

Administration of Joseph R. Biden, Jr., 2021

Statement on Signing the National Defense Authorization Act for Fiscal Year 2022
December 27, 2021

Today, I have signed into law S. 1605, the "National Defense Authorization Act for Fiscal Year 2022" (the "Act"). The Act authorizes fiscal year appropriations principally for the Department of Defense, for Department of Energy national security programs, and for the Department of State. The Act provides vital benefits and enhances access to justice for military personnel and their families, and includes critical authorities to support our country's national defense.

Unfortunately, section 1032 of the Act continues to bar the use of funds to transfer Guantánamo Bay detainees to the custody or effective control of certain foreign countries, and section 1033 of the Act bars the use of funds to transfer Guantánamo Bay detainees into the United States unless certain conditions are met. It is the longstanding position of the executive branch that these provisions unduly impair the ability of the executive branch to determine when and where to prosecute Guantánamo Bay detainees and where to send them upon release. In some circumstances these provisions could make it difficult to comply with the final judgment of a court that has directed the release of a detainee on a writ of habeas corpus. In addition, the limitations in section 1032 of the Act constrain the flexibility of the executive branch with respect to its engagement in delicate negotiations with foreign countries over the potential transfer of detainees and thus may in some cases make it difficult to effectuate the transfer of detainees in a manner that does not threaten national security. I urge the Congress to eliminate these restrictions as soon as possible.

Moreover, certain provisions of the Act raise constitutional concerns or questions of construction.

Some provisions of the Act, including sections 1048, 1213(b), 1217, and 1227(a)(1), will effectively require executive departments and agencies to submit reports to certain committees that will, in the ordinary course, include highly sensitive classified information, including information that could reveal critical intelligence sources or military operational plans. The Constitution vests the President with the authority to prevent the disclosure of such highly sensitive information in order to discharge his responsibility to protect the national security. At the same time, congressional oversight committees have legitimate needs to perform vital oversight and other legislative functions with respect to national security and military matters. Accordingly, it has been the common practice of the executive branch to comply with statutory reporting requirements in a way that satisfies congressional needs pursuant to the traditional accommodation practice and consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters. I believe the Congress shares this understanding, and my Administration will presume that it is incorporated into statutory reporting requirements of the kind at issue in the Act.

Sections 6103(a) and 6503(b) of the Act would direct the Executive on how to proceed in discussions with, or votes within, international organizations. I recognize that "[i]t is not for the President alone to determine the whole content of the Nation's foreign policy" (*Zivotofsky v. Kerry*) and will make every effort to take action consistent with these directives. Indeed, I support the objectives expressed in these provisions. Nevertheless, I will not treat them as limiting my constitutional discretion to articulate the views of the United States before international organizations and with foreign governments.

Section 351 of the Act requires the Secretary of Defense to create a working group "to integrate efforts to mitigate contested logistics challenges through the reduction of operational energy demand." It provides that the Service Secretaries shall "nominate" four of the members of the working group subject to the Senate's "confirmation." The working group is an executive branch entity charged with making recommendations and coordinating certain functions within the Department of Defense. Because its members would not be "officers" in the constitutional sense but would have more than an advisory role in the operations of the executive branch, subjecting them to Senate confirmation would conflict with the anti-aggrandizement principle of the separation of powers, by empowering part of the Congress to directly interfere with the executive branch's selection of employees. *See Bowsher v. Synar; The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 131–32 (1996). To be sure, the Congress may create offices under the laws of the United States and provide for appointment to such offices in a manner consistent with the Appointments Clause (U.S. Const. art. II, sec. 2, cl. 2), which may include appointment by the President by and with the Senate's advice and consent. The Appointments Clause does not, however, give the Senate any role in appointing non-officers, let alone any authority to "confirm" nominations by inferior officers such as the Service Secretaries. Therefore, although I anticipate that the Service Secretaries will be able to consult with members of the Senate in deciding whom to appoint to the working group and will welcome their input, the Service Secretaries will not submit those working group appointees to the Senate for confirmation.

Finally, I oppose the use of open-air burn pits, which is prohibited in contingency operations by Public Law 111–84, section 317 (10 U.S.C. 2701 note). I request that the Secretary of Defense seek Presidential approval prior to exercising the exemption authority to this prohibition added by section 316 of the Act.

JOSEPH R. BIDEN JR.

The White House,
December 27, 2021.

NOTE: An original was not available for verification of the content of this statement.

Categories: Bill Signings and Vetoes : National Defense Authorization Act for Fiscal Year 2022, signing statement.

Subjects: Armed Forces, U.S. : Benefits; Congress : Senate :: Presidential nominations, confirmation process; Cuba : Guantanamo Bay, U.S. Naval Base :: Detention of alleged terrorists; Defense, Department of : Secretary; Legislation, enacted : National Defense Authorization Act for Fiscal Year 2022; Presidency, U.S : Constitutional role and powers.

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