

GAO: Pentagon broke law in Bergdahl swap

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Sgt. Bowe Bergdahl prepares to be interviewed by Army investigators. (Eugene R. Fidell / AP)

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The Defense Department broke the law when it transferred five Taliban detainees from the prison at Guantanamo Bay, Cuba, to Qatar in exchange for former prisoner of war Army Sgt. Bowe Bergdahl, the Government Accountability Office said Thursday.

In a seven-page opinion, the GAO said a provision of the 2014 Defense Appropriations Act bars defense officials from using taxpayer funds to transfer any prisoner from Guantanamo unless the secretary of defense gives Congress at least 30 days' advance notice.

The Pentagon made the transfer May 31. In response to the GAO legal opinion, defense officials acknowledged that Defense Secretary Chuck Hagel sent written and telephonic notice to congressional leaders on May 31 and June 1 and 2.

Also, because appropriated funds were used to carry out the transfer when no money was expressly available for that purpose, the legal opinion said DoD violated the

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Antideficiency Act, which bars federal agencies from incurring obligations that exceed an amount approved by Congress in an appropriation. The Pentagon spent just under \$1 million on the prisoner exchange, according to the GAO.

Defense officials argued that the transfer was lawful in the context of the executive branch's constitutional obligations in "protecting the lives of Americans abroad and protecting U.S. service members."

The GAO disagreed. "In our view, DoD has dismissed the significance of the express language" in the relevant provision of the 2014 Defense Appropriations Act that calls for DoD to meet the notification requirement before using taxpayer funds for a prisoner transfer. To read the provision any other way, the GAO said, "would render the notification requirement meaningless."

The GAO opinion may well renew criticism of the prisoner exchange among lawmakers. Both Democrats and Republicans in Congress were angered by the deal, with some saying the cost was too high, and others expressing concern that the exchange could end up jeopardizing the lives of U.S. troops in Afghanistan. Still others likened the deal to negotiating with terrorists, although the White House worked the swap through the government of Qatar.

At a House Armed Services Committee hearing in June less than two weeks after the Bergdahl swap, Hagel said the administration was unable to notify Congress in advance because it was an "extraordinary situation" with a "unique set of dynamics."

"First, we weren't certain that we would transfer those detainees out of Guantanamo until we had Sgt. Bergdahl in hand," Hagel said. "Second, we had Sgt. Bergdahl in hand only a few hours after making the final arrangements. I would never sign any document or make any agreement, agree to any decision, that I did not feel was in the best interest of this country. Nor would the president of the United States, who made the final decision with the full support of his national security team."

Bergdahl, 28, is still under investigation by the Army for leaving his unit in Afghanistan five years ago. He is in a "holding pattern" doing administrative duties at Fort Sam Houston in San Antonio, according to his attorney, Eugene Fidell, a military justice expert.

The Army has extended the time line of its investigation. "It is possible that [Bergdahl] will have to follow up on issues that may require additional witness interviews," the Army said in a statement earlier this week.

The investigation is now expected to wrap up some time in September.

The Associated Press contributed to this report.

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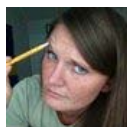
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