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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

June 5, 2014

### Via Electronic Transmission

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530

Dear Attorney General Holder,

In a letter dated January 31, 2014, not long after President Obama delivered his State of the Union address, I wrote to you to express concern about his “determination to take unilateral action if he cannot persuade Congress . . . of the merits of his ideas” and his record of failing to discharge his constitutional duty to “take Care that the Laws be faithfully executed.”

Recognizing that the Department of Justice’s Office of Legal Counsel (“OLC”) provides legal advice to the Executive Branch on constitutional questions, I requested that you direct OLC to “publicly disclose its opinions, analyses, and conclusions concerning the lawfulness” of Executive Orders issued by the President going forward.

Almost four months later, in a letter to me dated May 20, Principal Deputy Assistant Attorney General Peter Kadzik declined my request, citing both attorney-client and executive privilege. Unfortunately, this unwillingness to be transparent with the American people is generally consistent with the conduct of the Obama Administration. Indeed, the former executive editor of the *New York Times* recently called this “the most secretive White House” she had ever covered.<sup>1</sup> The President’s promise upon taking office that “transparency and the rule of law” would be the “touchstones” of his Administration is yet another that has been unfulfilled.<sup>2</sup>

Nonetheless, Mr. Kadzik invited me to contact the Department of Justice with any questions regarding specific OLC advice documents. I write to do so today.

As you are aware, the Administration recently exchanged five Taliban detainees held at Guantanamo Bay for Sgt. Bowe Bergdahl, a U.S. soldier captured by the Taliban and held by the

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<sup>1</sup> Dylan Byers, *Jill Abramson: ‘This is the most secretive White House I have ever dealt with’*, POLITICO (Jan. 23, 2014, 11:20 AM), <http://www.politico.com/blogs/media/2014/01/jill-abramson-this-is-the-most-secretive-white-house-181742.html>.

<sup>2</sup> *Vowing transparency, Obama Oks ethics guidelines*, CNN (Jan. 21, 2009, 8:44 PM) <http://www.cnn.com/2009/POLITICS/01/21/obama.business/>.

Haqqani network.<sup>3</sup> The detainees transferred from Guantanamo to Qatar were reportedly senior-level Taliban commanders, some with direct links to al-Qaeda, who were determined to be of high risk to the United States and recommended for continued detention.

However, the National Defense Authorization Act for Fiscal Year 2014, passed into law last December, requires that certain congressional committees be notified 30 days before the transfer or release of any detainee held at Guantanamo Bay.<sup>4</sup>

The notification is required by law to include: (1) a “detailed statement of the basis for the transfer or release,” (2) an “explanation of why the transfer or release is in the national security interests of the United States,” (3) a “description of any actions taken to mitigate the risks of reengagement by the individual to be transferred or released,” (4) a “copy of any Periodic Review Board findings relating to the individual,” and (5) an evaluation of certain other factors required to be considered regarding such a transfer or release.<sup>5</sup>

The Administration has conceded that no such notification took place regarding the transfer of the five senior-level Taliban commanders exchanged for Sgt. Bergdahl. Unfortunately, this is the latest instance in which the President has chosen to act unilaterally, without regard for Congress’s role, and contrary to a law he recently signed.

Moreover, the information that should have been provided is precisely the information lawmakers and the American people are now demanding to know about these controversial transfers. In particular, the possible return of these individuals to the battlefield is a matter of high interest to members of our military and the American people, who have sacrificed their blood and treasure in Afghanistan for many years to protect the Afghan people from the Taliban.

Accordingly, the public deserves a full and transparent accounting of why the Administration believed it could disregard the law. It is shocking to realize that, according to one reporter, the Taliban has been more transparent about this exchange than the Administration.<sup>6</sup>

Secretary of Defense Chuck Hagel reportedly cited the President’s authority as commander-in-chief pursuant to Article II of the Constitution as a legal basis for its failure to comply with the law requiring congressional notification.<sup>7</sup> And National Security Adviser Rice noted that the Department of Justice was consulted about the transfer.<sup>8</sup> As a result, it seems evident that OLC or other Department of Justice advice documents exist that would shed light on the Administration’s legal justification for its actions.

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<sup>3</sup> The circumstances surrounding Sgt. Bergdahl’s capture by the Taliban are unclear, but many of the members of his platoon have reportedly suggested that he may have deserted his post or even willingly collaborated with the Taliban.

<sup>4</sup> National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. § 1035 (2013).

<sup>5</sup> *Id.* at § 1035(d).

<sup>6</sup> Mika Brzezinski, *Morning Joe*, Interview with Richard Engel, (MSNBC television broadcast, June 4, 2014).

<sup>7</sup> Julian E. Barnes, *Chuck Hagel says Health Concerns Justified Bergdahl Swap*, Wall St. J. (June 1, 2014 5:34 AM), <http://online.wsj.com/articles/chuck-hagel-says-health-concerns-justified-bergdahl-swap-1401615231>.

<sup>8</sup> Candy Crowley, *State of the Union*, Interview with Susan Rice, (CNN television broadcast, June 1, 2014).

Therefore, I respectfully request that you direct OLC and any other relevant Department of Justice component to make public by June 19 its opinions, analyses and conclusions concerning the lawfulness of the transfer of these five senior-level Taliban commanders without compliance with the statute that requires congressional notification.

It is obviously too late for Congress to express its concerns about these transfers in time to prevent them. However, this measure of transparency will at least allow the American people to better understand the Administration's purported basis for ignoring the legal requirement that Congress be notified in advance, and shed additional light on this controversial decision. Moreover, it may increase the likelihood that the President will take care that the laws of the United States are faithfully executed in the future.

Sincerely,

  
Charles E. Grassley  
Ranking Member

cc: The Honorable Patrick Leahy  
Chairman