

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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<http://oversight.house.gov>

March 26, 2015

Mr. Denis McDonough
Chief of Staff
The White House
Washington, D.C. 20500

Dear Mr. McDonough:

Five individuals associated with the Taliban, who were detained at Guantanamo Bay, Cuba, were transferred to Qatar in exchange for Sgt. Bowe Bergdahl on May 31, 2014. So that the Committee can better understand the process that preceded the exchange, and the actions of White House officials directly thereafter, we are writing to request documents and information related to the decision to transfer the five Taliban members for Sgt. Bergdahl.

Sgt. Bergdahl was deployed as a machine gunner in early May 2009 to a small combat outpost in Paktika Province, Afghanistan.¹ On June 30, 2009, then-PFC² Bergdahl was reported missing when he failed to show up for the outpost's morning roll call.³ A press report from May 2012 stated that Sgt. Bergdahl's father believed his son was "frustrated by what he saw" in the military.⁴

Press reports indicate that the five Taliban members were transferred to the custody of Qatari officials at Guantanamo Bay on May 31, 2014, following a week of negotiations in Doha, Qatar, between the Taliban and the United States Government.⁵ The five were transferred directly after Sgt. Bergdahl was handed over to a U.S. Special Forces unit in Eastern Afghanistan, and flown to Qatar.⁶

¹ Elisabeth Bumiller, *Idahoan's Unlikely Journey to Life as a Taliban Prisoner*, N.Y. TIMES, May 13, 2012.

² Adam Entous and Julian E. Barnes, *Behind Bowe Bergdahl's Release, a Secret Deal That Took Three Years*, WALL ST. J., June 1, 2014.

³ Elisabeth Bumiller, *Idahoan's Unlikely Journey to Life as a Taliban Prisoner*, N.Y. TIMES, May 13, 2012.

⁴ *Id.*

⁵ Adam Entous and Julian E. Barnes, *Behind Bowe Bergdahl's Release, a Secret Deal That Took Three Years*, WALL ST. J., June 1, 2014.

⁶ *Id.*

The day after that transfer, June 1, 2014, White House National Security Advisor Susan Rice appeared on the ABC television program “This Week.”⁷ In response to questions from host George Stephanopoulos about Sgt. Bergdahl, Rice stated: “He is going to be safely reunited with his family. He served the United States with honor and distinction. And we’ll have the opportunity eventually to learn what has transpired in the past years.”⁸

On June 18, 2014, the House Committee on Foreign Affairs conducted a joint subcommittee hearing on the prisoner exchange involving Sgt. Bergdahl and the five Taliban members.⁹ During the hearing, witnesses testified that Sgt. Bergdahl’s departure from his post in Afghanistan may have been premeditated.¹⁰ Several of Sgt. Bergdahl’s former platoon members have publicly expressed the belief that Sgt. Bergdahl’s departure from his post constituted desertion, and that Sgt. Bergdahl’s fellow soldiers risked their lives to find him.¹¹

On August 21, 2014, the U.S. Government Accountability Office (GAO) issued an opinion, in which it found that the Department of Defense violated section 8111 of the Defense Appropriations Act, 2014, when it did not notify the relevant congressional committees at least 30 days in advance of the transfer.¹² That section states, in pertinent part:

None of the funds appropriated or otherwise made available in this Act may be used to transfer any individual detained at United States Naval Station Guantánamo Bay, Cuba to the custody or control of the individual’s country of origin, any other foreign country, or any other foreign entity except in accordance with section 1035 of the National Defense Authorization Act for Fiscal Year 2014.¹³

The five Taliban members were transferred under section 1035(b) of the National Defense Authorization Act for Fiscal Year 2014 (FY 2014 NDAA).¹⁴ Section 1035 of the NDAA authorizes the Secretary of Defense to transfer or release individuals detained at Guantanamo Bay, provided the Secretary makes a specific determination and provides notification to certain congressional committees.¹⁵ The Secretary must “notify the appropriate committees of Congress of a determination . . . not later than 30 days before the transfer or

⁷ Benjamin Bell, *Susan Rice Cites ‘Sacred Obligation’ in Making Deal for Bergdahl’s Freedom*, ABC NEWS, June 1, 2014.

⁸ *Id.*

⁹ *The Bergdahl Exchange: Implications for U.S. National Security Strategy and the Fight Against Terrorism: Joint Hearing Before the H. Comm. on Foreign Affairs Subcomm. on Terrorism, Nonproliferation, and Trade, and the Subcomm. on The Middle East and North Africa*, 113th Cong. (2014).

¹⁰ *Id.*

¹¹ See, e.g., Jake Tapper, *Fellow Soldiers Call Bowe Bergdahl a Deserter, Not a Hero*, CNN, June 4, 2014, available at <http://www.cnn.com/2014/06/01/us/bergdahl-deserter-or-hero> (last visited Mar. 26, 2015).

¹² Gov’t Accountability Office, *Department of Defense—Compliance with Statutory Notification Requirement* (Aug. 21, 2014) (GAO B-326013).

¹³ Pub. L. No. 113-76, div. C, title VIII, § 8111, 128 Stat. 5, 86, 131 (Jan. 17, 2014).

¹⁴ Gov’t Accountability Office, *Department of Defense—Compliance with Statutory Notification Requirement* (Aug. 21, 2014) (GAO B-326013).

¹⁵ Pub. L. No. 113-66, div. A, title X, subtitle D, § 1035, 127 Stat. 672, 851 (Dec. 26, 2013).

release of the individual.”¹⁶ The notification must include certain information, such as a “detailed statement of the basis for the transfer or release” and “[a]n explanation of why the transfer or release is in the national security interests of the United States.”¹⁷ For a release under section 1035(b), the Secretary must determine that “actions that have been or are planned to be taken will substantially mitigate the risk of such individual engaging or reengaging in any terrorist or other hostile activity that threatens the United States or United States persons or interests” and that “the transfer is in the national security interest of the United States.”¹⁸

According to the GAO, “The Secretary of Defense provided written notice of the transfer of the five [Taliban members] by letters dated May 31, 2014, addressed to the Chairmen and Ranking Members of the congressional appropriations, armed services, foreign relations, and intelligence committees.”¹⁹ The GAO concluded that the Department of Defense violated section 8111 by failing to provide at least 30 days advance notice to the specified congressional committees prior to transferring the five Taliban members.²⁰ It further concluded that because the Department violated section 8111 by failing to provide the appropriate notice, the Department violated the Antideficiency Act by obligating \$988,400 of its “Operation and Maintenance, Army” appropriation to effectuate the transfer.²¹

On June 16, 2014, the U.S. Army announced it was initiating an investigation into the facts and circumstances surrounding the disappearance and capture of Sgt. Bergdahl.²² On December 22, 2014, the investigation was completed and the findings were forwarded to a General Courts Martial Convening Authority.²³

On January 29, 2015, this Committee sent a letter to then-Secretary of Defense Chuck Hagel requesting information related to the investigation of, and disposition of charges against, Sgt. Bergdahl.²⁴ On March 4, 2015, Committee staff was briefed in connection with that request.

On March 25, 2015, Sgt. Bergdahl was formally charged by the U.S. Army.²⁵ Specifically, he was charged under Article 85 of the Uniform Code of Military Justice (UCMJ),

¹⁶ *Id.*, § 1035(d). Section 1035(e) of the FY 2014 NDAA states that the “appropriate committees of Congress” are the (1) Committee on Armed Services, Committee on Foreign Relations, Committee on Appropriations, and Select Committee on Intelligence of the United States Senate and (2) Committee on Armed Services, Committee on Foreign Affairs, Committee on Appropriations, and Permanent Select Committee on Intelligence of the House of Representatives. Pub. L. No. 113-66, § 1035(e).

¹⁷ *Id.*

¹⁸ *Id.*, § 1035(b).

¹⁹ Gov’t Accountability Office, *Department of Defense—Compliance with Statutory Notification Requirement* (Aug. 21, 2014) (GAO B-326013). (citing “DOD July 31 Email”).

²⁰ *Id.*

²¹ *Id.*

²² News Release, Dep’t of Def., Statement by U.S. Army on Sgt. Bowe Bergdahl Investigation, Release No: NR-319-14 (June 16, 2014).

²³ News Release, Dep’t of Def., Statement by U.S. Army on Sgt. Bowe Bergdahl Investigation, Release No: NR-628-14 (Dec. 22, 2014).

²⁴ Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov’t Reform, and Hon. Ron DeSantis, Chairman, H. Subcomm. on Nat’l Security, to Hon. Chuck Hagel, Secretary, U.S. Dep’t of Defense (Jan. 29, 2014).

“Desertion with Intent to Shirk Important or Hazardous Duty,” and Article 99 of the UCMJ, “Misbehavior Before The Enemy by Endangering the Safety of a Command, Unit or Place.”²⁶ According to a U.S. Army press release,²⁷ Article 85 of the UCMJ carries a maximum potential penalty of dishonorable discharge, reduction in rank, total forfeiture of all pay and allowances, and maximum confinement of five years.²⁸ Article 99 of the Uniform Code of Military Justice carries a maximum potential penalty of dishonorable discharge, reduction in rank, total forfeiture of all pay and allowances, and possible confinement for life.²⁹

Almost five years passed between the date that Sgt. Bergdahl disappeared from his unit and the date that he was exchanged for the five Taliban members. It is unclear from the information that has been provided to the Committee and from publicly available reports why the decision was made to exchange Sgt. Bergdahl for the five Taliban members. It is also unclear why National Security Advisor Rice stated, on the day after he was released, that Sgt. Bergdahl had “served the United States with honor and distinction.” To assist the Committee in its assessment of these issues, we request the following documents:

1. All intelligence, reports, and assessments referring or relating to the disappearance of Sgt. Bergdahl from his unit on or about June 30, 2009, that were considered by the Department of Defense prior to the May 31, 2014 exchange;
2. All intelligence, reports, and assessments referring or relating to the conditions under which Sgt. Bergdahl was detained in Afghanistan that were considered by the Department of Defense;
3. All intelligence, reports, and assessments that the Department of Defense considered as part of the determination as to whether it was appropriate to transfer the five Taliban members under section 1035(b) of the FY 2014 NDAA; and,
4. All documents, memoranda, notes, talking points, and records that were created in relation to National Security Advisor Susan Rice’s appearance on “This Week” on June 1, 2014.

In addition, we request that you designate officials to provide a briefing to the Committee staff as soon as possible.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at “any time” investigate “any matter” as set forth in House Rule X.

²⁵ News Release, Statement by U.S. Army Forces Command, U.S. Army Forces Command Announces Actions in Bergdahl Case, (Mar. 25, 2015).

²⁶ *Id.*

²⁷ News Release, Statement by U.S. Army Forces Command, U.S. Army Forces Command Announces Actions in Bergdahl Case (Mar. 25, 2015).

²⁸ UCMJ art. 885 (1956).

²⁹ UCMJ art. 899 (1956).

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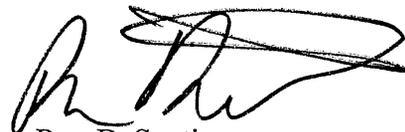
When producing documents to the Committee, please deliver production sets to the Majority staff in Room 2157 of the Rayburn House Office Building and the Minority staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment to this letter contains additional instructions for responding to the Committee's request.

If you have any questions about this request, please contact Art Arthur of Chairman Chaffetz' staff at (202) 225-5074. Thank you for your attention to this matter.

Sincerely,



Jason Chaffetz
Chairman



Ron DeSantis
Chairman
Subcommittee on National Security

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Stephen F. Lynch, Ranking Minority Member
Subcommittee on National Security

The Honorable Robert Goodlatte, Chairman
House Committee on the Judiciary

The Honorable John Conyers, Jr., Ranking Member
House Committee on the Judiciary

The Honorable Mac Thornberry, Chairman
House Armed Services Committee

The Honorable Adam Smith, Ranking Member
House Armed Services Committee

The Honorable Edward Royce, Chairman
House Foreign Affairs Committee

The Honorable Eliot Engel, Ranking Member
House Foreign Affairs Committee

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,
CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.