposes the additional \$96.9 million for B-52 flying hours and depot maintenance. The President's Budget adequately supports the current and planned force structure of the B-52 force.

Missile Defense: The Administration thanks the Committee for authorizing the President's full funding request of \$712 million for the European Missile Defense program. This program will protect the United States and our European allies against the emerging missile threat from Iran. The Administration, however, opposes the net reduction of \$412 million to our missile defense programs. This reduction will delay critical missile defense programs and put them at risk, including the Airborne Laser, the Multiple Kill Vehicle, and the Kinetic Energy Interceptor.

High Integrity Global Position System (iGPS): The Administration opposes the Committee's elimination of the entire \$61.2 million requested for the iGPS. Termination of the iGPS program would eliminate the development of a highly beneficial capability for the Special Operations Command and other isolated forces or units in the FY 2010 timeframe.

Independent Research Funds: The Administration opposes section 213 regarding the set-aside of 3 percent of laboratory funds for independent research. This section would overly expand laboratories' non-competitive funding (potentially by hundreds of millions of dollars) for which there would be little visibility and oversight. The laboratories already have sufficient assured sources of independent research funds and can compete for more as needed. The provision

would potentially require taxing pass-through funds awarded as contracts or grants to outside organizations, which would decrease funds available for open competition.

Support for Counter-drug Activities: The Administration appreciates section 1021, which extends authority that provides support to law enforcement agencies conducting counter-terrorism activities using DoD's counter-drug central transfer account funding. The Administration urges a simple extension of section 1033 of the FY 1998 National Defense Authorization Act (P.L. 105-85).

Chemistry and Metallurgy Research Building Replacement (CMRR): The Administration opposes cutting the CMRR budget request by \$50 million. The existing 50-year-old Chemistry and Metallurgy Research Facility is inadequate to support the maintenance and surveillance work required to support the U.S. stockpile.

Nuclear Weapons: The Administration is greatly concerned by the elimination of \$23.3 million of Navy funding requested under the Reliable Replacement Warhead program. The funding is needed for arming, fusing, and firing (AF&F) development work for existing nuclear warhead life extension programs. The Administration requests that the DoD funding be retained and targeted toward AF&F efforts, which still are needed to improve the security, reliability, and maintainability of the existing, aging nuclear stockpile. However, the Administration appreciates full authorization of request for the National Nuclear Security Administration study of the nuclear stockpile needs and strategic forces posture.

National Security Personnel System: The Administration is concerned with section 1103 as written. Although intended to clarify the Department's hiring flexibilities, the language remains too vague and could lead to costly and time-consuming litigation to resolve disputes.

North Korea: The Administration appreciates the inclusion of section 1221, which provides the requested authority for the President to waive the Glenn amendment nuclear nonproliferation sanctions to carry out activities necessary for the denuclearization and disablement activities planned. A comparable provision has recently been enacted, however, rendering section 1221 redundant

Center for Complex Operations: The Administration appreciates the Committee's promotion of this initiative, which facilitates crucial ongoing interagency efforts and supports such authority, if it is amended to include the concurrence of the Secretary of State. This modification would reflect better the shared agencies' responsibilities and their cross-cutting roles particularly with respect to civilian response capabilities.

Classified Programs: The Administration would oppose significant funding reductions and looks forward to reviewing the classified annex and working with Congress to address any concerns on classified programs as the legislative process moves forward.

Constitutional Concerns: The Administration notes that several provisions of the bill raise constitutional concerns. Several provisions of the bill would impermissibly constrain the President's constitutional authorities as Commander in Chief (sections 232, 841, and 2913), to supervise the Executive Branch (sections 586, 905(c), 921, and 923(c)), to conduct foreign affairs and diplomacy (sections 841 and 1616), and to protect against the unauthorized dissemination of national security and other sensitive information (sections 905(c), 923(c), 1037,

1052, 1054, and 1055). In addition, several other provisions raise constitutional concerns regarding the Recommendations Clause (sections 171 and 1053) and the Presentment Clause (section 1002). Finally, certain of these provisions (such as sections 586, 843, and 921) also raise general separation of powers concerns. The Administration looks forward to working with Congress to revise the bill so as to avoid these concerns.

Other requested authorities that the Administration urges the Senate to include in S. 3001:

Global Partnership Initiatives: The Administration appreciates the Committee's support for its proposals to build partnership capacity. The initiatives are critical to reduce stress on U.S. forces and the risks of terrorism and instability by helping U.S. partners counter these threats. The Administration urges the Senate to adopt the Administration's requested Building Partner Capacity provisions, which include the Secretary of State as a full partner and are designed deliberately to meet Combatant Commander and Ambassador needs to address security priorities and support allies, coalition partners, and others in the War on Terror.

Fluctuating Fuel Costs: The Administration strongly urges the Senate to authorize the Administration's request for the Refined Petroleum Products, Marginal Expense Transfer Account to ensure that DoD has sufficient funds to purchase fuel. Although the Congress has supported requests for supplemental funding to cover fuel price increases, it is increasingly difficult for the executive and legislative budget processes to keep pace with rising fuel costs.

Commander's Emergency Response Program (CERP): The Senate bill does not provide for any increased CERP authority beyond the FY 2009 cap of \$977 million that was provided in the FY 2008 National Defense Authorization Act. The Administration urges the Senate to adopt the Administration's request of \$1.7 billion for CERP and authorize the Secretary of Defense to accept financial contributions to CERP in Iraq and Afghanistan from any person, foreign government, or international organization.

Call-up of the Reserves for Domestic Emergencies: The Administration strongly urges authorizing the call-up of the Federal reserve components to assist in the response to a major disaster or emergency. This authority is necessary to ensure that the military can call upon its full capabilities at a time of domestic emergency to save American lives and property.

The Administration is ready to work with Congress on a national defense authorization bill that would strengthen the Nation's defense capabilities and support priorities in the War on Terror, so that the President can sign such a bill into law.

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