

Report on the Inquiry into:

**The Department of Defense's May 2014 Transfer to
Qatar of five law-of-war detainees in connection
with the recovery of a captive U.S. soldier**

Committee on Armed Services
U.S. House of Representatives

William M. "Mac" Thornberry, Chairman
December 9, 2015



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To the Members of the Committee on Armed Services:

Attached is the Committee's report on the Department of Defense's May 31, 2014 transfer of five detainees to Qatar from the Guantanamo Bay detention facility which was undertaken to secure the recovery of U.S. Army Sergeant Bowe Bergdahl.

The Committee's inquiry was initiated immediately after the transfer. The purpose was to determine the circumstances under which the transfer violated provisions of the Fiscal Year 2014 National Defense Authorization Act, the process by which the transfer decision was made within the Department of Defense, the Administration's rationale for its actions, and how the transfer will affect national security. This report addresses these and related topics.

In undertaking this work, the Committee, joined by the Subcommittee on Oversight and Investigations, reviewed over 4,000 pages of documents and hours of videos, conducted 16 transcribed interviews, and traveled to U.S. Naval Station Guantanamo Bay, Cuba and Doha, Qatar.

In keeping with our constitutional responsibilities, the Committee will continue to exercise vigorous oversight of the national security risk associated with these and future transfers and of the extent to which future transfers conform to the requirements of the National Defense Authorization Act.

Sincerely,

William M. "Mac" Thornberry
Chairman

Vicky Hartzler
Chairwoman
Subcommittee on Oversight and Investigations

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Introduction

Following the September 11, 2001 terrorist attacks, the United States attacked the Taliban government in Afghanistan. As a consequence, five senior Taliban leaders (termed the “Taliban Five” in this report) were among those captured. They were sent to the detention facility at the U.S. Naval Station in Guantanamo Bay, Cuba (GTMO).¹

As information distributed by GTMO explains, the facility is not a penal institution. Incarceration there is not intended to be punishment. Rather, detainees are held at GTMO to keep them off the battlefield. Detention is meant to prevent them from “engag[ing] in further armed attacks against innocent civilians and U.S. and allied forces.”²

Official unclassified U.S. government information provides some details on the Taliban Five:

Mohammad Fazl (Internment Serial Number 007) was the Taliban’s Deputy Minister of Defense.³ He was “a senior and respected military commander” and “an influential Taliban leader” who had developed an “effective military record” by the time he was captured.⁴ Before his detention, he developed “close ties” with those who subsequently rose to the Taliban’s senior leadership.⁵ In GTMO, Fazl was a “natural leader among the Afghan prisoners.”⁶ In 2013, the National Intelligence Council (NIC) assessed that if Fazl was allowed to move freely in Afghanistan, he “probably” would again “become an effective and influential military leader.”⁷

¹ The U.S. detention facility is located at U.S. Naval Station Guantanamo Bay (GTMO). The facility is operated by a multi-service organization, Joint Task Force-GTMO, frequently abbreviated as “JTF-GTMO.” In keeping with common convention, this report uses “Guantanamo” and GTMO to denote the detention operation. The Committee on Armed Services nonetheless recognizes the important distinction between the many vital and discrete functions of the naval station and the activities of JTF-GTMO, a tenant unit.

² See document captioned “Overview,” Joint Task Force-Guantanamo, April 30, 2014 (available at the website of U.S. Southern Command). Detainees are formally considered “unprivileged enemy belligerents. This document also specifies that detention “has long been recognized as legitimate under international law.”

³ See Records of Administrative Review Board, October 31, 2007; and Records of Combatant Status Review Tribunal, October 28, 2004. As described, the Taliban Five were senior leaders of the Taliban. Then-Secretary of Defense Chuck Hagel testified to the Committee in June 2014 that there is “no direct evidence of any direct involvement [of the Taliban Five] in . . . direct attacks on the United States or any of our troops.” Inasmuch as individuals of their rank would be expected to provide strategic direction and not necessarily personally engage in combat, this is an unremarkable statement. See “The May 31, 2014, Transfer of Five Senior Taliban Detainees,” hearing transcript, Committee on Armed Services, U.S. House of Representatives, June 11, 2014, p. 19 [hereafter “Taliban hearing transcript”].

⁴ National Intelligence Council Memorandum, “Background and Assessments of Five Taliban Detainees and the Impact of Their Release to Qatar or Subsequent Escape to Pakistan,” NICM 2014-058D, June 6, 2014, p. 3 (in Committee possession). Notwithstanding the date of this document, it notes “[t]he information presented reflects the most recent Intelligence Community analysis covering the topics as initially published by the National Intelligence Council on 17 June 2013” (p. 1).

⁵ National Intelligence Council Memorandum, p. 3.

⁶ National Intelligence Council Memorandum, p. 3.

⁷ National Intelligence Council Memorandum, p. 3.

Mohammad Nabi Omari (ISN 832) served in several roles in the Taliban government, including as Communications Chief and Border Chief.⁸ He was also suspected of being a member of a bomb-making cell.⁹ Omari “was directly involved in attacks against U.S. and Coalition Forces.”¹⁰ He attended weekly Al Qaeda planning meetings in the Afghan town of Khowst.¹¹ He was also involved in “weapons smuggling” and aided insurgents crossing from Khowst into Pakistan.¹²

Abdul Haq Wasiq (ISN 004) was the Taliban’s Deputy Minister of Intelligence.¹³ Wasiq had many contacts with other high ranking Taliban officials, including Mullah Omar, the now-deceased Taliban leader who was on the Department of State’s “most wanted” list.¹⁴ In 2002, as Omar’s trusted confidant, Wasiq managed all of the Taliban’s activities in Kabul related to Osama bin Laden and other foreigners.¹⁵ The NIC assessed Wasiq to be a “capable and trusted Taliban official,” but conceded he was not particularly influential.¹⁶

Khairulla Said Wali Khairkhwa (ISN 579) was a Taliban Interior Minister.¹⁷ Khairkhwa had close ties to Osama bin Laden.¹⁸ In 2001, for example, Khairkhwa was the only Taliban official who could grant access to one of bin Laden’s Afghanistan bases.¹⁹ Khairkhwa was also associated with Ayman Al Zawahiri, who succeeded bin Laden as al Qaeda’s top official.²⁰ As of June 2013, the NIC considered Khairkhwa to be “the least likely of the five to become involved in military operations” if given the opportunity, but would probably nonetheless “remain a Taliban political leader” in such circumstances.²¹

⁸ Records of Administrative Review Board, June 22, 2007; Records of Combatant Status Review Tribunal, November 16, 2004; and Habeas Filing, Mohammad Wabi Umari v. George Walker Bush, Civil Action No. 05-CV-2367 (RWR), August 10, 2009.

⁹ ARB records, June 22, 2007.

¹⁰ National Intelligence Council Memorandum, p. 4.

¹¹ ARB records, June 22, 2007.

¹² National Intelligence Council Memorandum, p. 4.

¹³ See Records of Administrative Review Board, August 14, 2007; Records of Combatant Status Review Tribunal, October 4, 2004; Habeas Filing, Abdul Haq v. George Walker Bush, Civil Action No. 05-CV-2367 (RWR), July 28, 2009, and records of FBI interview with detainee.

¹⁴ National Intelligence Council Memorandum, p. 4. For Department of State “most wanted” list, see www.rewardsforjustice.net.

¹⁵ National Intelligence Council Memorandum, p. 4.

¹⁶ National Intelligence Council Memorandum, p. 4.

¹⁷ See Records of Administrative Review Board, June 26, 2007; Records of Combatant Status Review Tribunal, September 2, 2004; and Habeas Filing, Khairulla Said Wali Khairkhwa v. Barack Obama, Civil Action No. 08-1805 (RMU) May 31, 2011.

¹⁸ ARB records, June 26, 2007.

¹⁹ National Intelligence Council Memorandum, p. 2.

²⁰ ARB records, June 26, 2007.

²¹ National Intelligence Council Memorandum, p. 2.

Mullah Norullah Noori (ISN 006) was a senior Taliban military commander who fought against the United States at Mazar-e-Sharif.²² In 2001, he was believed to be one of the 25 Taliban officials who met most frequently with Mullah Omar. The NIC determined that Noori was “a natural,” albeit not necessarily an “effective” leader among GTMO’s Afghan detainees.²³

During George W. Bush’s administration, approximately 530 detainees left GTMO.²⁴ The Taliban Five were among those who remained. Two days after Barack Obama’s 2009 inauguration, the new president signed an executive order to close GTMO.²⁵ To accomplish this goal, the executive order empaneled a group of executive branch specialists to evaluate the 240 detainees who were still held to recommend how they should be disbursed.²⁶

In 2010, the president’s Executive Order Task Force (EOTF) identified 126 detainees it believed could be sent (or “transferred” in bureaucratic parlance) to another country, provided arrangements could be made to manage the prospective danger posed by the detainee.²⁷ The EOTF deemed 48 other detainees “too dangerous to transfer” and said they should remain in “continued detention” at GTMO.²⁸ For this category, however, the Task Force noted that, “should potential receiving countries implement appropriate security measures” then “transfer might be appropriate.”²⁹ The EOTF identified the Taliban Five for “continued detention.”³⁰

As a consequence of the EOTF, the Obama Administration proceeded to send elsewhere some of those detainees recommended for transfer. In December 2013, as actions to reduce the GTMO population proceeded, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2014. The NDAA specified that at least thirty days before transferring any detainee from GTMO to a foreign country, the Secretary of Defense must describe to Congress the efforts which would be put into place to “substantially mitigate” the risk posed by the forthcoming transfer. The Secretary of Defense was also required to outline the receiving country’s capacity and willingness to institute necessary security measures, along with a description of that country’s prior performance if it had previously received a detainee.³¹ In

²² See Records of Administrative Review Board, January 27, 2007; Records of Combatant Status Review Tribunal, undated; Habeas Filing, Mullah Norullah Noori v. George Walker Bush, Civil Action No. 1:08-CV-1828(RMU), July 29, 2009, and records of FBI interview with detainee.

²³ National Intelligence Council Memorandum, p. 3.

²⁴ “Guantanamo Review Task Force,” p. 1.

²⁵ Executive Order 13492.

²⁶ Executive Order 13492; and “Guantanamo Review Task Force.”

²⁷ “Guantanamo Review Task Force,” p. 17. The Department of Defense considers a detainee “transferred” (rather than “released”) from GTMO if the detainee is subjected to some process instituted by or on behalf of the recipient government, such as judicial action, monitoring, or some limitation on movement. This report uses the same nomenclature. In reaching the transfer determinations, the EOTF made clear that a “recommendation for transfer” did not mean “the government lacked legal authority to hold the detainee” and that approval to transfer did “not reflect a decision that the detainee poses no . . . risk of recidivism.” See “Guantanamo Review Task Force,” p. 17.

²⁸ “Guantanamo Review Task Force,” p. ii. In addition, 44 other detainees were recommended for prosecution in civil or military proceedings.

²⁹ “Guantanamo Review Task Force,” pp. ii, 25.

³⁰ Declassified document captioned “Guantanamo Review Dispositions,” dated January 22, 2010 (in Committee possession).

³¹ Public Law 113-66.

enacting these provisions, Congress intended to ensure that it had an opportunity to be informed about the Administration's transfer arrangements before they were put into action.

Taliban Five transfer

On May 31, 2014, as part of an exchange which allowed the recovery of U.S. Army Sergeant Robert Bowdrie "Bowe" Bergdahl, the United States sent the Taliban Five from GTMO to Qatar. But, Rep. Howard P. "Buck" McKeon, then the chairman of the Committee on Armed Services in the U.S. House of Representatives, learned of the Taliban Five transfer only about two and one half *hours*, rather than 30 days, before it occurred.³² Furthermore, the Committee did not receive the required written classified notification and assessments until two days *after* the transfer.

The Committee is relieved that Sgt. Bergdahl, who was captured in Afghanistan in June 2009, is no longer held. But, the fact that the Taliban Five were transferred from GTMO as a component of a successful personnel recovery effort did not relieve the Administration of legal obligations pertaining to transfers. The Administration argued that the transfer was "an extraordinary situation" because it was related to the recovery of a U.S. serviceman held akin to a "Prisoner of War," thus giving the president the Constitutional authority as commander-in-chief to act without regard to the mandates in the NDAA.³³ The Committee disagrees with this interpretation.

The Committee concern is further heightened because the president's own internal review determined that the Taliban Five were sufficiently dangerous to require them to remain in detention and because the Administration never invoked for the Taliban Five the procedure it established to reconsider the disposition of "continued detention" detainees. Furthermore, Democratic and Republican leaders in both houses of Congress warned against the risks of a Taliban Five transfer before it took place.

Committee investigation

In light of the significant issues raised by the Taliban Five transfer, one week after it took place, Chairman McKeon directed the Committee to conduct a "a rigorous and fulsome assessment" of the role of the Department of Defense in the development and execution of the exchange. Among other topics, the inquiry was to consider the Department's rationale for the transfer, "the process by which the transfer decision was made" by the Department, and "how the transfer will affect national security."³⁴ The Oversight and Investigations subcommittee subsequently assumed primary responsibility for this evaluation, working alongside the full

³² E-mail, NJOIC notes from October 30, 2014 tranche, nos. 1 and 10; E-mail, May 31, 2014 in March 27, 2015 tranche, no. 26; and E-mail, May 31, 2014, in March 27, 2015 tranche, no. 107 (departure of Taliban Five from GTMO occurring "2.4 hours after SGT Bergdahl was released").

³³ Taliban hearing transcript, pp. 8-10, 15, 19-20, 23 ("Prisoner of War"), 27, 29-31, 38-39, 42-43, 55 (quotation), 66-67, 72-76, 78, and 84.

³⁴ Rep. Howard P. McKeon letter to Rep. Joe Heck and Rep. Niki Tsongas, July 17, 2014. In undertaking this work, the Committee was mindful of need to recognize nuance, uncertainty, alternative interpretations. For a discussion of the challenge of impartiality, see e.g. Peter Novick, *That Noble Dream: The 'Objectivity Question' and the American Historical Profession* (Cambridge: Cambridge University Press, 1988).

Committee. When Rep. McKeon retired at the conclusion of the 113th Congress, the inquiry continued under the direction of Chairman William M. “Mac” Thornberry in the 114th Congress.

The following report sets forth four **Findings** which are specific assessments of discrete components of the Taliban Five exchange and aftermath. A **Conclusion** evaluates the entire undertaking, set against the context of the Obama Administration’s broader national security priorities.

A **Background** section explicates many of the details about how and when the Taliban Five exchange plan was conceived, altered, and executed, and what individuals were involved. Much of this was unknown to the Committee before this investigation and a considerable portion of the Committee’s endeavors were devoted to discerning this important information. Five **sidebars** and a **timeline** are also included in order to provide a comprehensive overview of what transpired. The **appendix** sets forth details about how this investigation was conducted.

Other topics

It is also necessary to note what this inquiry did *not* consider. Elements of the executive branch other than the Department of Defense were not a focus of the Committee’s work. While most transfer-related activities involved the Department, to the extent other agencies or offices had a role, they are outside the Committee’s jurisdiction.

How Sgt. Bergdahl came to be a captive was not also within the scope of this evaluation. However, the Committee nonetheless makes two related points. First, based on the material available to the Committee, the circumstances that led to Sgt. Bergdahl’s captivity seem to have had no bearing on the Department of Defense’s efforts to recover him. In other words, how Department officials may have understood events which led to Sgt. Bergdahl’s captivity appear to neither have inhibited nor spurred them to action in seeking his recovery by way of the Taliban Five exchange.

Second, the Committee is confident that the U.S. Army will appropriately and fairly consider the actions which resulted in Sgt. Bergdahl’s capture. In keeping with its oversight responsibilities, the Committee will, however, remain abreast of the disciplinary process which is underway. The Committee will ensure that standard procedures are properly implemented and administered, and that Sgt. Bergdahl’s behavior is adjudicated as required.

Finally, in connection with the Memorandum of Understanding which outlines the conditions under which the Taliban Five were transferred to Qatar, the Committee recognizes that senior Qatari officials devoted considerable time over many months to develop this agreement. The Committee appreciates their efforts.

FINDING I: The transfer of the Taliban Five violated several laws, including the National Defense Authorization Act for Fiscal Year 2014. The constitutional arguments offered to justify the Department of Defense's failure to provide the legally-required notification to the Committee 30 days in advance are incomplete and unconvincing. The violation of law also threatens constitutional separation of powers.

FINDING II: The Committee was misled about the extent and scope of efforts to arrange the Taliban Five transfer before it took place. The Department of Defense's failure to communicate complete and accurate information severely harmed its relationship with the Committee, and threatens to upend a longstanding history and tradition of cooperation and comity.

FINDING III: Senior officials within the Department of Defense best equipped to assess national security risks associated with the detainee transfer were largely excluded from the Taliban Five efforts. This greatly increased the chance that the transfer would have dangerous consequences.

FINDING IV: The Department of Defense has failed to take sufficient precautions to ensure the ongoing national security risks posed by the Taliban 5 are mitigated, consistent with the Memorandum of Understanding with Qatar.

Conclusion

This extended study demonstrates that the Administration worked over six months to arrange and effectuate a complicated and controversial transfer of five dangerous Taliban detainees lawfully held at GTMO. It did so without properly informing Congress or even communicating the fact that the plan was being developed, despite a legal requirement and specific pledges to do precisely the opposite. This is deeply disturbing.

These actions and omissions call into question the meaning and application of the time-honored established constitutional principles of congressional oversight of the executive branch and the Department of Defense's relationship with its legislative overseers. The Committee also believes the Administration's actions must be placed in a broader context. The effort to transfer the Taliban Five was not merely a mechanism to recover a captive U.S. serviceman.

President Obama has pledged to close GTMO. Among other justifications for this goal, he has cited the fact that the facility's existence has purportedly invigorated our nation's enemies, despite scant evidence to justify this assertion and the fact that they faced no inhibitions about their anger towards the United States or allies before GTMO began operation. When President Obama assumed office and empaneled his own review of GTMO detainees, that interagency body determined that 48 detainees should not leave U.S. custody. As the Administration entered its second term, the Committee believes that this posed a particular challenge: how to rid the facility of detainees the president's own designees believed could not be readily sent elsewhere.

The Taliban Five transfer became cloaked as a component of an otherwise salutary prisoner recovery effort. Doing so allowed the Administration to rid itself of five of the most dangerous and problematic detainees (other than the 9/11 conspirators who are subject to criminal proceedings) who the Administration would otherwise have great difficulty relocating because of the Administration's own prior recommendation to keep them in detention.

Furthermore, transferring five senior Taliban leaders from GTMO offered the prospect of making other transfers appear to be less threatening or contentious. If these five left GTMO, it could ease the case for the departure of others presumed to be less risky.

Because the Administration recognized such an audacious effort faced broad, bipartisan public and congressional opposition, the Administration elected to arrange for the transfer without properly notifying Congress and claiming notification was precluded by the exigencies of the circumstances (notwithstanding the fact the efforts were spread over many months with much senior-level involvement). The Taliban Five transfer also essentially meant sidelining the officials and offices within the Department of Defense with considerable previous experience with other detainee relocations.

Indeed, until this inquiry began, the Department also failed to promptly identify an individual or office charged with the responsibility to monitor the adherence to the Memorandum of Understanding stipulating the conditions of the transfer of the Taliban Five. This was the case despite the fact that the Department was the signatory to the MOU.

Some of the Taliban Five have engaged in threatening activities since being transferred to Qatar. Regrettably, this outcome is a consequence of a poorly managed process undertaken contrary to a law specifically intended to minimize the risk posed by detainee transfers. In light of all these circumstances, the Committee will continue to closely monitor the situation using all the capabilities available to it.

Key Points

- Following briefings on a prospective swap of Sgt. Bowe Bergdahl for Taliban detainees at GTMO in November 2011, several members of the House and Senate wrote to President Obama and then-Secretary of State Hillary Clinton to express concern about such an exchange. In response, Secretary Clinton wrote “I want . . . to make clear that any transfer from Guantanamo will be undertaken after consultation with Congress and pursuant to all legal requirements for transfers, including those spelled out in the FY2012 [National] Defense Authorization Act.”
- Other Administration officials repeated this sentiment in following months, including White House Press Secretary Jay Carney who said in June 2013 “[a]s we have long said...we would not make any decision about the transfer of any detainees without consulting Congress and without doing so in accordance with U.S. law.”
- Then-Secretary of Defense Chuck Hagel and the Department of Defense general counsel traveled to Qatar in December 2013 to discuss the possibility of developing a Memorandum of Understanding (MOU) to govern the Taliban Five exchange.
- Administration “principals” and “deputies” met at least four times to provide guidance on this activity between December 2013 and May 2014.
- Senior Department of Defense officials (along with other Administration representatives) traveled to Qatar on three subsequent occasions to develop the MOU and arrange for the detainee transfer. The secretary of defense was kept apprised of these activities.
- The MOU was signed in a special ceremony in the White House complex two weeks before the transfer.
- Department of Defense personnel were recalled to work late one night before the MOU was signed to gather material on the proposed transfer for the secretary’s prospective review.

- In early 2014, a U.S. government organization outside of the Department of Defense planned an operation to secure Sgt. Bergdahl's release. The Department was aware of this activity.
- Contemporaneous news accounts of a prospective swap of Taliban detainees for Sgt. Bergdahl consistently contained details which were substantially accurate.
- In the months preceding the Taliban Five transfer on May 31, 2014, the Administration did not communicate any of the specifics or contemplated courses of action to the Committee, and the information it did convey was misleading and obfuscatory.
- The Taliban Five were officially informed they were being transferred to Qatar approximately two days before Congress was provided this information.
- GTMO personnel successfully fulfilled their transfer responsibilities, notwithstanding a requirement to do so in an unobtrusive manner and in a far shorter than normal timeframe.
- Administration officials feared that news of a prospective exchange would leak and jeopardize the ability to recover Sgt. Bergdahl.
- The initial White House statement on May 31, 2014 on the recovery of Sgt. Bergdahl disturbed both Defense officials and Qatari leaders. Defense officials were dismayed it did not mention that the Taliban Five were transferred in exchange for Sgt. Bergdahl. The Qataris were upset the statement was prematurely issued before the Taliban Five arrived in Qatar.

Background

U.S. Army soldier Robert Bowdrie “Bowe” Bergdahl left his post at Combat Outpost Mest-Lalak in Paktika Province, Afghanistan on June 30, 2009 and was taken captive.³⁵ Within a year, the Taliban apparently broached the possibility that Sgt. Bergdahl would be freed in exchange for Taliban members held at GTMO. The first proposal involved trading six Taliban detainees: the Taliban Five and a sixth detainee, Awal Gul. However, Gul had a heart attack and died in GTMO in February 2011. This exchange effort stalled.³⁶

By late 2011, the possible transfer of the Taliban Five was reinvigorated. At that time, the Administration was engaged in renewed efforts to broker an end to fighting in Afghanistan. A former State Department Special Representative for Afghanistan and Pakistan (SRAP) and another specialist explained later that the Taliban “refused to negotiate with Kabul” for a peaceful resolution to the conflict “unless they first secured the release of several of their former leaders” from GTMO.³⁷ Thus, consideration was given to combining goals: transferring the Taliban Five (characterized as “mid to high ranking” leaders) to entice the Taliban to renounce violence and participate in the political system while also securing the return of Sgt. Bergdahl.³⁸

Between September 2011 and March 2012, Jeh Johnson, then-Department of Defense (DOD) General Counsel, participated in three meetings with officials from Qatar to discuss the possibility of sending the Taliban detainees to that country as part of a swap. In his discussions, Mr. Johnson sought to develop a Memorandum of Understanding (MOU) which would stipulate the arrangements Qatar would institute to minimize the threat the detainees might pose in the event they were transferred.³⁹ Later press reports, citing anonymous “current and former

³⁵ U.S. Army Forces Command, “U.S. Army Forces Command Announces Actions in Bergdahl Case,” March 25, 2015 (in Committee possession). Pursuant to standard procedures, Bergdahl was promoted to sergeant while in captivity. This report uses that rank.

³⁶ After Secretary Chuck Hagel’s declaration to the Committee in June 2014 that the Taliban Five discussions “actually started with six” Taliban detainees, White House spokeswoman Laura Lucas Magnuson released a statement to *Foreign Policy* magazine. The statement explained, “[i]n initial talks, the Taliban also sought the transfer of Awal Gul, who later died in Guantánamo of a heart attack in February 2011.” See John Hudson, “Meet the Sixth Man the Taliban Wanted in the Bergdahl Swap,” *Foreign Policy*, June 13, 2014; and “The May 31, 2014, Transfer of Five Senior Taliban Detainees,” hearing transcript, Committee on Armed Services, U.S. House of Representatives, June 11, 2014, pp. 20, and 52-53 [hereafter “Taliban hearing transcript”]. For discussion of other “negotiations” between Army officers and “some Taliban leaders” about recovery of Sgt. Bergdahl “within a few days” of his departure, see transcript captioned “Record of Preliminary Hearing Under Article 32,” pp. 180-181, and 301.

³⁷ They recount that “Pentagon officials balked at the suggestion that the United States should release prisoners from Guantanamo in exchange for Bowe Bergdahl.” See James Dobbins and Carter Malkasian, “Time to Negotiate in Afghanistan,” *Foreign Affairs*, July/August 2015.

³⁸ Taliban hearing transcript, pp. 21-22, and 50. “Mid to high ranking” description is in “DOD Response to House Armed Services Committee Request to Secretary Hagel of October 17, 2014 – Item 3,” (in Committee possession).

³⁹ Taliban hearing transcript, p. 8; E-mail, May 29, 2014 (“Subject: CLOSE HOLD Timeline”), in November 3, 2014 tranche, no. 48; “Recon Timeline 2010-2014” attached to E-mail, May 13, 2014, in November 25, 2014 tranche, no. 52 (hereafter “CLOSE HOLD Timeline”). This document and e-mail were partially declassified at the Committee’s request. In doing so, the Department stipulated “[t]his draft document may contain inaccuracies as it was created for internal discussion purposes only and was never vetted or coordinated with other offices (see Department of Defense transmittal letter, January 21, 2015). While the Committee acknowledges this disclaimer, the Committee assesses as accurate the dates and activities referenced here when balanced against the totality of information received from the Department.

Why these Five?

It is impossible to determine with certainty many of the specific aspects of the negotiations which resulted in the Taliban Five trade. For example, did the United States initially propose something less than a five-for-one exchange? Were alternatives advanced which may have involved detainees other than the Taliban Five? Was an exchange contemplated in which Sgt. Bowe Bergdahl would have been traded for one GTMO detainee with the prospect of future additional trades if certain conditions were met?

The Committee is aware that the Taliban made varied demands at different points in the negotiations. While they apparently always sought the return of the Taliban Five, on at least two occasions, they sought a sixth detainee.⁴⁰ One, who the Taliban identified in discussions in 2011, died in GTMO of a heart attack shortly afterwards.⁴¹ When the Taliban broached the possibility of another in May 2014, Stephen Preston, then-Department of Defense General Counsel, apparently dissuaded them by conveying that the United States was “most unreceptive to adding a sixth.”⁴² At other points it seems the Taliban requested the return of *all* Taliban detainees at GTMO.⁴³

The Administration refused to describe the proposals and counterproposals advanced by both negotiating parties at each step of the discussions. Rather, the Administration declared the final trade was the result of extended back-and-forth negotiations which yielded the only possible deal. The Department of State summarized to the Committee:

Ultimately, we determined that the transfer of the five Taliban members from Guantanamo Bay to Qatar would be the minimum necessary to secure Sgt. Bergdahl's freedom through negotiation. This was the deal that was available, and we had to make a decision: would we accept this deal or not? We did not believe that there was a better deal available.⁴⁴

Efforts to transfer more than five seemed to have little support within the national security bureaucracy. This may be because, to the extent the Taliban Five exchange was a mechanism to reduce the GTMO population by transferring “continued detention” detainees who had poor prospects for leaving otherwise, proponents had to take into account concerns within the national security bureaucracy about transferring more. Acceding to Taliban demands to increase the number may have threatened to upend the support which the Taliban Five deal garnered within the Administration. An effort to exchange six or more detainees for Sgt. Bergdahl could have unraveled the entire deal, and this was a risk that advocates could not take. Settling for five may have been preferable to attempting to transfer more than five.

⁴⁰ Stephen Preston, classified interview transcript (redacted), November 4, 2014, p. 107 [hereafter “Preston transcript”].

⁴¹ Michael Lumpkin, classified interview transcript (redacted), October 16, 2014, p. 42; Preston transcript, p. 107; “The May 31, 2014, Transfer of Five Senior Taliban Detainees,” hearing transcript, Committee on Armed Services, U.S. House of Representatives, June 11, 2014, p. 48 [hereafter “Taliban hearing transcript”]; and John Hudson, “Meet the Sixth Man the Taliban Wanted in the Bergdahl Swap.” *Foreign Policy*, June 13, 2014 (Information released in a statement by White House spokeswoman Laura Lucas Magnuson to *Foreign Policy* magazine.)

⁴² E-mail, May 11, 2014, in March 27, 2014 tranche, no. 17.

⁴³ Taliban hearing transcript, pp. 20, and 52.

⁴⁴ Unclassified summary of remarks made by the State Department during a April 14, 2015 classified briefing to HASC (in Committee possession).

officials” indicate the proposed plan involved transferring Taliban detainees in groups of one or two, in part as a way to mitigate prospective dangers.⁴⁵

Senior members of the House of Representatives were briefed three times on the broad contours of Mr. Johnson’s actions. In November 2011, the Under Secretary of Defense for Policy, the Vice Chairman of the Joint Chiefs of Staff, and leaders from the Department of State, the National Security Council, and Intelligence Community provided classified details to then-Speaker John Boehner, then-Chairman Howard P. “Buck” McKeon, Ranking Member Adam Smith, their counterparts on the Foreign Affairs and Intelligence committees, and others. In the next two months, congressional leaders received additional classified briefings.

Then and later, several, including the Speaker and Chairman McKeon, expressed concern about what they learned.⁴⁶ In a classified communication to the president, several members noted they were disturbed by the prospect that the Taliban Five might return to the fight if transferred from GTMO, and worried about the likelihood that such a swap might induce other hostage taking. A second letter also raising objections was sent to then-Secretary of State Hillary Clinton by the chairmen and ranking minority members of the House and Senate Intelligence Committees.⁴⁷

Although the concerns about the possible exchange were also not resolved in the briefings, the views expressed then and in the related correspondence made clear congressional discomfort with the exchange proposal, and the expectation of continued communication with the executive branch.

Administration officials seemed to understand. When the congressional correspondence was vaguely described in press coverage at the time, a “senior administration official” told one news outlet that, although “[w]e will not characterize classified Congressional correspondence... what is clear is the President's order to us to continue to discuss these important matters with Congress.”⁴⁸ Furthermore, when responding to the December 2011 letter from the Intelligence Committee members, Secretary Clinton declared:

I want . . . to make clear that any transfer from Guantanamo will be undertaken after consultation with Congress and pursuant to all legal requirements for transfers, including those spelled out in the FY2012 [National] Defense Authorization Act.⁴⁹

⁴⁵ Anne Gearan and Ernesto Londono, “U.S. seeks prisoner swap with Taliban to free Army Sgt. Bowe Bergdahl,” *Washington Post*, February 17, 2014.

⁴⁶ Internal Committee communications (in Committee possession).

⁴⁷ Internal Committee communications (in Committee possession); John Parkinson, “Bowe Bergdahl Prisoner Swap ‘Totally’ Did Not Follow the Law, Senate Intel Chair Says,” *ABC News*, June 3, 2014; and Deidre Walsh and Ted Barrett, “Congressional leaders initially pushed back on Bergdahl swap,” *CNN*, June 4, 2014. For a contemporaneous albeit vague discussion of this correspondence, see Mark Hosenball, Missy Ryan and Warren Strobel, “U.S. mulls transfer of senior Taliban prisoner,” *Reuters*, December 30, 2011.

⁴⁸ Mark Hosenball, Missy Ryan and Warren Strobel, “U.S. mulls transfer of senior Taliban prisoner,” *Reuters*, December 30, 2011.

⁴⁹ Quoted in Senator Saxby Chambliss letter to President Barack Obama, June 3, 2014 (in Committee possession). In her letter, Secretary Clinton also discussed notional efforts to recover Sgt. Bergdahl. She stated “[t]he Department of Defense continues to refine operational plans in support of a possible recovery mission. U.S.

Similarly, if Secretary of Defense Leon Panetta were queried about the prospect of a detainee swap around this time, staffers suggested he reply “I take compliance with these legal requirements very seriously. No Guantanamo detainee will be transferred to a foreign country without close adherence to the requirements I must certify under the law.”⁵⁰

The referenced legal requirements were provisions included in the Department’s annual authorization bill. These sections mandated that the secretary of defense certify to Congress 30 days before any GTMO transfer that specific conditions existed to minimize the threat posed by the detainee. This provision had become law when the president signed the NDAA on the last day of December 2011, although he simultaneously declared that the requirement “needlessly interfere[s] with the executive branch’s processes for reviewing the status of detainees.”⁵¹

The possibility that Taliban detainees might be transferred from GTMO as part of wartime reconciliation sparked several news stories in this period.⁵² But, not until March 2012 did any journalistic account disclose that the prospective Taliban transfer was “part of a trade” and would involve “the return of a Western prisoner.” At that time, an article cited Senator Diane Feinstein as the source and reported that she was opposed to the potential swap, although “at the request of U.S. officials” the prisoner potentially to be repatriated was not identified.⁵³

CENTCOM and its subordinate commands recently completed an interagency tabletop exercise designed to identify and fix shortfalls with those planning efforts.” The Committee was unable to gather details about these exercises. Officials from the Department of Defense who were interviewed (including the general officer who served as the military aide to Secretary Panetta) could recall none of the specifics. See General John Kelly, classified interview transcript (redacted), November 14, 2014, pp. 24, and 26 [hereafter “Kelly transcript”].

⁵⁰ E-mail, February 8, 2012, in October 8, 2014 tranche, nos. 84-85.

⁵¹ The White House, “Statement by the President on H.R. 1540,” December 31, 2011.

⁵² See Missy Ryan, “Secret U.S.-Taliban talks may see Guantanamo prisoners given to Afghanistan,” *Reuters*, December 19, 2011; Jennifer Griffin, “U.S. Weighs Releasing Taliban Commander From Gitmo as Part of Peace Talks,” *Fox News*, December 20, 2011; Mark Hosenball, Missy Ryan and Warren Strobel, “U.S. mulls transfer of senior Taliban prisoner,” *Reuters*, December 30, 2011; Julian Borger and Jon Boone, “Taliban leaders held at Guantanamo Bay to be released in peace talks deal,” *Guardian*, January 3, 2012; Adam Entous and Julian E. Barnes, “U.S. Plans New Push for Talks With Taliban,” *Wall Street Journal*, January 11, 2012; Karen DeYoung, “Obama Administration’s Afghanistan endgame gets off to bumpy start,” *Washington Post*, February 5, 2012; “The Taliban Five,” *Wall Street Journal*, February 13, 2012; Adam Entous and Julian E. Barnes, “Detainee Deal Stalls Taliban Talks,” *Wall Street Journal*, March 21, 2012; and Missy Ryan and Mark Hosenball, “U.S. may accept less stringent controls for Taliban detainees,” *Reuters*, March 29, 2012. (In early January, Jeh Johnson e-mailed the Department of Defense spokesman to declare, “[t]his round of stories is better than the prior ones.” The spokesman replied, “[t]hey were planned.” See E-mail, January 12, 2012, in March 6, 2015 tranche, nos. 372-373 (as supplemented by information conveyed to Committee staff by Department of Defense, May 21, 2015). Days later, the Vice Chairman of the Joint Chiefs of Staff, referencing another similar news story and senior White House officials, e-mailed the spokesman to report “I told my breakfast group [McDonough, Burns, Brennan, etc.] that we are not putting this out and are exercising due diligence.” See E-mail, January 20, 2012, in March 6, 2015 tranche, nos. 368-371; bracketed names in original.) When Secretary Panetta was questioned about the possibility of an exchange in a February 2012 open hearing of the Committee on Armed Services in the Senate, senators cited news articles as the basis of their queries. See “Hearing to Receive Testimony on the Defense Authorization Request for Fiscal Year 2013 and the Future Years Defense Programs,” hearing transcript, Committee on Armed Services, U.S. Senate, February 14, 2012, pp. 20, and 50-51.

⁵³ Josh Rogin, “Taliban Gitmo deal is a swap for a Westerner,” *Foreign Policy*, March 13, 2012. For an exchange of e-mails decrying “disclosure of classified information” in this article, see E-mail, March 13, 2010, in October 8, 2014 tranche, nos. 86-88. Unclassified information prepared around December 2011 for use in responding to certain

The Taliban broke off reconciliation discussions in March 2012.⁵⁴ Mr. Johnson's efforts to develop an MOU to govern the Taliban Five transfer to Qatar ended at that time.⁵⁵ A press account written later reported that the talks "collapsed amid congressional skepticism and the strict security conditions the Obama Administration sought as part of any exchange." Conditions included, according to the *New York Times*, "the stipulation that the Taliban prisoners be sent to Qatar and forbidden to leave."⁵⁶ After discussions were suspended, Mr. Johnson left his position at the Pentagon in December 2012.

Then-Secretary of Defense Leon Panetta describes his opinion of a possible exchange in his memoirs. "I opposed the swap for several reasons," he writes.

First I did not believe the Taliban were sincere in their efforts to reconcile with the Afghan government; they were, after all, attacking our forces on the field of battle. Second, I did not believe it was fair to trade five for one. Third, Congress had passed a law stating that no prisoner could be released from Guantanamo unless we could assure that the country to which we were transferring the prisoner had the ability to prevent the prisoner from rejoining the fight. . . . I did not believe the Qatari government's assurances were strong enough to satisfy the law.⁵⁷

The secretary's senior military aide recounted to the Committee that Mr. Panetta expressed similar views ("the Secretary didn't think much of the deal") to him at the time.⁵⁸ Mr. Panetta was replaced by Chuck Hagel in February 2013.

Four months later, the possibility of a detainee swap was revived. In June, the Taliban opened a "political office" in Qatar. According to a later press account which cited an authoritative State Department source, the "U.S. made it clear" at the time that it was interested in discussing an exchange.⁵⁹

media queries about Sgt. Bergdahl also specified that the Taliban "are demanding the release of several prisoners in exchange for SGT Bergdahl's release," although it does not specify the identity of the Taliban detainees or stipulate they are held in GTMO. See document captioned "SGT Bowe R. Bergdahl, US Army; Captured: June 30, 2009 – Afghanistan," in March 27, 2015 tranche, no. 203.

⁵⁴ Taliban hearing transcript, pp. 7-8; E-mail, May 29, 2014, in November 3, 2014 tranche, no. 48; and E-mail, May 13, 2014, in November 25, 2014 tranche, no. 52.

⁵⁵ Mr. Johnson apparently hosted a Qatari delegation one final time, in June 2012. See E-mail, June 12, 2012, in October 8, 2014 tranche, nos. 57-59.

⁵⁶ Charlie Savage, "Negotiations With Taliban Could Hinge on Detainees," *New York Times*, June 20, 2013.

⁵⁷ Leon Panetta, *Worthy Fights: A Memoir of Leadership in War and Peace*, (New York: Penguin Press, 2014), p. 416.

⁵⁸ Kelly transcript, p. 13.

⁵⁹ Deb Riechmann, "How Qatar helped win Bowe Bergdahl's release," *Associated Press*, June 3, 2014 (quoting a "State Department official . . . who spent the last 11 days in Doha helping guide the final round of negotiations to release Bergdahl").

Renewed activity in 2013

The message was received. On June 18, the State Department spokesman confirmed that the Taliban were expected to raise the possibility of an exchange in forthcoming talks with the U.S.⁶⁰ Two days later, in an interview with the *Associated Press*, a Taliban spokesman in Qatar suggested that trading the Taliban Five for Sgt. Bergdahl “could build bridges of confidence” in the reconciliation discussions.⁶¹ This sparked another spate of articles on a possible swap.⁶²

One story in the *New York Times* noted Chairman McKeon’s skepticism and summarized that “[a]n administration official” told the newspaper that “consultation with lawmakers would be a prerequisite to a deal, if any ultimately emerges.”⁶³ Indeed, the next day at a June 21 White House press gaggle, Press Secretary Jay Carney replied to a question on the topic:

As we have long said . . . we would not make any decision about the transfer of any detainees without consulting Congress and without doing so in accordance with U.S. law.⁶⁴

By September 2013, Qatar had again offered to serve as an “intermediary” with the Taliban for an exchange of the five GTMO detainees for Sgt. Bergdahl.⁶⁵ Senior U.S. national security policy makers from across the government (the “interagency”) weighed in and directed that earlier efforts be renewed.⁶⁶ Because of staff turnover since the last effort, this work would be conducted by a new top tier of DOD leaders, including Stephen Preston, who became general counsel in late October.⁶⁷ Indeed, upon assuming office, Mr. Preston was advised that one of his initial responsibilities would be to advance the draft MOU with Qatar developed by his predecessor.⁶⁸

In November 2013, as an initial step in response to the Qatari offer, the United States solicited from the Taliban a “proof of life” video of Sgt. Bergdahl showing that the soldier was still alive.⁶⁹ Around the same time, the Administration’s interagency Taliban reconciliation group recommended that Mr. Preston accompany Secretary Hagel to meetings with Qatari

⁶⁰ U.S. Department of State, “Daily Press Briefing” transcript, June 18, 2013.

⁶¹ Kathy Gannon and Kay Johnson, “Taliban offer to free US soldier,” *Associated Press*, June 20, 2013.

⁶² See Elliott C. McLaughlin, “Taliban talks offer hope for family of only American POW in Afghanistan,” *CNN*, June 20, 2013.

⁶³ Charlie Savage, “Negotiations With Taliban Could Hinge on Detainees,” *New York Times*, June 20, 2013.

⁶⁴ White House press briefing, June 21, 2013. Mr. Carney also provided context. Of Sgt. Bergdahl, he said “[w]e continue to call for and work toward his safe and immediate release.” He further noted, “[w]e cannot discuss all the details of our efforts, but there should be no doubt that on a daily basis we are continuing to pursue – using our military, intelligence and diplomatic tools – the effort to return him home safely.”

⁶⁵ “DOD Response to House Armed Services Committee Request to Secretary Hagel of October 17, 2014 – Item 3,” (in Committee possession); and Stephen Preston, classified interview transcript (redacted), November 4, 2014, pp. 22-23, and 27 [hereafter “Preston transcript”].

⁶⁶ Preston transcript, pp. 22-23.

⁶⁷ Preston transcript, p. 8.

⁶⁸ Preston transcript, pp. 20-25, 45, and 77. Immediately after the transfer, Mr. Preston reported to the Vice Chairman of the Joint Chiefs of Staff that “[p]utting together the . . . MOU and the exchange deal was one of the toughest challenges in my entire career.” See E-mail, June 1, 2014, in November 3, 2014 tranche, no. 51.

⁶⁹ Taliban hearing transcript, p. 8.

government officials in Doha, Qatar in December. While the secretary's visit had many purposes, Mr. Preston's presence was meant to "emphasize the importance" the U.S. government placed on finalizing a MOU with Qatar for the Taliban Five.⁷⁰

Despite requests from the Committee during this investigation, the Department never provided the Committee with early drafts of the MOU, claiming these materials were "pre-decisional."⁷¹ This makes it impossible for the Committee to understand fully how the proposed agreement evolved throughout the course of negotiations. However, based upon other information the Committee received, it is clear that the length of time that any MOU would be in force was discussed by U.S. and Qatari interlocutors from at least the beginning of Mr. Preston's involvement.⁷²

Mr. Preston traveled to Qatar as suggested. Joined by the U.S. ambassador, colleagues from the Department of State, and others, Mr. Preston arrived ahead of the secretary to meet with the attorney general of Qatar on December 9, 2013 to "refresh" the MOU.⁷³ Using "third party" as a euphemism for the Taliban, Mr. Preston subsequently summarized the discussions in an unclassified email sent to officials in the Department of Defense and to Antony J. "Tony" Blinken, then the president's deputy national security advisor.

Our meeting with the AG earlier today went reasonably well. . . . there were no disagreements, and we achieved our immediate objectives: signaling to the third party our interest in pursuing this matter and confirming the host government's willingness to commit to the previously negotiated terms and assurances, subject to further discussions with the third party.⁷⁴

Mr. Preston also kept Mark Lippert, then-chief of staff to Secretary Hagel, apprised of the conversations. In addition, Mr. Preston compiled classified talking points for the secretary's use the next day when Secretary Hagel arrived in Qatar and both met with the ruling Emir.⁷⁵

Although the Administration did not advise the House of Representatives or Senate about the discussions in Qatar, or any effort to advance the MOU, Congress was amidst action in

⁷⁰ E-mail, November 26, 2013, in November 25, 2014 tranche, nos. 30-33 (declassified at Committee request).

⁷¹ Michael J. Stella, Performing the Duties of Assistant Secretary of Defense (Legislative Affairs) letter to Rep. Mac Thornberry, January 21, 2015 (in Committee possession).

⁷² E-mail, December 4, 2013, in December 5, 2014 tranche, nos. 532-533; E-mail, December 7, 2013, in March 27, 2015 tranche, nos. 4-7; E-mail, December 9, 2013, in March 27, 2015 tranche, nos. 34-36 (as supplemented by information conveyed to Committee staff by Department of Defense, October 13, 2015); and E-mail, December 17, 2013, in November 25, 2014 tranche, no. 5 (declassified at Committee request). For a general reference to the MOU being considered by the interagency in 2013, see Brigadier General Robert White, classified interview transcript (redacted), September 24, 2014, p. 58.

⁷³ Preston transcript, pp. 29-30; E-mail, November 26, 2013, in November 25, 2014 tranche, nos. 30-33 ("refresh" in no. 30)(declassified at Committee request); and E-mail, December 8, 2013, in March 6, 2014 tranche, nos. 101-102 (ambassador as participant). Date is in "CLOSE HOLD Timeline."

⁷⁴ E-mail, December 9, 2013, in March 27, 2015 tranche, nos. 34-36.

⁷⁵ E-mail, December 9, 2013, in November 3, 2014 tranche, no. 1; and Preston transcript, pp. 29-32. The Department of Defense news release that summarized the meeting did not reference the MOU or any aspect of a prospective Taliban exchange. See "Readout of Secretary of Defense Chuck Hagel's Visit to Qatar," Department of Defense, Release No. NR-058-13, December 10, 2013.

December 2013 approving the National Defense Authorization Act (NDAA) for Fiscal Year 2014. Section 1035 of the bill authorized the secretary of defense to transfer a detainee from GTMO only after notifying Congress at least 30 days beforehand that certain conditions had been met and providing information about actions to be taken to minimize the chance that the detainee could become again involved in terrorist or hostile activity against the U.S. or U.S. interests. The notification requirement was meant to assure that congressional leaders were familiarized with all proposed GTMO transfers before they took place.

In the weeks after the meeting in Qatar and the enactment of the 2014 NDAA, efforts continued towards obtaining an MOU. Between January 10 and February 11, 2014, cabinet secretaries from involved agencies met at least once in a “principals meeting” and their second-in-command had gathered one or more times in interagency “deputies meetings” chaired by the National Security Council’s (NSC) Blinken.⁷⁶ However, in the course of this investigation, the Department refused to provide information to the Committee about interagency discussion and actions. On three occasions it cited the “pre-decisional and deliberative nature of the information.”⁷⁷

Nonetheless, it is known that the meetings in January and February resulted in the general guidance to continue to negotiate the MOU.⁷⁸ Indeed, on January 16, Michael Dumont (the Deputy Assistant Secretary of Defense for Afghanistan, Pakistan, and Central Asia), Army Brigadier General Robert White (then-director of the Joint Staff’s Pakistan-Afghanistan Coordination Cell) and a State Department official exchanged emails about editing a “draft” of an “instruction cable.”⁷⁹ When finalized, the cable probably offered official guidance to the individuals involved in MOU discussions.

Although Congress was not formally informed of these developments beforehand, information about a possible detainee exchange became public at this time. Several news stories recounted specifics of the proposal. The stories caused consternation in the Administration and raised questions in Congress. (For details, see **Finding II**.)

Suspension of talks

By late February, however, the Taliban signaled to the United States they were not interested in a potential swap. Department of Defense officials received a message forwarded

⁷⁶ Preston transcript, pp. 33-34, and 39. For Mr. Blinken’s general role in deputies meetings, see U.S. Department of State, “Antony J. Blinken” biography on the department’s website. For a description of the origins and purpose of such meetings, see Karen DeYoung, “How the Obama White House runs foreign policy,” *Washington Post*, August 4, 2015. For a historical examination, see Bartholomew Sparrow, *The Strategist: Brent Scowcroft and the Call of National Security* (New York: Public Affairs, 2015).

⁷⁷ Elizabeth L. King, Assistant Secretary of Defense (Legislative Affairs) letter to Rep. Howard P. McKeon, November 3, 2014; Elizabeth L. King, Assistant Secretary of Defense (Legislative Affairs), letter to Rep. Howard P. McKeon, December 17, 2014; and Michael J. Stella, Performing the Duties of Assistant Secretary of Defense (Legislative Affairs), letter to Rep. Mac Thornberry, January 21, 2015.

⁷⁸ Preston transcript, pp. 33-34, and 39. For a reference to “recommended edits to the negotiating guidance,” see E-mail March 5, 2014, in September 21, 2015 tranche, no. 88.

⁷⁹ E-mail, January 16, 2014, in December 5, 2014 tranche, no. 534. For the State Department’s involvement in this exchange, see Department of Defense communication with Committee staff, E-mail July 1, 2015 (in Committee possession).

from the Taliban on February 23. Using the abbreviation “IE” for Islamic Emirate, the name the Taliban apply to their shadow government of Afghanistan (“the country”), and referring to its delegation in Qatar (the “Political Office”), the statement declared:

Some time ago the leadership of the IE had assigned the Political Office of the IE to hold talks with the Americans, with the mediation of Qatar, over the exchange [of] Afghan prisoners in Gitmo with one American prisoner who is with the Islamic Emirate. Based on the instruction the Political Office of the IE started working on this issue and thanks to mediation, some progress was also made. As proof that the American prisoner was present and alive, a video was provided to Americans about their prisoner. However, looking at the present complex political situation of the country, the IE leadership decided to delay this issue for some time. It is therefore that this process of prisoners’ exchange will be suspended till further orders.⁸⁰

The Committee could not determine why the Taliban halted the talks. However, five days after the Taliban message, e-mails circulated within the National Security Council, the Department of Defense, and the Department of State about a report that “[i]n approximately 7-10 days, there is the possibility that the USG may be able to recover Sgt. Bowe Bergdahl.”⁸¹ Indeed, in “early 2014,” some officials in the Department of Defense believed that a “non-DOD agency” was planning an operation which would lead to Bergdahl’s “imminent” release, according to a 2015 inquiry conducted by the Department of Defense Inspector General.⁸² It is possible that this activity, which obviously failed or never took place, was connected to the Taliban decision to cease talking with Qatari interlocutors. **(For further information, see “Additional Sources of Information.”)**

Despite the halt in talks, the Administration continued to consider guidance that would be provided to the U.S. negotiating team if discussions recommenced.⁸³ Preparing for reinvigorated negotiations proved to be apt. The lull in the negotiations lasted only about six weeks.

When a State Department official contacted Mr. Preston to discuss returning to Doha on April 6, Mr. Preston agreed.⁸⁴ At the time, however, he believed that portions of the MOU which addressed the Qatari authority to implement follow-on measures were problematic.⁸⁵ Nonetheless, by April 10, Mr. Preston was in Doha for the second time.⁸⁶

⁸⁰ Taliban public statement, February 23, 2014.

⁸¹ E-mails February 27-28, 2014, in September 21, 2015 tranche, nos. 1-2 (declassified at Committee request).

⁸² Jon T. Rymer (Department of Defense Inspector General) letter to Rep. Duncan Hunter, August 4, 2015 (in Committee possession).

⁸³ See E-mail March 6, 2014, in September 21, 2015 tranche, no. 88 (declassified at Committee request) on “recommended edits to the negotiating guidance as cleared by OGC;” and E-mail, March 10, 2014, in September 21, 2015 tranche, no. 84 (declassified at Committee request).

⁸⁴ E-mails, April 6-8, 2014, in March 27, 2015 tranche, nos. 37-39.

⁸⁵ E-mails, April 6-8, 2014, in March 27, 2015 tranche, nos. 37-39 (as supplemented by information conveyed to Committee staff by Department of Defense, October 13, 2015), identifying “a fairly fundamental problem with the revised MOU that needs to be fixed.” According to journalistic accounts, in April 2014, there was a Principals Committee meeting “about Guantanamo.” The MOU draft may have been discussed there. Regardless, this meeting resulted in a memorandum sent on May 24 to Secretary Hagel from National Security Advisor Susan Rice. The memorandum outlined the “President’s guidance in connection with decisions to transfer detainees from the

In an interview with the Committee staff, Mr. Preston generally described the subsequent negotiations as discussions in which “we appeared to make substantial progress.” The result was the development of yet another version of the MOU.⁸⁷ The apparent progress, however, was short-lived.

Once the meeting participants had returned home, the “Qataris forwarded proposals from the Taliban in which they had substantially reversed course,” according to Mr. Preston. Negotiations, he later said, were “moving backwards on matters that we had understood . . . were settled or likely settled.”⁸⁸ Indeed, in an April 14 email, Mr. Preston summarized what the Qatari intermediaries should tell the Taliban: “we yielded all we could.” The discussions, he said, would be at an “impasse” if “they press for changes.”⁸⁹

“Positive new developments”

At this time, “two key” issues remained unresolved: whether or not the agreement would be for one year and the authority Qatar might have to institute any “follow-on measures.”⁹⁰ Two days later, in another proposed message for the Qatari intermediary, Mr. Preston referenced the Taliban (“they”) and portions (presumably meant to address the unresolved questions) of the draft MOU:

If they are able to accept a deal with such provision, we can address the other points they raised, conclude the MoU, and proceed with the matter of transfers. I hope that you will be able to persuade the other side to think again and come back with a response designed to reach agreement.⁹¹

DOD’s efforts on these points succeeded. On April 27, a State Department official advised Mr. Dumont, National Security Council staffers, and others that “[w]e’ve had some movement on the MoU today.” The Qatari intermediary had “texted early in the morning that ‘there are some positive new developments’ which we would need to discuss face to face this week.” The message said a second intermediary “elaborated that after several rounds with the other side, they have a text he thinks will be acceptable to us.” Uncertainty about the length of time the agreement would be in force and how the Qatari government might react when it expired was resolved. “On the two key outstanding issues,” the State Department official

Guantanamo Bay detention facility.” This memorandum addressed other potential detainee transfers, not the contemplated Taliban Five swap. See document captioned “Memorandum for the Secretary of Defense,” May 24, 2014 (in Committee possession) and Charlie Savage, *Power Wars: Inside Obama’s Post-9/11 Presidency* (New York: Little, Brown, 2015), pp. 517-518.

⁸⁶ Preston transcript, p. 39.

⁸⁷ Preston transcript, pp. 62-63.

⁸⁸ Preston transcript, p. 62.

⁸⁹ E-mail, April 14, 2014, in March 27, 2014 tranche, no. 40.

⁹⁰ E-mail, April 28, 2014, in March 27, 2014 tranche, no. 105 (as supplemented by information conveyed to Committee staff by Department of Defense, October 13, 2015); and E-mail, April 27, 2014, in December 5, 2014 tranche, no. 400.

⁹¹ E-mail, April 16, 2014, in March 27, 2015 tranche, no. 48.

reported, “it is for 1 year; the section on any follow-on measures has been redrafted, but the [Qatari] AG’s authority is absolute and is not limited to enforcing Qatari law or the MoU.”⁹²

On April 28, Mr. Preston emailed chief of staff Lippert a message to be conveyed to the secretary of defense (a “note for SD”). “[I]nformal exchange indicates that the other party may be coming back with terms in line with what we insisted on,” he said. “[T]here is some cause for optimism, although the other party has disappointed in the past.” Mr. Preston reported that he, the ambassador, and the State Department’s Deputy Special Representative for Afghanistan and Pakistan (D/SRAP) would convene in Doha on May 1.⁹³

The Qataris subsequently conveyed three changes proposed by the Taliban to the April 10 MOU draft and the U.S. team met in Qatar with the intermediaries as had been reported to Secretary Hagel.⁹⁴ Optimism about what might occur in this session was well-founded. Early in the morning after the conclusion of the day-long negotiation session, Mr. Preston (in Doha for the third time) reported his assessment to Michael Lumpkin (who was “performing the duties of” the Under Secretary of Defense for Policy in the absence of a confirmed nominee), Mr. Dumont, and others. Mr. Preston recounted

[w]e concluded our discussions around 10:30 last night (Thur), and I believe we have an agreement, on the terms discussed with SD on Wed and consistent with Deputies’ instructions.⁹⁵

The U.S. needed to be certain that the Taliban accepted the tweaks which had been negotiated. Later the same day, Mr. Preston emailed Mr. Lumpkin and Mr. Dumont to report that the Qatari interlocutors “confirmed with the other party that we do indeed have a deal.”⁹⁶

In writing to Mr. Lumpkin and Mr. Dumont on May 2, Mr. Preston also emphasized the delicate nature of the proceedings. Referring to the Office of Secretary of Defense (OSD), the secretary’s staff (the secretary of defense “front office” or “SD/FO”), the relevant congressional committees (“overseers”), the Afghans (“As”), and the forthcoming prisoner exchange (the “next phase”) he said

There is great concern all around about possible leaks—not from OSD, I might add—as this phase of the discussion ends and we seek to proceed expeditiously with the next phase. (This concern is exacerbated by the prospect of notification

⁹² E-mail, April 27, 2014, in December 5, 2014 tranche, no. 400 (as supplemented by information conveyed to Committee staff by Department of Defense, May 21, 2015).

⁹³ E-mail, April 27, 2014, in November 3, 2014 tranche, no. 22. (Mr. Preston apologized for his “extended absence from the office,” but noted “this is v. important and time sensitive.”)

⁹⁴ Preston transcript, pp. 63-64. For MOU changes, see E-mail, April 29, 2014, in March 27, 2015 tranche, no. 59. These probably were communicated to a U.S. representative and subsequently circulated and/or discussed by classified e-mail (“high side”); see E-mail, April 30, 2014, in March 6, 2015 tranche, no. 133 (“AMB and I just saw [Qatari intermediaries]—details high side”) (information bracketed by Committee).

⁹⁵ E-mail, May 2, 2014, in March 27, 2015 tranche, no. 13; and E-mail, May 6, 2014, in March 27, 2015 tranche, no. 15.

⁹⁶ E-mail, May 2, 2014, in March 27, 2015 tranche, no. 13. For communication with the White House on this point, see E-mail, May 6, 2014, in March 27, 2015 tranche, no. 15.

to our overseers and/or the As.) There is some thought being given to necking down the group in on development going forward. Please act accordingly. I have informed SD/FO.⁹⁷

The Qataris, too, emphasized secrecy. On May 5, the State Department forwarded to Mr. Preston the text of a message received from a Qatari interlocutor:

As we agreed, it is very important to keep this agreement secret and on a need to know base [sic] only. To be more clear: for the sake of the success of the deal, this secrecy should continue up to the time of the actual transfer. At that time we can agree on the proper way to deal with the media.⁹⁸

As noted, communications with the Department of Defense's legislative overseers was on Mr. Preston's mind at this time. He and the NSC legal advisor considered congressional detainee transfer notification requirements. On May 6, the two sought "authoritative guidance" by email (rather than a "formal memorandum opinion") from the Department of Justice (DOJ) about the "applicability and impact of the 30-day notice requirement."⁹⁹ "[S]hortly thereafter," Mr. Preston told the Committee, DOJ reported back that it believed that the president's "constitutional authority" over service members permitted the president to act notwithstanding the notice requirement.¹⁰⁰ Mr. Preston said the DOJ guidance was subsequently "provided to the decision-makers."¹⁰¹ (See **Finding I.**)

With the agreed MOU text in hand, it had to be approved by senior leaders across the U.S. government, and the agreement had to be executed by both the United States and Qatar. By coincidence, Mr. Preston's office had learned from the Qatari embassy days earlier that the Qatari attorney general intended to visit Washington on May 12-14 on other business.¹⁰² Addressing this, Mr. Preston emailed Mr. Lippert, Mr. Lumpkin, and others on May 7 to recommend the steps he (the general counsel or "GC" and his office "OGC") and the involved Administration officials (the "Small Group"), and the State Department's Special Representative for Afghanistan and Pakistan should take before the week was over:

The first is to get SD's formal direction to GC to execute the MOU. Policy is putting together a package with the final text and recommendation, in which OGC will concur. Given the previous discussions, there may be no need for a meeting, although we are of course available to discuss this with SD.

⁹⁷ E-mail, May 2, 2014, in March 27, 2015 tranche, no. 15. For more on Afghanistan notification, see E-mail, May 6, 2014, in November 3, 2014 tranche, no. 24, and explanation in Preston transcript, pp. 71-73.

⁹⁸ E-mail, May 5, 2014, in March 27, 2015 tranche, no. 64.

⁹⁹ Taliban hearing transcript, p. 31 (first quotation), p. 29 (second), and p. 30 (third quotation). Date specified in Robert S. Taylor, Acting General Counsel, Department of Defense, letter to Rep. Mac Thornberry, July 17, 2015.

¹⁰⁰ Hagel hearing, pp. 68-72. "Shortly thereafter" in Robert S. Taylor, Acting General Counsel, Department of Defense, letter to Rep. Mac Thornberry, July 17, 2015.

¹⁰¹ Taliban hearing transcript, p. 70.

¹⁰² E-mail, April 22, 2014, in November 3, 2014 tranche, nos. 18-19; E-mails, April 22-25, 2014, in November 3, 2014 tranche, nos. 18-19; and Preston transcript, pp. 69-70.

The second is to get an informal go-ahead from SD on a set of basic terms/sequence of events for the exchange to be passed to the Qataris when they are in town. SRAP has put together a package based on informal discussions we have had since Friday. We (Policy and OGC) are reviewing it now, and it will be the focus of a Small Group tomorrow. Assuming there is support for proceeding along these lines, the idea is to pass a one-pager to the Qataris setting forth how we see the exchange taking place. We want to make sure SD is comfortable with the proposed approach before this is passed. Perhaps we could set up a meeting with SD on Friday—to include Mike and me, others as appropriate.

The latter is moving fast in part to take advantage of the presence of the Qataris next week, but it is driven more by the sense that, with the MOU finally done, there may be an opportunity to negotiate and effectuate an exchange relatively quickly and that, given SGT Bergdahl's circumstances, we would not want to miss such an opportunity.¹⁰³

May 9 meeting with the Secretary of Defense

The requested meeting with Secretary Hagel took place at 11:30 a.m. on Friday, May 9.¹⁰⁴ As part of the preparation, the evening before Mr. Lumpkin called the senior civil servant in DOD's Office of Detainee Policy to direct him to prepare the paperwork that was typically compiled when the secretary of defense was considering a GTMO transfer. That official immediately contacted Mr. Paul Lewis (the Department's Special Envoy for the Closure of the Guantanamo Bay Detention Facility) and others. These individuals all returned to their offices in the Pentagon to produce the requested information.¹⁰⁵

The group finished after midnight and forwarded the material, including a draft congressional notification letter, to Mr. Lumpkin's office.¹⁰⁶ This timing was extraordinary. The Detainee Policy official told the Committee that since GTMO's establishment, he had never been involved in preparing material for a proposed detainee transfer in such a short timeframe.¹⁰⁷ Indeed, immediately after Mr. Lewis received word of this assignment, he emailed Mr. Lumpkin to reiterate that the data would be produced as requested and offered to brief him on the contents. As if to emphasize the urgency of the forthcoming meeting with the secretary, however, Mr.

¹⁰³ E-mail, May 7, 2014, in September 19, 2014 tranche, no. 107 (declassified at Committee request).

¹⁰⁴ E-mail, May 7, 2014, in August 27, 2014 tranche, no. 348; and Preston transcript, p. 80.

¹⁰⁵ Deputy Special Envoy [name redacted], classified interview transcript (redacted), August 14, 2014, pp. 54-60, and 80-81 [hereafter "Deputy Special Envoy transcript"]; Special Envoy Paul Lewis, classified interview transcript (redacted), September 10, 2014, pp. 45-46 [hereafter "Special Envoy transcript"]; E-mail, May 8, 2014, in August 27, 2014 tranche, no. 47. (Note that this e-mail refers to the secretary's meeting as being scheduled for 11:00 am.) In an interview with the Committee, Mr. Lumpkin had an uncertain recollection of the meeting and the packages that he asked to be prepared the night before. He reported that his instruction to gather the material was related to the routine and "quite demanding" requests he regularly directs to subordinates. He recalled no urgency in his instructions to Detainee Policy. (See Michael Lumpkin, classified interview transcript (redacted), October 16, 2014, pp. 81, 84, 91-93, 96-97, and 114 [hereafter "Lumpkin transcript].)

¹⁰⁶ Deputy Special Envoy transcript, p. 58; E-mail, May 9, 2014, in September 19, 2014 tranche, nos. 73-74; and E-mail, May 9, 2014, in September 19, 2014 tranche, no. 76 (both declassified at Committee's request).

¹⁰⁷ Deputy Special Envoy transcript, p. 59.

Lumpkin replied, “[t]his one may have to go without briefing or full interagency status” which typically took place with GTMO detainee transfers.¹⁰⁸

In an interview with the Committee, Mr. Lewis described the material compiled by his office that night as an “action memo” which was modeled after those he typically forwarded “to summarize issues for the Secretary of Defense when we briefed him on transfer issues.”¹⁰⁹ Although it included a caveat that the office “did not have the latest details” on a proposed swap of the Taliban Five, the documents included a “draft recommendation” to undertake the transfer.¹¹⁰

Despite the hurried effort to compile these packages, their disposition is unclear. Either they were not transmitted to the secretary on May 9 or they were but are remembered differently by meeting participants. Mr. Lewis, who did not attend, recalls Mr. Lumpkin (who could not recall if he was present at the meeting with the secretary) telling him later that the secretary was not given the materials the next day as planned.¹¹¹ On the other hand, Mr. Preston did participate in the meeting with the secretary.¹¹² According to him, at the meeting the secretary reviewed a “compilation of information” about each detainee. Acknowledging he “could be mistaken,” he said he did not recall them being “action packages” and said the material was “dissimilar” to the paperwork usually collected for “secretarial action” when approving a proposed GTMO transfer. Indeed, Mr. Preston did not recall if the material presented to the secretary included a recommendation from Detainee Policy about the Taliban Five.¹¹³

In his interview with the Committee, Mr. Preston made clear his belief that “neither the purpose nor the result of the meeting” with the secretary was to secure approval of a transfer.¹¹⁴ Mr. Preston took pains to explain his understanding that the May 9 meeting was meant to discuss the MOU with the secretary and secure his assent to sign it. While the MOU set forth “security arrangements” to which detainees transferred from GTMO would be subjected, a swap required an agreement on the “terms of the exchange” and the “modalities” of bringing this about, such as the sequencing of events, the location of hand-over, and means of transport.¹¹⁵ Therefore, whether or not an executed MOU would ultimately result in a transfer of the Taliban Five in exchange for Sgt. Bergdahl was, in Mr. Preston’s recounting, a separate and discrete potentiality not settled at the time.¹¹⁶ Indeed, Mr. Lumpkin emphasized to the Committee that Secretary

¹⁰⁸ E-mail, May 8, 2014, in August 27, 2014 tranche, no. 287; and Special Envoy transcript, pp. 51-53.

¹⁰⁹ Special Envoy transcript, pp. 46, 50.

¹¹⁰ Special Envoy transcript, p. 50. For transmission of the completed documents, see E-mail, May 9, 2014, in September 19, 2014 tranche, no. 74 (declassified at Committee request).

¹¹¹ Special Envoy transcript, pp. 48, 53, and 58. (For Lumpkin attendance, see Lumpkin transcript, pp. 81 and 87.)

¹¹² Lumpkin transcript, p. 80.

¹¹³ Preston transcript, pp. 80-82.

¹¹⁴ Preston transcript, p. 82.

¹¹⁵ Preston transcript, pp. 73 (quotation), and 78-80. For other descriptions of the MOU being discussed at the meeting, see Michael Dumont, classified interview transcript (redacted), October 7, 2014, p. 94, and Lumpkin transcript, p. 84.

¹¹⁶ Preston transcript, pp. 76, and 78. (For Mr. Preston’s further reiteration of the distinction between determining the tenets of the MOU and the effectuation of a detainee exchange, see pp. 23, 42-43, 47, 50, and 54.) Furthermore, Mr. Lumpkin said the material produced by Detainee Policy on May 8 on the Taliban Five was compiled merely as a basic step so that the Secretary of Defense would “know all the . . . pieces that could potentially” be a factor in an exchange “if” an exchange was ever “actually done.” (See Lumpkin transcript, p. 115.)

Hagel did not formally authorize the Taliban Five departure from GTMO until the U.S. took custody of Sgt. Bergdahl on May 31.¹¹⁷ In a later interview with the Committee, Mr. Lumpkin said congressional notification was premature during the period of the meeting with the secretary “You don’t notify per the NDAA when there’s a possibility . . . if the planets line up that . . . you might do [a transfer],” he said.¹¹⁸

Memorandum of Understanding

Regardless, it seems Secretary Hagel did not assent to the MOU in the Friday, May 9 meeting. But, early the next Monday (May 12), OGC was advised that Secretary Hagel had “reviewed the MOU over the weekend. He had no comments.”¹¹⁹

Secretary Hagel may have simply acquiesced to the decision. Mr. Preston told the Committee the “interagency policy process” engaged the subject in this approximate time frame and “direction was given to proceed to execute the document.”¹²⁰ Indeed, late on May 9, days before the secretary’s office reported on his review of the MOU, a National Security Council staffer circulated an email which presumably referenced Deputy National Security Advisor Blinken. “Tony has okayed the Monday signing of the MOU,” the email noted.¹²¹

However, this email also indicates that one or more aspects of the MOU or prospective swap were unsettled. The NSC email specified, referring to the deputies committee that Mr. Blinken convened periodically, “[a]ll other decisions and actions are deferred to a DC Tuesday, May 13.”¹²² A follow up communication emphasized that the authority to sign was contingent upon “other pieces” being “stripped out” of the draft written document intended to authorize the action.¹²³

On May 12, the Qatari attorney general and three other Qatari officials attended the MOU signing ceremony. It was held in the ornate Indian Treaty Room in the Eisenhower Executive Office Building adjacent to the White House.¹²⁴ Mr. Preston (who affixed his name on behalf of the Department of Defense), Mr. Dumont, Navy Admiral James A. “Sandy” Winnefeld, Jr. (the Vice Chairman of the Joint Chiefs of Staff), two National Security Council staffers, and a State Department official attended.¹²⁵ Afterwards, the entire party dined at the nearby Metropolitan

¹¹⁷ Lumpkin transcript, pp. 98-99, and 108-111. See also Preston transcript, pp. 89-90, 96, and 143.

¹¹⁸ See Lumpkin transcript, p. 88.

¹¹⁹ E-mail, May 12, 2014, in November 3, 2014 tranche, no. 34. Similarly, on Saturday, May 10, Admiral James A. “Sandy” Winnefeld, Jr., the Vice Chairman of the Joint Chiefs of Staff, proffered his approval for the MOU and a related “action memo.” See E-mail, May 10, 2014, in November 3, 2014 tranche, no. 32.

¹²⁰ Preston transcript, pp. 61-68 (quotes, pp. 64 and 66).

¹²¹ E-mail, May 9, 2014, in December 5, 2014 tranche, no. 482.

¹²² E-mail, May 9, 2014, in December 5, 2014 tranche, no. 482; and E-mail, May 9, 2014, in December 5, 2014 tranche, no. 522.

¹²³ E-mail, May 9, 2014, in December 5, 2014 tranche, no. 391.

¹²⁴ Preston transcript, p. 68; E-mail, May 8, 2014, in March 6, 2015 tranche, no. 167A; and E-mail May 9, 2014, in November 3, 2014 tranche, no. 29. For description and history of the room see, www.whitehouse.gov/1600/eeob.

¹²⁵ For Qatari guests, see E-mail, May 8, 2014, in March 6, 2015 tranche, no. 167A; for others, see E-mail, May 12, 2014, in December 5, 2014 tranche, no. 61; and E-mail, May 12, 2014, in March 27, 2015 tranche, no. 79 (both as supplemented by information conveyed to Committee staff by Department of Defense.)

Club.¹²⁶ This was an important occasion. Arranging this event and determining who should be present from the executive branch had taken considerable coordination with the White House and across the executive branch.¹²⁷

Deputies meeting

Mr. Lumpkin and other senior interagency representatives met the next day (May 13) as instructed by Mr. Blinken.¹²⁸ This was a significant gathering at which much was resolved. Congressional notification requirements, the number of detainees which would be prospectively swapped, as well as determining the mechanics of the exchange were among the topics considered.¹²⁹ Indeed, a week earlier, Mr. Preston and his primary State Department counterpart exchanged emails about the MOU. Although Mr. Preston reported that he anticipated “[n]o big problems” within DOD, he conceded certain aspects, including the number of Taliban detainees involved, and other subjects still needed to be “talked through.”¹³⁰

Between May 10 and May 13, Mr. Preston and others communicated about these points.¹³¹ For example, Mr. Preston advised colleagues in the Department about the possibility of a sixth Taliban detainee at GTMO being added to the group considered for exchange in a May 11 email (which uses “Qs” for “Qataris”):

The Qs have relayed a request (not a demand) from the other party to add a sixth individual. Our response would be to the effect that the group at issue consists of five and that we are most unreceptive to adding a sixth. In other words, [sic] a pretty firm “No,” without slamming the door completely.¹³²

¹²⁶ E-mail May 9, 2014, in November 3, 2014 tranche, no. 29; and E-mail, May 6, 2014, in March 6, 2015 tranche, no. 145.

¹²⁷ See e.g. E-mails, May 9-12, in March 6, 2015 tranche, nos. 185-189, 210, 247, and 249 (no. 249 supplemented by information conveyed to Committee staff by Department of Defense, May 21, 2015); E-Mails, May 11, 2014, in December 5, 2014 tranche, nos. 98, 136-137, 412, and 473; and E-mails, May 12, 2014, in November 3, 2014 tranche, no. 36. In making the arrangements for the room, Mr. Preston’s office took steps to ensure the purpose of the gathering was not revealed. “Please ensure that nothing says MOU, MOU signing, Signing ceremony, etc. If such a description has already been used, is it possible to pull it back and say only ‘Qatari AG Visit?’” (See E-mail May 7, 2014, in March 6, 2015 tranche, no. 168.)

¹²⁸ Lumpkin transcript, p. 98; Preston transcript, p. 91; and E-mail, May 13, 2014, in March 6, 2015 tranche, no. 256. For a reference to “the material that State and NSC are preparing” in connection with the interagency activities occasioned by the deputies’ meeting, see E-mail, May 14, 2014, in March 6, 2015 tranche, no. 22 (as supplemented by information conveyed to Committee staff by Department of Defense, May 21, 2015).

¹²⁹ Lumpkin transcript, p. 98; and Preston transcript, pp. 91, and 94.

¹³⁰ E-mails, May 7-8, 2014, in March 6, 2015 tranche, no. 152 (as supplemented by information conveyed to Committee staff by Department of Defense, May 21 and October 13, 2015).

¹³¹ E-mails, May 10-11, 2014, in March 27 tranche, nos. 65-67, and 75 (all as supplemented by information conveyed to Committee staff by Department of Defense, October 13, 2015.) For related discussions, see E-mail, May 10, 2014, in March 27, 2015 tranche, nos. 72-73; E-mail, May 11, 2014, in March 27, 2015 tranche, no. 17; E-mail, May 11, 2014, in March 27, 2015 tranche, no. 71; E-mail, May 12, 2014, in March 27, 2015 tranche, no. 23.

¹³² E-mail, May 11, 2014, in March 27, 2014 tranche, no. 17 (as supplemented by information conveyed to Committee staff by Department of Defense, October 13, 2015) (parenthetical expression in the original); and Preston transcript, p. 107.

This yielded a response from Admiral Winnefeld. “As far as I can tell, there is no support for this in this building,” he declared, while also making the point that settling the details of an eventual exchange were discrete from the issue of signing the MOU.¹³³

The day after the deputies met (May 14), a State Department official emailed Mr. Preston to suggest a timeframe to be in contact with the Qataris again. It seems the two were eager to proceed once points raised in the meeting were resolved. Almost certainly referring to the White House and the Qataris, the State Department colleague wrote “WH is comfortable with us scheduling a time to see them next week . . . if we can work around your schedule.”¹³⁴

In this period, the American negotiators also learned from the Qataris their impression that Sgt. Bergdahl’s health was declining, that the Taliban’s interest in keeping Sgt. Bergdahl alive was diminishing, or the captors’ enthusiasm for a swap was waning. “Time is not on your side,” Mr. Dumont said the Qataris had reported to the U.S.¹³⁵ Later, Mr. Dumont said the Qatari attorney general told him, “If this [the pending exchange] leaks out, we cannot guarantee what will happen to Sergeant Bergdahl. . . if this gets out that you’re trying to do this transfer [then] . . . the wheels come off.”¹³⁶

The MOU stipulated how detainees would be handled if transferred to Qatar. It did not cover the mechanics and timing of recovering Sgt. Bergdahl and the movement of the Taliban Five. Thus, at this point it was planned that the negotiating team would go to Qatar again, “explain the terms” of the proposed swap, and learn from the Qataris if the proposal was acceptable to the Taliban. Another trip was anticipated to oversee the operation of the actual exchange.¹³⁷ But, before leaving for Doha again, Mr. Preston suggested that a single extended trip be considered to both confirm the possibility of an exchange and bring it about.

On May 17 he wrote Mr. Lumpkin:

Because ‘time is not on our side,’ I would like us to consider whether there is a way to engineer this where we can collapse the two [forthcoming tasks] into one, that is, present the term sheet on Sat and proceed directly to discussions aimed at reaching a deal, even if it takes a matter of days.¹³⁸

As Mr. Preston explained in another email the next day, he was “[t]rying to figure out how we can get to the part where we cut a deal soonest.”¹³⁹

On May 22, the Department’s proposed course of action was reported to the Department of Justice.¹⁴⁰ As DOD later explained to the Committee, DOJ “advised that the described facts

¹³³ E-mail, May 11, 2014, in March 27, 2015 tranche, no. 20.

¹³⁴ E-mail, May 14, 2014, in March 6, 2015 tranche, nos. 258-259 (as supplemented by information conveyed to Committee staff by Department of Defense, May 21, 2015).

¹³⁵ Dumont transcript, p. 123. See also Lumpkin transcript, pp. 95, and 99; and Taliban hearing transcript, p. 8.

¹³⁶ Dumont transcript, p. 123.

¹³⁷ E-mail, May 17, 2014, in March 27, 2015 tranche, no. 90.

¹³⁸ E-mail, May 17, 2014, in March 27, 2015 tranche, no. 90. Bracketed expression not in original.

¹³⁹ E-mail, May 18, 2014, in March 27, 2015 tranche, nos. 98-99. See also E-mail May 18, 2014, in March 27, 2015 tranche, no. 96.

did not alter its earlier analysis.” DOJ continued to assert that that the president could act despite the 30-day notice requirement.¹⁴¹

Return to Doha

The next day, the U.S. delegation, including Mr. Preston (in Doha for the fourth time), Mr. Dumont, the State Department’s Deputy Special Representative, an NSC staffer, and others, returned to Qatar.¹⁴² In the four days following the group’s arrival, work proceeded rapidly. Mr. Preston emailed brief updates to Mr. Lippert in Secretary Hagel’s office, Mr. Lumpkin, and others. Mr. Dumont kept Admiral Winnefeld apprised.¹⁴³

On May 24, Mr. Preston, using euphemisms (“intermediaries”) to refer to the Qataris and the Taliban (the “other party”), conveyed:

Productive discussions with intermediaries today. No breakthrough.
Intermediaries to confer with other party tonight or tomorrow morning. We will resume talks with intermediaries after that. It is POSSIBLE we will have/be close to a deal tomorrow, but we won’t know until tomorrow.¹⁴⁴

The next day (May 25) he wrote:

After morning session with intermediaries, we are very close to a deal. There is one outstanding issue, which we hope will be resolved this afternoon. Stay tuned.¹⁴⁵

¹⁴⁰ Robert S. Taylor, Acting General Counsel, Department of Defense, letter to Rep. Mac Thornberry, July 17, 2015 (in Committee possession).

¹⁴¹ Robert S. Taylor, Acting General Counsel, Department of Defense, letter to Rep. Mac Thornberry, July 17, 2015 (in Committee possession); and Taliban hearing transcript, pp. 29-31.

¹⁴² Preston transcript, pp. 94-95, and 97-100; Dumont transcript, pp. 107-108, and 111; and E-mail, May 15, 2014, in November 3, 2014 tranche, no. 38. Mr. Lumpkin explained to the Committee the purpose of the delegation to Qatar, was to see if the “framework” established by the MOU could result in an “actual” exchange of Sgt. Bergdahl for the Taliban Five. (See Lumpkin transcript, pp. 100-103.) Possibly because of some disagreement about the specifics, the interagency instructions meant to guide the negotiating team’s efforts were delayed. Although Mr. Preston and Mr. Dumont had hoped to have them before the May 9 meeting with the secretary or when the Qatari representatives left Washington after the MOU ceremony, they were not received until just before the American team returned to Doha. The Committee has been unable to determine what the instructions included. See Preston transcript, p. 94; and e.g. E-mail, May 17, 2014, in March 27, 2015 tranche, nos. 89-90.

¹⁴³ See e.g. E-mails, May 24-26, 2014, in October 8, 2014 tranche, nos. 40-41. On May 25, the president made an unannounced visit to Afghanistan. The Committee does not know if he discussed the potential transfer of the Taliban Five with Afghan officials while there. In the course of his visit, however, the name of the CIA station chief was revealed to journalists covering the trip. (See Matthew Rosenberg and Michael D. Shear, “Obama Makes Surprise Trip to Afghanistan,” *New York Times*, May 25, 2014.) The White House counsel subsequently conducted a review of this matter. Although others suggested that it was possible that the name of this covert official had been disclosed as a way to undercut any potential criticism the CIA officer might have made of a prospective transfer, the review did not find evidence of this. (See “Readout to the Press By Principal Deputy Press Secretary Josh Earnest,” June 11, 2014; and Sean Piccoli, “Hoeskstra: ‘High Probability’ Freed Taliban Will Return to War,” *Newsmax*, June 3, 2014.)

¹⁴⁴ E-mail, May 24, 2014, in November 3, 2014 tranche, no. 41.

¹⁴⁵ E-mail, May 25, 2014, in November 3, 2014 tranche, no. 42.

It is likely that Mr. Preston references a renewed effort by the Taliban to increase the number of detainees exchanged. As Mr. Preston recounted later to the Committee, “the other side made a run at having a sixth added. . . .” including “during the negotiations on the exchange.” This effort was rejected.¹⁴⁶

Mr. Preston reported hours later, “no developments here since report midday today. . . . Still hopeful we will have a deal.”¹⁴⁷ On May 26, Mr. Preston saw even more movement. Referring to Mr. Dumont, he advised:

Just left the intermediaries. We have an agreement on structure of exchange, most details of sequence of steps. On two elements, we and the intermediaries are of the same view, and the intermediaries will seek to confirm the other party’s agreement and get back to us tomorrow morning (our time). . . . Proceeding with planning to execute exchange—Mike D. working technical details.¹⁴⁸

“We have a deal”

The next day, Mr. Preston conveyed a message to the secretary by way of Mr. Lippert and others:

We have a deal. Agreement on structure of exchange, details of sequence of steps—open issues resolved—literally shook on it. Execution is already underway. Current plan is to consummate the transaction this week.¹⁴⁹

Hours before, Mr. Preston also emailed his office. “As this matter moves to the next phase, I want to stress the importance of maintaining strict secrecy. Premature exposure could have catastrophic consequences,” he wrote. “Please be careful about what you say and to whom.”¹⁵⁰

With the specifics of the transaction settled, President Obama called the leader of Qatar. The purpose was to emphasize the significance the United States placed on the terms of the MOU, and to elicit a personal commitment from the Emir to uphold what had been promised. In part, this is because Qatar’s ruler took his father’s place in June 2013. Former DOD General Counsel Johnson initiated MOU discussions with the elder Emir when he was in power; as the discussions with Qatar proceeded in 2014, policymakers across the U.S. government apparently thought it was necessary to ensure the son shared his father’s interest in the matter.¹⁵¹

¹⁴⁶ Preston transcript, p. 107.

¹⁴⁷ E-mail, May 25, 2014, in November 3, 2014 tranche, no. 43.

¹⁴⁸ E-mail, May 26, 2014, in November 3, 2014 tranche, no. 46. See also Mr. Preston’s similar report to the NSC in E-mail, May 26, 2014, in March 27, 2015 tranche, no. 101. In an e-mail to Admiral Winnefeld, Mr. Dumont described the difficulties as “two non-starters that we pushed back on tonight.” (See E-mail, May 26, 2014, in October 8, 2014 tranche, no. 39.)

¹⁴⁹ E-mail, May 27, 2014, in November 3, 2014 tranche, no. 46.

¹⁵⁰ E-mail, May 27, 2014, in March 6, 2015 tranche, no. 26.

¹⁵¹ Lumpkin transcript, pp. 86, 100-101, and 103; Taliban hearing transcript, pp. 8, 34, 53-54, and 65; Preston transcript, pp. 96-97; E-mail, May 27, 2014, in March 6, 2015 tranche, no. 320 (citing “WH” call upon conclusion of arrangements); and E-mail, May 27, 2014, in March 27, 2014 tranche, no. 102 (“The offer for POTUS to speak with the Amir at 1040am DC time has been extended”).

Also on May 27, Mr. Lumpkin spoke with General John F. Kelly, the commander of Southern Command, and directed him to prepare the Taliban Five to leave GTMO.¹⁵² General Kelly then telephoned Rear Admiral Richard Butler, who led JTF-GTMO.¹⁵³ Two U.S. Air Force C-17s arrived at GTMO before the day was out.¹⁵⁴ Thus started a complex series of choreographed events over the next four days, in which personnel at GTMO, Mr. Dumont in Qatar, and others elsewhere juggled many logistical issues. They worked to dispatch the Taliban Five to Qatar pursuant to the agreed upon arrangements and do so in a way which kept it from being publicly known. (See sidebar “GTMO activities.”)

The transfer process included Qatari representatives coming to GTMO to escort the detainees to Qatar. According to the GTMO commander, on May 29, the Qataris presented the Taliban Five with a statement which outlined their transfer terms.¹⁵⁵ Although the Taliban Five were probably not officially informed that their departure was keyed to the recovery of Sgt. Bergdahl, this means that detainees properly held pursuant to the law of war learned of their impending transfer before elected representatives in the United States Congress were notified. This circumstance was exacerbated when the detainee movement was initiated later than anticipated.

To those responsible for the Air Force C-17s at GTMO and others, Mr. Dumont emphasized secrecy. “[W]e need to constrain the discussion, limit e-mail and phone traffic, and keep this effort as small a group as possible to accomplish the mission,” he wrote in a message. Concerned in part about those being sent to rendezvous with Sgt. Bergdahl, he said

Please do not reveal purpose to anyone. We already have one press query that is causing us concern and there appears to be a possible leak. A leak could cause the wheels to come off everything we’ve done to date—and it would endanger American lives.¹⁵⁶

Mr. Dumont repeated his caution the next day. Probably referring to the forthcoming repatriation of Sgt. Bergdahl (“upcoming game”) and the Taliban Five (“your players”), Mr. Dumont wrote to many of the same individuals

We have details on the upcoming game. It will be several hours before we know when your players will take the field.

¹⁵² Lumpkin, pp. 104-105; and Kelly transcript, pp. 53, 55, and 59.

¹⁵³ Kelly transcript, p. 60; and Rear Admiral Richard Butler, classified interview transcript (redacted), September 2, 2014, pp. 34-36 [hereafter “Butler transcript”].

¹⁵⁴ Kelly transcript, p. 49.

¹⁵⁵ Butler transcript, pp. 40-41; and E-mails, May 28, 2014, in October 8, 2014 tranche, nos. 8-9.

¹⁵⁶ See E-mail, May 29, 2014, in October 8, 2014 tranche, no. 49. For media leaks, see E-mail May 29, 2014, in November 3, 2015 tranche, no. 49; and E-mail May 29, 2014, in October 8, 2014 tranche, no. 11. Mr. Preston reported the media attention to the National Security Council staff. See E-mail May 29, 2014, in March 6, 2015 tranche, no. 71.

OPSEC concerns are critical right now. Close hold please—no forwarding. Keep buying us time and maneuver room.¹⁵⁷

Hours later, on May 31, the Taliban handed off Sgt. Bergdahl to U.S. Special Forces at a prearranged remote location in Afghanistan.¹⁵⁸ About 10:30 am in Washington, Mr. Lumpkin called the Pentagon's National Joint Operations Intelligence Center to issue instructions for the Taliban Five to be dispatched. The orders were transmitted to Southern Command. Probably referring to oral instructions ("verbal orders of the commander," or VOCO), the deputy secretary of defense, and the Deputy Director of Operations at the National Military Command Center, typewritten notes from 11:48 am report:

We will not receive the normal correspondence

- No DepSecDef Authorization Memo [. . .]

- We received all instructions via VOCO from DDO NMCC. All authorities have been granted to transfer.¹⁵⁹

Around 11:15 am, Chairman McKeon learned by phone that Sgt. Bergdahl had been recovered and the Taliban Five were about to be sent to Qatar.¹⁶⁰ Minutes afterwards, Sgt. Bergdahl's parents were notified by a liaison officer at the Special Operations Command.¹⁶¹ At this time, Mr. Preston also reported by email to colleagues that "[t]he first half of the exchange has been completed." Referencing the impending transfer of the Taliban Five, he wrote, "[t]he second half is being initiated."¹⁶²

Just before noon, it seems the White House conducted a call with members of the media, although the information discussed could not be used (it was "embargoed") until 12:30.¹⁶³ In preparing for this "press backgrounder" the day before, an assistant press secretary at the NSC circulated information to Mr. Lumpkin, the Special Representative for Afghanistan and Pakistan,

¹⁵⁷ E-Mail, May 30, 2014, in October 8, 2015 tranche, no. 1. See also Kelly transcript, p. 59.

¹⁵⁸ E-mail, May 31, 2014, in November 3, 2014 tranche, nos. 52-53. Sgt. Bergdahl's personnel file notes he was "present for duty" as of 1745 (i.e. 5:45 p.m.) on May 31, 2014. See transcript captioned "Record of Preliminary Hearing Under Article 32," p. 223.

¹⁵⁹ Handwritten document captioned "31 May DMO; from NJOIC log book," in October 30, 2014 tranche, no. 10; and document captioned "CURRENT AS OF 311148L MAY 2014," in October 30, 2014 tranche, no. 1 (both declassified at Committee request). Ellipses show Committee edit.

¹⁶⁰ Internal Committee communications (in Committee possession). The president probably also called the leader of Afghanistan around this time. For what appear to be talking points for the call, see E-mail, May 27, 2014, in March 27, 2015 tranche, no. 102.

¹⁶¹ E-mail, May 31, 2014, in August 27, 2014 tranche, no. 138. Sgt. Bergdahl's parents were in Washington on this day. See Dan Lamonthe, "Disillusioned and self-deluded, Bowe Bergdahl vanished into a brutal captivity," *Washington Post*, September 20, 2015.

¹⁶² E-mail, May 31, 2014, in November 3, 2014 tranche, no. 50.

¹⁶³ For reference to an "embargoed media call" at 11:44, see E-mail, May 31, 2014, in October 30, 2014 tranche, no. 21. For an e-mail with the subject "WH lifting the embargo at 12:30" see E-mail, May 31, 2014, in March 6, 2015 tranche, no. 36.

and others. The material was described as a “narrative we’ll use . . . just for this briefing . . .” and a “Q&A document . . . for all the communicators to use once news breaks.”¹⁶⁴

Carl Woog, then-Secretary Hagel’s deputy spokesman had already circulated similar documents to Mr. Lumpkin. Among the more than four pages Mr. Woog transmitted was a brief summary of the negotiation activities. This included the statement that

Several weeks ago, a Memorandum of Understanding (MOU) between the State of Qatar and the United States was signed by Qatar and the Department of Defense, in Washington, on May 12, 2014.

In a series of meetings in Doha starting on Saturday (May 24), DoD led negotiations via Qatar intermediaries resulting in agreement Tuesday morning (May 27) on the release of Sergeant Bergdahl and the transfer of five detainees to Qatar.¹⁶⁵

The Committee cannot determine if the material the NSC circulated was identical to what Mr. Woog emailed, or if the NSC information otherwise contained the passages quoted above. However, when a State Department official reviewed the NSC details, he emailed Mr. Preston, Mr. Dumont and others that “[w]e should not use” one particular phrase. Whatever it was, he said, was “just a pointless stick in congress’ eye.”¹⁶⁶ In providing this email exchange to the Committee, the subject line was redacted by the Administration on the grounds that the withheld sentence touched on a diplomatic issue.¹⁶⁷ It may be that Administration officials were aware that Congress would object to an acknowledgement of the extensive activities that preceded the tardy notification eventually provided.

When the White House background briefing took place, it is not clear if the Taliban Five transfer was referenced, or if the briefing was limited to only highlighting Sgt. Bergdahl’s recovery. However, before the embargo was lifted, at least one member of the media learned about Sgt. Bergdahl’s recovery and the fact that it was connected to a GTMO transfer. “US Army Sgt. Bowe Bergdahl released today after 5 yrs in Taliban captivity, in exchange for 5 Afghan prisoners at Gitmo,” a journalist tweeted.¹⁶⁸

But, after the embargo expired, the White House issued a statement from President Obama. It declared, “[t]oday the American people are pleased that we will be able to welcome home Sergeant Bowe Bergdahl, held captive for nearly five years.”¹⁶⁹ In ten more sentences totaling more than 250 additional words, the president discussed the prospects of reconciliation

¹⁶⁴ E-mail, May 31, 2014, in March 27, 2015 tranche, nos. 30-31.

¹⁶⁵ E-mail, May 30, 2014 and attached document captioned “Additional Operational and ‘Next Steps’ Q&A Regarding the return of Sergeant Bergdahl,” in September 19, 2014 tranche, nos. 90-96 (declassified at Committee request).

¹⁶⁶ E-mail May 31, 2014, in March 27, 2015 tranche, no. 30.

¹⁶⁷ Information provided by Department of Defense, May 21, 2015.

¹⁶⁸ See <https://twitter.com/rajivscribe/status/472774927737970688>.

¹⁶⁹ “Statement by the President on Sergeant Bowe Bergdahl,” Office of the Press Secretary, The White House, May 31, 2014. For an e-mail showing the time of release as 12:28, see E-mail, May 31, 2014, in December 5, 2014 tranche, no. 546.

in Afghanistan and vaguely expressed his “deepest appreciation” for the Qatari Emir’s “assistance in helping to secure our soldier’s return.”¹⁷⁰ The statement did not mention directly or obliquely the Taliban Five. It was silent on the fact that Sgt Bergdahl’s recovery was linked to their transfer from GTMO.

This was noted by those involved. One DOD official forwarded it to colleagues in the Office of Detainee Policy. “A slightly bizarre statement,” he wrote, “with zero mention of what [w]e exchanged [Bergdahl] for.”¹⁷¹

Qatari officials were furious with the White House comments. They were angered not because their role in receiving the Taliban Five was omitted, but because of the timing of the president’s comments. Mr. Dumont in Doha reported to Mr. Lumpkin in Washington that he was being summoned to see Qatari officials because of “the premature press release by the WH.”¹⁷² It seems the Qataris expected no public acknowledgement of the exchange until after they had received the Taliban Five in Doha.

Mr. Dumont visited with the Qataris as requested. Nearly two hours later he reported to Washington that he was “still” in the meeting. But, Mr. Dumont explained that he had eased his interlocutor’s concern by explaining the U.S. Air Force cargo plane had left GTMO with the Taliban Five “2.4 hours after SGT Bergdahl was released” and the aircraft “was enroute [sic] without delay.”¹⁷³

Shortly after the ill-timed White House statement was made public, the Pentagon’s Office of Public Affairs issued a statement from Secretary Hagel. The secretary’s office immediately distributed it to retired military officers, former Departmental political appointees, and others.¹⁷⁴ A third statement was issued by the Chairman of the Joint Chiefs of Staff within minutes (“[i]t is our ethos that we never leave a fallen comrade. Today we have back in our ranks the only remaining captured soldier from our conflicts in Iraq and Afghanistan”).¹⁷⁵

On June 2, 2014, two days after the Taliban Five left GTMO, the Committee received the written congressional notification. The letter included the security assessments required by the NDAA. This information was 32 days late.

¹⁷⁰ “Statement by the President on Sergeant Bowe Bergdahl,” Office of the Press Secretary, The White House, May 31, 2014.

¹⁷¹ E-mail, May 31, 2014, in August 27, 2014 tranche, no. 186.

¹⁷² E-mail, May 31, 2014, in March 27, 2015 tranche, no. 107.

¹⁷³ E-mail, May 31, 2014, in March 27, 2015 tranche, no. 107.

¹⁷⁴ E-mail, May 31, 2014, in July 25, 2014 tranche, no. 453. For recipients, see for example, E-mail, May 31, 2014, in July 25, 2014 tranche, no. 147 (to retired Marine General John Allen); E-mail, May 31, 2014, in July 25, 2014 tranche, no. 146 (to Secretary Ashton Carter); E-mail, May 31, 2014, in July 25, 2014 tranche, no. 433 (to Robert Work).

¹⁷⁵ E-mail, May 31, 2014, in July 25, 2014 tranche, no. 426.

GTMO Activities

Moving a detainee from GTMO is typically a complex and logistically complicated process. After the secretary of defense formally makes a transfer decision, a written “Detainee Movement Order,” (DMO) is issued which directs that the transfer take place in 30 or more days. While anticipation of a DMO sometimes allows initial preparations to be made before the transfer is approved, GTMO’s receipt of the DMO triggers the standard process which unfolds over the subsequent four or so weeks.¹⁷⁶

There are many steps involved, including the coordination of aircraft to ferry the detainee to the new location, moving the detainee from a “general population” cell to a temporary holding zone, and giving him a final medical examination.¹⁷⁷ The Federal Bureau of Investigation has a final interview with the detainee. He also meets with representatives of the International Committee of the Red Cross (ICRC), in part, to confirm that he does not fear physical mistreatment in his prospective destination.¹⁷⁸

For the Taliban Five, this process was greatly abbreviated. There were also unexpected complications. The DMO was verbally issued on May 27, when Michael Lumpkin (who was “performing the duties of” the Under Secretary of Defense for Policy in the absence of a confirmed nominee), telephoned Marine General John Kelly, the commander of U.S. Southern Command (SOUTHCOM), the combatant command which oversees Joint Task Force-Guantanamo (JTF-GTMO). Among other details, Mr. Lumpkin told General Kelly that GTMO should be prepared to execute the DMO within a few days.¹⁷⁹ General Kelly immediately called Rear Admiral Richard W. Butler, then the commander of JTF-GTMO, to convey this information.¹⁸⁰ This exchange of calls meant that GTMO would have less than one week to accomplish what is normally done in four or more weeks.

In his call, General Kelly also told Rear Admiral Butler that five Qatari officials would soon arrive at GTMO to escort the detainees to Qatar.¹⁸¹ General Kelly emphasized that the presence of the Qataris and additional activities associated with the detainee movement must be done as discretely as possible, in order to avoid media attention.¹⁸² This was an especially challenging condition because a legal proceeding against another detainee was taking place at this time at GTMO which meant a large number of journalists, attorneys, and many others were at the naval station and might be able to discern the transfer preparations.¹⁸³ This schedule and requirement for unobtrusive action placed an extraordinary burden on personnel involved at GTMO.

¹⁷⁶ General John Kelly, classified interview transcript (redacted), November 14, 2014, pp. 42-47 [hereafter “Kelly transcript”].

¹⁷⁷ Rear Admiral Richard Butler, classified interview transcript (redacted), September 2, 2014, pp. 16, and 58-59 [hereafter “JTF-GTMO Commanding Officer transcript”].

¹⁷⁸ JTF-GTMO Commanding Officer transcript, pp. 25-26, 58-59.

¹⁷⁹ Kelly transcript, p. 59; and Michael Lumpkin, classified interview transcript (redacted), October 16, 2014, p. 104 [hereafter “Lumpkin transcript”].

¹⁸⁰ JTF-GTMO Commanding Officer transcript, p. 34.

¹⁸¹ JTF-GTMO Commanding Officer transcript, p. 36.

¹⁸² JTF-GTMO Commanding Officer transcript, p. 56.

¹⁸³ JTF-GTMO Commanding Officer transcript, p. 50; and Kelly transcript, p. 37.

In the course of this investigation, the Committee became further familiar with the general process which is instituted when a detainee is transferred from GTMO, including securely and humanely transporting a detainee from the detention facility to the GTMO airfield and on to his eventual destination. The Committee considered these standard practices when evaluating the transfer of the Taliban Five from GTMO.

In addition to a site visit, documentary evidence, and witness interviews, Committee staff reviewed classified video footage taken of the Taliban Five movement process. These five video discs showed the five detainees being processed to leave the GTMO facility and traveling to the awaiting aircraft, as well as the arrangements made to accommodate their in-flight needs, and their disembarkation in Qatar. This material is consistent with witness accounts. It demonstrates that GTMO personnel successfully endeavored to facilitate the Taliban Five transfer in an appropriate and safe manner, amidst a shortened preparatory period and unexpected complications.

Unexpected complications

Although the detainees immediately received a final medical evaluation, the typical ICRC visits and FBI interviews were eliminated because of the foreshortened timeframe.¹⁸⁴ Meanwhile, a U.S. Air Force C-17 transport plane arrived to carry the Taliban Five and their escorts to Qatar.¹⁸⁵ The aircraft developed problems. Consequently, a second plane was sent to GTMO, worrying Rear Admiral Butler, who feared that observers would interpret the presence of a C-17 (much less two) as a tell-tale sign of a pending transfer.¹⁸⁶

The five Qatari escorts arrived at GTMO on May 29, transported from Tampa by General Kelly's official aircraft and accompanied by a U.S. Air Force brigadier general who served as SOUTHCOM's Deputy Director of Operations.¹⁸⁷ That afternoon, the Taliban Five were transported to the GTMO airfield and held there while officials awaited the order to depart.¹⁸⁸ According to Rear Admiral Butler, the Qatari representatives met individually at that time with

¹⁸⁴ JTF-GTMO Commanding Officer transcript, p. 57. Paul Lewis, DOD Special Envoy for Guantanamo Closure, proposed remedying the ICRC situation by suggesting the ICRC visit the five detainees once they arrived in Qatar. See E-mail May 28, 2014, in September 19, 2014 tranche, no. 88. After the news of the transfer was released, but not realizing it had already taken place, an ICRC executive emailed an official in the Detainee Policy office asking about the possibility of an ICRC delegation going to GTMO for the pre-departure interviews. See Email May 31, 2014, in August 27, 2014 tranche, no. 183.

¹⁸⁵ JTF-GTMO Commanding Officer transcript, p. 45.

¹⁸⁶ JTF-GTMO Commanding Officer transcript, p. 50.

¹⁸⁷ Witness recollections varied between three and five Qatar delegates. However 12 Department emails reported the presence of five individuals. See also JTF-GTMO Commanding Officer transcript, pp. 37-39; and "DOD Response to House Armed Services Committee Request to Secretary Hagel of October 17, 2014 – Item 3," (in Committee possession). The process of coordinating the arrival of the escorts was itself a complicated task which took much of Mr. Dumont's time in Doha. See, e.g. E-mail, May 26, 2014 in November 3, 2014 tranche, no. 44; E-mails, May 27, 2014, in October 8, 2014 tranche, nos. 32, and 42; E-mail, Tuesday, May 27, 2014, in October 30, 2014 tranche, no. 24; "Another change!" E-mails, May 27, 2014, in October 8, 2014 tranche, nos. 52-54; "Another change! Sorry..." E-mail, May 27, 2014, in October 8, 2014 tranche, no. 25; E-mails, Wednesday, May 28, 2014, in tranche October 8, 2014, nos. 2, 4-5, 8-9, and 44-45; and E-mails, Wednesday, May 28, 2014, in tranche March 6, 2015, nos. 65-66, and 68-69.

¹⁸⁸ JTF-GTMO Commanding Officer transcript, pp. 40-42.

each detainee in the presence of GTMO personnel.¹⁸⁹ The detainees were presented with a notice, written in Pashtu, which set forth the terms by which they were being transferred to Qatar, including the stipulation that they remain in Qatar for one year.¹⁹⁰ Each agreed.¹⁹¹

The Taliban Five were not to depart, however, until Sergeant Bowe Bergdahl had been returned to U.S. control. Originally, this was anticipated to occur shortly after the Qataris arrived at GTMO and had met with the detainees. However, as Michael Dumont (Deputy Assistant Secretary of Defense for Afghanistan, Pakistan and Central Asia) explained to the committee, “[i]t took the Taliban much longer to get Sgt. Bergdahl to us” than originally expected.¹⁹² Consequently, this delayed the departure of the Taliban Five.

Eventually, after staging near the GTMO runway for about eight hours, it became clear that the transfer would not occur by the end of May 29. Accordingly, the Qatari delegation was provided with a room in the military hotel adjacent to the GTMO runway.¹⁹³ The Taliban Five spent the night in a secure facility at GTMO normally used by the Department of Homeland Security in connection with regional immigration enforcement activities.¹⁹⁴ The following day, the operation to recover Sgt. Bergdahl continued to drag out, further stalling the transfer.

This additional delay meant the Qatari delegation and the Taliban Five were accommodated for a second night in the same way.¹⁹⁵ In planning for the transfer, it was never anticipated that the Qatari escorts would have to be billeted overnight, nor that the Taliban Five would be handled and securely held for an extended period outside of the complex in which they were usually detained. GTMO personnel appropriately and carefully managed these unexpected circumstances.

The call for mission “GO” came Saturday morning, May 31, 2014. The Taliban Five were bused from their cells to the waiting aircraft.¹⁹⁶ Less than 3 hours after Sgt. Bergdahl was released into U.S. custody, the detainees were escorted onto the aircraft and flown to Qatar, along with the Qatari escorts.¹⁹⁷

U.S. security personnel were also aboard.¹⁹⁸ The fact that officials perceived some risk on the flight demonstrates the dangers they thought the Taliban Five potentially posed. Indeed, when considering various mechanisms to deliver the Taliban Five to Qatar, Mr. Dumont noted to others planning the movement that “[w]e are concerned about one of the knuckleheads trying something.”¹⁹⁹

¹⁸⁹ JTF-GTMO Commanding Officer transcript, pp. 40-41.

¹⁹⁰ E-mails, May 28, 2014, in October 8, 2014 tranche, nos. 8-9.

¹⁹¹ JTF-GTMO Commanding Officer transcript, p. 41.

¹⁹² Michael Dumont, classified interview transcript (redacted), October 7, 2014, p. 125 [hereafter “Dumont transcript”].

¹⁹³ JTF-GTMO Commanding Officer transcript, p. 44.

¹⁹⁴ JTF-GTMO Commanding Officer transcript, p. 42.

¹⁹⁵ JTF-GTMO Commanding Officer transcript, pp. 42-44.

¹⁹⁶ JTF-GTMO Commanding Officer transcript, p. 42.

¹⁹⁷ E-mail, May 31, 2014, in August 27, 2014 tranche, no. 38; and JTF-GTMO Commanding Officer transcript, p. 42; and E-mail, May 31, 2014, in March 27, 2015 tranche, no. 107.

¹⁹⁸ E-mail, May 31, 2014, in August 27, 2014 tranche, no. 38.

¹⁹⁹ E-mail, May 27, 2014, in October 30, 2014 tranche, no. 24, (declassified at Committee request).

However, the flight was uneventful. It landed at Al Udeid Air Base in Doha.²⁰⁰ Plans had been made to have the Taliban Five greeted by the Attorney General of Qatar.²⁰¹ Citing a “senior Taliban source,” the *Gulf Times* in Qatar reported “emotional scenes.” A prayer was said, according to the newspaper, and the five detainees were “hugged and kissed” by a Taliban representative.²⁰²

The next day, Mullah Omar, the Taliban leader issued a statement. He declared the Taliban Five transfer “a great and clear victory” because it “freed our comrades from the clutches of the enemy.”²⁰³ In a separate statement to NBC, he reiterated that the Taliban “thank almighty for this great victory” and declared the “sacrifice of our Mujahedin have resulted in the release of our senior leaders.”²⁰⁴

²⁰⁰ E-mail, May 31, 2014, in August 27, 2014 tranche, no. 265.

²⁰¹ E-Mail, May 31, 2014, in March 27, 2015 tranche, no. 28.

²⁰² Salman Siddiqui, “Freed Taliban leaders land in Qatar,” *Gulf Times*, June 2, 2014.

²⁰³ Tahir Kahn, “Taliban trumpet detainee release as a ‘great victory’,” (Pakistan) *Express-Tribune*, June 2, 2014.

²⁰⁴ “Taliban Leader Mullah Omar Calls Bowe Bergdahl Swap ‘Victory,’” *NBC News*, June 1, 2014.

FINDING I: The transfer of the Taliban Five violated several laws, including the National Defense Authorization Act for Fiscal Year 2014. The constitutional arguments offered to justify the Department of Defense’s failure to provide the legally-required notification to the Committee 30 days in advance are incomplete and unconvincing. The violation of law also threatens constitutional separation of powers.

In assessing the legality of the transfer of the Taliban Five, the Committee considered the GTMO transfer provisions contained in Section 1035 of the National Defense Authorization Act (NDAA) for Fiscal Year 2014; the relevant factual and legal circumstances leading up to the transfer; and the statutory and constitutional arguments made by the Administration following the transfer. The Committee concludes that the secretary of defense made a willful decision to undertake the transfer without providing the 30-days’ notification required by Section 1035(d) of the NDAA. This decision clearly violated the law, and the Administration’s assertion that the notification requirement was unconstitutional is unpersuasive and unsubstantiated. The legal arguments advanced in support of that assertion, moreover, would (if accepted) provide for virtually unfettered executive power, and may have been offered as a pretext to mask ulterior motives for avoiding timely notice to Congress. Finally, not only did the transfer of the Taliban Five violate the law, but also the Administration’s actions were detrimental to both the Department of Defense’s relationship with this Committee and constitutional separation of powers.

Circumstances leading to the Administration’s failure to provide legally-required notification to Congress

On December 26, 2013, President Obama signed the Fiscal Year 2014 NDAA. The law included several provisions to address when and under what circumstances detainees could be sent from GTMO to another country. These provisions were included in response to concerns expressed by the Administration that provisions in prior authorizing legislation were too onerous and effectively precluded all GTMO transfers. In crafting the 2014 NDAA, Congress sought to address the Administration’s objections, while ensuring that transfers could be undertaken only when the safety and security of the United States and its allies could be assured.

Section 1035(b) of the NDAA authorized the secretary of defense to transfer a GTMO detainee to a foreign country if he determined that:

- (1) actions that have been or are planned to be taken will substantially mitigate the risk of such individual engaging or reengaging in any terrorist or other hostile activity that threatens the United States or United States persons or interests; and
- (2) the transfer is in the national security interest of the United States.²⁰⁵

²⁰⁵ Pub. L. 113-66. Section 1035(a) authorized the secretary of defense to transfer or release a detainee from GTMO if the detainee no longer posed a “threat to the national security interest of the United States” or if required by a court order.

If and when the secretary made these determinations, he was required by Section 1035(d) to notify Congress at least 30 days before any detainee left the facility.²⁰⁶ Section 1035(d) also required such notification to include detailed information relating to the justification for the transfer or release and actions taken to mitigate the risk to U.S. security. The NDAA transfer provisions were reinforced in the Consolidated Appropriations Act, 2014 (Appropriations Act). Section 8111 of that law prohibited the Department of Defense from using any funds to transfer GTMO detainees to any foreign country “except in accordance” with Section 1035 of the NDAA.²⁰⁷

When signing the NDAA on December 26, 2013, the president expressed his opposition to the GTMO transfer sections. He issued a “signing statement” that declared, “in the event that the restrictions on the transfer of Guantanamo detainees in section . . . 1035 operate in a manner that violates constitutional separation of powers principles, my Administration will implement them in a manner that avoids the constitutional conflict.”²⁰⁸ As the president’s signing statement demonstrates, the Administration contemplated possible circumstances in which it might execute a GTMO transfer without complying with the relevant provisions of Section 1035.

On May 6, 2014, having reached agreement on the text of the Memorandum of Understanding (MOU) with Qatar relating to the transfer of the Taliban Five, Department officials asked counterparts at the Department of Justice (DOJ) to “consider the legal and constitutional implications” of transferring the Taliban Five.²⁰⁹ The question posed, as the Department later recounted, was

whether proceeding with the transfer of detainees without 30-days’ notice to Congress might be lawful given the extraordinary circumstances at issue here—in which providing 30-days’ notice would put into peril the life of a service member in captivity.²¹⁰

This request to DOJ took place 25 days before the transfer, demonstrating that the Department anticipated the transfer and was seeking to circumvent the NDAA. In describing the response DOJ provided, Stephen Preston (then the general counsel of the Department of Defense) recounted to the Committee that DOJ believed the president’s “constitutional authority” over service members could permit the president to act notwithstanding the 30-day notification requirement which might otherwise “interfere with or undermine” this authority. Mr. Preston said the DOJ guidance was “provided to decision-makers, who made the judgment

²⁰⁶ Pub. L. 113-66.

²⁰⁷ Pub. L. 113-76. See also Susan Poling (General Counsel, Government Accountability Office) letter to Sen. Mitchell McConnell, et al., Re: Department of Defense—Compliance with Statutory Notification, August 21, 2014, p. 3 [hereafter “GAO opinion”].

²⁰⁸ Barack Obama, President of the United States, “Statement by the President on H.R. 3304,” the White House, December 26, 2013.

²⁰⁹ “The May 31, 2014, Transfer of Five Senior Taliban Detainees,” hearing transcript, Committee on Armed Services, U.S. House of Representatives, June 11, 2014, p. 30 [hereafter “Taliban hearing transcript”]; date specified in Robert S. Taylor (Acting General Counsel, Department of Defense), letter to Rep. Mac Thornberry, July 17, 2015.

²¹⁰ Robert S. Taylor (Acting General Counsel, Department of Defense), letter to Rep. Mac Thornberry, July 17, 2015.

about whether the . . . particular circumstances in this case would permit the . . . formal 30-day notice.”²¹¹

The National Security Council (NSC) considered the issue on May 13, the day after the MOU was signed, when Antony J. “Tony” Blinken, then the president’s deputy national security advisor convened a meeting of the NSC’s Deputies Committee.²¹² Although it is not clear if attendees had DOJ’s opinion in hand by this time, Michael Lumpkin (who was “performing the duties of” the Under Secretary of Defense for Policy in the absence of a confirmed nominee) told Committee staff that the deputies concluded that, if circumstances arose which offered the prospect of getting Sgt. Bergdahl “home faster,” the Department “shouldn’t stop momentum in order to move forward with a Congressional notification.”²¹³ Similarly, although Mr. Preston did not attend the meeting, he told Committee staff that it was nonetheless his understanding that the policymakers reached a “consensus judgment” that if a swap which involved a “transfer as part of an exchange” was “successfully negotiated,” the Administration could “forgo” the 30-day notification requirement.²¹⁴

As negotiators subsequently returned to Qatar and other preparations were being made, the Department of Defense updated DOJ on the proposed transfer. Apparently the administration sought to determine if any intervening events changed the DOJ assessment. According to DOD, DOJ advised at that time “the described facts did not alter its earlier preliminary analysis.”²¹⁵

On May 22, the Detainee Policy office conveyed to a staffer working with Mr. Lumpkin and Michael Dumont (the Deputy Assistant Secretary of Defense for Afghanistan, Pakistan, and Central Asia) the Taliban Five paperwork, which had first been compiled May 9.²¹⁶ Also transmitted was a draft Detainee Movement Operation (DMO) memorandum for the secretary to

²¹¹ Taliban hearing transcript, p. 30. Securing these details took extraordinary legislative action, despite Mr. Preston’s declaration that “we certainly want to make sure that interested Members fully understand the legal basis on which the administration acted.” (Taliban hearing transcript, p. 30.) On at least two occasions, the Committee requested details about this guidance from the Department of Defense. (See Rep. Howard P. “Buck” McKeon letter to Secretary Chuck Hagel, June 9, 2014; and Rep. Howard P. “Buck” McKeon letter to Secretary Chuck Hagel, December 9, 2014.) The Committee also requested it twice directly from the Attorney General. (See Rep. Howard P. “Buck” McKeon letter to Attorney General Eric Holder, November 10, 2014; Rep. Mac Thornberry and Rep. Bob Goodlatte letter to Attorney General Loretta Lynch, June 17, 2015.) The guidance was finally described in a letter to the July 2015 Committee from the Department of Defense Acting General Counsel. (See Robert S. Taylor (Acting General Counsel, Department of Defense), letter to Rep. Mac Thornberry, July 17, 2015.)

²¹² Michael Lumpkin, classified interview transcript (redacted), October 16, 2014, p. 98 [hereafter “Lumpkin transcript”]; E-mail, May 13, 2014, in March 6, 2015 tranche, no. 256. See also Stephen Preston, classified interview transcript (redacted), November 4, 2014, p. 91 [hereafter “Preston transcript”]. For a reference to “the material that State and NSC are preparing” in connection with the interagency activities occasioned by the deputies’ meeting, see E-mail, May 14, 2014, in March 6, 2015 tranche, no. 22 (as supplemented by information conveyed to Committee staff by Department of Defense, May 21, 2015).

²¹³ Lumpkin transcript, p. 99.

²¹⁴ Preston transcript, p. 92.

²¹⁵ Robert S. Taylor (Acting General Counsel, Department of Defense), letter to Rep. Mac Thornberry, July 17, 2015

²¹⁶ Deputy Special Envoy [name redacted], classified interview transcript (redacted), August 14, 2014, pp. 68-70; E-mail, May 22, 2014, in September 19, 2014 tranche, no. 118; E-mails May 22, 2014, in September 19, 2014 tranche, nos. 73-74; and E-mail, May 23, 2014, in September 19, 2015 tranche, no. 1 (“we are building the [detainee transfer] package”) (all declassified at Committee request).

send to the director of the Joint Staff to authorize the physical transfer of the Taliban Five, and an updated version of the congressional notification letter.²¹⁷

An email sent the next day set forth what might take place if the exchange was settled (“likely no earlier than Saturday night/Sunday”). The communication said details would then be gathered “to finish up the Action Memo to the SD,” meaning the secretary of defense. Mr. Dumont and others would subsequently receive a package of paperwork, including the memo, “congressional notification letters for signature; the US-Qatar MOU; and required intel assessments of the detainees.”²¹⁸

Also on May 23, an email reported that Mr. Lumpkin concurred with a document captioned “Engagement Plan & Timeline,” which was also circulated to the NSC staff.²¹⁹ Among other details, the document said:

Upon confirmation a transfer will occur

- The Secretary of Defense authorizes the transfer upon making the appropriate determinations as required by law. The package will contain the appropriate Congressional notification letters that will be delivered to Congress in Phase 2 (below).
- Congressional Notification, Phase I: Not earlier than 24 hours prior to the pending transfer of the Guantanamo detainees, DOD (Mr. Michael Lumpkin) will notify the Chair and Ranking Members of DOD’s four primary committees: Senate Armed Services, House Armed Services, Senate Appropriations/Defense, and House Appropriations, Defense.

Immediately following the transfer

- Congressional Notification, Phase 2: DOD will deliver Congressional notification letters to the Armed Services, Foreign Relations, Appropriations,

²¹⁷ The Detainee Movement Operation memorandum specified “[t]he Office of the Department of Defense Special Envoy for Guantanamo Detention Closure will provide the Joint Staff with final confirmation of the completion of all litigation and diplomatic clearance matters and the expiration of the congressional notification period prior to the movement of this [sic] detainee.” The singular rather than plural reference and notation about resolving any outstanding litigation and diplomatic issue suggests this document was based on a standard template. When an assistant forwarded the DMO to Mr. Dumont, she noted “I do not expect we will need this in our package given the circumstances” but suggested having it was nonetheless helpful “so that each member of our circle has the docs required for the CN pkg to the SecDef.” (See E-mail and attachment, May 22, 2014, in September 19, 2014 tranche, nos. 118-119; declassified at the Committee’s request). As for the congressional notification letter, the senior civil servant in Detainee Policy advised that the email recipient “might need to tweak it with a few things from the MOU.” E-mail, May 22, 2014, in September 19, 2015 tranche, no. 76 (declassified at Committee request). It seems at least officials in Detainee Policy believed this material would be forwarded to Secretary Hagel. See E-mail, May 22, 2014 in September 19 tranche, no. 73 (“SD . . . is likely to refer to” the information) (declassified at Committee request).

²¹⁸ E-mail, May 23, 2014, in September 19, 2015 tranche, no. 1 (declassified at Committee request).

²¹⁹ Document captioned “Engagement Plan and Timeline,” attached to E-mail, May 23, 2014, in September 21, 2015, no. 67-69; (declassified at Committee request); and E-mail, May 27, 2014, in December 5, 2014 tranche, no. 536 (“the document we sent over last Friday that spells out the who/when/how”).

and Intelligence committees. DOD will also provide a classified briefing to these committees at this time. The briefing will focus on the conditions of the U.S. person, including next steps (activities, timelines, process); and facts pertaining to the transfer, [phrase redacted]. We will also inform the Members we will be notifying the family, the Afghan and Pakistani governments, and issuing a public statement. [. . .]

- Following the accomplishment of the steps above, the USG would issue a public statement concerning the return of the U.S. person to U.S. custody and control.

In the days immediately following transfer

- Congressional notification, Phase 3: DOD and State representatives would be prepared to deliver a classified briefing to a wider Congressional audience as requested.²²⁰

At the same time the “Engagement Plan & Timeline” was being circulated within the NSC staff, the president was apparently dissatisfied with the pace at which detainees, in general, were leaving GTMO. This was delaying the fulfilment of his campaign pledge to close the facility. Accordingly, within 24 hours of the Taliban Five Engagement Plan being received by the NSC, Susan Rice, then the president’s national security advisor, signed an otherwise unrelated memorandum to the secretary of defense reflecting “the President’s guidance” in how detainee transfers, other than those which were part of the forthcoming swap, should be eased.²²¹

This memorandum stated that the president specifically believed that in making the required determination that a “transfer is in the national security interest of the United States,” the secretary should be mindful of the “longstanding Administration policy” to close GTMO. In determining the adequacy of risk mitigation measures for a transfer, the document also declared “this is not a ‘zero risk’ standard” and must be balanced against “in part the increased harm to the national security caused by the continued operation of the facility.”²²² It is reasonable to conclude that the president’s objections about the dilatory progress of other GTMO transfers influenced how the White House staff considered the Taliban Five plan offered to them at nearly the same time.

On May 25 after Mr. Preston reported from Doha that “we are very close to a deal,” he and Brian Egan (who was then serving concurrently as the Legal Adviser to the National Security Council, Deputy Assistant to the President, and Deputy Counsel to the President) exchanged emails. Although the the specific content of this exchange remains unclear to the

²²⁰ Document captioned “Engagement Plan and Timeline,” attached to E-mail, May 23, 2014, in September 21, 2015, no. 67-69 (declassified at Committee request) (Committee edit indicated by brackets).

²²¹ Document captioned “Memorandum for the Secretary of Defense,” May 24, 2014 (in Committee possession).

²²² Document captioned “Memorandum for the Secretary of Defense,” May 24, 2014 (in Committee possession).

Committee, it is known that the subject was the Department of Justice’s legal advice about congressional notification.²²³

Indeed, Mr. Preston explained to the Committee he saw a draft notification letter during his final stint in Doha. However, he also said “I’m not sure I had a clear lead on when the notification . . . would be provided relative to the transfer” but acknowledged his understanding “that the notification would not be provided within the 30-days waiting period before the transfer would be executed.”²²⁴ Similarly, Mr. Dumont (who was also in Doha) told the Committee he realized congressional notification had not taken place until “around the time” Sgt. Bergdahl was recovered.²²⁵ He said he only “generally” was familiar with the topic because it was not his responsibility. “I think the concern was,” he recalled,

we don’t know when the transfer is going to take place, [so] we don’t want to do it [congressional notification] too soon. . . . [W]e had been warned by the Qataris on several occasions that leaks out of the United States and the media were not helpful. And so we wanted to be very careful about how we proceeded.²²⁶

On May 27, the White House apparently deemed the “Engagement Plan” unacceptable. Mr. Dumont e-mailed from Doha (probably referencing three NSC staffers):

[w]e need a very detailed congressional notification plan sent over to Jeff, Bill, and Phil as quick as possible, please. Apparently they think the one we have is probably unsat for this little project. They want—

Who gets called exactly when, by whom.

What committees, when precisely, etc.²²⁷

When NSC staffer William Burke wrote to DOD officials that he was “getting lots of questions” on the subject of the “congressional plan,” his correspondent replied that there were “[m]any moving parts and unknowns. We are working this but don’t have anything yet to share beyond the document we sent over last Friday that spells out the who/when/how.”²²⁸ The Committee could not determine the nature of the White House objections which emerged in this period.

²²³ See E-mail, May 25, 2014, in March 6, 2015 tranche, no. 278 (as supplemented by information conveyed to Committee staff by Department of Defense, May 21, 2015). For Egan position in May 2014, see Office of the Press Secretary, the White House, “President Obama Announces More Key Administration Posts,” September 18, 2014.

²²⁴ Preston transcript, p. 99.

²²⁵ Michael Dumont, classified interview transcript (redacted), October 7, 2014, p. 106 [hereafter “Dumont transcript”].

²²⁶ Dumont transcript, p. 105.

²²⁷ E-mail, May 27, 2014, in March 6, 2015 tranche, no. 27. E-mail correspondents on the subject of the Taliban Five included NSC staffers by the first name of Jeff, Bill, and Phil. See e.g. E-mail, May 27, 2014 in December 5, 2014 tranche, no. 536; and E-mail, May 30, 2014, in March 27, 2015 tranche, no. 33.

²²⁸ E-mail, May 27, 2014 in December 5, 2014 tranche, no. 536.

Nevertheless, on May 28 an employee in the DOD general counsel's office reported to Mr. Preston and others the "CN and action memo have been delivered to the front office, and I understand they are being printed and 'autopenned' now. They are expected to be hand delivered by Mike Lumpkin, although it is not clear what day that would happen. All principals have concurred."²²⁹

On May 29, 2014, the Taliban Five were notified of the impending transfer, although Congress remained in the dark. On May 31, less than two hours before the Taliban Five left GTMO—and almost two days after the detainees themselves were made aware of their departure—the Department finally provided oral notification of the transfer to then-Committee Chairman Howard P. "Buck" McKeon. Formal, written notification did not arrive until June 2, 2014, two days *after* the Taliban Five left GTMO.

Statutory analysis of the Administration's failure to provide legally-required notification to Congress

Because the Department of Defense failed to provide the required 30-days' congressional notification to Congress, the Taliban Five transfer was plainly inconsistent with the terms of Section 1035(d) of the NDAA. Given this inconsistency, and thus the Administration's clear violation of a statute President Obama had signed into law, the Committee has sought to understand the legal basis for the Administration's decision to execute the transfer without providing the required notice to Congress. Although the Administration has consistently refused to provide the Committee with a fulsome explanation of the legal advice and facts upon which it relied when it chose not to comply with the requirements of the NDAA, the Committee believes that DOD has made a good-faith effort to accommodate the Committee's interest. In continuing to withhold from Congress the legal advice received prior to the transfer, DOJ (on behalf of the Administration) has refused to provide more specific information, citing "Executive Branch institutional interests."²³⁰ Nonetheless, the Committee has discerned the contours of the DOJ's advice by considering information the Administration made public following the transfer, in addition to the Department of Defense's subsequent correspondence with the Committee.

On June 1, 2014, the day following the transfer, then-Secretary of Defense Chuck Hagel told reporters that, "We believe that the president of the United States is commander in chief, has the power and authority to make the decision that he did under Article II of the Constitution."²³¹ On the same day, then-National Security Advisor Rice told CNN that, "given the president's constitutional responsibilities, it was determined that it was necessary and appropriate not to adhere to the 30-day notification requirement, because it would have potentially meant that the opportunity to get Sergeant Bergdahl would have been lost."²³²

²²⁹ E-mail, May 28, 2014, in March 6, 2015 tranche, no. 31.

²³⁰ Peter Kadzik (Assistant Attorney General) letter to Rep. Thornberry and Rep. Bob Goodlatte (chairman, Committee on the Judiciary) September 15, 2015. DOJ and DOD have not invoked any privileges to attempt to justify the withholding of documents and information from the Committee.

²³¹ Charlie Savage and David E. Sanger, "Deal to Free Bowe Bergdahl Puts Obama on Defensive," *New York Times*, June 4, 2014.

²³² Transcript from State of the Union with Candy Crowley, *CNN*, June 1, 2014.

The earliest detailed written public statement of the legal rationale for flaunting the notification requirement came not from the DOD or DOJ but from the NSC. On June 3, 2014, the NSC Press Office issued a release in response to widespread criticism that the Taliban Five had been transferred in violation of congressional notification requirements. The NSC statement outlined the Administration's core legal argument. These points have been subsequently reiterated but never substantially altered by various Administration representatives.

First, the NSC press release inexplicably separated the determination required by Section 1035(b) (the transfer determination) from the notification requirement contained in Section 1035(d) (the justification and mitigation explanation). Thus, the Administration conceded that it was required to comply with Section 1035(b), but asserted that Section 1035(d)

should be construed not to apply to this unique set of circumstances, in which the transfer would secure the release of a captive U.S. soldier and the Secretary of Defense, acting on behalf of the President, has determined that providing notice as specified in the statute could endanger the soldier's life.²³³

Second, the NSC press release contended that, because adhering to a 30-day notice requirement as part of a transfer for Sgt. Bergdahl "would significantly alter the balance between Congress and the President, and could even raise constitutional concerns, we believe it is fair to conclude that Congress did not intend that the Administration would be barred" from transferring the Taliban Five following same-day notification.²³⁴

As for the referenced "constitutional concerns," the press release posited that

delaying the transfer in order to provide the 30-day notice requirement would interfere with the executive's performance of two related functions that the Constitution assigns to the President: protecting the lives of Americans abroad and protecting U.S. soldiers.²³⁵

The NSC press release did not cite any specific constitutional provisions in support of this claim or provide the specific "unique set of circumstances" triggering the president's claimed authority. Finally, the NSC release noted that, even though the president signed the NDAA into law, he had expressed "concerns regarding [the] notice requirement" because it would "in certain [unspecified] circumstances . . . violate constitutional separation of powers principles."²³⁶

²³³ Document captioned "Statement By NSC Spokesperson Caitlin Hayden on the NDAA and the Transfer of Taliban Detainees from Guantanamo," June 3, 2014 (in Committee possession) [hereafter "NSC Press Release"].

²³⁴ NSC Press Release.

²³⁵ NSC Press Release.

²³⁶ NSC Press Release. See also "Statement by the President on H.R. 3304," the White House, December 26, 2013 ("Section 1035 does not, however, eliminate all of the unwarranted limitations on foreign transfers and, in certain circumstances, would violate constitutional separation of powers principles. The executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers.")

On June 11, 2014, Secretary Hagel testified before the Committee. He repeated his earlier statement and the arguments contained in the NSC press release. He justified the Administration's decision not to comply with the NDAA's notification requirement by asserting that the transfer was "an extraordinary situation" which involved a U.S. serviceman held as a "Prisoner of War." During the same hearing, Mr. Preston conceded that Section 1035 "is constitutional" but argued that "it was necessary to forego [congressional notification] under the constellation of circumstances presented in this situation in which the president was seeking to free a servicemember in captivity and in peril." From the Administration's perspective, these circumstances gave the president the authority to act unilaterally because of his constitutional authority as commander-in-chief. The Administration, however, has proffered no limiting principle for its arguments. Indeed, the Administration's basis for claiming that *notification to Congress* would have endangered the soldier's life appears facially frivolous.

A few days following the testimony from Secretary Hagel and Mr. Preston, the nonpartisan Government Accountability Office (GAO) was asked to consider whether, aside from violations of the NDAA, DOD had acted contrary to the prohibitions included in Section 8111 of the Appropriations Act.²³⁷ At GAO's request, DOD on July 31, 2014 submitted an unsigned memorandum reiterating (in somewhat more detail) the legal arguments first set forth in the NSC press release.²³⁸ The key points of the DOD's statutory argument were:

- Section 8111 of the Appropriations Act prohibited only transfers made without a transfer determination.
- The transfer of the Taliban Five was lawful because Secretary Hagel made the determination required by Section 1035(b).
- Section 1035(d) did not make notice a precondition of transfer.²³⁹

Having considered this input, in August 2014, GAO nonetheless issued an opinion which determined that the Administration had completed the Taliban Five transfer in violation of both Section 1035 of the NDAA and Section 8111 of the Appropriations Act. It also concluded the Administration violated the Antideficiency Act.²⁴⁰ In reaching these conclusions, GAO found unconvincing DOD's attempt to circumvent the plain meaning of the relevant statutory provisions.

The Committee emphatically agrees. Statutes must be interpreted according to their plain meaning. As the Supreme Court has held, this "respects the words of Congress."²⁴¹ Furthermore, the Committee is uniquely positioned to affirm to the absolute lack of *any* legislative history supporting the Administration's defective statutory analysis. In mandating

²³⁷ GAO Opinion, p. 1 ("This responds to your June 13, 2014, request . . ."). See also Pub. L. 113-76.

²³⁸ GAO Opinion, p. 2 ("On July 31, 2014, DOD provided us with . . . with its legal views . . ."); "Administration Views Provided to the Government Accountability Office" [hereafter "DOD July 31 E-mail"].

²³⁹ DOD July 31 E-mail.

²⁴⁰ GAO Opinion, p. 4, 6-7. The Antideficiency Act bars the executive branch from the incurring of obligations or the making of expenditures in excess of amounts available in appropriations or funds. See also U.S. CONST, art. I, sec. 9 (providing that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

²⁴¹ *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004).

notice “not later than 30 days before the transfer or release” of detainees from GTMO, Congress meant what it said.

As for Section 8111 of the Appropriations Act, GAO noted it required the secretary of defense to comply with Section 1035 of the NDAA and Section 8111 “makes no distinction regarding the weight of various subsections under section 1035.”²⁴² Thus, GAO determined, the notification requirement in Section 1035(d) “stands on equal footing with determination requirements” contained in Section 1035(b), with which the Administration complied and which it conceded were binding.²⁴³ “To read section 8111 otherwise,” the GAO opined, “would render the notification requirement meaningless,” contradicting the fundamental canon of statutory interpretation that laws should be interpreted “so as to avoid rendering superfluous any parts thereof.”²⁴⁴ The Committee also notes that the DOD interpretation is contrary to the purpose and intent of Congress in crafting Section 1035.

When responding to GAO, the Department also advanced a “constitutional avoidance” argument. DOD maintained that because interpreting the 30-day notice requirement as applicable would raise (according to the Administration) constitutional issues, it should be construed as inapplicable.²⁴⁵ However, “[t]he canon of constitutional avoidance only applies when a statute is ambiguous.”²⁴⁶ The NDAA is not ambiguous. There is no plausible reading of Section 1035(d) that renders the notification requirement inapplicable to the transfer of the Taliban Five.²⁴⁷

Indeed, the Committee concurs with an analysis of the GTMO-related provisions of the Fiscal Year 2012 NDAA (including a similar 30-day notification requirement), which concluded that President Obama “should respect [Congress’] role in this policy arena and neither ignore the restrictions *nor interpret them out of existence in the name of avoiding constitutional difficulties.*”²⁴⁸ Unfortunately, the Administration appears to have succumbed to the “risk that executive actors will abuse the avoidance canon by employing it in circumstances where, by its own terms, it does not apply.”²⁴⁹

²⁴² GAO Opinion, p. 5.

²⁴³ GAO Opinion, p. 5.

²⁴⁴ GAO Opinion, p. 5; *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

²⁴⁵ DOD July 31 E-mail, p. 2.

²⁴⁶ Nicholas Quinn Rosenkranz, quoted in Lawrence Solum, “Rosenkranz on the Avoidance Canon and Justice Roberts Opinion in the Health Care Cases,” *Legal Theory Blog*, July 11, 2012. See also *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems *unless such construction is plainly contrary to the intent of Congress.*”) (emphasis added).

²⁴⁷ Subsequently, the July 17, 2015, letter from Robert S. Taylor (Acting General Counsel, Department of Defense) to Rep. Mac Thornberry emphasized that 30-day notice requirement moved to separate subsection from FY13 to FY14 NDAA. This is immaterial, and does not meaningfully alter analysis—8111 requires transfers be conducted “in accordance” with 1035, which clearly means all of 1035, no matter how sub-divided from year to year.

²⁴⁸ *Recent Legislation*, 125 HARV. L. REV. 1876, 1883 (2012) (emphasis added).

²⁴⁹ Trevor W. Morrison, *Constitutional Avoidance in the Legislative Branch*, 106 COLUM L. REV. 1189, 1235 (2006).

Constitutional analysis of the Administration's failure to provide legally-required notification to Congress

In addition to its wholly unconvincing statutory argument, the Administration also put forward a constitutional argument. It asserted that, even though it failed to comply with the NDAA's congressional notification requirement, transferring the Taliban Five was a permissible exercise of the President's inherent authority as commander-in-chief "to protect the life of a U.S. soldier."²⁵⁰ Only after the Taliban Five transfer did the Administration publicly make the argument that the notification requirement, although facially constitutional, is unconstitutional in the case of the Taliban Five exchange because notification would have impermissibly "prevent[ed] the executive branch from accomplishing its constitutionally assigned functions."²⁵¹

Although the GAO elected not to engage the Administration's constitutional arguments, the Committee has considered them carefully.²⁵² The legality of the Taliban Five exchange ultimately hangs on resolution of these assertions.²⁵³ As noted, the DOJ and others in the Administration refused to provide key documents which might have shone light on the Administration's actual analysis. For example, two Administration letters to the Chairman fail to provide any meaningful additional insight into the Administration's constitutional analysis, or any facts supporting that analysis.²⁵⁴

The Administration has posited, without specifying, that the Executive Branch has some special constitutional prerogative, presumably deriving from Article II of the Constitution, with respect to recovering U.S. service personnel.²⁵⁵ The Committee accepts that protecting the life of U.S. service members is a legitimate and important objective. But the notion that the president has broad authority to negotiate for the return of a service member whose life is in danger is separate from the question of what the president may trade in return. The president may not use illegitimate means, such as breaking the law, to achieve legitimate ends. Thus, in the famous case of *Youngstown Sheet & Tube vs. Sawyer*, the Supreme Court held that, notwithstanding the president's constitutional authority as commander-in-chief, it was illegal to direct the secretary of commerce to take possession of and operate most of the country's steel

²⁵⁰ DOD July 31 E-mail, p. 3.

²⁵¹ The only specific reservation made by President Obama's December 26, 2013 signing statement with respect to Section 1035 is that it might unconstitutionally constrain "executive . . . flexibility . . . to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers." That concern is generally inapplicable here, insofar as it was not offered as the constitutional basis legitimizing the Taliban Five transfer notwithstanding the relevant statute. (See DOD July 31 E-mail, p. 3., quoting *Morrison v. Olson*, 487 U.S. 654, 695 (1988).)

²⁵² GAO Opinion, pp. 5-6.

²⁵³ See, e.g., Jack Goldsmith, "The President Pretty Clearly Disregarded a Congressional Statute in Swapping GTMO Detainees for Bergdahl," *Lawfare*, June 4, 2014; and Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency* (New York: Little, Brown, 2015), pp. 519-523. Saliiently, the relevant subchapter of the Savage book is titled "Violating the Transfer Restrictions to Save Bergdahl."

²⁵⁴ The July 17, 2015, letter from Robert S. Taylor (Acting General Counsel, Department of Defense) to Rep. Mac Thornberry, largely repeated—in some cases word-for-word—the analysis provided to GAO almost a year earlier. See also the September 15, 2015, letter from Peter Kadzik (Assistant Attorney General) to Rep. Thornberry and Rep. Bob Goodlatte.

²⁵⁵ See, e.g., NSC Press Release; DOD July 31 E-Mail, pp. 2-3.

mills during the Korean War, without statutory authorization from Congress.²⁵⁶ Nationalizing the steel mills would have ensured an important supply of vital material flowed to soldiers engaged in combat operations during wartime. Nevertheless, the Court determined the seizure was impermissible in the face of implicit congressional disapproval (namely, a prior rejection of a provision that would have authorized such governmental seizures in cases of emergency).²⁵⁷

Similarly, whatever authority the president has to protect the life of U.S. service members, the Administration is not permitted to disregard the law—in this case an *explicit* prohibition—unless the law in question is unconstitutional as applied to the circumstances at issue. In other words, whether the Taliban Five transfer was legal depends not on the scope of the president’s inherent authority to protect U.S. service members, but on whether Section 1035 of the NDAA was a constitutional exercise of Congress’ legislative power.

Contrary to DOD’s implication in its submission to GAO, the burden falls on the executive branch, not Congress, to demonstrate the constitutionality of its actions—and the unconstitutionality of the law(s) it violated.²⁵⁸ This is because, when the executive acts contrary to a congressional prohibition such as Section 1035(d) of the NDAA, presidential power is at its “lowest ebb,” and unilateral executive actions “incompatible with the expressed . . . will of Congress” are lawful only when “the President’s asserted power [is] both ‘exclusive’ and ‘conclusive’ on the issue.”²⁵⁹ This is a high bar, which the Administration has manifestly failed to clear in the case of the Taliban Five transfer, especially given that Congress has a well-established and important constitutional role to play with respect to wartime detainees.

As a court opinion addressing this issue has emphasized, “the constitutional text, Justice Jackson’s *Youngstown* opinion, and recent Supreme Court precedents indicate that the President does not possess exclusive, preclusive authority over the transfer of detainees.”²⁶⁰ Indeed, a 2009 legal opinion from the Bush Administration’s Office of Legal Counsel (OLC) acknowledged that “sweeping assertions in [several 2002-2003 OLC opinions] that the President’s Commander in Chief authority categorically precludes Congress from enacting any legislation concerning the detention . . . of enemy combatants are not sustainable” and were

²⁵⁶ 343 U.S. 579 (1952).

²⁵⁷ *Youngstown*, 343 U.S. at 586.

²⁵⁸ See DOD July 31 E-mail, p.3. (citing *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443 (1977)).

²⁵⁹ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ; *Zivotofsky v. Kerry*, 576 U.S. ____ (2015) (slip op. at 7). See also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb--Framing the Problem, Doctrine, and Original Understanding*, 121 HARV.L. REV. 689, 694, 803 (2008) (“[T]he idea is that Congress may not regulate the President’s judgments about how best to defeat the enemy — that the Commander in Chief’s discretion on such matters is not only constitutionally prescribed but is preclusive of the exercise of Congress’s Article I powers. . . . For too long, the claim that the Framers did not intend the President to be statutorily constrained as to a category of decisions . . . has had a firm grip on modern war powers scholarship and, by extension, the contemporary constitutional culture. Our detailed review is a reminder that the high school civics notion of checks and balances should not be dispensed with so quickly in this context. When it comes to constitutional mythmaking about war powers in the Founding era, it seems it is the contemporary defenders of preclusive power, rather than those who raise concerns about monarchy, who may be spinning tales.”) Note that Professor Lederman and then-Professor Barron, whom President Obama subsequently appointed to a seat on the U.S. Court of Appeals for the First Circuit, were describing—and thoroughly criticizing—the legal arguments put forward by the George W. Bush Administration.

²⁶⁰ *Kiyemba v. Obama*, 561 F.3d 509, 517 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

“overtaken by subsequent decisions of the Supreme Court and by legislation passed by Congress and supported by the President.”²⁶¹

These conclusions are buttressed by the constitutional text conferring affirmative responsibilities on Congress. As is well known, Article I, Section 8, commits to Congress the authority to “declare War.” Academic and legal historians have debated the significance of this clause on the scope of Congress’ authority to direct the conduct of a war once declared. Against the background of that debate, however, presidents have asked for and acquiesced to authorizations to use military force (AUMFs) containing significant limitations. Most recently, in February 2015, President Obama proposed to Congress an AUMF that would “not authorize the use of the United States Armed Forces in enduring offensive ground combat operations.”²⁶² Past (and current) practice thus strongly suggests that Congress has an important role in directing the use of military force after war is declared, or even when it is undeclared.²⁶³ Indeed, the Supreme Court has recognized that the president’s authority to detain members of Al Qaeda and the Taliban at GTMO flows *directly* from Congress’s explicit authorization to use “all necessary and appropriate force” against “nations, organizations, or persons” associated with the September 11, 2001 terrorist attacks.²⁶⁴

Also significant is that “Congress possesses express constitutional authority to make rules concerning wartime detainees.”²⁶⁵ The so-called Captures Clause in Article I, Section 8, of the Constitution, grants Congress “Power . . . To . . . make Rules concerning Captures on Land and Water.”²⁶⁶ Additionally, “[t]he constitutionality of the NDAA’s regulation of detainee treatment (which includes transfers) . . . draws support from historical practice” with respect to captures.²⁶⁷

Sources from around the time of the Framing suggest that the Founders understood battlefield ‘captures’ to include the capture of enemy prisoners. During the Revolutionary War, the Continental Congress passed legislation concerning not simply the capture of enemy vessels, but also the capture and treatment of persons on board those vessels.²⁶⁸

²⁶¹ Steven G. Bradbury (Deputy Assistant Attorney General), Memorandum for the Files from Principal re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, Jan. 15, 2009 pp. 2, 4 [hereafter “Bradbury OLC memo”].

²⁶² Document captioned Joint Resolution, Sec. 2(c); see also Barack Obama, President of the United States, “Letter from the President--Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant,” the White House, February 11, 2015.

²⁶³ Pub. L. 107–40.

²⁶⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion). See also Pub. L. 107–40.

²⁶⁵ *Kiyemba v. Obama*, 561 F. 3d at 517 (Kavanaugh, J., concurring).

²⁶⁶ *Kiyemba v. Obama*, 561 F. 3d at 517 (Kavanaugh, J., concurring). Article I, Section 8, also commits to Congress the power to “define and punish piracies and felonies committed on the high seas, and offences against the law of nations,” “raise and support armies,” “provide and maintain a navy,” “make rules for the government and regulation of the land and naval forces,” and “make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”

²⁶⁷ *Recent Legislation*, 125 HARV.L. REV. at 1881.

²⁶⁸ Bradbury OLC memo,” p. 5.

Further, “during the Quasi-War with France from 1798 to 1800, Congress passed a law that ‘required’ the president ‘to cause the most rigorous retaliation’ against French citizens who had imprisoned Americans on French ships, without raising any constitutional concerns.”²⁶⁹

In more recent practice, Congress has repeatedly passed, presidents have routinely signed and implemented, and courts have interpreted and upheld the validity of, extensive rules governing detainees. For example, the Detainee Treatment of Act of 2005 (DTA)

- Prohibited cruel, inhuman, or degrading treatment or punishment of any prisoner of the U.S. government, including at GTMO, and required DOD interrogations to be performed in accordance with the U.S. Army Field Manual for Human Intelligence Collector Operations;
- Directed DOD to establish Combatant Status Review Tribunals (CSRTs) for persons held at GTMO, and gave the U.S. Court of Appeals for the District of Columbia Circuit jurisdiction to review; and
- Stripped, in response to *Hamdi v. Rumsfeld*, the federal courts of jurisdiction over *habeas corpus* petitions filed by individuals detained at GTMO.²⁷⁰

In *Hamdan v. Rumsfeld*, the Supreme Court interpreted, and declined to give retroactive effect to, the jurisdiction-stripping provisions of the DTA with respect to then-pending cases.²⁷¹ If Congress lacked the constitutional authority to legislate in this area, as the Administration has appeared to contend when justifying its disregard of the 30-day notification requirement in the Taliban Five transfer, there would have been no need for the Court to engage in a careful parsing of the DTA.²⁷²

Additionally, the Court in *Hamdan* determined that trying wartime detainees in military commissions established by executive order was unlawful without congressional authorization, notwithstanding President Bush’s inherent commander-in-chief authority.²⁷³ As Justice Kennedy noted in concurrence, with comments that are equally applicable to Section 1035 of the NDAA:

This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject . . . and set limits on the President’s authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation

²⁶⁹ *Recent Legislation*, 125 HARV.L. REV. at 1881 (citing Act of Mar. 3, 1799, ch. 45, 1 Stat. 743); Barron & Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV.L. REV. 941, 970-72 (2008).

²⁷⁰ Pub. L. 109-148.

²⁷¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 575-84 (2006).

²⁷² *Hamdan*, 548 U.S. at 575-84.

²⁷³ *Hamdan*, 548 U.S. at 593-94, 612-13, 625.

of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.²⁷⁴

Following *Hamdan*, Congress passed the Military Commissions Act of 2006 (2006 MCA), which included a *habeas* jurisdiction-stripping provision that applied retroactively “to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”²⁷⁵ The Supreme Court gave retroactive effect to this statutory provision, and reaffirmed Congress’ role in making detainee policy:

If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan*’s holding that the DTA’s jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute, and we agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the *habeas corpus* actions now before us.²⁷⁶

The 2006 MCA also authorized trial by military commission of GTMO detainees for violations of the law of war. The executive branch continues to operate military commissions in accordance with the 2006 MCA and its successor statute, the Military Commissions Act of 2009.²⁷⁷

As recently as November 25, 2015, President Obama signed into law the NDAA for Fiscal Year 2016, which expands the DTA by requiring all U.S. government interrogations, including those conducted by intelligence agencies, to be performed in accordance with the U.S. Army Field Manual for Human Intelligence Collector Operations.²⁷⁸ The Administration supported this limitation. Thus, Congress continues to exercise its constitutional authority to legislate detainee policy, and the Administration has generally accepted and acquiesced to such provisions. Indeed, President Obama has for six consecutive years signed into law NDAAs containing limitations on his ability to transfer prisoners from GTMO similar to those at issue here.²⁷⁹ Moreover, the Administration has complied with the congressional notification

²⁷⁴ *Hamdan*, 548 U.S. at 636-37 (Kennedy, J., concurring in part).

²⁷⁵ Pub. L. 109-366.

²⁷⁶ *Boumediene v. Bush*, 128 S. Ct. 2229, 2243-44 (2008). The Court ultimately determined that the MCA’s retroactive jurisdiction-stripping provision was unconstitutional, not for infringing on the President’s Article II executive power, but for reasons not applicable here: because GTMO is *de facto* part of the United States for *habeas* purposes, “MCA § 7 . . . effects an unconstitutional suspension of the writ” of *habeas corpus* of violation of the express textual guarantee of Article I, Section 9. (*Boumediene*, 128 S. Ct. at 2262, 2274.)

²⁷⁷ Pub. L. 111-84. See generally www.mc.mil.

²⁷⁸ Pub. L. 114-92.

²⁷⁹ See Jennifer K. Elsea and Michael John Garcia, “Wartime Detention Provisions in Recent Defense Authorization Legislation,” Congressional Research Service, May 28, 2015; and Fiscal Years 11–16 National Defense Authorization Acts.

requirement for *every* GTMO transfer other than the Taliban Five, despite purported constitutional concerns expressed in President Obama’s various signing statements.

The Constitution *expressly* gives Congress authority to regulate detainees, as it did by requiring 30 days’ notification before their transfer from Guantanamo. Such detainee-related restrictions are constitutional even if the president has implicit authority to “protect the life of a U.S. soldier” and has strong policy disagreements with the law the president has signed.²⁸⁰ In the words of one recent court opinion, “to the extent Congress wants to place judicially enforceable restrictions on Executive transfers of Guantanamo or other wartime detainees, it has that power.”²⁸¹ This is especially true in the case of mere notice requirements.²⁸² Therefore, because Congress “possesses express constitutional authority to make rules concerning wartime detainees,” Section 1035(d) is presumptively valid.²⁸³

The Administration has failed to establish any unconstitutionality of the applicable notice provisions, or even to seriously attempt such a justification. It has not dealt with the important legal precedents analyzed above, including “scope of the Captures clause, . . . the source and scope of the president’s burdened military functions, or . . . the scope or implications of the constitutional override.”²⁸⁴ And it has not even mentioned the important legal cases discussed here, such as *Youngstown*, *Hamdan*, or *Hamdi*.²⁸⁵

The Administration also has not even attempted to put forward facts that would establish the existence of “a genuine, short-term emergency” (or other similarly exigent circumstances) with respect to the Taliban Five transfer.²⁸⁶ Most notably, the Administration has failed to substantiate its repeated claims that complying with the 30-day notification requirement would have jeopardized Sgt. Bergdahl’s life.²⁸⁷ No doubt Sgt. Bergdahl was mistreated and in ill

²⁸⁰ *Recent Legislation*, 125 HARV. L. REV. at 1883.

²⁸¹ *Kiyemba*, 561 F. 3d at 517 (Kavanaugh, J., concurring).

²⁸² Section 1035 of the NDAA conditioned transfers but did not prohibit them. Even former Deputy Assistant U.S. Attorney General John Yoo, a noted exponent of executive authority, has conceded that reporting requirements such as those contained in Section 1035 are generally constitutional because they “do not stand in the way of the exercise of the President’s constitutional authority; they only require the President to tell Congress when he is exercising his authority.” The constitutionality of reporting requirements is further bolstered by well-established practice. For instance, the Committee routinely receives briefings about sensitive military operations before they occur.

“A[nother] good example is the regulation of covert action, where Congress requires the President to provide a finding that authorizes the CIA to undertake the program. Presidents seem to have accepted this arrangement. Even though every modern president until Obama has thought the War Powers Resolution is unconstitutional, they have still complied with its reporting requirement as well.” John Yoo, “Was the Bergdahl Deal Lawful?” *Ricochet*, June 4, 2014. For an extensive catalog of President Obama’s War Powers Resolution notifications, see Matthew C. Weed, “The War Powers Resolution: Concepts and Practice,” Congressional Research Service, April 3, 2015.

²⁸³ *Kiyemba*, 561 F. 3d at 517 (Kavanaugh, J., concurring).

²⁸⁴ Jack Goldsmith, “More on the Legal Basis for the Administration’s Disregard of Congressional Restrictions on Detainee Transfers in the Bergdahl Context, and on the Implications for Closing GTMO,” *Lawfare*, April 10, 2015.

²⁸⁵ Jack Goldsmith, “More on the Legal Basis for the Administration’s Disregard of Congressional Restrictions on Detainee Transfers in the Bergdahl Context, and on the Implications for Closing GTMO,” *Lawfare*, April 10, 2015. (“As [Judge] Kavanaugh [in his *Kiyemba* concurrence] suggested, all three of these cases (and the latter two concretely) indicate that Congress has significant controlling authority in Jackson Category 3 situations in related post-9/11 wars military contexts.”).

²⁸⁶ *Kiyemba*, 561 F. 3d at 517 (Kavanaugh, J., concurring); Taliban hearing transcript, pp. 8-10, 15, 27, 29-31, 39, 42, 55, 72-75, and 84.

²⁸⁷ Taliban hearing transcript, pp. 19-20, 38.

health, but no factual circumstances provided to or discovered by this Committee support the Administration's bare assertions that notification to Congress would have endangered the soldier's life.

Indeed, the Administration did not believe the situation was so exigent that the Department was precluded from obtaining (almost 30 days before the transfer) legal advice suggesting that it need not comply with the notification requirement. The Department also failed to informally notify or consult its committee of oversight in anticipation of a transfer following less than 30 days' notice, despite weeks of planning for just such an eventuality and previous public and personal commitments to only take such an action in consultation with Congress.

Given that presidential power is at its lowest ebb at a circumstance such as this, where Congress has legislated with an unusual deal of care and specificity, the Administration has manifestly failed to surmount the very high bar required to demonstrate constitutionality of its decision to disregard the notification requirement contained in Section 1035(d) of the NDAA. Rather than making a clear case for its controversial actions, the Administration has relied on vague incantations of Article II. The Congress and the American public are entitled to more when the president unilaterally overrides the law based on breathtaking claims of executive authority.

Consequences of the Administration's failure to provide legally-required notification to Congress

As noted above, the Administration waited until May 31, less than two hours before the transfer was executed (and two days *after* the prisoners themselves made aware of their impending departure from GTMO), to inform Congress about the Taliban Five deal. The Administration's inexcusable delay in providing notice to Congress strongly suggests that at least some of the motivations for not timely notifying Congress about the transfer remain obscured.²⁸⁸ The Committee is deeply concerned that the legal advice used to justify this exercise of unilateral executive authority may have been pretextual, and that the Administration's real objective was to avert what Mr. Preston termed "the prospect of notification to our overseers."²⁸⁹ This is especially so given the Committee is routinely briefed, without incident, on extraordinarily sensitive military operations before they occur. Indeed, as discussed, the Committee had been briefed years before about separate negotiations to swap detainees from GTMO for Sgt. Bergdahl.

The Administration's disregard for Congress has and will continue to have negative practical consequences, including eroding trust and damaging a historically cooperative working relationship between the Department and its oversight committees. Additionally, the Administration's disregard for the plain meaning of the NDAA sets a dangerous precedent. The

²⁸⁸ As is described elsewhere in this report, after U.S. negotiators returned to Qatar in the first week of May, a series of events suggesting the transfer would soon take place transpired in rapid succession, without any notification to Congress. For example, detainee transfer paperwork was compiled in a late night session in the Office of Detainee Policy, the secretary was briefed, the MOU was signed in the White House complex, the deputy national security advisor convened a meeting, GTMO was notified, and U.S. Air Force transport aircraft were staged. By May 28, all the paperwork was in place, including a draft notification.

²⁸⁹ E-mail, May 2, 2014, in March 27, 2015 tranche, no. 15.

Administration's implausible interpretation of a very clear, detailed statute raises the question of what other NDAA provisions the Administration will attempt to render inapplicable through evasive legal gymnastics. Furthermore, the Administration's justification of its statutory violation with a vague and unsubstantiated appeal to constitutional authority is no small matter; it is extremely troubling to this Committee, and, we suspect, the American people generally.

Although the Administration argues that its decision to defy the law in this case arose from a specific and unique fact pattern, the legal arguments made in support of that decision admit of no limiting principle. On the contrary, unchallenged they pose a threat not just to separation of powers but to the very foundation of constitutional government.

FINDING II: The Committee was misled about the extent and scope of efforts to arrange the Taliban Five transfer before it took place. The Department of Defense’s failure to communicate complete and accurate information severely harmed its relationship with the Committee, and threatens to upend a longstanding history and tradition of cooperation and comity.

On January 15, 2014, CNN and NBC reported that the Department of Defense possessed the “proof of life” video of Sergeant Bowe Bergdahl.²⁹⁰ That afternoon a Pentagon press official wrote to 25 colleagues to alert them to the possibility of additional related stories. Unlike the first accounts which did not connect the receipt of the video to efforts to swap Sgt. Bergdahl for GTMO detainees, there was concern that subsequent stories might convey more details. As the official noted

two separate members of the press from disparate agencies have asked for the past week if a hand-over of Afghan detainees at GTMO was in the works. I’ve told them repeatedly I’ve heard nothing even close to that. Today, each returned to me and said that they’d heard that the proof-of-life video was the first step in the process and that a Bergdahl-for-detainees trade was in the works.²⁹¹

Using an abbreviation for the “National Security Staff,” the name given at the time to those who worked for the National Security Council, the Defense official reported, “I’ve alerted NSS and they will let us know how the[y] plan to respond (they too have recently been asked a similar line of questions).”²⁹² The email was forwarded to Michael Dumont, the Deputy Assistant Secretary of Defense for Afghanistan, Pakistan, and Central Asia. Mr. Dumont conveyed it to subordinates with the note “[p]lease keep your hands on this one. . . Huge equities here.”²⁹³

²⁹⁰ Jim Miklaszewski, Courtney Kube, and Tracy Connor, “U.S. has recent ‘proof of life’ video of POW Bowe Bergdahl,” *NBC News*, January 15, 2014; and Jim Sciutto, “Missing U.S. soldier Bowe Bergdahl seen in video,” *CNN*, January 15, 2014. The Sciutto story is conveyed in E-mail, January 15, 2014, in December 5, 2014 tranche, nos. 21-22. Before these stories appeared, Department of Defense officials worked to notify Sgt. Bowe Bergdahl’s parents that the United States possessed the video, lest news accounts disclose its existence before the parents were apprised. Although there was some confusion about who within DOD had primary responsibility for this task, DOD representatives made contact on January 9, 2014. (See, e.g. E-mail, January 9, 2014, in August 27, 2014 tranche, nos. 67-70; E-mail, January 9, 2014, in August 27, 2014 tranche, no. 145; E-mail, January 9, 2014, in August 27, 2014 tranche, nos. 149-150; and E-mail February 15, 2014, in December 5, 2014 tranche, no. 274.)

²⁹¹ E-mail, January 15, 2014, in December 5, 2014 tranche, no. 548.

²⁹² E-mail, January 15, 2014, in December 5, 2014 tranche, no. 548. For discussion of nomenclature, see Caitlin Hayden, “NSC Staff, the Name Is Back! So Long, NSS,” blog post, February 10, 2014.

²⁹³ E-mail, January 15, 2014, in December 5, 2014 tranche, no. 548 (ellipses in original). See also E-mail, January 15, 2014, in December 5, 2014 tranche, no. 487 (“request that APSA FO and APC leadership . . . be included in further [related] traffic”).

DOD, the State Department, and the National Security Council subsequently worked to devise talking points to use when they received queries about Bergdahl, especially if questions went beyond the existence of the video.²⁹⁴ In part, the talking points which were finally prepared said

Our hearts go out to the Bergdahl family. We have great sympathy for them.

Sgt. Bowe Bergdahl has been gone far too long and we continue to call for his immediate release.

We cannot discuss all the details of our efforts, but there should be no doubt that we work every day—using our military, intelligence[,] and diplomatic tools—to try to see Sgt. Bergdahl returned home safely.²⁹⁵

The talking points included proposed responses to be used only if reporters asked questions on specific related subjects. “If pressed on talking to the Taliban,” for example, the document suggested officials reply

No, we are not involved in active negotiations with the Taliban. Clearly if negotiations do resume at some point with the Taliban then we will want to talk with the Taliban about the safe return of Sgt. Bowe Bergdahl. . . .²⁹⁶

“If asked about [a] Guantanamo detainee swap,” the talking points offered

the President reiterated when he signed the FY14 NDAA that his Administration will not transfer a detainee unless the threat the detainee may pose can be sufficiently mitigated and only when consistent with our humane treatment policy.²⁹⁷

Interestingly, the State Department sought to have this section read instead “As we have long said, we will make any decisions about Guantanamo detainees in consultation with Congress and according to U.S. law. Moreover, our desire to close Guantanamo remains firm.”²⁹⁸

²⁹⁴ E-mail, January 15, 2014, in August 27, 2014 tranche, no. 320. For Defense draft talking points, see E-mail, January 15, 2014, in December 5, 2014 tranche, no. 238. For State draft, see E-mail, January 15, 2014, in December 5, 2014 tranche, nos. 19-20; and E-mail, January 15, 2014, in December 5, 2014 tranche, nos. 290-291. It appears that Michael Lumpkin pledged to forward the Defense proposal to Secretary Hagel’s aides. (E-mail, January 15, 2014, in August 27, 2014 tranche, no. 262 including reference to “Abe, Mark & company.”) For National Security Council staff involvement, see E-mail, January 15, 2014, in December 5, 2014 tranche, no. 238; and E-mail January 15, 2014, in December 5, 2014 tranche, nos. 503-504.

²⁹⁵ These are reproduced in E-mail, January 16, 2014, in December 5, 2014 tranche, nos. 28-29.

²⁹⁶ E-mail, January 16, 2014, in December 5, 2014 tranche, nos. 28-29.

²⁹⁷ E-mail, January 16, 2014, in December 5, 2014 tranche, nos. 28-29.

²⁹⁸ E-mail, January 15, 2014, in December 5, 2014 tranche, no. 291.

A Precedent?

The Committee is concerned that the Administration has used the practices illustrated in the Taliban Five transfer when addressing other contentious national security issues. For example, after the Taliban Five exchange, the Obama Administration secured the freedom of a U.S. citizen held captive by the Cuban government, in part by exchanging him for three Cuban intelligence agents convicted by the United States of espionage in 2001.²⁹⁹ This swap was a component of talks initiated by the Administration on normalizing relations with Cuba and involved two White House officials traveling in secret for meetings with interlocutors in Canada and elsewhere for more than a year.³⁰⁰

As with the discussions in Qatar, officials refused to acknowledge that the Administration sought diplomatic ties with Cuba as activities aimed at precisely this goal were underway. Among other instances, in November 2014, a White House official denied that any “new specific initiative” towards Cuba was in the offing. But, when the policy change was announced the next month, the official parsed his previous response, declaring that his answer rested on his particular definition at the time of “new specific initiative.”³⁰¹

The opening to Cuba raises the prospect that the Administration might also use it as an excuse to vacate the strategically significant U.S. Navy base there, despite the fact the detention facility is one of many activities hosted at the complex. When asked earlier this year if the United States intended to return the naval station to Cuba, National Security Advisor Susan Rice replied, “We are not, at this stage, at all interested in changing the nature of our understandings and arrangements on Guantanamo.” She continued, “that’s not in the offing at the present.”³⁰² Her characterization of “at this stage” and “at the present” seems curiously specific in light of the Administration’s denials of “direct” and “active” negotiations with the Taliban.

²⁹⁹ Mark Landler, “U.S. Swap for Bergdahl Shook Up Secret Talks With Cuba,” *New York Times*, December 30, 2014; and Elise Labott, “Cuba releases American Alan Gross, paves way for historic easing of American sanctions,” *CNN*, December 17, 2014.

³⁰⁰ Julie Hirshfeld Davis and Peter Baker, “A Secretive Path to Raising U.S. Flag in Cuba,” *New York Times*, August 15, 2015.

³⁰¹ Al Kamen and Colby Itkowitz, “White House adviser Dan Pfeiffer knows how to keep a Cuba secret,” *Washington Post*, December 18, 2014.

³⁰² Toluse Olorunnipa, “Obama’s Guantanamo Prison Closing Plan in Final Drafting, Earnest Says,” *Bloomberg*, July 22, 2015.

Probably as a result of guidance from the National Security Council, the two January 15 proof-of-life stories spurred Administration officials to contact Capitol Hill.³⁰³ State Department officials, for example, briefed staff at the House Committee on Foreign Affairs. In the days after the transfer, the State Department's Special Representative for Afghanistan and Pakistan, along with a senior congressional affairs official prepared an internal memorandum to summarize their recollections of the communications with Congress in connection with the Taliban Five. Recounting the House briefing, the document summarizes that in January the

[m]essage was to confirm proof of life video for SGT Bergdahl, confirm his deteriorating condition, and say we continued to evaluate and consider all options to secure his safe return, including through possible talks with the Taliban in the context of our overall reconciliations efforts.³⁰⁴

Significantly, this summary makes no reference to the potential transfer of Taliban detainees at GTMO.

But, four weeks after the congressional briefings, another news story appeared, which contained details linking the Bergdahl video to a potential Taliban trade. “[T]he U.S. government requested this proof of life as a precondition to resuming direct U.S.-Taliban talks over a prisoner swap,” the *Daily Beast* reported on February 12, 2014. The paper claimed that a deal was being contemplated in which the American soldier would be swapped “in exchange for Taliban commanders currently imprisoned in Guantanamo Bay.”³⁰⁵

Other reporters had also discerned additional specifics. The day after the *Daily Beast* story, Rear Admiral John Kirby, then the Defense Department's press secretary, received an email from a reporter.

I understand that the DOD general counsel traveled to Doha recently as part of an interagency team for meetings aiming to ensure the Qatari government was still willing to host/receive (with the same conditions as in the past) the 5 GTMO Taliban detainees who were under consideration for transfer as part of the Afghan peace process? My understanding is that there's now less resistance within DOD to the transfer because of the change in NDAA rules (though what Congress will say is a different matter!)³⁰⁶

³⁰³ See “Timeline of Hill Engagements Associated with Sergeant Bergdahl/Taliban Negotiations,” attached to “Note to Secretary,” June 9, 2014, released to VICE News pursuant to Freedom of Information Act request (in Committee possession). Hereafter “Department of State timeline.” For a reference to an NSC meeting in place of a D[eputies] C[ommittee] meeting, see E-mail, January 15, 2014, in December 5, 2014 tranche, no. 497. For Michael Dumont's participation, see Michael Dumont, classified interview transcript (redacted), October 7, 2014, p. 53 [hereafter “Dumont transcript”].

³⁰⁴ Department of State timeline. Referring to communications the State Department's Deputy Special Representative for Afghanistan and Pakistan had with committees within his jurisdiction, this document notes “[s]taff appreciated the outreach and asked we keep them updated. We told them we would keep them updated and continue to consult before taking any action.”

³⁰⁵ Josh Rogin, “Here's Why America's Only P.O.W. Was Suddenly Shown Alive,” *Daily Beast*, February 12, 2014.

³⁰⁶ E-mail, February 13, 2014, in August 27, 2014 tranche, no. 210.

Rear Admiral Kirby forwarded the email to then-General Counsel Stephen Preston, Michael Lumpkin (who was “performing the duties of” the Under Secretary of Defense for Policy in the absence of a confirmed nominee), Mark Lippert in Secretary Hagel’s office, leaders in the Office of Legislative Affairs, and others. “Obviously I will decline to comment,” Rear Admiral Kirby wrote, “but wanted to make sure you saw the content of what she’s hearing. Whether right or wrong seems enormously unhelpful.”³⁰⁷

Those who knew the accuracy of such details were concerned. On February 15, a State Department official lamented in an email to Mr. Dumont, Brigadier General Robert White (the director of the Joint Staff’s Pakistan-Afghanistan Coordination Cell), and others “[T]hese leaks are killing us.” The official also cautioned that a related *Washington Post* story might appear soon.³⁰⁸ In addition, the State Department official recommended that the soldier’s parents be contacted and told about prospective “creative diplomatic efforts” to recover their son, alongside the caveat “we have not had any direct contact with the Taliban since they broke off talks in our last meeting in January 2012.”³⁰⁹

Late on February 17, 2014 the *Washington Post* ran the anticipated story. Headlined “U.S. seeks prisoner swap with Taliban to free Amy Sgt. Bowe Bergdahl,” it cited “current and former officials,” and outlined the contours of the ongoing efforts (“[f]ive members of the Afghan Taliban who have been held at Guantanamo for years would be released to protective custody in Qatar in exchange for the release of Bergdahl”). The account referenced a “mid-January” deputies meeting, efforts to “refresh” a past U.S. offer, and the proof-of-life video. Although some specific details were imprecise (including putative “talks with the Taliban” rather than with Qatari intermediaries) it largely reflected the circumstances at the time.³¹⁰

Indeed, when Brig. General White forwarded an electronic copy of the article to Mr. Dumont on February 18, he asked rhetorically, “who’s leaking this very accurate info?”³¹¹ (“No idea,” Mr. Dumont replied.³¹²) Similarly, Antony J. “Tony” Blinken, then-the president’s deputy national security advisor, sharply reacted to the story. “I know you share my dismay, and frankly, disgust, at the leak in today’s *Washington Post* about our Bergdahl efforts,” Mr. Blinken wrote to Mr. Lumpkin, the Vice Chairman of the Joint Chiefs of Staff, the Special Representative for Afghanistan and Pakistan, and others.³¹³

³⁰⁷ E-mail, February 13, 2014, in August 27, 2014 tranche, no. 210.

³⁰⁸ E-mail, February 15, 2014, in December 5, 2014 tranche, no. 280 (as supplemented by information conveyed to Committee staff by Department of Defense, May 21, 2015).

³⁰⁹ E-mail, February 15, 2014, in December 5, 2014 tranche, no. 280. For discussion of how the proposed outreach was ultimately handled, see E-mail, February 15, 2014, in December 5, 2014 tranche, no. 274; E-mail, February 15, 2014, in December 5, 2014 tranche, no. 269; and E-mail, February 15, 2014, in December 5, 2014 tranche, no. 281. This official also suggested current and forthcoming press coverage meant additional congressional outreach was required. E-mail, February 15, 2014, in December 5, 2014 tranche, no. 280.

³¹⁰ Anne Gearan and Ernesto Londono, “U.S. seeks prisoner swap with Taliban to free Amy Sgt. Bowe Bergdahl,” *Washington Post*, February 17, 2014.

³¹¹ E-mail, February 18, 2014, in August 27, 2014 tranche, no. 162. See also Brigadier General Robert White, classified interview transcript (redacted), September 24, 2014 [hereafter “White transcript”].

³¹² E-mail, February 18, 2014, in August 27, 2014 tranche, no. 162.

³¹³ E-mail, February 18, 2014, in December 5, 2014 tranche, no. 143. The reference to “today’s” newspaper probably reflects the fact that electronic version of the story appeared on February 17 and in the print edition on February 18.

Despite the private acknowledgement of veracity, the White House seemed to steer reporters away from this story. On February 18 Press Secretary Jay Carney had an extended colloquy on the *Washington Post* article. He did not confirm any of the details and repeated the January talking points almost verbatim (“our hearts go out to his family. . . . We can’t discuss all the details of our efforts. . . . We are not . . . involved in active negotiations with the Taliban. . . . [I]f negotiations do resume at some point then we will want to talk with the Taliban about the safe return of Sergeant Bergdahl”).³¹⁴

Also on February 18, a senior aide to General Martin Dempsey (then the chairman of the Joint Chiefs of Staff) emailed the Committee to clarify the related activities of the Joint Staff (JS). “JS [is] not directly involved and [there is] no real breaking news on this issue unfortunately,” the assistant reported.³¹⁵ In this period, the Committee’s general counsel contacted the senior-most official in the Department’s Office of Legislative Affairs (OLA). The general counsel was told that, as far as her interlocutor knew, the *Washington Post* account merely reflected the activities which then-Committee Chairman Howard P. “Buck” McKeon had been advised in 2011 and 2012.³¹⁶

Possibly as a result of this conversation, on February 21, an OLA staffer emailed others at the Committee seeking to arrange a call from Mr. Dumont. The purpose was “to clarify recent media reports regarding the potential for US talks with the Taliban and SGT Bergdahl.” The OLA staffer noted (using abbreviations for talking points and Afghanistan), “[h]aving reviewed the TP, it doesn’t seem to be anything you haven’t heard in recent AFG briefings.”³¹⁷

The talking points referenced by the OLA staffer suggested, “[w]e are not currently engaged in direct talks with the Taliban, and do not know if or when the Taliban will agree to resume talks they broke off in early 2012.”³¹⁸ That document further proffered that “[i]f asked” about “release of detainees from Guantanamo” the response should indicate “[w]e expect the Taliban to raise the issue of detainee transfers if talks resume. The Secretary of Defense, in close

³¹⁴ White House, Office of the Press Secretary, “Press Briefing by Press Secretary Jay Carney, 2/18/2014,” transcript, February 18, 2014. One Defense official who was not integrally involved but apparently knew the general contours of the negotiations at the time characterized Mr. Carney’s response as “stonewalling.” See E-mail, February 19, 2014, in August 27, 2014 tranche, no. 340; and E-mail, February 18, 2014, in December 5, 2014 tranche, no. 490 (“I am not involved in those discussions.”) However after Mr. Carney spoke, one email reports that the National Security Council staff updated the internal talking points. “[N]ote that they removed the reference to not currently being in active negotiations with the Taliban” one recipient observed to another. Because this phrase remains in other talking points, including those cited below, what transpired is difficult to discern. See E-mail, February 18, 2014, in December 5, 2014 tranche, no. 490; and E-mail, February 19, 2014, in December 5, 2014 tranche, no. 519 (“I was told some [new talking points] were in the works”).

³¹⁵ Internal Committee communications (in Committee possession). Furthermore, at the direction of the National Security Council staff, similar communications took place with the House Foreign Affairs Committee and the Speaker’s office. (See Internal Committee communications, in Committee possession, E-mail, February 19, 2014, in December 5, 2014 tranche, no. 352; and E-mail, February 21, 2014, in March 6, 2015 tranche, no. 324 (“NSS-directed calls to defense committee PSMs”).

³¹⁶ Internal Committee communications (in Committee possession).

³¹⁷ Internal Committee communications (in Committee possession); and E-mail, February 19, 2014, in December 5, 2014 tranche, nos. 350-354.

³¹⁸ Document captioned “NSS-Directed Outreach on Recent Media Reporting on AFG/Bergdahl,” attached to E-mail, February 21, 2014, in December 5, 2014 tranche, no. 161.

cooperation with other Principals from the President’s national security team, will carefully consider the issue in light of national security interests and consistent with applicable law.”³¹⁹

There is no evidence that the information conveyed by the Joint Staff officer or the OLA officials differed from what they thought to be the prevailing details at the time. Indeed, the prospect that such individuals are not privy to the relevant specifics of issues directly within the Committee’s jurisdiction greatly complicates its oversight function. How can the Committee proceed if it cannot rely on Department officials with which it is routinely in contact with to have access to information the Committee requires to undertake its work?

As arranged by OLA, Mr. Dumont’s call with Committee staff took place on February 21. In a subsequent interview with the Committee, Mr. Dumont could not remember placing the unclassified call or if he consulted the talking points before or during the conversation.³²⁰ However, Mr. Dumont did recount what he thought was his general understanding of the Bergdahl recovery effort was in this period, and what he would likely have conveyed at the time.³²¹

Mr. Dumont told Committee staff in the interview that, although he was not yet involved in the discussions, he knew Mr. Preston “and others . . . had been talking with the Qataris” in February 2014.³²² But, he said he was uncertain if the Qataris had consequently been in touch with the Taliban about the prospect of an exchange, and was even less confident that any engagement with the Taliban might result in a successful outcome.³²³ “[A]t this point in time I would say negotiations hadn’t resumed,” Mr. Dumont recounted. Rather, he believed the Department was “trying to get a response from the Taliban or the Qataris or anybody else” about the prospect of recovering Sgt. Bergdahl.³²⁴ According to the recollections of the Committee majority staffer who participated in the call with Mr. Dumont, this is the substance of what he conveyed.³²⁵ Regardless, Mr. Dumont and the OLA staffer agreed afterwards that the Committee representatives were “underwhelmed” with the details imparted to them.³²⁶

³¹⁹ Document captioned “NSS-Directed Outreach on Recent Media Reporting on AFG/Bergdahl,” attached to E-mail, February 21, 2014, in December 5, 2014 tranche, no. 161.

³²⁰ Dumont transcript, pp. 69, 74-75. For preparations for the calls, see E-mail, February 20, 2014, in December 5, 2014 tranche, nos. 355-359; and E-mail, February 21, 2014, in December 5, 2014 tranche, no. 155. Brig. General White also participated in the call (see E-mail, February 21, 2014, in December 5, 2014 tranche, no. 249 “General White and I have concluded calls . . .”). In an interview with the Committee, Brig. General White did not remember doing so. See White transcript, pp. 45-46.

³²¹ Dumont transcript, p. 75.

³²² Dumont transcript, p. 63 and p. 57. In describing his attitude when approving (and using) Bergdahl-related talking points for the media in 2014, Mr. Dumont described his concern about the sensitivities of the situation. “I didn’t want anything to endanger Sergeant Bergdahl, and I didn’t want to derail the talks we were having with the Qataris” (Dumont transcript, p. 73).

³²³ Dumont transcript, pp. 75-76. Mr. Dumont said he did not know at the time how advanced were the discussions with Qatar (p. 64). He believed the Qataris were “presumably” (but not certainly) in contact with the Taliban as a consequence of the U.S. contact (p. 71, p. 53).

³²⁴ Dumont transcript, p. 75.

³²⁵ Dumont transcript, p. 77.

³²⁶ E-mail, February 21, 2014, in December 5, 2014 tranche, no. 239. As a consequence of two letters he wrote to Secretary Hagel, Rep. Duncan Hunter received a telephone call from the secretary on February 21 also. See sidebar.

The Committee staff's conversation with Department representatives, coupled with the White House's public demurral, left the Committee with the impression that recent news stories were wrong and no recent or relevant activities had taken place in connection with a potential swap. The Taliban, however, had a different understanding. On February 22, using the abbreviation "IE" for Islamic Emirate, the name the Taliban apply to their shadow government of Afghanistan ("the country"), and referring to its delegation in Qatar (the "Political Office"), the Taliban issued a statement that declared:

Some time ago the leadership of the IE had assigned the Political Office of the IE to hold talks with the Americans, with the mediation of Qatar, over the exchange [of] Afghan prisoners in Gitmo with one American prisoner who is with the Islamic Emirate. Based on the instruction the Political Office of the IE started working on this issue and thanks to mediation, some progress was also made. As proof that the American prisoner was present and alive, a video was provided to Americans about their prisoner.³²⁷

Possibly as a reflection of his belief that the Taliban were potentially unreliable and unpredictable negotiating partners, Mr. Dumont responded to the news of the suspension of talks by writing to colleagues "[u]nfortunately, not a surprise."³²⁸ But, contrary to what he later reported to the Committee was his uncertainty about the status of discussions, he evinced no surprise that the Taliban declared that they had been engaged by the Qataris and seemed to have been serious partners to the negotiations.

As described elsewhere in this report, by mid-February 2014, Administration principals and deputies had already contemplated the possibility of a prospective swap. A proof-of-life video had been solicited from the Taliban. The DOD general counsel and the secretary of defense had traveled to Doha to meet with Qatari officials. Journalists had discerned much of this in addition to related information, and the Deputy National Security Advisor and others had privately acknowledged its accuracy. Yet, the Department did not convey any of the details to the Committee. Indeed, the Taliban's statement to the Associated Press contained more specifics about a prospective exchange than what was conveyed through official channels to the Committee and others in Congress at the time.

On February 23, Mr. Dumont and Brig. Gen. White were advised that the State Department was "getting queries" about the Taliban statement. The "front office" for the Special Representative for Afghanistan and Pakistan suggested responding

³²⁷ E-mail, February 23, 2014, in October 8, 2014 tranche, nos. 13-14. Spelling and punctuation as in the original. The statement was issued to the Associated Press. See Kathy Gannon, "Taliban says it suspends talks on held US soldier," *Associated Press*, February 23, 2014. Rear Admiral John Kirby, the Department spokesman, forwarded the AP article to Mr. Preston asking the general counsel if he anticipated requesting to "fix or amend" anything in the story. Mr. Preston replied "I don't." See E-mail, February 23, 2014, in November 3, 2014 tranche, no. 10. For other stories, see Qadir Sediqi, Taliban say they're suspending talks on captive U.S. soldier Bowe Bergdahl," *CNN*, February 23, 2014; and Mohammed Anwar, "Afghan Taliban kill 21 soldiers, suspend prisoner swap attempt," *Reuters*, February 23, 2014.

³²⁸ E-mail, February 23, 2014, in August 27, 2014 tranche, no. 284.

We have seen these reports. As we've said several times over the past few weeks: we have not been involved in active negotiations with the Taliban recently. . . . However there are some issues, including the safe return of Sgt. Bergdahl, we need to discuss with the Taliban directly and remain open to such discussions.³²⁹

On the same day, Mr. Preston wondered how to proceed. In an email to the Department's spokesman he said

In the prep for the budget hearings, the issue has come [up] as how SD ought to respond, in an open hearing, to questions about a reported "secret MOU" with Qatar and the Taliban concerning possible detainee transfers or a Bergdahl swap. What have you been saying to the press?³³⁰

The spokesman replied, "essentially nothing, sir. Only that we continue to work to try to bring Bergdahl home."³³¹ The next day, Mr. Preston circulated the revised talking points which had earlier been suggested by the State Department's special representative ("we have not been involved in active negotiations with the Taliban recently").³³² On February 25, Mr. Preston proposed talking points to staffers in Secretary Hagel's office. Anticipating questions about a "secret MOU" with Qatar or other aspects of a potential Taliban-for-Bergdahl swap, Mr. Preston's document suggested

The safe return of Army Sergeant Bowe Bergdahl remains a top priority for me as Secretary of Defense, and the U.S. Government is engaged in a concerted effort to bring this about [. . .]

As for recent reports, let me just say this: We have not been involved in active negotiations with the Taliban recently, but SGT Bergdahl's return is an issue we would like to discuss with the Taliban if and when such talks are restarted. [. . .]³³³

"If asked" further, the secretary could reply:

Any transfer of detainees from GTMO would be in accordance with applicable provisions of the NDAA. We will not transfer GTMO detainees unless associated threats can be substantially mitigated and humane treatment is reasonably assured.³³⁴

Months later, when the deputy special representative testified to a subcommittee of the Senate Foreign Relations Committee on April 30, he was asked about Sgt. Bergdahl. He testified

³²⁹ E-mails, February 23, 2014, in December 5, 2014 tranche, nos. 168-169.

³³⁰ E-mail, February 23, 2014, in November 3, 2014 tranche, no. 9.

³³¹ E-mail, February 23, 2014, in November 3, 2014 tranche, no. 9.

³³² E-mail, February 24, 2014, in March 6, 2014 tranche, no. 9.

³³³ E-mail (and attachment), February 25, 2014, in March 6, 2015 tranche, nos. 12-13.

³³⁴ E-mail (and attachment), February 25, 2014, in March 6, 2015 tranche, nos. 12-13.

“our colleagues across the government are striving in the most energetic and creative ways to secure his release.” Drawing upon the February talking points, he continued:

Unfortunately the Taliban broke off direct contact with us in January of 2012. We would very much like to return to direct contact with them and if we do at the top of our agenda will be Sergeant Bergdahl.³³⁵

Perhaps “direct contact” was desirable. But, according to Mr. Preston, the day after this testimony, the deputy special representative was with the U.S. delegation in Qatar.³³⁶ They were meeting with individuals acting as intermediaries with the Taliban, in a session which had been arranged to allow the deputy special representative to leave for Doha *after* appearing before the Senate.³³⁷

Indeed, in the 19 weeks between the call organized by OLA to Committee staff and the Taliban Five exchange, talks on a prospective swap stopped, restarted, senior Defense officials flew overseas two more times to negotiate an MOU developed by the DOD general counsel, and that agreement was signed in a special Washington ceremony with senior Qatari government officials. In this period, the Department solicited an opinion from the Department of Justice about congressional notification, special briefings for the Secretary of Defense were convened, and extraordinary steps were taken by the Department’s Special Envoy for the Closure of the Guantanamo Bay Detention Facility and the Office of Detainee Policy to prepare detainee transfer paperwork.

The Department failed to advise the chairman or others in Congress of any of these actions or other preparations for the Taliban Five exchange, despite specific promises to do so. Indeed, after February 2014, the Committee received no further outreach from the Department about any of the Department’s related actions. Following Mr. Dumont’s call to the Committee, the next communication received was when Chairman McKeon was contacted hours before the Taliban Five left GTMO on May 31. Furthermore, the Committee rejects the suggestion that negotiating with Taliban by way of Qatari intermediaries is not akin to negotiating with the Taliban. Not only is such crabbed parsing inaccurate, but it appears to be intended to mislead.

White House statements to the press combined with incomplete information relayed to the Committee precluded the Committee from gaining a full understanding of the extent of the Taliban Five exchange efforts as they progressed. This prevented the Committee from exercising appropriate oversight. The Department is obligated to communicate complete and accurate information. Failure to do so is inexcusable. The Department violated not only its legal obligations to the Committee, but also severely harmed its relationship with the Committee. This

³³⁵ The deputy special representative asked that these remarks be circulated to others involved in the Doha negotiations. See E-mail, May 1, 2014, in December 5, 2014 tranche, no. 75.

³³⁶ Stephen Preston, classified interview transcript (redacted), November 4, 2014, p. 63.

³³⁷ Travel arrangements were made more difficult by the fact that all the U.S. participants had complicated schedules. In addition to the Deputy Special Representative’s forthcoming appearance in the Senate, Mr. Preston had just arrived in Manila and the U.S. ambassador to Qatar was preparing to come to the U.S. when the need to return to Qatar became apparent. See E-mails, April 27, 2014, in March 6, 2015 tranche, nos. 124-125 (as supplemented by information conveyed to Committee staff by Department of Defense, May 21, 2015).

is an especially grave outcome given the history and tradition of cooperation and comity of the past many decades.

The Committee on Armed Services is responsible for overseeing the nation's most critical national security activities and programs. Without detriment to our security, Committee members are routinely briefed on highly classified operations, including before they take place. Especially in light of this fact, the actions of the Administration and Department in connection with the Taliban Five exchange constitute a significant breach of trust which is in addition to and distinct from the violation of the specific legal requirements pertaining to congressional notification of detainee transfers imposed by the National Defense Authorization Act.

As described elsewhere in this report, congressional leaders of both parties were concerned about a prospective Taliban swap when they were briefed about this possibility in 2011. At that time, the exchange was a component of a broader Afghanistan "reconciliation" effort, and advocates asserted a swap would not only allow for the recovery of a captive serviceman, but also potentially offer a mechanism to secure a lasting peace. Yet, even when faced with these desirable twin goals, members of Congress urged caution because they feared the risk of the transfer of Taliban leaders.

The exchange which took place three years later succeeded in recovering Sgt. Bergdahl but was utterly divorced from any effort to set a framework for reconciliation. Thus, the deal which was eventually carried out offered even fewer benefits than the proposal to which bipartisan congressional members previously objected. The Administration was knowledgeable about congressional concerns. The Administration knew the exchange they sought beginning in 2013 was likely to get even less congressional support. Thus, it seems the Administration sought to avoid providing appropriate, fulsome, and timely details to Congress after 2013 as a way to preclude congressional assessment of the Taliban Five swap before it was carried out.

FINDING III: Senior officials within the Department of Defense best equipped to assess national security risks associated with the detainee transfer were largely excluded from the Taliban Five efforts. This greatly increased the chance that the transfer would have dangerous consequences.

The Executive Order Task Force (EOTF), convened after President Obama's 2009 inauguration assessed the 240 detainees then held at GTMO. The EOTF recommended that 126 be transferred elsewhere as soon as arrangements could be made, in addition to 30 Yemeni detainees who could only leave GTMO once the security situation improved in Yemen or another location to receive them was identified.³³⁸ Since 2010, the Administration has transferred at least 53 detainees for whom this action was recommended by the EOTF.³³⁹

The Taliban Five and 43 other detainees were designated for "continued detention" by the Administration's EOTF.³⁴⁰ Nonetheless, the EOTF anticipated the possibility that detainees who were categorized for "continued detention" could nonetheless potentially leave GTMO, but only if "receiving countries implement appropriate security measures."³⁴¹ Furthermore, rather than have a "continued detention" decision be considered permanent and inalterable, more than one year after the EOTF completed its work, the Administration established a mechanism to occasionally reevaluate the status of each such detainee. "Periodic Review Boards," non-judicial panels of senior officials from various U.S. government agencies, have been convened to consider if circumstances have changed such that a detainee not previously designated for transfer could subsequently be placed into that category.³⁴² As a result, fifteen of the 48 detainees originally identified for "continued detention" by the EOTF have had their status

³³⁸ In reaching these recommendations, the Task Force nonetheless noted that "a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee." "Final Report; Guantanamo Review Task Force," January 22, 2010, p. 17 [hereafter "Guantanamo Review Task Force"].

³³⁹ "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba," Office of the Director of National Intelligence, March 2015; "Guantanamo Review Task Force;" and Department of Defense transfer press releases, (in Committee possession). A total of 130 detainees have been transferred since President Obama took office: 45 detainees were transferred prior to completion of the EOTF report; 53 were transferred as a result of EOTF designations; three were transferred following referrals for prosecution; four were transferred following Periodic Review Board decisions; and the Taliban Five were transferred despite their "continued detention" designation by the EOTF. The designation of 20 additional detainees transferred in 2010 and 2012 is unknown to the Committee.

³⁴⁰ Executive Order Task Force disposition worksheet, (in Committee possession).

³⁴¹ "Guantanamo Review Task Force," pp. ii and 25.

³⁴² The Periodic Review Secretariat is charged with administering periodic reviews to determine whether certain individuals detained at GMTMO represent a continuing significant threat to the security of the United States such that their continued detention is warranted. Periodic Review Boards are comprised of senior officials from the Departments of Defense, Homeland Security, Justice, and State; the Joint Staff; and the Office of the Director of National Intelligence. The Periodic Review Board system was established by Executive Order 13567, signed March 7, 2011 and further mandated by Section 1023 of the National Defense Authorization Act for the Fiscal Year 2012. (See also Special Envoy Paul Lewis, classified interview transcript (redacted), September 10, 2014, p. 30 [hereafter "Special Envoy Transcript"]; and www.prs.mil.) Theoretically, a detainee in "continued detention" could have his status changed to "referred for prosecution."

revised to be deemed “eligible for transfer.”³⁴³ As of December 1, 2015, four have subsequently left GTMO.³⁴⁴

The Taliban Five were recommended for “continued detention” by the EOTF, their cases were never considered by a Periodic Review Board (PRB), and as far as the Committee can determine, they were never scheduled to be assessed for a potential change of status.³⁴⁵ Indeed, the Taliban Five are the only detainees identified for “continued detention” who were transferred without an intervening alteration in designation. In light of the EOTF’s stipulation that possible transfer of “continued detention” detainees required the implementation of a security regime which took the circumstances into account, such a transfer placed a special onus on those responsible to ensure that appropriate conditions existed in the receiving nation.

Yet, several individuals and offices in the Department of Defense which are usually engaged in contemplating and bringing about transfers had a dramatically diminished role with the transfer of the Taliban Five. Perhaps because the Taliban Five left GTMO as a part of an atypical “prisoner exchange” rather than a regular detainee transfer, some might expect this unusual lack of involvement. But, the sidelining of the Department of Defense detainee transfer specialists is a significant deviation from standard procedure that yielded a dangerous outcome. The president’s EOTF determined that detainees designated for “continued detention” were those who “pose a high level of threat” based upon their training and experience, personal histories, and former organizational roles.³⁴⁶ Indeed, the transfer of detainees in this category suggests circumstances which would necessitate *greater* rather than reduced participation of subject matter experts.

Even the strongest proponents of GTMO closure did not appear to support transferring detainees designated for “continued detention.” Seven days before the Taliban Five left GTMO, National Security Adviser Susan Rice signed a memorandum to Secretary Hagel entitled “Guidance on Guantanamo Bay Transfers” which addressed ways to facilitate detainee movements *other* than the Taliban Five. It stated

[t]he President’s expectation is that all detainees who have been determined to be eligible for transfer or release by the Executive Order Task Force (EOTF) . . . the Periodic Review Boards . . . or by a court or competent tribunal of the United States having jurisdiction, will be repatriated or resettled from Guantanamo Bay as quickly as possible, consistent with U.S. national security interests.³⁴⁷

³⁴³ Periodic Review Secretariat, www.prs.mil; and “Guantanamo Review Task Force,” p. ii.

³⁴⁴ Special Envoy transcript, pp. 8 and 29. A Kuwaiti national designated for “continued detention” was transferred to Kuwait in November 2014 after a Periodic Review Board (PRB) determined “continued law of war detention does not remain necessary to protect against a continuing significant threat to the security of the United States.” See Department of Defense Press Release, “Detainee Transfer Announced,” Nov 5, 2014. A Saudi national’s status was also changed, and he was transferred in November 2014. See Department of Defense Press Release, “Detainee Transfer Announced,” Nov 22, 2014.

³⁴⁵ Deputy Special Envoy [name redacted], classified interview transcript (redacted), August 14, 2014, p. 48 [hereafter “Deputy Special Envoy transcript”]; and Special Envoy transcript, pp. 8 and 29.

³⁴⁶ “Guantanamo Review Task Force,” pp. 23-24 (quote p. 23).

³⁴⁷ Document captioned “Memorandum for the Secretary of Defense,” May 24, 2014 (in Committee possession). This guidance did not come as a surprise to the Department of Defense. For comments by the Department’s Special Envoy for Guantanamo Closure, see Special Envoy transcript, pp. 43-44.

Significantly, however, despite its otherwise forward-leaning guidance, the memorandum did not go so far as to suggest that detainees designated for “continued detention,” such as the Taliban Five, should be subjected to an expeditious process.

Special Envoy for Guantanamo Closure and the Office of Detainee Policy

The organization within the Department of Defense most closely involved in managing and coordinating the Department’s activities related to GTMO detainee transfers is the Office of Detainee Policy. Although the name and organizational structure has changed throughout the more than ten years the office has exercised these functions, officials there (along with counterparts at the Department of State) help to identify countries to which detainees might be transferred, and work to ensure these countries can successfully implement necessary security measures if transfers come about. From working on these tasks for hundreds of transferred detainees over many years, Detainee Policy has developed considerable institutional expertise. Staffers there have come to learn the relative effectiveness of various “security assurances” offered by other countries, as well as which locations have established records of successful transfers.³⁴⁸

Paul Lewis, the Department of Defense’s Special Envoy for Guantanamo Detention Closure, has held the position since October 2013. His deputy was a career civil servant who played an important role in the Department’s GTMO detainee efforts between February 2004 and his retirement in January 2015. Among other duties, the civil servant (who was the Deputy Special Envoy) had been the secretary of defense’s voting representative on the EOTF in 2009. He also had prior experience handling the only other detainee transfer to Qatar, in 2008.³⁴⁹ Notwithstanding these personal and institutional backgrounds, Mr. Lewis, the career civil servant, and others in the Office of Detainee Policy had negligible responsibilities associated with the Taliban Five transfer.³⁵⁰

After it was determined in December 2013 that Stephen Preston, the Department of Defense General Counsel, should travel to Qatar to begin his involvement in this matter, Mr. Lewis on several occasions made clear to Mr. Preston his availability to assist.³⁵¹ The general counsel did not seek his guidance. Mr. Lewis did not travel to Qatar to assist in the negotiations nor participate much in other matters relating to the transfer.³⁵² Mr. Lewis explained to the Committee, it became apparent early in the process that Mr. Preston would be handling the

³⁴⁸ Deputy Special Envoy transcript, pp. 21 and 34; The Department of Defense’s Special Envoy works collaboratively with a Special Envoy counterpart at the Department of State. Both officials co-chair the “Guantanamo Detainee Transfer Working Group,” an interagency body that coordinates decisions to transfer detainees out of GTMO. See Special Envoy transcript, pp. 11-12.

³⁴⁹ Deputy Special Envoy transcript, pp. 7, 34, and 67.

³⁵⁰ Special Envoy transcript, p. 28.

³⁵¹ E-mail, November 26, 2013, in November 25, 2014 tranche, no. 35; E-mail, December 2, 2013, in November 25, 2014 tranche, no. 5; E-mail, December 17, 2013, in November 25, 2014 tranche, no. 6 (all declassified at Committee request).

³⁵² Special Envoy transcript, p. 28.

Taliban Five issue.³⁵³ “It was clear to me that my role would be supporting Preston if he asked. . . [H]e was in charge,” Mr. Lewis reported.³⁵⁴

This distinction was apparently rooted in the circumstances of the prospective transfer. Because it was linked to the recovery of Sgt. Bowe Bergdahl or part of an effort to reconcile the Taliban with the Afghan government, some officials believed it should be handled outside the standard procedures. As Mr. Lewis said, “[i]t was my understanding that the Taliban Five . . . would be as part of either a discussion involving Sergeant Bergdahl or peace negotiations of some sort . . . [I]t would be different than regular detainee transfers.”³⁵⁵

Consequently, Mr. Lewis said Mr. Preston did not consult with him on the contents of the Memorandum of Understanding (MOU) with Qatar or any of the security arrangements referenced in that document.³⁵⁶ The senior civil servant who was Mr. Lewis’ deputy reported much the same.³⁵⁷ In an interview with the Committee, the senior official explained, “[m]y office was not involved with anything to do with the transfer of these five individuals from the first days in which they were considered.”³⁵⁸ Indeed, he said he was sufficiently uninvolved that he was uncertain even when the transfer discussions started.³⁵⁹

The exclusion of the specialists in Detainee Policy deprived the secretary of defense and other officials of the knowledge and background that they could bring to bear to this transfer. It also placed the special envoy and the officials in Detainee Policy in an unusual position when they were asked late on May 8, 2014 to prepare the standard transfer paperwork on an expedited basis. Having not been involved in the preceding discussions and not aware of the specifics which had been negotiated, they could neither outline these points in the documents they authored nor provide their fullest professional assessment.³⁶⁰

Referring to his conversation with Michael Lumpkin (who was “performing the duties of” the Under Secretary of Defense for Policy) in which the Taliban Five material was requested, the Deputy Special Envoy reported to colleagues in an email “[i]t will be tricky since we don’t have all the current facts, but he knows this and asked us to do the best we can.” The deputy also acknowledged that neither the Special Envoy nor others from Detainee Policy would attend the meeting the next day with Secretary Hagel because “we are not in the circle of trust.”³⁶¹

Referring to his office, Mr. Lewis recounted to the Committee staff, “[e]verybody knew that we were out of the loop,” but he and the others nonetheless endeavored to produce the sort of information the secretary expected when considering transfers. Indeed, Mr. Lewis explained

³⁵³ Special Envoy transcript, p. 33.

³⁵⁴ Special Envoy transcript, p. 36.

³⁵⁵ Special Envoy transcript, p. 33.

³⁵⁶ Special Envoy transcript, p. 61.

³⁵⁷ Deputy Special Envoy transcript, pp. 16, 17, and 53.

³⁵⁸ Deputy Special Envoy transcript, pp. 52-53.

³⁵⁹ Deputy Special Envoy transcript, pp. 52-53.

³⁶⁰ Special Envoy transcript, pp. 46-50.

³⁶¹ Email, May 8, 2014, in August 27, 2014 tranche, no. 47.

that his recommendation to approve the transfer was a placeholder in the Taliban Five paperwork he conveyed to Mr. Lumpkin.³⁶²

In light of this, it is difficult to understand the flurry of activity which Detainee Policy was directed to undertake. Despite the fact that Detainee Policy had almost no role in the Taliban Five process, staff were recalled late one evening to compile paperwork in a very short timeframe, and asked to proffer a “draft recommendation” on the transfer. Yet, once the documents were prepared, they may not have been forwarded to the secretary.³⁶³

The only other engagement Mr. Lewis and his deputy had before the transfer was some involvement, seemingly at Mr. Lewis’ request, in the Congressional notification efforts beginning on May 27.³⁶⁴ In the course of this effort, it became apparent that civilian Defense officials had not solicited the assent of the Chairman of the Joint Chiefs of Staff in the impending transfer of the Taliban Five. On May 29, General Martin Dempsey’s legal advisor wrote (making reference to the congressional notification) to Mr. Lewis to note that “General Dempsey supports [the] transfer but was never shown the CN letter and does not concur with the language that he was consulted and concurs.” Within two hours, any concerns were addressed. Mr. Lewis advised “issue resolved. Gen Dempsey okay with letter.”³⁶⁵ Perhaps the best illustration of the trajectory of the transfer in the days leading up to it is the fact that it was proceeding without securing the formal approval of the nation’s senior-most military officer.

Contextual information potentially missing when considering transfer arrangements

Limiting the engagement of the Detainee Policy office potentially deprived those working on the Taliban Five transfer access to relevant information. For example, before the Taliban Five, Qatar had received only one former GTMO detainee. By Secretary Hagel’s own admission in testimony to the Committee after the Taliban Five transfer, that 2008 experience “wasn’t particularly good.”³⁶⁶ Mr. Preston similarly acknowledged to the Committee that the detainee (Jarallah al-Marri), after being transferred from GTMO traveled to another country

³⁶² Special Envoy transcript, p. 49.

³⁶³ Special Envoy transcript, p. 50.

³⁶⁴ A May 27 email shows that National Security Council staff and officials in the Department sought to “obtain concurrence of Principals” for the congressional notification (or “CN”) on May 27. (See E-mail, May 27, 2014, in March 6, 2015 tranche, no. 28). The next day, Mr. Lewis asked to review the congressional notification letter before it was sent. (See E-mail, May 28, 2014, in September 19, 2014 tranche, no. 117; and E-mail, May 29, 2014, in September 19, 2014 tranche, no. 71 (declassified at Committee request).) On May 28, Mr. Lewis was also involved in suggesting how the International Committee of the Red Cross might have the required access to the Taliban Five immediately after their transfer if not beforehand. See E-mail, May 28, 2014, in September 19, 2014 tranche, no. 88 (declassified at Committee’s request).

³⁶⁵ E-mail, May 29, 2014, in September 19, 2014 tranche, no. 71 (declassified at Committee request). One month after the transfer, General Martin Dempsey, the Chairman of the Joint Chiefs of Staff, wrote to Senator Carl Levin that he “supported the Secretary’s decision to exchange five Taliban detainees for the release of Sergeant Bowe Bergdahl.” Letter dated June 23, 2014 (in Committee possession).

³⁶⁶ “The May 31, 2014, Transfer of Five Senior Taliban Detainees,” hearing transcript, Committee on Armed Services, U.S. House of Representatives, June 11, 2014, p. 53 [hereafter “Taliban hearing transcript”].

eight months later, an action Mr. Preston termed “inconsistent” with the restrictions imposed on him as a condition of his transfer.³⁶⁷

In 2008, the Joint Staff anticipated these difficulties. They advised senior DOD leaders that they disagreed (“non-concurred” in bureaucratic parlance) with the recommendation to transfer al-Marri. The staff was explicit in the reasons for objecting. “It is likely that there will be insufficient oversight or information sharing by the Government of Qatar after the transfer,” the Principal Deputy Assistant Secretary of Defense for Global Security Affairs was told at the time.³⁶⁸

It is not clear to the Committee the extent those who negotiated the terms of the Taliban Five MOU knew about these previous experiences with Qatar. For example, when asked about the security arrangements associated with the 2008 transfer, Mr. Preston implied that they were ill-defined. He told the Committee that the stipulations in the Taliban Five agreement were intended to improve upon this past deficiency.

One of the reasons we were having more formal discussions about a written MOU that would set forth a variety of security assurances and restrictions on the formerly detained individuals was in order to have a clearer documented and agreed to set of assurances that may not have been in place in . . . the previous experience

he said.³⁶⁹

However, Department documents suggest that a travel ban was an explicit component of the 2008 transfer. The decision memorandum signed by then-Deputy Secretary of Defense Gordon England included talking points which appear to be developed for the deputy secretary’s conversation with a senior Qatari official. The document urges the deputy secretary to note that measures should be instituted which “mitigate the security risk from returned detainees.” In particular, “these steps include restricting al-Marri’s travel outside of Qatar, as is necessary and appropriate with Qatari law.”³⁷⁰ Knowing the full details of the earlier experience may well have aided officials in crafting better arrangements for the Taliban Five.

The evidence suggests Mr. Preston and others were not knowledgeable or sought information about prior experiences with Qatar. By excluding Detainee Policy, which was intimately involved in developing and managing the previous arrangements, senior department officials were deprived of the input of knowledgeable staffers ordinarily responsible for such

³⁶⁷ Stephen Preston, classified interview transcript (redacted), November 4, 2014, p. 87 [hereafter “Preston transcript”]. See also “Detainee Transfer Announced,” U.S. Department of Defense, Release No. 640-08, July 28, 2008 (indicating Qatar destination); Memorandum for Chairman, Joint Chiefs of Staff, May 30, 2008, September 19, 2014 tranche, nos. 33-38 (quote on pp. 37-38) (declassified at Committee request); and “Ex-Guantanamo prisoner arrested at UK airport,” Alarabiya.net, February 25, 2009.

³⁶⁸ Memorandum for the Principal Deputy Assistant Secretary of Defense for Global Security Affairs, May 22, 2008, September 19, 2014 tranche, no. 34 (declassified at Committee request).

³⁶⁹ Preston transcript, p. 87.

³⁷⁰ Memorandum for Chairman, Joint Chiefs of Staff, May 30, 2008, September 19, 2014 tranche, nos. 33-38 (quote on pp. 37-38); and Decision Memorandum, September 19, 2014 tranche, no. 57 (declassified at Committee request).

matters. Indeed, since the Taliban Five transfer in 2014, the Committee has observed a troubling decline in the quality of the information included in required congressional notifications related to detainee transfers.

Indeed, the lack of detail and absence of data, including elements required by section 1035 of the National Defense Authorization Act for Fiscal Year 2014, prompted Committee Chairman William M. “Mac” Thornberry to express his concerns in a letter to the Department in September 2015.³⁷¹ The chairman was not only disturbed about the lack of transparency with Congress, but also the transfer decisions themselves. In some cases, the transfers appeared to be made despite unmitigated derogatory information contained in the notification.

One intended purpose of the congressional notification process is to allow Congress to consider, before a transfer, the extent to which proposed security agreements are adequate, especially in light of any previous transfers to the same country. The failure to notify Congress as stipulated in law deprived the Congress of this opportunity in the case of the Taliban Five. The National Defense Authorization Act for Fiscal Year 2014 authorized the secretary of defense to transfer detainees only thirty days after the secretary determined that certain specific conditions were met. This included an “an assessment of the capacity, willingness, and past practices” of the foreign country in meeting any assurances it had provided when receiving detainees previously, “including the country’s capacity and willingness to mitigate the risk of reengagement.”³⁷² Had the Department acted in accordance with the law, it is possible Congress could have discerned the scant extent to which the Department had considered the 2008 experience when crafting the 2014 agreement.

Although the Department did not engage Detainee Policy on the Taliban Five transfer, the Committee acknowledges it nonetheless prudently and consciously avoided transferring the Taliban Five directly to Afghanistan. Transferring detainees into a combat zone could have had disastrous effects on U.S. interests in the country, needlessly putting troops in harm’s way and complicating an already-complex security transition. Such a transfer would also have endangered our Afghan allies. In considering the Taliban Five transfer, the Committee recognizes that the Department appropriately recognized this particular risk. By contrast, the Department showed less caution when sending four other Taliban detainees to Afghanistan in December 2014, without assurances that they would be detained.³⁷³

Once out of GTMO, the Taliban Five could come to play an important role in Afghanistan. As former senior Taliban commanders, this could be the case even if they did not return to that country. Yet, it is notable that senior military officials in Afghanistan were not consulted in advance of the decision to move forward with the Taliban Five transfer. According to Secretary Hagel’s testimony to the Committee, both Army General Lloyd Austin (then-commander of U.S. Central Command) and Marine General Joseph Dunford (then-commander

³⁷¹ Rep. William M. “Mac” Thornberry, letter to Secretary of Defense Ashton Carter, September 8, 2015 (in Committee possession).

³⁷² Section 1035 of the National Defense Authorization Act for Fiscal Year 2014 (P.L. 113-66).

³⁷³ Department of Defense News Release, “Detainee Transfer Announced,” December 20, 2014. An Administration official stated that “the four men are not likely to be subjected to further detainment in Afghanistan.” See Helene Cooper, “Four Afghans Released From Guantanamo Bay,” *New York Times*, December 20, 2014.

of forces in Afghanistan) were “informed” (but their views not necessarily solicited) on the prospective transfer merely four days before it took place.³⁷⁴

Intelligence organizations not involved before transfer

Before the Taliban Five were sent to Qatar, the intelligence officials in the Department of Defense were also not involved in the decision-making process. Although the Defense Intelligence Agency (DIA) is the entity within the Intelligence Community with primary responsibility for intelligence relating to former GTMO detainees, the acting DIA director described the agency’s engagement in the Taliban Five transfer in a December 2014 letter to the Committee. DIA did not make “recommendations as part of the transfer deliberation process,” the acting director wrote.³⁷⁵

In addition, then-Under Secretary of Defense for Intelligence, Michael Vickers, had a minimal role in the Taliban Five transfer. Although the under secretary recounted for the Committee a meeting in early 2014 with Secretary Hagel, the Special Envoy for the Closure of Guantanamo, and other senior Department officials, to review certain details about the Taliban Five and their GTMO detention, he did not recall any discussion in that meeting of their prospective transfer.³⁷⁶ Assuming Mr. Vickers correctly recalls the approximate timing of this meeting, many activities associated with this possibility had taken place by this point, including decisions by senior policy-makers and the trip to Qatar by Mr. Preston and Secretary Hagel.

Indeed, in the months leading up to the transfer, Mr. Vickers was not aware of or invited to any interagency meetings on the subject. “I didn’t participate in any [meetings] and nobody told me about them,” he reported to the Committee.³⁷⁷ Mr. Vickers found out about the transfer the day before it occurred.³⁷⁸ He did not see the Memorandum of Understanding until after the transfer had taken place.³⁷⁹ Mr. Vickers said he was surprised he had been excluded from these matters because he said he was “generally” apprised of “most policy matters” and “anything operational” in the Department.³⁸⁰

The exclusion of Mr. Vickers and other senior officials in matters related to the Taliban Five transfer raises further questions about the MOU negotiations and transfer decision. The Committee is troubled by the intentional efforts to cut out Department officials with subject matter expertise, as well as senior military officials with a direct stake in the outcome of the transfer. In retrospect, it is clear that the Administration did not solicit the perspectives of those who may have offered dissenting views.

³⁷⁴ Taliban hearing transcript, p. 86.

³⁷⁵ “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba,” Office of the Director of National Intelligence, March 2014; and David Shedd, Acting Director, Defense Intelligence Agency (DIA) letter to Rep. Howard P. McKeon on DIA’s role in transfer of Taliban Five, December 11, 2014 (in Committee possession).

³⁷⁶ Michael Vickers, classified interview transcript (redacted), February 26, 2015, pp. 19-22 [hereafter “Vickers transcript”]. The Under Secretary also recalled several other related interagency meetings that took place during the first half of 2012. (See Vickers transcript, p. 18.)

³⁷⁷ Vickers transcript, p. 25.

³⁷⁸ Vickers transcript, pp. 28-29.

³⁷⁹ Vickers transcript, pp. 34-35.

³⁸⁰ Vickers transcript, pp. 28-29.

FINDING IV: The Department of Defense has failed to take sufficient precautions to ensure the ongoing national security risks posed by the Taliban 5 are mitigated, consistent with the Memorandum of Understanding with Qatar.

Since the Taliban Five transfer, the Committee has worked to oversee the implementation of the Memorandum of Understanding (MOU) between the Department of Defense and Qatar which governed the conditions of the exchange. Other congressional committees have also undertaken activities focused on the Taliban Five, appropriate to their jurisdiction. The House Intelligence Committee has been especially vocal in expressing concern about what its members have learned. Just before the MOU expired, that committee's majority members wrote to the president in May 2015 to declare

[d]espite the current restrictions of the MOU, it is clear . . . that the five former detainees have participated in activities that threaten U.S. and coalition personnel and are counter to U.S. national security interests--not unlike their activities before they were detained on the battlefield.³⁸¹

The Committee on Armed Services shares this deep concern.

The Intelligence Committee letter followed several earlier reports that suggested the Taliban Five were not abiding by the terms of their transfer. For example, in January 2015, then-Pentagon press secretary Rear Admiral John Kirby acknowledged that the Department "had reason to believe" that "at least one" of the Taliban Five were involved in "some activities . . . centered around potential reengagement." "[W]e communicated with the government of Qatar over that activity," he said, and "proper steps are being put in place to . . . further limit it."³⁸² Two months later, one news outlet reported that "at least three of the five Taliban leaders . . . have tried to plug back into their old terror networks."³⁸³

Between February and June 2015, the Committee and the subcommittee on Oversight and Investigations convened four related classified hearings and briefings with senior officials from the Department of Defense, Department of State, and the Intelligence Community to learn more about this important topic. The Committee is concerned that the unusual and ad hoc approach to transferring the Taliban Five, which excluded intelligence and detainee specialists, may have resulted in confused and deficient follow-up activities by the Department of Defense. The Committee had a difficult time discerning how and when responsibility for implementing the MOU transitioned within the Department and elsewhere in the executive branch, and the extent to which senior Department leaders are kept apprised of the implementation of the related security assurances.

³⁸¹ Rep. Devin Nunes et al letter to President Barack Obama, May 13, 2015.

³⁸² Department of Defense press briefing by Rear Admiral John Kirby, January 30, 2015.

³⁸³ Catherine Herridge, "Official: At least 3 members of 'Taliban 5' tried to reconnect with terror networks," *Fox News*, March 25, 2015.

U.S. – Qatar Memorandum of Understanding

When they arrived in Qatar, the Taliban Five were subjected to certain conditions imposed by Qatar. These conditions were meant to manage the danger the former detainees might pose. The conditions imposed were specified in a Memorandum of Understanding (MOU) between the United States and Qatar. Representatives of both nations signed the MOU in Washington, D.C., on May 12, 2014. Two weeks later, the Qatari Emir personally committed to the agreement in a telephone call with President Obama.³⁸⁴

The MOU became effective upon the arrival of the former detainees in Qatar on May 31, 2014. It had a term of one year.³⁸⁵ When that period expired, however, Qatar subsequently agreed to extend the restrictions until other lasting arrangements could be instituted.³⁸⁶ The MOU remains in place today.

The MOU is classified but has been made available to Congress for review. In testimony to the Committee in June 2014, then Secretary of Defense Chuck Hagel characterized the MOU as containing “strong” and “meaningful and enforceable” mechanisms.³⁸⁷

Based upon unclassified information available to the Committee, it is also possible to note the MOU specifies:

- “monitoring”³⁸⁸ to be undertaken by Qatar,³⁸⁹ with allowances for “information sharing” of details gathered.³⁹⁰
- Qatari “reintegration” efforts; actions meant to reunify the Taliban Five with their families, provide employment or other gainful activity, and offer education for their children.³⁹¹

and the MOU prohibits:

- travel outside Qatar.³⁹²
- engaging in conduct that will raise money for prohibited causes.³⁹³
- threatening American interests.³⁹⁴

The MOU does not specify actions to be taken if one or more former detainees violate the agreement.³⁹⁵

³⁸⁴ “The May 31, 2014, Transfer of Five Senior Taliban Detainees,” hearing transcript, Committee on Armed Services, U.S. House of Representatives, June 11, 2014, p. 8 [hereafter “Taliban hearing transcript”].

³⁸⁵ Michael Dumont, classified interview transcript (redacted), October 7, 2014, p. 100 [hereafter “Dumont transcript”]; and Taliban hearing transcript, p. 54.

³⁸⁶ Department of Defense Communication with House of Representatives, June 1, 2015 (in Committee possession). The MOU does not outline any specific actions to be taken upon the expiration of the one-year term (See Dumont transcript, p. 100).

³⁸⁷ Taliban hearing transcript, pp. 34, and 46.

³⁸⁸ Josh Earnest, White House press briefing transcript, January 30, 2015.

³⁸⁹ Stephen Preston, classified interview transcript (redacted), November 4, 2014, p. 88 [hereafter “Preston transcript”].

³⁹⁰ Taliban hearing transcript, p. 8.

³⁹¹ Preston transcript, p. 109. There were no additional arrangements for a formal custodial rehabilitation program.

³⁹² Dumont transcript, p. 100; and Taliban hearing transcript, pp. 8, and 54.

³⁹³ Dumont transcript, p. 101.

³⁹⁴ Dumont transcript, p. 101.

³⁹⁵ Dumont transcript, p. 102; and Preston transcript, p. 89.

For example, in November 2014, in response to a query from Rep. Joe Heck (then-Oversight and Investigations subcommittee chairman) about the Department's monitoring of the MOU, Secretary Hagel stated that he received regular updates on the topic from Stephen Preston, then-General Counsel at DOD. The secretary further noted that he was satisfied that the terms of the MOU were being met.³⁹⁶ By contrast, however, Mr. Preston told the Committee that his involvement in the Taliban Five ceased following the conclusion of the MOU negotiations.³⁹⁷ Indeed, other Department officials briefed the Committee on the status of the Taliban Five agreement three times in 2015. Mr. Preston did not participate.

The Defense Intelligence Agency reported to the Committee that it “does not play a role in the physical monitoring of the five detainees.”³⁹⁸ Under the assumption that the Department's other intelligence functions might have a role following the transfer, in December 2014, the Committee wrote to Michael Vickers, then-Under Secretary of Defense for Intelligence. Mr. Vickers provided classified written answers to questions about the activities the Department undertook, including in monitoring the MOU.³⁹⁹ He subsequently participated in a transcribed classified interview. Based upon the information gathered, combined with the knowledge that Mr. Vickers is no longer with the Department, the Committee does not have confidence that the Department has established clear accountability for follow-up related to the transfer.

Given the expectation that important follow-up activities might take place in Qatar, majority Committee staffers also traveled to Doha in 2014 in connection with this inquiry. The staff reported to the Committee that they were impressed by the incumbent U.S. ambassador's personal commitment to ensuring the MOU was carried out as specified. However, it was not apparent that all relevant personnel at the U.S. embassy understood the significance she placed on the Taliban Five exchange and the obligations and responsibilities it imposed on their functions.

The MOU initially had a term of twelve months. That period expired on May 31, 2015. The Committee was advised at that time that the MOU had been indefinitely extended and that the U.S. and Qatar were working to “find an option for these five individuals that mitigates any threats these individuals might pose.”⁴⁰⁰ The State Department also released a statement to the press confirming “all five remain in Qatar, where they remain subject to extensive monitoring as well as travel restrictions.”⁴⁰¹

³⁹⁶ “The Administration's Strategy and Military Campaign against the Islamic State in Iraq and the Levant (ISIL),” hearing transcript, Committee on Armed Services, U.S. House of Representatives, November 13, 2014, p. 47.

³⁹⁷ Stephen Preston, classified interview transcript (redacted), November 4, 2014, p. 89 [hereafter “Preston transcript”].

³⁹⁸ David Shedd, Acting Director, Defense Intelligence Agency (DIA) letter to Rep. Howard P. McKeon on DIA's role in transfer of Taliban Five, December 11, 2014 (in Committee possession).

³⁹⁹ Rep. Howard P. McKeon letter to Michael G. Vickers, Under Secretary of Defense for Intelligence, December 19, 2014 (in Committee possession).

⁴⁰⁰ E-mail communication with the Committee, June 1, 2015.

⁴⁰¹ Statement quoted in Justin Fishel, “Taliban 5' Travel Ban Extended for Further Negotiations,” *ABC News*, May 31, 2015.

There are indications that Qatar is eager to have the Taliban Five depart. In an August 2015 interview with the Associated Press, the Qatari foreign minister suggested that Qatar wanted the Taliban Five to receive passports to allow them to travel, presumably to Afghanistan. The government of Qatar, the minister told the news service, “would rather see them go to their children, to their family,” rather than remain in Qatar.⁴⁰²

Days before the transfer, arrangements were made for President Obama to talk with the Emir of Qatar to secure his personal commitment “to uphold and enforce the security arrangements” set forth in the MOU. A conversation between the two leaders before the detainee movement was considered by transfer proponents to be essential in order to help assure the success of the action.⁴⁰³ Seventeen months later, however, the president and Emir spoke again. In the intervening time, the MOU had been extended and worrisome information was apparently in hand about the Taliban Five. Thus, the Committee was surprised and dismayed to see no mention of the Taliban Five in a readout of President Obama’s October 2015 call with the Emir.⁴⁰⁴ Either the president did not broach the topic of the former detainees and the conditions of their presence in Qatar, or it was not considered sufficiently important to merit mention in the summary produced by the White House. Either scenario concerns the Committee.

The implementation and monitoring of the MOU involves many organizations across the U.S. government. But, the Taliban Five were held by the Department of Defense, and the Secretary of Defense is the official responsible for formally approving all transfers from Guantanamo. Although other organizations may have a role, the Committee believes it is unacceptable for the Department to relinquish accountability for detainees once they are transferred, regardless of other possible executive branch equities.

Given the grave stakes, the Committee’s engagement on this topic will continue.

⁴⁰² Adam Schreck, “AP Interview: Qatar’s FM urges ‘serious dialogue’ with Iran,” Associated Press, August 4, 2015. The Administration’s commitment to a close relationship with Qatar remains evident. In October 2014, Secretary Carter met with Qatar’s defense minister, where he “reaffirmed the strength and importance of the U.S.-Qatari relationship and the necessity for continued cooperation to ensure the stability of the Middle East.”⁴⁰² Furthermore, Qatar’s ambassador to the U.S. characterized Qatar as “among the staunchest and most effective” American allies. See October newsletter from the Embassy of Qatar (in Committee possession).

⁴⁰³ “The May 31, 2014, Transfer of Five Senior Taliban Detainees,” hearing transcript, Committee on Armed Services, U.S. House of Representatives, June 11, 2014, pp. 8 (quotation), 21, 53-54, 78, 123, and 149; Michael Lumpkin, classified interview transcript (redacted), October 16, 2014, pp. 86, 100-101, and 103; and Preston transcript, pp. 96-97.

⁴⁰⁴ Office of the White House Press Secretary, “Readout of the President’s Call with Amir Tamim bin Hamad al Thani of Qatar,” October 29, 2015.

Additional Sources of Information

During the course of this investigation, two individuals claimed to have knowledge of options other than the Taliban Five trade which could have resulted in the recovery of Sgt. Bowe Bergdahl. Because the Department of Defense claimed that the transfer of the Taliban Five was specifically managed and conducted due to the alleged exigencies of the situation and in the absence of other alternatives, it was necessary for the Committee to learn about what may have been considered or attempted instead of the scheme which was ultimately utilized. Accordingly, information was gathered from these individuals and considered at length by the Committee.

Alternative efforts and allegations of a ransom

In mid-February 2014, Rep. Duncan Hunter sent two letters to then-Secretary of Defense Chuck Hagel. Rep. Hunter wrote that he believed the U.S. government's recovery activities lacked a single leader to coordinate activities across agencies and suggested the appointment of such an individual would ensure that alternatives potentially available to the Department of Defense were evaluated before the proposed Taliban Five swap (as reported by the *Washington Post*) was implemented instead.⁴⁰⁵

Secretary Hagel telephoned Rep. Hunter on February 21. Talking points prepared by the office of Michael Lumpkin (who was "performing the duties of" the Under Secretary of Defense for Policy) suggested that the secretary note that Mr. Lumpkin was the Department's "point of contact" on Sgt. Bergdahl recovery initiatives.⁴⁰⁶ The talking points also suggested the secretary convey "I am not in a position to discuss specific DoD or even USG planning on this issue, but I can assure you that we are exploring a full range of options."⁴⁰⁷

When testifying before the Committee in June 2014 about the Taliban Five transfer, Secretary Hagel was asked if the exchange was the only non-military alternative available to the Department to repatriate Sgt. Bergdahl. The secretary responded, "Yes . . . this was the one option that we had." He also described it as the recovery option that "looked like the best."⁴⁰⁸ He said no other "non-kinetic" alternatives were "serious" and later emphasized that the Taliban

⁴⁰⁵ Rep. Duncan Hunter letter to Chuck Hagel, February 18, 2014; and Rep. Duncan Hunter letter to Chuck Hagel, February 20, 2014. Rep. Hunter also wrote to the president. See Rep. Duncan Hunter letter to Barack Obama, March 13, 2014 (all in Committee possession).

⁴⁰⁶ Document captioned, "Talking Points for Secretary of Defense Call with Representative Duncan Hunter," in August 27, 2014 tranche, nos. 349-351; E-mail, February 20, 2014, in November 3, 2014 tranche, nos. 5-8; and E-mail and attachment, February 21, 2014, in August 27, 2014 tranche, nos. 353-354. Mr. Lumpkin's role was reiterated in an email distributed across the Office of the Under Secretary of Defense for Policy two weeks later. See E-mail March 6, 2014, in August 27, 2014 tranche, no. 96. The call apparently begat press inquiries to the Department. See e.g. E-mail, February 25, 2014, in December 5, 2014 tranche, no. 545; and E-mail February 25, 2014, in August 27, 2014 tranche, no. 279.

⁴⁰⁷ Document captioned, "Talking Points for Secretary of Defense Call with Representative Duncan Hunter," in August 27, 2014 tranche, nos. 349-351. The talking points also suggested the secretary say, "[w]e are working closely with the Department of State, Intelligence Community, and National Security Council Staff on a range of options to get SGT Bergdahl back" and "[o]ur DoD efforts are part of a whole-of-government approach. State Department is aware of our activities and we are aware of and involved in their efforts regarding SGT Bergdahl."

⁴⁰⁸ "The May 31, 2014, Transfer of Five Senior Taliban Detainees," hearing transcript, Committee on Armed Services, U.S. House of Representatives, June 11, 2014, p. 57 [hereafter "Taliban hearing transcript"].

Five transfer “was the one that was on the table that was the most realistic [and] viable.”⁴⁰⁹ Further, the secretary testified that he was not “aware of” anyone in the Department of Defense (DOD) who presented any non-combat alternatives for the president’s consideration.⁴¹⁰

However, Army Lieutenant Colonel Jason Amerine believed that, as a consequence of his assignment to the U.S. Army’s directorate of operations and plans headquarters staff, he was knowledgeable of details which varied from those conveyed in Secretary Hagel’s public testimony. As a result of a request from Rep. Hunter, the Department of Defense Inspector General (DODIG) subsequently opened an inquiry into some of Lt. Colonel Amerine’s allegations.⁴¹¹

Committee staff received testimony directly from Lt. Colonel Amerine.⁴¹² In addition, the Committee conducted transcribed classified interviews with other officers within the organization to which Lt. Colonel Amerine was assigned, including a subordinate and superior, and reviewed related material provided by the Department. In undertaking this work, the Committee was sensitive to several facts, including that the DODIG was undertaking its own investigation.

Lt. Colonel Amerine’s subordinate and superior confirmed that then-Lieutenant General John Campbell (at the time the Deputy Chief of Staff of the Army for operations and plans) asked if there was anything their organization “could do . . . to . . . help possibly in the recovery” of Sgt. Bergdahl.⁴¹³ Although recollections varied, this request likely came in mid-2012.⁴¹⁴ They also reported that, as a first step, their organization sought to determine what entities of the U.S. government were involved in the recovery of American citizens (including Sgt. Bergdahl) who were held captive abroad.⁴¹⁵ Their work resulted in contact with U.S. Central Command (CENTCOM), Department of State, Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and others.⁴¹⁶ The subordinate recounted that this review left him with impression that coordination between various involved agencies was problematic. “[T]here were . . . seven or 10 disparate agencies all working the same problem,” of recovering captive Americans he said, and “there wasn’t a whole lot of information sharing.”⁴¹⁷

⁴⁰⁹ Taliban hearing transcript, pp. 57-58.

⁴¹⁰ Taliban hearing transcript, p. 58.

⁴¹¹ “Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers,” hearing transcript, Committee on Homeland Security and Governmental Affairs, U.S. Senate, June 11, 2014, pp. 6, and 33 [hereafter “Senate hearing transcript”].

⁴¹² Although no classified information was imparted to or solicited from him, Lt. Colonel Amerine was interviewed in a facility in which classified material could be disclosed and by Committee staff who hold security clearances. The resulting transcript was not conveyed to the Department for a classification review because of the circumstances under which Lt. Colonel Amerine approached the Committee. Absent a confirmation that everything he said was unclassified, the transcript is being handled as if it contains classified information. For this reason, it cannot be quoted or referenced in this report.

⁴¹³ Army officer “A,” classified interview transcript (redacted), September 9, 2015, pp. 12-13 [hereafter “Army officer ‘A’ transcript”]; and Army officer “B,” classified interview transcript (redacted), September 9, 2015, p. 10 (quotation) [hereafter “Army officer ‘B’ transcript”].

⁴¹⁴ Army officer “A” transcript, p. 12.

⁴¹⁵ Army officer “B” transcript, p. 12; and Army officer “A” transcript, pp. 16-17 .

⁴¹⁶ Army officer “A” transcript, pp. 14, and 19; and Army officer “B” transcript, pp. 12-13.

⁴¹⁷ Army officer “A” transcript, pp. 17-18. Similar accusations were made in an April 2014 Associated Press article. Citing “two individuals in the military,” the story reported that the “captors of an American soldier held for nearly

Lt. Colonel Amerine outlined a similar perspective during public testimony to the U.S. Senate Homeland Security and Governmental Affairs Committee in June 2015. In describing the activities of his organization, Lt. Colonel Amerine told the Senate committee “my office was asked to help get SGT Bergdahl home.” One contemplated initiative, Lt. Colonel Amerine said, was considering the possibility of trading Haji Bashar Noorzai, an Afghan serving a criminal sentence in U.S. prison, for Sgt. Bergdahl and five other Westerners held in the region.⁴¹⁸ He recounted that “we made a lot of progress” on this scenario.⁴¹⁹

Lt. Colonel Amerine’s subordinate testified to staff of the Committee on Armed Services that in February 2013, the subordinate, Lt. Colonel Amerine, Lt. Colonel Amerine’s superior, and others briefed Lt. General Campbell about their work and presented preparatory materials on five potential activities which their organization could possibly undertake.⁴²⁰ While classification restrictions prevent a fuller description, it is known that at this time there was a suggestion to engage retired Army Lt. Colonel Tony Shaffer.⁴²¹ The prospect of Lt. Colonel Shaffer’s involvement had been broached by Lt. Colonel Amerine’s subordinate.⁴²²

Shortly after the briefing with Lt. General Campbell, Lt. Colonel Amerine and his superior were advised by an attorney in the organization to not continue contact with Lt. Colonel Shaffer because of his “background.”⁴²³ Years before, Lt. Colonel Shaffer had alleged that the Department’s “Able Danger” program had provided intelligence which was overlooked before the 2001 terror attacks, and he published a book in 2010 which the Department believed contained classified information.⁴²⁴ Therefore, Lt. Colonel Amerine’s organization did not proceed further with that potential initiative, although before or after this briefing occurred, the

five years in Afghanistan have signaled a willingness to release him but are unclear which US government officials have the authority to make a deal.” To illustrate this point, the story recounted confusion within the Department about how best to notify the Bergdahl family in January when the proof-of-life was in hand. (See Deb Riechmann, “Taliban ready to deal on captive US soldier,” Associated Press, April 24, 2014.) Despite the Department’s denial, there was some mix-up in informing the family about the video. (See, e.g. E-mails, January 9, 2014, in August 27, 2014 tranche, nos. 67-70, 145 and 149-150; and E-mail February 15, 2014, in December 5, 2014 tranche, no. 274. For the Department’s objection to this characterization, see e.g. E-mail, April 24, 2014, in August 27, 2014 tranche, nos. 2-7; E-mail, April 24, 2014, in December 5, 2014 tranche, nos. 34-40; E-mails, April 24, 2014, in August 27, 2014 tranche, nos. 13-21 and 243-244.) As discussed elsewhere in this report, by late April the negotiation process was well developed. There had been extensive discussion about Sgt. Bergdahl’s recovery and agreement was struck soon after this time on the Memorandum of Understanding. Therefore, it is hard to believe that the Taliban were uncertain that the senior government officials from the National Security Council, State Department, and Department of Defense with whom the Qataris were engaging at the time had the necessary authorizations to pursue a deal.

⁴¹⁸ Senate hearing transcript, p. 21.

⁴¹⁹ Senate hearing transcript, p. 22.

⁴²⁰ Army officer “A” transcript, pp. 20-22, 25-26, and 53.

⁴²¹ Army officer “A” transcript, pp. 22, 25; and Army officer “B” transcript, pp. 22-23.

⁴²² Army officer “A” transcript, p. 22; and Army officer “B” transcript, pp. 22-23.

⁴²³ Army officer “B” transcript, pp. 22-23, 38, and 39 (quotation).

⁴²⁴ The DODIG “did not substantiate” the Able Danger accusation. See Department of Defense, Office of Inspector General, “Alleged Misconduct by Senior DOD Officials Concerning the ‘Able Danger’ Program and Lt. Colonel Anthony A. Shaffer, U.S. Army Reserve,” case no. H05L97905217, September 18, 2006 (in Committee possession). For *Dark Heart*, see for example, Scott Shane, “‘Operation Dark Heart’ Author Sues for Uncensored Edition,” *New York Times*, December 14, 2010; and “Pentagon Relaxes Censorship of Afghan War Memoir,” *Secrecy News*, January 23, 2013, Vol. 2013, no. 8.

subordinate attempted unsuccessfully to interest CENTCOM, the DEA, and FBI in having Lt. Colonel Shaffer involved.⁴²⁵ (Lt. Colonel Shaffer's activities are discussed further below.)

When another of the five potential endeavors to assist with Sgt. Bergdahl's recovery broached with Lt. General Campbell was also subsequently dropped, three possibilities remained.⁴²⁶ Lt. Colonel Amerine's organization then proceeded to obtain formal authority from the secretary of defense to exercise these options.⁴²⁷ According to his superior, this authority was not granted until about May 3, 2014.⁴²⁸

Around May 27, (coincidentally the day U.S. Southern Command was directed to prepare the Taliban Five to leave GTMO), Lt. Colonel Amerine's superior met with Mr. Lumpkin to discuss the newly-acquired authorization.⁴²⁹ At that time, Mr. Lumpkin advised, according to the superior, that "in a few days' time you're not going to need this."⁴³⁰ Mr. Lumpkin was not more specific, but the superior recounted that "it was clear in the discussion that Bergdahl was about to be released."⁴³¹ As a consequence, Lt. Colonel Amerine's superior ceased all related planning activities.⁴³²

Lt. Colonel Amerine's allegations enabled the Committee to have a fuller understanding of the events which transpired in connection with Sgt. Bergdahl's recovery. The DODIG's related review was also illuminating. The DODIG determined that "in early 2014" a "non-Department of Defense (DOD) agency planned an operation . . . to secure Sgt. Bergdahl's release." The DODIG found that this "agency erroneously suggested that Sgt. Bergdahl's release was imminent" and that "DOD was aware of this operation and maintained situational awareness of it, but did not directly participate in it."⁴³³

Emails produced to the Committee by the Department in September 2015, and subsequently declassified at its request, discuss actions which may be related to what the DODIG references. For example, one February 27, 2014, email states "[i]n approximately 7-10 days, there is a possibility that the USG[overnment] may be able to recover Sgt. Bowe Bergdahl."⁴³⁴ Another email references the Joint Special Operations Command and a briefing "slidedeck"

⁴²⁵ Army officer "A" transcript, pp. 23, 26, and 35.

⁴²⁶ Army officer "A" transcript, p. 28.

⁴²⁷ Army officer "B" transcript, pp. 11, and 29. Lt. Colonel Amerine's subordinate has a different recollection of the need for authorities. See Army officer "A" transcript, pp. 28, and 30-31. Lt. General Campbell was subsequently promoted to General and became the Vice Chief of Staff of the Army. Presumably, he recalled the task he gave Lt. Colonel Amerine's office because when he learned on January 9, 2014 about the proof-of-life video, he reported to Admiral James Winnefeld (then-Vice Chairman of the Joint Chiefs of Staff) that he would ensure that an officer from Lt. Colonel Amerine's office talk with Mr. Dumont. See E-mail, January 9, 2014, in August 27, 2014 tranche, no. 68; and Army officer "B" transcript, pp. 25-26, and 28-29.

⁴²⁸ Army officer "B" transcript, pp. 15, and 33.

⁴²⁹ Army officer "B" transcript, p. 15. For instructions given to GTMO, see Michael Lumpkin, classified interview transcript (redacted), October 16, 2014, pp. 104-105 [hereafter "Lumpkin transcript"]; and General John Kelly, classified interview transcript (redacted), November 14, 2014, pp. 53, 55, and 59.

⁴³⁰ Army officer "B" transcript, p. 33.

⁴³¹ Army officer "B" transcript, p. 34.

⁴³² Army officer "B" transcript, pp. 35-36.

⁴³³ Jon T. Rymer (DOD Inspector General) letter to Rep. Mac Thornberry, August 4, 2015 (in Committee possession).

⁴³⁴ E-mail, February 27, 2014, in September 21, 2015 tranche, no. 2.

which had been “evidently worked up by JSOC, replete with a code name and an exfiltration plan.”⁴³⁵

After receiving this email, Michael Dumont (the Deputy Assistant Secretary of Defense for Afghanistan, Pakistan, and Central Asia) wrote to Navy Rear Admiral Craig Faller (then-Director of Operations, CENTCOM) and Army Brigadier General Robert White (then-Director, Pakistan Afghanistan Coordination Cell for the Joint Staff) declaring “[f]or something that was to be very, very close hold and extremely sensitive, this is starting to get out. We need to somehow shut this down and get the info back under control.” “I will do what I can from D[istrict of] C[olumbia],” Mr. Dumont said, “but this is getting W[hite] H[ouse] attention.”⁴³⁶

Yet, when the Committee asked in transcribed classified interviews about alternative repatriation options for Sgt. Bergdahl, no witnesses, including Mr. Lumpkin, Mr. Dumont, and General Joseph Votel, (then-Commander of Joint Special Operations Command) evinced knowledge of activity to recover Sgt. Bergdahl which reached advanced stages. For example, Mr. Dumont was asked “how close any of those [contemplated recovery] efforts came? . . . [w]ere you on the verge at some point [of recovering Sgt. Bergdahl]?” Mr. Dumont responded, “During my tenure, I would say, no, we were not on the verge. Proposals that people were coming to talk to me about I thought were half-baked and ill-conceived and risky. . . I didn’t find anything that was viable.”⁴³⁷

Mr. Dumont responded to written follow-up questions posed by the Committee subsequent to his classified interview. He stated that:

at various times I would learn that various U.S. military organizations were working to locate Sgt Bergdahl or obtain his release; however, none of them ever brought any proposal or concept forward for consideration by DoD leadership during the period of my service as the DASD for the AF-PAK region. Every time I heard of an idea to obtain Sgt Bergdahl’s release, the information was presented to me as a concept or idea that was being developed — but no idea or concept was ever viable enough to be acted upon at the time it was described to me. I doubt any of the avenues being looked into at various times became viable enough to pursue. Had they, I would have been formally briefed I[n] A[ccordance] W[ith] established DoD procedures for such efforts.⁴³⁸

The Committee is deeply concerned that it is difficult to reconcile these characterizations with information contained in the DOD emails and what was discerned by the DODIG. Furthermore, the fact that the Committee did not learn about any prospective alternative recovery planning efforts until related information was produced in the course of this investigation

⁴³⁵ E-mail, February 28, 2014, in September 21, 2015 tranche, no. 23.

⁴³⁶ E-mail, February 28, 2014, in September 21, 2015 tranche, no. 41.

⁴³⁷ Michael Dumont, classified interview transcript (redacted), October 7, 2014, p. 32 [hereafter “Dumont transcript”].

⁴³⁸ Michael Dumont, classified interview follow-up questions (redacted), April 18, 2015, p. 4 (in Committee possession).

additionally illustrates the fraught oversight relationship which exists between the Committee and the Department.⁴³⁹

Given the significant issues raised, the Committee, in collaboration with the House Permanent Select Committee on Intelligence, will continue to investigate this subject.

In his June 2015 testimony to the Senate, Lt. Colonel Amerine also made another allegation. He said that he believed the United States government had paid money to some foreign party in an attempt to recover Sgt. Bergdahl, but this payment had failed to result in Sgt. Bergdahl's repatriation.⁴⁴⁰ In August 2015, however, the DODIG reported to the Committee that a review by its Defense Criminal Investigate Service "did not substantiate that a payment was made or attempted in connection with efforts to recover Sgt. Bergdahl."⁴⁴¹ The DODIG did find, however, that "small payments were made to individuals in return for information relating to Sgt. Bergdahl's captors, location, or physical condition." It reported "[t]hese payments were described as ranging from \$100 up to \$1000 per payment."⁴⁴² These findings comport with other information gathered by the Committee.⁴⁴³

Lt. Colonel Tony Shaffer

Retired Army Lt. Colonel Shaffer separately approached the Committee. Lt. Colonel Shaffer was known to the Committee from his previous high-profile public activities noted above. When meeting with the Committee in connection with the Taliban Five, Lt. Colonel Shaffer described an alternative repatriation option that he said he had discussed earlier with

⁴³⁹ In his interview, Mr. Dumont was asked about potential alternatives. He replied, "I wouldn't say there were options. . . 'activity' would maybe be a better term." (See Dumont transcript, p. 33). When Mr. Lumpkin, was asked if the Taliban Five transfer was the only option being considered by DOD around the time the swap took place, he told the Committee he was "aware of other lines of effort that CENTCOM was working." He elaborated that "some of these were well outside the scope of clearance" that could be discussed during the Top Secret interview. However, the Committee employs staff cleared to receive information classified at all levels and the Department made no subsequent effort to advise the Committee of information at a higher clearance. (See Lumpkin transcript, pp. 27-28, 32, and 45).

⁴⁴⁰ Senate hearing transcript, p. 20.

⁴⁴¹ Jon T. Rymer letter to Rep. Hunter, August 4, 2015 (in Committee possession).

⁴⁴² Jon T. Rymer letter to Rep. Hunter, August 4, 2015 (in Committee possession). The Office of the Secretary of Defense provided written information to the Committee that no entity of the Department made any payments to the Haqqani Network, the Taliban, or any surrogates in connection with the exchange of Sgt. Bergdahl for the five Taliban detainees, nor provided any payment to Qatar in connection with this exchange. See document captioned "DOD Response to House Armed Services Committee Request to Secretary Hagel of October 17, 2014 – Item 3" (in Committee possession).

⁴⁴³ Among other material, a document provided to the Committee by the Department declared "[n]o entity of DoD made any payments to the Haqqani Network, the Taliban, or any surrogates in connection with the exchange of Sergeant Bergdahl for the five Taliban detainees." See document captioned "DOD Response to House Armed Services Committee Request to Secretary Hagel of October 17, 2014 – Item 3" (in Committee possession). Another 2011 public affairs document produced by the Department notes the "Department of Defense has offered up to \$1 million for information leading to the location and successful recovery of SGT. Bergdahl." See document captioned "Attachment C (APO Lines to Take) to FRAGO X (Public Information Program for Recovery of Missing Coalition Personnel (SGT Bowe Bergdahl, Colin Rutherford, Cydney Mizell," in March 27, 2015 tranche, nos. 190-191.

individuals in the Department of Defense.⁴⁴⁴ He said he believed this option would have been a preferable course of action to the Taliban Five transfer.

The Committee interviewed two civilian government employees of CENTCOM who Lt. Colonel Shaffer acknowledged were aware of his efforts. These individuals reported that on October 10, 2013, they met with Lt. Colonel Shaffer in a secure facility at an Army Intelligence Command headquarters building at Ft. Belvoir, Virginia.⁴⁴⁵ It is unclear the extent to which this meeting was a direct result of the activities of Lt. Colonel Amerine's subordinate outlined above.⁴⁴⁶ Regardless, Lt. Colonel Shaffer discussed an offer to assist in recovering Sgt. Bergdahl and proffered a written proposal titled "Track 2, Enhancement 1."⁴⁴⁷ The CENTCOM officials met with Lt. Colonel Shaffer for about two and one-half hours and talked with him to learn more about what he was suggesting and how he might proceed if his effort was deemed to be worth pursuing.⁴⁴⁸

These individuals reported to higher authorities at CENTCOM what they learned. An unclassified summary provided to the Committee by the Department states that CENTCOM subsequently "conducted an assessment of his specific offer to assist in the recovery of Sgt. Bergdahl" and decided not to pursue the proposal.⁴⁴⁹ Subsequently, the CENTCOM employees conveyed the decision to Lt. Colonel Shaffer on December 30, 2013 at a restaurant in Alexandria, Virginia.⁴⁵⁰

⁴⁴⁴ Although no classified information was imparted to or solicited from him, Lt. Colonel Shaffer was interviewed in a facility in which classified material could be disclosed and by Committee staff who hold security clearances. The resulting transcript was not conveyed to the Department for a classification review because of the circumstances under which Lt. Colonel Shaffer approached the Committee. Absent confirmation that everything he said was unclassified, the transcript is being handled as if it contains classified information. For this reason, it cannot be quoted or referenced in this report. In his interview with the Committee, General Votel described a proposal from Lt. Colonel Shaffer related to Lt. Colonel Shaffer's putative "access and placement with certain people in Pakistan, within the Pakistani government, who might be able to assist" with locating and recovering Sgt. Bergdahl." See General Joseph Votel, classified interview transcript (redacted), December 1, 2014, pp. 35, and 38-40.

⁴⁴⁵ CENTCOM official "A", classified interview transcript (redacted), July 15, 2015, pp. 24, 26, 30, 37, and 50 [hereafter "CENTCOM official 'A' transcript"]; CENTCOM official "B", classified interview transcript (redacted), July 15, 2015, pp. 9-10, 14, 16, and 18 [hereafter "CENTCOM official 'B' transcript"]. The secure area was one in which information classified as high as "secret" could be discussed. Recollections varied as to whether the room was formally designated a Sensitive Compartmentalized Information Facility. See CENTCOM official "A" transcript, p. 26 and CENTCOM official "B" transcript, p. 14.

⁴⁴⁶ Army officer "A" transcript, p. 41; and Army officer "B" transcript, p. 24.

⁴⁴⁷ CENTCOM official "B" transcript, p. 18; and DOD unclassified summary of a classified November 1, 2013, CENTCOM memorandum (both in Committee possession).

⁴⁴⁸ CENTCOM official "A" transcript, pp. 34, and 37.

⁴⁴⁹ DOD unclassified summary of a classified November 1, 2013, CENTCOM memorandum (both in Committee possession); CENTCOM official "A" transcript, pp. 44, and 47; and CENTCOM official "B" transcript, p. 28. The U.S. Army headquarters intelligence directorate was aware of CENTCOM's decision. (See CENTCOM official "A" transcript, p. 49.)

⁴⁵⁰ CENTCOM official "A" transcript, pp. 56-57; and CENTCOM official "B" transcript, pp. 29-30.

What Lt. Colonel Shaffer told the Committee he proposed comports with what the CENTCOM officials and Lt. Colonel Amerine's subordinate also recounted. Having considered what the CENTCOM employees conveyed to the Committee, in addition to reviewing a classified CENTCOM memorandum which assesses Lt. Colonel Shaffer's proposal, the Committee agrees with DOD's decision not to pursue Lt. Colonel Shaffer's alternative. Although CENTCOM communicated the command's decision in December 2013 to Lt. Colonel Shaffer, and this was after the DOD general counsel and Secretary Hagel had traveled to Qatar in an effort to advance the Memorandum of Understanding for the Taliban Five transfer, the Committee found no evidence that these events are related. Indeed, the Committee determined that the CENTCOM officials who met with Lt. Colonel Shaffer were not aware of the Taliban Five transfer planning activities until they learned about the actual exchange from news reports five months later.⁴⁵¹

⁴⁵¹ CENTCOM official "A" transcript, p. 58; and CENTCOM official "B" transcript, p. 30.

Timeline

June 30, 2009

U.S. Army soldier Robert Bowdrie “Bowe” Bergdahl leaves his post at Combat Outpost Mest-Lalak in Paktika Province, and is taken captive.

February 2011

GTMO detainee, Awal Gul (contemplated for trade for Sgt. Bergdahl) has a heart attack and dies in GTMO.

Late 2011

The Administration renews efforts to link the recovery of Bergahl with measures meant to reconcile the Taliban with the government

Between September 2011 and March 15, 2012

Jeh Johnson, then-General Counsel of the Department of Defense, participates in three meetings with officials from Qatar to discuss the possibility of sending some Taliban GTMO detainees to that country as part of a swap for Sgt. Bergdahl.

November 2011

The Under Secretary of Defense for Policy, the Vice Chairman of the Joint Chiefs of Staff, and leaders from the Department of State, the National Security Council, and Intelligence Community provide classified details to then-Speaker John Boehner, then-House Armed Services Committee Chairman Howard P. "Buck" McKeon, Ranking Member Adam Smith, their counterparts at the Foreign Affairs and Intelligence committees, and others.

December 12, 2011

Several congressional members write to the president to express concern with the prospect that the Taliban Five might return to the fight if transferred from GTMO, and the likelihood that such a swap might induce other hostage taking.

December 31, 2011

The President signs the FY12 National Defense Authorization Act (NDAA). It includes sections mandating that the secretary of defense certify to Congress thirty days before any GTMO transfer that specific conditions existed to minimize the threat posed by the detainee. The president declares that the requirement “needlessly interfere[s] with the executive branch's processes for reviewing the status of detainees.”

Early 2012

Then-Secretary of State Hillary Clinton writes in response to a December 2011 letter sent by members of the of the House and Senate intelligence committees expressing discomfort with the GTMO Taliban exchange proposal. She writes:

I want . . . to make clear that any transfer from Guantanamo will be undertaken after consultation with Congress and pursuant to all legal requirements for transfers, including those spelled out in the FY2012 [National] Defense Authorization Act.

March 2012

The Taliban break off reconciliation discussions.

February 2013

Chuck Hagel is confirmed as secretary of defense.

June 2013

The Taliban open a “political office” in Qatar. The possibility of a detainee swap is revived.

June 20, 2013

In an interview with the *Associated Press*, a Taliban spokesman in Qatar suggests that trading the Taliban Five for Sgt. Bergdahl “could build bridges of confidence” in the reconciliation discussions.

June 21, 2013

White House Press Secretary Jay Carney states, “As we have long said . . . we would not make any decision about the transfer of any detainees without consulting Congress and without doing so in accordance with U.S. law.”

September 2013

Qatar again offers to serve as an “intermediary” with the Taliban for an exchange of the five GTMO detainees for Sgt. Bergdahl.

November 2013

The United States solicits from the Taliban a “proof-of-life” video of Sgt. Bergdahl showing that the soldier is still alive.

December 9, 2013

Steven Preston, then the General Counsel of the Department of Defense, meets in Qatar with the attorney general of Qatar to “refresh” a Memorandum of Understanding (MOU) potentially guiding a detainee transfer.

December 26, 2013

While signing the FY 2014 NDAA into law, the President issues a “signing statement” that expresses his opposition to the GTMO transfer sections.

January 2014

The Taliban transmit the proof-of-life video of Sgt. Bergdahl to the U.S. government.

Between January 10 and February 11, 2014

Cabinet secretaries from involved agencies meet at least once in a “Principals Committee” and the second-in-command for each gather one or more times in interagency “Deputies Committee” to discuss the MOU and swap.

Between February 18 and February 21, 2014

Committee staffers are in contact with Department of Defense officials, including an aide to the chairman of the Joint Chiefs of Staff, the senior-most official in the Office of Legislative Affairs, and a Deputy Assistant Secretary of Defense about news accounts about a prospective Taliban Five transfer. Committee staff are told the officials are either unknowledgeable about the details outlined or that the stories overstate the scope and extent of the notional action.

February 23, 2014

Department of Defense officials receive a message forwarded from the Taliban halting negotiations.

April 10, 2014

Administration officials return to Qatar in connection with reinvigorated MOU negotiations.

May 1, 2014

Administration officials return again to Qatar.

May 2, 2014

Qatari interlocutors confirm to U.S. officials that the Taliban agree to an exchange.

May 6, 2014

DOD seeks “authoritative guidance” from the Department of Justice (DOJ) about the “applicability and impact of the 30-day notice requirement.”

May 8, 2014

DOD’s Office of Detainee Policy prepares the paperwork typically compiled when the Secretary of Defense considers a GTMO transfer, including a draft congressional notification letter.

May 9, 2014

The Secretary of Defense reviews a “compilation of information” about each detainee.

May 12, 2014

The MOU is signed in the White House complex.

May 13, 2014

Michael Lumpkin (Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict) and other senior interagency representatives meet in a deputies meeting on details of the exchange.

May 22, 2014

The Department of Justice confirms that nothing has altered its previous opinion that the president can act despite the 30-day notice requirement.

May 23, 2014

Administration officials return to Qatar for the final session.

May 24, 2014

National Security Adviser Susan Rice signs a memorandum to Secretary Hagel relaying the president's guidance in connection with detainee transfers other than the Taliban Five. Entitled "Guidance on Guantanamo Bay Transfers," the memo states, "[t]he President's expectation is that all detainees who have been determined to be eligible for transfer or release by the Executive Order Task Force (EOTF) . . . the Periodic Review Boards . . . or by a court or competent tribunal of the United States having jurisdiction, will be repatriated or resettled from Guantanamo Bay as quickly as possible, consistent with U.S. national security interests."

May 27, 2014

Mr. Preston reports "We have a deal."

President Obama calls the Emir of Qatar to emphasize the significance the United States placed on the terms of the MOU, and to elicit a personal commitment from the Emir to uphold what had been promised.

Mr. Lumpkin directs General John F. Kelly, the commander of Southern Command, to prepare the Taliban Five to leave GTMO. General Kelly then relays the order to Rear Admiral Richard Butler, who leads JTF-GTMO.

Two U.S. Air Force C-17 transport planes arrive at GTMO.

The White House apparently deems unacceptable a proposed congressional "Engagement Plan," approved by Mr. Lumpkin on May 23.

May 29, 2014

Qatari representatives arrive in GTMO to escort the detainees to Qatar. The Qataris present the Taliban Five with a statement outlining the transfer terms.

May 31, 2014**c. 9:15 am**

The Taliban hand off Sgt. Bergdahl to U.S. Special Forces at a prearranged remote location in Afghanistan.

c. 10:30 am

Mr. Lumpkin issues order for the Taliban Five to be dispatched.

c. 11:15 am

Chairman McKeon learns by phone that Sgt. Bergdahl has been recovered and the Taliban Five are about to be sent to Qatar.

Sgt. Bergdahl's parents are notified of his release by a liaison officer at the Special Operations Command.

c. 11:40 am

The aircraft carrying the Qatari delegation, the Taliban Five, and U.S. security personnel is en route to Qatar from GTMO.

c. noon

The White House conducts a call with members of the media, although the information discussed could not be used until 12:30.

12:28 pm

The White House releases President Obama's official statement regarding Sgt. Bergdahl's recovery. It does not mention the Taliban Five transfer.

June 2, 2014

The Committee receives the written congressional notification. The letter includes the security assessments required by the NDAA. By law, both were to be submitted 30 days before the transfer.

January 30, 2015

Then-Pentagon press secretary Rear Admiral John Kirby acknowledges that the Department "had reason to believe" that "at least one" of the Taliban Five were involved in "some activities . . . centered around potential reengagement."

May 13, 2015

House Intelligence Committee's majority members write to the president to declare:

[d]espite the current restrictions of the MOU, it is clear . . . that the five former detainees have participated in activities that threaten U.S. and coalition personnel and are counter to U.S. national security interests--not unlike their activities before they were detained on the battlefield.

May 31, 2015

The Committee is advised that the MOU has been indefinitely extended upon the expiration of its original one year term, and that the U.S. and Qatar were working to "find an option for these five individuals that mitigates any threats these individuals might pose."

Appendix

This investigation involved hearings, site visits, interviews, and the evaluation of a considerable volume of written material provided by the Department of Defense. As a first step, days after the transfer, the Committee convened a hearing in June 2014 to hear directly from then-Secretary of Defense Chuck Hagel and other officials. Between August 2014 and September 2015, Committee staff subsequently conducted 16 transcribed classified interviews (totaling more than 31 hours) to talk first-hand with Department officials involved in planning the transfer, arranging for the exchange, and fulfilling other roles. Staff also reviewed several hours of classified Department of Defense video of GTMO's preparations for the transfer and how the Taliban Five were accommodated on the U.S. Air Force flight to Qatar.

In September 2014, then-Oversight and Investigations subcommittee Chairman Joe Heck and Ranking Member Niki Tsongas traveled to GTMO to interview a senior U.S. Army officer who helped to oversee the transfer activities. Other members, including Rep. Jackie Speier and Rep. K. Michael Conaway from the subcommittee, were among the participants in that bipartisan Congressional Delegation which also reviewed GTMO's continuing practices and procedures. Two months later, majority staff traveled to Qatar to meet with U.S. embassy personnel and senior Qatari government representatives to gain a better understanding of Qatar's role in the Taliban Five transfer and to learn more about the detainees' subsequent integration in Qatar.

The Committee sent 20 letters, including requests for classified and unclassified documents, emails, videos, and other information from the Department of Defense.⁴⁵² Although this ultimately yielded nearly 4150 pages of written material, the Department's provision of some of this information took much longer than anticipated or was otherwise problematic as described below.⁴⁵³ Therefore, the Committee's inquiry extended beyond Chairman Howard P. "Buck" McKeon's retirement at the conclusion of the 113th Congress and the election of Rep. William M. "Mac" Thornberry as Committee chairman in the 114th Congress.

Upon ascending to the chairmanship, Rep. Thornberry directed the continuation of the investigation. He asked for further assistance from the Oversight and Investigations subcommittee, in which Rep. Vicky Hartzler (chairwoman) and Rep. Speier (ranking member) had assumed leadership. Shortly thereafter, Chairwoman Hartzler led a bipartisan Congressional Delegation to GTMO, which included Rep. Gwen Graham from the subcommittee among its participants.

Some information initially conveyed by the Department was incomplete. For example, the Department provided the Committee with more than 165 pages of unclassified emails in which the names of originators and/or recipients were redacted in 900 instances. In about 40 other cases, substantive content was also redacted.

⁴⁵² Chairman McKeon sent 12 letters; Chairman Thornberry sent eight.

⁴⁵³ Despite several specific requests to the Administration, for example, it took until July 2015 for the Department to convey details on the timing and substance of certain relevant departmental communications with the Department of Justice.

This was unacceptable to the Committee. Such redactions made it impossible to properly interpret and contextualize information critical to this inquiry. Although Department officials described these elisions as “minimal” and asserted that they were rooted in “confidentiality concerns associated with executive branch deliberations,” and it is true that only a small percentage of documents were affected, such redactions, regardless of volume, impeded proper Congressional oversight.⁴⁵⁴ A duly-authorized Congressional investigation requires the complete production of all relevant information. Because the Administration’s performance in this regard threatened to further weaken the already endangered oversight relationship which this report otherwise highlights, the Committee invoked legislative remedies to spur the Department to produce the necessary information. As a consequence, the Department addressed the Committee’s concerns.

Evidentiary basis of report

Interview transcripts and emails provide the substantial basis for this report. Although the Committee received and evaluated classified and unclassified information, it elected to produce only this unclassified report because providing information in the public domain allows for the most vigorous oversight. The Committee does not believe the classified material contravenes the findings set forth. In other words, public access to the classified records would not alter the Committee’s findings.

How this report’s unclassified source material was gathered and managed also deserves further explanation. Most of the emails the Department provided to the Committee were unclassified.⁴⁵⁵ However, the Committee also received hundreds of pages of classified emails. In order to cite some of these in this report, the Department declassified about 150 of these pages at the request of the Committee.

A similar process existed for most transcripts of Committee staff interviews. Interviews took place in a classified setting and classified transcripts were produced and retained by the Committee. With the exceptions outlined below, the Committee subsequently provided transcript copies to the Department for the sole purpose of allowing DOD classification reviewers to identify for the Committee which portions were *not* classified. The Department was not permitted to share these transcripts, including with other potential interview subjects.⁴⁵⁶

This declassification process allowed the Committee to obtain a complete, albeit classified, record for the Committee’s use, while providing a corpus of material to cite in this public report. This arrangement also allowed Committee to assess what material in each transcript was deemed classified to ensure that the classification process was not being inappropriately applied in order to keep information from the public. While the Committee was

⁴⁵⁴ Michael J. Stella, Performing the Duties of Assistant Secretary of Defense (Legislative Affairs), letter to Rep. Mac Thornberry, March 6, 2015; and Michael J. Stella, Performing the Duties of Assistant Secretary of Defense (Legislative Affairs) letter to Rep. Mac Thornberry, March 26, 2015.

⁴⁵⁵ In referencing emails, this report notes the email date, date in which the email was provided to the Committee (tranche date) and the page number (no.) applied by the Department to the email in the tranche.

⁴⁵⁶ The committee is aware of miscellaneous immaterial transcription errors, including minor transcription mistakes caused by audio quality or the transcriptionist’s unfamiliarity with certain names, terms, and/or abbreviations. Footnotes in this document indicate when alterations have been made to accommodate these errors.

generally satisfied with the Department's performance in this regard, the Committee disagreed with the extent to which the Department considered information on two pages in one transcript to be classified. However, the Committee successfully appealed these redactions to the Department.

Two interview transcripts were not provided to the Department for classification review. These were classified transcripts of Committee staff interviews with individuals who came to the Committee's attention and sought to convey (outside of official Department of Defense channels) information putatively relevant to the inquiry. At the time, the need to keep confidential the identities of these interview subjects and aspects of their discussions with the Committee precluded conveying these transcripts to DOD.

**DISSENTING VIEWS OF
ADAM SMITH, RANKING MEMBER,
COMMITTEE ON ARMED SERVICES
AND
JACKIE SPEIER, RANKING MEMBER,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON ARMED SERVICES**

This report is an unbalanced, partisan, and needless attempt to justify a predetermined position regarding the transfer of five Guantanamo detainees in exchange for the release of Sergeant Bowe Bergdahl from enemy captivity. The report struggles to prove its assertions, yet it excoriates the Administration over the means by which Sergeant Bergdahl's release was secured. In our view, the report is more advocative and speculative than determinative, and we disagree with a preponderance of its assertions.

We will not provide an exhaustive evaluation of the report; however, we will emphasize our principal objections and concerns with the following aspects of it:

Bias

The report is woefully unbalanced in its presentation. We note that the report's findings are remarkably similar to the resolutions emblazoned in H. Res. 644, which passed the House of Representatives in September 2014. Indeed, it appears as if the report's primary objective is to justify those resolutions after the House adopted them by constructing a biased narrative to support them. The report also indulges in accusatory speculation. The combined result is a weighted and politically motivated document that makes no serious effort to fairly assess the Administration's perspective. Imbalance is also evidenced by the skewed manner in which the report draws upon its source material. The report selectively chooses sources to support its findings, and it cherry-picks favorable materials from within some of those sources when a full reading of the cited source reveals a far more balanced discussion replete with counterpoints. As a result, we fear that untold volumes of information, testimony, case law, legal commentary, and other variables were ignored, omitted or failed to make the editorial cut, not because they were extraneous or irrelevant, but because they did not advocate the resolved position.

Findings

We agree to an extent with Finding II, and we disagree with Findings I, III, and IV. We consider the arguments supporting each area of disagreement to be flawed, and, in several instances, we consider them to be contrived or poorly substantiated.

Finding I

We strongly object to the report's finding that the transfer of five Taliban detainees from the detention facility at United States Naval Station, Guantanamo Bay, Cuba, to the State of Qatar in exchange for the safe return of Sergeant Bergdahl from nearly five years of captivity violated several laws. The report refuses to acknowledge that the difficult question of legality remains unsettled and without a clear, controlling precedent. Instead, the report labors to declare otherwise. We are not so certain.

In arguing that the Administration's actions were illegal, the report reads, in places, much like a judicial opinion and, in others, much like a legal brief. We do not consider either analytical posture to be valid or appropriate. The former implies to the reader that the report's legal analysis is somehow decisive when the Committee plainly has no adjudicatory power, while the latter betrays the report's attempt to persuade, rather than to inform, the reader, which serves to underscore the report's inherent imbalance and overtly prosecutorial tone. We find the report's resort to empty judicature and advocacy sorely misplaced. As legislative overseers, the Committee should be concerned with the objective determination of fact. It should leave the interpretation of law to the courts and zealous advocacy to those with the will and the standing to bring suit.

Overzealousness is vividly displayed in the report's pronouncement that the failure of the Administration to provide the appropriate congressional committees at least 30 days' notice of the determination made by the Secretary of Defense, supporting the May 31, 2014, transfer of the five detainees from Guantanamo to Qatar, in exchange for the release of Sergeant Bergdahl, pursuant to section 1035(d) of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66; 10 U.S.C. 801 note) was a violation of law.

There has long been stark disagreement between the Administration and certain members of Congress as to whether, in certain circumstances, statutory transfer requirements would encroach upon constitutional separation of powers principles. In our full-committee hearing on the Bergdahl exchange, on June 11, 2014, then-Secretary of Defense Chuck Hagel described the Administration's position as follows:

In the decision to rescue Sergeant Bergdahl, we complied with the law, and we did what we believed was in the best interests of our country, our military, and Sergeant Bergdahl. The President has constitutional responsibilities and authorities to protect American citizens and members of our armed forces. That's what he did. America does not leave its soldiers behind. We made the right decision, and we did it for the right reasons – to bring home one of our people.

In light of this contention, it is far from certain that failure to meet the 30-day notification requirement, as unwelcome as that failure was, clearly amounted to a violation of law.

Although the report dismisses the Administration's arguments as "evasive legal gymnastics," much of the report's constitutional argumentation relies on its own underlying acrobatic stunt. The report insists that "the notion that the president has broad authority to negotiate for the return of a service member whose life is in danger is separate from the question of what the president may trade in return." In other words, the report invents the premise that the Administration's decision to transfer detainees from Guantanamo must be divorced from all circumstance and legally evaluated in isolation. This contrivance is then used to steer the report's argument away from the circumstances confronting the Administration regarding Sergeant Bergdahl and to facilitate the report's straw-man argument that the Administration's actions challenged Congress' constitutional authority to legislate on detention issues altogether. The report loses focus in its inordinate preoccupation with the potential for the President to take unitary action on detention issues, despite the fact that the Bergdahl exchange was the only instance in which the Administration conducted a noncompliant Guantanamo detainee transfer. The report overstates the Administration's constitutional assertion and then speculates darkly that it may have been construed to conceal dubious purposes. It states: "The legal arguments advanced in support of that assertion, moreover, would (if accepted) provide for virtually unfettered executive power, and may have been offered as a pretext to mask ulterior motives for avoiding timely notice to Congress."

The report then expends a great deal of energy analyzing whether the President's constitutional powers preclude those of Congress with respect to detention, opining that the President's lack of preclusive powers, coupled with Congress' express authorities regarding detainees, render Section 1035(d) "presumptively valid." However, the issue of preclusive power is not the dispute regarding the Bergdahl exchange. Again, the Administration's contention centers on whether the statute constrained the President's authorities, given the unique circumstances shaping the Administration's efforts to protect and to repatriate a captured U.S. service member. We consider this a valid question. Nevertheless, the report conveniently asserts, "whether the Taliban Five transfer was legal depends not on the scope of the president's inherent authority to protect U.S. service members, but on whether Section 1035 of the NDAA was a constitutional exercise of Congress' legislative power."

We reject this construction and the unsound analysis built upon it. We cannot separate the transfer from the circumstances of the recovery effort. The President has an undisputed duty to protect U.S. service members, and the negotiated exchange was the best available option for effectuating Sergeant Bergdahl's release. To predicate constitutional analysis on a contorted premise that excludes these circumstances from consideration in order to fulfill a preordained narrative on illegality is to be overly circumscribed and misleading.

The report's confined analytical approach may also explain why the report obfuscates the potential exception associated with its vague reference to "a genuine, short-term emergency," derived from Judge Kavanaugh's concurrence to *Kiyemba v. Obama*. The report does not fully reveal that the concurrence states: "Except perhaps in a genuine, short-term emergency, the President must comply with legislation regulating or

restricting the transfer of detainees.” This statement’s limited deference to Presidential power gives credence to the kind of constitutional case the Administration makes for having acted in a manner inconsistent with statute on the basis of exigent circumstances.

The report is too dismissive of numerous factors supporting the case for exigency in securing Sergeant Bergdahl’s release. These concerns included: reports of Sergeant Bergdahl’s declining health; the fragility of negotiations and then of the agreed outcome right up to the moment Sergeant Bergdahl was delivered into U.S. hands; the foreign interlocutors’ sensitivity to any publicity of the exchange and the potentially hazardous implications that public leaks might have had for Sergeant Bergdahl’s safety; and a prior history of frustrated negotiations. We add that, if one also considers the unavoidable uncertainty that shrouds any negotiated rescue effort and the difficulty of an unpredictable timetable for securing the negotiated exchange to the list, one might appreciate that a plausible case for exceptional action could be made.

Finding II

We agree that the Department of Defense did not adequately inform relevant congressional committees of the transfer of the five Taliban detainees from Guantanamo to Qatar, and we regret that this failure has severely impaired the Department’s relationship with the Committee. We consider the report’s assertion that “it seems the Administration sought to avoid providing appropriate, fulsome, and timely details to Congress after 2013 as a way to preclude congressional assessment of the Taliban Five swap before it was carried out” to be too narrow. Given the Administration’s concerns over exigent circumstances affecting the exchange, we allow that other, more immediate factors could have influenced the unfortunate decision to improperly notify Congress.

The Administration must maintain proper respect for the active and timely participation of the Congress, as a co-equal branch of government, in important national security matters. The Department should have notified us of the Secretary’s determination at least 30 days before the transfer took place in compliance with the notification requirement of section 1035(d) of the National Defense Authorization Act for Fiscal Year 2014. Furthermore, this Administration, and all future administrations, should comply with applicable requirements in the future and welcome congressional participation. There is no question that the Congress needs to be properly informed of detainee transfers, and, in the past, the Congress has repeatedly proven that it can be trusted to guard sensitive information associated with important national security issues.

We do not consider the damage incurred to the Department’s relationship with the Committee to be irreparable. We hope to dispel residual mistrust and to build a more constructive relationship between the executive and legislative branches of government.

Finding III

We strongly disagree with the report's finding that the limited involvement of certain senior officials in the Department of Defense from the Bergdahl recovery effort "greatly increased the chance that the transfer would have dangerous consequences."

The report does not adequately define the scope of those offices and functions within and without the Department that were actively involved in the effort, so it is impossible to determine whether additional resources were actually needed. In addition, the report does not associate any of the senior officials identified as having limited involvement as also having disapproved of the exchange. Finally, and perhaps most importantly, the report's finding on increased risk is counterfactual. It provides no proof that the limited involvement of the identified senior officials actually increased the risk of harm. It only suggests that the limited involvement of some of those officials potentially deprived those working on the transfer of contextual information and potentially dissenting views.

Finding IV

We disagree with the report's finding that the Department of Defense "has failed to take sufficient precautions to ensure the ongoing national security risks posed by the Taliban 5 are mitigated, consistent with the Memorandum of Understanding with Qatar." The report fails to define what its measure of sufficiency is. Clearly, the transfer to Qatar was executed with the risk that the transferred individuals might attempt to re-engage in hostilities. The terms of the Memorandum of Understanding (MOU) were specifically crafted to mitigate that risk, and the fact that those terms have been extended indefinitely beyond the original duration of the MOU, that all five individuals remain in Qatar, and that they continue to be subject to extensive monitoring and travel restrictions emphasize that risk mitigation efforts are continuing. The report does not articulate how the Department of Defense has specifically failed to take sufficient precautions.

The risks presented by the five individuals transferred to Qatar can be, and to date have been, managed, but we think it worth noting that risk mitigation precautions do not equate to a zero-risk guaranty and that the risks were assumed as the necessary price to recover a captured U.S. soldier.

The report also mentions that responsibility for implementing the MOU appears to be transitioning from the Department of Defense to other executive organizations. The report laments that this transition would relieve the Department from a certain amount of accountability for managing risk going forward. However, the report does not identify any concerning practical effects associated with the transition, and it fails to identify any risk management responsibilities that cannot be balanced by other organizations.

Conclusion

The report's conclusion is grossly irresponsible. It wildly asserts that the effort to safely recover Sergeant Bergdahl served as convenient cover for winnowing the detainee population at Guantanamo Bay. The report states:

The Taliban Five transfer became cloaked as a component of an otherwise salutary prisoner recovery effort. Doing so allowed the Administration to rid itself of five of the most dangerous and problematic detainees (other than the 9/11 conspirators who are subject to criminal proceedings) who the Administration would otherwise have great difficulty relocating because of the Administration's own prior recommendation to keep them in detention.

We consider this statement to be conjectural and unsubstantiated. It ignores the fact, acknowledged elsewhere in the report, that the Taliban, not the Administration, identified the five transferred individuals in its conditional terms of exchange. It also discounts the fact that the Administration rebuffed the Taliban's demands to increase that number. The Administration has routinely stated that a certain number of detainees at Guantanamo Bay are ineligible for foreign transfer and that, as long as those detainees remain ineligible, they will continue to be lawfully detained. The five individuals transferred in exchange for Sergeant Bergdahl were deemed ineligible for transfer, and they were only transferred in the context of a prisoner exchange. We have no reason to doubt that the Administration's primary objective was to recover Sergeant Bergdahl, albeit with a calculated risk and at a negotiated cost, rather than "to rid itself of five of the most dangerous and problematic detainees" and recover Sergeant Bergdahl to boot.

We also object to the report's unfounded and somewhat reckless speculation that the exchange to recover Sergeant Bergdahl could set a precedent for vacating the United States Naval Station, Guantanamo Bay, Cuba. Although the Administration has been clear in its intent to shutter the detention facility at Guantanamo Bay, the Administration has been equally clear that it does not intend to vacate the base, regardless of Cuba's position with respect to the leasehold. The report's suggestion that the Administration is currently harboring a different motive is factually baseless, if not absurd.

Process

Much of our disappointment with the report derives from the highly exclusive manner in which it was generated. The minority was excluded from the majority's closed process for: analyzing and distilling the collected information, crafting findings and conclusions, and drafting the report. In fact, despite months of prodding by the minority, the majority failed to provide a draft of the report to the minority until 5:15 pm on Monday, November 23, 2015. (The underlying investigation was initiated by Chairman McKeon nearly a year-and-a-half prior, on July 17, 2014.) We were then provided two weeks, which included the Thanksgiving holiday period, to review the majority's draft report and to make comment. All the while, the majority was making substantial edits to

that draft. The majority did not provide a final draft of the report to the minority until 10:27 am on Wednesday, December 9, 2015. The opacity and unreasonable timeframe, girding the majority's sudden rush to issue the report, offered us insufficient opportunity for meaningful discussion with our majority counterparts or for resolving differences. Instead, we were limited to determining the extent to which we could agree or disagree with the majority's product and to giving voice to our most prominent differences.

We find the majority's deliberate policy and practice of exclusion unacceptable. It is not consistent with this Committee's storied tradition of bipartisan cooperation, and it does not comport with the understanding we thought we had secured with our majority counterparts for maintaining an open and collegial working relationship. Unfortunately, the majority's closed process also ensured that the report's resultant content would indelibly stamp the report as an unbalanced and partisan document. We find it sadly ironic that one of the report's chief complaints, to which we stipulate, is that "a longstanding history and tradition of cooperation and comity" on important national security matters was threatened by the Department of Defense. We strongly encourage the Committee's majority to reflect on its reprimand, as it applies internally.

Waste

We are disappointed that the majority needlessly allocated tremendous amounts of time and taxpayer resources to generate a report that essentially found what the supporters of H. Res. 644 already passed in 2014 with little evidence to support it. That debate began more than a year ago, and the subsequent investigation and report have done nothing to resolve or even significantly shift the arguments which continue to fuel that debate. We are also concerned that the majority unnecessarily chased and that, as it pledged in the report, will continue to chase, counterfactual theories associated with the recovery of Sergeant Bergdahl on the remote chance that one of those theories may be supported as having been a viable alternative to the prisoner exchange that took place in May 2014. The report's sidebar expository briefly describes these efforts to date. The only benefit of these sidebar efforts is that they appear to confirm that the prisoner exchange that occurred was indeed the best option for recovering Sergeant Bergdahl. We are left to wonder what public benefit future forays in this direction might bring and at what cost.

We would have strongly preferred the Administration to have fulfilled the statutory notification requirement prior to executing the transfer and thereby reinforced its commitment and ability to maintain a productive relationship with Congress, but as it stands, the report does little to advance good government. The report's overly partisan and prosecutorial tone will likely be an impediment, rather than an inducement, to a more engaging and constructive relationship between the legislative and executive branches of government, regarding sensitive national security affairs.

Closing Views

The Administration performed an arduous task in securing the return of an American service member held captive by enemy combatants for nearly five years. As with many undertakings in the national security arena, significant risks were involved and difficult choices needed to be made. As gravely disappointed as we may be over the Administration's failure to comply with a statutory notice requirement, the majority's nakedly partisan effort to indict the Administration and to second guess its decisions, in hindsight, while simultaneously expressing relief that the benefit of Sergeant Bergdahl's safe return was in fact achieved, is as unfair as it is wrong. We consider this report to be an expression of shrill demagoguery, contrary to the interests of national security, and beneath the dignity of the House Armed Services Committee.

For all of the preceding reasons, we dissent.