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THE MAY 31, 2014, TRANSFER OF FIVE SENIOR TALIBAN DETAINEES

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

HEARING HELD
JUNE 11, 2014

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THE MAY 31, 2014, TRANSFER OF FIVE SENIOR TALIBAN DETAINEES

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Wednesday, June 11, 2014.

The committee met, pursuant to call, at 10:03 a.m., in room 2118, Rayburn House Office Building, Hon. Howard P. "Buck" McKeon (chairman of the committee) presiding.

OPENING STATEMENT OF HON. HOWARD P. "BUCK" MCKEON, A REPRESENTATIVE FROM CALIFORNIA, CHAIRMAN, COMMITTEE ON ARMED SERVICES

The CHAIRMAN. The committee will come to order. Please hold as we seat the public.

At the start of this hearing, I am pleased to welcome members of the public who have such an interest in these proceedings.

We intend to conduct this hearing in an orderly and efficient manner to ensure all the Members have an opportunity to ask questions and our witnesses have an opportunity to be heard. To that end, please be advised I will not tolerate disturbances of these proceedings, including verbal disruptions, photography, standing, or holding signs. And I thank you all for your cooperation.

I want to thank Secretary Hagel and Mr. Preston for testifying before the committee today on the May 31st transfer of five senior Taliban detainees from detention at Guantanamo Bay to the Government of Qatar.

The matter before us is deeply troubling. The committee has begun a full investigation into the administration's decision, its unprecedented negotiations with terrorists, the national security implications of releasing these dangerous individuals from U.S. custody, and the violation of national security law. We hope for and expect the Department's full cooperation.

Let me be clear upfront on the focus of today's hearing. It is not my intention to dive into the circumstances of the disappearance of Sergeant Bergdahl from his base in 2009. There will be a time and a process for that. I also do not intend to use this hearing to weigh the merits of returning an American soldier to the United States. Everyone who wears the uniform should be returned home.

However, the detainee transfer raises numerous national security policy and legal questions. The explanations we received from the White House officials at a House-wide briefing earlier this week were misleading and at times blatantly false.

This transfer sets a dangerous precedent in negotiating with terrorists. It reverses longstanding U.S. policy and could incentivize

other terrorist organizations, including Al Qaeda, to increase their use of kidnappings of U.S. personnel.

It increases risk to our military and civilian personnel serving in Afghanistan and elsewhere. As the President, yourself, and other administration officials have acknowledged, these five terrorists still pose a threat to Americans and Afghans alike, and in 1 year they will be free to return to Afghanistan or anywhere else.

What is more, although there will be fewer U.S. personnel in Afghanistan in 2015, the return of these five Taliban leaders directly threatens the gains of our men and women who have fought and died—the gains that our men and women have fought and died for.

The transfer is a clear violation of section 1035 of the National Defense Authorization Act of 2014. There is no compelling reason why the Department could not provide a notification to Congress 30 days before the transfer, especially when it has complied with the notification requirement for all previous GTMO [Guantanamo Bay Naval Base] detainee transfers since enactment of the law.

The statute is more than a notification; it requires detailed national security information, including detailed consideration of risk and risk mitigation that the Congress and American people would expect any administration to consider before a decision is made to transfer GTMO detainees. It was designed and approved by a bipartisan majority in Congress due to real concerns that dangerous terrorists were being released in a manner that allowed them to return to the battlefield.

We are also seeing the consequences of the President's hasty Afghanistan withdrawal strategy. Afghanistan is at a critical juncture. At the same time we are focused on the first democratic transition of government and supporting security and stability within the country, this negotiation has legitimized the Taliban, the organization that safeguarded the 9/11 Al Qaeda perpetrators and ruled Afghanistan through atrocities.

Lastly, this transfer sets dangerous precedent for how the President intends to clear out GTMO. The remaining detainees, by the Obama administration's own analysis, include the most dangerous against U.S. forces and national security interests. In the President's rush to close GTMO, are other deals in the works to release these dangerous individuals?

Mr. Secretary, I don't envy the position you have been put in. We understand the responsibility you bear for signing these transfer agreements, but we are also aware of the immense pressure the White House has put on you to transfer these detainees so it can claim victory for closing GTMO. Nevertheless, we expect the Department to abide by the law and to provide its candid assessment of national security impacts of the President's decisions.

This is a bipartisan committee. Last month, we passed our authorization act out of committee unanimously and off the floor with well over 300 votes. That kind of bipartisanship is based on trust. Members on this committee trust each other to live up to our word. And when we work with the Department and the White House to pass legislation the President will sign, we have to trust that he will follow those laws. The President has broken a bipartisan law and put our troops at greater risk, and I am eager to find out why.

Mr. Smith.

[The prepared statement of Mr. McKeon can be found in the Appendix on page 93.]

STATEMENT OF HON. ADAM SMITH, A REPRESENTATIVE FROM WASHINGTON, RANKING MEMBER, COMMITTEE ON ARMED SERVICES

Mr. SMITH. Thank you, Mr. Chairman, and thank you for holding this hearing.

Thank you to our witnesses for being here.

I think this is a very appropriate issue for Congress to exercise oversight on. And there are a lot of questions that need to be answered, and I am pleased the administration is here today to attempt to answer those questions.

I also want to agree upfront with the chairman that one thing we shouldn't talk about today is the circumstances of Sergeant Bergdahl's—sorry—of Mr. Bergdahl's capture. And I am happy about that. Regrettably, at the briefing we had on Monday, that issue did come up. There, you know, simply is no proof, no evidence. I think the way Mr. Bergdahl has been slandered has been scandalous, you know. And I hope we will take a step back and do what Admiral Winnefeld said, which is we will bring him home, we will get him healthy, then we will figure out what happened, and due process will be exercised. So that should not be discussed today.

What should be discussed today are the circumstances of this deal. And I think the chairman raised a number of appropriate questions.

And I have enormous sympathy for the President and for you, Mr. Secretary, of the very difficult decision that had to be made here in terms of figuring out whether or not this was an exchange that was in the best interests of the United States. Ultimately, I will tell you, I think it was. We do our level-best to bring our service men and women home if we possibly can.

Not under any circumstances. The issue was raised, you know, would we have traded Khalid Sheikh Mohammed for him. Absolutely not. Totally different situation. But when you are talking about these five members of the Taliban, it is a different equation.

And that really raises the issues that the chairman came up with. Who were we negotiating with? He says we were negotiating with terrorists. But Sergeant Bergdahl was captured on the battlefield in a war zone. The Taliban were, until just a few months before that, the legitimate Government of Afghanistan.

The current Afghan Government has said over and over again that they want to negotiate with the Taliban. Any sensible person who looks at the situation in Afghanistan right now understands that there is no ultimate peaceful solution if at some point you don't negotiate with some of the Taliban. Which ones, we don't know.

So to simply dismiss this as one terrorist group and negotiating with terrorists I think totally misstates the situation. This was on the battlefield, in a war zone, a soldier who was captured by a group of people that were the legitimate Government of Afghanistan mere months before.

I don't know the full implications of that. And I completely agree with the chairman that we need to be very, very careful about setting any precedent that we would negotiate with terrorists. But I think this raises an entirely different set of questions that need to be answered and addressed. And I would be very interested, Secretary Hagel, in your viewpoint on that. What does that mean going forward?

But understand: The idea that under no circumstances will we negotiate with the Taliban is one that has been rejected by virtually everyone. We, the Afghan Government, if we are going to get any sort of peaceful solution in Afghanistan, are going to have to negotiate with at least some elements of the Taliban. Which ones, we don't know. But that has certainly been the position of the Afghan Government. So this is an entirely different situation than saying we simply negotiated with terrorists.

The second troubling question this raises is the situation in Guantanamo. And I will disagree with the chairman on one key point. The President is not pursuing this out of some naked political goal; he wants to close Guantanamo just because politically he would like to. That is not the situation.

We have over 150 people held in Guantanamo, many of them in very murky status. Is it the plan of the United States of America to hold these people forever without charge and without trial? What would that do to our values, to precedents that we have set in a different way if we do that?

Now, there is no easy way out of this. But to simply dismiss it and say any effort to try to close Guantanamo is purely political overlooks the fact that we are in a very difficult situation, in large part because a lot of these people were captured in the first place without a clear understanding of how or why, without a plan to try them, and now we have them. And it is not the United States of America that I believe in that says, look, we are just going to grab people and hold them forever without charge, without trial, without process. How are we going to handle that?

Now, one of the interesting questions that has been raised, it has been argued that these five that were captured would have had to have been released at the end of hostilities with Afghanistan. It is not my understanding that that is actually the status that we have given them. They are not being treated, clearly, as prisoners of war. As a matter of fact, I believe the phrase was "unlawful enemy combatants," has been the phrase that has been used for them.

So if they weren't being held as prisoners of war, is it the administration's position that at the end of our full involvement in Afghanistan we would have to release them? I don't believe that it is. That has been alluded to. That really needs to be clarified, first of all, with regard to these five, but, second of all, how many more inmates are there in Afghanistan that might be put into that category, that at the end of 2014 we would feel like we would have to release?

Again, it is my understanding that it is none of them, that we didn't put them in that law-of-war category, prisoner-of-war category, where they would have to be released at the end of hostilities. But the category they are in is very murky and very con-

fusing and something that we have to answer if we are going to live up to our own constitutional values.

Now, the final issue that I think is worth exploring and where I am in more substantial agreement with the chairman is on the congressional consultation issue. And there are two pieces of this.

First of all, it is very important, I believe, for the White House to engage with Congress just as a way for us to work together to advance the right policies, to consult us on key issues. And I think it is wrong that months before when—well, it is wrong that when you knew that you were thinking about doing this deal, you didn't take it to the top leadership in Congress and talk about it.

Now, I know the concern. The concern was that it would have been leaked. But as has been mentioned, Congress has been trusted with many, many other things, including the location of Osama bin Laden, and not leaked it. I think that type of consultation would have helped the process, not hurt it.

And the second piece that I am concerned about is the 30-day requirement. Now, I know the President put a signing statement when he signed the law that had that 30-day requirement in it, saying that he was concerned about the constitutionality about it. But the law is the law. The way you challenge constitutionality is you go to court, and you would figure out whether or not the courts say it is constitutional or not. And until the courts rule on that, it is the law.

When President Bush was in the White House, he had, gosh, hundreds of signing statements, and there was, I believe, a correct amount of outrage amongst many that those signing statements were put out there as a way to simply avoid the law. If it wasn't right for President Bush to do it, it is not right for President Obama to do it. So I would be very curious to understand the argument for why that 30-day requirement wasn't in place.

And, again, I will come back to the fact that there was no reason that that 30 days' notice couldn't have been given to the leadership of Congress. We can, in fact, keep a secret. Or, I would say, we are no worse at it than the administration if you go back through history in terms of how things get out. So I think better consultation with Congress is something we will definitely need going forward.

With that, I look forward to your testimony.

I thank the chairman for this hearing.

[The prepared statement of Mr. Smith can be found in the Appendix on page 95.]

The CHAIRMAN. I ask unanimous consent that non-committee-members, if any, be allowed to participate in today's hearing after all committee members have had an opportunity to ask questions. Is there objection?

Without objection, non-committee-members will be recognized at the appropriate time.

Mr. Secretary, the time is yours.

STATEMENT OF HON. CHUCK HAGEL, SECRETARY OF DEFENSE, U.S. DEPARTMENT OF DEFENSE; ACCOMPANIED BY HON. STEPHEN PRESTON, GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE

Secretary HAGEL. Mr. Chairman, thank you. Ranking Member Smith, thank you. And to the members of this committee, I appreciate an opportunity to discuss the recovery of Sergeant Bowe Bergdahl and the transfer of five detainees from Guantanamo Bay to Qatar.

And I appreciate having the Department of Defense's general counsel, Steve Preston, here with me this morning. Mr. Preston was one of our negotiators throughout this process in Qatar and signed on behalf of the United States the memorandum of understanding between the Governments of Qatar and United States.

Also here, representing the Joint Chiefs of Staff, sitting behind me, is Brigadier General Pat White, who is the Director of the Joint Staff's Pakistan/Afghanistan Coordination Cell. General White helped coordinate the Bergdahl recovery on behalf of the Chairman of the Joint Chiefs of Staff, General Dempsey.

The Vice Chairman of the Joint Chiefs, Admiral Winnefeld, who the chairman has noted, will join us later this morning in the classified, closed portion of the hearing.

And, as you know, General Dempsey and Admiral Winnefeld played critical roles in the meetings at the National Security Council leading up to Sergeant Bergdahl's release and supported the decision to move forward with this prisoner exchange.

In my statement today, I will address the issues of Chairman McKeon and Mr. Smith, the issues they raised when the chairman asked me to testify and explain why it was so urgent to pursue Sergeant Bergdahl's release, why we decided to move forward with the detainee transfer, and why it was fully consistent with U.S. law, our Nation's interests, and our military's core values.

Mr. Chairman and members of this committee, I want to make one fundamental point. I would never sign any document or make any agreement, agree to any decision that I did not feel was in the best interests of this country, nor would the President of the United States, who made the final decision with the full support of his national security team.

I recognize that the speed with which we moved in this case has caused great frustration, legitimate questions, and concern. We could have done a better job, could have done a better job of keeping you informed.

But I urge you to remember two things. This was an extraordinary situation. First, we weren't certain that we would transfer those detainees out of Guantanamo until we had Sergeant Bergdahl in hand. And, second, we had Sergeant Bergdahl in hand only a few hours after making the final arrangements.

There are legitimate questions about this prisoner exchange. And Congress, obviously, has an important constitutional role and right and responsibility to play in all of our military and intelligence matters. As a former member, Mr. Chairman, of the Senate Select Committee on Intelligence and the Council on Foreign Relations, I appreciate the vital role Congress plays in our national security.

And I will present to this committee, within the limits of an open, unclassified hearing and in more detail in the classified hearing, everything I can to answer your questions and assure you, this committee, the American people, that this prisoner exchange was done legally, it was substantial mitigation of risk to our country, and in the national interests of this country.

Let's start with Sergeant Bergdahl's status as a member of the United States Army. He was held captive by the Taliban and the Haqqani Network for almost 5 years. He was officially listed as "missing-captured." No charges were ever brought against Sergeant Bergdahl, and there are no charges pending now.

Our entire national security apparatus—the military, the intelligence community, and the State Department—pursued every avenue to recover Sergeant Bergdahl, just as the American people and this Congress and the Congresses before you expected us to do. In fact, this committee—this committee knows there were a number of congressional resolutions introduced and referred to this committee directing the President of the United States to do everything he could to get Sergeant Bergdahl released from captivity. We never stopped trying to get him back, as the Congress knows that, because he is a soldier in the United States Army.

Questions about Sergeant Bergdahl's capture, as Mr. Smith noted and you, Mr. Chairman, are separate from our effort to recover him, because we do whatever it takes to recover any and every U.S. service member held in captivity. This pledge is woven into the fabric of our Nation and our military. As former Central Command Commander Marine General Jim Mattis recently put it, quote, "The bottom line is we don't leave people behind. That is the beginning and that is the end of what we stand for. We keep faith with the guys who sign on, and that is all there is to it," end of quote.

As for the circumstances surrounding his captivity, as Secretary of the Army McHugh and Army Chief of Staff Odierno will review later and they have said clearly last week that the Army will review—they will review this exchange, circumstance, captivity of Sergeant Bergdahl in a comprehensive, coordinated effort that will include speaking with Sergeant Bergdahl.

And I think I need not remind anyone on this committee, like any American, Sergeant Bergdahl has rights. And his conduct will be judged on the facts, not political hearsay, posturing charges, or innuendo. We do owe that to any American and especially those who are members of our military and their families.

Like most Americans, I have been offended and disappointed in how the Bergdahl family has been treated by some in this country. No family deserves this. I hope there will be some sober reflection on people's conduct regarding this issue and how it relates to the Bergdahl family.

In 2011, the Obama administration conducted talks with the Taliban on a detainee exchange involving the same five Taliban detainees that were ultimately transferred after the release of Sergeant Bergdahl—2011. These talks, which Congress was briefed on—some of you in this room were in those briefings, I understand—which Congress was briefed on in November of 2011 and in

January of 2012, were broken off by the Taliban in March of 2012. We have not had direct talks with the Taliban since this time.

In September of 2013, the Government of Qatar offered to serve as an intermediary. And in November of last year, we requested that the Taliban provide a new proof-of-life video of Sergeant Bergdahl.

In January of this year, we received that video, and it was disturbing. Some of you may have seen the video. It showed a deterioration in his physical appearance and mental state compared to previous videos. Our entire intelligence community carefully analyzed every part of it and concluded that Sergeant Bergdahl's health was poor and possibly declining. This gave us growing urgency to act.

In April of this year, after briefly suspending engagement with us, the Taliban again signaled interest in indirect talks on an exchange. At that point, we intensified our discussions with the Qatar Government about security assistance and assurances, particularly security assurances.

On May 12th, we signed a memorandum of understanding [MOU] with Qatar detailing the specific security measures that would be undertaken and enforced—and enforced by them if any Taliban detainees were transferred to their custody. Steve Preston, as I noted earlier, signed that memorandum of understanding on behalf of the United States Government and was included in those negotiations.

Included in this MOU were specific risk-mitigation measures and commitments from the Government of Qatar, like travel restrictions, monitoring, information-sharing, and limitations on activities, as well as other significant measures which we will detail in the closed portion of this hearing. They were described, as you know, Mr. Chairman, in the classified documentation and notification letter I sent to this committee last week.

That memorandum of understanding has been sent to the Congress, to the leadership, to the committees. And every Member of Congress has an opportunity to review that memorandum of understanding in a closed setting.

U.S. officials received a warning—we received a warning from the Qatari intermediaries that, as we proceeded, time was not on our side. And we will go into more detail in a classified hearing on those warnings. This indicated that the risks to Sergeant Bergdahl's safety were growing.

We moved forward with indirect negotiations on how to carry out that exchange of five detainees and agreed to the mechanics of the exchange on the morning of May 27th following 3 days of intensive talks.

That same day, President Obama received a personal commitment and a personal telephone call from the Emir of Qatar to uphold and enforce the security arrangements, and the final decision was made to move forward with that exchange on that day.

As the opportunity to obtain Sergeant Bergdahl's release became clear, we grew increasingly concerned that any delay or any leaks could derail the deal and further endanger Sergeant Bergdahl. We were told by the Qataris that a leak—any kind of a leak would end the negotiation for Bergdahl's release.

We also knew that he would be extremely vulnerable during any movement and our military personnel conducting the handoff would be exposed to the possible ambush or other deadly scenarios in very dangerous territory that we did not control. And we had been given no information on where the handoff would occur.

For all of these reasons and more, the exchange needed to take place quickly, efficiently, and quietly. We believe this exchange was our last, best opportunity to free him.

After the exchange was set in motion, only 96 hours passed before Sergeant Bergdahl was in our hands.

Throughout this period, there was great uncertainty—great uncertainty about whether the deal would go forward. We did not know the general area of the handoff until 24 hours before. We did not know the precise location until 1 hour before. And we did not know until the moment Sergeant Bergdahl was handed over safely to U.S. Special Operations Forces that the Taliban would hold up their end of the deal.

So it wasn't until we recovered Sergeant Bergdahl on May 31st that we moved ahead with the transfer of the five Guantanamo detainees.

The President's decision to move forward with the transfer of these detainees was a tough call. I supported it. I stand by it.

As Secretary of Defense, I have the authority and the responsibility, as has been noted here, to determine whether detainees—any detainees, but these specific detainees at Guantanamo Bay—can be transferred to the custody of another country. I take that responsibility, Mr. Chairman, members of this committee, damn seriously—damn seriously, as I do any responsibility I have in this job.

Neither I nor any member of the President's National Security Council were under any illusions about these five detainees. They were members of the Taliban, which controlled much of Afghanistan prior, all the territory, to America's invasion and overthrow of that regime. They were enemy belligerents detained under the law of war and taken to Guantanamo in late 2001 and 2002. They had been in the U.S. custody at Guantanamo since then—12, 13 years.

But they have not been implicated in any attacks against the United States, and we had no basis to prosecute them in a Federal court or military commission. It was appropriate to continue to consider them for an exchange, as we had been over the last few years, as Congress had been told that we were. And if any of these detainees ever try to rejoin the fight, they would be doing so at their own peril.

There is also always—always some risk associated with the transfer of detainees from Guantanamo. This is not a risk-free business. We get that.

The U.S. Government has transferred 620 detainees—620 detainees from Guantanamo since May 2002, with 532 transfers occurring during the Bush administration and 88 transfers occurring during the Obama administration.

In the case of these five detainees, the security measures Qatar put in place led me, as Secretary of Defense, to determine, consistent with the National Defense Authorization Act, that the risks

they posed to the United States, our citizens, and our interests were substantially mitigated.

I consulted with all of the members of the President's national security team and asked them as they reviewed all of the details, they reviewed the draft of my notification letter, the specific line-by-line, word-by-word details of that letter, I asked for their complete reviews, the risks associated, and I asked, either concur or object to the transfer.

The Secretary of State, the Attorney General, the Secretary of Homeland Security, Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff all supported this transfer, all put their names on it. There was complete unanimity on this decision, Mr. Chairman.

The President and I would not have moved forward unless we had complete confidence that we were acting lawfully, in the national interest, and in the best traditions of our country.

Our operation to save Sergeant Bergdahl's life was fully consistent with U.S. laws and our national security interests in at least five ways:

First, we complied with the National Defense Authorization Act of 2014 by determining that the risk the detainees posed to the United States, American citizens, and our interests was substantially mitigated and that the transfer was in the national security interests of the United States.

Second, we fulfilled our commitment to recover all military personnel held captive.

Third, we followed the precedent of past wartime prisoner exchanges, a practice in our country that dates back to the Revolutionary War and has occurred in most wars that we have fought.

Fourth, because Sergeant Bergdahl was a detained combatant being held by an enemy force and not a hostage, it was fully consistent with our longstanding policy not to offer concessions to hostage-takers. The Taliban is our enemy, and we are engaged in an armed conflict with them.

Fifth, we did what was consistent with previous congressional briefings this administration had provided, as I have already noted, in late 2011 and early 2012 reflecting our intent to conduct a transfer of this nature with these particular five individuals.

Mr. Chairman, I fully understand and appreciate the concerns, the questions, about our decision to transfer these five detainees to Qatar without providing 30 days' notice to Congress. But under these exceptional circumstances, a fleeting opportunity to protect the life of an American service member held captive and in danger for almost 5 years, the national security team and the President of the United States agreed that we needed to act swiftly.

We were mindful that this was not simply a detainee transfer but a military operation with very high and complicated risks in a very short window of opportunity that we didn't want to jeopardize, both for the sake of Sergeant Bergdahl and our operators in the field who put themselves at great risk to secure his return. In consultation with the Department of Justice, the administration concluded that a transfer of the five could lawfully proceed.

The options available to us to recover Sergeant Bergdahl were very few and far from perfect, but they often are in wartime, Mr.

Chairman, and especially in a complicated war like we have been fighting in Afghanistan for 13 years. Wars are messy, and they are full of imperfect choices.

I saw this firsthand during my service in Vietnam in 1968. In 1968, this committee may recall, we sent home nearly 17,000 of our war dead in 1 year. I see it as the Secretary of Defense. A few of you on this committee—a few of you on this committee have experienced war, and you have seen it up close. You know there is always suffering from war. There is no glory in war. War is always about human beings; it is not about machines. War is a dirty business. And we don't like to deal with those realities. But realities they are, and we must deal with them.

Those of us charged with protecting the national security interests of this country are called upon every day to make the hard, tough, imperfect, and sometimes unpleasant choices based on the best information we have and within the limits of our laws and always based on America's interests.

War, every part of war, like prisoner exchanges, is not some abstraction or theoretical exercise. The hard choices and options don't fit neatly into clearly defined instructions in how-to manuals. All of these decisions are part of the brutal, imperfect realities we all deal with in war.

In the decision to rescue Sergeant Bergdahl, we complied with the law and we did what we believed was in the best interest of our country, our military, and Sergeant Bergdahl. The President has constitutional responsibilities and constitutional authorities to protect American citizens and members of our Armed Forces. That is 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 own people.

As all of you know, I value the Defense Department's partnership with this Congress and the trust we have developed over the years. I know that trust has been broken. I know you have questions about that.

But I will tell you something else. I have always been straightforward, completely transparent with this committee since I have been Secretary of Defense. I will continue to do that. I will do that always, with all my relationships and associations and responsibilities to the Congress.

That is what I always demanded, Mr. Chairman, of any administration when I was a Member of the United States Senate. I have been on your side of this equation; I understand it.

That is what I have done this morning with this statement I have made. And I made the decision I did, and I have explained that in general terms. The circumstances surrounding my decisions were imperfect, and these decisions that have to lead to some kind of judgment always are. The President is in the same position, but you have to make a choice, you have to make a decision.

The day after the Bergdahl operation at Bagram Air Base in Afghanistan, I met with the team of special operators that recovered Sergeant Bergdahl. They are the best of the best, people who didn't hesitate to put themselves at incredible personal risk to recover one of their own. And I know we all thank them. I know this committee thanks them, and we appreciate everything that they do.

And we thank all of our men and women in Afghanistan who make the difficult sacrifices every day for this country.

Earlier this week, we were reminded of the heavy cost of war—the heavy cost of war, when we lost five American service men in Afghanistan. I know our thoughts and our prayers are with their families. We are grateful for their service, and we are grateful for the service of all our men and women in uniform around the world.

As I conclude, Mr. Chairman, I want to again thank this committee—this committee for what you do every day to support our men and women around the world.

Mr. Chairman, I appreciate the opportunity to make this statement, and I look forward to your questions.

[The prepared statement of Secretary Hagel can be found in the Appendix on page 97.]

The CHAIRMAN. Thank you very much, Mr. Secretary.

In your statement, you indicated that the President had made the final decision on this operation. I appreciate you clarifying that. We had a briefing just a couple of days ago, and the last question asked by a Member of Congress of the briefers was, who made the final decision? And one of the briefers stated that you had made the final decision.

I think all of us understand how this place works, and a decision of this nature is always made by the Commander in Chief. And I think that you clarified that, and I appreciate that.

Mr. Secretary, one of the things that has bothered me the most about this is the fact that we did pass a law last year that stated that Congress should be notified 30 days before any transfer of detainees from Guantanamo.

Just a little history. We were briefed, some of us, some of the leadership on this committee and other pertinent committees in Congress, starting in November of 2011, that there was negotiations—that we were entering into negotiations with the Taliban, looking towards reconciliation at some point. Along with that, in that meeting, there was also mention about a potential transfer of detainees, as you mentioned, for the release of Sergeant Bergdahl.

That was followed up with another briefing in January, and then the Taliban set up a headquarters in Qatar. President Karzai learned of that, everything hit the fan, and we were briefed again, saying that all of those negotiations have come to a halt; if we start those negotiations again, we will inform you. We never heard another briefing on that matter.

And so, when we passed that law, we felt that we did it for a good reason. The law didn't just state that we would be given a notice; it required that the Department provide numerous pieces of critical information, including how the risk posed by the detainee had been substantially mitigated, how the transfer is in the national security interests of the United States, an assessment of the capacity, willingness, and past practices of the receiving country, along with the notice, along with several other pieces of information.

And previous NDAAs [National Defense Authorization Acts] had also required that same thing. In fact, our language that we had passed in this committee and through this body was softened some

by language from the Senate that we worked out in conference, which was the final language that was passed last year.

You know, Mr. Secretary, I think you have just made a very strong case for the position taken by the President and the administration. You just left one thing out: These negotiations, as we were told in a briefing last week, started in January of this year, with the tape and with the other things that went forth. And I have been told in a couple of different briefings now that somewhere—I think the final number given to us a couple days ago was somewhere between 80 and 90 people in the Department of Justice, the State Department, the Homeland Security I guess was one of them, and the Department of Defense knew about this—80 to 90 people. The only one I know of that was elected was the President and perhaps the Vice President. We don't know who those 80 or 90 people were.

Yet, in all that time, the leadership of the House that has the responsibility, a co-leadership, according to the Constitution, with the President of the United States, was not informed, not told of any of this.

If you had—or somebody—I think you have the most credibility, but if you had been able to meet with the responsible people in the Congress and give them the same story you just now gave us, the law would have been complied with. We didn't need to know the operational details. We didn't need to know anything of that, other than the things that I have mentioned that the law states, and full compliance with the law would have been met. And I don't think we would have pushed back at all.

And yet, when the law is ignored and—you know, we all have—we all feel keenly the responsibilities that we have, sometimes more than others. This is one of those times where this is a very important principle. And I wish that you or somebody had sat down with the leadership of the Congress, including the Senate, and told us the same things that you have just told us in your briefing here.

I think it would have gone—would have been very helpful in reestablishing, or establishing, or keeping the trust that we should have between the Congress, the President of the United States, the Supreme Court, all of us trying to work together to the satisfaction of the Constitution and the American people that we are all sent here to serve.

Let me just ask one question, Secretary Hagel. Will the Department fully cooperate with this committee's inquiry going forward with the detainee exchange, including the recent request that I sent a couple of days ago for documents?

Secretary HAGEL. Absolutely. Yes.

[The information referred to can be found in the Appendix on page 107.]

The CHAIRMAN. Thank you very much.

And thank you for your service in the military in uniform, in the Senate, and now in this very tough job that you hold.

Secretary HAGEL. Thank you.

The CHAIRMAN. Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

I think, two very important parts to this. And one is one the chairman just mentioned, which I will get to in a second. But the first is this whole notion that we have somehow broken precedent, that this negotiation, we negotiated with terrorists in exchange for this and, you know, went against a longstanding U.S. policy. And I think that has been the central criticism; it was the criticism from the Speaker yesterday. And I think it is just absolutely wrong, given the situation that we were in, as you described it.

We went to war in Afghanistan. Sergeant Bergdahl was fighting in that war. And we were fighting directly against the Taliban. You know, for the first couple of months, they were the Government. They were knocked out, and they kept fighting as an insurgent force.

Could you walk us through—and maybe, Mr. Preston, as the lawyer, you can sort of get into this—how you view this and whether or not this is unprecedented? Because it certainly doesn't seem to be. I mean, there are exchanges, as you have mentioned, in just about every war we have fought, of prisoners. And whatever one may think of the Taliban, we were fighting a war with them. It was in a battle zone. It was not, you know, a diplomat or a civilian, it was a member of the Armed Forces who was captured in that battle.

So do you think that we have set some precedent here for negotiating with terrorists? Or is this clearly, as it is in my mind, in a different legal category?

Secretary HAGEL. Congressman Smith, thank you.

I, as you noted, alluded to some of this in general terms in my statement. Two general comments to respond, and then I will ask Mr. Preston for, as you have suggested, his thoughts.

One, this was an extraordinary situation, for the reasons I had mentioned, I think, in the classified briefings that some of you have attended or heard. We will get more into the extraordinary dynamics when we close this hearing down and go into classified. It was a very unique set of dynamics that we were dealing with. That is number one.

On the precedent-setting side of this, I am not the legal person here, but I do occasionally read, and I don't think there were any precedents set by this, as far as I know from past wars and how we have always gotten our prisoners back, or attempted to get them back, time of war or after war. We can get into all of the appropriate categorizations of who are combatants and who we are at war with and who are terrorists. We have legal definitions for all of those.

But I said something at the beginning of my testimony here. I know it is imperfect, but I do think it plays into the larger scope of what we were dealing with—what we are dealing with, still dealing with, and will be dealing with, not just in Afghanistan. I mean, you look at Yemen, what is going on all over the world. What is unprecedented today is the threats and what we are up against around the world: organized, sophisticated terrorist groups.

Now, have we declared war on any of them? Or how will we define them, other than some as terrorist groups? But these are different dynamics and unprecedented situations that this country has never had to deal with before.

I will make one last comment and then ask Mr. Preston for his legal opinion on your question.

You all have major responsibilities. We each in government have major responsibilities. I have the responsibility of getting up every morning—I have one responsibility, and that is the security of this country. That is what I am charged with. That is what the President asked me to do. The Senate confirmed me to do that. I agreed to do it.

I took an oath of office. We all take the same oath of office, and that is to the Constitution and security of this country. That is my primary focus every day. You all have your focuses, not too dissimilar from mine, either, on some of these things. I just happen to have a more narrow gauge in what I do. The President of the United States has the ultimate responsibility for the security of this country.

So I just remind us of all of this. It is imperfect, I know, and it might sound like an excuse, but it is not an excuse; it is reality.

And I will ask Mr. Preston.

Mr. PRESTON. Thank you.

There is, of course, a good deal of detail, technical legal detail, on what constitutes a POW per se versus a detained combatant or a privileged or unprivileged belligerent. I don't think we need to get into that to answer your question.

What we had here were detained combatants held by opposing forces in the same armed conflict. And, as such, this exchange falls within the tradition of prisoner exchanges between opposing forces in time of war.

Now, it is true that the Taliban is not the conventional nation-state that has been party to conventional armed conflict of the past. But it is not the character of the holding party, it is the character of the detainee that inspires and motivates our commitment to the recovery of service members held abroad.

We don't see this as setting a particular precedent, both because it does fall within that tradition of prisoner exchanges and there have been in the past occasions where the United States has dealt with non-state actors who were holding a service member in order to achieve their recovery.

Mr. SMITH. Can you give us a specific example of that?

Mr. PRESTON. The one example I am aware of is the helicopter pilot, Michael Durant, in Somalia, who was held captive by the warlord Mohamed Aidid. And there was a quiet, as I understand it, arrangement whereby the United States regained Durant's freedom and functionally in exchange for individuals that were captured in the same operation.

Mr. SMITH. Yeah.

And I just want to say again, I think any characterization of this as negotiating with terrorists totally misses the fact that we were and are at war, and Sergeant Bergdahl was a member of our military fighting that war.

On the GTMO piece, is it your opinion that at the end, you know, let's say 2014—we consider that to be the end of hostilities, which is an interesting argument because we still are going to have 10,000 troops there—but assuming at some point there was an end of hostilities, that these five would have had to have been released

at the end of hostilities. Is that the Department's opinion? Are they undecided? Or do they feel the opposite?

Mr. PRESTON. Sir, the way I would answer that is to say that we believe we have, under domestic law, specifically the AUMF [Authorization for Use of Military Force], and under international law, principles of the law of armed conflict, that we have authority to hold and had the authority to hold these five at Guantanamo as enemy belligerents.

Mr. SMITH. Even after the war would have ended?

Mr. PRESTON. Well, I will speak to that.

Mr. SMITH. Okay.

Mr. PRESTON. There will come a point in time where the armed conflicts we are engaged in with the Taliban and Al Qaeda and their associates come to an end. And, at that point, the law-of-war rationale for continuing to hold these unprivileged belligerents would end unless there were some other basis for continuing to hold them——

Mr. SMITH. But that is——

Mr. PRESTON [continuing]. Such as prosecution.

Mr. SMITH. Not just the war in Afghanistan.

Mr. PRESTON. That is right.

Mr. SMITH. I mean, it is the broader battle as defined under the AUMF.

Mr. PRESTON. And the further point I would make is that I am not aware of any determination as yet that, with the cessation of the current combat mission at the end of this year, that the armed conflicts are determined to be over such that it would trigger the consequences that we have been discussing.

Mr. SMITH. Right. Thank you.

And the last thing I will say, and no need to respond to this, but I will just reemphasize a point the chairman has made, a point I made in my opening statement. It would be, oh, so more helpful—let me just say, the Department of Defense, in my experience, has been very good about consulting with us and about working with this body. So it is not really about that.

The White House, on the other hand, has not been very good about keeping in touch with Congress, working with us, consulting with us on major policy issues. It is sort of hit-or-miss. And if we could do better at that, it would make my job a whole lot easier. If we could just trust Congress a little bit and have those consultations before policy decisions are finalized, I think it would make this entire town work better than it is right now.

I yield back.

The CHAIRMAN. The gentleman yields back.

There are two things I need clarified.

Did you, Mr. Preston, say that at some point conflict would end and then we would release these people or we would have to release them, there would be no reason to hold them, and that that conflict is ending in December of this year?

Mr. PRESTON. Sir, the point was, when the armed conflict ends, the international-law basis for continuing to hold people who are being held on the basis of their membership in a——

Mr. SMITH. I am sorry, Mr. Preston, but you really have to point out which armed conflict you are talking about. Your answer was

not the armed conflict in Afghanistan. It was the one as defined under the AUMF.

In other words, as long as we are fighting Al Qaeda and as long as we are fighting their associated forces, that is the armed conflict that you were talking about being over, not Afghanistan. I believe that is the point of the chairman's question.

Mr. PRESTON. The point is we are currently in armed conflict with the Taliban and with Al Qaeda. At some point, the armed conflict with the Taliban ends. And, at that point, for those detainees that are being held as enemy belligerents against our enemy, the Taliban, unless there is an additional basis for holding them, then we would no longer have that international-law basis for holding them.

Now, it has been suggested that Taliban may also be candidates to be held as associates of Al Qaeda as the conflict with Al Qaeda continues.

The CHAIRMAN. The point that Mr. Smith made is that this conflict may not end in December just because the majority of our troops are pulled out. Is that your understanding?

Mr. PRESTON. That is my understanding, as well, sir.

The CHAIRMAN. I mean, we see—we thought the conflict was over in Iraq, and we see that it is not, that it continues to go on.

Now, a second thing. I may have left the wrong impression when I was talking to the Secretary, saying that if you had given the same report, that that probably would have just solved everything. We still have big concerns about the five. And I didn't mention that when we were briefed in November of 2011 and January of 2012 that there was real concerns of Members of Congress that those five would be released. In fact, there was real opposition to it.

And that is why we are very concerned that we weren't told other than, if we reenter those negotiations, you would be told, and then we weren't. So those are things that we really need to have clarified and work through.

Mr. Thornberry.

Mr. THORNBERRY. Thank you, Mr. Chairman.

Mr. Secretary, I would like to just begin with a brief additional observation on the notification issue.

For the past several years, this committee has worked on a bipartisan basis to establish an oversight structure for cyber operations, for terrorism operations, and for sensitive military operations, and an oversight structure that allows the Department to have the flexibility it needs to operate in a volatile, rapidly changing world and still give us the ability to exercise our duties under the Constitution.

Now, the basis for all of those, in all three of those areas, is that we get timely, accurate information from the Department. And this failure, even if it was ordered by the White House, undermines the ability to have that sort of oversight structure.

I have been a member of the Intelligence Committee for 10 years. Our work depends on getting accurate, timely information from the intelligence community. If the President can violate the law and say, "No, in this case, we are not going to give you the information," it undermines the oversight process that we have with the intelligence community.

So my point to you is it is not just about this incident; it is not just about somebody having their feelings hurt. This decision undermines a lot of the working relationship in all these areas of national security. And I think it is important that the whole administration understands some of the ramifications of this.

Let me ask a specific question. Press reports indicate that Sergeant Bergdahl was captured by a Haqqani Network commander and was held by the Haqqani Network. Is that true?

Secretary HAGEL. What I would prefer is, as I noted, in the classified session that we get into the specifics of that 15–6 commander's evaluation report that was done on the circumstances at the time of Sergeant Bergdahl's capture. I believe that was done in August of 2009. That has been sent up here unredacted, was sent up here yesterday. And I would just as soon get into that in a classified briefing.

Mr. THORNBERRY. Well, I am not——

Secretary HAGEL. But I would say this, though. I would say this. He was—in that report that the Army did, he was classified as missing-slash-captive. So——

Mr. THORNBERRY. Yeah. I wasn't really——

Secretary HAGEL. And he was not charged with anything.

Mr. THORNBERRY [continuing]. Focused on him. I am trying to just verify. As I understand it, administration people have said clearly it was the Haqqani Network that kept him.

Secretary HAGEL. Well, the Haqqani Network did have him through periods of time. This was another complication. Over a 5-year period, he was moved around. We had difficulty finding him and knowing where he was. Different groups held him. So the complication of the Haqqanis being part of this, that is right.

Mr. THORNBERRY. Okay. And it is also true the Haqqani Network is listed by the State Department as a foreign terrorist organization.

Secretary HAGEL. That is right.

Mr. THORNBERRY. Okay.

Secretary HAGEL. That is right.

Mr. THORNBERRY. Let me just turn——

Secretary HAGEL. But we didn't negotiate with Haqqani.

Mr. THORNBERRY. Okay. I think that is a subject we will want to discuss more, if we must, in the classified session. But I think who——

Secretary HAGEL. Well, I want to make sure the record is clear on that. We engaged the Qataris, and they engaged the Taliban.

Now, if the Haqqanis were subcontracting to the Taliban, or whatever that relationship is—you know there is the Pakistan Taliban and the Afghan Taliban. There is a difference there. So we get back into definitions of who has responsibility for whom.

But I just want to make sure that that is clear on the record, and we can go into a lot more detail——

Mr. THORNBERRY. Okay. Well, I think that you just pointed out some of the difficulty in making categorical statements that we don't negotiate with terrorists, when, at least for some period, the Haqqanis were the ones who had him.

Let me just ask about one other thing, and that is the five detainees that were released. You said that there is always some risk

associated with releasing someone from Guantanamo, but you also said that they have not been implicated in any attacks on the United States.

I have some unclassified summary of evidence before the combatant status review tribunals. For example, for Mr. Fazl, it says, "The detainee engaged in hostilities against the United States or its coalition partners." Maybe there is a difference between us and our partners. For Mr. Wasiq, it says, "The detainee participated in military operations against the coalition."

So, at least at some point, there was evidence that they were involved in hostilities, military operations against the coalition, weren't there?

Secretary HAGEL. Yes. They were mid- to high-ranking members of the Taliban government—of the Taliban. So, yes, they were part of planning. But what my point was, we have no direct evidence of any direct involvement in their direct attacks on the United States or any of our troops.

They were part of the Taliban at the time some were given to us. We picked two of them up, captured two. But, yes, they were combatants.

Mr. THORNBERRY. Your point was they didn't pull the trigger. But they were senior commanders of the Taliban military who directed operations against the United States and its coalition partners. Would that be——

Secretary HAGEL. That is right.

Mr. THORNBERRY [continuing]. A better way do it?

Secretary HAGEL. That is right.

Mr. THORNBERRY. Okay.

Secretary HAGEL. Now, as I said in my statement, Congressman, they were combatants. We were at war with the Taliban. I mean, there is no getting around that. And I had made that point, I thought, pretty clearly.

Mr. THORNBERRY. Thank you.

The CHAIRMAN. Just like bin Laden didn't pull a trigger but we went after him because he is the one that caused the 9/11.

Ms. Davis.

Mrs. DAVIS. Thank you, Mr. Chairman.

And thank you both for being here.

Mr. Secretary, I do think that your presentation did provide us, I think, additional ways of really looking at the discussion.

I do understand how people feel, in terms of notice, but I wanted to have an opportunity to just look at that issue and whether or not the circumstances under which he was captured or the fact that regardless of whether or not his life was in danger would have made any difference in terms of the 30-day notice. You know, it is difficult for me to imagine that Members would have included that within the language of that bill.

To what extent were those situations weighing on the decision of whether or not to engage in that discussion during the imminent-danger period?

Secretary HAGEL. Well, all of those were factors that we had to consider as we were thinking through this: his deteriorating health, which was clear to us from the last proof-of-life video we had; the uncertainty of where he was, who exactly held him.

Again, I remind everybody, this service member was held in pretty difficult circumstances for almost 5 years. And we don't know the facts of all of that until he gets back and we are able to get the facts.

The urgency of getting him, the fleeting opportunity that was made clear to us by the Qataris in our engagements and negotiations. Mr. Preston was there through those. All these were factors. The concern about leaks we were warned about.

Every one of these different dimensions we had to think through. And we did believe, as I said—and we had information to support this—that this effort might be the last real effort that we had to get him back. There were too many things floating around that we didn't control, that we didn't know enough about. So we had to factor in all of those.

Mrs. DAVIS. Did you have any other—did you, I guess, entertain other approaches to his rescue that you were looking at at that particular time? And why were any of those not followed?

Secretary HAGEL. Well, Congresswoman, we were. As I said in my statement, since the time he went missing, we were looking at different ways to get him back. Our combatant commanders were always looking at plans, possibilities, options, rescue missions, and so on.

But, as I said in my remarks, we had to factor in the risk to our other forces to go get him. And if he was in Pakistan—we know he was moved in and out across the border—that would also affect some different dimensions.

But, yes, we looked at all the options, had all the possibilities. But up until this last time when we got him, in our opinion, our intelligence community's opinion, our military, everyone who was involved, this was the best possibility that we had to get him out, and we were concerned we might lose it.

And, as I gave you some dimension of the timeframe, we didn't even know where we were going to pick him up.

Mrs. DAVIS. Yeah.

Secretary HAGEL. It was less than an hour. We knew the general area.

Mrs. DAVIS. And the detainees, were there—was it always this five or were there others?

Secretary HAGEL. Well, it actually started with six, as some of you may recall.

Mrs. DAVIS. Right. One of them——

Secretary HAGEL. One of them died. And there had been back-and-forth. They wanted all the Taliban detainees at one point, and we said no.

And so this was part of the whole engagement of what we need to do and where we draw a line saying, no, we are not going to do this. So, yes, there were different variations of that engagement over the years.

Mrs. DAVIS. All right. Thank you. Thank you, Mr. Secretary.

The CHAIRMAN. Mr. Jones.

Mr. JONES. Mr. Chairman, thank you very much.

Secretary Hagel, Mr. Preston, it is good to see both of you. Thank you for being here today.

Mr. Secretary, on June 1, you were on "Meet the Press," and you expressed hope that the release of Sergeant Bergdahl would lead to direct U.S. talks with the Taliban.

Mr. Secretary, the Taliban have stated there will be no peace with the Afghan Government, with the United States, or any foreign presence as long as troops remain in Afghanistan and prisoners are detained at Guantanamo Bay. They have repeated these statements time and time again and have proven they do not desire peace with the United States or its allies.

With this known, why did you at that point on "Meet the Press" express hope—and we can all have hope—that the release of the sergeant would lead to some type of direct negotiations with the United States? And do you today feel that that is still a real possibility?

And maybe there is something you want to say in the classified setting that you can't say here today. But this, to me—your statement was received by many of the people that I represent in the Third District of North Carolina that maybe there was, in this negotiation about the sergeant, that maybe there were some signals sent to you, sir, or to the administration that there might be an opportunity for direct negotiations with the Taliban.

Knowing the history of the Taliban, knowing how they fought the Russians, Alexander the Great, the Brits, and then fighting the Americans, I would hope that maybe you do know something that you can share with us, if not in a public setting but in a private setting.

Can you comment, sir?

Secretary HAGEL. Congressman Jones, thank you. And good to see you again.

Mr. JONES. Thank you.

Secretary HAGEL. Thank you.

First, as you know, the position of the United States Government regarding the Taliban has always been that we support a reconciliation between the Afghan Government and the Taliban. That has been a general position, as you know.

As to the specific answer I gave on "Meet the Press," it was to a specific question when we were talking about Sergeant Bergdahl's release. And I don't recall exactly the question, but if I can piece it together enough to respond, I think the question was set up, "Well, could this lead to talks with the Taliban or reconciliation?" And, as you quoted me, I said, well, I hope, or maybe, whatever. But, no, that wasn't any direct hint or wink or possibility that I know something that that is going to happen.

But I would also remind us again, too, that, if you recall—some of you do, because you were in some of these meetings, briefings—in the 2011–2012 timeframe, I wasn't in this job at the time, but I have looked at the files on this, I have seen it all, there was a larger scope and framework of a larger reconciliation which included Bergdahl's release. But the current situation that we were in was a straight "get Bergdahl."

Now, that doesn't dismiss, Congressman, the hope that there can be some possibility of the Afghan Government and the Taliban finding a reconciliation somehow, some way. But in no way did I—

was I intending to imply in that answer that there is something else going on out here.

Mr. JONES. Well, my interest was simply that the Taliban's history does not seem that they want to see a foreign presence that is going to influence the future of their country. And I was hopeful that maybe, in the negotiations for the sergeant, that maybe there had been some signal sent with the intermediary that maybe had been shared.

And, again, if there has been, maybe you could, through your staff or maybe in the classified setting, let me know that there are some possibilities. Because my Marines down in Camp Lejeune, quite frankly, are tired of going to Afghanistan and getting their legs blown off.

So thank you, Mr. Chairman. I yield back.

[The information referred to can be found in the Appendix on page 107.]

Secretary HAGEL. Thank you.

The CHAIRMAN. Thank you.

Secretary HAGEL. And we will, Congressman Jones.

The CHAIRMAN. Mr. Langevin.

Mr. LANGEVIN. Thank you, Mr. Chairman.

Mr. Secretary and Mr. Preston, I want to thank you for being here today and for your testimony.

As we were reminded just yesterday, with the loss of five American special operating forces, Afghanistan obviously remains a very dangerous battlefield for our voluntary military. And I join many of my colleagues, of course, in expressing gratitude for the return of the American prisoner of war. And the return of any U.S. service member from enemy captivity should be a priority for his or her fellow soldiers and, of course, for our country. And Sergeant Bergdahl is an American soldier, and we are certainly grateful that he has been freed.

That said, this whole situation raises many troubling concerns. And among them, of course, this committee has a significant oversight role, and there are legitimate questions regarding both congressional notification as well as the long-term incentives for the Taliban and Al Qaeda. Certainly, significant personnel and other resources have been expended to conduct what could result in very dangerous and disturbing incentives on the battlefields. As one Taliban commander said, and I quote, "It has encouraged our people. Now everybody will work hard to capture such an important bird," end quote.

So, Mr. Secretary, how do you anticipate this transfer will impact the incentives and the behavior for the Taliban and Al Qaeda? Are we prepared to counter any new behavior?

Secretary HAGEL. Congressman, I would answer this way. First, I think everyone on this committee knows, some more than others, who served in war, that war is a dangerous business. And so a soldier is always—always at risk. That is number one.

Two, you probably know that the Taliban has standing orders to capture American service members, and that has been a standing order for 12 years. So there is nothing new here about where the Taliban have been and where they continue to be.

But I would say this also. Now that we have our last prisoner back, this very much gives us more flexibility, quite frankly, to free up resources that every day we were thinking about, our commanders on the ground in that area, if we have the opportunity, how can we get Bergdahl. Now that he is back, that frees up that obligation. I think that actually strengthens the point.

And the last point I would make, I mentioned this in my comments, and, again, those who have served in uniform on this committee know this, pretty basic to military, and I expressed it in different ways by quoting different senior members of our military and retired: that to have our men and women in uniform all over the world, who some are more at risk than others every day, to have them be reassured that this country will come get them or will make every effort to go get them has got to be pretty significant. And I was told that by all of our commanders.

Now, there can be issues on the specifics of Sergeant Bergdahl, but that is irrelevant, quite frankly. He was a member of our Armed Forces, and we went and we got him back after 5 years. I think that is pretty significant. And I think it also falls into the category of your question, answering that question.

Thank you.

Mr. LANGEVIN. Mr. Secretary, thank you for that answer.

As the chairman and the ranking member have mentioned in their opening statements, the questions about Sergeant Bergdahl's conduct should be addressed with due process at the appropriate time and such. But could you settle one conflicting report, at least, in terms of regarding the number of the loss of soldiers who may have been involved in searches for Sergeant Bergdahl?

Secretary HAGEL. First, any loss of any soldier is a terrible loss to their family and to our country. And I think we should note that first.

Second, your question has been asked a number of times. I have personally gone back and asked that question inside the Pentagon, in the Army, in all of our reports. I have seen no evidence that directly links any American combat death to the rescue or finding or search of Sergeant Bergdahl. And I have asked the question. We have all asked the question. I have seen no evidence, no facts presented to me when I asked that question.

The CHAIRMAN. Mr. Secretary, you did say there is nothing new here, that the Taliban is always out to try to capture us. But isn't it true that there is one thing new, that we have now made a trade for a hostage?

Secretary HAGEL. No. He was not a hostage. He was a prisoner of war. That is not new.

The CHAIRMAN. Have we made other trades with the Taliban?

Secretary HAGEL. With the Taliban, I don't know. I don't think so. I don't think so.

The CHAIRMAN. Thank you.

Mr. Forbes.

Mr. FORBES. Thank you, Mr. Chairman.

Mr. Secretary, thank you for being here and for mentioning the need for transparency. And as you talked about our inability to prosecute the individuals that were released, this administration has not exactly had a stellar record on prosecution of people at

GTMO. When you look at the fact that the lead prosecutor for the 9/11 terrorists had specifically said that he would have had a guilty plea out of all of them within 6 months, and this administration came in, shut down his prosecution, destroyed all of his pretrial work, and we have been 5 years and still haven't brought them to trial.

Secondly, I don't think even you would argue that the conversations that took place in 2011 complied with the law. And, basically, what we are trying to get across is that we are a nation of laws. You can't pick and choose, just because they are convenient or not convenient, which ones we are going to enforce and which ones we aren't.

But the third thing is, and you said this, that there are limits to trades that we would make and some where we draw the line, and I want to talk about where we drew the line. The individuals we released were essentially equivalent to releasing a deputy secretary of defense, a deputy secretary of intelligence, a deputy secretary of interior, a governor, and a commander.

And when the President was asked if there was a possibility of them returning to activities that are detrimental to the U.S., his answer was, "Absolutely." Our Deputy Director of National Intelligence was even harsher. He said the latest community-wide U.S. intelligence assessment on these five terrorists said he expected four out of the five Taliban leaders would return to the battlefield. And this assessment was in accord with the 2008 Pentagon dossier that said that all five of the individuals released were considered to be a high risk to launch attacks against the United States and its allies if they were liberated.

Now, you state in your testimony that if any of these detainees ever try to rejoin the fight, they would be doing so at their own peril. So my first question to you is, does this mean you would put American lives at risk to go after them?

Secretary HAGEL. Well, Congressman, we have American lives at risk every day——

Mr. FORBES. But not——

Secretary HAGEL [continuing]. In parts of the world——

Mr. FORBES [continuing]. For individuals that we have released——

Secretary HAGEL [continuing]. That go after people who have tried to kill us.

Mr. FORBES [continuing]. And put back out there. So my question is, would we put American lives at risk to go after them if they rejoined the fight?

Secretary HAGEL. Well, depending on the threat.

But, also, let me remind you of the other pieces that you didn't mention in our analysis of these five. The intelligence community has said clearly that these five are not a threat to the homeland.

Mr. FORBES. Mr. Secretary, you have said in here that if they rejoin the fight, they do it at their own peril.

Secretary HAGEL. In Afghanistan.

Mr. FORBES. My question is a pretty simple one. Would we put American lives at risk to go after them?

Secretary HAGEL. We have American——

Mr. FORBES. Yes or no?

Secretary HAGEL. We have American lives put at risk every day to go after people trying to kill us.

Mr. FORBES. I understand that, Mr. Secretary. My question is, will we put American lives at risk to go after these individuals if they rejoin the fight?

Secretary HAGEL. Well, yes, because——

Mr. FORBES. Okay. If that is the case—let me ask you just two other questions.

Secretary HAGEL. You could use the same argument, Congressman, on Yemen or anywhere else.

Mr. FORBES. I could do that, but not because of individuals we released.

And the second question I would ask you is two parts. In the calculus that you made for releasing these individuals, were you asked or did you make an assessment of the number of American lives that were lost or put at risk in capturing these individuals in the first place? And did you make an assessment of the number of American lives that may be put at risk if we have to go recapture them again?

Secretary HAGEL. Again, I saw no evidence, no facts—I asked the question about how these five found their way to Guantanamo. And I have in front of me the facts on the five. Two of them were detained by U.S. forces.

Mr. FORBES. Mr. Secretary, I understand that.

Secretary HAGEL. And so, no.

Mr. FORBES. And I understand—we are running out the clock. I only have 50-some seconds left.

Secretary HAGEL. The answer is "no."

Mr. FORBES. So you didn't even make a calculus as to how many——

Secretary HAGEL. No, I said I did. And I said the answer is—you asked if there were lives lost in capturing these.

Mr. FORBES. And you said "no."

Secretary HAGEL. I have no direct evidence that there were——

Mr. FORBES. Did you make an assessment——

Secretary HAGEL [continuing]. Any American lives lost in capturing them.

Mr. FORBES. Did you make an assessment of how many American lives may be put at risk if they have to be recaptured?

Secretary HAGEL. No.

Mr. FORBES. Okay.

Secretary HAGEL. But there is risk that we have to our country, threats to our country every day, everywhere.

And the other point I would make on this, we determined that there was a substantial mitigation of risk for this country, for our interests, for our citizens and our service members when we made this decision.

Mr. FORBES. And that just flies in——

Secretary HAGEL. Partly the MOU, partly—and we were satisfied that we could make that determination.

Mr. FORBES. It just flies in the face of all the other evidence we have.

And, with that, Mr. Chairman, I yield back.

The CHAIRMAN. Ms. Bordallo.

Ms. BORDALLO. Thank you very much, Mr. Chairman.

Secretary Hagel and Mr. Preston, thank you for appearing today and providing us with your testimony.

Secretary Hagel, I appreciate the detailed information that you had in your statement, and I support your position. I do appreciate also your continued commitment to our men and women in uniform and your steadfast leadership during these challenging times.

My first question is for you, Mr. Secretary. What impact would Sergeant Bergdahl's continued imprisonment if we had not engaged in his exchange have had on the security situation in Afghanistan as we draw down forces? Did his continued imprisonment create a heightened security threat to our men and women in uniform?

Secretary HAGEL. Well, in a sense, Congresswoman, as I answered in a previous question about putting at risk American lives to capture him—I mean, not to capture him, but to get him back, and to do that, if it would have taken another course of action or if we would have taken another option, that would have put our men and women at risk. Our men and women were at risk——

Ms. BORDALLO. Every day.

Secretary HAGEL [continuing]. In fact, carrying out this one mission. But, fortunately, it was done the right way.

And I don't think, again, that effort has gotten enough attention. This was all done in less than 60 seconds. Not one death, not one issue, not one problem. And I have seen very little recognition of that given to our forces by anybody. I mean, that was a significant effort by our Armed Forces, knowing as little as they did but planning it as well as they did and having the outcome as positive as it was. So thank you.

Ms. BORDALLO. I agree.

My next question is for Mr. Preston.

With the heightened media attention, how will you ensure Sergeant Bergdahl receives a fair investigation?

Mr. PRESTON. Thank you.

We will pursue our usual policies and practices with respect to investigations and follow-on actions.

A key element of that is avoiding what is referred to as unlawful or undue command influence. So you will see that the leadership, military and civilian, at the Department have been entirely neutral in their discussion of this and focused on ensuring due process without prejudging what the outcome should be one way or the other.

Those dealing with Sergeant Bergdahl more directly, and the Army more generally, are, I believe, sensitive to ensuring that, in the process of bringing him home, restoring him to health, debriefing him for intelligence purposes, and then ultimately reviewing the circumstances of his capture, that fairness be preserved and that his rights be preserved.

Ms. BORDALLO. Thank you. Thank you.

And my final question is for Secretary Hagel.

Prior to securing the recovery of Sergeant Bergdahl, had you received correspondence from Members of Congress requesting that you take action to obtain Sergeant Bergdahl's release?

Secretary HAGEL. Yes.

Ms. BORDALLO. Thank you.

The CHAIRMAN. Thank you.

Mr. Miller.

Mr. MILLER. Thank you, Mr. Chairman.

Thank you, Mr. Secretary, for being here.

I am looking at your testimony, and on the first—third page, excuse me, it says that "we complied with the National Defense Authorization Act of 2014."

Did you or did you not notify Congress within the 30-day timeframe, yes or no?

Secretary HAGEL. No.

Mr. MILLER. Okay.

Secretary HAGEL. What I——

Mr. MILLER. No, sir. Yes or no?

Secretary HAGEL. All right. No.

Mr. MILLER. Does the administration intend to violate the notice requirements of section 1035 of the NDAA and section 8111 of the DOD Appropriations Act in future transfers?

Secretary HAGEL. Not unless there—not unless there is an extraordinary set of circumstances like this one would we be in a position to make a call like that.

Mr. MILLER. Will you assure this committee that the Department will not proceed with future detainee transfers without notifying Congress, consistent with the law?

Secretary HAGEL. We have, I believe, before my time in every circumstance except this one. And we intend to continue to do that.

Mr. MILLER. You were part of the legislative branch, as a Member of the United States Senate. We make the laws. You are part of the executive branch now, which the responsibility is to enforce the law. Whose responsibility is it to interpret the law? Is it the President's responsibility or is it the courts'?

Secretary HAGEL. The courts'.

Mr. MILLER. Then why did the President make the decision or you make the decision not to notify Congress?

Secretary HAGEL. We believed, and the Justice Department Office of Legal Counsel——

Mr. MILLER. Part of the executive branch.

Secretary HAGEL [continuing]. Told the President that he had the constitutional authority to do that, that he had under his constitutional powers the authority to make the decision that he did.

Mr. MILLER. You said that you would put American lives at risk if the Taliban prisoners that were swapped in the secret deal would rejoin the fight—if they rejoin the fight in Afghanistan. What if they rejoined it from somewhere else? They don't have to necessarily be on the battlefield in Afghanistan. Certainly we would pursue them wherever they are.

Secretary HAGEL. We would do everything we needed to do to, as we have said, to deal with that threat, as we are doing today.

Mr. MILLER. Your testimony is we are doing everything that we can——

Secretary HAGEL. To deal with the threats to the United States of America, whether they are in Afghanistan, whether they are in Yemen, whether they are in homeland defense. It isn't just limited to Afghanistan, the threats that face this country.

Mr. MILLER. Mr. Secretary, you keep saying we can't get the facts from Sergeant Bergdahl until he returns home. Have you ever thought about going to Landstuhl and talking to him there?

Secretary HAGEL. Well, I don't know how much medical training you had, Congressman. I haven't had much. And what we are doing is we are allowing——

Mr. MILLER. I tell you what, Mr. Secretary——

Secretary HAGEL [continuing]. The doctors—the doctors will make the decision.

Mr. MILLER. No, Mr. Secretary. Wait a minute. Wait a minute. Why hasn't he been returned to the United States? We have seriously wounded soldiers that are returned to the United States almost immediately after they are stabilized. How long did Jessica Lynch wait before she was returned to the United States? You are trying to tell me that he is being held at Landstuhl, Germany, because of his medical condition?

Secretary HAGEL. Congressman, I hope you are not implying anything other than that. The fact is——

Mr. MILLER. I am just asking the question, Mr. Secretary.

Secretary HAGEL. I am going to give you an answer, too.

Mr. MILLER. Well, answer it.

Secretary HAGEL. And I don't like the implication of the question.

Mr. MILLER. Answer it. Answer it.

Secretary HAGEL. He is being held there because our medical professionals don't believe he is ready until they believe he is ready to take the next——

Mr. MILLER. Have you——

Secretary HAGEL [continuing]. Step, which is rehabilitation.

Mr. MILLER. Have you ever seen a traumatically injured service member brought to the United States immediately upon being stabilized at Landstuhl? We do it all the time.

Secretary HAGEL. This isn't just about a physical situation, Congressman. This guy was held for almost 5 years in God knows what kind of conditions. We do know some of the conditions from our intelligence community, not from, by the way, Bergdahl. This is not just about can he get on his feet and walk and get to a plane. These are——

Mr. MILLER. So you are telling me he cannot be questioned because of his condition.

Secretary HAGEL. I am telling you that the medical professionals that we rely on their judgment for his health, which I assume everybody respects, have made the determination and will make the determination that when he is ready to move and move to the next step, which will most likely be in San Antonio, then we can proceed. That is what I am saying.

Mr. MILLER. Yeah.

One other question. Why is the Army just now reviewing the circumstances of Sergeant Bergdahl's capture?

Secretary HAGEL. They are not. I said in my testimony and I said in my comments they did it back after he went missing in 2009. That 15–6 report was filed, completed by General Scaparrotti, who now is our commanding general in Korea, in August of 2009.

That 15–6 report, review, complete, not redacted, was sent up to the Hill yesterday to the committees——

Mr. MILLER. Thank you, Mr. Secretary.

Secretary HAGEL [continuing]. And you are welcome to read it.

Mr. MILLER. Thank you.

The CHAIRMAN. And that will be made available to all the Members in the proper setting to review.

Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman.

I want to thank the witnesses for being here today and, Secretary Hagel, for your powerful testimony, which again laid out the fact that this is—not every choice in your position is always black and white. You have to weigh a lot of factors.

And one of the factors which I just want to, kind of, maybe reemphasize is that, in terms of when you were deciding this back on May 27th, I mean, it wasn't like you had a lot of other options. I mean, there was no plan B or plan C that was sitting on your desk, in terms of how to get this American soldier back in our jurisdiction. Isn't that correct?

Secretary HAGEL. That is exactly correct. There was no option.

Mr. COURTNEY. Because there are Members who have been on some of the shows saying that, you know, well, we should have sent Special Forces in to get him. I mean, we actually were not totally clear about where he was even.

Secretary HAGEL. That is right.

Mr. COURTNEY. And so there really wasn't even a place to send Special Forces to recover him.

You also, again—and this has been alluded to earlier, is that in terms of the risk mitigation of the five transferees, Taliban transferees, that if they do get back into the conflict, they do so at their own peril.

Secretary Kerry, I think in some public setting, also made the comment that it is not like we are totally without options to, you know, raise their risks in terms of getting back involved in the fight. Again, they don't always involve the use of military personnel. I mean, we have all been on the CODELs [congressional delegations] over to Afghanistan, most of us, and have seen the availability of unmanned assets that we have to take out targets that, again, have been identified through the chain of command. Isn't that correct?

Secretary HAGEL. That is correct.

Mr. COURTNEY. And, certainly, that would be available to us, again, if a situation arose that would not put soldiers or airmen or anyone necessarily at risk.

Secretary HAGEL. That is right.

Mr. COURTNEY. Mr. Preston, you know, we have been sort of talking about the legal sort of consultation that was going on with your office and the Department of Justice [DOJ] during that 5- or 6-day period when the decisions were being made. Did DOJ address, in terms of the legal opinions that you were given, the question of consultation with Congress, the 30-day requirement?

Mr. PRESTON. Yes, sir. The administration sought the guidance from the Department of Justice on the applicability and impact of the 30-day notice requirement under these circumstances and received guidance from the Department of Justice.

Mr. COURTNEY. And was that in writing?

Mr. PRESTON. It was not by means of a formal memorandum opinion but, rather, by email exchange principally.

Mr. COURTNEY. Okay. And I know the chairman mentioned that he has, you know, got requests from the committee for documents, which it sounds like are going to be forthcoming. I mean, is that—I assume that is one of the requests in terms of making any sort of legal analysis that you requested and received or offered from DOJ, that that would be one of the documents that you would share with us. I hope you would.

Mr. PRESTON. We will certainly take that back. I am sure—we appreciate that there is interest, and we certainly want to make sure that interested Members fully understand the legal basis on which the administration acted. As to the disposition of the document, we will take that back.

Mr. COURTNEY. Thank you. Again, and I will follow up with the chairman, because I think it is important, that if the Department was claiming a constitutional authorities, which the Secretary mentioned, in terms of that issue, I think we would like to see that analysis.

And, with that, I would yield back, Mr. Chairman.

[The information referred to can be found in the Appendix on page 108.]

The CHAIRMAN. The gentleman yields back.

Mr. Preston, when did you consult the DOJ on the 30-day notification? On what date was that?

Mr. PRESTON. Mr. Chairman, I don't remember the precise date, but it was in the timeframe in which we had completed our discussions with the Qataris over the MOU but before it was signed.

We anticipated that these issues would arise, and I engaged with my counterpart at the National Security Council [NSC], who, in turn, engaged with the Department of Justice to ask them to consider the legal and constitutional implications in this setting.

The CHAIRMAN. Do you recall last week, when you and other members of the administration were briefing the staff—I attended and Mr. Thornberry attended that briefing—and I asked the question if at any time since the January discussion started you had talked about the 30-day requirement, and nobody said at that time that there ever was a discussion about it?

Mr. PRESTON. I don't recall that exchange, sir, but I can assure you that the 30-day requirement was discussed. The part of the lawyers in this and my part was, in working with my counterpart at the NSC, to solicit the Department of Justice's guidance. That guidance was then provided to the decisionmakers, who made the judgment about whether the circumstances would—the particular circumstances in this case would permit the 30-day—the formal 30-day notice.

The CHAIRMAN. This is one of the things that has bothered me about reports we hear in the press and some of the briefings that we have had over a period of time, that we get different answers from one time to another. And we will go back and check our notes from that meeting, but when I asked that specific question, it was—nobody responded. And you were in that—were you one of the briefers.

Mr. PRESTON. I, frankly, don't know whether the question was directed to me or whether it was properly understood. I can tell you——

The CHAIRMAN. I asked all of the briefers, I said, at any time in any of these meetings, did you discuss the law that pertained to the 30-day notice to Congress? And——

Mr. PRESTON. Well, I can only say in no uncertain terms that we set in motion an effort to get authoritative guidance from the Department of Justice on the legal issues and that that guidance was part of and provided to decisionmakers who addressed what the administration was going to do vis-a-vis congressional notification.

The CHAIRMAN. So you had time to discuss this with the Department of Justice. You probably could have used that same time to talk to Congress about it.

Mr. PRESTON. I can just speak for my part of it, which is, we foresaw the possibility that these issues would arise and wanted to have——

The CHAIRMAN. What I was trying to determine when I asked the question last week was if you had just forgotten the law or if you had purposely decided not to address it. It sounds like what you are saying right now is that you thought about it, you were aware of it, and you had a discussion about it and decided that the law didn't apply.

Mr. PRESTON. We certainly thought about it. We did not ignore the law. And we solicited legal guidance on the legal issues that would apply in application in this extraordinary set of circumstances in which the President was seeking to repatriate a service member who was in captivity and in peril. Whether in these extraordinary circumstances and——

The CHAIRMAN. So if the circumstances are extraordinary, you don't have to follow the law.

Mr. PRESTON. No. The way I would put it is that the Constitution vests in the President certain authorities and responsibilities, to include protecting——

The CHAIRMAN. As it does to the Congress.

Mr. PRESTON [continuing]. It does, indeed—protecting Americans abroad and protecting service members in particular. And to the extent that the application of the 30-day notice in this application would interfere with or undermine the President's efforts to secure the recovery of this service member, then, in the exercise of his constitutional authority, the statutory notice provision——

The CHAIRMAN. That was your interpretation. I think somebody talked earlier about the interpretation should be made by the courts, not by a couple of attorneys talking about the law.

Mr. PRESTON. The courts certainly have a role, but the President has a responsibility to execute his——

The CHAIRMAN. Thank you. Thank you very much.

Mr. PRESTON [continuing]. Authority, and he seeks the counsel of the Department of Justice.

The CHAIRMAN. Mr. Wilson.

Mr. WILSON. Thank you, Mr. Chairman, for your strong efforts to uncover the truth of what is occurring before us today.

Mr. Secretary, I appreciate your being here today.

Yesterday, I had the opportunity to stand in front of polling locations during a primary, where hundreds of concerned citizens of both political parties expressed to me their shock and outrage that the President would release five terrorists who they believe will have a background of having been facilitators of the attacks of September the 11th, 2001.

We know the Taliban allowed the Al Qaeda to operate from safe havens in Afghanistan to attack the United States. And for the top leadership of this terrorist regime, for the President to release them is just incredible to the people I represent. Because they know that the terrorists have a goal in mind, and the goal is very clear: Death to America, death to Israel. And the thought that people like this would be released was just inconceivable to the people that I spoke with yesterday.

Additionally, putting this in the context of this week, Al Qaeda or Taliban terrorists have attacked Karachi twice. Dozens of citizens have been murdered by the Taliban. It is not just Americans at risk. Additionally, in Baghdad, there have been car bombings with, again, dozens of people being murdered. This week, we had the circumstance of Mosul now possibly coming under Al Qaeda control, again creating a safe haven which will affect American families in the homeland, because the safe havens will be used for attacks on America.

The safe havens are growing across North Africa, Middle East, Central Asia. I believe it is dangerous to provide more terrorist leadership as this is occurring. The President was wrong. Last year, he announced that terrorism was being diminished around the world. In fact, it is growing, and it is growing exponentially.

And, with that in mind, on June the 5th, Time magazine, of all people, reported an interview that they conducted with the Taliban commander in Afghanistan, where the reporter asked him if this deal had inspired he and others to attempt to capture other American military personnel. The Taliban commander replied, quote, "Definitely. It is better to kidnap one person like Bergdahl than capturing or kidnapping hundreds of useless people," end of quote. And the quote continued, "It has encouraged our people. Now everybody will work hard to capture such an important bird," end of quote.

Can you now recognize that there is an increased risk to our service members because of this outrageous deal?

Secretary HAGEL. First, let me note again: Taliban policy for 12 years has been to do exactly what that Taliban representative told Time magazine, and that is to capture American service men. So that is not—that is not new.

I go back again to the factors that we all looked at to be able to substantially mitigate the risk to this country, to our allies, to our interests. And we believed, the analysis of the intelligence community, all who had a role in this, that we could substantially mitigate the risks through the 12-month memorandum of understanding that Qatar provided the enforcement of the security there. The other follow-on dynamics and threats and realities, which we factored in, we believed were mitigated enough.

These are five individuals who have been off the battlefield for 12, 13 years. Doesn't mean they won't go back. This is a different world—a different world for us, as well.

So I would give you those answers again. I know that you don't agree with them. But I would also remind all of us, there is risk to all of this. This is not a perfect situation. I know that; we all know that. And that is why we spent an awful lot of time——

Mr. WILSON. But we really should look at what our enemies say.

In the Augusta Chronicle, on Tuesday, June the 3rd, reported that one of the five, Mullah Mohammad Fazl, a leader infamous for his exceptional cruelty, according to Taliban commander Mullah Salim Khan, Fazl's return "is like pouring 10,000 Taliban fighters into the battle on the side of jihad," end of quote.

Mr. Secretary, our country is at risk. You identified the homeland as if it was far away. It is not. The safe havens are being created to attack the American people here, and action should be taken. And that would not include releasing terrorist leaders.

Thank you.

Secretary HAGEL. Congressman, I can assure you there is nobody more aware of that than this Secretary of Defense, and there is no one doing more to——

Mr. WILSON. Well, please act that way, my goodness.

Secretary HAGEL. Thank you.

The CHAIRMAN. Ms. Tsongas.

Ms. TSONGAS. Thank you, Mr. Chairman.

And welcome, Secretary Hagel and Mr. Preston. It is great to have you here today. I think the issues we have been talking about today really do merit the serious discussion that we have been having here.

But I would like to begin by reiterating the point that we, as a Nation, have a solemn responsibility to bring home every service man or woman who volunteers to put on the uniform and places themselves in harm's way on behalf of the values our Nation holds dear and on behalf of each and every one of us. It is the abiding promise we make, and it was the underlying motivator in the actions that our President has taken, with your guidance and advice and consent.

I would just briefly like to address the issue of notice that has received so much discussion. It is clear that, as we look at the actions that took place in 2011–2012 in the context of a possible reconciliation process, there was indeed generalized notice. I think that Member of Congress knew that there might be five Taliban who would be exchanged for Sergeant Bergdahl in an effort to bring him home. So, on that front, I don't think there is deep surprise that this has actually—would possibly take place.

But a lot of the concern has been on the issue of specific notice. And I think it troubles all of us, given the 2014 NDAA. On the other hand, I do think the exigent circumstances that you have described, the quick turn of events that necessitated quick action, made the 30 days' notice a tough one. But I do think a little heads-up, maybe a couple-hours call to the leaders of Congress might have served you all very well.

And that being said, I would also note that what you have said, this was not a simple transfer but a military action, and conducted

very well by our military, who was put in harm's way. And I commend those soldiers for pulling this off, as they did, without incident.

But I would actually like to address another aspect of section 1035 of the NDAA, and that is the need to put in place mitigating circumstances that do have a level of comfort that these released detainees will be held as promised and not quickly put back in the battle place.

Can you talk about that a bit? I know some of it you will revisit or visit in a classified setting, but I would like to hear as much as you can talk about in this context.

Secretary HAGEL. Congresswoman, thank you.

As you note, I mentioned about four general areas that are included in the specifics of the memorandum of understanding on the enforcement commitments made by the Government of Qatar, personally made in a telephone conversation with President Obama.

I can't get into the specifics until we get into this closed session on the real most significant parts of that MOU assurance, which we all assessed, every agency in the government who signed off on this decision all agreed that those were strong enforcement mechanisms that would give us some significant reassurance that those five individuals would be kept in Qatar and all the other assurances as to their activity. And, again, we can go into the specifics of that.

Through that——

Ms. TSONGAS. The track record, though—the track record hasn't been great. So what do you have, you know, up your sleeve that you feel comfortable will allow you to carefully monitor the situation?

Secretary HAGEL. Well, recognizing what you just said, the dimensions now that we are looking at, too, that have changed a bit in Qatar. You have a new leader in Qatar, a new Emir, over the last year. We have a significant United States force presence in Qatar. Many of you have visited our base there. We have thousands of people there. We have some significant relationship with the Government of Qatar.

They have had difficulties with their neighbors. I think the geopolitical arrangements that they would like to see change—I can't speak for them, but you asked me some of my thoughts—I think put a different face on this, as well. And there are some other assurances that I don't want to address here in an open session.

But suffice it to say, they are all strong enough to get the commitments that we each individually, each leader of each agency, came to the same conclusion, as ultimately did the President, that it, in fact, was in the interest of our country and, in fact, did substantially mitigate the risk.

Ms. TSONGAS. Thank you. This is a legitimate and real concern of, I know, my constituents.

Secretary HAGEL. Well, it is a concern of ours.

The CHAIRMAN. And the memo of understanding will be made available. Again, it got to us last evening. And that will be made available to all members of the committee in the proper setting.

Mr. Turner.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. Secretary, we have had very important issues to discuss here: obviously, one, the issue of notice to Congress; two, the issue of judgment, was this a good idea; a third issue, the policy of whether or not this is a shift from our policy of not negotiating with terrorists.

We had a briefing on Monday from Mr. Tony Blinken, Deputy National Security Advisor to the President; Ambassador Dobbins, Department of State; Mr. Work, Department of Defense; Admiral Winnefeld, Joint Chiefs Vice Chairman; and Robert Cardillo, Deputy Director for Intelligence, on Monday. I asked them this question: Can you cite any precedent for this nature of a swap, where we have swapped with a non-nation-state, in the last 40 years?

And, Mr. Preston, you were asked this same question by our ranking member, and you cited the exchange, the securing the release of helicopter pilot Michael Durant from warlord Mohammed Farah Aidid. You used the words, it was a—functionally exchanged.

Now, the five briefers, of course, said that they had—when I asked them that question, that there was no precedent, that we had not done any exchange with nonsovereign states within the last 40 years.

Now, Mr. Preston, I want to point out to you that when helicopter pilot Michael Durant was released in Somalia, Mohammad Aidid said that he did so, he released Durant, as a result of a gesture of goodwill. And President Clinton immediately called a press conference. President Clinton stated that, "I want to emphasize that we made no deals to secure the release of Chief Warrant Officer Durant," Clinton said at his press conference. "We had strong resolve. We showed that we are willing to support the resumption of the peace process." And he goes on.

And then he said, Clinton said, that it will be a U.N. decision whether to release the 32 Aidid aides captured by United Nations forces. Their release was demanded by Aidid, but Clinton says that there were absolutely no deals to secure his release.

Now, you have said that Mr. Durant's release was a result of a functional exchange. And the five that we had, briefers, on Monday said there was no precedent of a nonsovereign state.

Mr. Preston, was President Clinton lying at his press conference, or would you like to retract your testimony that Durant's release was secured as a result of an exchange by the United States Government of prisoners?

Mr. PRESTON. Sir, I certainly wouldn't want to suggest that the former President lied, and I don't think I need to recant my statement. I was trying to be responsive.

Mr. TURNER. Okay, well, I only have 5 minutes, so, Mr. Preston, in your response then I would like you in writing to provide additional information as to the exchange that occurred to secure Mr. Durant, because there is no public evidence or discussion of anything of that nature. In fact, there are disclaimers, including by the President of the United States, Mr. Clinton. It doesn't appear that on the record, this would be precedent for this Taliban swap, and I would like you to explain that and that we can release it to the public so they can understand the true nature of Durant's release.

Mr. PRESTON. It certainly wouldn't be on all fours, but it would be an example of——

Mr. TURNER. Mr. Preston, you cited that in this hearing. I would like the details of that exchange in writing provided to this committee.

Mr. PRESTON. I understand.

[The information referred to can be found in the Appendix on page 107.]

Mr. TURNER. Thank you, Mr. Preston.

Now, Mr. Secretary, the confusion in this, is because of the issue of the policy of we don't negotiate with terrorists. Now, you said that you don't want to talk about who held Mr. Bergdahl, whether or not it was Haqqani. And unless we are in a classified session, which I can understand you—your preference to being that. However, the Haqqani Network say that they were the ones holding him. Time Magazine says they were the one holding him. The Washington Post says that they were the ones holding him. It is reported openly in the Washington Free Beacon, The Daily Beast, Newsmax, all say that it was Haqqani. Now, the State Department lists the Haqqani Network as an international terrorist organization.

Mr. Secretary, do you disagree with the State Department's designation of the Haqqani Network as a terrorist organization?

Secretary HAGEL. No, I acknowledged that earlier this morning.

Mr. TURNER. Excellent. Next question, Mr. Secretary, do you agree that it has been the standing policy of the United States that we do not negotiate with terrorists?

Secretary HAGEL. Yes, I agree.

Mr. TURNER. Mr. Secretary, would you please explain to me how then that we could have been in negotiations that included the Haqqani Network because they certainly were involved in the capture, holding, and release of Sergeant Bergdahl, how is it the United States could have been in negotiations with the Haqqani Network, a listed terrorist organization, and it not conflict with our policy that we do not negotiate with terrorists?

Secretary HAGEL. We dealt directly with the Government of Qatar.

Mr. TURNER. Oh, that is our footnote now. So now the new policy of this administration is, we don't negotiate with terrorists directly.

Secretary HAGEL. Well, Congressman, you didn't let me finish.

Mr. TURNER. Mr. Secretary, that is what you said.

Secretary HAGEL. I did say it, but you cut me off before I could say the other party that we were dealing with, the Taliban. Now, I actually—I actually dealt with this question earlier this morning about the Haqqani Network holding at different times.

Mr. TURNER. Actually, you deferred and said we would talk in classified session. But it is well-known, well-known——

Secretary HAGEL. But I also said that the Haqqani Network was holding him at different times. We don't know——

Mr. TURNER [continuing]. As long as it is not direct, that we will negotiate with terrorists.

Secretary HAGEL. We didn't negotiate with terrorists, Congressman.

The CHAIRMAN. Mr. Cooper.

Mr. COOPER. Thank you, Mr. Chairman.

And thanks to our distinguished witnesses.

I wish that this committee would not be so prosecutorial in its tone. I think it is very important that this not become a political football. I don't know if my friend on the other side of the aisle is already running for majority leader or not, but it sounds like the tone here is way too political. I think, at least for the audience back home, people need to understand in case some people have forgotten that our Secretary of Defense is a distinguished former United States Senator of the Republican Party with a distinguished war record in Vietnam. So, hopefully, this committee will not cast aspersions on anyone and certainly not impugn their patriotism.

The chairman tried to narrow the scope of this hearing with his opening statement, and I think he essentially wanted to confine it to the 30-day notice requirement that this Congress perhaps should have received on this prisoner transfer. I think that if the committee hearing were, in fact, narrowed to that point, it would not be the near media circus that it has become. Not only would not many members of the press have shown up, but many members of this committee would not have shown up.

So let's try to de-escalate the tensions here. Let's try to focus on the substance. Let's try to be fair to each other, and hopefully bipartisan, because as the chairman correctly noted, this committee is noted for its bipartisanship and its fairness. It was a great triumph for the chairman and the Buck McKeon Defense Authorization Bill, for it to be passed out of this committee unanimously and overwhelmingly on the floor. That is the way our Nation should approach its national defense. In unity, there is strength. So, hopefully, my colleagues will focus on what is really important here. There has been a lot of discussion about precedent, and no one wants to set a bad precedent for us, the greatest country in the history of the world, but I think that if there is any precedential effect of this decision, it is a vitally important principle that so many of our generals and admirals and others have reiterated, leave no man behind. That is the message of this possibly politically unpopular decision, that is leave no man behind.

We can investigate what he did or didn't do once he is safely back in our custody, once he has been presumed innocent, and the regular course of justice can take its place. But I am shocked, really, that this has become such a political football, and such unfairness, as the Secretary of Defense quite rightly pointed out, not only toward our men in uniform, but towards his family. You know, I don't know the particulars, but justice will take its course. That is the nature of this country. That is the nature of our constitutional guarantees, and as the Secretary of Defense also pointed out, not only is this person a U.S. citizen, he is a person who volunteered to wear the uniform. So he should be given the benefit of the doubt. Let justice take its course.

I would like to ask Mr. Preston in a much less prosecutorial tone than some of the earlier questions, do you think that the 30-day notice requirement for Congress that was in the last NDAA was in fact a constitutional provision? Does the Commander in Chief, any Commander in Chief of either party, have the right to take action, you know, when time requires it, to protect the life of a service

man, to perhaps circumvent 30-day notice requirements to this body. And it was my impression also that the Senate Majority Leader, Mr. Reid, said that he had in fact been notified. I don't know the extent of notification.

Mr. PRESTON. Thank you for the question. Sir, we believe the provision is constitutional. The question was the constitutional implications of its application in the particular circumstances here. And the administration determined that it was necessary to forego the full 30-day formal notice to the eight committees under the constellation of circumstances presented in this situation in which the President was seeking to free a service member in captivity and in peril. And the circumstance can be described in terms of the fragility of the negotiations and concerns about delay and leaks and the impact in premature ending of the negotiation, the circumstance of a fleeting opportunity to effectuate the exchange. The Secretary mentioned that from the time it was decided to do an exchange to the actual execution was something on the order of 96 hours. The potential harm to Sergeant Bergdahl if the deal became public, all of this in the context and backdrop of uncertainty as to his physical condition, and the realization that this might be our last best chance to get him. It was in that circumstance, Mr. Chairman, if I could just finish, it was in that circumstance, that with the deal coming together, and the prospect of having a decision to transfer, the concern was that delaying at that point for 30 days to effectuate notice of the transfer would scuttle the deal and could possibly further endanger Sergeant Bergdahl.

Mr. COOPER. Thank you, Mr. Chairman. I see my time is expired.

The CHAIRMAN. You know, we can hammer on this and hammer on it, but the point is, those negotiations started last January. You had talked to us about it in November of 2011. Neither of you were in your jobs then, so when I say you, I mean the Department, had talked to us in November of 2011. When those negotiations blew up in February of 2012, you came to us and said, if we start the negotiations again, we will come back to you. That didn't happen, and so I understand, when you are down to the final days and you have got—you are planning the operation itself, and putting those things together, yeah, that is real crunch time, when you are down to a few days. But that was the end of May. What about January, February, March, April? There was plenty of time. You had time to talk to the Department of Justice; 80 or 90 people were informed and knew about this, but Congress was not informed. And I guess the reason I think they weren't informed is because when you originally brought it up back in November of 2011 and February—January and February of 2012 because you had real pushback from Congress. They didn't want those five guys released. And so then this time you just decided we will bypass Congress and deal with it after.

Mr. PRESTON. Let me address that.

The CHAIRMAN. That is the problem I have with all of this.

Mr. PRESTON. If I could address that with reference to the 30-day notice requirements, specifically. That is key to a transfer. And in this instance, there was no decision to transfer and could be no decision to transfer.

The CHAIRMAN. There was, when you started the negotiations in January and February as a result of the tape that you saw of Sergeant Bergdahl, you entered into a negotiation just as you had been a few years before it was transferring five detainees for the one prisoner, or hostage, or whatever we are going to call him. That didn't change. All that changed was you got closer to an actual deal.

Mr. PRESTON. We did not have a decision to transfer and could not have a decision to transfer until we had security assurances in place, which was May 12, and until there was an agreement to exchange, which was May 27th—excuse me, sir.

The CHAIRMAN. Then why didn't you talk to us about it in November of 2011?

Mr. PRESTON. I understand that there is a serious issue here, which the Secretary has addressed about the relationship and communication. What I am trying to focus on is what would trigger the statutory 30-day notice requirement. And that would be a transfer. We did not have a decision to transfer until—until that last week.

The CHAIRMAN. You don't need an exact date of transfer to begin the 30 days' notice.

Mr. PRESTON. It is notice of the transfer. That means there has to have been a decision to transfer.

The CHAIRMAN. Okay, we are probably not going to agree on this.

Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman.

Thank you, gentlemen, for being here.

I was somewhat amused by the gentleman from Tennessee's admonition of my colleagues for taking a prosecutorial approach. I am amused because I remember very well a few years ago, when the gentleman would hold up a newspaper headline and address representatives of the Republican administration in what one could see as a prosecutorial manner.

Nevertheless, Mr. Secretary, let me ask you a question that we have been around all morning. Who specifically selected the particular detainees that were transferred?

Secretary HAGEL. The five detainees that were transferred have been the subject of conversation, negotiation over a period of time. They just didn't appear on anybody's scope. These are individuals that we have been talking about as the chairman noted and I mentioned. I wasn't there at the time in 2011, as you note, in 2012, but I am aware that Members that were briefed on these five individuals, Members of the Congress, disagreed with these five individuals. Where those five individuals initially came from, I have—I don't know all of the history to that, Congressman.

Mr. KLINE. Okay, I thank you for that, but let me—somebody made the decision that these five were going to be transferred at the end. Now, there could have been discussions for going on for months, but somebody made that decision. Who was it, in May?

Secretary HAGEL. The decision to transfer, if that is your question——

Mr. KLINE. To transfer specifically these five.

Secretary HAGEL. Well, those decisions were made ultimately by the President. But we all in the National Security Council agreed

once we had all of the assurances in place, the things that Steve Preston has talked about, if that is your question.

Mr. KLINE. I guess we are going to talk past each other here, because at some point, somebody decided that it would be specifically these five, and I am just trying to figure out who that was.

You said in response or in a conversation with Ms. Davis earlier, they wanted all of the Taliban detainees. Who is "they"?

Secretary HAGEL. The Taliban.

Mr. KLINE. The Taliban.

Secretary HAGEL. At one point in these discussions, this is before my time, by the way.

Mr. KLINE. Right, so you can see why there is—I hope you can see why there is a lot of confusion here, because you have been very careful to say on more than one occasion that you were not negotiating with terrorists. You have even said you weren't negotiating with the Taliban because you were negotiating with the Emir of Qatar. And so we have had some pretty tortuous, I would say, tortuous legal responses to questions that we are trying to get at when we are just trying to find out the basics. And Mr. Preston, of course, he is a lawyer, but he has come back with—in response to the chairman and others, well, we didn't know because we didn't have a decision date. I think that was the answer that was just right here, and therefore, the 30 days didn't start because we specifically hadn't made a decision.

And Mr. Secretary, I am sorry, but these responses are very, very tortuous, as we are try to weave around here legalities. And I understand there a lot of lawyers and probably a lot of them here on the committee. But fundamentally, I am just trying to understand who made the decision when it was made to do the transfer, and who made the decision on the notification and why?

And so we are just walking around here. And I will just close, because my time is rapidly running out, by saying that this confusion leads to this belief that was expressed by Mr. Turner and others, that, in fact, the United States did set a precedent, did break the policy of negotiating with terrorists, because despite the maneuvering of the little pieces about well, I can't really say if it is Haqqani, who is a designated terrorist network, it was real Taliban, but we really weren't talking to Taliban either, because we were talking to Qatar, I am sorry, I think all of that just adds to the confusion and to the perception.

I yield back, Mr. Chairman.

Secretary HAGEL. May I just quickly respond? I notice the Congressman has 20 seconds, just a general response.

Mr. KLINE. Sure.

Secretary HAGEL. I am taking care of your time for you.

Mr. KLINE. Seventeen seconds left.

Secretary HAGEL. Yes, there was confusion. I have said that. This was imperfect, imprecise. Just to go back to a timeline, we didn't even engage here in Qatar until April. Yes, just exactly what the general counsel has said, what I have said; sure there was confusion. There was imprecision. We didn't know from day to day what we had, what we didn't have. The questions over here about the Taliban not having a good track record on keeping their word. They are in; they are out. We had to have assurances, what Steve

has talked about, what I have talked about, absolutely. Absolutely there was a lot of confusion. But through that, we had to stay focused on what the objective was. And that was getting an American POW back with the reassurances that we needed to be able to say it would substantially mitigate the risk and it was in the interest of our country. That was the objective, and that is what we tried to do. And I know there are differences. I know there are questions. I get it. But we did get him back. And we don't have any more POWs.

The CHAIRMAN. Mr. Smith.

Mr. SMITH. Yeah, Mr. Chairman, if I could, just on the point of who we negotiated with. To clarify this, originally this was all worked through the Qataris, and they were talking with the Taliban. Originally, we had the connection. So there is no evidence whatsoever, that we, or even the Qataris for that matter, negotiated with the Haqqani Network. It was always the Taliban; the Taliban reaching out to Doha and then reaching out to us. So it is pretty straightforward that the people we were negotiating with were the Taliban. Who held him where, when, whatever, but the people we were talking about his release, the people who apparently controlled his release was the, you know, the former Taliban government, now the insurgents, is that not correct?

Secretary HAGEL. That is correct.

Mr. PRESTON. Yeah, my only gloss on that would be my understanding is in the very early going, there were direct talks between the U.S. Government and the Taliban, and then it later became indirect with the Qataris. But there was never a point in time where, either directly or through the Qataris, we were negotiating with Haqqani. There were no demands made or concessions made by or to the Haqqanis as far as I am aware of, period.

The CHAIRMAN. I was going to use an example earlier when—but Mr. Runyan had to leave, a professional football player. He probably had an agent. The agent probably negotiated for him. The owner probably has somebody, a general manager or somebody negotiates for him. But at the end of the day, it is the football team negotiating with the player, even though the player and the football team aren't there; it is other people negotiating that. So is the Haqqani part of the Taliban? What is the relationship between the Haqqani and the Taliban?

Mr. PRESTON. I, to tell you the truth, you are out of my area, and this is something the intelligence community folks could address better.

The CHAIRMAN. Mine, too. And I am not an attorney, I am just asking the questions.

Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

I want to commend you, Mr. Chairman, for your effort to set the scope and the tone of this hearing, which I think most Members have adhered to.

And I want to thank you for that. And I think this is the way that—this is the tone that we should have in this hearing, because this is a legitimate issue of legislative oversight.

And Secretary Hagel, I am apologetic to you for not having been able to repeat your first answer to the question about whether or not we negotiated with terrorists. It is clear that we did not do so.

And I want to ask you some questions, Mr. Preston. You are the attorney, so you are familiar with the Constitution and the separation of powers, and the power of the Executive, insofar as being the Commander in Chief, and those duties and obligations are not specifically set forth in the Constitution or limited in any way. Would you agree with me that section 1035 of the Defense Authorization Act for fiscal year 2014 restricted the transfer of GTMO detainees by the Commander in Chief without giving 30 days' notice? Would you agree that that restriction is on the power of the Commander in Chief?

Mr. PRESTON. I would agree with that, sir.

Mr. JOHNSON. And would you also agree that the purpose of that provision was to, in effect, require congressional approval before the President could utilize the power of Commander in Chief to transfer a detainee without giving 30 days' notice to Congress? Would you agree?

Mr. PRESTON. I understand that to be the general intent.

Mr. JOHNSON. And would you further agree with the signing statement that President Obama issued in signing the National Defense Authorization Act, that this was an unnecessary limitation or an unwarranted limitation, let me put it like that—not unnecessary, but he said unwarranted limitation and violates the constitutional power—constitutional separation of powers principle?

Mr. PRESTON. Yes, sir. I understand that the signing statement, you know, served to—the President to make clear his view that these restrictions in application could impinge upon his constitutional authority.

Mr. JOHNSON. Yes, and isn't it a fact also that section 1035 of that National Defense Authorization Act does not make any provisions for a time-sensitive prisoner exchange negotiation of the sort that we have with Mr. Bergdahl? Would you agree that the NDAA does not provide for that circumstance?

Mr. PRESTON. Not by its expressed terms. Yes, I agree.

Mr. JOHNSON. What would be the effect on the Nation, on the institution of the Presidency if the President were to comply with this undue restriction and seek 30-day approval from Congress before dealing with an emerging—an emergent situation?

Mr. PRESTON. Well, let me first point out that the Executive has consistently adhered to these provisions in all previous transfers. And I wouldn't want this transfer in connection with the Bergdahl exchange to be interpreted as an exception to the statute whenever there are emergent situations. You could imagine any number of emergent situations. This was driven by the particular collection of circumstances involved here in which the concern was that if, look, the—in the process of finalizing this deal and executing on the exchange there had to be a delay for formal notice, that it would stand to scuttle the deal and quite possibly endanger the individual.

Mr. JOHNSON. Thank you, sir.

I yield back.

The CHAIRMAN. Just for the record, it probably doesn't matter whether we would agree that that is a restriction or an unnecessary restriction. It was the law. It was passed out of this committee. It was passed on the floor of the House. It was passed on the Senate and the House in a final form and signed by the President. Granted, he did write a note that he didn't think it was constitutional, but until the Supreme Court acts and says it is not constitutional, it is, as Mr. Smith said earlier, the law.

Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman, and thank both of you for being here.

Mr. Secretary, I believe, as I know you do, that one of America's greatest and most sacred treasures is the men and women in uniform who risk and sometimes sacrifice their lives for the cause of American freedom and, further, that as a Nation, we do indeed owe it to each one of them to carry them from the battlefield and back to their home and families. And it is also my belief that these heroes, down to the last person, would reject gaining their release through an unprecedented negotiation with jihadist terrorists that would categorically break American law, that would return five high-value terrorists, that would diminish the security of the United States, and that would place a bounty on all of our men and women in uniform and ultimately, essentially, weaken America's hold on this priceless freedom for which generations have fought and died.

Mr. Secretary, I also agree with you that every one of our military personnel should know that if they are captured by the enemy that we will come and get them. But that isn't what happened here. What happened here is that the Obama administration has now telegraphed to terrorists the world over, that all they have to do is to kidnap or capture an American soldier or citizen and that the United States will capitulate and free some of their most dangerous terrorist leaders.

Now, Mr. Secretary, I want to say this the right way, but for the last 5 years, the American people and terrorists themselves have watched in astonishment and disbelief as this administration has handed back blood-bought gains to our enemies. And I believe the result is that somewhere in this world, this moment, that there are terrorists watching this hearing in complete jubilation. And so my question is, do you believe that this, what I believe to be an illegal trade, is going to intensify the terrorist policy that you have mentioned and their efforts to kidnap American citizens and personnel of our military forces across the world that would afford them the obvious leverage that they have gained here in this case?

Secretary HAGEL. Congressman, as I have said before, our military is always at risk, especially in war. Afghanistan is one such place, so those men and women are at risk and have been.

Mr. FRANKS. But has this intensified the terrorists' efforts here and their policy? Has this been——

Secretary HAGEL. If I believed that that would have been the case, I would have never signed off on this. As I said earlier, the Taliban's position on trying to capture American service men and women have been very clear for 12 years.

Mr. FRANKS. But certainly this deal has undergirded that policy. Certainly, this seems to be one of those things that would encourage them to focus on it more.

Secretary HAGEL. I don't know how that would be after, for 12 years, it has been——

Mr. FRANKS. Well, the fact that they have got the entire American people focused on this debate, that they brought us into this kind of chaos, that they have gained these gains, certainly, would tell me that they see that there is great value in doing that.

Secretary HAGEL. Well, you know, one issue that has not been mentioned here this morning is the tremendous progress the Afghan Government has made and particularly the military. And I think that is rather measurable. Looking at the elections, we have got another election, the final next week. They are doing all of the combat missions themselves. Yes, they have a ways to go. But the reason I mention that, Congressman, is because this is a different world than it was 5 years ago in Afghanistan or 3 years ago. And the increased strength of the Afghan army and all of the institutions of Afghanistan is a significant part of this. If I believed that it was going to increase the risk to our soldiers, I would have never ever signed off on it.

Mr. FRANKS. Well, I don't doubt your sincerity in that regard, sir. I do profoundly, in all due respect, doubt your judgment on that front.

Secretary HAGEL. Well, that is fair.

Mr. FRANKS. So let me finally ask you: Can you clarify for us, I didn't get it clear a moment ago, what is the connection or the relationship between the Haqqani Network and the Taliban?

Secretary HAGEL. I don't know exactly the relationship. And by the way, I said in my statement, the Haqqani Network was holding Bergdahl. We know that there is an affiliation. There is an association. We don't know if the Taliban had subcontracted to the Haqqanis to hold Bergdahl. We, again, can get down deeper in this in a classified hearing.

Mr. FRANKS. Well, I think that would be important for the record at some point.

Secretary HAGEL. We don't know all of the pieces.

Mr. FRANKS. Well, I am out of time, Mr. Secretary. Thank you for your answers.

And Mr. Chairman, I do believe that this effort has ultimately weakened America's freedom in the world.

The CHAIRMAN. Ms. Speier.

Ms. SPEIER. Mr. Chairman, thank you.

And thank you for the balanced way that you have handled this hearing. Let me just say at the outset to my colleagues, I was somewhat stunned by one of the earlier questioners about Bowe Bergdahl, and I would just ask us to think for a moment how we would be responding if Bowe Bergdahl was our son. I really fear for his return to this country with the kind of rhetoric that is being spewed in this very room.

To you, Secretary Hagel, thank you for your very persuasive presentation this morning and for your leadership. I would like to ask kind of a fundamental question. In hindsight, which is always

20/20, do you think it would have been appropriate for you to have informed the leadership of both Houses?

Secretary HAGEL. Well, Congresswoman, in hindsight, I suppose any of us in our own lives in every decision we have ever made, can we do it better? I mentioned that in my opening statement. Yes, we could have done this better. But I also said that we thought we had one shot here, and we were told by people that we were engaged with—this gentleman right here was on the ground in Qatar. We can go into more of the details—that any risk of any leak in anything, any security operations break would jeopardize the deal. We didn't know what kind of health Bergdahl was in, for sure. All we had was a 6-month video. We did know that he had been transferred back and forth quite a bit. We were not sure where he was; 5 years in that captivity. And I don't think anybody on this committee would think that that was a walk in the park. And we will find out more and more about it. But we do have some intelligence that is clear on this, on some of the conditions he was held in.

So you factor it all in, and we were told that this may be your last shot at this. It was a judgment. That is right. Could we have done it better? Could we have done it smarter? And I would just add this: Does anybody on this committee really believe that I would want to come up to this committee, the President of the United States would want to take the criticism that he has taken on this issue, intentionally if there wasn't a good reason?

Ms. SPEIER. All right, let's move on. Thank you.

Secretary HAGEL. I mean, come on, you can question our judgment on it. That is fair, but we did this because we were concerned enough, with the fleeting opportunity we might miss it, and we just didn't want to risk any further security of operations. That is all.

Ms. SPEIER. In open hearing, can you provide us with information about how these five detainees were held? Were they subject to waterboarding, torture or anything else when they were at GTMO?

Secretary HAGEL. Let me ask our counsel on this, because I am not aware of any kind of torture or—I don't know. I wasn't—I haven't been around for the 12 years they were down there. I am not aware of any situation that would have put them through any of that, but I don't know. I will ask the general counsel.

Mr. PRESTON. I am not either, but I have not reviewed for that purpose.

Ms. SPEIER. Would you do that for us and report back to us?

Secretary HAGEL. Yeah, we will.

[The information referred to can be found in the Appendix on page 107.]

Ms. SPEIER. In terms of their movement in Qatar, the first reports were that they were going to be housed in some secure location, and then word came out that, no, they were going to be able to freely move throughout Qatar. If in fact they are freely moving throughout Qatar, do we have ankle bracelets on them? How are we in a position to know precisely where they are at every moment?

Secretary HAGEL. Well, this is a—we will get into this, and I will answer your question, but this really needs to be in a classified set-

ting. Short answer is, yes, we have the kind of assurances we think are meaningful and enforceable, and we believe the Qatar Government will enforce them. But we need to take this up in a classified hearing.

Ms. SPEIER. All right, my time is expired.

Thank you.

The CHAIRMAN. Thank you. Mr. Conaway.

Mr. CONAWAY. Thank you, Mr. Chairman.

Secretary Hagel, trust is a fragile concept, and you said toward the end of your conversation that you broke trust with the committee and with Congress. And I would agree with that.

Secretary HAGEL. I didn't say I broke trust with them. I think I said something different.

Mr. CONAWAY. Yeah, well, we can get the transcript out, and we will read it back to you. Over, and over, and over, you and Mr. Preston both have said, "We don't trust Congress. We don't trust Congress." It is insulting. It is disrespectful. And I get it. And so our system of trying to deal with you and deal with us demands trust. You made a self-laudatory comment that you would never sign anything that was not in the national interest of our country, et cetera, et cetera. I have to trust that based on your word. I now cannot do that. And so you put a rift in the entire system by choosing to not obey the spirit.

Mr. Preston, it was very offensive that you tried to strain out a gnat on whenever that 30-day notification triggered, but, Mr. Hagel, under the NDAA, it is your responsibility to notify Congress. It is not the President's responsibility. You are to make that notification. Did you personally decide on your own to not do that?

Secretary HAGEL. I decided in consultation with the interagency. The President was aware of it.

Mr. CONAWAY. So it was your call to not notify Congress. As a Senator, can you——

Secretary HAGEL. I notified Congress.

Mr. CONAWAY. No, you didn't.

Secretary HAGEL [continuing]. But I notified Congress when we had Bergdahl.

Mr. CONAWAY. That was not even within the spirit of the 30 days. Even if you had done it on May 12, whenever the MOU was signed, you would not hear this pushback from us, but you did it.

Secretary HAGEL. Congressman, I explained why the notification was handled the way it was.

Mr. CONAWAY. All right. Yeah, I know, and over, and over——

Secretary HAGEL. By the way, I never said that I don't trust Congress. That is your word.

Mr. CONAWAY. Yes, you did. Yes you have, over and over.

Secretary HAGEL. I never said I don't trust Congress. You ought to check your transcript, Congressman.

Mr. CONAWAY. Mr. Secretary, were any of the detainees aware of the negotiation for their release?

Secretary HAGEL. Let me ask the general counsel. I don't know.

Mr. PRESTON. To the best of my knowledge, no.

Mr. CONAWAY. So if we were to get the visitor logs and the flight manifests at GTMO, it would not show that these guys were con-

ferred with as a part of this process? All right, I take that blank answer to——

Secretary HAGEL. I don't think so. But Congressman, I am sure with the investigation, we are going to turn over everything we have. So——

Mr. CONAWAY. And we would need to be able to trust you.

Secretary HAGEL. I get that.

Mr. CONAWAY. But we don't.

Secretary HAGEL. But I never said I don't trust the Congress. Those are your words.

Mr. CONAWAY. Your actions—no, no, your actions said that.

Secretary HAGEL. No, I didn't say. You said I said it.

Mr. CONAWAY. Your actions demonstrate, Mr. Secretary, that you do not trust Congress because you wouldn't tell the chairman and the ranking member something like this. Your actions say you don't trust Congress. I get it.

With respect to the release of these five and the overall impact it has on the ability of the Taliban to work their mischief in Afghanistan, would you agree or disagree that a weakened Taliban would be better for Afghanistan than a stronger Taliban?

Secretary HAGEL. Yes.

Mr. CONAWAY. Would you agree that the return of these five individuals, once they serve their halfway house nonsense in Qatar and get back into Afghanistan will strengthen the Taliban and their efforts to do whatever it is they wanted to do in Afghanistan?

Secretary HAGEL. Maybe. Do you know that?

Mr. CONAWAY. Maybe.

Secretary HAGEL. We don't know. We do know enough.

Mr. CONAWAY. We have already had one of them say so in the open press that that is in fact what he will do.

Secretary HAGEL. Well, what is a fact? Somebody is projecting 12 months down the road and that is a fact?

Mr. CONAWAY. So you think that 12 months in this halfway house is going to somehow cure them of their hatred of America, and their ability to want to not take back——

Secretary HAGEL. That is not what I said, and that is not what we meant. But to take it as fact when something that hasn't happened and won't happen for 12 months——

Mr. CONAWAY. Mr. Secretary, the notification concept under the January of 2012 had some broad parameters that said, here is what we will do in the terms of negotiating with the Taliban—classified at this point, but there is a long list. The phrase we won't—nothing is agreed to until everything is agreed to. Somewhere between January 2012 and May 27 of 2014, that changed the deal that you notified Congress that you are trying to cling to that you are—that you in fact notified Congress that this was going on. When did that change occur, and were you a part of that decision? Because the way I understand it, all we got was Sergeant Bergdahl, as important and wonderful as that is, that is it. We got no other agreements that were in those broad kind of conversations that you had with us, or the administration had with us in January of 2012. None of that appears to have been a part of this deal whatsoever. When did we abandon that criteria, and why weren't we notified that that change was made?

Secretary HAGEL. When did we abandon that criteria? What criteria?

Mr. CONAWAY. The criteria from January of 2012.

Secretary HAGEL. But what criteria are you talking about?

Mr. CONAWAY. I can't tell you that. It is open session.

Secretary HAGEL. Well, we will take it up in closed session then. I don't know—I can't answer a question that you can't give me the question to.

Mr. CONAWAY. I will remember the next time we try—never mind, Mr. Secretary, I yield back.

The CHAIRMAN. Mr. Barber.

Mr. BARBER. Thank you, Mr. Chairman.

Thank you, Mr. Secretary and Mr. Preston, for being here today. Last week during our recess, I was home in district like I think all of us were, and I met with many veterans. I was in Sierra Vista, which is home to Fort Huachuca, and I had about 70 people come to my "Congress on Your Corner" event that weekend, and over and over again—virtually every one of them was a veteran—they said to me, What is going on? We agree that we should never leave one of our Armed Forces behind. And I agree with that, too. But they wanted me to know if it was appropriate that we released these detainees from Guantanamo in exchange for Sergeant Bergdahl. They asked, "Couldn't we have gotten a better deal?"

And in your statement, Mr. Secretary, you say that this transfer was a tough call—and I am sure it was—and that these detainees were enemy belligerents. One of the five detainees was the deputy minister of intelligence, and another was the deputy minister of defense for the Taliban. And yet you also stated that these detainees were appropriate in exchange because they had not been implicated in any attacks against the United States and that you have no basis, we have no basis to prosecute them in Federal Court. I actually find these statements very difficult to accept, Mr. Secretary, given the status that these particular individuals had before they were captured.

It is hard to believe that these individuals in these positions within the Taliban government had no role in attacks on Americans. So could you, Mr. Secretary, speak to this issue and explain to the people I represent and to this committee and those of us who are all across this country asking these questions, why you believe the release of these men was appropriate and that it does not pose a threat to our national security?

Secretary HAGEL. Congressman, I mean, I think I have answered the question, and I think I address what you quoted from my testimony, but let me start again. We recognize, as I said in my testimony, and I think the answers I have given this morning, that there are risks. There are always risks. There are going to be risks in a deal like this. We had to factor in every circumstance that we could factor in. Our intelligence, where these guys came from, what facts we had on them, as you noted from my testimony, how big a risk would they be? How substantial could we mitigate those risks for our country, for our allies, for our citizens, our service members? We think we have done that.

We think we have done it through a 12-month pretty tight enforcement of the memorandum of understanding. We know that

after 12 months, that is another deal. But factoring everything in, we all felt, everyone was secure on this, in the National Security Council signing off on this, our number one and our number two uniformed military, General Dempsey, Admiral Winnefeld, that in fact, we had substantially mitigated the risk to this country.

And I believe that. I would not have signed it. The President wouldn't have signed it.

Mr. BARBER. Well, thank you, Mr. Secretary.

Let me move to a second aspect of this issue, and I understand that this is hard to predict, but we, as you know, of course, have not been able to secure a bilateral security agreement with the Afghan Government. President Karzai is on again, off again. He has been off signing that agreement for some time. I was in Afghanistan a couple of months ago, and I was wanting to find out how our troops were reacting to this situation and particularly to the attacks, verbal attacks, that President Karzai has made on our troops and our country. Of course, we have an election coming up in just a few days, but my question is, do you have any sense of how the release of these detainees will impact on the ability for us to secure a bilateral security agreement with the new administration, whoever that might be, because clearly, we have seen a lot of anger in Afghanistan over the release, and we wonder, obviously, how that might affect future agreements with the new Afghan president?

Secretary HAGEL. Congressman, as you know, the two finalists, one will be presumably the next president of Afghanistan, either Abdullah Abdullah, or Ghani, have both said and both reaffirmed that, if elected president, one of the first things they would do is sign that bilateral security agreement. I have seen nothing to change that. We have heard nothing to change that. I believe that commitment is firm, from either one of them, from both of them, and they have made that commitment.

Mr. BARBER. Thank you, Mr. Secretary.

Mr. Chairman, I yield back.

The CHAIRMAN. Mr. Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman.

Mr. Hagel, prisoner exchanges in the past, for instance, after the Korean War and the Vietnam War, were done after a peace deal had been hammered out. The President recently said about the Bergdahl deal, "This is what happens at the end of wars," quote-unquote. How is what is happening in Afghanistan the end of a war other than the President has made a unilateral decision to remove our forces next year no matter what the facts on the ground are? In other words, have we negotiated some type of peace with the Taliban making this an end to the war?

Secretary HAGEL. Well, the first part of the question, Congressman, I don't think anyone would have wanted us to wait if we had a chance to get Bergdahl until the so-called war is over. We had an opportunity to get him. It was a fleeting opportunity. We did it.

Mr. LAMBORN. So the President was wrong when he said "This is what happens at the end of wars"?

Secretary HAGEL. No, that is the first part, if you will let me finish. This decision the President made, this wasn't a new decision. You go back to the Lisbon NATO [North Atlantic Treaty Organiza-

tion] conference of 2010, it was established by the ISAF [International Security Assistance Force] partners in NATO in 2010 that combat missions would come to an end at the end of 2014 for the United States and our ISAF partners. The only questions that remained up until about a month ago, is how many forces would the President decide to leave behind in their missions to train, assist, advise if there was any terrorism. So that is not new. It wasn't any arbitrary——

Mr. LAMBORN. Okay, the administration's position isn't new, but I don't understand how his unilateral decisions bring in the Taliban and make them a negotiating partner.

Secretary HAGEL. Well, I am not sure he said that. What you just said, I am not sure what you mean.

Mr. LAMBORN. After Vietnam, after the Korean War, the Korean War, prisoner exchanges were done when a peace agreement was signed. This is unprecedented to have a release like this before there is even a peace agreement. All that has happened is the President said we are withdrawing forces and the Taliban are not a party to the negotiation—the Afghan Government was not brought in on this, were they?

Secretary HAGEL. This was a prisoner exchange, and again, I don't think the American people would have wanted us to wait. If we had a chance to get our POW——

Mr. LAMBORN. But you keep saying that this is a prisoner release. It is not a deal with terrorists releasing a hostage. This is a negotiated prisoner release with a legitimate type of government. I don't see where the Taliban——

Secretary HAGEL. Well, I am not sure I get your point though, Congressman.

Mr. LAMBORN. You are saying this was not a deal with terrorists, is that correct?

Secretary HAGEL. That is right.

Mr. LAMBORN. You said that this—the alternative is that this is a deal with a legitimate government of some kind, with a legitimate military that we are in the process of hammering out a peace agreement. None of those things are happening.

Secretary HAGEL. The President didn't say we are in the process of hammering out a peace agreement. This was a prisoner exchange. I mentioned this morning in one of the—in answer to one of the questions about you go back to the 2012, 2011 days, there was the larger scope of reference of reconciliation, and maybe the Taliban and Afghan Government getting to a peace agreement. That is what we were talking about in 2011, 2012. Taliban shut all of that off, so this was a straight, let's-get-our-prisoners, prisoner exchange.

Mr. LAMBORN. Was the Afghan Government brought into the loop on this decision during the negotiation?

Secretary HAGEL. No.

Mr. LAMBORN. But you said earlier that this was an attempt to, among other things, reconcile the Afghan Government and the Taliban.

Secretary HAGEL. No, I didn't say that.

Mr. LAMBORN. You didn't say that?

Secretary HAGEL. I just said the opposite. I said this was not. I said, in 2011 and 2012, there was a broad framework of reconciliation. That was 2011, 2012. That has changed.

Mr. LAMBORN. I am just trying to understand how this is not a deal with terrorists holding a hostage. You cast this as a legitimate prisoner swap, and yet, they are a terrorist organization. We are not.

Secretary HAGEL. The Taliban have never been designated by us as a terrorist organization.

Mr. LAMBORN. The Treasury Department says the Pakistan Taliban is a terrorist organization.

Secretary HAGEL. The Pakistan Taliban.

Mr. LAMBORN. And the State Department says the Haqqani Network is a terrorist organization.

Secretary HAGEL. Yeah, we are talking about the Afghani Taliban. These are bad guys. I mean, there is no question that they are bad guys. Of course, they are. And I have laid that out, and I have said that today. But again, I go back to all of the considerations that we put into play to substantially mitigate the risk to this country to get our POW back.

Mr. LAMBORN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Ms. Shea-Porter.

Ms. SHEA-PORTER. Thank you, and Secretary Hagel, thank you very much for being here under obviously challenging circumstances. And I want to thank you for your service and say that you probably more than most people in this room know what it is like to be in combat and could imagine what it feels like to be left behind. So I want to thank you for that very principled stand because we do have that policy and we tell our men and women that we will not leave them behind.

So I want to thank you for that. I do have some concerns, though. And one of the concerns is, obviously, you know, the trade. And I am particularly concerned about why five? Is that the minimum number that they would accept because, you know, looking at that, we got one; they got five; and we know that they are bad guys, like you said. And so I have some concerns about the number to begin with. And then I am also—would like to comment, and I will let you wrap up with this, but I would like you to comment about the reintegration process. One of my colleagues suggested that there was something going on that you didn't just quickly bring him back. But I do remember watching our POWs from Vietnam coming back, and we learned a lot of lessons about dropping them right into American culture after having been isolated for so many years. And so my understanding is there is a reintegration process, and there is three stages and that we have to allow the former prisoner to work his or her way through these stages.

So I would like you to address that, and also, why five? And I would like to put my comment in that I do believe that Congress should have been notified. I probably split the difference here between my colleagues in that I understand why you might not tell all of Congress because of the sensitivity and the timing and the risk. But certainly, I do believe the leadership of Congress should have been told. So anything else you would like to add to that I

still have 3 minutes, and please tell me why there is five, and a little bit about the reintegration process, and any other comments you would like to add. Thank you.

Secretary HAGEL. Congresswoman, thank you on the reintegration process. I think everyone agrees that the principal focus now, on Sergeant Bergdahl, should be his health. Maybe someone disagrees with that, I don't know. But for us, for the military, that is, getting him healthy enough, his body, mind, spirit, and that is the point of a reintegration process. You know your point about what we have learned since POWs came back from Vietnam, is an important point. We have learned a lot, our doctors have, our health care specialists have, everybody is different to start with. Every situation is different to start with. So that is the focus. Let's get him healthy, mind, body, spirit, and then we will get on with the rest of it. The United States Armed Forces and his family agrees with this, incidentally. We let the medical professionals make those calls.

Ms. SHEA-PORTER. And let me add, this doesn't mean that he won't have to answer questions. They are important questions that need to be answered. We are just waiting for him to be well enough.

Secretary HAGEL. That is right. As I said in my testimony, both the Secretary of the Army, and the Chief of Staff of the Army, has already said there will be a comprehensive review——

Ms. SHEA-PORTER. Right, and there should be.

Secretary HAGEL [continuing]. Of all of the circumstances surrounding his disappearance, every element.

Ms. SHEA-PORTER. And I thank you for that. Now why five?

Secretary HAGEL. There is just one other—and I will get to that. One other point on that, I remind you, again, you will have an opportunity to look at the so-called form 15–6, which does give a review at the time of his disappearance. It was signed off, I believe, in August of 2009. That is up here at the committee.

Now, the five. Okay. General counsel has asked——

Mr. PRESTON. I just, before the Secretary addresses——

Ms. SHEA-PORTER. Well, I am sorry, we won't be able to, because my time is running out. I really would like the answer from the Secretary.

Mr. PRESTON. Okay, very well.

Ms. SHEA-PORTER. We can talk about that in closed meeting.

Secretary HAGEL. I give shorter answers. Why five? Well, first, I have addressed this in other questions about how did that all come about. It was originally six, and then we went back and forth over the years. They wanted all the Taliban prisoners, the Taliban did, wanted all in Guantanamo.

Ms. SHEA-PORTER. Right.

Secretary HAGEL. And it settled at around five. The sixth detainee died. So that is part. But I think there is a bigger issue here, too. The American people, the American society, our Armed Forces, has never seen life exchange of just one for one. We put a value on our American lives as the most important thing—not that other societies don't. I can't speak for any other society, and I wouldn't try. But our society is every human being is important. So why wasn't it 20? Why wasn't it three? The five started to be

what the Taliban insisted on. They wanted more. It had been six. Then they wanted everything. So I don't think there is any magic to it. It just—that is the way it developed. But again, we don't—we don't put a one-for-one deal on our——

Ms. SHEA-PORTER. Well, thank you. And I just want to reiterate that you can trust Congress to handle this.

The CHAIRMAN. Time has expired.

Ms. SHEA-PORTER. Thank you. I yield back.

The CHAIRMAN. Mr. Wittman.

Mr. WITTMAN. Thank you, Mr. Chairman.

Secretary Hagel, Mr. Preston, thank you so much for joining us today.

Secretary Hagel, let me go to the administration's own Guantanamo task force report, where they reviewed the files of these five detainees that were transferred and unanimously recommended in 2010 they continue to be held by the United States based on the specifics of their cases. The task force also said that it was conceivable, with adequate security measures, the five could be sent elsewhere eventually.

In light of those recommendations that these detainees continue to be kept and that recommendation taking place when it did, can you tell us what extraordinary security measures can Qatar offer today to allow for this transfer?

Secretary HAGEL. Well, again, that is the essence of much of our mitigating dimension that—why we signed off on the deal, those assurances the first year.

Congressman, again, I will say, when we close this place down and go into the classified, we will go into every one of those specifics. But I would tell you this. You may have already read the MOU, which we sent up here yesterday.

Mr. WITTMAN. Yes.

Secretary HAGEL. And we will be glad to take you down into the subparagraph 6 of each one of those to get to your question. But to go beyond my testimony here, I don't want to do that, and if it is okay, we will wait until——

Mr. WITTMAN. Let me go back historically, then, and look at the history of Qatar and what they have done in receiving detainees. As you know, the first transfer to Qatar was in 2008. And was that one considered a successful test case?

Secretary HAGEL. I believe—and I just asked our general counsel if we just had one transfer.

Is that right? To Qatar?

Mr. PRESTON. To my knowledge.

Secretary HAGEL. So we have had one.

Mr. WITTMAN. Okay.

Secretary HAGEL. I don't know all the history of that transfer, although my understanding is it wasn't particularly good.

Mr. WITTMAN. Uh-huh.

Secretary HAGEL. And generally—so what has changed? I, again, addressed this here this morning, but, first of all, you have a new Emir. We have more presence, assets there. Their relationship with the area and with us is significantly changing.

Now, are these absolute guarantees? No. I mean, there are very few absolute guarantees in life, as we all know. But I think a num-

ber of things have changed enough, significantly changed, to be able to have confidence in the enforcement that the Emir told the President of the United States that he would personally see to that, as well as the government.

And, if you follow down, as you did through your reading of the those MOU requirements—and then we will get into the details—we felt confident that that MOU covered enough that the enforcement was good enough.

Mr. WITTMAN. You did acknowledge, though, that there was an additional risk there in Qatar taking those detainees, especially based on their past performance. So are you comfortable with that risk?

And does this willingness for the U.S. to accept that risk, does that now set the stage for the U.S. transferring detainees to other nations who have not met obligations under previous agreements in accepting these detainees from Guantanamo?

Secretary HAGEL. Well, you said the right word, "risk," and that is the essence of what we are always dealing with here. And the analysis that we made, the decision I made, as well as the National Security Council and ultimately the President, again, I say, we believe that all of this together could substantially mitigate the risk.

Mr. WITTMAN. Uh-huh.

Let me ask this. There is some concern, too, that of those considerations given for the Qatari Government and what they will do to keep up with these detainees, is there an opportunity for these detainees to go to the Qatari legal system to have these travel restrictions lifted so that under legal means they could actually have free rein to travel throughout Qatar or elsewhere?

Secretary HAGEL. Well, I will ask the general counsel. He signed the MOU. And I am going to ask him to handle that in particular, that question, because he negotiated and signed it. Thank you.

Mr. PRESTON. I think the question is best answered in the closed session——

Mr. WITTMAN. Okay.

Mr. PRESTON [continuing]. If you would indulge us in that respect.

Mr. WITTMAN. Let me close by asking this, then. What happens to these detainees after a year?

Mr. PRESTON. As has been said, the restrictions of the MOU are for a 1-year period. That includes the restriction on their travel outside of Qatar. So, after 1 year——

Mr. WITTMAN. So, after 1 year, no restrictions?

Mr. PRESTON. Except under circumstances that we would discuss in the closed session.

The CHAIRMAN. The gentleman's time has expired.

Mr. WITTMAN. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Maffei.

Mr. MAFFEI. Thank you, Mr. Chairman.

Thank you very much, Mr. Secretary and Mr. Preston. I appreciate very much your service.

Mr. Secretary, you said in your testimony that this was a—well, first of all, let me just say that I think a lot of people have had very, you know, emotional reactions to this and what they have seen about this with incomplete information. And I certainly think

that is understandable, but these are difficult circumstances to judge. And we, as elected officials, and you, as appointed officials, have to put aside our emotions and political expediency in order to best use our professional judgment. And, obviously, what will be said in secret session also pertains to this.

But what I am concerned about now is the law and the notification of Congress. And you said in your testimony, I believe you actually used the word "unique circumstances." I am a little concerned that this isn't unique. It might be rare but not all that unique.

And do you believe that Congress hadn't thought this was the sort of issue that could come up when they passed the law? Should we amend this law if indeed these kind of, you know, very rapidly evolving situations occur where you would want to have the authority to do a prisoner transfer?

First the Secretary, and then if Mr. Preston—or either one of you.

Secretary HAGEL. Well, here is the way I would answer your question.

First, it was an extraordinary situation. And maybe everyone doesn't agree with that. I absolutely believe it, the President believed it, the National Security Council leaders believed it, for the reasons we have discussed here the last 3 hours and actually more. So I think we are on pretty solid ground in saying that this was an extraordinary situation.

I think it also gets into the constitutional issues that we have discussed here this morning, the responsibilities of the President given to him through Article II of the Constitution. What are his authorities under that article? That doesn't discount what the Congress passes as laws.

And, by the way, this is not the first challenge to a law by a President. As has been noted here this morning, President Bush, George W. Bush, probably signed as many signing statements as anybody. Executive, legislative differences exist since probably the beginning of the Republic.

So I answer your question that way, too. And then if you want to hear from the general counsel——

Mr. MAFFEI. Well, actually, let me just stick with—I think you answered it fine, Mr. Secretary.

I am concerned, though, that there was an opportunity to notify the Congress. I have heard some reports that 80 or 90 people in our administration knew. I don't know if you can confirm that or not. But, sort of, the answer that goes back to 2011, 2012, I agree with the chairman on that; that was a different set of circumstances. It was also, by the way, a different Congress. I wasn't in that Congress. And it does concern me that that many people knew and there wasn't some sort of a notification of Congress, particularly given that, obviously, the Qatari officials knew.

How are we to avoid the perception that this administration trusts Qatari officials more than it trusts leaders in Congress?

Secretary HAGEL. Well, you may see it that way as a Congressman, and I wouldn't question your perspective, but I would just say this. The Qataris had to be part of it because they were part of it; they were doing the deal. We signed the memorandum of under-

standing with them. There would have been no prisoner exchange without the Qataris.

So—not everybody, by the way, in the Qatari Government was aware of this. And, again, Preston was there.

So I don't think it is a matter of we trust the Qataris but we don't trust our own Congress. I have already addressed this, too, as you know, Congressman, in my opening statement. Could we have done it better, smarter? Yes.

Mr. MAFFEI. Yeah. I mean, I think my concern—and I am not sure if this would rest in your office or not. My concern is, okay, I understand the circumstances under which the Department was not able to obey the letter of the law. My concern is whether the Department even tried to obey the spirit of the law, certainly not informing myself, a rank-and-file Member, but at least the leadership of the relevant committees that this was happening.

Secretary HAGEL. Well, again, I will say, and I know members of this committee don't agree with this, but in explanation as to why we did what we did—and, again, I will say one sentence—we were very, very concerned about the risk. We had a fleeting opportunity here. We were told there was a risk. The more people who knew about it, the more risk. I get that. I get, well, why do you trust some in the White House and not here? I get all that.

But your overall question about who knew and who didn't, I don't know about the 80 or 90 number. I can tell you, from my responsibility at DOD, very, very few people knew about this at DOD.

The CHAIRMAN. The gentleman's time has expired.

Mr. Hunter.

Mr. HUNTER. Thank you, Mr. Chairman.

Mr. Secretary, good to see you.

I guess you have said that there were better ways to do this, there were more precise ways to do it. I guess my first question would be, is that because DOD was not in charge of this the entire time?

Secretary HAGEL. Congressman Hunter, I am sorry. I just read a note. I apologize. If you——

Mr. HUNTER. Okay. If you could add 20 seconds back on.

Secretary HAGEL. Take it out of my time.

Would you repeat the question? I am sorry.

Mr. HUNTER. Was DOD in on this the whole time?

You have said before that this could have been done better, and I am guessing that means that if you were doing this from the beginning, this prisoner exchange, it would have been done better.

Secretary HAGEL. Well, I appreciate the comment. But, yes, was DOD involved in this right from the beginning, yes, we were.

Mr. HUNTER. Let me interject there then. We talked in February, and I said—because the State Department had this option on the table and they had preapproval from the Executive to go ahead with this prisoner exchange—this was months ago—you appointed Mr. Lumpkin as the OSD [Office of the Secretary of Defense] representative—this was just a few months ago—to the Bergdahl case.

Secretary HAGEL. Yes.

Mr. HUNTER. Which makes me think that you weren't heavily vested in this from the very beginning but that you did get vested in it a few months ago.

Secretary HAGEL. No, that is—that is not true. You are right, let's pick up February. And you are right, we had the conversation. You know; you had written me about this. I did appoint Lumpkin, who actually was the guy who oversaw the whole operation, as you know, from DOD, Mike Lumpkin.

Congressman, this was so fast-moving. Everything you said here is right. There was a break, and I have the chronology right here——

Mr. HUNTER. Well, I don't need that from you. What I am asking was—okay, let me put it this way. Did you have other options that you looked at for approval or at least consideration, nonkinetic options—nonkinetic options that you looked at for at least consideration?

Secretary HAGEL. You mean DOD?

Mr. HUNTER. You. Yes, sir.

Secretary HAGEL. Yes. No, actually. This was the one option that we had.

Mr. HUNTER. This was the only option that you considered, the only nonkinetic option you considered?

Secretary HAGEL. We consider everything, and we are. But where we were in the timeframe you are talking about in the scope of the reality here, this was the one option that we were all working toward that looked like the best. That is what Lumpkin did when I—that is why I appointed him to get into it. You are exactly right in your——

Mr. HUNTER. Let me ask again, did you have other nonkinetic options that you have looked at for approval or at least consideration?

Secretary HAGEL. Not anything that was serious. I mean, we look at all kinds of things all the time——

Mr. HUNTER. Well, let me ask you, then, so you didn't pass any other courses of action besides this one for the President's consideration from the Department of Defense?

Secretary HAGEL. If you are talking about this specific deal with Qatar and the——

Mr. HUNTER. I am talking about getting Bergdahl back. Just getting Bergdahl back.

Secretary HAGEL. No. This was the one that was on the table that was the most realistic, viable. And, no, we didn't present, that I am aware of, anybody in DOD, present any other——

Mr. HUNTER. Okay. Well, let me ask this, then. Why would the President approve, or you approve, only one course of action after seeing, now self-admittedly, no other courses of action?

I have never heard that, where you only say, "This is the one thing that we have chosen to do, and we are not going to consider any other courses of action besides this one." And that means that the President didn't even have any other options, nonkinetic options, from the Department of Defense that you recommended to him. Because you just said that you recommended no other options but this one.

Secretary HAGEL. Well, Congressman, we weren't holding all the cards here, as you know. If the Taliban wasn't ready to engage——

Mr. HUNTER. No, I—forget about the Taliban. I am not asking that. What I am asking is——

Secretary HAGEL. But they——

Mr. HUNTER [continuing]. You have different courses of action. If I want to enter this room, I can come in through that door, that door, or the door over there. What you are saying is you didn't look at any other doors except that one, you didn't consider any other options besides this prisoner exchange, and you only recommended to the President this one pathway to get Bergdahl back.

Secretary HAGEL. Congressman, this was the only pathway that was emerging that was available. There was no other pathway, unless you are aware——

Mr. HUNTER. Well, here is what I——

Secretary HAGEL [continuing]. Of something.

Mr. HUNTER. I am aware, actually.

Secretary HAGEL. Okay.

Mr. HUNTER. And these are not from special briefings, so I can probably mention a few of them.

Secretary HAGEL. Yeah.

Mr. HUNTER. But you had DOD, your department, working concurrent options with Pakistan to get Bergdahl's release. You had other options that we know that at least people in your department had looked at.

Secretary HAGEL. Well——

Mr. HUNTER. And we won't go into those nonkinetic options. But it just astounds me that for something this large that you wouldn't recommend to the President any other course of action but this one and that the President of the United States would not have looked at other courses of action besides this one before he made the decision to approve this.

Secretary HAGEL. Well, two issues here.

One is, do we always look at other courses of actions? Yes, we do.

Second issue, recommending to the President. This was the most viable, best pathway we could find, we knew that was active. The Taliban were coming back; the Qataris were telling us they were coming back. So we pursued that as the most immediate, viable, and possible option we had to get him back.

Mr. HUNTER. Well, here is—in closing, I would think that there were better options. And I think that the President should have been better briefed by folks in your department that knew what those options were. And I hope that the DOD and Mr. Lumpkin take a stronger role in trying to get the rest of the Americans back that were forgotten via this exchange in Afghanistan.

I yield back.

The CHAIRMAN. Ms. Duckworth.

Ms. DUCKWORTH. Thank you, Mr. Chairman.

Mr. Secretary, it is good to see you again. And I just want to say how great it is to see a member of the NCO [noncommissioned officer] corps, the backbone of our military, at the head of the DOD. I served in Iraq with a Vietnam veteran E–7 who went back over at 59 years old. Didn't make it home. And he probably is smiling and cussing at me right now and telling me I better treat you right.

I think your background and the background of all of us who have worn a uniform and, as you said, been in combat informs how we feel about the release of Sergeant Bergdahl, as well as how we

feel about someone who abandons their post and exposes their buddies to attack by the enemy.

However, it has never been the practice of the United States to leave one of our own behind on the battlefield, regardless of the circumstances of their disappearance. We do everything we can to bring them home. You don't leave them to be dealt with by the enemy. It is not who we are as a country, and it is not who we are as a military.

Now, that doesn't mean that there are not questions that need to be answered about the circumstances around his departure from his post, and I would hope that the military will take appropriate action to review the circumstances again. And I have full faith in the leadership of the United States Army and the Uniform Code of Military Justice to conduct a thorough investigation and to carry out any justice that the result of a subsequent investigation may warrant.

That said, I wanted to ask you two specific questions. First, are there any plans by the DOD or the Department of the Army to go back and review the circumstances of his disappearance? And then, if it is found that he did abandon his post, he did desert, that there will be an investigation and perhaps prosecution?

Secretary HAGEL. Congresswoman, yes.

And thank you for your service. And to the other members of this committee who I didn't by name acknowledge but I referenced, as you noticed, in my testimony, thank you for your service.

Yes. As I noted in my testimony and a couple of the answers I have given this morning, the Secretary of the Army and the Chief of Staff of the Army have both indicated, did last week, that they intended a full, comprehensive review of all the circumstances involved in the disappearance of Sergeant Bergdahl.

The results of those reviews will determine if any action would be required based on conduct and based on the review. They feel strongly, and I do, but I am not going to get involved in trying to influence that. That is a United States Army decision, as you know how this works.

Ms. DUCKWORTH. Uh-huh.

Secretary HAGEL. They are open to get the facts. And wherever the facts lead them, they will get them and they will respond appropriately.

Ms. DUCKWORTH. Thank you.

Secretary HAGEL. Thank you.

Mr. ENYART. Would the gentlelady yield, please?

Ms. DUCKWORTH. Yes.

I would like to yield the balance of my time to the gentleman from Illinois, Mr. Enyart.

Mr. ENYART. Thank you.

Mr. Secretary, you have a tremendous perspective, as Ms. Duckworth has alluded to, with your background as a combat infantryman. Now, I am sure that you weighed every pro and con in this decisionmaking process and your decision was made in the best interests of this Nation based on the facts you had as a whole, I am sure. And it is really unfortunate that the toughest decision that many of your critics have been making on this is as to whether or not they should run for reelection.

Now, have you received a single or heard a single sound suggestion from any of these Monday morning quarterbacks as to a better course of action that you might have taken in this decision?

Secretary HAGEL. The cupboard has been rather bare on that account. We have a lot of experts, in this town especially. But as I said—and I appreciate your service, sir. I am well aware of it.

In this town, it is pretty easy, or anywhere else, to give analysis, usually uninformed, and criticize every decision. That is okay. That is the role everybody has. The country is built that way. Everybody's opinion matters and counts. Everybody has one.

But, in the end, as I said in my testimony, some of us are dealing with the responsibilities of having to make the tough choices. You make them up here in your votes, and I make them. And that is the way it is, and that will always be that way. So I just deal with it, and I do the best I can and I do what I think is right for my country. And I don't have any problem sleeping.

Mr. ENYART. Thank you, Mr. Secretary.

I yield back.

The CHAIRMAN. The gentlelady's time has expired.

They have called the votes. About 6 minutes left, but about 394 haven't voted yet. So I want to thank the Secretary. We have gone over what we thought we would—it would take, but it is a very important issue. And this is the largest committee in Congress, and everybody wanted to have their questions answered.

The Secretary has agreed we will take one more question. Then we will break for votes. I would encourage all who have not had an opportunity to ask questions that want to return; the Secretary said he will stay for that. And then we will reschedule at a later time the closed-session part.

Dr. Fleming.

Dr. FLEMING. Thank you, Mr. Chairman.

Secretary Hagel, we have talked about this 30-day notice. Yesterday, the chairman told us that he received notification after Sergeant Bergdahl had actually been transferred. I am sure his Senate counterpart received that notice at the same time. It was really a notice after the fact.

And I listened carefully through all the questions, all the legalese, the technical, the spin, everything. It is clear to me that really what happened here—and this goes back to the question from the previous gentleman as to what else could have been done, has there been any other offers. My understanding is that, back in 2011 and in 2012, when this issue was first brought forward, that Secretary Clinton opposed it without additional measures and protections, and I believe also Mr. Clapper and others as well. Congress, on a bipartisan basis, pushed back on this.

And so it really suggests to me that when this erupted again this past January that the President decided he didn't want to hear "no." All he wanted to do was to move forward, get it done, and whatever thing he could do here in terms of lawyering or end-runs around Congress or whatever. I mean, it has been reported by many different agencies that at least 90 people in the executive branch knew about this, but yet the chairman of House Armed Services did not know about it.

So, I mean, isn't this really just an attempt by the President to do an end-run around Congress, to not take "no" for an answer, or not get some pushback and maybe a little bit of wisdom from people who have been around here a long time and have been elected?

Secretary HAGEL. Congressman, the President of the United States, like every President of the United States, as you know, has not just constitutional responsibilities but moral responsibilities on behalf of every American. And his first responsibility is the security of this country. And I have never seen, in the time I have known him—and I have known him since he has been in the Senate, and I have been in this job about 15 months—ever a time he flinched on that. Now, you may disagree with decisions he has made, but——

Dr. FLEMING. Well, I appreciate that.

Secretary HAGEL [continuing]. There was no political decision here.

Now, on Clinton and Clapper. The Director of National Intelligence [DNI] has already made a statement on his agreement with this——

Dr. FLEMING. Right, but he had first opposed it, is my understanding.

Secretary HAGEL. He did, but he explained why he has changed his position——

Dr. FLEMING. All right. Let me move on.

Secretary HAGEL [continuing]. As did, by the way—Secretary Clinton's situation was the same. It was a different world in 2011–2012 for all——

Dr. FLEMING. Right.

Secretary HAGEL [continuing]. The reasons we have talked about.

Dr. FLEMING. All I am saying is there is a benefit to more heads, more wisdom in this. And I think the President really didn't want to hear "no." He wanted to do this no matter what.

Let's go to number two here. The other——

Secretary HAGEL. He wanted to make sure we could get our POW back, but not no matter what.

Dr. FLEMING. I understand.

Secretary HAGEL. I mean, you all were driving this, as the American people——

Dr. FLEMING. Well, I didn't say "no matter what." That wasn't my statement.

Now, as far as who had control of Sergeant Bergdahl, we keep hearing about the Taliban, but the reports have all been it was the Haqqani Network. You yourself, I think, suggested that.

Secretary HAGEL. Uh-huh.

Dr. FLEMING. We know the Haqqani Network is a terrorist—an international terrorist organization. We all agree with that. And so, ultimately, just because we have a surrogate, in this case Qatar, who is going between, who is acting as an agent, how is that not negotiating with terrorists?

Secretary HAGEL. Well, first, let's look at the objective here. It is to get our prisoner of war back, who is a prisoner of war. It was a prisoner exchange——

Dr. FLEMING. I get that. But, I mean—but, again——

Secretary HAGEL [continuing]. Between the Taliban——

Dr. FLEMING [continuing]. Aren't we violating a commitment, a doctrine that we have had for decades by doing that?

Secretary HAGEL. No. No.

Dr. FLEMING. How is that not negotiating with terrorists? Simply because we put someone in between, how is that any better than direct negotiations?

Secretary HAGEL. We engaged with the Government of Qatar. At the——

Dr. FLEMING. But wouldn't the outcome be the same?

Secretary HAGEL [continuing]. Other end of it was the Taliban, a combatant against us in war and——

Dr. FLEMING. But still surrogates——

Secretary HAGEL [continuing]. Was, in fact, the de facto government of——

Dr. FLEMING. So would the outcome have been any differently if we talked directly with the Haqqani——

Secretary HAGEL. Well, I mean, you and I disagree on that, and——

Dr. FLEMING. I don't think it would, and I don't hear you saying it would be any different. But anyway——

Secretary HAGEL. You didn't hear me say what?

Dr. FLEMING. I didn't hear you say that it would be any different. You are saying you didn't know. And I think it would be.

Secretary HAGEL. I am saying I didn't know what? What are you saying?

Dr. FLEMING. That the outcome would be any different whether we talked with——

Secretary HAGEL. I didn't say that.

Dr. FLEMING [continuing]. Haqqani Network directly.

Secretary HAGEL. I didn't say that. Not at all. We were very clear who we were talking to and why and following the law. That is what I said in my testimony, and I have said it all morning.

Dr. FLEMING. Okay. I yield back. Thank you.

The CHAIRMAN. The gentleman's time has expired.

Okay. We will recess for the two votes. I would encourage that Members return as soon as possible so we can finish up the questioning.

The committee is in recess.

[Recess.]

The CHAIRMAN. The committee will come to order. We will reconvene. Thank you for your patience.

Mr. Rigell.

Mr. RIGELL. Thank you, Mr. Chairman.

And, Mr. Secretary, I thank you so much for being here today. Your patience in this entire process, I respect that.

I want you to know that I hold you in high regard. My limited military service, I was never activated out of the Reserves, never shot at. And so I thank you for your service to our country, both in uniform, in public office, and as Secretary of Defense.

And my respect for you will be undiminished, though we are going to work through a couple of tough topics here in the few minutes that I have with you.

It would be helpful to me if you would review, as concisely as you could, the number of people who, at least within the Department

of Defense, were aware of the impending release, up to and until the moment that Sergeant Bergdahl, in fact, was released, and then—or transferred rather, and that the five detainees were then given over to the representatives from Qatar.

Secretary HAGEL. Congressman, thank you. I appreciate your comments, and thank you for your service.

First, I don't have the exact number of individuals within DOD who knew about the operation, but here is what I would say. As I have said here this morning, and I mentioned specifically DOD, this was ongoing as the days—as you know the timelines here. You start with—essentially, I start with about the 21st and then go down, then 27th and so on. Each day, there had to be some more people brought in for——

Mr. RIGELL. If you could, just out of—my time is so limited. If you had to just estimate that amount, how many, approximately?

Secretary HAGEL. I just don't know, and——

Mr. RIGELL. That is okay.

Secretary HAGEL [continuing]. It would be wrong. But——

Mr. RIGELL. The numbers that I have seen——

Secretary HAGEL. We will get it, but——

Mr. RIGELL. Okay. I appreciate that.

Secretary HAGEL [continuing]. I just don't know. But, again, just suffice it to say, we kept it a very, very small number.

Mr. RIGELL. I appreciate that.

What is largely in the public domain has made it clear to me that a number of people, certainly more than 25 or 30, I am very safe with that, certainly on the DOD side. Perhaps if you are—when you come back and tell us in a definitive way how many.

But the point of it is this: is that if we look at the 30-day requirement, which is the law of the land, even if one sets aside a strict interpretation of the 30-day requirement, even if one gives every benefit of the doubt to the testimony that you provided here today and what other administration officials have provided in public statements, I remain convinced that really no effort whatsoever was made to comply not only with the letter of the law but even the spirit of the law.

And I do not understand why no effort was made whatsoever to pick up the phone and to call a committee chairman, either on the House or the Senate side. To me, it seems like a repudiation and really a slap in the face to this institution and this equal branch of government. And I do not understand, even though I have listened carefully to your testimony and that by other officials, what compelled you to move without picking up the phone.

Secretary HAGEL. Well, as I have said this morning a number of times, we felt that the fleeting opportunity to get this done required an absolute minimum in people who knew.

I have also said that if we had an opportunity to come back around and do this again, we didn't handle some of this right. So I get that. And I have taken exactly what you said.

But the reason we didn't let anybody know right up until the end is because of what I said. We were concerned. We thought we were—we really did believe that the risk was so great, just one thing getting out.

And I understand your point of view, so that——

Mr. RIGELL. Mr. Secretary, I was and remain convinced that you exercised your best judgment. I don't question that.

I do believe that damage has been done to the governance aspect of this, to whatever trust and confidence there may have been in the administration's commitment to complying with a law, a statutory requirement. And I think it might yield and result in something, you know, from this institution that I think there ought to be some formal condemnation of it, frankly.

But I appreciate your service to our country. Indeed, I do.

And I yield back the remainder of my time.

Secretary HAGEL. Thank you.

The CHAIRMAN. Thank you.

Ranking Member Smith.

Mr. SMITH. Thank you, Mr. Chairman.

I want to revisit the issue of the threat that these five Taliban present. And I think you have been very straightforward in saying, without question, you knew there were risks. And, as always, if you simply look at one side of a deal, it is not going to look good. But the issue was, can you get Sergeant Bergdahl back, and how do you balance the risk of that?

And I think this committee needs to be careful about acting like we got nothing out of this. We brought home one of our soldiers, who, you know, based on what I have seen, was in very, very poor health, was in a very dangerous situation, and we met that obligation. So we got something for this.

That is not to say that releasing these five Taliban came with no risk. Of course it came with risk. But I think that risk has been greatly exaggerated. I think at one point one Member said, you know, it was like releasing 10,000 fighters, which is the type of exaggeration that isn't particularly helpful.

These five guys, as I understand it, were mid-level commanders, mid- to high-level commanders in the Taliban. They have been out of the loop for 12 years. Presumably, in that timeframe, the Taliban have replaced them frequently.

Now, this is five more that, you know, probably after a year will go back and help the Taliban. But how, out of the thousands of Taliban that are actively working against the Afghan Government in Afghanistan—and, also, you know, there is no real evidence that these five were part of attacks against the U.S. homeland. They were part of the Taliban government; they are interested in toppling the Afghan Government. But where is the evidence that they are interested in plotting attacks against the U.S.?

So can you revisit a little bit how much is that risk? Admittedly, without question, that you released these five guys, there is risk, but how much risk, in your assessment?

Secretary HAGEL. Congressman, thank you.

I asked the DNI, General Clapper, to give me an intelligence community assessment of that question that you asked me, to come back to me with the best assessment they could give me, recognizing, first, we start with there is risk. We get that.

And I am going to read to you three sentences of what I got back. And this is, I think, unclassified, so I think we are fine. And then there is more classified.

But this is one observation. This is our intelligence community, total. Threat if returned to Afghanistan or Pakistan:

One, should these five detainees return and reintegrate with the Taliban, their focus would almost certainly be on Taliban efforts inside Afghanistan, not the homeland of the United States.

Second, a few new Taliban leaders, no matter how senior, will not appreciably change the threat to the Afghan people, to the Afghan Army, but most importantly for us, to our forces. And I would just again go back and note, "will not appreciably change the threat." This is the intelligence community's latest report to me.

Then it is a point—third point they make is a point I made this morning, in pointing out the significant progress the Afghan military, the Army, has made over the last few years. And they say the same thing. "Afghanistan's future will depend more upon accepted outcome to the second round of Presidential elections, how Afghan security forces perform against the Taliban over the next 18 months, and continued external donor support that would allow Kabul to fund civil and security functions."

So does that say there is no threat? No. But we have never said that. But this is the best, most recent assessment from our intelligence community.

Mr. SMITH. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Ms. Hartzler.

Mrs. HARTZLER. Thank you, Mr. Chairman.

Hello.

During the 2011–2012 consultations with Congress regarding a larger deal with the Taliban, the Secretary of State then, Secretary Clinton, told the national security chairman in writing and verbally that if detainees at GTMO were transferred, this was not an, quote, "exchange, but rather these Taliban detainees would only be released as part of a larger diplomatic process."

She identified a number of prerequisites to this deal over and above the security assurances from Qatar. So, Mr. Secretary, in addition to the release of Sergeant Bergdahl, which of those other prerequisites were met?

Secretary HAGEL. Well, first, I start with—and this is really the answer to the General Clapper issue, which he had the same position, as you know, as Secretary Clinton in that year. But because things have changed, General Clapper has supported, signed off on this deal.

One, the whole dimension of Afghanistan today, where the Afghan Army is, where the Afghan Government is, that is first. Second, the assurances, written assurances, that we have from the Qatari Government, particularly the Emir's specific personal commitment to the President of the United States. A change in leadership in Qatar. These are all differences that were not present in 2011 and 2012.

Also, the framework—and I have read the letter, by the way, that the Secretary sent. The framework, as you recall, in that letter, as I mentioned earlier this morning, was a larger reconciliation piece. Not that Bergdahl was incidental to that, but Bergdahl was not the core of it. This time, Bergdahl is the core of it.

So those are some of the differences and the changes that are pretty dramatic and, in fact, why General Clapper signed off on this and supports this decision.

Mrs. HARTZLER. Uh-huh. What I would like to know is, what else did we get for this deal? And I am not minimizing the impact of the sergeant himself.

Secretary HAGEL. Well, we got—we will start with the sergeant.

Mrs. HARTZLER. Well——

Secretary HAGEL. But what else? I mean, you mean——

Mrs. HARTZLER. There was other assurances talked about in that letter that was hoped to be secured as part of an overall deal.

Secretary HAGEL. Well, an overall deal, but this was not an overall deal.

Mrs. HARTZLER. Right.

Secretary HAGEL. This was a prisoner exchange——

Mrs. HARTZLER. Uh-huh.

Secretary HAGEL [continuing]. Versus 2011 and 2012, where the framework was of what the intent was, what the objectives were. Those objectives were far broader and wider, is your point. And we didn't have those objectives.

Mrs. HARTZLER. At the briefing on Monday, the question was asked whether any money was exchanged with Qatar or with other people for this deal. And the answer was no money was exchanged, but it wasn't clarified with who and if there was anything additional. The question wasn't answered whether there was anything besides, perhaps, money discussed in this.

So did the Taliban or any of the individuals involved receive anything from our government——

Secretary HAGEL. No.

Mrs. HARTZLER [continuing]. Other than——

Secretary HAGEL. No.

Mrs. HARTZLER. No. Okay.

At the House-wide Member briefing, the same briefing Monday night, Deputy National Security Advisor Tony Blinken was asked if this agreement makes American men and women in uniform and other officials stationed abroad safer. And I recall his response to be that the agreement wouldn't make Americans safer but that the law didn't require the administration to assess that.

So do you believe that our military service members around the world, not just in Afghanistan, are safer because of this deal?

Secretary HAGEL. The way I would answer it is this way. First of all, the objective was to get our POW back. That was the objective, and we did. Mitigating risks and so on, which you have heard this all morning.

But to your specific question, when you look at, first, now we have no POW, that means there are more resources that we can apply in other areas, in Afghanistan in particular.

I think for our military—and I mentioned this this morning—for our military to know that we will come get them if they are captured, regardless of the circumstances, it may not translate into direct safety but I think that is pretty significant.

Plus, giving our forces more of their own capacity to deal with what they are doing in Afghanistan without, quite frankly, some

restrictions that did inhibit some because we knew every day we were trying to find ways to get our POW back.

So, I mean, I think, again, when you add all that up, that is pretty significant.

Mrs. HARTZLER. Thank you.

Secretary HAGEL. Thank you.

The CHAIRMAN. The gentlelady's time has expired.

Mr. Secretary, I believe that these are likely already included in the letter that I wrote to you, but a couple of documents have been mentioned here today. And I would like to specifically request, if I didn't already, copies of those: the DOJ guidance to the NDAA that Mr. Preston was talking about; and the ODNI [Office of the Director of National Intelligence] assessment that you requested, that you just were referring to, on the threat posed by the five detainees. Please, if they are not on that list, if you could add them.

Secretary HAGEL. We will include them.

[The information referred to can be found in the Appendix on page 107.]

The CHAIRMAN. Thank you.

Mr. Enyart.

Mr. ENYART. Thank you, Mr. Chairman.

Good afternoon again, Mr. Secretary.

Mr. Secretary, Retired Marine General James Mattis, who is, of course, the former chief of U.S. Central Command, said on Sunday that the prisoner swap for Sergeant Bergdahl will give the United States military more freedom to carry out missions against the Taliban and the Haqqani Network.

He went on to say that U.S. commanders in Afghanistan always lived with the concern that Bergdahl would be killed in retaliation for a U.S. offensive against the Taliban. And I am quoting here. Quote, "We no longer have that concern they have this pawn they can play against us. It is also a military vulnerability the Haqqanis now face, the Taliban now faces, because they no longer hold a U.S. soldier in captivity," end quote.

Now, to me, as a veteran of just over 35 years' service, that means to me that the United States military has increased its operational effectiveness.

Mr. Secretary, would you agree with General Mattis's assessment? And would you agree with the assessment that this, in fact, has increased our operational effectiveness and thereby effectively rendered U.S. military personnel safer worldwide?

Secretary HAGEL. Well, those of you who know General Mattis know that you run a risk if you disagree with him. I have the greatest respect for General Mattis, and I agree with his analysis, everything that you laid out.

And I am glad he said those things on Sunday because they are not things that have been said throughout this 10 days or less and they are important factors as to how they affect our military, and I believe they are real. And I think his specific points not only are accurate but they come from someone who knows a little something about this business.

Thank you.

Mr. ENYART. And he is not a member of the administration. He is now retired; is that correct? So he is an independent——

Secretary HAGEL. He is retired, fishing and hunting now somewhere.

Mr. ENYART. That is a wonderful thing. I look forward to that day, Mr. Secretary, as I am sure you do.

Secretary HAGEL. Thank you.

Mr. ENYART. Mr. Secretary, I have seen the proof-of-life video of Sergeant Bergdahl, as I am sure you have. It is currently classified. And my question to you is, sir, after having viewed that video, is there any doubt in your mind that his health and mental state was in very, very serious condition?

Secretary HAGEL. There is no doubt in my mind. I render that analysis not as anyone who has any medical expertise but I listened carefully to what our health experts did say, our intelligence people. And then just the—just looking at the past videos of him versus that video, it was pretty clear to me that his health was deteriorating.

Thank you.

Mr. ENYART. Mr. Secretary, there has been some previous questioning about the risk, future risk, potential future risk, to American service members if they were to have to recapture these five individuals who were swapped in the prisoner-of-war exchange.

Is there any evidence whatsoever that any future risk for those five is any greater than the 532 folks who have previously been released by the Bush administration or, for that matter, the 88 who have been previously released by the Obama administration, a total of 620 previously released GTMO prisoners?

Secretary HAGEL. According to our intelligence community, the answer is "no."

Mr. ENYART. And one final question for you, Mr. Secretary. Now, Sergeant Bergdahl, when he was captured, was a private first-class, correct? And for those who are not familiar, that would be an E–3. And today he is a sergeant, or an E–5. So he has been promoted twice by the Army during his period of captivity; isn't that correct?

Secretary HAGEL. That is correct.

Mr. ENYART. All right. And were there overwhelming evidence or any evidence whatsoever that he had done something wrong, would those promotions have taken effect?

Secretary HAGEL. No. As I said in my testimony, there was never any charge brought against—by the United States Army against Sergeant Bergdahl.

Mr. ENYART. So it is clearly a rush to judgment against this young man.

Secretary HAGEL. Well, I think it is. As we all know and I have said, the United States Army is going to conduct a complete review of all the circumstances once Sergeant Bergdahl is back and he can speak for himself. And that is appropriate, and that will happen.

Thank you.

Mr. ENYART. Thank you, Mr. Secretary.

I yield back.

Dr. HECK [presiding]. Thank you.

Mr. Secretary, I know that one of the issues that has been addressed or that you have addressed in regarding the lack of notifi-

cation to this body was the concern about potential leaks and the impact it may have on the operation.

Can you tell me, was that concern over leaks so great that it would also prevent limited notification, as is allowed, to the Gang of Eight, the leadership of both the majority and minority party in both Chambers as well as the chairman and ranking member of the relevant committees?

Secretary HAGEL. Yes.

Dr. HECK. So—and I know you weren't Secretary of Defense at the time, but was there any less concern over—and I know you mentioned that part of it was the potential for an adverse effect on the safety of the operators who were going to execute the operation.

But was there any less concern over the safety of the operational personnel who were actually known to be going into a kinetic operation in the Osama bin Laden caper? Would there be any less concern about leaks and their safety?

Secretary HAGEL. No, there were—I wasn't there, but you are right, there were, I know, concerns about that. And it is equally risk—risky, both operations.

But this one was different, though. We had some—much more control, quite frankly, over the Osama bin Laden exercise, and that operation was more within our control. This one was not. As I said, we didn't even know where we were going to—where he was going to be.

Dr. HECK. Well, I understand that. I understand that, Mr. Secretary. But in the Osama bin Laden raid, the Gang of Eight was notified and there was no leak of information.

Secretary HAGEL. I know. I know. But, again, what I am saying, Congressman, is there was actually more risk in this because we had far less control over this in case something leaked out.

Dr. HECK. And moving on to another—and I appreciate your answer. Thank you.

Moving on to another question. Obviously, this issue of the exchange was brought to a sufficient level that it was addressed with Members of Congress back in the 2011–2012 timeframe. And during testimony today, you have said that there was a growing urgency to act, a need to act swiftly, and that was the reason—one of the reasons, coupled with the leaks, why we weren't necessarily notified.

But had the issue concerning leaks not necessarily been an issue, would you not agree that after you received the January video, proof-of-life video that escalated reentering negotiations, that that might have been a time where perhaps Congress could have been informed?

Secretary HAGEL. Yes, that might have been.

Dr. HECK. Or when——

Secretary HAGEL. As I have already said, if we had a chance to redo this, Congressman, probably——

Dr. HECK. Well, I understand, Mr. Secretary, but that seems to be an apparent pattern in this administration, is always coming back after something has happened to say, if we had a chance to do it all over again, we would have done it differently.

Secretary HAGEL. Well, I can only answer to this one, so——

Dr. HECK. I appreciate that.

Secretary HAGEL. Yeah.

Dr. HECK. Likewise, I would say that after you received the Qatari warning that the window may be closing would have been an opportunity, and that was in early May, to come and notify at least the Gang of Eight.

Secretary HAGEL. Well, I have been over this before. I mean, again, if we go back and replay everything. But, again, I say the risk, we felt, was so great that any leak—we were told this by the people we were negotiating with, and we were warned about this.

And so, yes, it was a judgment call. We might do it differently again, but I don't know. But the risk was still, no matter what, overwhelming for us, because we thought we had—and we were told—probably one shot at getting Bergdahl back. And it was a rapidly evolving opportunity that could close, as well.

Dr. HECK. Well, and I would just close by making the statement, or asking—and I am not sure of—were you familiar, or have you seen the letter from various chairmen of jurisdiction to Secretary of State Clinton and her response back in 2011–2012?

Secretary HAGEL. Yes, I did.

Dr. HECK. Okay. So, you know, obviously, in that 2011 letter to then-Secretary of State Clinton there was significant nonconcurrence——

Secretary HAGEL. Yes.

Dr. HECK [continuing]. With the thing.

So my concern is, how much of that letter and the potential for pushback from this organization actually influenced the actions not to provide timely notification, for fear of being able to ask for forgiveness rather than permission and come back after the fact to say, if we had a chance to do it all over again, we would perhaps do it differently?

Secretary HAGEL. I am not sure what you mean by pushback in this institution——

Dr. HECK. Well, you know that, in 2011, when this was first contemplated, the ranking members and the chairmen of the appropriate committees did not concur with the swap. But yet, understanding that the environment has changed, perhaps there was a concern by the administration of coming to notify for fear that that same——

Secretary HAGEL. Oh, I see. Uh-huh.

Dr. HECK [continuing]. Pushback would have been put forward.

Secretary HAGEL. I understand what you are saying. Well—and I just answered as you heard probably my answer here to Ms. Hartzler on this. Complete change in environment, dynamics, realities, objectives from 2011 to 2012, but I can tell you, from my perspective and what I know—and I know a lot about it—I was involved in only on this deal. I can't answer to 2011 or 2012, but it wasn't because we were concerned that somehow the Congress wouldn't go along with it. I have given you the reasons why we made the decisions we did.

Dr. HECK. Thank you. Thank you.

Ms. Gabbard.

Ms. GABBARD. Thank you very much, Mr. Chairman.

Secretary Hagel, Mr. Preston, thank you very much for being here.

Secretary, thank you for your service, both in uniform, here in Congress, and as you continue your service now to our country.

Secretary HAGEL. Thank you.

Ms. GABBARD. Like you, I am a soldier, and understand at the core of my being that principle of leaving no man behind. Along with that principle goes another, which is, I will always place the mission first. And that mission of national security and the context that that provides to this whole conversation is really where I would like to focus and where I have the most concern. You have mentioned earlier about the assurance to service members that, regardless of circumstances, your words, regardless of circumstances, they will not be left behind.

And I think that that is—that is an issue to call into question because there are varying circumstances. We were told, I think, possibly today, but in a briefing yesterday—on Monday, rather, that if this were a deal to be done exchanged with the release of Khalid Sheikh Mohammed, the deal would not have been done. So the circumstances do play a role in this, based on that mission of national security.

So with regards to the five Taliban detainees who were released, your statements from DNI Director Jim Clapper, I would like to address that directly because we have had some issues with statements from Jim Clapper before Congress previously on a different topic with regards to his statement that the NSA does not collect data on Americans, which he later admitted to be in his words, the least untruthful answer. It was not a truthful answer.

So I would like to point to the Guantanamo review task force that was done where it was stated that these five individuals, specifically, in quotes, "pose a high level of threat that cannot be mitigated sufficiently except through continued detention."

And I am wondering what has changed from the time that this assessment was made by this President's appointed task force of military officers, Federal prosecutors, FBI agents, intel analysts, and civil litigators that has changed?

Secretary HAGEL. Well, Congresswoman, thank you for your service, first.

Ms. GABBARD. Thank you.

Secretary HAGEL. A couple of things. One, obviously, is the reassurance that we got from Qatar, which we have gone over in some detail.

Second, more to the point of I think that——

Ms. GABBARD. I am sorry, Qatar is not detaining them though. They are not continuing to——

Secretary HAGEL. The reassurance from Qatar that 1 year, and I don't know if you have had a chance to look at the MOU on this on the things that they would enforce, so that these five transfer detainees not leave the country, so on, and so on, and so on——

Ms. GABBARD. Right.

Secretary HAGEL [continuing]. Which we have covered a lot this morning. That is one big thing that has changed to give us some assurance in the United States, that these five detainees, we would have some control over them.

Second, to the point that you made about the commission's recommendations—and I think that commission started in 2009—3

years has passed. We looked at comments made by Guantanamo guards, others. I am not saying or implying that these five individuals all of a sudden transformed into St. Frances. That is not the point. But the circumstances changed in many ways. And we felt, again, as I have said here this morning, that when you take the totality of all of the new dimensions, the environment, the reassurances, so on and so on, and what I just—I don't know if you were here when I just answered Congressman Smith's question about the insurance or the Intelligence Committee's reassurance and their evaluation of how dangerous these five detainees would be if they went back to Afghanistan and joined the Taliban. That has changed considerably.

Ms. GABBARD. Thank you very much.

Before my time runs out I want to just make one quick point that the discussion of them returning to the battlefield seems to imply that return would put them as foot soldiers with boots on ground. We are talking about the five most senior Taliban leaders——

Secretary HAGEL. Well, they weren't the most senior.

Ms. GABBARD [continuing]. Who were detained. They can become operational without having boots on ground in Afghanistan. We will have troops on the ground for the next couple of years, according to the President's plan, and that is really where my concern lies. Thank you very much.

Secretary HAGEL. And thank you, Congresswoman, and we have the same concerns.

Dr. HECK. Mr. Scott.

Mr. SCOTT. Thank you Mr. Chairman.

Secretary Hagel, at the start of the committee, you made a statement that said, the Justice Department said the President had the constitutional authority to essentially do this deal and ignore the 30-day requirement in the law in this case. Is that—did I hear that correctly?

Secretary HAGEL. Someone asked the question I think on what basis the President made a decision and what authority he had, and I think my response was——

Mr. SCOTT. Very similar to that.

Secretary HAGEL. Yes, yes.

Mr. SCOTT. Could we get a copy of the letter from the Justice Department that says that the President had that authority?

Mr. PRESTON. Sir, we have received a request for that, and we are taking that back. It is not entirely within our control.

Mr. SCOTT. Thank you. And I look forward to seeing that.

[The information referred to can be found in the Appendix on page 108.]

Mr. SCOTT. And Mr. Preston, you are an attorney from Yale and Harvard. Which provision of the Constitution would allow the President to ignore the law?

Mr. PRESTON. The President has authority under Article II.

Mr. SCOTT. Yes, sir.

Mr. PRESTON. And has a duty and responsibility to exercise that authority. It is not a matter of ignoring the law. It is where the exercise of his constitutional authority is in tension with the statute; where, in this case, his duty and authority to protect service

members, to protect U.S. citizens abroad, where the application of this particular provision in this particular set of circumstances would interfere with the exercise of authority, then the statute yields to the constitutional authority either as a matter of interpretation or through the application of separation of powers principles.

Mr. SCOTT. So is it Article II, Section 2, then that the Justice Department is using to justify saying that he does not have to comply with the law?

Mr. PRESTON. It is his authority as Commander in Chief and Chief Executive.

Mr. SCOTT. So it is Article II, Section 2?

Mr. PRESTON. I believe that is right.

Mr. SCOTT. Under what other circumstances would the Justice Department, potentially Eric Holder, simply tell the President that he did not have to comply with the law?

Mr. PRESTON. I wouldn't really be in a position to answer that question.

Mr. SCOTT. I think that is the key concern here for most of us on the committee, is that if the Attorney General can simply give the President of the United States, who appointed the Attorney General, a letter that says, Mr. President, you don't have to comply with the law, or the Constitution gives you the authority to ignore the law, then that is the law of the land and under which the President operates; seems to be in clear violation of what our forefathers gave us and the system of our democracy, where you have a House, and a Senate, and a President. The House and the Senate both passed pieces of legislation. The President signed that law, signed that, making it the law, and now he can get a letter from an appointee of his that says, Mr. President, you don't have to comply with this, which leads me to a bigger concern in what you said at the start, which was that today this country has had and has the authority to hold detainees. That would potentially change in the future, but it would not necessarily change at the end of 2014, when we essentially declare we are no longer engaged in hostilities in Afghanistan, but that that would continue as long as we were in a conflict with the Taliban and Al Qaeda. And I guess my question is, that is your opinion, correct?

Mr. PRESTON. That is my understanding of how the international law principles apply.

Mr. SCOTT. Yes, sir, and I agree with you. But if we follow this same train of thought and action which they used to determine they did not have to give the 30-day notice, the Attorney General could simply give the President a letter and say, you don't have to do this. And he could release everybody. And that is where—that is why we are here. The law required 30 days' notice. And the idea that Eric Holder or somebody at the Justice Department can just give the President a letter and say you don't have to comply with the law, that is simply ridiculous.

Mr. PRESTON. Well, let me just say in general, the role of the Department of Justice, among them, is to advise the President on the law. I wouldn't be in a position to talk about the content and I can't agree with your characterization, but that is normal process for the executive branch for the President to receive advice on the law in the execution of his constitutional and statutory responsibilities.

Mr. SCOTT. This law is extremely clear. The law requires 30 days' notice. And the idea that Eric Holder can give him a letter saying, you don't have to comply with the law and then that becomes the law of the land, it is a clear violation, separation of powers.

Dr. HECK. Mr. Smith.

Mr. SMITH. Just following up on that just really quickly. Under the Bush administration, you know, there was warrantless wiretapping authorized. There was indefinite detention. Post 9/11, there was a whole host of things that were clearly against a wide variety of laws. And the President and Vice President's justification at that time was that the Constitution gave them those powers given the circumstances. I don't recall any outrage on the right. I recall a great deal of outrage on the left. I recall a number of folks on the left, including one memorable gentleman who wouldn't let me go at the gym about the fact that I was unwilling to impeach the President over this.

But this was not even remotely unprecedented. And I just wanted you to comment on that from the legal standpoint. The Constitution is a law. And now, I disagree, at first glance with the interpretation that you made here, but it is not unprecedented. And walk through a little bit what, you know, President Bush did. I mean, he justified an endless array of things that were clearly contrary to U.S. law based on his interpretation of the Constitution. And on a much smaller, more narrow scale, isn't that exactly what you guys are doing? I mean, I don't agree with it, but it is far, far from unprecedented.

Mr. PRESTON. Congressman, I wouldn't be in a position to comment on what the previous administration did, but I think your point is a good one that in the exercise of the President's Article II powers, he is called upon to make judgments about the extent of those powers, and that is precisely what he does. And there will be occasions where the statutory law is intentioned with the constitutional provisions, and there are canons of interpretation that call for interpreting the statute so as to avoid a conflict, but where the conflict can't be avoided, then the Constitution reigns. And it is not uncommon and has happened in the history of Presidency.

Mr. SMITH. Just——

Mr. SCOTT. If I may, if that interpretation had been handled by——

Dr. HECK. The gentleman's time is expired——

Mr. SCOTT [continuing]. Disagreed with it but would have been more accepting of it than an individual Presidential appointee.

Dr. HECK. Mr. McIntyre.

Mr. MCINTYRE. Thank you, Mr. Chairman.

And thank you Mr. Secretary for your strong commitment and service to our country. In light of these recent questions, and I know it has been a long hearing, I just want to clarify for the record, again, as we are coming toward the end of this hearing. On page 4 of your testimony, you say, and I quote, "Consistent with previous congressional briefings this administration provided in late 2011 and early 2012 reflecting our intent to conduct a transfer of this nature with these particular five individuals."

So, now, in that quote, it sounds like you are saying that this met—or it is implying that it met the requirements of notifying, quote, "as the law says the appropriate committees of Congress at least 30 days before the transfer, release of Guantanamo detainees."

Yet, in the next paragraph, again, quoting your testimony, you state that "I fully understand and appreciate concerns about our decision to transfer the five detainees without providing 30 days' advance notice to Congress." So in that, are you stating and admitting that the 30 days' advance notice was not met?

Secretary HAGEL. No. That wasn't the point of why I put that in my statement. The point was to give some frame of reference of the history of this issue and in particular, the five Taliban detainees that had been discussed. But it wasn't anything more than that. And if I was unclear, then I am glad you cleared it up.

Mr. MCINTYRE. Okay, so you are just saying you understand and appreciate the concern, but you are not stating that, in fact, you did not meet that 30-day advanced notice, is that correct?

Secretary HAGEL. Well, we didn't meet the 30 days' notice. Yeah, yeah.

Mr. MCINTYRE. Right. Okay. That was my point. You stated that you did not meet that.

Secretary HAGEL. Right.

Mr. MCINTYRE. All right, then, I want to clarify that you are saying "exceptional circumstances" and that was the phrase used in your testimony, "allowed you to construe that it was not necessarily to follow the law as stated by the National Security Council spokesman Caitlin Hayden on June 3rd and, I quote from Caitlin Hayden, that "notification requirement should not be construed to apply to this unique set of circumstances." And that has been your strong opinion today, correct?

Secretary HAGEL. Well, I agree. And I think that was probably the core of this conversation and exchange between Congressman Scott and Mr. Preston on the authority the President had, and I agree with that.

Mr. MCINTYRE. All right, and that is why I am just trying to clarify this, and then for future reference, is it your opinion that the administration would have this same liberty to disregard or to construe that it is not necessary to follow the 30 days' notice in future similar situations?

Secretary HAGEL. Well, the way I answered and I actually answered it again this morning, maybe once or twice, is that, first, the constitutional responsibilities and authorities the President has, which I happen to—even though when I was in the Senate, I would challenge the administration at the time on some of this, but I think that, in my opinion, the Constitution is clear on that. And when there are extraordinary circumstances and situations regarding the security of the American people or a service member or a citizen, I think the President has the authority to act.

Mr. MCINTYRE. All right, so it would—this decision then in future situations that may be similar, you believe then would always be subject to the administration's interpretation of the situation on an ad hoc basis, actually?

Secretary HAGEL. Well, I think that is probably right, but I don't think, Congressman, anyone wants to ever tie the hands of the Commander in Chief, the President of the United States, on an extraordinary situation. I mean, I don't think that is what was intended. I am not a lawyer, but just the practicality of the responsibilities the President has, regardless of the party.

Mr. MCINTYRE. Right. No, no, and I understand that.

Secretary HAGEL. Yeah.

Mr. MCINTYRE. I am just simply trying to again clarify for the record. So, in a similar situation in the future then, in light of your statement you just made——

Secretary HAGEL. We would intend to continue to comply, as we have in almost every circumstance, with that 30-day notification in the future on any future transfers. But again, I think the—any President has to have that power, that authority, which I do think is in the Constitution, to deal with extraordinary cases.

Mr. MCINTYRE. All right, that was the clarification I wanted. Thank you very much.

And thank you, Mr. Chairman.

Dr. HECK. Mr. Nugent.

Mr. NUGENT. Thank you, Mr. Chairman.

And Secretary Hagel, I want to thank you for your service, having a brother in Vietnam right around the same time you were, and so I appreciate what you have done.

You have mentioned a couple of things today and I will get to in just a second, but does the Department of Defense consider Taliban detainees at GTMO prisoners of war?

Secretary HAGEL. Let me ask the general counsel to give you the specific answer because that was the basis of what we had the prisoners exchange on.

Mr. NUGENT. So tell me, are they classified as prisoners of war?

Mr. PRESTON. They are not—pardon me. They are not technically prisoners of war. They are detained—what we would call unprivileged belligerents, and as such, they are entitled to the basic entitlements under common article 3 of the Geneva Conventions, but they do not enjoy full-up POW status, and all of the protections of the Third Geneva Convention. It is a little technical, but they are detainees in armed conflict.

Mr. NUGENT. But they are not classified as a prisoner of war.

Mr. PRESTON. They are not—they don't meet the legal definition for a prisoner of war.

Mr. NUGENT. And Mr. Preston, you know, I think the administration has referred to this as a prisoner exchange, but the administration never classified Sergeant Bergdahl as a prisoner of war.

Mr. PRESTON. That is, as I understand it, for two reasons. And again, they tend to be technical. One is, the term, "prisoner of war," relates to a combatant detained in the context of an international armed conflict, whereas armed conflict with a Taliban is characterized as a non-international armed conflict. The other thing is a prisoner of war under the law governing prisoners of war is someone who is lawfully held and, in our view, very strong view, is that Bergdahl was not lawfully held. But again, he is a detained combatant in the context of an armed conflict—was.

Mr. NUGENT. So really, to any—prisoner exchange is probably not the correct term the administration should have used, but regardless, you have heard a lot here, obviously, and I certainly don't want to second-guess you in regards to the recovery of Sergeant Bergdahl. But I do have concerns about the administration, any administration, basically going to an attorney and giving me opinion that allows me to operate outside the law.

Now, this was passed specifically because of concerns that Congress had in regards to prior notifications about these five. And I know Ms. Gabbard brought up about, you know, these are—these weren't just trigger pullers. These were planners and organizers, and while they may have been out of the mix for 12 years, what they do bring, and I think you will agree with this, they do bring some level of expertise, particularly in regards to the fact that they are highly revered amongst the Taliban. So you have just increased their operational, at least, morale. Would you agree with that?

Mr. PRESTON. Well, I would say that the Department of Justice provides to the Executive its legal guidance. The decision is made by the policymakers and the decisionmakers.

Mr. NUGENT. Secretary Hagel, you mentioned this, that if you had to do this all over again, there are some things that you would do differently. What would you do differently?

Secretary HAGEL. Well, I haven't spent a lot of time thinking about it, Congressman, quite frankly, Congressman.

Mr. NUGENT. But you have mentioned it a number of times.

Secretary HAGEL. No. Here is the way I said it. I responded and I said in my testimony, like anything. I don't know if I have ever done anything, made any big decision on anything, where I wouldn't go back maybe and say, well, maybe I could have done that better.

Congressman, I haven't spent a lot of time on inventorying what I would do differently because we have got all of the things coming at us. But what I am saying is, sure, if we had an opportunity to go back, maybe we could have handled this differently, should have handled it differently.

Mr. NUGENT. I mean, you could have notified Congress.

Secretary HAGEL. Well, there is a lot of pieces.

Mr. NUGENT. Because otherwise, what you are saying is you don't trust Congress, and I am sure that is not what you are saying.

Secretary HAGEL. I had a little exchange on that earlier this morning.

Mr. NUGENT. I am sorry I missed that.

Secretary HAGEL. Well, I was told by one of your members that I said that, that I don't trust Congress.

Mr. NUGENT. And I am not saying that you don't.

Secretary HAGEL. I didn't say that, which I would never say that. But——

Mr. NUGENT. But the actions would look as if the administration does not——

Secretary HAGEL. I explained it. I get it. I understand it. I have said it, and I told you. You may not agree, but why the decision was made the way it was. But I understand exactly what you are saying.

Mr. NUGENT. Thank you, I yield back.

Dr. HECK. Dr. Wenstrup.

Dr. WENSTRUP. Thank you, Mr. Chairman.

Secretary, and Mr. Preston, you know, we are charged with the responsibility of providing security and defense for this country as well as you. And we take that oath.

You said earlier, I know the trust has been broken, and I appreciate that you recognize that that has happened. It is really disturbing to me. I have a track record of being trusted by my government. I served in Iraq. I had secret clearance. I knew what battles were coming up so that as a surgeon running a cache, I could prepare for what may be coming our way. It bothers me that I am not trusted now that I am here. It bothers me that you are afraid that I would provide a leak with my record of service. And I think that stands for many others here. And if that is not even considered, it is really bothersome and should be to the American people. But I am glad that when I was in uniform, that I was trusted to carry out my mission as opposed to here by this administration, apparently.

And you had mentioned that everyone was unanimous on the plan and I wonder if they were unanimous on the premise itself for this exchange because there is a difference between being in favor of what we are doing and approving the plan once it is decided that we are doing it. So I would be curious to know about that. But during the course of this, I wonder, did we promise any retaliation if our soldier was harmed in any way? Did we let our enemy know that if this soldier was harmed in any way, that there would be retaliation of some sort?

Secretary HAGEL. If the Taliban, the Haqqani——

Dr. WENSTRUP. In the negotiations, if—I will call him by name, Sergeant Bergdahl, if harm came to him under their care, would there be any retaliation from the United States of America?

Secretary HAGEL. Well, let me ask Steve Preston. He was there during the negotiations, so——

Mr. PRESTON. I would say, sir, that in the discussions of the exchange, the focus was specifically on the logistics.

Dr. WENSTRUP. So no is the answer. We did not say, if you harm him in any way——

Mr. PRESTON [continuing]. Was to engineer it so as to minimize the chance of harm to our——

Dr. WENSTRUP. I understand that, okay, but obviously, we didn't say that there would be some retaliation if he was harmed.

Now, Secretary, you before said that he was a POW. You said that here today, that he was a POW. And now we are hearing it is a different name. But regardless, so do we know, did his captors adhere to the Geneva Conventions like we do?

Secretary HAGEL. Wait a minute. Let me just respond. First, when I referenced him as a POW, he was a prisoner of war. He was a prisoner of war.

Dr. WENSTRUP. Okay. I am okay with that.

Secretary HAGEL. And the technicality of what the general counsel is talking about, that is why I asked the general counsel to make sure the technical concept——

Dr. WENSTRUP. Going to my question, do they adhere to the Geneva Conventions as we do?

Mr. PRESTON. I think it remains to be seen how he was treated, but there is a serious question of that——

Dr. WENSTRUP. Sure.

Mr. PRESTON [continuing]. To say the least.

Dr. WENSTRUP. I appreciate that. And are you familiar with our policy for compassionate release of detainees, either of you? Because if you are not, I can inform you because I served as a surgeon at Abu Ghraib prison in 2005 and 2006. We had a program for some of our worst enemies, if they were to be fatally ill, we release them to their families. It is called a compassionate release. This is a policy of the United States. Did we ask them for a compassionate release if, indeed, our soldier was so sick that we had to move so quickly? Did we ask them for a compassionate release in the manner that we perform as the United States of America?

Mr. PRESTON. Not to my knowledge.

Dr. WENSTRUP. Thank you. So we do it——

Secretary HAGEL. I might add, though, Congressman——

Dr. WENSTRUP. Yes, sir.

Secretary HAGEL. The Taliban, as you know, you have some experience, for which I thank you for that service. They don't play by the same rules.

Dr. WENSTRUP. That is my point. That is exactly my point, Mr. Secretary, and I thank you for verifying the case I am trying to make. We play by a set of rules as a decent people. And we are not dealing with decent people here, yet we acted as though we were. And we acted as though we were releasing decent people, and we are not. And I would ask you, does anyone here really think that the world is a safer place after we have made this trade? And I want to ask one other question. We had five American casualties yesterday. What if one of those was captured by the Taliban? Would we be back in Qatar at the negotiation table?

Secretary HAGEL. Well, you know, you served. You heard it all morning. We don't leave anybody behind. We do what we have to.

Dr. WENSTRUP. There are several ways of not leaving someone behind.

Secretary HAGEL. Well, that is right, but you don't send them chocolates and say, send him over. Tough business. Tough business.

Dr. WENSTRUP. I agree, and I yield back.

Dr. HECK. Ms. Walorski.

Mrs. WALORSKI. Thank you, Mr. Chairman.

Mr. Secretary, is the administration considering the transfer or release of other Afghan or Taliban detainees, including those that have been previously assessed as not a candidate for release?

Secretary HAGEL. We are always assessing possible detainee transfers.

Mrs. WALORSKI. Right, but I have a New York Times article right here that talks about six that are being considered right now to go Uruguay. So you are then considering additional transports and transfers of these of the detainees in Guantanamo?

Secretary HAGEL. Well, we are always looking at this. It is not new, I mean. You know——

Mrs. WALORSKI. I know. I am very aware.

Secretary HAGEL [continuing]. The Bush administration transferred far more than the Obama administration.

Mrs. WALORSKI. Are you looking at Afghan, or——

Secretary HAGEL. I am not going to get into the security arrangements here.

Mrs. WALORSKI. Let me just ask you this, hypothetically, if you are releasing any more Afghan detainees, are they going directly back to Afghanistan after the international law expires and we no longer have, as Mr. Preston was saying in a year when the international law expires that we are holding those detainees under, then do they go right back to Afghanistan, conceivably? Could they?

Secretary HAGEL. I am not going to respond to any specific actions, but counsel may want to.

Mr. PRESTON. I may have been misunderstood. I did not—I don't believe I said that the conflict would expire at the end of the year. So just with that clarification.

Mrs. WALORSKI. You made a comment about the international law that they are being held under by which we are actually detaining them.

Mr. PRESTON. Right, as belligerents in an armed conflict.

Mrs. WALORSKI. And that goes on, if we are completely pulled out of the conflict and we are no longer involved, except for minimal troop level, or, in 2016, when we are completely pulled out——

Mr. PRESTON. There will come a point in time where the conflict ends, and if there is not an alternative basis for which to hold them, the law of war basis would no longer be available to us.

Mrs. WALORSKI. Right. What is that point in time? Is that point in time when we pull out our—on the drop date the President made and say, hey, by the end of 2015, 2016, we are going to be completely pulled out. They are going to be on their own.

Mr. PRESTON. When an armed conflict comes to an end is a rather complex question. You can—one could answer it, as my predecessor did, in terms of the degradation of the enemy. This was in reference to Al Qaeda to the point where they no longer present a threat. Our view and I think, as reflected in the President's NDU [National Defense University] speech, is that this is—our government works best, our country is strongest when both the political branches——

Mrs. WALORSKI. Right.

Mr. PRESTON [continuing]. Focus on issues such as the end of a conflict.

Mrs. WALORSKI. Yeah. My concern is, is that we are getting ourselves in the position because we have made an exception to a law that we are getting potentially ourselves into a corner where we could conceivably be releasing Afghans from Guantanamo and, by whatever means or for whatever measure, sending them right back into Afghanistan. Is Afghanistan a list—is Afghanistan on the list of potential countries that can even receive GTMO prisoners?

Mr. PRESTON. I think you described a—whatever the arrangement, it would have to meet the statutory requirements of 1035(b), which is to say the risk is properly mitigated.

Mrs. WALORSKI. Yeah, I understand that. I understand the list. So, right now, based upon that list and you guys are considering and looking at and evaluating all the time, and you are looking at this list of potential countries. Obviously, Qatar is a country that says we are going to be able to receive and further detain these people. Is Afghanistan on there, or when the drawdown continues to happen, is there going to be a point where Afghanistan is going to be free and clear because we are pulling our troops out, they are on their own, they are handling themselves? Are they on that list now to be able to receive prisoners, or is there going to come a time when they are on the list to receive their people?

Secretary HAGEL. I don't know. I mean, we have had—detainees have gone to, I think, over 15 countries. And——

Mrs. WALORSKI. I mean, I have seen the list. You certainly have the list of potential countries that are available. We have had conversations in other hearings about, for example——

Secretary HAGEL. Well, you asked in the future and so on, but you have to understand——

Mrs. WALORSKI. Right now is Afghanistan on the list now where they can receive people back from GTMO?

Mr. PRESTON. Ma'am, I am not familiar with the list, per se. But——

Mrs. WALORSKI. Well, is Afghanistan a country that can be considered a country that meets the parameters?

Mr. PRESTON. Afghanistan could be a candidate to receive detainees.

Mrs. WALORSKI. But it is not now. Is it currently a country that we say meets the parameters and we could take Afghans from GTMO and send them back to Afghanistan if they met the criteria, and we are saying that Afghanistan does meet the criteria. Does Afghanistan meet the criteria today? For example, there is obviously a list of six that are going to Uruguay or potentially being looked at to go to Uruguay, so Uruguay qualifies as a country. I am just asking if Afghanistan in its current situation——

Mr. PRESTON. As far as I know, Afghanistan would be a potential recipient country.

Mrs. WALORSKI. Okay, thank you very much. I yield back my time.

Mr. GIBSON [presiding]. The gentlelady yields back.

Mr. Bridenstine.

Mr. BRIDENSTINE. Thank you, Mr. Chairman.

Mr. Secretary, did I hear correctly earlier you mentioned that when you were making the decision to release the five members of the Taliban, that you did not take into consideration whether or not they would return to the field of battle?

Secretary HAGEL. No, I didn't say that. We took that into consideration. We took everything into consideration, yes.

Mr. BRIDENSTINE. And was your assessment the best assessment from the people who advised you? Was that assessment that they would or would not return to the field of battle?

Secretary HAGEL. The assessment was, at first, we looked at the threat, whether they would or not. We can't predict, obviously.

Mr. BRIDENSTINE. You can make an assessment and I am sure somebody gave you an assessment.

Secretary HAGEL. I will read you what I just read this committee a little bit ago, and I don't think you were here, on the latest intelligence community assessment on the threats. I asked for this from General Clapper. This is the most recent intelligence community [IC] assessment. Threat if returned to Afghanistan, Pakistan after they—after the 1 year in Qatar. It says, Should they return and reintegrate with the Taliban, their focus would almost certainly be on Taliban efforts inside of Afghanistan, not a threat to the homeland.

Mr. BRIDENSTINE. Will we have troops in Afghanistan at that time?

Secretary HAGEL. Well, this is 12 months from May 31st, so, yes, we will have troops.

Mr. BRIDENSTINE. So they would pose a threat to American troops?

Secretary HAGEL. Well, that is—let me finish this.

Mr. BRIDENSTINE. Hold on. Let me move to Mr. Preston. I have only got 3 minutes left.

Secretary HAGEL. Well, I am giving you what the—if you want information, I am giving you what the IC says to answer your question.

Mr. BRIDENSTINE. I understand that. I think I got the answer I was looking for.

Secretary HAGEL. Well, it is in here.

Mr. BRIDENSTINE. Mr. Preston, my understanding, I am a Navy pilot. I flew combat in Iraq and Afghanistan. My understanding is that there are really two types of law. There is a law of war, a law of armed conflict, if you will, which is international law, and then there is a law of peace, which is how we handle things domestically. And under the law of war, correct me if I am wrong, but we don't detain people for rehabilitation and we don't detain people for purposes of, you know, punishing them. We detain them to keep them off the field of battle. Is that correct under the laws of international conflict?

Mr. PRESTON. As I understand it, when they are held under those laws, it is for that purpose.

Mr. BRIDENSTINE. It is to keep them off the field of battle so if there is a judgment that there is a chance that these folks could go back into the field of battle, and we still have an authorization for use of military force indicating that we still are at war, the judgment, whether these people are going to go back and harm our troops is pretty important, is that correct?

Mr. PRESTON. The way I would answer that is to say that it is clear that we have and had the authority to detain these people. The judgment to transfer them to the custody of another country is one that is governed in substantial measure by the NDAA provision and a judgment by the President.

Secretary HAGEL. I might just add, Congressman, in the second sentence of this intelligence community report to answer your question, it says, "A few new Taliban leaders," these five, "if they would return to the Taliban in Afghanistan, no matter how senior, will not appreciably change the threat to American forces, the Afghan people, or the Afghan Army."

Mr. BRIDENSTINE. Is that in a physical sense or in a morale sense? Because if you look at what the Taliban is putting out right now, they are declaring victory on this. Are you aware of this?

Secretary HAGEL. Well, I am aware a lot of what the Taliban says. I can't control what the Taliban says.

Mr. BRIDENSTINE. Yes, you can. Because you didn't have to release these five people, and by releasing them, you have created, in essence, a victory for the Taliban. It is being used as propaganda against this country. And ultimately, I think you are aware that these people are likely to return to the field of battle, and our troops are going to be in harm's way because of it.

Secretary HAGEL. Congressman, I just gave you the best intelligence community assessment we have, what they say about that. This is an imperfect business. If we want our prisoner of war back, we have to make some accommodations to that. We did it with a substantial mitigation of risk. We thought this was the smartest, wisest, most responsible thing that we could do to protect our people, get our prisoner back.

Mr. BRIDENSTINE. And the Taliban feels the same way.

Secretary HAGEL. There is nothing I can do about that. They are going to be predictable, I suspect, and try to use this. But you ask whether that is physical, or is it a morale boost? Well, I think the first thing we ought to look at, is this a physical threat that they represent and you just heard what the——

Mr. BRIDENSTINE. You know, the morale boost turns into a physical threat.

Secretary HAGEL. Well, it is an imperfect world, Congressman, and you know that.

Mr. GIBSON. The gentleman's time is expired.

Mr. Byrne.

Mr. BYRNE. Thank you, Mr. Secretary. I have been watching you as you have been asking—answering questions about the consultation with Congress, and I know that you are sensitive to that. And I was wondering if at any time during this process did you, yourself, recommend or suggest to anyone in the White House, the NSC, any of the parties, any of the people involved that they should consult or notify the Congress prior to May 31st?

Secretary HAGEL. Congressman, through this process, which I have in front of me, the deputies meetings at the White House, principals meeting, which I am a principal, all of these things were discussed; notification, the risks which we have talked about today. I support the decision that was made on notification. I didn't particularly like it. I think a lot of people didn't, but we felt in the interest of not risking any further Bowe Bergdahl and the opportunity to get him back, and maybe even his life, this was—this was the smartest way to do it.

Mr. BYRNE. Well, I understand it was discussed, but did you yourself suggest or recommend that some notification, or consultation be made prior to May 31st?

Secretary HAGEL. We all made different suggestions, recommendations as to at least exploring what happens if we don't, should we, what is the downside of that, what is the downside if we do? So all of these things were——

Mr. BYRNE. So you did it.

Secretary HAGEL. Well, we all talked about it. It wasn't just a recommendation. It was, we went around the table. We talked about it, all of us.

Mr. BYRNE. So you suggested, maybe we should talk to Congress or give some notification?

Secretary HAGEL. Everybody suggested that. We talk about this. We look at it, go up and down. No formal recommendation was made by me. At the end, we discussed it. We all came out in the same place, that the risk was just too great. We didn't want to take the risk.

Mr. BYRNE. Mr. Preston, let me ask you a question. I was interested in the colloquy you have had with several people over this constitutional issue. Is it your position, is it the position of the Obama administration that after the President of the United States signs a law and it becomes law, that he can on his own, after consultation with legal counsel, the Justice Department, whoever, say I don't have to comply with a particular provision of that law without going to court first?

Mr. PRESTON. I can only speak for myself, but I think that the President may act in the exercise of his constitutional authority as he understands it and as circumstances demand, without necessarily going to court.

Mr. BYRNE. How is that different from the position that people in the Nixon administration took during Watergate that if the President does it, it is legal. How is that different?

Mr. PRESTON. Now, I wouldn't even know where to begin to answer that. I think it is——

Mr. BYRNE. Well, begin with the beginning. Can the President of the United States decide he can do whatever he wants to do because he thinks he has got some constitutional protection, despite a clear provision in the law to the contrary? Can he do that?

Mr. PRESTON. Well, the way I would answer that is, this President faced a service member in peril and in captivity and exercised a constitutional duty and authority to recover that service member. In circumstances in which it was the judgment of the policy, the leading policymakers of this country, that the circumstances were not going to permit the 30-day notification. That is a very concrete response to what—a very compelling situation, so——

Mr. BYRNE. Well, I understand that you are saying that under these particular circumstances, you are not saying that it is a blanket thing, but you think under certain circumstances, the President of the United States after he has signed a law and it has become law, can decide that certain parts of it he doesn't have to comply with without going to a court and getting a determination about his constitutional basis for doing so?

Mr. PRESTON. There are circumstances and this was one.

Mr. BYRNE. One final question for you, Secretary Hagel. Could you please provide us assurance that there will be no unlawful command influence related to the case of Sergeant Bergdahl?

Secretary HAGEL. Absolutely, and I have said it here in answer to a couple of questions before.

Mr. BYRNE. Thank you, sir, I yield back.

Mr. GIBSON. The gentleman yields back.

I will recognize myself for 5 minutes, and just want to echo the remarks. I appreciate the panelists for being here today and your leadership in the DOD.

And Mr. Secretary, thank you for your courageous and honorable service in Vietnam. And as a former soldier myself, I will start by saying that the ethos that we will leave no soldier behind I think is very important to the Profession of Arms.

I still have deep concerns about the judgment in this particular case, and I want to associate myself with the remarks of Ms. Gabbard earlier.

First, some context. I must say that I respectfully disagree with the administration's decision to keep troops in Afghanistan for 2 more years. I think that we have largely accomplished what we set out to do, decimating Al Qaeda and preventing them from having a safe haven in Afghanistan. I certainly would stipulate that we have an enduring national security interest to make sure that that remains the case. I don't think that we need to leave troops on the ground to do that. I believe we can do that from over the horizon with special operations troops, Arabian Sea or Indian Ocean, and evidently, the administration agrees because the administration is talking about departing in 2 years. And you know, if the administration believes that we have an interest in continuing to train the Afghanistan forces, I don't see why we can't bring them to the United States of America and train them here. And by the way, the Afghanistan people should pay for that.

But you know, we are where we are today and that is that the administration wants to keep troops, U.S. troops there for 2 more years, and you know, and given that, I question the judgment of this particular decision, and I know we have been over—I am not going to ask us to rehash a lot of the ground that we have been on, but I do want to ask this point, that at any point in the negotiations, sir, did it come up that we would want to keep these five detainees in Qatar until the last American troop comes home?

Mr. PRESTON. Congressman, that was not the nature of the discussion. It was with reference to the period of time for which the security assurances would be in place.

Mr. GIBSON. Well, listen, and I certainly caught the earlier remark that said, you know, we weren't holding the best cards, I get that. It doesn't appear we were holding any cards. I am not sure that our negotiating position, we gave up very high-level commanders. It doesn't appear to us that, you know, we had any kind of leverage. And I just refuse to accept that we had no leverage at all. They evidently had been wanting to get these five leaders back. And I think at the very minimum, we would have pressed for the point that these five commanders would not return to Afghanistan until the last American troop had returned back to our soil.

Let me say this, that I am interested to know in the best military judgment of our commanders, our ground commander in Afghanistan, the CENTCOM commander, and the Chairman of the Joint Chiefs, and I guess I am curious why the chairman is not with us today, but I am interested in their assessment and their go/no-go recommendation.

Secretary HAGEL. Thank you, Congressman, and thank you for your distinguished service. I know about it. And we appreciate it.

Chairman Dempsey is in London. He is convening a group of chief military defense officers, counterparts of his from NATO. This was a conference that was planned months and months ago. He considered not going. Since Chairman McKeon asked not to have any uniformed military at the table for this hearing, I told General Dempsey not to come back because he was not invited to sit here.

As to his role, I said in my testimony, as well as the Vice Chairman who has been very active on this, Admiral Winnefeld, in fact, I think has been in every briefing for the House and the Senate last 2 weeks. They have been very intricately involved in all of the meetings, all of the counseling, all of the steps, signed off, supported. They have not been left out in any dimension of this and the Vice Chairman, as I said, has actually been at all of the meetings.

Mr. GIBSON. And so I am understanding that both the Vice Chairman and the Chairman recommended "go" on this mission?

Secretary HAGEL. Yes.

Mr. GIBSON. And what about the ground commander and the CENTCOM commander?

Secretary HAGEL. They were notified on the 27th of May, General Dunford, General Austin. Their awareness of something going on was there, but again, to keep this as close as we could, they were not informed until 4 days before the specific operational plans and decisions, until 4 days before the operation. I believe that I am right on those days.

Mr. GIBSON. I thank the gentleman.

I will now move to Chairman McCaul.

Mr. MCCAUL. I thank you, Mr. Chairman.

Thank you, Mr. Secretary, Mr. Preston. I chair the Homeland Security Committee, so I look at that from that vantage point. I do have concerns that this move, this swap empowers and emboldens our enemies. One only look at what Mullah Omari is saying about this when he celebrates. This is a huge triumph in his words, a colossal victory. For the first time, we have negotiated with the Taliban as equals. And we gave them everything they asked for, the dream team. These are the heads of intelligence, military, with long ties to Osama bin Laden. When I was in Iraq last month, I met with General Dunford and Ambassador Cunningham. As we were standing up the Afghans at this critical point in time, I am concerned about the influence these five could have on the process, and as the Ambassador told me, as we withdraw, his biggest fear is there will be a vacuum and then we will get hit again.

Mr. Secretary, can you tell me how this move is in our best interest in terms of our security?

Secretary HAGEL. Well, to start with, as I have covered this ground this morning, we got our one remaining prisoner back. I don't think that is an incidental accomplishment.

Second, as has been quoted here a couple of hours ago, the former Central Command Commander, Marine General Jim Mattis, what he said this Sunday, last Sunday about one of the significant features of this return was it frees up our forces in Afghanistan to not be concerned and not have any adjustments or realities or limitations, to always be mindful of trying to get our prisoner back. And I think, again, I don't think this is anything to be dimin-

ished either, as noted by the Congressman, the fact is, our military men and women know that we will go after them. We won't leave them behind.

Mr. MCCAUL. My time is limited, but, you know, one of these five, they have already come out publicly, Mr. Noori, and said, I want to go to Afghanistan and kill Americans. That concerns me. And these guys are over there, reviving the movement, if you will, filling the vacuum, and then hitting the homeland again, as we saw pre-9/11. There is an old axiom in foreign policy and you, sir, have been in the Senate Foreign Affairs Committee, Armed Services, for a long time, that we don't negotiate with terrorists. The Haqqani Network, as I understand it, were responsible for holding the sergeant captive. Isn't it true that the Haqqani Network is designated a foreign terrorist organization?

Secretary HAGEL. They are designated a foreign terrorist.

Mr. MCCAUL. And if so, did we just not negotiate with a terrorist?

Secretary HAGEL. No, we negotiated with the Government of Qatar. The Taliban made the deal. The Haqqani Network is, as far as we can tell, a subcontractor to—and they do it not just with the Taliban, but they do it with different groups.

Mr. MCCAUL. I mean, let's be—I mean, let's be clear. Okay, so we negotiate with a middle man, the Qataris government, with the Haqqani Network, who held him captive, held the sergeant captive, and the Haqqani Network has been designated——

Secretary HAGEL. It was the Taliban that were represented.

Mr. MCCAUL. But ultimately, it is with the Haqqani Network, which is a foreign terrorist organization.

Secretary HAGEL. Well, as I said, yes, they are associated in different ways. We know that. And as I said, I think the best way I can describe it is essentially a subcontractor.

Mr. MCCAUL. Well, the Haqqani Network, as I understand it, is the most lethal force over there right now.

Secretary HAGEL. It is.

Mr. MCCAUL. It is the biggest threat that is coming into Afghanistan after we withdraw and fill in the vacuum and then from a Homeland Security standpoint, potentially hitting Americans.

Secretary HAGEL. The Haqqani Network didn't have any role in this deal.

Mr. MCCAUL. But they held him captive.

Secretary HAGEL. Preston can give you the specifics of this.

Mr. MCCAUL. In my limited time, there is a New York Times story about—you read about a memo from Guantanamo transfers to you from National Security Advisor Susan Rice. What role does the White House play in your determination regarding the release of detainees from Guantanamo?

Secretary HAGEL. I have the authority and the responsibility to make the decisions and to notify Congress on whether they are going to be transferred or not.

Mr. MCCAUL. Does it stop with you, or does it go to the White House?

Secretary HAGEL. Well, the President signs off as well. But you asked what role they play. My assessments are made based on, yes, the National Security Council, because the subcommittee that you

chair, the Secretary of Homeland Security is part of that, an integral, important part of that for obvious reasons; so is Secretary of State; so is the National Director of Intelligence; so is the Chairman of the Joint Chiefs of Staff; so is the President's National Security Advisor. Sure, I want all of that. And they all signed off on this decision, by the way. I have got to have all of that, because all of them have different pieces along with our own internal DOD pieces.

Mr. MCCAUL. And I understand that. I see my time is expired. Thank you so much for being here today.

Secretary HAGEL. Thank you.

Mr. GIBSON. All time is expired. We thank the gentlemen. They have been very gracious with their time this morning and this afternoon, and we thank you for your service, and this meeting is adjourned.

Secretary HAGEL. Thank you, Congressman.

[Whereupon, at 3:13 p.m., the committee was adjourned.]

A P P E N D I X

June 11, 2014

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

JUNE 11, 2014

Opening Statement of Chairman Howard P. "Buck" McKeon

HEARING ON

The May 31, 2014, Transfer of Five Senior Taliban Detainees

June 11, 2014

I would like to thank Secretary Hagel and Mr. Preston for testifying before the committee today on the May 31st transfer of five senior Taliban detainees from detention at Guantanamo Bay to the government of Qatar.

The matter before us is deeply troubling. This committee has begun a full investigation into the administration's decision, its unprecedented negotiations with terrorists, the national security implications of releasing these dangerous individuals from U.S. custody, and the violation of national security law. We hope for and expect the Department's full cooperation.

Let me be clear upfront on the focus of today's hearing. It is not my intention to dive into the circumstances of the disappearance of Sergeant Bergdahl from his base in 2009. There will be a time and process for that. I also do not intend to use this hearing to weigh the merits of returning an American soldier to the United States. Everyone who wears the uniform should be returned home. However, the detainee transfer raises numerous national security policy and legal questions. The explanations we received from White House officials at a House-wide briefing earlier this week were misleading and often times blatantly false.

This transfer sets a dangerous precedent in negotiating with terrorists. It reverses longstanding U.S. policy and could incentivize other terrorist organizations, including al Qaeda, to increase their use of kidnappings of U.S. personnel.

It increases risk to our military and civilian personnel serving in Afghanistan and elsewhere. As the President, yourself, and other administration officials have acknowledged, these five terrorists still pose a threat to Americans and Afghans alike, and in one year they will be free to return to Afghanistan or anywhere else. What's more, although there will be fewer U.S. personnel in Afghanistan in 2015, the return of these five Taliban leaders directly threatens the gains our men and women have fought and died for.

This transfer is a clear violation of section 1035 of the National Defense Authorization Act of 2014. There is no compelling reason why the Department could not provide a notification to Congress 30 days before the transfer, especially when it has complied with the notification requirement for all previous GTMO detainee transfers since enactment of the law.

The statute is more than a 'notification.' It requires detailed national security information, including detailed consideration of risk and risk mitigation, that the Congress and American people would expect any administration to consider before a decision is made to transfer GTMO detainees. It was designed and approved by a bipartisan majority in Congress due to real concerns that dangerous terrorists were being released in a manner that allowed them to return to the battlefield.

We are also seeing the consequences of the President's hasty Afghanistan withdrawal strategy. Afghanistan is at a critical juncture. At the same time we're focused on the first democratic transition of government and supporting security and stability within the country, this

negotiation has legitimized the Taliban – the organization that safeguarded the 9-11 al Qaeda perpetrators and ruled Afghanistan through atrocities.

Lastly, this transfer sets dangerous precedent for how the President intends to clear out GTMO. The remaining detainees, by the Obama administration's own analysis, include the most dangerous to U.S. forces and national security interests. In the President's rush to close GTMO, are other deals in the works to release these dangerous individuals?

Mr. Secretary, I don't envy the position you have been put in. We understand the responsibility you bear for signing these transfer agreements, but we're also aware of the immense pressure the White House has put on you to transfer these detainees so it can claim victory for closing GTMO. Nevertheless, we expect the Department to abide by the law and to provide its candid assessment of national security impacts of the President's decisions.

This is a bipartisan committee. Last month we passed our Authorization Act out of committee unanimously and off the floor with well over 300 votes. That kind of bipartisanship is based on trust. Members on this committee trust each other to live up to our word, and when we work with the Department and the White House to pass legislation the President will sign, we have to trust that he will follow those laws.

The President has broken a bipartisan law and put our troops at greater risk. I'm eager to hear why.

Statement of Ranking Member Adam Smith

HEARING ON

The May 31, 2014, Transfer of Five Senior Taliban Detainees

June 11, 2014

Thank you, Mr. Chairman. And I would like to thank the witnesses for appearing here today to address concerns about the transfer of five Taliban detainees to Qatar in exchange for the release of Sergeant Bergdahl.

I am certain that the decision to exchange five senior Taliban detainees for Sergeant Bergdahl was not an easy one, but it was likely the appropriate decision to make. The concerns that will be expressed here today, including by me, about the release of members of an organization currently engaged in combat against our forces should not be taken lightly. On balance, however, I believe the President made the right call to recover Sergeant Bergdahl and reinforce the standard that "no service member is left behind".

There are those who have tried to use this decision for political purposes or to gloss over the difficult nature of the decision the President and the Secretary of Defense faced by trying Sergeant Bergdahl in the media and suggesting that we should not have exchanged the five detainees for him because he was not "worth it". Such statements are morally repugnant. If Sergeant Bergdahl is to be punished for a transgression, he should receive the same due process as any other member of the military. And in no case is it acceptable to suggest that leaving a captured U.S. service member in the hands of the Taliban is an appropriate punishment for an alleged but unproven violation of the Uniformed Code of Military Justice.

There are, however, many difficult and legitimate questions raised by this exchange. Many Members have focused on the lack of notification to Congress about the transfer of the detainees. The National Defense Authorization Act explicitly calls for a notice to Congress 30 days before transferring any Guantanamo detainee, among other steps. The administration has argued that there was not time to notify Congress, that Sergeant Bergdahl's life was at risk, and that the President's signing statement on the NDAA noted that such restrictions may violate the separation of powers. These are factors worthy of consideration and ultimately it may be left to the courts to decide.

Many Members of Congress feel strongly that even if the administration could not provide the full 30 days notification, some heads-up about the trade would have been appropriate. As a Member of Congress and the Ranking Member of the House Armed Services Committee, it's not hard to share that sentiment. The administration says they discussed some elements of such a deal as part of a larger reconciliation with the Taliban a couple years ago. We also have to think about where we draw the line on notifying Congress about impending operations carried out in a time of war—it is, for example, clearly inappropriate and constitutionally unnecessary for the administration to provide advance notice of a raid on a terrorist hideout. On which operations do we expect an advance notice and how far in advance?

Sergeant Bergdahl was not being held by a conventional military force as defined by the Geneva Conventions. But the Taliban is clearly not the same thing as al Qaeda or the Islamic State of Iraq and Syria. Are there forces with whom we should not negotiate for the return of captured Americans? If so, are we potentially dooming captured American service members to death because of the nature of the force that captured them? How do we draw that line and how did the administration draw it in this case? Although the "Arms for Hostages" deals of the 1980s did not seem to set a precedent or encourage the capture of more Americans, should we be concerned in this case?

We must thoroughly explore any risk of releasing these five detainees. They have been described as senior leaders of the Taliban. We clearly do not want them to be engaging in the fight in Afghanistan. What assurances have the Qataris given the United States that they can be kept from immediately returning to the folds of the Taliban? Are we comfortable with those assurances? What risk does the release pose to our troops and to our Afghan allies? Some have suggested that as we draw down in Afghanistan, and certainly after 2016, we may no longer have the ability to hold Taliban detainees under international law—does the administration agree with this view and was this considered as part of the deal for Sergeant Bergdahl?

Again, I would like to thank our witnesses for appearing here today. Their jobs, and the decisions regarding the Sergeant Bergdahl trade that they made or were part of were not easy, and I thank them for their service.

AS PREPARED / EMBARGOED UNTIL DELIVERY

SECRETARY OF DEFENSE CHUCK HAGEL
HEARING ON THE TRANSFER OF DETAINEES
HOUSE ARMED SERVICES COMMITTEE
WASHINGTON, DC
WEDNESDAY, JUNE 11, 2014

Chairman McKeon, Ranking Member Smith, members of the committee.

I appreciate the opportunity to discuss the recovery of Sergeant Bowe Bergdahl, and the transfer of five detainees from Guantanamo Bay to Qatar. And I appreciate having the Department of Defense General Counsel Stephen Preston, here with me. Mr. Preston was one of our negotiators in Qatar and signed on behalf of the U.S. the Memorandum of Understanding between the Governments of Qatar and the United States. Also here representing the Joint Chiefs of Staff is Brigadier General Pat White, who is the Director of the Joint Staff's Pakistan/Afghanistan Coordination Cell and who helped coordinate the Bergdahl recovery on behalf of the Chairman of the Joint Chiefs of Staff, General Dempsey. The Vice Chairman of the Joints Chiefs, Admiral Winnefeld, will join us for the closed portion of this hearing. As you know, General Dempsey and Admiral Winnefeld played a critical role in the meetings at the National Security Council leading up to Sergeant Bergdahl's release and supported the decision to move forward with this prisoner exchange.

In my statement today, I will address the issues Chairman McKeon raised when he asked me to testify, and explain why it was urgent to pursue Sergeant Bergdahl's release, why we decided to move forward with the detainee transfer, and why it was fully consistent with U.S. law, our nation's interests, and our military's core values.

Mr. Chairman, I want to be clear on one fundamental point – I would never sign off on any decision that I did not feel was in the best interests of this country. Nor would the President of the United States, who made the final decision with the full support of his national security team.

There are legitimate questions about this prisoner exchange, and Congress obviously has an important oversight role to play in all military and intelligence matters. As a former member of the Senate Select Committee on Intelligence and the Senate Foreign Relations Committee, I appreciate the vital role Congress plays in our national security. And I will present to this committee – within the limits of an open, unclassified, hearing, and in more detail in the closed, classified, hearing – everything I can to assure you that this prisoner exchange was done legally, with substantial mitigation of risk, and in the national interest of our country.

Let's start with Sergeant Bergdahl's status as a member of the U.S. Army. He was held captive by the Taliban and the Haqqani network for almost five years. He was officially listed as "missing-captured." No charges were ever brought against him and there are no charges pending now. Our entire national security apparatus – the military, the intelligence community, and the State Department – pursued every avenue to recover Sergeant Bergdahl, just as the American people and the Congress expected us to do. In fact, as this committee knows, there were a number of Congressional Resolutions introduced, and referred to this committee, directing the President to do everything he could to get Sergeant Bergdahl released from captivity. We never stopped trying to get him back, as the Congress knows, because he is a soldier in the United States Army.

Questions about Sergeant Bergdahl's capture are separate from our effort to recover him – because we do whatever it takes to recover *any* U.S. service member held in captivity. This

pledge is woven into the fabric of our nation and its military. As former Central Command Commander Marine General Jim Mattis recently put it, "bottom line, we don't leave people behind, that is the beginning and that is the end of what we stand for … we keep faith with the guys who sign on, and that is all there is to it."

As for the circumstances surrounding his captivity, as Secretary of the Army McHugh and Army Chief of Staff General Odierno have said, the Army will review this in a comprehensive, coordinated effort that will include speaking with Sergeant Bergdahl. Like any American, Sergeant Bergdahl has rights, and his conduct will be judged on facts – not political hear-say, posturing, charges, or innuendo. We owe that to any American and especially those who are members of our military and their families. Like most Americans, I've been offended and disappointed in how the Bergdahl family has been treated by some people. No family deserves this. I hope there will be sober reflection on people's conduct regarding this issue and how it relates to the Bergdahl family.

In 2011, the Obama administration conducted talks with the Taliban on a detainee exchange involving the five Taliban detainees that were ultimately transferred after the release of Sergeant Bergdahl. These talks – which Congress was briefed on in November of 2011 and January of 2012 – were broken off by the Taliban in March 2012. We have not had direct talks with the Taliban since this time. In September of 2013, the Government of Qatar offered to serve as an intermediary, and in November, we requested that the Taliban provide a new proof-of-life video of Sergeant Bergdahl.

In January of this year, we received that video, and it was disturbing. It showed a deterioration in his physical appearance and mental state compared to previous videos. The intelligence community carefully analyzed it and concluded that Sergeant Bergdahl's health was poor and possibly declining.

This gave us growing urgency to act. In April, after briefly suspending engagement with us, the Taliban again signaled interest in indirect talks on an exchange. At that point, we intensified our discussions with Qatar about security assurances. On May 12th, we signed a Memorandum of Understanding with Qatar detailing the specific security measures that would be undertaken and enforced by them if any Taliban detainees were transferred to their custody.

Included in this MOU were specific risk mitigation measures and commitments from the Government of Qatar like travel restrictions, monitoring, information sharing, and limitations on activities, as well as other measures which we will detail in the closed portion of this hearing. They were described in the classified notification letter I sent to this committee last week.

Soon after the Memorandum of Understanding was finalized, senior U.S. officials received a warning from the Qatari intermediaries that time was not on our side. This indicated that the risks to Sergeant Bergdahl's safety were growing. We moved forward with indirect negotiations on how to carry out the exchange of five detainees, and agreed to the mechanics of the exchange on the morning of May 27th, following three days of intensive talks. That same day, the President received a personal commitment from the Amir of Qatar to uphold and enforce the security arrangements and the final decision was made to move forward with the exchange.

As the opportunity to obtain Sergeant Bergdahl's release became clearer, we grew increasingly concerned that any delay, or any leaks, could derail the deal and further endanger Sergeant Bergdahl. We were told by the Qataris that a leak would end the negotiations for Bergdahl's release. We also knew that he would be extremely vulnerable during any movement, and our military personnel conducting the hand-off would be exposed to a possible ambush or

other deadly scenarios in very dangerous territory. And we had been given no information on where the hand-off would occur.

For all these reasons and more, the exchange needed to take place quickly, efficiently, and quietly. We believed this exchange was our last, best opportunity to free him.

After the exchange was set in motion, only 96 hours passed before Sergeant Bergdahl was in our hands. Throughout this period, there was great uncertainty about whether the deal would go forward. We did not know the general area of the hand-off until twenty-four hours before. We did not know the precise location until one hour before. And we did not know until the moment Sergeant Bergdahl was handed over safely to U.S. Special Operations Forces that the Taliban would hold up their end of the deal. So it wasn't until we recovered Bergdahl on May 31st that we moved ahead with the transfer of the five Guantanamo detainees.

The President's decision to move forward with the transfer of these detainees was a tough call, but I support it and stand by it. As Secretary of Defense, I have the authority and responsibility to determine whether detainees at Guantanamo Bay can be transferred to the custody of another country. I take that responsibility as seriously as any responsibility I have.

Neither I nor any member of the President's National Security Council was under any illusions about these five detainees. They were members of the Taliban, which controlled much of Afghanistan prior to America's invasion and overthrow of that regime. They were enemy belligerents, detained under the law of war and taken to Guantanamo in late 2001 and 2002. They have been in U.S. custody at Guantanamo since then. But they have not been implicated in any attacks against the United States, and we had no basis to prosecute them in a federal court or military commission. It was appropriate to consider them for an exchange. And if any of these detainees ever try to rejoin the fight, they would be doing so at their own peril.

There is always some risk associated with the transfer of detainees from Guantanamo. The U.S. government has transferred 620 detainees from Guantanamo since May 2002, with 532 transfers occurring during the Bush administration and 88 transfers occurring during the Obama administration.

In the case of these five detainees, the security measures Qatar put in place led me to determine – consistent with the National Defense Authorization Act – that the risks they posed to the United States, our citizens, and our interests were substantially mitigated. I consulted with the other members of the President's national security team and asked them to review the risks and either concur or object to the transfer. The Secretary of State, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff all supported this transfer. There was complete unanimity on this decision.

The President and I would not have moved forward unless we had complete confidence that we were acting lawfully, in the national interest, and in the best traditions of our military. Our operation to save Sergeant Bergdahl's life was fully consistent with U.S. laws and our national security interests in at least five ways:

First, we complied with the National Defense Authorization Act of 2014 by determining that the risk the detainees posed to the United States, American citizens, and our interests was substantially mitigated and that the transfer was in the national security interests of the United States.

Second, we fulfilled our commitment to recover all military personnel held captive.

Third, we followed the precedent of past wartime prisoner exchanges, a practice in our country that dates back to the Revolutionary War and has occurred in most wars America has fought.

Fourth, because Sergeant Bergdahl was a detained combatant being held by an enemy force, and not a hostage, it was fully consistent with our long-standing policy not to offer concessions to hostage takers. The Taliban is our enemy, and we are engaged in an armed conflict with them.

Fifth, what we did was consistent with previous congressional briefings this administration provided in late 2011 and early 2012, reflecting our intent to conduct a transfer of this nature with these particular five individuals.

I fully understand and appreciate concerns about our decision to transfer the five detainees to Qatar without providing 30 days advance notice to Congress. Under these exceptional circumstances – a fleeting opportunity to protect the life of an American service member held captive and in danger – the national security team and the President agreed that we needed to act swiftly.

We were mindful that this was not simply a detainee transfer, but a military operation with very high risk and a very short window of opportunity that we didn't want to jeopardize – both for the sake of Sergeant Bergdahl, and our operators in the field who put themselves at great risk to secure his return. In consultation with the Department of Justice, the administration concluded that the transfer of the five could lawfully proceed.

The options available to us to recover Sergeant Bergdahl were few, and far from perfect. But they often are in wartime, and especially in a complicated war like we have been fighting in Afghanistan for 13 years. Wars are messy and full of imperfect choices. I saw this firsthand during my service in Vietnam in 1968, when we sent home nearly 17,000 of our war dead in one year. And I see it today as Secretary of Defense. A few of you on this committee have experienced war and seen it up close. There is always suffering in war – not glory. War is always about human beings – not machines. War is a dirty business. And we don't like to deal with those realities … but realities they are.

Those of us charged with protecting the national security interests of this country are called upon every day to make hard, imperfect, and sometimes unpleasant choices based on the best information we have and within the limits of our laws – and always based on America's interests. War, every part of war, like prisoner exchanges, is not some abstraction or theoretical exercise. The hard choices and options don't fit neatly into clearly defined instructions in "how-to" manuals. All of these decisions are part of the brutal, imperfect realities we deal with in war.

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.

As all of you know, I value the Defense Department's partnership with Congress and the trust we have developed over the years. I have always been completely transparent and straightforward in my dealings with Congress since I've been Secretary of Defense. That's what I always demanded of administration officials when I was in the U.S. Senate. And that's what I've done this morning with my statement on why I made the decision I did, the circumstances surrounding my decision, and the decisions of the President and his national security team.

The day after the Bergdahl operation, at Bagram Air Base in Afghanistan, I met with the team of special operators that recovered him. They are the best of the best … people who didn't hesitate to put themselves at incredible personal risk to recover one of their own.

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I know we all thank them, and all our men and women in Afghanistan who make difficult sacrifices every day for this country. Earlier this week we were reminded of the heavy costs of war when we lost five American service members in Afghanistan. I know our thoughts and prayers are with their families. We are grateful for their service, and the service of all our men and women in uniform around the world. And I again thank this committee for what you do every day to support them.

Thank you.

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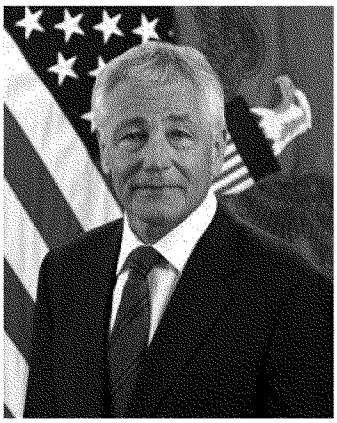
Chuck Hagel

Secretary of Defense



Chuck Hagel was sworn in as the 24th Secretary of Defense on February 27, 2013 becoming the first enlisted combat veteran to lead the Department of Defense.

Secretary Hagel was born on October 4, 1946 in North Platte, Nebraska, the eldest of four brothers. He joined the United States Army and volunteered to go to Vietnam, rising to the rank of Sergeant and serving as an infantry squad leader alongside his brother, Tom, with the Army's 9th Infantry Division in 1968. He earned numerous military decorations and honors, including two Purple Hearts.

Following his tour in Vietnam, Secretary Hagel graduated from the University of Nebraska at Omaha using the G.I. Bill. Continuing his commitment to public service, Secretary Hagel became Chief of Staff to Nebraska Congressman John Y. McCollister.

In 1981, Secretary Hagel was nominated by President Ronald Reagan to serve as Deputy Administrator of the Veterans Administration. In that post he helped pioneer early electronic health record keeping and pushed for increased benefits for Vietnam veterans suffering from Agent Orange. This fight became one of the causes of his life, later helping federal courts distribute hundreds of millions of dollars for Agent Orange victims through the Court settlement that set up the Agent Orange Payment Program which he chaired.

In the mid-1980's, Secretary Hagel co-founded Vanguard Cellular Systems, Inc., which became one of the largest independent cellular networks in the country. Secretary Hagel also served as President and CEO of the USO; the Chief Operating Officer of the 1990 Economic Summit of Industrialized Nations (G-7 Summit) in Houston, Texas; Deputy Commissioner General of the United States for the 1982 World's Fair, President of the Private Sector Council and President of McCarthy & Company, an Omaha based investment bank.

In 1996, Secretary Hagel was elected to the United States Senate and represented Nebraska until 2009. While in the Senate, he was a senior member of the Foreign Relations; Banking, Housing and Urban Affairs; and Intelligence Committees. He chaired the Foreign Relations International Economic Policy, Export and Trade Promotion Subcommittee; and the Banking Committee's International Trade and Finance, and Securities Subcommittees. Secretary Hagel also served as the Chairman of the Congressional-Executive Commission on China and the Senate Climate Change Observer Group.

Following his Senate career, Secretary Hagel served as Co-Chairman of President Obama's Intelligence Advisory Board and a member of the Secretary of Defense Policy Board. He was a Distinguished Professor in the Practice of National Governance at the Georgetown University School of Foreign Service and Chairman of the Atlantic Council, a non-partisan institution devoted to promoting transatlantic cooperation and international security. He also served on the board of PBS and a number of corporations and financial institutions.

Secretary Hagel is author of the 2008 book *America: Our Next Chapter*. He and his wife Lilibet have a daughter, Allyn, and a son, Ziller.

THE HONORABLE STEPHEN W. PRESTON
General Counsel of the Department of Defense

Stephen W. Preston is General Counsel of the Department of Defense. Appointed by the President with the advice and consent of the Senate, he was sworn in on October 28, 2013. By statute, the General Counsel is the chief legal officer of the Department.

Mr. Preston served as General Counsel of the Central Intelligence Agency from July 2009 until his appointment as DoD General Counsel. Earlier positions in government have included General Counsel of the Department of the Navy (1998-2000), Deputy Assistant Attorney General at the Department of Justice (1995-1998), and Principal Deputy General Counsel of the Department of Defense (1993-1995).

Mr. Preston was previously a partner at the law firm of Wilmer Cutler Pickering Hale and Dorr LLP in Washington, DC, where he was co-chair of the Defense and National Security Practice Group, as well as a member of the Regulatory and Litigation Departments. He joined the firm in 1986.

A member of the District of Columbia Bar, Mr. Preston is a fellow of the American Bar Foundation and a member of the Council on Foreign Relations. He has been active with the American Bar Association Standing Committee on Law and National Security and, prior to his appointment as CIA General Counsel, served on the board of directors of the Center for Strategic and Budgetary Assessments.

During his earlier service at the Pentagon, Mr. Preston received the Department of Defense Medal for Distinguished Public Service (with bronze palm in lieu of second award) and the Department of the Navy Distinguished Public Service Award. At the CIA, he was awarded the Agency's Distinguished Intelligence Medal and the National Intelligence Distinguished Service Medal. Upon his departure, Mr. Preston was again awarded the National Intelligence Distinguished Service Medal and was presented the Director's Award for Distinguished Service.

Mr. Preston received a Bachelor of Arts degree, summa cum laude, from Yale University and a Juris Doctor degree, magna cum laude, from Harvard University. He is married, with two children, and lives in Washington, DC.

WITNESS RESPONSES TO QUESTIONS ASKED DURING THE HEARING

JUNE 11, 2014

RESPONSE TO QUESTIONS SUBMITTED BY MR. MCKEON

Secretary HAGEL. The Department is working to provide the Committee the documents responsive to the Chairman's document request of June 9, 2014. [See page 13.]

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RESPONSE TO QUESTION SUBMITTED BY MR. JONES

Secretary HAGEL. The transfers of the five detainees were decided in the context of the security transition in Afghanistan, as we approach the end of combat operations. We remain committed to an Afghan-led peace process and it is our hope that the events leading to Sgt. Bergdahl's return could potentially open the door for broader discussions among Afghans about the future of their country by building confidence that it is possible for all sides to find common ground. [See page 22.]

RESPONSE TO QUESTION SUBMITTED BY MR. TURNER

Mr. PRESTON. Thank you for your letter of June 18, 2014, to the Secretary of Defense, in which you express your concerns regarding the exchange off five Taliban detainees for Sergeant Bowe Bergdahl and comments I made at a House Armed Services Committee hearing on June 11, 2014, with reference to the release of Chief Warrant Officer (CWO) Michael Durant from Somali militants in October 1993. I have been asked to respond to your letter on behalf of Secretary Hagel.

Sergeant Bergdahl is a member of the U.S. military who was detained in the course of an armed conflict, and he was released in an exchange of detained combatants between parties to the armed conflict. Although there are differences between the current conflict and America's past wars, of course, this exchange was consistent with historical wartime prisoner exchanges and within the tradition of securing the safe return of captive U.S. service members through such exchanges.

My comments about the release of CWO Durant sought to provide a previous example of functionally similar engagement with a non-state actor resulting in the release of a U.S. service member. In that instance, the discussions between the U.S. Government and the Somali militants' representatives were followed by the release of CWO Durant, which was followed some time later by the release of detained militants. As you note, however, there are differences between the two situations. Although it is possible that there was an expectation on the part of the Somali militants that the detained militants would be released once CWO Durant was released, as I understand it, there was no promise or agreement by the U.S. Government to effect release of the detained militants if CWO Durant were released.

The Department is committed to recovering each and every U.S. service member held in enemy captivity. In this case, there was a fleeting opportunity to protect the life of a U.S. soldier held captive and in danger for almost five years. As Secretary Hagel testified during the June 11 hearing, the decision to transfer the five detainees in exchange for Sergeant Bergdahl was a difficult one, but it was a decision that he believed to be in the national security interest of the United States.

Please know that the Department is fully cooperating with the ongoing House Armed Services Committee inquiry into the detainee transfer and continues to provide documents in response to the Committee's requests. Thank you for your continued support of our service men and women deployed in harm's way. [See page 36.]

RESPONSE TO QUESTIONS SUBMITTED BY MS. SPEIER

Mr. PRESTON. Those detainees were held in a manner that reflects the best practices for detention in non-international armed conflict and complies with all applicable U.S. law and policy, including Common Article 3 of the Geneva Conventions of

1949 and the Detainee Treatment Act of 2005. Indeed, a review by Admiral Walsh, as requested by President Obama in January 2009, confirmed that conditions of detention at the Guantanamo Bay detention facility not only met, but frequently exceeded, Common Article 3 standards. [See page 45.]

RESPONSE TO QUESTION SUBMITTED BY MR. COURTNEY

Mr. PRESTON. The Department is working to provide the Committee the documents responsive to the Chairman's document request of June 9, 2014. [See page 30.]

RESPONSE TO QUESTION SUBMITTED BY MR. SCOTT

Mr. PRESTON. The Department is working to provide the Committee the documents responsive to the Chairman's document request of June 9, 2014. [See page 72.]

QUESTIONS SUBMITTED BY MEMBERS POST HEARING

JUNE 11, 2014

QUESTIONS SUBMITTED BY MR. PALAZZO

Mr. PALAZZO. Mr. Secretary, I turned 21 in the desert, and I still serve as an NCO with the MS National Guard. Like you, I know the sacrifices that our soldiers make. We just celebrated Memorial Day and honored the 1.3 million Americans that have paid the ultimate sacrifice in service to our country. I believe in the military ethos of no soldier left behind. That doesn't mean I agree with the events that we are here to discuss today.

I believe that the messages we send matter. The messages we send to our soldiers, the messages we send to the rest of the world. And the messages that we send to the American people. Mr. Secretary, I'm extremely concerned that we're not sending the right messages. More and more, it seems: Our friends don't trust us, and our enemies don't fear us. And the American people are tired of being ignored. I recently met with individuals from my district who do business every day with our allies overseas and in the Middle East, and I can tell you that they are concerned. Our allies and partners are upset. These individuals have faced harsh criticism because of the actions of our President and this administration.

What kind of message, sir, does it send that we are now negotiating with terrorists?

Secretary HAGEL. In the decision to rescue Sergeant Bergdahl, the Administration complied with the law and did what we believed was in the best interests of our country, our military, and Sergeant Bergdahl.

The United States will take reasonable steps to recover any and every U.S. servicemember held in captivity. Sergeant Bergdahl is a member of the military who was detained during the course of an armed conflict and held captive and in danger for almost five years. We have been clear that we would pursue every avenue to recover Sergeant Bergdahl, just as the American people and the Congress expected us to do.

The United States acted upon what we believed was our last, best opportunity to protect Sergeant Bergdahl's life. The exchange of the five Taliban detainees for Sergeant Bergdahl is fully consistent with U.S. law and our nation's interests, as well as our military's core values. The Secretary of Defense, in coordination with the President's national security team, determined that the transfer was in the national security interest of the United States and that the threat posed by the detainees to the United States or U.S. persons or interests would be substantially mitigated.

Mr. PALAZZO. What kind of message does the release of five senior Taliban officials send to all our men in women in uniform?

Secretary HAGEL. The United States will take reasonable steps to recover any and every U.S. servicemember held in captivity. Sergeant Bowe Bergdahl is a member of the military who was detained during the course of an armed conflict and held captive and in danger for almost five years. We remain steadfast in our commitment to our men and women in uniform that America does not leave its servicemembers behind.

We have been clear that we would pursue every avenue to recover Sergeant Bergdahl, in line with the expectations of the American people and Congress. By exchanging the five Taliban detainees for Sergeant Bergdahl, we acted upon what we believed was our last, best opportunity to protect Sergeant Bergdahl's life.

The five individuals transferred from Guantanamo Bay were members of the Taliban, which controlled much of Afghanistan's territory prior to the U.S. invasion and overthrow of that regime. The United States detained these individuals in 2001 and 2002 and held them at Guantanamo Bay as unprivileged enemy belligerents. They have not been implicated in any attacks against the United States, and we had no basis to prosecute them in a federal court or military commission.

Mr. PALAZZO. What kind of message is this administration sending to the American people? As members of Congress and as members of this committee, we are the elected representatives sent here to reflect the voices and views of hundreds of millions of Americans. What kind of message should we take away, that the law was blatantly ignored because the President thought it was best?

Secretary HAGEL. The exchange of the five Taliban detainees for Sergeant Bergdahl is fully consistent with U.S. law and our nation's interests, as well as our military's core values. The United States will take reasonable steps to recover any and every U.S. servicemember held in captivity.

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