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U.S. House of Representatives

Washington, DC 20515-6035

ONE HUNDRED TWELFTH CONGRESS

April 12, 2012

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ROBERT L. SIMMONS, II, STAFF DIRECTOR

The Honorable Leon Panetta
Secretary of Defense
Washington, DC 20301

Dear Secretary Panetta:

I am writing regarding two memoranda of understanding between the United States and Afghanistan addressing special operations ("Special Ops MOU") and the disposition of detainees ("Detainee MOU"). I understand that these memoranda are precursors to a new strategic partnership agreement that will govern the overall relationship between Afghanistan and the United States following the President's planned withdrawal of U.S. combat forces in 2014.

I have significant concerns with both of the recent memoranda as well as what they signal about the Administration's fervor to finalize the larger strategic partnership agreement before the NATO Chicago Summit in May.

Special Ops MOU

The Special Ops MOU raises several questions and concerns. In recent testimony before the Committee, General John Allen noted that he did not want special operations night raids to "lose their momentum, which is really what gives them their effectiveness." Despite General Allen's testimony and the fact that Afghanistan affirmed the establishment of a new administrative detention regime in the Detainee MOU, the Special Ops MOU requires "judicial authorizations" for capture operations by Special Operations Forces (SOF). This is particularly troubling given that SOF typically handle capture and kill operations for the highest value targets.

As the U.S. Supreme Court has noted, the authority to capture and detain combatants is "fundamental" and an "important incident of war" accepted by "universal agreement and practice." The new requirement for judicial authorization appears to be inconsistent with Afghanistan's seeming acknowledgment that a detention system for purposes of incapacitating and interrogating the enemy is essential during wartime.

Afghan security forces have made significant strides in their training and capabilities. Yet, the Administration must be extremely cautious about putting U.S. forces in harm's way without independent legal authority to detain combatants. Instead, it appears that they are now beholden to a foreign judge to capture the highest value targets.

The new framework could also potentially compromise sensitive U.S. information since more Afghans will be involved in sensitive intelligence activities and operational planning. At best, targets may be tipped off before an operation; at worst U.S. lives may be lost.

The Special Ops MOU also seems to limit the ability of U.S. forces to have access to newly captured terrorists to obtain critical intelligence. Intelligence derived during detainee interrogations frequently assists in identifying the location and identities of other terrorists, provides information on the enemy's plans, and assists with protecting U.S. forces. Such interrogations, along with the capture operations themselves, are extremely time sensitive. This factor must not be overlooked.

Moreover, it is difficult to see how the new framework is sustainable since it requires critical U.S. enabling assets including intelligence, rotary wing, fire support, medical evacuation and security. How will the Administration ensure that these operations are sustained against the tide of a larger U.S. drawdown? Further, how will the Administration measure the overall success and adequacy of the Special Ops MOU? Will future operations be compared to those of 12-18 months ago when only U.S. forces were engaged in these operations? Will the Administration measure the number of raids conducted, whether the primary or secondary targets were killed or captured, the number of shots fired or kinetic action taken, and any civilian casualties?

I expect the Department to compile these metrics for past and future raids. I also expect the Department to maintain metrics for future operations on the number of high value targets U.S. forces propose, whether the Afghans agree to seek judicial authorization, whether judicial authorization is provided, the time it takes to receive judicial authorization, and the outcome of each raid. Please provide these metrics to the Committee on a quarterly basis.

Questions about the Special Ops MOU must be resolved quickly.

Detainee MOU

Regarding the Detainee MOU, I am extremely concerned about the disposition of Afghan detainees who represent an enduring security threat to the United States. My understanding is that the United States has agreed to transfer all of these detainees currently held at the Detention Facility in Parwan to Afghan custody within six months.

While the Detainee MOU states that Afghanistan will "consult" with the United States before releasing a detainee and will "consider favorably" U.S. input, significant doubts remain about Afghanistan's capacity and willingness to continue to detain or prosecute these dangerous

individuals. As we have seen with detainee transfers from Guantanamo Bay, as well as in Iraq, reliance on other countries to address the threat to the United States posed by terrorists is unwise. Afghan officials have already made public statements that contradict U.S. interpretation of the Detainee MOU. Specifically, Afghan officials have disputed claims by U.S. officials about whether U.S. forces have a veto over proposed detainee releases. We must also ensure that U.S. forces will continue to have access to detainees transferred to Afghan custody for intelligence interrogations.

My staff has reviewed biographical and threat information regarding each of the high value Afghan detainees currently in U.S. custody. As a result of this review and briefings with the Department, I understand that much of the information related to the threat posed by these individuals is classified U.S. intelligence, which makes prosecution in the Afghan criminal justice system unlikely.

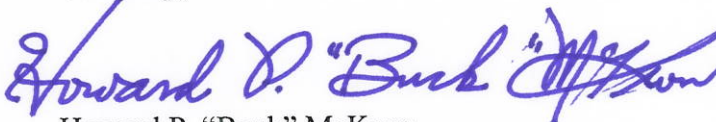
I am also troubled about an issue that was not addressed in the Detainee MOU: the disposition of third country national detainees. This is a particularly difficult issue given that the Administration currently has no location for long-term detention pursuant to the law of armed conflict and refuses to consider bringing terrorists to Guantanamo Bay.

Time is short and the Administration has left itself with few options. It is apparent that the Administration will try to transfer these terrorists to other countries, release them, or bring them to the United States. None of these options are acceptable.

As the Administration continues to negotiate the strategic partnership agreement and implements the two recent memoranda, the fundamental U.S. national security objective in Afghanistan—denial of safe havens for the terrorists who have attacked us before and seek to do it again—must be paramount relative to any other aim.

Now is not the time to rush into imprudent arrangements that jeopardize the safety of U.S. forces or the American people.

Sincerely,



Howard P. "Buck" McKeon
Chairman