

*United States, Afghanistan Conclude Agreement on Their Long-Term Relationship*

At the beginning of May 2012, U.S. President Barack Obama made a previously unannounced six-hour visit to Afghanistan to join Afghan President Hamid Karzai in signing the “Enduring Strategic Partnership Agreement” between the two countries.<sup>1</sup> The nine-page document is a broadly worded executive agreement<sup>2</sup> that will not be submitted to the Senate for advice and consent. It is intended as a general framework for future bilateral relations in the decade following the scheduled withdrawal of most U.S. forces by 2014. It anticipates negotiation of additional agreements, including a bilateral security agreement addressing future military cooperation.

The United States undertakes in the agreement to provide economic and social assistance to Afghanistan’s population and military assistance to Afghanistan’s armed forces for ten years after 2014. It does not indicate specific assistance levels, and U.S. financial undertakings are made subject to the U.S. appropriations process. While Karzai reportedly pressed for a U.S. commitment to spend two billion dollars annually on Afghan forces, the United States could not agree because funding levels depend on future congressional approval.<sup>3</sup>

U.S. Ambassador to Afghanistan Ryan Crocker and Afghan National Security Adviser Rangin Dadfar Spanta initialed a draft of the agreement in April 2012, shortly before the president’s visit.<sup>4</sup> The negotiations took nearly two years and were delayed by disputes between the two countries over continued detention of Afghans by U.S. forces and by U.S. forces’ nighttime raids on houses and residential compounds thought to be sheltering insurgents.

In March 2012, the United States agreed to gradually transfer control of most of the 3,200 detainees in U.S. custody over a six-month period; the United States will retain custody of about 50 non-Afghan detainees and rights to monitor detainees’ treatment in an effort to limit abuses.<sup>5</sup>

Nighttime military operations by U.S. Special Forces were particularly contentious. According to press reports, there were about 3,000 such operations involving U.S. forces in Afghanistan in a fourteen-month period, with suspects apprehended in over 80 percent of them.<sup>6</sup> Karzai repeatedly called for an end to nighttime raids, which are deeply unpopular among Afghans.

<sup>1</sup> Mark Landler, *Obama Signs Pact in Kabul, Turning Page in Long War*, N.Y. TIMES, May 2, 2012, at A1; Alissa J. Rubin, *A Visit Well Timed to Future Uncertainties in Afghanistan*, N.Y. TIMES, May 2, 2012, at A12; Kevin Sieff & Scott Wilson, *Obama Makes Surprise Trip to Afghanistan to Sign Key Pact, Mark bin Laden Raid*, WASH. POST, May 2, 2012, at A1; Kevin Sieff, *Pact Opens New Phase in Afghanistan*, WASH. POST, May 3, 2012, at A10.

<sup>2</sup> At <http://www.whitehouse.gov/sites/default/files/2012.06.01u.s.-afghanistansassignedtext.pdf>.

<sup>3</sup> Greg Jaffe, *U.S. Promises a Long-Term Commitment to Afghanistan*, WASH. POST, Apr. 19, 2012, at A8.

<sup>4</sup> Karen DeYoung & Sayed Salahuddin, *Afghan Officials Stress Need for Long-Term Role for U.S.*, WASH. POST, Apr. 11, 2012, at A10; Tom A. Peter, *US, Afghanistan Agree in Private to Long-Term Partnership*, CHRISTIAN SCI. MONITOR, Apr. 22, 2012, at <http://www.csmonitor.com/World/Asia-South-Central/2012/0422/US-Afghanistan-agree-in-private-to-long-term-partnership>; Alissa J. Rubin, *Afghan Pact Vows U.S. Aid for a Decade*, N.Y. TIMES, Apr. 23, 2012, at A1; Kevin Sieff, *Post-2014 Deal with Afghans Is Reached*, WASH. POST, Apr. 23, 2012, at A8; Editorial, *The Afghan Deal*, WASH. POST, Apr. 24, 2012, at A18.

<sup>5</sup> Alissa J. Rubin, *U.S.-Afghanistan Talks Falter Despite Leeway on Detention Facilities*, N.Y. TIMES, Mar. 5, 2012, at A4; Rod Nordland, *U.S. and Afghanistan Agree on Prisoner Transfer as Part of Long-Term Agreement*, N.Y. TIMES, Mar. 10, 2012; Ernesto Londoño & Peter Finn, *U.S. to Hand over Control of Detainees*, WASH. POST, Mar. 10, 2012, at A8; Rod Nordland, *Detainees Are Handed over to Afghans, but Not out of Americans’ Reach*, N.Y. TIMES, May 31, 2012, at A4.

<sup>6</sup> Kevin Sieff, *U.S. and Karzai Near Agreement on Afghan Night Raids*, WASH. POST, Apr. 5, 2012, at A8.

In April 2012, following lengthy negotiations, the United States agreed to hand over responsibility for these operations to Afghan forces, with most requiring prior authorization by an Afghan court and with U.S. personnel playing only a supporting role.<sup>7</sup> Pursuant to Articles 5 and 6 of an April 2012 memorandum of understanding between Afghanistan and the United States on “Afghanization of Special Operations on Afghan Soil”:

5. The Participants affirm their intent to ensure that special operations are conducted within the framework of the Constitution of Afghanistan, including in particular articles 4, 5, 7, 38 and 57 of the Constitution. To that end, the Participants affirm their intent as follows:

A. special operations that are expected to result in detention or the search of a residential house or private compound are to be authorized in accordance with Afghan laws;

B. residential houses are to be searched only if necessary, and as part of the conduct of special operations, only Afghan Forces should search residential houses and private compounds;

C. the [Afghan Special Operations Unit] can enter private compounds, residential houses, and other areas for the purposes of search and arrest, in accordance with Afghan laws, with support from U.S. Forces only as required or requested; and

D. Afghan Forces are to protect any women, children, or culturally sensitive places.

6. Afghanistan affirms that it is to put into place the necessary arrangements and capacities to ensure that special operations are conducted within the framework of the Constitution of Afghanistan, in order to permit the Participants to fulfill their intent under paragraph 5 above. This is to include, but not be limited to:

A. establishing judicial, prosecution, and investigative mechanisms capable of issuing timely and operationally secure judicial authorizations to conduct special operations missions against persons who are reasonably suspected of meeting the criteria for prosecution or detention under Afghan laws . . . .<sup>8</sup>

In the weeks following agreement on the new procedures, Afghan commanders reportedly refused to approve more than two dozen nighttime operations proposed by U.S. forces.<sup>9</sup>

#### *State Department Legal Adviser Outlines Legal Principles Bearing on Crisis in Syria*

In late March 2012, U.S. Department of State Legal Adviser Harold Hongju Koh addressed the Annual Meeting of the American Society of International Law. Koh outlined the U.S. view

<sup>7</sup> Karen DeYoung, *Afghan Officials Likely to Insist on Veto Power over Raids*, WASH. POST, Mar. 22, 2012, at A7; Matthew Rosenberg, *Deal Close on Night Raids, U.S. and Afghan Officials Say*, N.Y. TIMES, Apr. 4, 2012, at A9; Sieff, *supra* note 6; Alissa J. Rubin, *U.S. Transfers Control of Raids to Afghanistan*, N.Y. TIMES, Apr. 9, 2012, at A1; Sayed Salahuddin, *U.S., Afghanistan Sign Deal on Raids*, WASH. POST, Apr. 9, 2012, at A7.

<sup>8</sup> Memorandum of Understanding Between the Islamic Republic of Afghanistan and the United States of America on Afghanization of Special Operations on Afghan Soil (Apr. 9, 2012), at <http://www.afghanistan-un.org/2012/04/memorandum-of-understanding-between-the-islamic-republic-of-afghanistan-and-the-united-states-of-america-on-afghanization-of-special-operations-on-afghan-soil/>. [Editor’s note: The numbering of subparagraphs is believed correct, but numbering in the text as posted on the website of the Afghan Mission to the United Nations was jumbled.]

<sup>9</sup> Kevin Sieff, *Afghan Army’s Defiance Grows*, WASH. POST, May 12, 2012, at A1.