

Administration Views Provided to the Government Accountability Office

3. Please provide your legal views on the application of section 8111 of the Consolidated Appropriations Act, 2014 to the transfer of the five individuals.

Under the particular circumstances presented, the transfer of the five individuals at issue was lawful notwithstanding the absence of 30 days' advance notice. Section 8111 of division C of the Consolidated Appropriations Act, 2014, Pub. L. 113-76, 128 Stat. 131, provides that “[n]one of the funds appropriated ... in this Act may be used to transfer any [Guantanamo detainee] 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 (“FY 2014 NDAA”), Pub. L. 113-66, 127 Stat. 851].” Section 8111 did not prohibit the transfer of the five individuals for one of three possible reasons.

1. Under the best reading of section 8111, that provision prohibits the use of appropriated funds to make a covered transfer only if the transfer is unlawful under section 1035. Here, although questions have been raised about the Administration's compliance with the notice requirement in section 1035(d), the transfer itself was lawful under section 1035, because section 1035 does not make notice a precondition of transfer.

Section 1035(b) states that, except as provided in section 1035(a), “the Secretary of Defense may transfer an individual detained at Guantanamo to the custody or control of ... a foreign country[] only if the Secretary determines” two things—(1) that actions have or will be taken that substantially mitigate the risk that the individual will engage in activity that threatens the United States or U.S. persons or interests and (2) that the transfer is in the national security interest of the United States. Section 1035(c) lists several factors that the Secretary “shall specifically evaluate and take into consideration” “[i]n making the determination specified in subsection (b),” but section 1035 does not impose any other preconditions on the Secretary's authority under section 1035(b) to make transfers. In the case of the transfer of the five individuals, the Secretary made the two determinations required by section 1035(b) after evaluating and taking into consideration the factors specified in section 1035(c). The transfer was therefore lawful under section 1035.

The fact that the Secretary did not provide notice 30 days before the transfer as described in section 1035(d) does not alter that conclusion. Section 1035(d) states that the Secretary “shall notify the appropriate committees of Congress of a determination . . . under subsection . . . (b) not later than 30 days before” a covered transfer, but section 1035(d) specifies no consequence for the failure to make that notification. Thus, while section 1035(d) imposes a legal requirement that the Secretary provide Congress with notice 30 days before making certain transfers, neither it nor any other provision of section 1035 (or the FY 2014 NDAA) states that a transfer that is otherwise authorized by section 1035(b) is rendered unlawful by the absence of the notification.

The language of the transfer restriction in the prior version of the National Defense Authorization Act, the NDAA for Fiscal Year 2013 (“FY 2013 NDAA”), Pub. L. 112-239, 126 Stat. 1914, supports this plain language reading of the FY 2014 NDAA. The FY 2013 transfer restriction stated that, subject to a limited exception, the Secretary could not use any funds available to the Department of Defense to make a transfer “unless the Secretary submit[ted] to Congress” a certification containing specified findings “not later than 30 days before the transfer.” FY 2013 NDAA, section 1028(a) (1). Unlike the language in section 1035 of the FY 2014 NDAA, the FY 2013 language expressly conditioned the lawfulness of a transfer on the Secretary’s notifying Congress 30 days in advance of the transfer. Congress’s deliberate decision not to use that language in the FY 2014 NDAA strongly suggests that the FY 2014 NDAA—as its plain text indicates—does not condition the lawfulness of the transfer itself on the provision of notice.

Accordingly, under this reading of section 8111, the use of appropriated funds to effect the transfer of the five individuals was lawful under section 8111 because the transfer was lawful under section 1035, regardless of whether the Administration complied with any notice requirement imposed by section 1035(d).

2. Section 8111 might be read more broadly, to prohibit the use of appropriated funds to make a transfer not only when the transfer is itself unlawful under section 1035, but also whenever any other applicable requirements in section 1035, including the notice requirement in section 1035(d), are not satisfied. Even under that broader reading, however, the transfer of the five individuals did not violate section 8111 because, under the particular circumstances of this transfer, the absence of 30 days’ advance notice did not violate section 1035(d), for one of two reasons.

a. First, section 1035(d) might be construed as having been inapplicable to this particular transfer. The transfer was necessary to secure the release of a captive U.S. soldier, and the Administration had determined that providing notice as specified in the statute could jeopardize negotiations to secure the soldier’s release and endanger the soldier’s life. In those circumstances, providing notice would have interfered with the Executive’s performance of two related functions that the Constitution assigns to the President: protecting the lives of Americans abroad and protecting U.S. service members. Such interference would “significantly alter the balance between Congress and the President,” and could even raise constitutional concerns; and courts have required a “clear statement” from Congress before they will interpret a statute to have such an effect. *Armstrong v. Bush*, 924 F.2d 282, 289 D.C. Cir. (1991). Congress may not have spoken with sufficient clarity in section 1035(d) because the notice requirement does not in its terms apply to a time-sensitive prisoner exchange designed to save the life of a U.S. soldier. *Cf. Bond v. United States*, 134 S. Ct. 2077, 2090-93 (2014).

b. Second, if section 1035(d) were construed as applicable to the transfer, the statute would be unconstitutional as applied because requiring 30 days' notice of the transfer would have violated the constitutionally-mandated separation of powers. Compliance with a 30 days' notice requirement in these circumstances would have "prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions," *Morrison v. Olson*, 487 U.S. 654, 695 (1988), without being "justified by an overriding need" to promote legitimate objectives of Congress, *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443 (1977). As just discussed, the Administration had determined that providing notice as specified in the statute would undermine the Executive's efforts to protect the life of a U.S. soldier. Congress's desire to have 30 days to weigh in on the determination that the Secretary had already made, in accordance with criteria specified by Congress, that the transfer did not pose the risks that Congress was seeking to avoid, was not a sufficiently weighty interest to justify this frustration of the Executive's ability to carry out these constitutionally assigned functions. Thus, even though, as a general matter, Congress had authority under its constitutional powers related to war and the military to enact section 1035(d), that provision would have been unconstitutional to the extent it applied to the unique circumstances of this transfer. And, just as section 1035(d) would be unconstitutional to the extent it was construed as applicable to the transfer, the broader reading of section 8111 would likewise be unconstitutional as applied to that transfer, because it would attempt to impose through the spending power the same unconstitutional requirement that section 1035(d) would attempt to impose directly.

Accordingly, even under this reading of section 8111, the use of appropriated funds to effect the transfer of the five individuals was lawful under section 8111, either as matter of statutory interpretation or under separation of powers principles.

3. Finally, note that GAO itself held that various statutory funding restrictions against U.S. combat operations in Southeast Asia did not apply to the rescue of Americans, including the attempted rescue of the crew of the *Mayaguez*. *Letter to the Hon. Thomas Eagleton*, 55 Comp. Gen. 1081 (1976). Having earlier noted the President's constitutional power to order such rescue operations, GAO stated that "neither the language of the acts nor their legislative histories make clear congressional intent respecting the President's power to rescue Americans abroad," *id.* at 1086, and therefore that "the availability of appropriations for rescue operations for Americans is not flatly precluded by the . . . funding limitation statutes," *id.* at 1088. The literal language of some of the restrictions, GAO conceded, would seem to cover rescue operations, but GAO read that language as aimed at offensive operations, *id.* at 1087. Here, for the reasons described earlier, the literal language of Section 8111 need not be construed to apply to this transfer, and reading the provision to apply to it would have rendered the provision unconstitutional as applied. Accordingly, GAO precedent supports the conclusion that section 8111 did not prohibit the use of appropriated funds to carry out the transfer.