

Howard D. "Buck" McKeon

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113TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { 113-

CONDEMNING AND DISAPPROVING OF THE OBAMA ADMINISTRATION'S FAILURE TO COMPLY WITH THE LAWFUL STATUTORY REQUIREMENT TO NOTIFY CONGRESS BEFORE RELEASING INDIVIDUALS DETAINED AT UNITED STATES NAVAL STATION, GUANTANAMO BAY, CUBA, AND EXPRESSING NATIONAL SECURITY CONCERNS OVER THE RELEASE OF FIVE TALIBAN LEADERS AND THE REPERCUSSIONS OF NEGOTIATING WITH TERRORISTS

JULY --, 2014.—Referred to the House Calendar and ordered to be printed

Mr. MCKEON, from the Committee on Armed Services, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H. Res. 644]

The Committee on Armed Services, to whom was referred the resolution (H. Res. 644) condemning and disapproving of the Obama administration's failure to comply with the lawful statutory requirement to notify Congress before releasing individuals detained at United States Naval Station, Guantanamo Bay, Cuba, and expressing national security concerns over the release of five Taliban leaders and the repercussions of negotiating with terrorists, having considered the same, reports favorably thereon with amendments and recommends that the resolution be agreed to.

The amendments are as follows:

Strike all after the resolving clause and insert the following:

That the House of Representatives—

(1) condemns and disapproves of the failure of the Obama administration to comply with the lawful 30-day statutory reporting requirement in executing the transfer of five senior members of the Taliban from detention at United States Naval Station, Guantanamo Bay, Cuba;

(2) expresses grave concern about the national security risks associated with the transfer of five senior Taliban leaders, including the national security threat to the American people and the Armed Forces of the United States;

(3) expresses grave concern over the repercussions of negotiating with terrorists, even when conducted through intermediaries, and the risk that such nego-

tiations with terrorists may further encourage hostilities and the abduction of Americans;

(4) stipulates that further violations of the law set forth in section 1035 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66; 10 U.S.C. 801 note) and section 8111 of the Department of Defense Appropriations Act, 2014 (Public Law 113-76) are unacceptable;

(5) expresses that these actions have burdened unnecessarily the trust and confidence in the commitment and ability of the Obama administration to constructively engage and work with Congress; and

(6) expresses relief that Sergeant Bergdahl has returned safely to the United States.

Amend the preamble to read as follows:

- Whereas section 1035 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66; 10 U.S.C. 801 note) requires the Secretary of Defense to notify the appropriate committees of Congress not later than 30 days before the transfer or release of any individual detained at United States Naval Station, Guantanamo Bay, Cuba (hereinafter referred to as "GTMO");
- Whereas on May 31, 2014, the Department of Defense transferred five Taliban detainees held at GTMO to the State of Qatar;
- Whereas according to declassified United States government documents, the five detainees were all senior Taliban leaders: Abdul Haq Wasiq was the Taliban Deputy Minister of Intelligence, Mullah Norullah Noori was the Taliban military commander at Mazar-e-Sharif, Mullah Mohammad Fazl was the Taliban Deputy Minister of Defense, Khairullah Said Wai Khairkwa was the Taliban Minister of Interior, and Mohammad Nabi Omari was the Taliban communications chief and border chief;
- Whereas these five senior Taliban leaders have had associations with al-Qaeda or have engaged in hostilities against the United States or its coalition partners;
- Whereas these five senior Taliban detainees held leadership positions within the Taliban in Afghanistan when it provided safehaven for al-Qaeda to conduct planning, training, and operations for the September 11, 2001, attacks;
- Whereas in 2010, after an extensive evaluation meant to identify detainees who could be transferred out of the detention facility at GTMO, the Obama administration determined that these five should remain in United States detention because they were "too dangerous to transfer" because each "poses a high level of threat that cannot be mitigated sufficiently except through continued detention";
- Whereas the President has stated that there is "absolutely" the "possibility of some" of these former Taliban detainees "trying to return to activities that are detrimental to" the United States;
- Whereas other former GTMO detainees that were transferred have become leaders of al-Qaeda affiliates actively plotting against the United States and are "involved in terrorist or insurgent activities";
- Whereas Secretary of Defense Chuck Hagel testified before the Committee on Armed Services of the House of Representatives that, pursuant to an agreement with Qatar, the five former detainees transferred in May would not be allowed to leave Qatar for one year, but after that date there would be no restrictions on the movement of the former detainees;
- Whereas notwithstanding the fact that Qatar is an important regional ally, after another GTMO detainee was transferred to Qatar in 2008, Qatar apparently had difficulty implementing the assurances Qatar gave the United States in connection with that detainee's transfer;
- Whereas senior officials in the Obama administration negotiated, through intermediaries in the government of Qatar, with the Taliban, and with the Haqqani Network, which the Department of State has designated as a foreign terrorist organization, and which held Sergeant Bowe Bergdahl captive;
- Whereas Secretary Hagel testified to the Committee on Armed Services of the House of Representatives that negotiations for the transfer of the five Taliban detainees in exchange for Sergeant Bergdahl began in January 2014;
- Whereas the General Counsel of the Department of Defense signed a memorandum of understanding with the Attorney General of the State of Qatar on May 12, 2014, regarding the security conditions for transfer of these five Taliban detainees;
- Whereas in addition to an unknown number of officials of Qatar, senior Obama administration officials acknowledge that approximately 80 or 90 individuals with-

in the Obama administration were knowledgeable of the planned transfer of the five Taliban detainees prior to their transfer;

Whereas Congress was not notified of the transfer until June 2, 2014, three days after such individuals were transferred, and 33 days after the date on which such notification was required by section 1035 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66; 10 U.S.C. 801 note) and section 8111 of the Department of Defense Appropriations Act, 2014 (Public Law 113-76);

Whereas the Secretary of Defense, in consultation with the President and other senior Obama administration officials, did not comply with the 30-day notification requirement;

Whereas article II, section 3 of the Constitution stipulates that the President “shall take care that the laws be faithfully executed”;

Whereas on January 15, 2009, the Office of Legal Counsel in the Department of Justice acknowledged that, under article I of the Constitution, Congress possesses legislative authority concerning the detention and release of enemy combatants;

Whereas the Obama administration has complied with the law in all other detainee transfers from GTMO since the date of the enactment of prevailing law; and

Whereas in 2011, after leaders of the Senate and House of Representatives expressed their bipartisan opposition to the prospective transfer of these Taliban detainees from GTMO, senior Obama administration officials assured these Senators and Members of Congress that there would be no exchange of Taliban detainees for Sergeant Bergdahl, and that any transfer of Taliban detainees that might otherwise occur would be part of a reconciliation effort with the Taliban and the Government of Afghanistan and that such a transfer would only take place in consultation with Congress pursuant to law: Now, therefore, be it

Amend the title so as to read:

Resolution condemning and disapproving of the failure of the Obama administration to comply with the lawful statutory requirement to notify Congress before transferring individuals detained at United States Naval Station, Guantanamo Bay, Cuba, and expressing concern about the national security risks over the transfer of five Taliban leaders and the repercussions of negotiating with terrorists.

PURPOSE AND BACKGROUND

On June 25, 2014, Representative Scott E. Rigell introduced H. Res. 644, "condemning and disapproving of the Obama administration's failure to comply with the lawful statutory requirement to notify Congress before releasing individuals detained at United States Naval Station, Guantanamo Bay, Cuba, and expressing national security concerns over the release of five Taliban leaders and the repercussions of negotiating with terrorists." H. Res. 644 was referred to the Committee on Armed Services on June 25, 2014.

On May 31, 2014, the United States transferred five detainees from the U.S. detention facility at United States Naval Station, Guantanamo Bay (GTMO), Cuba to Qatar. This transfer was carried out due to an agreement achieved between the Afghan Taliban and the United States (brokered by the Government of Qatar) to release Army Sergeant Bowe Bergdahl to the United States in exchange for five GTMO detainees: Abdul Haq Wasiq, Mullah Norullah Noori, Mullah Mohammad Fazl, Khairullah Said Wai Khairkwa, and Mohammad Nabi Omari.

The Department of Defense informed the committee of the transfer of the five Guantanamo detainees to Qatar on the same day as the exchange. On June 2, 2014 the Secretary of Defense provided the committee written notification regarding the transfer.

There are two statutory provisions governing foreign transfers of GTMO detainees to the custody or control of another country. Section 1035 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66) requires the following before the transfer or release of a GTMO detainee: (1) the Secretary of Defense must determine that the risk posed by the detainee will be substantially mitigated and that the transfer is in the national security interests of the United States; (2) the Secretary of Defense must notify the appropriate committees of Congress at least 30 days before the transfer or release of a GTMO detainee; (3) the Secretary of Defense must provide detailed information regarding the circumstances of the transfer or release along with the notification, including how the risk posed by the detainee will be substantially mitigated, and an assessment of the capacity, willingness, and past practices of the receiving country. Section 8111 of the Department of Defense Appropriations Act, 2014 also contains the following language, "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 Guantanamo 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."

On July 29, 2014, the Committee on Armed Services met in open session to consider H. Res. 644 and report the measure to the House. During the markup, Chairman Howard P. "Buck" McKeon offered an amendment in the nature of a substitute to H. Res. 644 that would condemn and disapprove of the failure of the Obama administration to comply with the lawful statutory requirement to notify Congress before transferring five GTMO detainees, and expressing concern about

the associated national security risks and repercussions of negotiating with terrorists. The amendment in the nature of a substitute offered by Chairman McKeon was agreed to by record vote, 34-25. The title of H. Res. 644 would be amended so as to read: "Condemning and disapproving of the failure of the Obama administration to comply with the lawful statutory requirement to notify Congress before transferring individuals detained at United States Naval Station, Guantanamo Bay, Cuba, and expressing concern about the national security risks over the transfer of five Taliban leaders and the repercussions of negotiating with terrorists."

The committee ordered H. Res. 644, as amended, reported to the House with a favorable recommendation by voice vote, a quorum being present.

HEARINGS

No hearings were held by the committee on H. Res. 644.

The committee held a hearing "The May 31, 2014 Transfer of Five Senior Taliban Detainees" on June 11, 2014, to receive testimony from Secretary of Defense, Chuck Hagel, and the General Counsel of the Department of Defense, Stephen Preston. The committee subsequently met to receive a classified briefing "The May 31, 2014 Transfer of Five Senior Taliban Detainees" on June 18, 2014 from senior officials in the Department of Defense and the Office of the Director of National Intelligence.

COMMITTEE POSITION

On July 29, 2014, the Committee on Armed Services held a markup session to consider H. Res. 644. The committee agreed to an amendment in the nature of a substitute during the consideration of H. Res. 644.

The committee ordered H. Res. 644, as amended, reported to the House with a favorable recommendation by voice vote, a quorum being present.

COMMITTEE VOTES

In accordance with clause 3(b) of rule XIII of the Rules of the House of Representatives, record votes were taken with respect to the committee's consideration of H. Res. 644. The record of these votes is contained in the following pages.

COMMITTEE ON ARMED SERVICES

113TH CONGRESS

ROLL CALL VOTE NO. 1

H. RES. 644

On agreeing to the Smith Amendment, Log 001r1

Description: Substitute for the McKeon Amendment in the Nature of a Substitute expressing that the Obama administration should have given 30 days notice before transferring GTMO detainees to Qatar; and that all administrations must give this notice before GTMO detainees are transferred to the custody or control of a foreign country on the basis of a determination by the Secretary of Defense.

Tuesday, July 29, 2014

Member	Aye	No	Present	Member	Aye	No	Present
Mr. McKeon	X			Mr. Smith	X		
Mr. Thornberry	X			Ms. Sanchez	X		
Mr. Jones				Mr. McIntyre	X		
Mr. Forbes	X			Mr. Brady		X	
Mr. Miller	X			Mrs. Davis		X	
Mr. Wilson	X			Mr. Langevin	X		
Mr. LoBiondo	X			Mr. Larsen	X		
Mr. Bishop	X			Mr. Cooper	X		
Mr. Turner	X			Ms. Bordallo	X		
Mr. Kline	X			Mr. Courtney		X	
Mr. Rogers	X			Mr. Loeb sack	X		
Mr. Franks	X			Ms. Tsongas		X	
Mr. Shuster	X			Mr. Garamendi	X		
Mr. Conaway	X			Mr. Johnson		X	
Mr. Lamborn	X			Ms. Hanabusa			
Mr. Wittman	X			Ms. Speier		X	
Mr. Hunter	X			Mr. Barber	X		
Dr. Fleming	X			Mr. Carson	X		
Mr. Coffman	X			Ms. Shea-Porter	X		
Mr. Rigell	X			Mr. Maffei	X		
Mr. Gibson	X			Mr. Kilmer	X		
Mrs. Hartzler	X			Mr. Castro	X		
Dr. Heck	X			Ms. Duckworth	X		
Mr. Runyan	X			Mr. Peters	X		
Mr. Scott	X			Mr. Enyart		X	
Mr. Palazzo	X			Mr. Gallego	X		
Mr. Brooks	X			Mr. Veasey		X	
Mr. Nugent				Ms. Gabbard	X		
Mrs. Noem		X					
Mr. Cook		X					
Mr. Bridenstine		X					
Dr. Wenstrup		X					
Mrs. Walorski		X					
Mr. Byrne		X					

Roll Call Vote Total: Ayes 19; Noes 40; Present 0.

COMMITTEE ON ARMED SERVICES

113TH CONGRESS

ROLL CALL VOTE NO. 2

H. RES. 644

On agreeing to the McKeon Amendment in the Nature of a Substitute to H. Res. 644

Description: Amendment in the Nature of a Substitute condemning and disapproving of the failure of the Obama administration to comply with the lawful statutory requirement to notify Congress before transferring five GTMO detainees, and expressing concern about the associated national security risks and repercussions of negotiating with terrorists.

Tuesday, July 29, 2014

Member	Aye	No	Present	Member	Aye	No	Present
Mr. McKeon	X			Mr. Smith		X	
Mr. Thornberry	X			Ms. Sanchez		X	
Mr. Jones				Mr. McIntyre	X		
Mr. Forbes	X			Mr. Brady		X	
Mr. Miller	X			Mrs. Davis		X	
Mr. Wilson	X			Mr. Langevin		X	
Mr. LoBiondo	X			Mr. Larsen		X	
Mr. Bishop	X			Mr. Cooper		X	
Mr. Turner	X			Ms. Bordallo		X	
Mr. Kline	X			Mr. Courtney		X	
Mr. Rogers	X			Mr. Loeb sack		X	
Mr. Franks	X			Ms. Tsongas		X	
Mr. Shuster	X			Mr. Garamendi		X	
Mr. Conaway	X			Mr. Johnson		X	
Mr. Lamborn	X			Ms. Hanabusa			
Mr. Wittman	X			Ms. Speier		X	
Mr. Hunter	X			Mr. Barber		X	
Dr. Fleming	X			Mr. Carson		X	
Mr. Coffman	X			Ms. Shea-Porter		X	
Mr. Rigell	X			Mr. Maffei		X	
Mr. Gibson	X			Mr. Kilmer		X	
Mrs. Hartzler	X			Mr. Castro		X	
Dr. Heck	X			Ms. Duckworth		X	
Mr. Runyan	X			Mr. Peters		X	
Mr. Scott	X			Mr. Enyart		X	
Mr. Palazzo	X			Mr. Gallego		X	
Mr. Brooks	X			Mr. Veasey		X	
Mr. Nugent				Ms. Gabbard	X		
Mrs. Noem	X						
Mr. Cook	X						
Mr. Bridenstine	X						
Dr. Wenstrup	X						
Mrs. Walorski	X						
Mr. Byrne	X						

Roll Call Vote Total: Ayes 34; Noes 25; Present 0.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Clause 3(c)(3) of rule XIII of the House of Representatives is not applicable because the Congressional Budget Office did not provide a cost estimate for the resolution.

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d) of rule XIII of the Rules of the House of Representatives, the committee estimates the costs of implementing the resolution would be negligible.

STATEMENT REQUIRED BY THE CONGRESSIONAL BUDGET ACT

In accordance with clause (3)(c)(2) of rule XIII of the Rules of the House of Representatives, and section 308(a) of the Congressional Budget Act of 1974 (Public Law 93-344), this resolution does not provide new budget authority, new spending authority, new credit authority, or an increase or decrease in revenues or tax expenditures.

ADVISORY OF EARMARKS

The committee finds that H. Res. 644, as reported, does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

OVERSIGHT FINDINGS

With respect to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee are incorporated in the descriptive portions of this report.

GENERAL PERFORMANCE GOALS AND OBJECTIVES

In compliance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, there are no general performance goals and objectives associated with this legislation, as it authorizes no funding.

FEDERAL ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

STATEMENT OF FEDERAL MANDATES

Pursuant to section 423 of Public Law 104-4, this resolution contains no Federal mandates with respect to state, local, and tribal governments, nor with respect to the private sector. Similarly, the resolution provides no Federal intergovernmental mandates.

APPLICABILITY TO THE LEGISLATIVE BRANCH

The committee finds that this legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104-1).

DUPLICATION OF FEDERAL PROGRAMS

No provision of the resolution establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The committee estimates that H. Res. 644, as amended, requires no directed rule makings.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, H. Res. 644, as amended, would not make any changes to existing law.

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COMMITTEE ON ARMED SERVICES

U.S. House of Representatives

Washington, DC 20515-6035

ONE HUNDRED THIRTEENTH CONGRESS

DISSENTING VIEWS

ROBERT L. SIMMONS, II, STAFF DIRECTOR

H. Res. 644 is an overstated and unnecessary product of a rhetorical exercise fueled by overt partisanship. We dissent from the condemnation made by H. Res. 644, as reported by the House Armed Services Committee, that is based on the premise that the Obama administration violated the law in providing the appropriate congressional committees less than 30 days' notice of the determination made by the Secretary of Defense, supporting the May 31, 2014 transfer of five Taliban detainees from the detention facility at United States Naval Station, Guantanamo Bay, Cuba to the State of Qatar, in exchange for the release of Sergeant Bowe Bergdahl, as called for by section 1035(d) of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66; 10 U.S.C. 801 note). H. Res. 644 does not provide appropriate means for settling questions on the legality of the administration's actions associated with the transfer of the five Guantanamo detainees, nor for protecting valid congressional interests in being properly informed of national security matters, nor for building a more constructive relationship between the executive and legislative branches of government.

The House of Representatives should not presume that the Obama administration violated the law. There exists stark disagreement between the administration and certain members of the legislative branch as to whether, in certain circumstances, the statutory requirement in question would encroach upon constitutional separation of powers principles. In our hearing on the matter, on June 11, Secretary of Defense Chuck Hagel expressed the administration's position in his testimony as follows:

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.

In light of this contention, it does not follow that the failure to meet the 30-day notification requirement, as unwelcome as that was, clearly amounts to a violation

of law, and the Obama administration should not be condemned by the House of Representatives for its actions on a presumption of illegality. Unsubstantiated condemnations of executive actions merely serve to undermine the legitimacy of our national government.

The more salient issue involves maintaining proper respect for the active and timely participation of the Congress, as a co-equal branch of government, in important national security matters. The administration should have notified us of the Secretary's determination at least 30 days before the transfer of the five Taliban detainees from Guantanamo, and the Obama administration and all future administrations should always comply with the notification requirement of section 1035(d) of the National Defense Authorization Act for Fiscal Year 2014 and welcome congressional participation. There is no question that the Congress needs to be informed of such detainee transfers, and, in the past, the Congress has repeatedly proven that it can be trusted to guard sensitive information associated with very important national security issues.

The reported resolution also expresses that actions taken by the Obama administration "have burdened unnecessarily the trust and confidence in the commitment and ability of the Obama administration to constructively engage and work with Congress." We would have strongly preferred the administration to have fulfilled the 30-day notification requirement, and thereby reinforced its commitment and ability to maintain a productive relationship with the Congress. However, we find the overly partisan and prosecutorial tone of H. Res. 644 to be an impediment, rather than an inducement, to a more engaging and constructive relationship between the legislative and executive branches of government, regarding sensitive national security affairs.

The President and his administration performed an arduous task in securing the safe return of an American serviceman held captive by enemy combatants. As with many undertakings in the national security arena, significant risks were involved and difficult choices needed to be made. For the House of Representatives to second guess those decisions, in hindsight, on the basis of risk, while simultaneously expressing relief that the benefit of Sergeant Bergdahl's safe return was in fact achieved, would be as unfair as it would be wrong.

John Smith

John Smith

John Smith

John Smith

John Smith

John Smith

Mr. Smith

Mr. Garamendi

Mr. Larsen

Joe Courtney

Madeline Z. Bordallo

Mrs. Susan A. Davis