

Roll Call



Did President Obama Break the Law in Prisoner Swap?

By Tim Starks

June 9, 2014

Republicans in Congress, and even some Democrats, have heard the Obama administration's explanation for why it didn't need to notify Congress 30 days in advance of the Guantánamo Bay Taliban prisoner swap for Bowe Bergdahl and found it lacking. The Senate Armed Services Committee has a briefing this coming Tuesday, and the House panel has a hearing the next day.

But what do the legal experts say?

There is no consensus, exactly, since there are arguments for both the administration's position and the GOP's on the statutory requirement for congressional notification vs. the president's power to act in an emergency. And none of the experts line up neatly and ideologically based on any affiliations with past Republican or Democratic politicians. But among those who say Obama flouted the law, there are those who aren't all that fired up about it as an egregious offense.

"It's a clear example of the President defying a statute based on his constitutional powers, the same sort of thing Bush did, but this one is pretty minor," Eric Posner, a University of Chicago law professor, was quoted as saying in a New York Daily News' columnist's evaluation of the subject.

Jack Goldsmith, a former Justice Department official under President George W. Bush who notably questioned a national security initiative by the president that led to a dramatic hospital bed confrontation between the White House and then-Attorney General John Ashcroft, argued that the Obama administration has potentially disregarded several laws, in fact.

At the same time, Goldsmith laughed off former Vice President Dick Cheney's criticism of Obama not complying with the notification requirement, writing at Lawfare that Cheney was rather fond of citing the president's national security authority to "go-it-alone" under Article II of the Constitution on "military commissions, detention, surveillance, interrogation, and other issues."

There's another train of thought, slightly off the question of whether the swap violated the law, about whether Obama, had he not made the trade, would've soon run afoul of international law by the end of

2014 when combat operations cease in Afghanistan. Ken Gude of the Center for American Progress and John Bellinger of Arnold & Porter LLP (who served under Bush) make that point.

Those more sympathetic or open to the administration's case – although not in all cases endorsing it – include Marty Lederman, professor at the Georgetown University Law Center, writing at Just Security; Stephen Vladek, also of Just Security, and an American University law professor (via the Wall Street Journal); and William H. Taft IV, a former official in the State Department and Defense Department (via WSJ).

Those more sympathetic to the GOP argument include Lawrence Rosenthal, a former federal prosecutor who teaches constitutional law at Chapman University in California (also via WSJ); Ilya Somin, a professor at George Mason University School of Law, writing at The Volokh Conspiracy; and Timothy Sandefur of the Cato Institute.