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B-326013

August 21, 2014

The Honorable Mitch McConnell, Republican Leader
United States Senate

The Honorable Richard Shelby, Vice Chairman
Committee on Appropriations
United States Senate

The Honorable Thad Cochran, Vice Chairman
The Honorable Dan Coats, Member
The Honorable Lindsey Graham, Member
The Honorable Lamar Alexander, Member
The Honorable Susan Collins, Member
The Honorable Lisa Murkowski, Member
The Honorable Roy Blunt, Member
Subcommittee on Defense
Committee on Appropriations
United States Senate

Subject: *Department of Defense—Compliance with Statutory Notification Requirement*

This responds to your June 13, 2014, request for our opinion on whether the Department of Defense (DOD) incurred obligations in violation of section 8111 of the Department of Defense Appropriations Act, 2014 when it transferred five individuals detained at Guantanamo Bay, Cuba, to the nation of Qatar. Section 8111 prohibits DOD from using appropriated funds to transfer any individuals detained at Guantanamo Bay unless the Secretary of Defense notifies certain congressional committees at least 30 days before the transfer. Pub. L. No. 113-76, div. C, title VIII, § 8111, 128 Stat. 5, 131 (Jan. 17, 2014).

As explained below, we conclude that DOD violated section 8111 because it did not notify the relevant congressional committees at least 30 days in advance of the transfer. In addition, because DOD used appropriated funds to carry out the transfer when no money was available for that purpose, DOD violated the Antideficiency Act. The Antideficiency Act prohibits federal agencies from incurring obligations exceeding an amount available in an appropriation. 31 U.S.C. § 1341(a).

In accordance with our regular practice, we contacted DOD on June 24, 2014, to obtain relevant facts and its legal views on this matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Deputy General Counsel (Fiscal), DOD (June 24, 2014). See also GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/lawresources/resources.html. On July 9, 2014, DOD identified the appropriation account and amounts obligated for the transfer at issue. E-mail from Deputy General Counsel (Fiscal), DOD, to Assistant General Counsel for Appropriations Law, GAO, *Subject: RE: GAO request for factual info and legal views re Guantanamo Bay transfer* (July 9, 2014) (DOD July 9 E-mail). On July 31, 2014, DOD provided us with the date of the transfer, the date of congressional notification, and its legal views on the application of section 8111 to the transfer. E-mail from Deputy General Counsel (Legislation), DOD, to Assistant General Counsel for Appropriations Law, GAO, *Subject: GAO request for factual info and legal views re Guantanamo Bay transfer* (July 31, 2014) (DOD July 31 E-mail).

BACKGROUND

In the aftermath of the September 11 attacks, the United States and its allied forces captured individuals fighting on behalf of al-Qaida or the Taliban. DOD, Joint Task Force Guantanamo, *Overview*, available at www.jtfgtmo.southcom.mil/xWEBSITE/fact_sheets/GTMO%20Overview.pdf (last updated Apr. 30, 2014), at 1. The United States detains some of these individuals in camps at the U.S. Naval Station Guantanamo Bay in Cuba. *Id.*, at 1–2.

Section 1035 of the National Defense Authorization Act for Fiscal Year 2014 (FY 2014 NDAA) authorizes the Secretary of Defense to transfer or release individuals detained at Guantanamo Bay, provided the Secretary makes a specific determination and provides notification to certain congressional committees.¹ Pub. L. No. 113-66, div. A, title X, subtitle D, § 1035, 127 Stat. 672, 851 (Dec. 26, 2013). The Secretary must “notify the appropriate committees of Congress of a determination . . . not later than 30 days before the transfer or release of the

¹ The Secretary of Defense may make a determination under section 1035(a) or section 1035(b) of the FY 2014 NDAA. Under section 1035(a), the Secretary determines that “the individual is no longer a threat to the national security of the United States.” Pub. L. No. 113-66, § 1035(a). Under section 1035(b), the Secretary determines that “actions that have been or are planned to be taken will substantially mitigate the risk of such individual engaging or reengaging in any terrorist or other hostile activity that threatens the United States or United States persons or interests” and that “the transfer is in the national security interest of the United States.” *Id.*, § 1035(b). The Secretary of Defense made a determination under section 1035(b) in this case. DOD July 31 E-mail, Attachment 1, at 1. The Secretary’s determination is not at issue in this opinion.

individual.”² *Id.*, § 1035(d). The notification must include certain information, such as a “detailed statement of the basis for the transfer or release” and “[a]n explanation of why the transfer or release is in the national security interests of the United States.” *Id.*

Section 8111 of the Department of Defense Appropriations Act, 2014, reinforces the legal requirements in section 1035 of the FY 2014 NDAA:

“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 Guantánamo 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.*”

Pub. L. No. 113-76, div. C, title VIII, § 8111, 128 Stat. 5, 86, 131 (Jan. 17, 2014) (emphasis added).

On May 31, 2014, DOD transferred five individuals from Guantanamo Bay to the nation of Qatar in exchange for the Taliban’s release of an American soldier. DOD July 31 E-mail; Secretary of Defense, *Statement on the Transfer of Detainees before the House Armed Services Committee* (June 11, 2014), available at www.defense.gov/Speeches/Speech.aspx?SpeechID=1860 (last visited Aug. 21, 2014). DOD obligated appropriations provided under title IX, Overseas Contingency Operations, in the Department of Defense Appropriations Act, 2014, to effectuate this transfer. DOD July 9 E-mail. Specifically, DOD obligated \$988,400 of its Operation and Maintenance, Army appropriation.³ *Id.*

We asked DOD what date the Secretary of Defense provided the notice required by section 1035 of the FY 2014 NDAA to the appropriate committees of Congress. DOD responded that “[t]he Secretary of Defense provided written notice of the transfer of the five individuals by letters dated May 31, 2014, addressed to the Chairmen and Ranking Members of the congressional appropriations, armed services, foreign relations, and intelligence committees.” DOD July 31 E-mail. Your

² Section 1035(e) of the FY 2014 NDAA states that the “appropriate committees of Congress” are the (1) Committee on Armed Services, Committee on Foreign Relations, Committee on Appropriations, and Select Committee on Intelligence of the United States Senate and (2) Committee on Armed Services, Committee on Foreign Affairs, Committee on Appropriations, and Permanent Select Committee on Intelligence of the House of Representatives. Pub. L. No. 113-66, § 1035(e).

³ See Department of Defense Appropriations Act, 2014, Pub. L. No. 113-76, div. C, title IX, 128 Stat. at 138 (Operation and Maintenance, Army appropriation).

staff advised us that committee leadership received telephonic notice from May 31 to June 1, 2014, and received written notice on June 2, 2014.

DISCUSSION

At issue in this opinion is whether DOD violated section 8111 of the Department of Defense Appropriations Act, 2014, for failing to provide at least 30 days of advance notice to specific congressional committees, and if so, whether DOD also violated the Antideficiency Act.

Section 8111

As with any question involving statutory interpretation, our analysis begins with the language of the statute. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). This is because the “starting point in discerning congressional intent is the existing statutory text.” *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). If the statutory language is clear and unambiguous on its face, then the plain meaning of that language controls. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); B-324469, Nov. 8, 2013; B-307720, Sept. 27, 2007.

In our view, the meaning of section 8111 of the Department of Defense Appropriations Act, 2014, is clear and unambiguous. Section 8111 prohibits the use of “funds appropriated or otherwise made available” in the Department of Defense Appropriations Act, 2014, to transfer any individual detained at Guantanamo Bay to the custody or control of a foreign entity “except in accordance with section 1035 of the [FY 2014 NDAA].” Pub. L. No. 113-76, § 8011. Section 1035 of the FY 2014 NDAA, in turn, requires the Secretary of Defense to notify certain congressional committees at least 30 days in advance of such a transfer, among other things. Pub. L. No. 113-66, § 1035. Because DOD did not provide written notice to the relevant congressional committees until May 31, 2014, the same day as the transfer, DOD violated section 8111. DOD July 31 E-mail.

We asked DOD for its legal views on the application of section 8111 to the transfer at issue in this opinion. DOD responded that section 8111 prohibits the use of appropriations “only if the transfer is unlawful under section 1035” and that the “transfer was lawful under section 1035, regardless of whether the Administration complied with any notice requirement imposed by section 1035(d).” DOD July 31 E-mail, Attachment 1, at 1–2. DOD asserts that a transfer is lawful if the Secretary of Defense makes the requisite determinations under section 1035, and that “section 1035 does not impose any other preconditions on the Secretary’s authority under section 1035(b) to make transfers.” *Id.*, Attachment 1, at 1. While DOD acknowledged the section 1035(d) 30-day advance notice requirement, DOD states that section 1035 does not provide that “a transfer that is otherwise authorized by section 1035(b) is rendered unlawful by the absence of the notification.” *Id.*

In our view, DOD has dismissed the significance of the express language enacted in section 8111. Section 8111 prohibits DOD from using appropriated funds to carry out a transfer “except in accordance with section 1035 of the National Defense Authorization Act for Fiscal Year 2014.” Pub. L. No. 113-76, § 8111. Section 8111 makes no distinction regarding the weight of various subsections under section 1035. The notification requirement in section 1035(d) thus stands on equal footing with the determination requirements in section 1035(a) or section 1035(b). Section 8111 means, then, that DOD must comply with *all* provisions in section 1035, including the notification requirement, before obligating appropriated funds to carry out a transfer. To read section 8111 otherwise would render the notification requirement meaningless.⁴

Alternatively, DOD asserts that section 8111 is unconstitutional as applied to this transfer.⁵ DOD July 31 E-mail, Attachment 1, at 2–3. DOD states that 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.” *Id.*, Attachment 1, at 2. DOD asserts that these provisions violate the “constitutionally-mandated separation of powers.” *Id.*, Attachment 1, at 3. According to DOD, section 8111 improperly “attempt[s] to impose through the spending power the same unconstitutional requirement that section 1035(d) would attempt to impose indirectly.” *Id.*

We do not offer any opinion on the constitutionality of section 1035 of the FY 2014 NDAA or of section 8111 of the Department of Defense Appropriations Act, 2014. It

⁴ DOD also asserted that our 1976 opinion, 55 Comp. Gen. 1081, provided a lawful basis for its transfer. The 1976 opinion addressed the rescue of Americans from South Vietnam and Cambodia in light of statutory prohibitions against the use of appropriated funds for “combat activity” in those areas. 55 Comp. Gen. at 1082–83. Construing the language of the statutes at issue, we distinguished “rescue operations” from “combat activity,” and concluded that the prohibitions did not preclude rescue operations for Americans. *Id.* at 1087. Unlike our 1976 opinion, this opinion addresses the notification requirements in section 1035 of the FY 2014 NDAA, reinforced by section 8111 of the Department of Defense Appropriations Act, 2014.

⁵ The President had previously expressed concerns about the constitutionality of section 1035 of the FY 2014 NDAA. In a statement issued in connection with his signature of the FY 2014 NDAA, the President stated that “in certain circumstances,” section 1035 “would violate constitutional separation of powers principles.” *Statement on Signing the National Defense Authorization Act for Fiscal Year 2014*, Daily Comp. Pres. Doc., 2013 DCPD No. 201300876 (Dec. 26, 2013), at 1. The President added that “[t]he executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers.” *Id.*

is not our role or our practice to determine the constitutionality of duly enacted statutes. See, e.g., B-323449, Aug. 14, 2012 (declining to opine on the constitutionality of the Defense of Marriage Act); B-321982, Oct. 11, 2011 (declining to opine on the constitutionality of a law prohibiting the Office of Science and Technology Policy from engaging in bilateral activities with China). In our view, where legislation has been passed by Congress and signed by the President, thereby satisfying the bicameralism and presentment requirements in the Constitution, that legislation is entitled to a heavy presumption in favor of constitutionality.⁶ B-302911, Sept. 7, 2004. GAO is not the appropriate forum to decide the constitutionality of section 1035 or section 8111.

Antideficiency Act

Next, we consider whether a violation of section 8111 constitutes a violation of the Antideficiency Act. If an agency incurs an obligation in excess or in advance of amounts that are legally available, the agency has violated the Antideficiency Act. 31 U.S.C. § 1341(a). See also B-317450, Mar. 23, 2009.

In B-319009, Apr. 27, 2010, we addressed a similar situation. In that opinion, we found that the Department of Homeland Security (DHS) and the United States Secret Service violated section 503(b) of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, when the Secret Service obligated \$5.1 million of reprogrammed funds before notifying the appropriations committees of the reprogramming. B-319009, at 4. Section 503(b) of that act provided that no funds were available through a reprogramming in excess of \$5 million unless the Secretary of Homeland Security notified the appropriations committees 15 days in advance of the reprogramming. *Id.*, at 2. Because the reprogrammed amounts were not legally available for obligation until DHS notified the relevant committees, DHS and the Secret Service incurred obligations in excess of available appropriations. We found that DHS and the Secret Service's violation of section 503(b) constituted a violation of the Antideficiency Act. *Id.*, at 4–5.

We arrive at a similar conclusion in this case. Like the Secret Service, DOD obligated funds that were not legally available for obligation because DOD did not satisfy the notification requirements under section 8111. Accordingly, DOD violated the Antideficiency Act. See 31 U.S.C. § 1341(a). If Congress specifically prohibits a

⁶ We are aware of one recent lawsuit in which an individual detained at Guantanamo Bay challenged the constitutionality of section 1035 of the FY 2014 NDAA. *Ahjam v. Obama*, Docket No. 09–745 (D.D.C. Apr. 8, 2014). The federal district court held that the petitioner lacked standing and did not address the merits of the constitutionality of section 1035. *Id.*, slip op. at 11. The petitioner has since appealed to the U.S. Court of Appeals for the D.C. Circuit. *Id.*, *appeal docketed*, Docket No. 14-5116 (D.C. Cir. May 20, 2014).

particular use of appropriated funds, any obligation for that purpose is in excess of the amount available.⁷ B-321982. Here, DOD obligated at least \$988,400 in excess of available appropriations. See DOD July 9 E-mail. DOD should report its Antideficiency Act violation as required by law.⁸

CONCLUSION

Our opinion in this matter rests upon the Secretary of Defense's responsibility to comply with a notification condition on the availability of appropriations to transfer individuals from Guantanamo Bay. This opinion does not address the Secretary's decision to transfer the five individuals in this case as part of DOD's efforts to secure the release of an American soldier. However, when DOD failed to notify specified congressional committees at least 30 days in advance of its transfer of Guantanamo Bay detainees to Qatar, DOD used appropriated funds in violation of section 8111. As a consequence of using its appropriations in a manner specifically prohibited by law, DOD violated the Antideficiency Act. See 31 U.S.C. § 1341(a). DOD should report its Antideficiency Act violation as required by law.



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⁷ We have consistently concluded that the use of appropriated funds for prohibited purposes violates the Antideficiency Act, because zero funds are available for the purpose. See, e.g., B-302710, May 19, 2004 (use of funds in violation of statutory prohibition against publicity or propaganda); B-300325, Dec. 13, 2002 (appropriations used for unauthorized technical assistance purposes); B-300192, Nov. 13, 2002 (violation of appropriation rider prohibiting use of funds to implement an Office of Management and Budget memorandum); B-290005, July 1, 2002 (appropriation used to procure unauthorized legal services).

⁸ See 31 U.S.C. § 1351 (requiring the head of an agency to report all relevant facts and a statement of actions taken to the President and Congress, and send a copy of the report to the Comptroller General).