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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*  
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November 10, 2015

### Via Electronic Transmission

The Honorable Loretta Lynch  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530

Dear Attorney General Lynch,

I write today to renew my request to the Department of Justice to publicly disclose the legal advice that it provided to the Obama administration related to the June 2014 transfer of five senior Taliban leaders from Guantanamo Bay in exchange for U.S. Army Sergeant Bowe Bergdahl. As you know, this transfer occurred without notifying Congress, as required by the National Defense Authorization Act of 2014 (“NDAA”). Respectfully, the Department’s most recent response to me on this issue, a letter from Assistant Attorney General Peter J. Kadzik dated September 15, 2015, does not withstand the most basic scrutiny.

First, in justifying its refusal to disclose the advice, the letter noted that the Department “generally does not disclose confidential legal advice OLC [the Office of Legal Counsel] has provided, whether in a formal opinion or in a more informal way (except through the established publication process below).” However, that process, memorialized in the Memorandum regarding Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) (“the Memorandum”) weighs in *favor of*, not *against*, publishing the advice in this instance.

The Memorandum specifically states that in determining whether to make OLC opinions public, “[OLC] operates from the presumption that it should make its significant opinions fully and promptly available to the public” in order to “further[] the interests of Executive Branch transparency, thereby contributing to accountability and effective government, and promoting public confidence in the legality of government action.” However, the letter fails to suggest any reason why the presumption should not be followed in this instance.

Even more to the point, the Memorandum describes when publication of Department of Justice advice documents is “especially important”:

Timely publication of OLC opinions is especially important where the office concludes that a federal statutory requirement is invalid on constitutional grounds and where the Executive Branch acts (or declines to act) in reliance on such a conclusion. In such situations, Congress and the public benefit from understanding the Executive’s reasons for non-compliance, so that Congress can consider those reasons and respond appropriately, and so that the public can be assured that Executive action is based on sound legal judgment and in furtherance of the President’s obligation to take care that the laws, including the Constitution, are faithfully executed.

*These are precisely the circumstances here*, where the Department has asserted that the NDAA was unconstitutional as applied to the transfer of these senior Taliban commanders.<sup>1</sup> And yet, again, the letter fails to suggest any reason why the Department has refused to disclose its advice in response to my request – even in a situation where doing so is “especially important,” according to its own guidance.

Second, the Department’s response also suggested that “where there is congressional or public interest in understanding the legal basis for government conduct, generally the government entity or entities responsible for the decision to undertake a given course of action are in the best position to provide the Executive Branch’s explanation for the legal basis of that conduct.” But this suggestion is irrelevant to my concern with promoting transparency *within* the Department, and ensuring that, in executing the Committee’s oversight function, the Department’s *advice* to those entities is consistent with both the law and the Constitution. Moreover, none of the reasons favoring public disclosure of OLC opinions that are set forth in the Memorandum suggest that Congress should instead seek explanations for Executive Branch actions from other agencies; rather, the onus of timely, public disclosure is placed squarely on OLC by the terms of its own guidance.

Indeed, on many occasions when it has suited the Department’s purposes, it has chosen to release OLC opinions that explain the legal basis for actions taken by other government entities. For example, the Department released the OLC opinion directed to the Department of Homeland Security concerning the president’s executive action on immigration – legal advice that turned out to be faulty, as the United States Court of Appeals for the Fifth Circuit confirmed yesterday. This kind of selective transparency casts doubt on the soundness of OLC legal advice, especially where that advice is not made public in spite of the clear direction in OLC’s own guidance to do so.

Third, the Department’s response references information in additional documents – in addition to its own advice documents – that I now request be made public in order to bring additional transparency to the circumstances surrounding this matter. Attached to the Department’s response was a copy of a letter sent by the Department of Defense to the House Armed Services Committee dated July 17, 2015. That letter references (1) the “extraordinary circumstances” described by the Department of Defense on May 6, 2015 that purportedly justified failing to notify Congress, and (2) a “description of the specific circumstances at issue” provided by the Department of Defense on May 22, 2015 to further justify this failure to obey the law. The public interest in understanding the facts on which the Department based its legal advice is just as important as the advice itself, given the shifting nature of the administration’s justifications for failing to notify Congress. Moreover, nothing in the Memorandum suggests that these factual representations could not be made public immediately.

Sincerely,



Charles E. Grassley  
Chairman

cc: The Honorable Patrick J. Leahy  
Ranking Member

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<sup>1</sup> See Letter from the Department of Defense to the House Armed Services Committee dated July 17, 2015, p. 3 (contending that the statute was “unconstitutional as applied because requiring 30-days’ notice of the transfer would have violated the constitutionally mandated separation of powers”).