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OFFICE OF MANAGEMENT AND BUDGET
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(Senate)

STATEMENT OF ADMINISTRATION POLICY

S. 1547 – National Defense Authorization Act for Fiscal Year 2008

(Sen. Levin (D) MI)

The Administration appreciates the Senate Armed Services Committee's continued strong support of our national defense. However, the Administration has a number of significant concerns with S. 1547, which the Administration looks forward to addressing with Congress as the bill moves through the legislative process.

Combatant Status Review Tribunals (CSRTs) and the Military Commissions Act (MCA): The Administration strongly opposes section 1023, which contains harmful revisions to the procedures for CSRTs and unwarranted and disruptive amendments to the MCA, which passed with a bipartisan majority just last fall. If the provisions of section 1023, which would interfere with the effective conduct of the War on Terror, were included in the bill and ultimately presented to the President, his senior advisors would recommend that he veto the bill.

The CSRT provisions in section 1023(a) would impose on the U.S. military an unprecedented and onerous burden by granting a commission-like trial to every detainee held as an unlawful enemy combatant for two years or more by the Department of Defense (DoD), anywhere in the world. Such unwarranted procedural entitlements for enemy detainees would severely compromise our war effort, divert the strained resources of the Judge Advocate General's Corps, and require our soldiers to adopt strict criminal law practices in dealing with our enemies, rather than concentrating their efforts on effective combat. The layers of additional procedural entitlements conferred by section 1023 (a) would apply not only to current detainees at Guantanamo, but to anyone who meets the definition of "unlawful enemy combatant" anywhere in the world, including within Iraq and Afghanistan. The provision's demanding requirements for the disclosure of evidence to defense counsel effectively would require the Government to choose between disclosing vital secrets in the midst of armed conflict or risk releasing detainees to resume their fight against American and allied soldiers. Collectively, these proposed amendments would interfere with the President's constitutional authority as Commander in Chief and Chief Executive during a time of armed conflict.

The MCA provisions in section 1023(b) would overturn the legislative compromises reached last year, further delay commission trials, and provide additional procedural rights for enemy detainees that are unprecedented, unwarranted, and harmful to the efforts of our military to successfully pursue the war effort. These expanded protections are neither justified nor legally necessary. Of particular concern are provisions that would exclude hearsay, which would result in the exclusion of crucial evidence, and exclude statements merely alleged to be coerced, even if the interests of justice favored their admission, unless the Government demonstrated compliance with an excessively rigid standard of admissibility. Finally, section 1023 (b) would

amend the definition of enemy combatant in a manner that would permit detainees to relitigate determinations of their enemy combatant status. This section would permit members of al Qaeda and the Taliban to claim that they are lawful combatants, notwithstanding the President's determination to the contrary and their flagrant disregard for the laws of war.

Mandatory Provision of Requested Documents in 15 Days Unless the President Claims

Constitutional Privilege: Section 1063 would require the Intelligence Community (IC) to provide intelligence information requested by the Armed Services committees within 15 days unless the President certifies that such information is privileged pursuant to the Constitution. This provision would abandon the existing process of comity and accommodation between the two branches of government. Furthermore, the provision ignores the present statutory framework to keep the Congress fully informed while protecting classified information. Instead of facilitating effective interaction between the Legislative and Executive Branches, section 1063 would foster political gamesmanship and elevate routine disagreements to the level of Constitutional conflicts. This requirement is also impractical and would require Intelligence Community agencies to direct resources from critical missions to comply with broad information requests within an artificial deadline. If this provision were included in the bill and ultimately presented to the President, his senior advisors would recommend that he veto the bill.

Anti-Coordination Provision: In addition, the Administration strongly opposes the provision barring existing coordination between departments and agencies of testimony, legislative recommendations, or comments before such communications are made to Congress. This provision would prohibit the Executive Branch from requiring any Intelligence Community element to receive approval to testify or to submit testimony for review before testifying. Such coordination is a longstanding practice, since at least the 1930s, within the Executive Branch and is vital to ensuring that Congress receives the most complete and accurate information and testimony. More fundamentally, the anti-coordination provision would place unconstitutional restrictions on the President's authority to oversee the Executive Branch. If this provision were ultimately presented to the President, his senior advisors would recommend that he veto the bill.

Potential Amendments: Potential amendments which would be highly objectionable include:

- Amendment on U.S. Withdrawal from Iraq: The Administration strongly opposes any provision that sets an arbitrary date for beginning the withdrawal of American troops 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. Withdrawal could embolden our enemies and confirm their belief that America will not stand behind its commitments. Setting a date for withdrawal is equivalent to setting a date for failure and could lead to a safe haven in Iraq for terrorism that could be used to attack America and freedom-loving people around the world. It is likely to unleash chaos in Iraq that could spread across the region. In addition to infringing upon the President's constitutional authority as Commander-in-Chief, the provision would require a precipitous withdrawal of troops that itself could increase the probability that American troops would have to one day return to Iraq – to confront an even more dangerous enemy. If the President were presented a bill that includes such provisions, he would veto the bill.

- Amendments on Iran: The Administration strongly opposes amendments to the bill to restrict the ability of the United States to deal effectively with the threats to regional security posed by the conduct of Iran, including Iran's efforts to develop nuclear weapons. The Administration also notes that provisions of law that purport to direct or prohibit international negotiations, covert action, or use of the armed forces are inconsistent with the Constitution's commitment exclusively to the presidency of the executive power, the function of Commander-in-Chief, and the authority to conduct the Nation's foreign policy. If the bill were presented to the President with provisions that would prevent the President from protecting America and allied and cooperating nations from threats posed by Iran, the President's senior advisors would recommend that he veto the bill.
- Guantanamo-Related Amendments: The Administration strongly opposes amendments that would modify or repeal habeas corpus provisions of the Military Commissions Act of 2006 (MCA). Repealing the MCA's provisions would simply burden our courts with duplicative and unnecessary litigation and would delay the vital work of bringing enemy combatants to justice. The Administration also opposes amendments that would micromanage the detention of enemy combatants by the United States in the War on Terror. Current laws and treaties already address the subject of detained enemy combatants and preserve appropriate flexibility for the President as Commander-in-Chief to conduct the war effectively. If a bill were presented to the President with provisions preventing him from bringing enemy combatants to justice, detaining enemy combatants, or collecting from them in accordance with current law intelligence necessary to safeguard and protect the national security of the United States, the President's senior advisors would recommend that he veto the bill.

Building Global Partnerships Act: The Administration encourages the Senate to adopt the requested Building Global Partnerships Act, recently transmitted to provide critical authorities for combatant commanders to address security priorities and support allies, coalition partners, and others in the War on Terror. These proposals seek authorities to enhance partners' capacity for effective operations and develop greater commonality by expanding professional training and education for partner nations.

Modifications to the National Security Personnel System (NSPS): The Senate bill is a significant improvement over the House version; however, the Administration remains opposed to the repeal of current authority to implement a mission-focused labor management relations system.

Military Pay: The Administration strongly opposes section 601. The additional 0.5 percent increase above the President's proposed 3.0 percent across-the-board pay increase is unnecessary. When combined with the overall military benefit package, the President's proposal provides a good quality of life for servicemembers and their families. Since 2001, military basic pay has increased 33 percent. The cost of increasing the FY 2008 military pay raise by an additional 0.5 percent is \$2.2 billion from FY 2008 to FY 2013, funds that would otherwise be available to support our troops.

Defense Health Program (TRICARE): The Committee language does not address the need to allow DoD to adjust TRICARE health fees and payments for retired military beneficiaries under

age 65. 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 would add over \$1.86 billion in additional costs in FY 2008 and \$19 billion from FY 2008 to FY 2013, funds that would otherwise be available to support our troops.

The Administration strongly opposes section 701, which would impose price controls on prescription drugs when they are dispensed to enrollees in TRICARE through community pharmacies. The Administration believes market competition is the most effective way to promote discounts in the community setting. Government price-setting at community pharmacies would eliminate retail competition; it could also have an adverse impact on other markets, which could limit access to life-saving drugs, reduce convenience for beneficiaries, and ultimately increase costs.

Reduced Age for Eligibility for Non-Regular Retirement Based on Certain Active Duty Service:

The Administration strongly opposes section 655, which would shorten career lengths and provide an earlier retirement benefit for certain full-time National Guard duty and for all reservists for each 90 days of active duty performed, regardless of purpose. Although the Administration has supported additional benefits for members who are bearing the burden of mobilization and deployment, we are concerned about the growth in deferred compensation and entitlements. A recent RAND study found that reducing the age for receipt of retired pay only marginally affects retention and overall reduces the number of years a reservist will serve.

Expansion of Combat Related Special Compensation Eligibility: The Administration strongly opposes piecemeal changes to disability compensation contained in section 653. Several commissions and review groups are reconsidering the country's responsibilities to those medically separated prior to completing a full military career, and the Administration will consider comprehensive reform once these reviews are completed.

Reductions and Requirements for Weapons Systems: A number of provisions negatively impact weapons systems and are objectionable, such as:

- B-52 Retirements: The bill allocates funds to sustain more than 56 B-52 aircraft, thus diverting funds from the development and fielding of more capable replacement systems.
- Littoral Combat Ship (LCS): The bill's \$430 million cut to the \$912 million request for the Navy's LCS program would prevent the procurement of two ships in FY 2008 and delay the fielding of this urgent warfighting capability.
- C-130E/H and KC-135E: Prohibitions or restrictions in sections 141 and 142 on retiring aging aircraft would divert funds from other more critical capabilities necessary for the future.
- Joint Strike Fighter Alternate Engine: Continuing this program would delay critical development activities, increase the overall cost and length of the program, jeopardize planned procurement ramps, and increase costs for DoD and coalition Partners.

- Joint Network Node (JNN)/Warfighter Information Network – Tactical (WIN-T): In light of the proposed program restructuring, the size of the bill’s reductions to the JNN and WIN-T program (recently integrated into a single tactical network) would impair executing this certified program, which will provide a critical modern communications capability to support current and future forces.
- Space Radar: Denial of all funding for the Space Radar program would greatly delay fielding of this program to enhance warfighter capabilities through the continuous collection of battlefield and intelligence information.
- Expeditionary Fighting Vehicle (EFV): The \$100 million cut to the \$288 million request for the EFV program would have a negative effect on the cost, schedule, and success of this program, which is the Marine Corps’ primary means of accomplishing surface power projection and forcible entry against any defended coastline.
- High Integrity Global Positioning System (GPS): The bill’s \$71 million cut to the \$81 million request would have an adverse effect on the Air Force’s GPS program to test alternative approaches to accelerate the fielding of a capability to overcome adversaries jamming of GPS signals.
- W76 Life Extension Program Cut: The \$60 million cut to the \$236 million request would significantly delay warhead production and, in turn, delivery schedules to the U.S. Navy. These funds are needed to maintain an adequate sea-based nuclear strategic deterrent consistent with national security.

Missile Defense: The Administration strongly opposes the reductions of \$85 million for the U.S. missile defense site in Europe and the limitations on the availability of funds for procurement, construction, and deployment of missile defense assets in Europe, which would delay the fielding of missile defense assets to protect the U.S. and Europe against the emerging missile threat from Iran. The Administration is also strongly opposed to the \$200 million cut for the Airborne Laser program, which would delay DoD’s most promising program to counter missile threats in their boost phase.

Research: The Administration opposes language directing how research funding is allocated, which would constrain contract or grant awards to specific areas of research and reduce the use of merit review in the selection of projects.

Federal Acquisition: The Administration opposes several provisions that would hinder the effectiveness of the acquisition process:

- Section 801(a) would define “substantial savings” for multiyear contracts and unnecessarily limit the contracting options available for large programs where significant taxpayer dollars could be saved.
- Section 821 would create new protest rights for task and delivery order contracts that delay performance and promote unnecessary litigation.

- Section 823 would substantially restrict DoD’s ability to follow the common commercial practice of acquiring commercial services on time-and-materials or labor-hour basis when fixed-price contracts are unsuitable and the extent or duration of work cannot be accurately estimated.
- Section 824 would greatly reduce Federal inmate work opportunities through the Federal Prison Industries (FPI) program, the Federal Bureau of Prisons’ most successful tool in reducing recidivism. Any proposal to curtail the FPI program needs to be accompanied by proposals to cost-effectively increase Federal inmate work opportunities.
- Section 845 would require costly and overly burdensome reporting on contracting.

The Administration favors improved use of competition and contract management to increase accountability for results and urges the Senate to make the Acquisition Workforce Training Fund permanent and to authorize civilian agencies to directly hire qualified acquisition professionals.

National Foreign Language Coordination Council: The Administration strongly opposes section 1068, which would establish this Council and duplicate much of the work already being carried out under the President’s National Security Language Initiative (NSLI). This provision could detract from NSLI’s ability to give priority attention to certain critical languages needed for national security interests and would intrude on the President’s management authority.

Pakistan: The Administration opposes the certification, reporting, and other requirements concerning Pakistan set out in section 1232, particularly those that restrict providing prompt “Coalition Support Fund” reimbursement of expenses to a key ally. This could directly impair the ability of the U.S. Government to conduct timely and effective counter-terrorist and counter-narcotics operations, at a time when a consistent U.S. alliance is critical to stability in the joint war effort.

Thailand: The Administration opposes section 1215, which is duplicative of existing provisions that restrict the provision of direct assistance to the Government of Thailand.

Reconstruction and Stabilization Assistance Restrictions: The Administration opposes section 1217, which restricts the ability of the U.S. Government to fund any reconstruction and stabilization assistance, particularly under section 1207 of the FY 2006 NDAA, as amended by this act, until the President takes the unrelated step of naming a Senior Coordinator for North Korea Policy. This would jeopardize ongoing operations in Haiti and Lebanon.

Overseas Humanitarian, Disaster and Civic Aid (OHDACA): The Administration opposes the \$40 million cut to the \$103 million request for the OHDACA program. Full funding is necessary for DoD to respond quickly to natural disasters without adversely impacting the Military Departments’ operations or DoD’s baseline humanitarian assistance programs.

Repeal of Modification to Insurrection Act: The Administration opposes section 1022, which could be perceived as significantly restricting the statutory authority for the President to direct the Secretary of Defense to preserve life and property, and would imprudently limit the President’s authority to call upon the Reserves. Such a result would be detrimental to the President’s ability to employ the Armed Forces effectively to respond to the major public

emergencies contemplated by the statute.

Chief Management Officer: The Administration opposes section 902, which unduly restricts the President's and Secretary of Defense's flexibility to build an integrated management team. DoD has adopted the intent of section 902 by investing in the Deputy Secretary of Defense the appropriate responsibilities and functions of a "Chief Management Officer" while not assuming prerogatives rightly held by the President.

Center for International Issues Research (CIIR) Program: The Administration strongly opposes the elimination of funding for the CIIR program, the only open-source analysis center focused on daily analysis of Arab-language television and jihadist internet activity to provide critical security updates and analysis that enhance force protection and support U.S. military operations.

Classified Programs: The Administration strongly opposes certain classified program changes, reductions, and realignments (including section 211). The Administration's concerns will be forwarded separately.

Comprehensive Nuclear Test-Ban Treaty (CTBT): While supporting the continued voluntary moratorium on testing, the Administration strongly opposes a provision of section 3122 that calls for the ratification of the CTBT. It would be imprudent to tie the hands of a future administration that may have to conduct a test of an element of an aging, unmodernized stockpile in order to assure the reliability of the nuclear deterrent force. Absent such a test, the United States may not be able to diagnose or remedy a problem in a warhead critical to the Nation's deterrent strategy.

Whistleblower Protections: The Administration strongly opposes section 861, which would provide whistleblower protection to contractor employees. This provision is unnecessary in light of the existing protections for whistleblowers in the private sector, including government contractor employees. To the extent it would create a cause of action against the United States or would permit disclosure of national security information, section 861 is both unnecessary and potentially harmful to the preservation of national security information.

Grades of Judge Advocates General: The Administration opposes section 573, which would by statute elevate the Judge Advocates General to 3-star grade. This provision would undermine the flexibility of the President to determine what positions of importance and responsibility merit grades above major general or rear admiral (upper half). The Judge Advocates General, as 2-star officers, already participate fully in the legal affairs of their respective Military Departments and the entire Department of Defense.

Grade of the Legal Counsel to the Chairman of the Joint Chiefs of Staff: While the Administration appreciates the Senate Armed Service's elevation of the rank of Legal Counsel to the Chairman of the Joint Chiefs of Staff from Colonel/Navy Captain to 1-star grade in section 573(e), which would add a new section 156 to title 10, U.S. Code, we urge Congress to further elevate the position to that of 2-star grade.

Constitutional Concerns: The Administration notes that several provisions of the bill raise constitutional concerns. Section 701 raises questions under the Appointments Clause. Several other provisions impermissibly infringe on the President's constitutional authority to solicit

advice from cabinet members under the Opinions Clause, to command the Armed Forces and control sensitive national security information (e.g., sections 114, 212, 234, 1531(2), and 1231-33), and to make legislative recommendations to Congress (e.g., sections 231(c)(6), 255(d), 341(b)(2), 864(c), 904, and 1068(c)(2)). The Administration looks forward to working with Congress to resolve these concerns.

Other requested authorities that the Administration urges the Senate to include in S. 1547:

Flexible Management of Deployments of Members: The Administration is disappointed that the Committee did not include its proposals providing DoD with more flexible tools to manage the deployment and compensation of servicemembers. The proposed changes would allow DoD to balance operational tempo and compensate servicemembers who deploy more frequently or for longer periods than normal.

Stryker Brigade Combat Team Conversion: The proposal that supports the conversion of the Second Brigade, 25th Infantry Division to a Stryker Brigade Combat Team is necessary to resolve legal challenges to the transformation of this important unit that is scheduled to deploy for operations in Iraq by the end of the year.

Aircraft Carriers: The proposal authorizes Navy to maintain 10 operational carriers between the decommissioning of USS ENTERPRISE (CVN 65) and the commissioning of USS GERALD R. FORD (CVN 78). The Navy can meet Combatant Commander surge and presence requirements using a 10-carrier fleet during this time with acceptable risk.

Counter-Drug Activities: The proposal renews DoD's authority to provide support to law enforcement agencies conducting both counter-drug and counter-terrorism activities. This authority is essential to our ability to combat narcotics trafficking.

Army Incentive Fund: The proposal would establish the Army Incentive Fund to offer value based incentives to potential recruits. The funding mechanism is key to implementing the temporary Army authority to provide additional recruitment incentives.

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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