

## **FACT SHEET: PROCEDURES IMPLEMENTING SECTION 1022 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012**

President Obama today issued a Presidential Policy Directive that sets forth procedures implementing Section 1022 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA). These procedures, which are expressly required by the NDAA, are designed to ensure that Section 1022 is implemented in a manner consistent with our national security, our laws, and our values.

The procedures reflect the consensus of the President's national security team that maintaining the seamless integration of our law enforcement, military, and intelligence professionals – and for the executive branch to determine how best to capture, detain, interrogate, and try suspected terrorists – is essential to our success, including our ability to collect intelligence and incapacitate dangerous individuals. You can read the full document [here](#).

The procedures include several important elements:

- The procedures provide greater clarity to our counterterrorism professionals by clarifying key phrases in the statute and explaining that Section 1022's military custody requirement applies only to non-U.S. citizens who are closely linked to al-Qa'ida and have participated in planning or carrying out an attack or attempted attack against the United States or our coalition partners. The procedures also make clear that existing Department of Defense policies and procedures satisfy the requirements of Section 1022.
- As expressly contemplated by the NDAA, the procedures establish a process for ensuring that the executive branch has sufficient time and information to make decisions about whether to issue a national security waiver before an individual is transferred to military custody. The President also issued several national security waivers for categories of individuals where he found that the waivers were in our national security interest and that it was impractical, unnecessary, or overly burdensome to rely on individualized waivers.
- The procedures create an interagency process for determining whether an individual is a covered person whom the statute requires to be transferred to military custody. The procedures ensure that an individual will be transferred from civilian to military custody only after a thorough evaluation of all of the relevant facts, based on the considered judgment of the President's senior national security team, and not a rigid statutory requirement that does not account for the unique facts and circumstances of each case. This decision requires the concurrence of the Attorney General, Secretary of State, Secretary of Defense, Secretary of Homeland Security, Chairman of the Joint Chiefs of Staff, and Director of National Intelligence.
- The procedures clarify that, until an individual is formally designated a covered person, federal law enforcement agencies should follow their standard practices. The procedures also make clear that, even after an individual is determined to be a covered person, a transfer to military custody may only occur once it is clear that it will not disrupt ongoing law

enforcement and intelligence operations. In the event an individual is transferred to military custody, the procedures provide that the Federal Bureau of Investigation will retain its lead responsibility for coordinating the investigation and interrogation of the individual until a disposition decision is made.

In essence, these procedures are intended to ensure that the executive branch can continue to utilize all elements of national power -- including military, intelligence, law enforcement, diplomatic, and economic tools – to effectively confront the threat posed by al-Qa’ida and its associated forces within the framework of our legal authorities, and will retain the flexibility to determine how best to apply those tools to the unique facts and circumstances we face in confronting this diverse and evolving threat.

As the President stated when he signed the NDAA, it is essential for the United States to maintain a clear and flexible framework within our legal authorities for the detention, interrogation and trial of suspected terrorists that maximizes the ability of counterterrorism professionals both to collect intelligence and to incapacitate dangerous individuals. These procedures accomplish that goal.

Our military and intelligence capabilities have been enormously effective in our campaign against international terrorism. Similarly, our criminal justice system has demonstrated unrivaled effectiveness, unquestioned legitimacy, and the flexibility to preserve and protect the full spectrum of our national security objectives. That system has proven to be invaluable means of disrupting terrorist plots as well as incapacitating and collecting intelligence on terrorists through prosecution and incarceration, and must continue to be an unrestricted counterterrorism tool going forward.

### **Background on Section 1022 of the NDAA:**

The NDAA, signed into law on Dec. 31, 2011 (Public Law No. 112-81), included a provision (Section 1022) that, subject to certain limitations, requires the U.S. Armed Forces to hold in military custody a very narrow category of non-citizen terrorist suspects (defined as “covered persons”) pending “disposition under the law of war.” Consistent with the statute, covered persons include a non-U.S. citizen:

- Whose detention is authorized under the 2001 Authorization for Use of Military Force (AUMF), and
- Who is a member of or part of al-Qa’ida or an associated force that acts in coordination with or pursuant to the direction of al-Qa’ida, and
- Who participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.

Section 1022 of the NDAA provides the President with broad authority to waive the military custody requirement under this section at any time, in both individual cases and in categories of cases, where doing so is in the national security interests of the United States. The

NDAA also gives the President the authority to determine how best to implement Section 1022 and requires the President to issue implementing procedures 60 days after the law was enacted.

When signing the legislation, the President made clear that he “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.”

### **Procedures for Determining a “Covered Person” under Section 1022**

The implementing procedures issued today for Section 1022 establish a process that preserves the ability of the executive branch to determine how best to detain, interrogate and prosecute suspected terrorists. It does so by maintaining the same approach this administration has utilized to successfully extract intelligence from and to prosecute suspected terrorists, unless and until senior national security officials can make informed decisions, based on the unique facts and circumstances of each case, about whether to place someone into military custody under the statute or to waive that requirement in the interests of national security.

Under these procedures, a federal law enforcement agency arresting a terrorist suspect must notify the Attorney General when there is probable cause to believe the suspect is covered by the statute – or when a suspect might be a “covered person” -- and therefore potentially subject to the military custody requirement of Section 1022. If the Attorney General initially agrees that there is probable cause to believe that the individual is covered by the statute, a careful review commences to determine whether there is clear and convincing evidence that the military custody requirement applies, and to determine whether the requirement should be waived in the interests of national security. The Attorney General, in consultation and coordination with other senior national security officials, makes this determination based on the facts, circumstances, and all relevant information in the possession of the U.S. government. The Attorney General may issue a final determination that an individual is a covered person who must be transferred to military custody only with the concurrence of Secretary of State, Secretary of Defense, Secretary of Homeland Security, Chairman of the Joint Chiefs of Staff, and Director of National Intelligence.

Before any transfer of an individual to military custody occurs, the Director of the FBI must determine that the transfer will not disrupt any ongoing intelligence collection or compromise any national security investigation, as is expressly contemplated by the statute.

Finally, even in the event that an individual is transferred to military custody, the statute expressly recognizes that there are a number of different options for the individual’s ultimate disposition. These options may include transfer back to law enforcement custody for trial in federal court; continued military detention until the end of the conflict with al-Qa’ida; transfer for trial by a military commission, or transfer to a foreign government. Therefore, as specifically envisioned by the NDAA, an individual required to be held in military custody under Section 1022 may ultimately be returned to law enforcement custody for criminal trial.

Under the implementing procedures, the process described above for determining whether a terrorist suspect is covered by the statute and potentially subject to military custody does not apply to individuals captured, arrested, detained by, or otherwise taken into the custody of the Department of Defense, state and local law enforcement agencies acting under their authorities, or a foreign government. In short, the “covered person” determination process applies only to those arrested by or taken into the custody of the FBI or another federal law enforcement agency.

### **National Security Waivers under Section 1022:**

The President’s procedures authorize the Attorney General, in consultation with the rest of the President’s national security team, to waive the military custody requirement of Section 1022 at any time, when doing so is in the interests of U.S. national security. The procedures also ensure that these officials have sufficient time to determine whether an individual is subject to the military custody requirement in the statute, and the consequences that would flow from placing that individual into military custody, before being forced to make a decision about whether to issue a national security waiver.

In addition, the President has decided to waive application of Section 1022 at the outset in a number of specific situations where it serves our national security interests, including by avoiding harm to our counterterrorism efforts. Specifically, as certified in the procedures issued today, the President has determined it is in the national security interests of the United States to waive the military custody requirement of Section 1022 in the following circumstances:

- When placing a foreign country’s nationals or residents in military custody will impede counterterrorism cooperation;
- When a foreign government indicates that it will not extradite or transfer suspects to the United States if the suspects may be placed in military custody;
- When an individual is a U.S. lawful permanent resident who is arrested in this country or arrested by a federal agency on the basis of conduct taking place in this country;
- When an individual has been arrested by a federal agency in the United States on charges other than terrorism offenses (unless such individual is subsequently charged with one or more terrorism offenses and held in federal custody in connection with those offenses);
- When an individual has been arrested by state or local law enforcement, pursuant to state or local authority, and is transferred to federal custody;
- When transferring an individual to military custody could interfere with efforts to secure an individual’s cooperation or confession; or
- When transferring an individual to military custody could interfere with efforts to conduct joint trials with co-defendants who are ineligible for military custody or as to whom a determination has already been made to proceed with a prosecution in a federal or state court.

When a national security waiver is issued or applies, standard operating procedures would continue to be followed, and the terrorist suspect would remain in law enforcement custody.

The President's procedures also make clear that the Attorney General, in consultation with other senior national security officials, has the authority to issue additional waivers for categories of conduct, or for categories of individuals, or on an individual case-by-case basis, when doing so is in the interest of national security.

**Scope and Impact of Section 1022:**

It is important to recognize that the scope of the new law is limited. Section 1022 does not apply to U.S. citizens, and the President has decided to waive its application to lawful permanent residents arrested in the United States. An individual required to be held in military custody under Section 1022 may be returned to law enforcement custody for criminal trial. In addition, Section 1022 does not change the FBI's authorities to respond to terrorism threats and these procedures do not apply to any individuals held in the custody of the Department of Defense, state and local law enforcement agencies acting under their authorities, or a foreign government.

Finally, a determination by the executive branch that the military custody requirement of the Section 1022 does not apply or should be waived in a particular context does not affect the executive branch's discretion to use any lawful disposition option that is in the interest of U.S. national security. Such a determination means only that there is no statutory requirement to place an individual in military custody.

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