



UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

DEC 5 2014

COMPTROLLER

The Honorable Gene Dodaro
Comptroller General of the United States
Washington, DC 20548

Dear Mr. Dodaro:

Consistent with section 145.8 of OMB Circular A-11, this letter reports the views of the Department of Defense regarding the opinion of the U.S. Government Accountability Office (GAO), dated August 21, 2014, concluding that the Department of Defense's transfer of five detainees from Guantanamo Bay to Qatar without 30 days' advance notice to Congress as described in section 1035(d) of the National Defense Authorization Act for Fiscal Year 2014 violated section 8111 of the Department of Defense Appropriations Act, 2014, and that the Department's obligation of appropriated funds to carry out the transfer therefore violated the Antideficiency Act, 31 U.S.C. § 1341(a). The Department disagrees with GAO's conclusion.

As previously explained to Congress and GAO, the Administration concluded that the transfer of the five detainees could lawfully proceed, in the exercise of the President's constitutional authority to protect the lives of Americans abroad and, specifically, to protect U.S. service members, notwithstanding the absence of 30 days' notice as described in section 1035(d). In response to GAO's request, the Department provided a statement of the Administration's legal views on the application of section 8111 to the transfer (enclosed), in which both the Department of Justice and the Department of Defense concurred, presenting three separate grounds for concluding that the transfer did not violate federal law. First, section 8111 bars the use of funds for transfers that do not comply with section 1035, but section 1035, unlike the version of the provision covering the prior year, conditions the authority to make transfers only on the Secretary's making certain determinations (which the Secretary made), not on his providing advance notice under section 1035(d). Second, even if section 1035 were read to make compliance with the notice requirement a condition on transfers, the provision should not be read, in the absence of a clear statement, to apply where providing the notice would interfere with the President's exercise of his constitutional authority to protect the life of an American service member. Third, if section 1035(d) were nonetheless read to apply in those circumstances, it would be unconstitutional as applied.

Observing that it is not GAO's role to determine the constitutionality of federal statutes, GAO's opinion expressly declined to address the constitutionality of section 8111 or section 1035 as applied in this instance. GAO's opinion similarly failed to take into account the potential constitutional infirmities when construing these statutes. Accordingly, the legal analysis in the opinion is incomplete, and GAO's stated conclusion is unfounded.

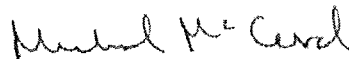


GAO's conclusion with respect to the Antideficiency Act is premised on its analysis of section 8111 and is likewise incorrect. GAO's opinion states: "If an agency incurs an obligation in excess of or in advance of amounts that are legally available, the agency has violated the Antideficiency Act." The opinion further asserts that "DoD obligated funds that were not legally available for obligation because DoD did not satisfy the notification requirements under section 8111." To the contrary, for the reasons explained in the statement of the Administration's legal views, the use of appropriated funds to effect the transfer of the five detainees was lawful under section 8111, either as a matter of statutory interpretation or under separation of powers principles. Because funds appropriated by Congress for purposes including detainee transfers were, under the circumstances presented here, legally available for obligation notwithstanding the absence of 30 days' advance notice, there was no violation of the Antideficiency Act.

The foregoing is concurred in by the Department of Justice.

Identical letters are being submitted to the President, President of the Senate, Speaker of the House of Representatives, Chairman of the Senate Committee on Armed Services, Chairman of the House Committee on Armed Services, Chairman of the Subcommittee on Defense of the Senate Committee on Appropriations, and Chairman of the Subcommittee on Defense of the House Committee on Appropriations.

Sincerely,



Michael McCord

Enclosure:
As stated