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# Fair Trade: The President's Power to Recover Captured U.S. Servicemembers and the Recent Prisoner Exchange with the Taliban

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**FAIR TRADE:  
THE PRESIDENT’S POWER TO RECOVER  
CAPTURED U.S. SERVICEMEMBERS AND  
THE RECENT PRISONER EXCHANGE  
WITH THE TALIBAN**

*Celidon Pitt\**

*The Obama Administration’s controversial exchange of five Taliban detainees for a captured U.S. soldier in May 2014 reignited a heated debate over the proper scope of wartime executive authority. From a legal perspective, the primary issue centers on the constitutional balance of power between congressional appropriations and the President’s power as Commander in Chief. A complete analysis incorporates both judicial and historical precedent to evaluate the conflict within the broader context of prisoner recovery efforts.*

*This Note argues that, regardless of the validity of legislative restrictions on the transfer of Guantánamo detainees, the President possessed sufficient authority to conduct the prisoner exchange. Commanders in Chief have retained exclusive control over recovery efforts since the Revolutionary War, often exchanging nontraditional detainees for regular servicemembers without any congressional opposition. Furthermore, as this Note concludes, Congress elsewhere granted the President ample discretion over notification and defense spending to legally conduct the exchange.*

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Congress are not a fit Body to act as a Council of war. They are too large, too slow and their Resolutions can never be kept secret.<sup>1</sup>

#### INTRODUCTION

The Afghan valley consists mostly of scrub grass and boulders.<sup>2</sup> U.S. Army Sergeant Bowe Bergdahl seems disoriented as he sits in the back of a pickup truck, repeatedly blinking his eyes as if seeing daylight for the first time in a while.<sup>3</sup> He makes small talk with a couple of men in traditional dress, their faces covered and their hands gripping automatic rifles.<sup>4</sup> The churn of rotor blades from an approaching helicopter focuses Bergdahl’s attention.<sup>5</sup> A white scrap of fabric attached to a crooked piece of wood snaps in the downwash as a dust cloud envelops the landing zone, causing Bergdahl to blink even more.<sup>6</sup>

A handful of men stride out of the helicopter and toward the truck.<sup>7</sup> They are wearing Western clothing and also cover their faces.<sup>8</sup> The

1. Letter from Samuel Chase to Richard Henry Lee (May 17, 1776), in 4 *LETTERS OF DELEGATES TO CONGRESS, 1774–1789: MAY 16, 1776–AUGUST 15, 1776*, at 22 (Paul Smith ed., 1979).

2. This description is based on the open source video of the American recovery of Bergdahl. See Mark Thompson, *Watch the Bowe Bergdahl Video*, TIME (June 4, 2014), <http://time.com/2822102/heres-what-that-bergdahl-video-really-shows/>.

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

exchange is quick and informal, each side offering small head nods before going their separate ways.<sup>9</sup> The Westerners accompany Bergdahl to the helicopter, stopping him a few feet short to quickly pat him down for hidden weapons or explosives.<sup>10</sup> He does not seem to mind.<sup>11</sup> Moments later, the helicopter picks up and noses over, hugging the terrain on its way out of the zone and taking the first step in Bergdahl's long journey back to American soil.<sup>12</sup> The rest of the men jump in the pickup truck and drive off, presumably to continue their efforts in support of the insurgency that has plagued Afghanistan since the U.S. invasion in 2001.<sup>13</sup>

The scene in that valley, only a few minutes long, was the culmination of years of negotiation between the U.S. government and the Taliban, which had held Bergdahl captive since mid-2009.<sup>14</sup> In exchange for Bergdahl's freedom, the Department of Defense (DOD) agreed to transfer five Taliban detainees from the Guantánamo Bay Detention Center to Qatari custody.<sup>15</sup> It also sent nearly one million dollars to Qatar as encouragement for the country to accept the detainees and host them over the next year.<sup>16</sup> The return of the final American prisoner of war (POW) in Operation Enduring Freedom—and indeed the broader “War on Terror”—was cause for celebration<sup>17</sup> and a necessary precursor to the abatement of the United States' involvement in Afghanistan.<sup>18</sup> According to the Government Accountability Office (GAO), however, the exchange was also illegal.<sup>19</sup>

The GAO's argument for illegality focused on two statutes. First, section 8111 of the 2014 Consolidated Appropriations Act<sup>20</sup> (CAA) prohibited the Pentagon from “using appropriated funds to transfer any individuals

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8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See* Eric Schmitt & Charlie Savage, *American Soldier Freed by Taliban in Prisoner Trade*, N.Y. TIMES, June 1, 2014, at A1.

15. *See id.*

16. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO B-326013, DEPARTMENT OF DEFENSE—COMPLIANCE WITH STATUTORY NOTIFICATION REQUIREMENT 3 (2014) [hereinafter GAO REPORT].

17. *See* Matt Furber, *Planned Celebration for a Soldier Just Got a Whole Lot Bigger*, N.Y. TIMES, June 2, 2014, at A7.

18. *See* Elisabeth Bumiller & Matthew Rosenberg, *Parents of P.O.W. Reveal U.S. Talks on Taliban Deal*, N.Y. TIMES, May 10, 2012, at A1 (describing peace talks as “moribund” in the absence of a prisoner exchange agreement); Jack Goldsmith, *Two Legal Takeaways from Yesterday's HASC Hearing*, LAWFARE (June 12, 2014, 9:19 AM), <http://www.lawfareblog.com/2014/06/two-legal-takeaways-from-yesterdays-hasc-hearing/> (“[A] declaration of the end of the conflict—with the Taliban, al Qaeda, or both—would trigger legal pressure and eventually a legal duty to release all Taliban and/or al Qaeda detainees not subject to trial, including ones the President has deemed too dangerous to release.”). Overall, the status of the Guantánamo detainees after U.S. withdrawal from Afghanistan is unclear. *See* Deborah N. Pearlstein, *How Wartime Detention Ends*, 36 CARDOZO L. REV. 625, 625–28 (2014); Stephen I. Vladeck, *Detention After the AUMF*, 82 FORDHAM L. REV. 2189, 2193–96 (2014).

19. *See* GAO REPORT, *supra* note 16, at 1.

20. Pub. L. No. 113-76, div. C, tit. VIII, § 8111, 128 Stat. 5.

detained at Guantanamo Bay unless the Secretary of Defense notifies certain congressional committees at least 30 days before the transfer.”<sup>21</sup> Citing the time-sensitive nature of the negotiations, as well as the questionable status of Bergdahl’s health, however, the Pentagon did not notify Congress of the transfer until after it had been completed.<sup>22</sup> Second, the GAO concluded that DOD’s use of appropriated funds for an unauthorized purpose—specifically the “reprogramming” of one million dollars from the Army’s wartime operations and maintenance budget to pay Qatar—violated the Antideficiency Act<sup>23</sup> (ADA), which “prohibits federal agencies from incurring obligations exceeding an amount available in an appropriation.”<sup>24</sup> DOD, in other words, could not afford to pay the Qataris because it did not request money from Congress to do so.<sup>25</sup> The GAO limited its analysis to DOD’s noncompliance with the notification requirements and spending limitations, avoiding the issue of the statutes’ underlying constitutionality.<sup>26</sup> DOD immediately challenged this analysis, arguing that the spending restrictions violated fundamental separation of powers principles.<sup>27</sup>

The Bergdahl exchange is the most recent example of the tension between the executive and legislative branches over the conduct and funding of national security–related matters. This conflict stems largely from each branch’s perception of the proper scope of its powers, as well as the dynamic nature of wartime operations and their resistance to easy classification as either “tactics” subject to presidential discretion or “policy” subject to congressional oversight.<sup>28</sup> As the United States has moved increasingly toward short-term, limited engagements overseas, the issue has become more relevant and contentious.<sup>29</sup>

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21. GAO REPORT, *supra* note 16, at 1. This provision incorporated an identical notification requirement from the 2014 National Defense Authorization Act (NDAA). See Pub. L. No. 113-66, 127 Stat. 672.

22. Krishnadev Calamur, *Bergdahl Swap Was ‘Extraordinary Situation,’ Hagel Says*, NPR (June 11, 2014, 10:01 AM), <http://www.npr.org/blogs/thetwo-way/2014/06/11/320969162/hagel-to-face-skeptical-lawmakers-over-bergdahl-trade>.

23. 31 U.S.C. § 1341 (2014).

24. GAO REPORT, *supra* note 16, at 1; Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1374–77 (1988) (discussing the Antideficiency Act and the principle of appropriations control).

25. See GAO REPORT, *supra* note 16, at 6–7.

26. See *id.* at 5–6.

27. See *id.* at 6; DOD, *Administration Views Provided to the Government Accountability Office*, available at <http://www.lawfareblog.com/wp-content/uploads/2014/08/GAO-Response-question-3-FINAL.pdf> (last visited Mar. 25, 2015).

28. See Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 404 (2008) (“Virtually all important decisions as to the conduct of a war . . . can be framed as either ‘tactical’ military decisions for the President to make as Commander in Chief or broad policy decisions for Congress to make under its war powers.”).

29. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 944–45 (2008); see also JAMES E. BAKER, *IN THE COMMON DEFENSE* 99 (2007); STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 5 (2013).

Indeed, the War on Terror's "unusual entwinement with the home front, its heavy focus on preemptive action and intelligence collection, and its targeting of a diffuse, non-state enemy, all guarantee that presidential uses of force are likely to be conducted for years to come in a context that is thick with statutory restrictions."<sup>30</sup> Yet there is no clear answer from the courts over the degree to which Congress may restrain the ability of the President to negotiate the recovery of American prisoners of war in exchange for U.S.-held detainees.<sup>31</sup>

This Note examines the origins of the conflict over the Bergdahl-Taliban exchange and ultimately concludes that the President had the constitutional power to authorize the exchange. Part I explores the historical development of defense appropriations and contextualizes the conflict over national security spending within a broader constitutional framework, focusing on the balance of powers between the legislative and executive branches and the judiciary's reluctance to intervene. This part includes an evaluation of the President's powers as Commander in Chief and the traditional practice of congressional deference to executive leadership in matters pertaining to the recovery of U.S. captives during hostilities.

In Part II, this Note examines the current controversy over whether the Obama Administration failed to comply with the terms of the 2014 CAA and ADA. In doing so, this Note addresses the separation of powers implications raised by the dispute. Congress, on the one hand, has viewed its funding restrictions on transfers and releases from Guantánamo as an appropriate means of governing the conduct of war. The President, on the other hand, has argued that, as Commander in Chief of the armed forces, he is the only person entrusted with the discretion to determine detainee policy and to ensure the safe repatriation of American servicemembers. Finally, in Part III, this Note argues that Congress, by severely limiting the President's ability to negotiate for the release of an American POW, abused its power of the purse and infringed on the President's authority as Commander in Chief.

## I. THE SWORD AND THE PURSE:

### THE BALANCE BETWEEN LEGISLATIVE AND EXECUTIVE WAR POWERS

Throughout American history, the power of the purse has been one of the most effective means of legislative control of defense policy, which is executed by the President in his role as Commander in Chief of the armed forces. Part I.A.1 discusses the origins of the appropriations doctrine and analyzes several of its historical applications. Part I.A.2 outlines the historical and textual basis for the President's authority as Commander in Chief. Part I.B surveys U.S. Supreme Court jurisprudence evaluating the appropriate scope of executive power, focusing on the tripartite scheme

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30. Barron & Lederman, *supra* note 29, at 945.

31. See, e.g., Louis Fisher, *Judicial Review of the War Power*, 35 PRES. STUDIES Q. 466 (2005) (contrasting pre- and post-Vietnam War judicial responses to challenges of the President's war powers); Lobel, *supra* note 28, at 408–09 (discussing the judiciary's refusal to address cases relating to tension between legislative and executive powers).

articulated in Justice Robert Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>32</sup> as the most appropriate method for determining the legitimacy of presidential action. Part I.C examines several practical examples of the overlapping spheres of defense appropriations riders, congressional notification requirements, and negotiations over the recovery of captured U.S. military personnel, drawing from them broader conclusions about agreed-upon standards for legislative and executive conduct in these areas.

*A. Textual and Historical Origins of the Tension  
Between Congress’s Defense Spending Power  
and the President’s Authority As Commander in Chief*

The U.S. Constitution’s grant of the power of the purse to Congress is an “empowerment of the legislature [that] is at the foundation of our constitutional order.”<sup>33</sup> Congress often has exercised that authority in the context of defense spending, using it as a tool to set and enforce broad policy objectives.<sup>34</sup> Likewise, the President’s authority as Commander in Chief has deep historical roots that directly explain the scope of his authority to coordinate the recovery of captured U.S. servicemembers.<sup>35</sup> The power of the purse and the Commander-in-Chief power are not always mutually exclusive—there have been many historical instances of overlap and controversy. This section explains how each doctrine has developed.

1. Congress’s Defense Spending Power

Within democratic governments, the authority to raise revenue has long been recognized as one of a legislature’s most fundamental powers.<sup>36</sup> The British Parliament, one of the antecedents to the U.S. Congress, exercised its power of the purse over national security affairs consistently but not uniformly, often supplying the military only in exchange for concessions from the King.<sup>37</sup> American colonial assemblies, Congress’s other principal legislative model, frequently seized on opportunities presented by military emergencies to expand their political control.<sup>38</sup> This system broke down during the Revolutionary War, however, when “the exigencies of war” revealed the inefficiency of battlefield decisions being made by committees far from the front lines.<sup>39</sup>

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32. 343 U.S. 579 (1952).

33. Stith, *supra* note 24, at 1344.

34. See discussion *infra* Part I.A.1.

35. See discussion *infra* Part I.A.2.

36. See Stith, *supra* note 24, at 1344.

37. See WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 16–17 (1994).

38. In 1715, for example, Virginia’s House of Burgesses granted funding for defense against attacks by Native Americans only on the condition that the governor repeal an unpopular tobacco act. See *id.* at 19.

39. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 778 (2008).



Congress retained the power of the purse upon ratification of the Constitution largely as a check on executive power.<sup>40</sup> Article I, Section 9 of the Constitution states, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”<sup>41</sup> This “structural imperative” ensures that the President may not withdraw funds on his own initiative, for whatever reason.<sup>42</sup> Legislative authority over defense appropriations is further codified in Article I, Section 8, which grants Congress the powers to “raise and support Armies”<sup>43</sup> and “provide and maintain a Navy”<sup>44</sup> and was largely drafted in response to war-making abuses by the Crown.<sup>45</sup> These provisions, when combined with the power “to declare [w]ar,”<sup>46</sup> seemed to give the legislative branch control over the broader aspects of defense policy.<sup>47</sup>

At first, Congress exercised this appropriation power through a linear process of request, authorization, and appropriation.<sup>48</sup> This distinction was sharpest before the Civil War, when congressional appropriations contained only the duration, amount, and purpose of the granted funds.<sup>49</sup> Over time, the line between authorizations and appropriations began to blur, as funding grants contained more and more restrictions in the form of riders designed to limit executive discretion over a given program.<sup>50</sup> Through World War II, though, defense appropriations were largely immune to this trend, remaining mostly “no strings attached” checks given to the President to spend as he saw fit during various war efforts.<sup>51</sup> However, beginning in the 1950s, increasing congressional skepticism over military and covert actions prompted Congress to seek additional oversight through the imposition of various riders to defense spending bills, with the understanding that the President may not spend funds Congress has granted him unless he complies with the conditions Congress sets.<sup>52</sup>

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40. See Stith, *supra* note 24, at 1349.

41. U.S. CONST. art. I, § 9, cl. 7.

42. Stith, *supra* note 24, at 1349–50.

43. U.S. CONST. art. I, § 8, cl. 12.

44. *Id.* cl. 13.

45. See Louis Fisher, *Presidential Power in National Security: A Guide to the President-Elect*, 39 PRES. STUDIES Q. 347, 353 (2009) (“The British model gave the king the absolute power to make war. The framers repudiated that form of government because . . . [t]he resulting military adventures were disastrous to their countries, both in lives lost and treasures squandered.”).

46. U.S. CONST. art. I, § 8, cl. 11.

47. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952) (These clauses “certainly lay[] upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement.”); Fisher, *supra* note 45, at 354.

48. See U.S. GOV’T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 102–16 (2005); BANKS & RAVEN-HANSEN, *supra* note 37, at 43–45.

49. See BANKS & RAVEN-HANSEN, *supra* note 37, at 45.

50. See *id.* at 46–47.

51. See *id.* at 47–48.

52. See *id.* at 48–53; see also *infra* Part I.C.1–2.

## 2. The President's Authority As Commander in Chief

In the British military, commanders in chief, just like the King himself, depended on parliamentary appropriations for supplies and pay, and the position “had very little, if any, discretion to act in contravention of Parliament.”<sup>53</sup> This system became the model for the Continental Army, of which the Continental Congress appointed George Washington “General and Commander in [C]hief, of the army of the United Colonies,” in June 1775.<sup>54</sup> The Founders curtailed Washington’s powers as Commander in Chief even further than Parliament had restricted the King, so that rather than “hav[ing] *sole* power to conduct warfare,” Washington could merely “direct military campaigns subject to legislative oversight.”<sup>55</sup>

Such oversight was rarely smooth, however. Friction between the Continental Congress and Washington led to various military setbacks throughout the Revolutionary War,<sup>56</sup> and the problem was especially apparent under exigent circumstances.<sup>57</sup> In response to these tactical failures, the Continental Congress allowed for a “gradual but substantial augmentation” of Washington’s power during the latter years of the war.<sup>58</sup>

Delegates to the Constitutional Convention in 1787 recorded only a “limited discussion” of the issue.<sup>59</sup> As a means of mitigating the threat posed by an unchecked executive, the Framers consciously “rejected a government in which a single branch could both make war and fund it.”<sup>60</sup> The Constitution solidified the President’s singular role as Commander in Chief of the armed forces<sup>61</sup> while also requiring him to recruit, equip, train, and deploy those forces only with money granted by Congress.<sup>62</sup> Beyond this basic alignment of sword and state, neither the text of the Constitution nor the records of the Convention and ratification process offers much insight into the intended scope of the President’s powers as Commander in Chief.<sup>63</sup>

53. Barron & Lederman, *supra* note 39, at 773.

54. 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 96 (Worthington Chauncey Ford et al. eds., 1905).

55. Lobel, *supra* note 28, at 419.

56. See ROBERT MIDDLEKAUF, *THE GLORIOUS CAUSE* 333–558 (2005).

57. See Barron & Lederman, *supra* note 39, at 779–80.

58. *Id.* at 779. *But see* HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 78 (1990) (As President, George Washington “took military action only once without express congressional authorization, and even then, Congress arguably endorsed his decision by subsequent acts.”).

59. Barron & Lederman, *supra* note 39, at 792. According to Barron and Lederman, though, it is a “common assumption” that the Framers “were specifically aiming to prevent the sorts of inefficiencies that characterized the earlier regime, when the Continental Congress had micromanaged General Washington.” *Id.* at 779.

60. Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 J. AM. INT’L L. 758, 762 (1989).

61. U.S. CONST. art. II, § 2, cl. 1 (“The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”).

62. *Id.* art. I, § 8, cl. 1; cl. 12–13.

63. See Barron & Lederman, *supra* note 39, at 788 (“The most that can be said about which branch ultimately should be in control of the ‘direction’ of the armed forces, in light

Congress directly regulated the military in the early days of the Republic, dictating the organization of the armed forces as well as the qualifications for who could join them.<sup>64</sup> Later, during the Civil War, President Abraham Lincoln acted several times in his capacity as Commander in Chief with neither congressional permission nor appropriation, but each time returned to the legislature for ex post confirmation of and funding for his decisions.<sup>65</sup> This “give and take” continued through World Wars I and II, with Congress regulating general military functions while avoiding intrusion into tactical decision making.<sup>66</sup>

Regulation, moreover, was not equivalent to command, as Congress still recognized the need for presidential discretion in the handling of specific troop movements and the recovery of captured U.S. personnel.<sup>67</sup> Congress enshrined this principle in the National Security Act of 1947,<sup>68</sup> which “place[d] American governmental decisions regarding war making, intelligence, covert operations, military sales, and military aid under the executive’s unified and coordinated control.”<sup>69</sup> Since its enactment, controversy has arisen over the ability of the executive branch to initiate war, but never over its authority to dictate tactical decisions.<sup>70</sup> Throughout this period, the President also has engaged in various negotiations and agreements with state and non-state actors, often for the return of captured Americans.<sup>71</sup>

#### *B. Supreme Court Jurisprudence on the Scope of Executive Authority*

Although the Supreme Court has not directly addressed the balance between the spending and Commander-in-Chief powers, its holdings on somewhat analogous issues provide insight into how that balance might be

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of the available evidence, is that the Framers did not assign that function at all in the text of the Constitution.”); see also PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 46, 190 (2010).

64. See Barron & Lederman, *supra* note 29, at 957.

65. See, e.g., Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in *PRESIDENTIAL POWER STORIES* 53–92 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

66. See Barron & Lederman, *supra* note 29, at 1034–55.

67. See generally *id.* See also *infra* Part I.C.3.

68. Pub. L. No. 80-253, 61 Stat. 495 (codified in scattered sections of 50 U.S.C.).

69. KOH, *supra* note 58, at 102.

70. See Barron & Lederman, *supra* note 29, at 1059–98. Overall, “the [P]resident remains at the center of the national security process” because he alone “speak[s] on behalf of the United States in a way that congressional and other national leaders cannot. . . . In addition, in time of crisis it is the president who often decides on whether and how to use the national security tools that are the product of legislative authorization and appropriation.” BAKER, *supra* note 29, at 101.

71. See, e.g., MITCHELL B. REISS, *NEGOTIATING WITH EVIL: WHEN TO TALK TO TERRORISTS* 11–12 (2010) (listing various examples, including payment of the Barbary pirates under three Presidents, concessions to a Berber chieftain by President Theodore Roosevelt, and the transfer of weapons to Iran under President Ronald Reagan); David Ignatius, *Tea with the Taliban?*, WASH. POST, Oct. 26, 2008, at B7 (describing the early efforts of the George W. Bush Administration to enter peace negotiations in Afghanistan despite the ongoing conflict).

struck. This section provides an overview of the Supreme Court decisions relevant to analyzing the Bergdahl-Taliban prisoner exchange.

The Supreme Court has implied that the President possesses exclusive power not explicitly stated in Article II, but that the independent war powers conferred by the Commander in Chief Clause are still subject to undefined statutory limitations.<sup>72</sup> This gap has led one scholar to conclude that “Congress may constitutionally constrain the President as long as the legislative action does not violate a mandatory provision or express restriction of the Constitution and does not impede on an exclusive presidential power.”<sup>73</sup> Just as “a state of war is not a blank check for the President,”<sup>74</sup> neither, as Chief Justice John Marshall once observed, are “the whole powers of war” vested in Congress.<sup>75</sup> The Court has addressed this tension in three main decisions.

1. *United States v. Curtiss-Wright Export Corp.*: What Are the Limits of Presidential Discretion over Foreign Affairs?

The Supreme Court first evaluated the degree to which the powers of the federal government vary between foreign (“external”) and domestic (“internal”) affairs in its 1936 decision, *United States v. Curtiss-Wright Export Corp.*<sup>76</sup> Seeking to curb American involvement in the Chaco War between Bolivia and Paraguay, Congress passed a joint resolution in 1934 empowering the President to prohibit the sale of arms and munitions to any party in the conflict.<sup>77</sup> President Franklin Roosevelt soon issued a proclamation implementing the ban, which remained in place for over a

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72. See Barron & Lederman, *supra* note 39, at 772; Fisher, *supra* note 45, at 352 (“Although some justices of the Supreme Court have described the president’s foreign relations power as ‘exclusive,’ the Court itself has not denied to Congress its constitutional authority to enter the field and reverse or modify presidential decisions in the area of national security and foreign affairs.”); Abraham D. Sofaer, *Presidential Power and National Security*, 37 PRES. STUDIES Q. 101, 110–120 (2007) (analyzing the balance between executive prerogative and legislative oversight in the area of national defense).

73. William M. Hains, Comment, *Challenging the Executive: The Constitutionality of Congressional Regulation of the President’s Wartime Detention Policies*, 2011 BYU L. REV. 2283, 2284. Hains based most of his legal analysis of congressional control over Guantánamo policy on Professor Lobel’s framework for evaluating shared and exclusive governmental powers. See *id.* at 2297–2300; Lobel, *supra* note 28, at 445–51; see also KOH, *supra* note 58, at 4 (“Although the National Security Constitution has assigned the president the predominant role in making foreign policy decisions, it has granted him only limited *exclusive* powers. Thus, the Constitution directs most governmental decisions regarding foreign affairs into a sphere of concurrent authority, under presidential management, but bounded by the checks provided by congressional consultation and judicial review.”); Fisher, *supra* note 45, at 354 (The title of Commander in Chief “was never intended to give the president sole power to initiate war and determine its scope. Such an interpretation would nullify the express powers given to Congress under Article I and undercut the framers’ determination to place the power of war with the elected representatives of Congress.”).

74. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

75. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

76. 299 U.S. 304, 315 (1936). See generally H. Jefferson Powell, *The Story of Curtiss-Wright Export Corporation*, in PRESIDENTIAL POWER STORIES, *supra* note 65, at 195–232.

77. See *Curtiss-Wright*, 299 U.S. at 311–13.

year.<sup>78</sup> The Court considered the scope of the non-delegation doctrine, finding that, by granting the President the authority to validate their resolution, Congress did not “abdicate[] its essential functions [by] delegat[ing] them to the Executive.”<sup>79</sup>

The Court’s analysis also more broadly examined the President’s unique power to dictate U.S. foreign affairs.<sup>80</sup> The Court explained that Congress only plays a limited role in foreign affairs because, “[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”<sup>81</sup> Although the President makes treaties with the “Advice and Consent of the Senate,”<sup>82</sup> for example, “he alone negotiates” their terms.<sup>83</sup> The Court further concluded that the President, as “the sole organ of the nation in its external relations, and its sole representative with foreign nations,”<sup>84</sup> has discretion to act beyond the powers specifically enumerated in Article II.<sup>85</sup> This responsibility reflects the special trust inherent to the office, giving the President latitude to act with “caution and unity of design” toward foreign nations.<sup>86</sup>

The Court then clarified the role of Congress in relation to the President, concluding that legislation affecting external affairs must grant the President “freedom from statutory restriction which would not be admissible were domestic affairs alone involved[, because] . . . he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and *especially is this true in time of war.*”<sup>87</sup> The opinion concluded with a warning about the “unwisdom” of narrow congressional resolutions meant to control the President’s discretion in external affairs.<sup>88</sup>

## 2. *Youngstown Sheet & Tube Co. v. Sawyer*:

### When May the President Act in Contravention of Congressional Will?

In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court considered whether President Harry Truman’s seizure of steel mills to avert a labor crisis during the Korean War fell within the scope of his inherent

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78. *See id.* at 312–13.

79. *Id.* at 315.

80. *See id.* at 319–22.

81. *Id.* at 319.

82. U.S. CONST. art. II, § 2, cl. 2.

83. *See Curtiss-Wright*, 299 U.S. at 319.

84. *Id.* (quoting then-Congressman John Marshall, 10 ANNALS OF CONG. 613 (1800)).

85. *See id.* at 320. *But see* Louis Fisher, *The Sole Organ Doctrine*, STUDIES ON PRESIDENTIAL POWER IN FOREIGN RELATIONS, STUDY NO. 1 (Law Library of Cong. 2006), available at <http://www.loc.gov/law/help/usconlaw/pdf/SoleOrgan-Aug06.pdf> (criticizing the popular use of *Curtiss-Wright* as justification for the existence of independent presidential power in foreign affairs).

86. *Curtiss-Wright*, 299 U.S. at 319.

87. *Id.* at 320 (emphasis added).

88. *Id.* at 321–22.

executive authority.<sup>89</sup> In reaching its conclusion that the executive order authorizing the seizure violated the Takings Clause of the Fifth Amendment, the Court also offered a broader examination of the appropriate allocation of powers between the executive and legislative branches.<sup>90</sup> President Truman, the government argued, had been motivated to act not out of greed or hunger for power.<sup>91</sup> Instead, his fear of the damage to the overseas war effort that could result from even a brief strike led President Truman to exercise his “inherent power” as the country’s chief executive and Commander in Chief.<sup>92</sup> This inherent power, the government urged, was “supported by the Constitution, by historical precedent, and by court decisions.”<sup>93</sup>

The Court disagreed. Justice Hugo Black, writing for the majority, stated that “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”<sup>94</sup> In this case, the fact that Congress already had considered and rejected the use of seizures to help resolve labor disputes left only the Constitution as a possible source for executive authority.<sup>95</sup> However, Article II restricts the President’s “functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”<sup>96</sup> Congress could have authorized the seizure of steel mills, but it did not; therefore, the President’s decision to do so anyway was an invalid exercise of legislative power by the executive branch.<sup>97</sup>

Justice Jackson famously concurred in the opinion.<sup>98</sup> He began by addressing the need for a pragmatic approach in resolving competing legislative and executive claims, one based on an understanding of the entire document and the history of interaction among the branches.<sup>99</sup> Because “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress,”<sup>100</sup> Justice Jackson announced a tripartite scheme for evaluating the constitutionality of presidential action in relation to Congress.<sup>101</sup>

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89. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). See generally Patricia L. Bellia, *The Story of the Steel Seizure Case*, in *PRESIDENTIAL POWER STORIES*, *supra* note 65, at 233.

90. See *Youngstown*, 343 U.S. at 585–89.

91. See *id.* at 583.

92. *Id.*

93. *Id.* at 584 (quoting government’s motion in opposition to a preliminary injunction).

94. *Id.* at 585.

95. See *id.* at 586–87.

96. *Id.* at 587.

97. See *id.* at 588.

98. See *id.* at 634–55 (Jackson, J., concurring); KOH, *supra* note 58, at 105; Lobel, *supra* note 28, at 445.

99. See *Youngstown*, 343 U.S. at 635 (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”).

100. *Id.*

101. See *id.* at 635–38.

In the first category, the President's "authority is at its maximum" when he "acts pursuant to an express or implied authorization of Congress."<sup>102</sup> These actions are "supported by the strongest of presumptions and [given] the widest latitude of judicial interpretation"<sup>103</sup> because they are fully aligned with the Constitution and conducted with the sum of congressional and presidential authority.<sup>104</sup> In *Youngstown*, Congress did not just fail to authorize the mill seizures, it repeatedly refused to do so.<sup>105</sup>

Alternatively, in the second category outlined in the concurring opinion, the President can still act on his own authority if Congress is silent on a particular issue.<sup>106</sup> This category is especially relevant in times of congressional backlog or disinterest, and courts will often interpret silence on the part of Congress as consent to the presidential action.<sup>107</sup> Actions in this category exist in a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."<sup>108</sup> Within this second category, a judicial analysis will be highly contextual, a theme echoed in the Court's remarks on the appropriate interpretation of constitutional ambiguities.<sup>109</sup> Here, Congress took action and directly addressed the issue, providing several alternative channels for the seizure of private property.<sup>110</sup> The Truman Administration's refusal to use any of these methods could not be justified by a lack of available options.<sup>111</sup>

Finally, the third category involves presidential action that runs contrary to congressional will, either express or implied.<sup>112</sup> Under these circumstances, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>113</sup> Justice Jackson acknowledged that the President does, in fact, possess some inherent, or non-delegated, powers.<sup>114</sup> These powers alone, though, usually are not sufficient to overcome explicit congressional rejection of a given action.<sup>115</sup>

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102. *Id.* at 635.

103. *Id.* at 637.

104. *Id.* at 635–37.

105. *See Bellia, supra* note 89, at 241–42.

106. *See Youngstown*, 343 U.S. at 637.

107. *See id.*

108. *Id.*

109. *See id.* ("[A]ny actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.")

110. *See id.* at 639.

111. *See id.*

112. *See id.* at 637.

113. *Id.*

114. *See id.* at 640; *see also id.* at 653 (identifying and discussing "the gap that exists between the President's paper powers and his real powers").

115. *See id.* at 640; *see also Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (resolving a conflict between the President's authority as Commander in Chief to seize foreign vessels during war and Congress's ability to limit that power via statute). The *Little* Court held that a statute will prevail over a conflicting presidential proclamation, even in a time of war, because "the legislature seem[s] to have prescribed . . . the manner in which [the] law shall

3. *Dames & Moore v. Regan*:  
Is Congressional Silence Tantamount to Acquiescence?

In *Dames & Moore v. Regan*,<sup>116</sup> the Supreme Court addressed the degree to which the President's power to conduct foreign affairs may translate to domestic issues.<sup>117</sup> The Court applied the *Youngstown* framework to find that an executive order issued with the acquiescence of Congress was a valid exercise of the President's authority, thus taking a deferential view of executive power to dictate "the resolution of a major foreign policy dispute between our country and another."<sup>118</sup>

To resolve the Iran hostage crisis, during which several dozen U.S. diplomats and citizens were held captive in Tehran for almost fifteen months,<sup>119</sup> President Jimmy Carter agreed on behalf of the United States to terminate all litigation between its nationals and the government of Iran.<sup>120</sup> Because of the close ties between the deposed Shah of Iran and the United States, there had been many U.S. businesses operating in Iran who had brought suits in U.S. courts to recover on property or contracts in Iran that had been devalued, nullified, or placed at risk by the sudden regime change there.<sup>121</sup> President Carter issued—and President Ronald Reagan later confirmed—an executive agreement implementing the terms of the settlement with Iran and establishing the Iran-United States Claims Tribunal as the venue for final arbitration of all claims between the nationals and governments of the two countries.<sup>122</sup> *Dames & Moore*, an American engineering and consulting firm with preexisting claims against the government of Iran that were not related to the hostage crisis, challenged the validity of the tribunal as the sole venue for satisfaction of its claims.<sup>123</sup>

In upholding the executive agreement and cementing the tribunal as a legitimate means of resolution,<sup>124</sup> the Court also weighed the degree to which an executive order stemming from the President's authority to conduct foreign affairs may control the pursuit of lawsuits that had already been filed—and, in some cases, decided—in U.S. courts.<sup>125</sup> Congress had neither authorized nor prohibited the establishment of the arbitral tribunal, nor had Congress addressed the agreement establishing it.<sup>126</sup> Instead, Congress displayed a history of "acquiescence in conduct of the sort

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be carried into execution." *Id.* at 177–78. Of course, this conclusion presumes that the statute complied with the Constitution in the first place.

116. 453 U.S. 654 (1981).

117. *See id.* at 675.

118. *Id.* at 688.

119. DAVID FARBER, TAKEN HOSTAGE 1–2 (2004).

120. *See Dames & Moore*, 453 U.S. at 664–65.

121. *See* Harold H. Bruff, *The Story of Dames & Moore: Resolution of an International Crisis by Executive Agreement*, in PRESIDENTIAL POWER STORIES, *supra* note 65, at 369, 381–82.

122. *See Dames & Moore*, 453 U.S. at 664–66.

123. *See id.* at 666–67.

124. *See id.* at 686.

125. *See id.* at 667.

126. *See id.* at 678–79; *see also* Bruff, *supra* note 121, at 381–82.



engaged in by the President.”<sup>127</sup> According to the Court, this acquiescence, when combined with the President’s Article II power to enter the agreement with Iran and various historical precedents of presidential resolution of the claims of American nationals against foreign governments, placed the executive order into the first category identified by Justice Jackson in his *Youngstown* concurrence.<sup>128</sup>

The *Dames & Moore* Court interpreted legislative history of congressional silence as proof of congressional consent.<sup>129</sup> As such, the executive order was “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”<sup>130</sup> By acquiescing to the exercise of presidential authority, Congress had given the order tacit approval.<sup>131</sup> The decision also qualified *Youngstown* by noting that a given executive action falls on a spectrum, “not neatly in one of three pigeonholes,” especially in cases “involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.”<sup>132</sup> The Court stated that judicial interpretation of legislative intent should therefore be more lenient to executive authority in cases involving foreign affairs and particularly under emergent or unforeseen circumstances, such as the need to negotiate for the release of U.S. hostages.<sup>133</sup> Executive agreements, made without the consent of the Senate, have survived this and subsequent rounds of judicial review as a valid exercise of the President’s Article II powers.<sup>134</sup>

### C. *Practical Precedents Illustrating the Balance Between Legislative and Executive War Powers*

Congress repeatedly has tried to check the President’s ability to wage war, using assorted means to at least oversee—if not attempt to seize outright control of—the executive branch’s conduct of military operations.<sup>135</sup> The White House has offered various reactions to these methods, ranging from unchallenged acceptance, to grudging acquiescence, to blatant disregard.<sup>136</sup> Two primary methods, appropriations riders and the

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127. *Dames & Moore*, 453 U.S. at 678–79.

128. *See id.* at 674.

129. *See id.* at 678.

130. *Id.* at 674 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (internal quotation marks omitted)).

131. *See id.* at 686.

132. *Id.* at 669.

133. *See id.*

134. *See* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 219–24 (2d ed. 1996). The exact contours of the form and substance of executive agreements remain undefined. *See id.* at 224 (“If an agreement is within the President’s power, there seem to be no formal requirements as to how it shall be made. . . . [T]here is no reason why an executive agreement must be formal or even that it has to be in writing.”).

135. *See* KOH, *supra* note 58, at 128 (citing “statutory sunset provisions, reporting and consultation requirements, committee oversight procedures, legislative vetoes, and appropriations limitations”); LOBEL, *supra* note 28, at 401 (explaining that, under the general rules and tactical commands theory, the President traditionally implements and enforces broad congressional policy decisions, including those related to military affairs).

136. *See* LOBEL, *supra* note 28, at 411–12.

implementation of requirements for congressional notification and consultation, have emerged as both the most effective and the most popular congressional tools for checking the President's war powers. This section will describe several of the ways in which Congress has used these tools to attempt to shape national security policy.

1. Appropriations Riders As a Means of Congressional Oversight:  
The Boland Amendments and the Iran-Contra Affair

Appropriations riders, which contain specific conditions on the grant of funds and are inserted as amendments to large spending bills, give Congress an opportunity to more narrowly tailor the use of federal money.<sup>137</sup> As one scholar notes, this dimension of the power of the purse has been “one of the major factors in shaping and restricting presidential decision making with respect to the commitment of forces abroad.”<sup>138</sup> Congress has traditionally given the President much more discretion over the use of funds during times of emergency or conventional war than under circumstances of indefinite conflict or terrorist threat.<sup>139</sup> Riders to defense spending bills therefore have become more common over the last fifty years, as Congress has sought to exercise more control over small wars and covert activity.<sup>140</sup> The Iran-Contra Affair combined all of these elements and sparked a broader debate about the role of “restrictive national security appropriations” in shaping defense policy.<sup>141</sup>

The Reagan Administration's attempts to overthrow the Communist Sandinista regime in Nicaragua in the early 1980s were scandalous for several reasons.<sup>142</sup> Congress, concerned over reports that the White House was raising and training the anti-Sandinista Contra movement without appropriate oversight, passed an initial spending restriction in 1982.<sup>143</sup> This amendment to the DOD Appropriations Act prohibited the use of funds for military equipment, training, or other activities in support of any group not part of the Nicaraguan armed forces.<sup>144</sup>

Under the leadership of House Intelligence Committee Chair Edward Boland, Congress gradually tightened funding restrictions over the next

137. See BANKS & RAVEN-HANSEN, *supra* note 37, at 43–44.

138. JAMES P. TERRY, *THE WAR ON TERROR: THE LEGAL DIMENSION* 42 (2013).

139. See *id.* at 49 (“In wartime, the Congress has gladly delegated its responsibilities to the president. In periods of conflict or terrorist threats short of declared war, it has retained that level of control, through funding restrictions and other legislative enactments, necessary to ensure that vital national interests *are reflected* in the actions of the Commander-in-Chief.”).

140. See *id.* at 42–44 (describing the use of appropriations riders to affect U.S. activity throughout Africa, Southeast Asia, Southwest Asia, and the Soviet Union).

141. BANKS & RAVEN-HANSEN, *supra* note 37, at 137.

142. See KOH, *supra* note 58, at 101–16.

143. See S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 3 (1987) [hereinafter IRAN-CONTRA REPORT]. As Harold Koh explains, “The Iran-Contra affair occurred in two constitutional areas of shared congressional-executive authority—military aid and covert operations.” KOH, *supra* note 58, at 113.

144. See IRAN-CONTRA REPORT, *supra* note 143, at 3.

several years.<sup>145</sup> Congress eliminated all funding by 1984, declaring that no money designated for intelligence activities “may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.”<sup>146</sup> President Reagan signed these provisions into law without objection.<sup>147</sup>

Despite these restrictions, staff members of the National Security Council (a group known as “the Enterprise”) channeled money to the Contras as part of a larger scheme to also free U.S. hostages being held in Lebanon by Iranian-backed forces.<sup>148</sup> The Iran-Contra Affair prompted Congress to initiate an investigation into the executive branch’s apparent deceit and resolve potential constitutional issues.<sup>149</sup> The congressional committee concluded that the Enterprise executed a covert Contra aid program by raising “private and non-appropriated money[] and without the accountability or restrictions imposed by law on the CIA.”<sup>150</sup> Moreover, this was a program “that Congress thought it had prohibited.”<sup>151</sup> Aside from the conviction of one member of the Enterprise for the commission of several minor offenses, no legal consequences stemmed from the Iran-Contra Affair.<sup>152</sup> Congress issued a series of recommendations at the end of its report, reminding the White House that “Congress is the partner, not the adversary of the executive branch, in the formulation of policy” and calling for a more rigid system of presidential findings related to covert action.<sup>153</sup>

## 2. Consultation and Notification Requirements

A second method of congressional control over defense policy is the enactment of consultation and notification requirements, either through attachment to a spending bill or as stand-alone legislation.<sup>154</sup> When the political system is functioning as designed, the formal framework of consultation and notification is often complemented by a less rigid, more ad hoc consultative process between the executive and legislative branches that is “an essential unwritten ingredient in the national security process.”<sup>155</sup>

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145. *See id.*

146. DOD Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935 (1984).

147. *See* Barron & Lederman, *supra* note 29, at 1082.

148. *See* IRAN-CONTRA REPORT, *supra* note 143, at 4.

149. *Id.* at xv-xvi; *see also* LOUIS FISHER, PRESIDENTIAL WAR POWERS 180 (1995) (explaining that, in addition to spending non-appropriated funds, the executive branch usurped another congressional function by effectively issuing a letter of marque and reprisal to use private parties for military purposes); KOH, *supra* note 58, at 113 (President Reagan “denied Congress its constitutional entitlement to participate in the setting of broad foreign policy objectives as well as its attendant rights to information and consultation”).

150. IRAN-CONTRA REPORT, *supra* note 143, at 4.

151. *Id.*

152. *See* KOH, *supra* note 58, at 36.

153. IRAN-CONTRA REPORT, *supra* note 143, at 423-27.

154. *See* KOH, *supra* note 58, at 128.

155. BAKER, *supra* note 29, at 103.

Congress also must strike a balance between fulfilling its role as a representative body and observing the need for limited transparency in the national security context.<sup>156</sup> This section will examine two recent efforts by Congress to control presidential discretion through the use of reporting requirements.

*a. The War Powers Resolution*

Spurred by the mission creep of U.S. involvement in Vietnam, the War Powers Resolution was “the product of almost four decades of bipartisan effort to recapture legislative authority that had drifted to the President.”<sup>157</sup> The resolution declared that any foreign introduction of U.S. armed forces without a declaration of war would require the President to submit a report to congressional leaders within forty-eight hours.<sup>158</sup> The report must contain details about, at a minimum, the circumstances leading to the deployment, the constitutional and legislative authority under which the President is conducting the military operation, and an estimation of the involvement’s scope and duration.<sup>159</sup> This reporting requirement remains in effect for the duration of the engagement, during which the President must submit updates at least every six months.<sup>160</sup> Furthermore, the engagement must cease after sixty days unless Congress has declared war, been incapacitated, or voted to delay the deadline.<sup>161</sup>

The War Powers Resolution was controversial during its enactment and has been applied unevenly since.<sup>162</sup> The first test came in 1975, when President Gerald Ford initially sought authorization to evacuate the remaining U.S. personnel from Cambodia and South Vietnam, but, after growing impatient with congressional delays, unilaterally approved the evacuations under his executive authority to protect American lives.<sup>163</sup> Two missions to recover captured Americans, from the *Mayaguez* commercial ship under President Ford and the U.S. embassy in Iran under President Carter, have complied with the reporting requirements in letter but not in spirit.<sup>164</sup> In both cases, the White House circumvented

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156. *See id.*

157. FISHER, *supra* note 149, at 128.

158. *See* 50 U.S.C. § 1543(a) (2014). The statute makes exceptions for the military’s planned forward-deployment at any given time, waiving the reporting requirement if the troops are already present in a foreign country and will not be “substantially enlarge[d],” or if they are engaged in non-combat activities. *Id.* § 1543(a)(1)–(3).

159. *See id.* § 1543(a)(3)(A)–(C).

160. *See id.* § 1543(c).

161. *See id.* § 1544(b). The President may extend this window another thirty days if he determines “that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.” *Id.*

162. *See* FISHER, *supra* note 149, at 134–61.

163. *See id.* at 135–36.

164. *See id.*

congressional input by waiting to file the report until after the engagement had either ceased or “reached the point of no return.”<sup>165</sup>

*b. Intelligence Oversight*

Congress possesses similar tools for oversight of the intelligence community.<sup>166</sup> Passed in the wake of revelations about counterproductive covert actions in Latin America and Southeast Asia, the Intelligence Oversight Act of 1980<sup>167</sup> prohibits the President from authorizing a covert action without first making a formal determination that “such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States.”<sup>168</sup>

This finding must be submitted in writing to the congressional intelligence oversight committees prior to the initiation of the covert action, unless the President determines that “it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States.”<sup>169</sup> In that case, the President may inform only the chairs and ranking minority members of each intelligence committee, as well as the majority and minority leaders in both the House and the Senate, as long as he provides a written justification for doing so.<sup>170</sup> If the President complies with neither of these options, he still must inform the intelligence committees “in a timely fashion,” along with providing justification for not notifying them earlier.<sup>171</sup>

Over the years, the Intelligence Oversight Act has been just as riddled as the War Powers Resolution with noncompliance and arguments over separation of powers.<sup>172</sup> From early assertions that “[t]o the extent a covert

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165. *Id.* at 139. Prior to the Desert One raid to recover the U.S. personnel from Iran, “members of Congress, including the leadership, were not consulted or informed in advance of either the preparatory activities or the mission itself. In such a context, the constitutional moment occurred when the president considered and decided not to consult or advise the Congress of these actions.” BAKER, *supra* note 29, at 67.

166. These tools include authorization and appropriation, nomination of leaders, congressional hearings, investigations, treaty ratification, and the Government Accountability Office. See ERIC ROSENBAACH & AKI J. PERITZ, BELFER CTR. FOR SCI. & INT’L AFFAIRS, HARVARD KENNEDY SCH., CONFRONTATION OR COLLABORATION? CONGRESS AND THE INTELLIGENCE COMMUNITY 20–21 (2009), available at <http://belfercenter.ksg.harvard.edu/files/IC-book-finalasof12JUNE.pdf>; *Legislative Oversight of Intelligence*, CIA, <https://www.cia.gov/library/publications/additional-publications/the-work-of-a-nation/intelligence-oversight/legislative-oversight-of-intelligence.html> (last visited Mar. 25, 2015).

167. Pub. L. No. 96-450, 94 Stat. 1975, 1981–82 (codified as amended in 50 U.S.C.).

168. 50 U.S.C. § 3093(a) (2014); see also ROSENBAACH & PERITZ, *supra* note 166, at 28–30.

169. 50 U.S.C. § 3093(c)(1)–(2).

170. See *id.* § 3093(c)(2). This group comprises the so-called Gang of Eight. KOH, *supra* note 58, at 58.

171. 50 U.S.C. § 3093(c)(3).

172. See KOH, *supra* note 58, at 58–60; see also James F. Basile, *Congressional Assertiveness, Executive Authority and the Intelligence Oversight Act: A New Threat to the Separation of Powers*, 64 NOTRE DAME L. REV. 571, 580 (1989) (“[T]hose who conduct foreign policy cannot be subject to the regularity of legal norms. Quick action in response to

action is analogous to a military action, . . . the President as Commander-in-Chief retains complete control over” a given operation,<sup>173</sup> to debates over whether CIA drone strikes constitute covert actions,<sup>174</sup> the executive branch has repeatedly sought to confine the scope of congressional control over covert actions. Likewise, Congress has attempted to tie intelligence appropriations to committee oversight of CIA interrogation techniques and warrantless surveillance.<sup>175</sup>

### 3. Presidential Control of Wartime Prisoner Detention and Recovery Policy

Another area in which concerns over separation of powers have played out is the disposition and treatment of enemy captives during times of armed conflict, as well as the often-related efforts to recover U.S. captives.<sup>176</sup> Historical analysis is especially relevant here, as the controversy over which political branch should exert control over detainee policy has never come directly before the Supreme Court.<sup>177</sup> Further, as Justice Frankfurter wrote in *Youngstown*, “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President.”<sup>178</sup> Congressional deference to presidential decisions on the treatment and disposition of enemy captives and the proper methods of recovering American prisoners seems to provide just such a “gloss.”<sup>179</sup>

This section explores the history of American treatment of enemy captives and efforts at recovering U.S. servicemembers. These examples

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fluid situations cannot be slowed by the legal restraints normally imposed on other policy areas.”).

173. Barron & Lederman, *supra* note 29, at 1083–84 (quoting *Oversight Legislation: Hearings on S. 1721 and S. 1818 Before the S. Select Comm. on Intelligence*, 100th Cong. 181–82 (1987) (statement of Charles Cooper, Assistant Att’y Gen., Office of Legal Counsel)).

174. See Todd C. Huntley & Andrew D. Levitz, *Controlling the Use of Power in the Shadows: Challenges in the Application of Jus In Bello to Clandestine and Unconventional Warfare Activities*, 5 HARV. NAT’L SEC. J. 461, 467 (2014).

175. See ROSENBACH & PAVITZ, *supra* note 166, at 25.

176. The term “captive” is intentionally ambiguous, describing both prisoners of war, who must be afforded full protections under the United States’ international obligations, and other detainees, whose legal status is either uncertain or does not entitle them to the full extent of these protections. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *Geneva Convention*]. Additionally, “[t]he President’s power as Commander in Chief to dispose of the liberty of individuals captured during military engagements is not limited to those who are entitled to prisoner of war status.” Memorandum from Jay S. Bybee, Assistant Att’y Gen., Dep’t of Justice, to William J. Haynes II, General Counsel, Dep’t of Def. 20 (Mar. 13, 2002), available at <https://ccrjustice.org/files/memorandum03132002.pdf>.

177. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 636–37 (2006) (Kennedy, J., concurring) (explaining that the Court has jurisdiction over detainee controversies only if they involve conflicts over statutory regulations).

178. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

179. *Id.*; see also Pearlstein, *supra* note 18, at 629–30.

focus on nontraditional detainees while offering a comprehensive view of the longstanding tradition of presidential control over detainee policy in conflicts large and small, against a variety of both state and non-state actors, within the United States and around the world. The President often has executed prisoner transfers and releases as part of a broader effort to repatriate American captives, a policy over which he has consistently exercised exclusive control.

*a. The Revolutionary War*

Under the British model from which the colonists derived their understanding of a commander in chief, “the Crown had absolute authority to dispose as it saw fit of prisoners of war and other detainees.”<sup>180</sup> Once the Revolutionary War erupted, British field commanders, not their civilian counterparts, executed local control over POW policy by acting under the authority of the King.<sup>181</sup> As Commander in Chief of the Continental Army, George Washington mirrored this approach by taking responsibility for the treatment of over 14,000 captured enemy soldiers and sailors.<sup>182</sup> A system of local prisoner exchanges developed early in the Revolution and quickly became essential to the reciprocal treatment of POWs.<sup>183</sup> Within this system, senior officers “were usually exchanged by direct correspondence and agreements between General Washington” and British military leadership with little to no input from Congress.<sup>184</sup>

The only exception seems to have arisen in the case of the “Convention Army,” a unit of almost 6000 British, Hessian, and Canadian captives designated for transport to and release in Canada under an agreement reached in the field between American and British generals.<sup>185</sup> Congress, however, refused to acknowledge the agreement, likely balking at the sheer number of captives who would be set free and the gentlemanly circumstances under which it was negotiated.<sup>186</sup> Instead, “a jurisdictional dispute” emerged between Congress and the American general who

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180. John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1203 (2004). *But see* PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 168–74 (2010) (arguing that the British judiciary oversaw the detention conditions of prisoners of war and regularly considered applications for their release).

181. *See* Yoo, *supra* note 180, at 1204.

182. *See* ROBERT C. DOYLE, *THE ENEMY IN OUR HANDS: AMERICA’S TREATMENT OF ENEMY PRISONERS OF WAR FROM THE REVOLUTION TO THE WAR ON TERROR* 11–12 (2010).

183. *See id.* The exchange system, although decentralized, became the most efficient means for disposing of prisoners. *See* PAUL J. SPRINGER, *AMERICA’S CAPTIVES: TREATMENT OF POWS FROM THE REVOLUTIONARY WAR TO THE WAR ON TERROR* 41 (2010) (“[A]ny efforts made to utilize prisoners for any purpose other than exchange proved mostly counterproductive.”).

184. DOYLE, *supra* note 182, at 13. Indeed, captured “British officer[s] . . . often received paroles of honor within a designated area and, at their own expense, found quarters in private homes or inns while they awaited exchange.” *Id.* at 30; *see also* SPRINGER, *supra* note 183, at 15 (“Washington was under the command of Congress, but he was given great leeway in the daily operations of [prisoner] policies.”).

185. *See* DOYLE, *supra* note 182, at 15–16; SPRINGER, *supra* note 183, at 21–22.

186. *See* DOYLE, *supra* note 182, at 16; SPRINGER, *supra* note 183, at 22.

brokered the deal, with only the British leader and several of his staff officers—the most valuable detainees according to the metric in place at the time—being released.<sup>187</sup> Commanders gradually arranged for the exchange of the rest of the “Convention Army” over the course of the War, however, without further congressional interruption.<sup>188</sup> This episode is also notable for the intentional grouping of mercenary Hessian forces, who were not representing a state party to the conflict, with British regulars, who represented the Crown.<sup>189</sup>

### *b. The Civil War*

By the commencement of the Civil War, the trend toward decentralized military execution of detainee policy dictated by the President as Commander in Chief had been cemented through conflicts of various intensities.<sup>190</sup> As such, detainees held by the Union, whether military or civilian, were “subject to the exclusive control of the President” through the intermediaries of cabinet officials and field officers.<sup>191</sup>

Parole, or the release of enemy prisoners on the condition that they not reengage in hostilities, became customary during the first several years of the war despite Union refusal to recognize Confederate forces as representatives of a sovereign state.<sup>192</sup> In 1864, however, recognizing that paroles and exchanges undermined the Union’s manpower advantage, Secretary of War Edwin Stanton and General Ulysses Grant forbade both practices without any congressional consultation, notification, or opposition.<sup>193</sup>

### *c. World War II*

In the opening years of World War II, the Allied Powers mostly used enemy captives as cheap sources of labor on the front in which they were captured.<sup>194</sup> As the war progressed, President Franklin Roosevelt, in consultation with the Secretary of War and the newly created War Manpower Commission, experimented with a new policy: the transfer of captives from Europe to camps on American soil, primarily around cities

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187. DOYLE, *supra* note 182, at 16.

188. *See id.* at 25. “Congress issued contradictory orders that were often ignored by field commanders and state governments.” SPRINGER, *supra* note 183, at 15.

189. *See* DOYLE, *supra* note 182, at 23.

190. *See, e.g., id.* at 124–25 (describing the ordeals of members of the Arapaho, Comanche, Kiowa, and Cheyenne tribes who had been captured during the Indian Wars but could not “be held as prisoners of war or be indicted for anything at all”); Yoo, *supra* note 180, at 1206–10 (discussing prisoner policy during the Quasi-War with France in the late eighteenth century and concluding that Congress “provide[d] no substantive standards [for prisoner exchanges], and expressly le[ft] all prisoner exchanges to the complete discretion of the President”).

191. Yoo, *supra* note 180, at 1213.

192. *See* DOYLE, *supra* note 182, at 89, 92.

193. *See id.* at 94. The Union paroled or exchanged at least twice as many Confederate troops as the Confederacy did Union troops. *See id.* at 111.

194. *See* Yoo, *supra* note 180, at 1217–18.



along the eastern seaboard.<sup>195</sup> All told, the War Department housed 425,000 enemy captives in hundreds of camps throughout the United States, with German soldiers comprising the majority of the captured population.<sup>196</sup> This system remained in effect for the duration of the war without any congressional opposition, despite repeated escapes and the heightened risk of domestic sabotage.<sup>197</sup>

*d. The Vietnam War*

Starting with the Westmoreland-Co Agreement in 1965, the United States contracted to transfer all enemy captives in the Vietnam War, regardless of status, to South Vietnamese control.<sup>198</sup> This development, a formal arrangement between the commander of American forces in country and the South Vietnamese Minister of Defense, marked a continuation of the overall trend toward local or regional military control over enemy captives in support of a broader policy articulated at the executive level.<sup>199</sup>

Once this framework had been established, American officials began to pursue the return of American captives.<sup>200</sup> From covert raids to more transparent measures such as exchanges, no option seemed to be completely off the table.<sup>201</sup> One State Department proposal included offering ransom by transferring funds directly to the North Vietnamese in exchange for the release of American prisoners.<sup>202</sup> The Joint Chiefs of Staff immediately rejected the idea, however, citing concerns over the dangerous precedential value and the propaganda exploitations of such an approach.<sup>203</sup> As one historian notes, “[a]doption of ransom as the official policy of the U.S. government received no further serious consideration, then or later.”<sup>204</sup>

Prisoner exchanges offered a more viable option, although only after the United States offered a clandestine channel for negotiations to take place with the Viet Cong.<sup>205</sup> When the South Vietnamese government found out about the negotiations, however, the United States denied any involvement and reiterated its refusal to negotiate with non-state actors like the Viet Cong.<sup>206</sup> Instead, reciprocal release, “a de facto, informal exchange” in

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195. See DOYLE, *supra* note 182, at 179–80; SPRINGER, *supra* note 183, at 151–61.

196. See Arnold Kramer, *Japanese Prisoners of War in America*, 52 PAC. HIST. REV. 67, 67 (1983).

197. See DOYLE, *supra* note 182, at 182, 193–94; SPRINGER, *supra* note 183, at 155–61.

198. See VERNON E. DAVIS, *THE LONG ROAD HOME: U.S. PRISONER OF WAR POLICY AND PLANNING IN SOUTHEAST ASIA* 91–92 (2000). The United States recognized neither the Communist government’s regular soldiers nor the Viet Cong as sovereign state actors. See DOYLE, *supra* note 182, at 269.

199. See DAVIS, *supra* note 198, at 91.

200. See *id.* at 85–112.

201. See generally GEORGE J. VEITH, *CODE-NAME BRIGHT LIGHT: THE UNTOLD STORY OF U.S. POW RESCUE EFFORTS DURING THE VIETNAM WAR* (1998).

202. See DAVIS, *supra* note 198, at 104–05.

203. See *id.* at 104.

204. *Id.* at 105.

205. See *id.* at 101–02.

206. See *id.* at 103. As a result, the release of only two Americans could definitively be traced to these efforts. See *id.*

which “one party to a conflict returns one or more prisoners of war to the other side in the hope that the enemy will respond by freeing a corresponding number of captives,” became the rule for the rest of the war.<sup>207</sup> This system tilted mostly in favor of the Northern Vietnamese and Viet Cong, many more of whom were released than Americans and South Vietnamese.<sup>208</sup>

In terms of POW policy during the Vietnam War, congressional action was initially limited to comments from “individual members, speaking about the problems of POW/MIA families among their constituencies or reacting to an isolated event in the current news.”<sup>209</sup> Starting in 1969 with the implementation of DOD’s “Go Public Campaign,”<sup>210</sup> Congress used rallies, floor speeches, and formal statements to try to raise awareness of the abuses being suffered by American captives.<sup>211</sup> This movement eventually culminated in the passage, unanimously in both Houses, of a resolution protesting prisoner treatment and urging the North Vietnamese government to honor the framework established in the Geneva Conventions.<sup>212</sup> The resolution also “approve[d] and endorse[d] efforts by the United States Government” to work toward the release of American servicemembers, even though at that point the executive branch continued to handle all negotiations.<sup>213</sup> This trend continued throughout the rest of the peace process, which involved extensive discussions on the proper disposition of captured servicemembers.<sup>214</sup> Although some members of Congress travelled to Paris to participate in negotiations, they did so as individuals.<sup>215</sup> Institutional participation by Congress never rose to the level of negotiating or overseeing U.S. recovery efforts.<sup>216</sup>

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207. *Id.* at 90; *see also* SPRINGER, *supra* note 183, at 188.

208. *See* DAVIS, *supra* note 198, at 93 (“[T]he U.S. reciprocity policy, when pursued in tandem with a refractory South Vietnamese government, could hardly be counted a success.”); DOYLE, *supra* note 182, at 291.

209. DAVIS, *supra* note 198, at 211.

210. *Id.* at 199.

211. *Id.* at 211.

212. *See id.* at 212.

213. *Id.*; *see also id.* at 453–90. These negotiations included secret meetings between National Security Advisor Henry Kissinger and high-level Vietnamese officials of which Congress was unaware. *See id.* at 468, 470. Seven months later, in October 1970, President Nixon announced a five-part plan for peace with the North Vietnamese, the last prong of which included “the immediate and unconditional release of all prisoners of war held by both sides,” again without congressional objection. *Id.* at 539.

214. “As the president’s plenipotentiary in the negotiations, Kissinger retained exclusive control.” *Id.* at 489. Senator George S. McGovern, in acknowledging that the President retained control over prisoner repatriation policy under his authority as Commander in Chief, stated that “[i]n a very real sense President Nixon holds the key to the jail cells of Hanoi.” *Id.* at 471.

215. *See id.* at 214.

216. *See id.* at 486 (explaining that the Four-Party Joint Military Commission, staffed by representatives from DOD, and the International Commission of Control and Supervision, which did not have any American members, arranged the logistics of prisoner returns to the United States and North Vietnam).

*e. The Global War on Terror Before 2009*

The Global War on Terror, commenced after the attacks of September 11, 2001, has been no exception to the historical practice of presidential discretion in handling detainee and POW exchange policies.<sup>217</sup> After some internal debate, the administration of President George W. Bush declared that al Qaeda and Taliban forces taken captive in Afghanistan were non-state actors and therefore not privy to the same protections as POWs.<sup>218</sup> Housed at Guantánamo Bay, the detainees dwelled in legal limbo as the administration struggled to define which protections it would afford them instead of those granted by the Geneva Conventions.<sup>219</sup> Congress remained on the sideline for much of this conversation, passing the Detainee Treatment Act<sup>220</sup> and Military Commissions Act<sup>221</sup> only after the revelation of prisoner abuse at Abu Ghraib and the striking down by the Supreme Court of the judicial procedures settled on by the executive branch, respectively.<sup>222</sup>

Indeed, “[t]o the limited extent that the legislative body was involved in detention policy, Congress cooperated with the administration in the effort . . . to give the president maximum flexibility and discretion to deal with detainees as he saw fit.”<sup>223</sup> From the first use of Guantánamo as a detention facility in January 2002 until the establishment of Combatant Status Review Tribunals three years later, the President transferred 142 detainees to other countries without any congressional input or notification.<sup>224</sup> In total, the Bush Administration transferred over 500 detainees from Guantánamo to foreign custody,<sup>225</sup> with Congress “quick to give the President whatever authority he asked for, exercising only the most modest oversight” of detainee transfers.<sup>226</sup> This policy of acquiescence changed almost immediately after President Obama took office, as members

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217. See Yoo, *supra* note 180, at 1235.

218. See KAREN GREENBERG, *THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS* 2-3 (2009); Neal Richardson & Spencer Crona, *Detention of Terrorists As Unlawful Combatants and Their Trial by American Military Commissions*, in *LAW IN THE WAR ON INTERNATIONAL TERRORISM* 123, 130-32 (Ved P. Nanda ed., 2005); see also Manooher Mofidi & Amy E. Eckert, “Unlawful Combatants” or “Prisoners of War”: *The Law and Politics of Labels*, 36 *CORNELL INT'L L.J.* 59 (2003) (analyzing practical repercussions of the administration's decision).

219. See SPRINGER, *supra* note 183, at 196-97; see also Gregory P. Noone et al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 *NAVAL L. REV.* 1, 19-21 (2004) (describing the use of naval vessels as temporary detainee sites during the early phases of Operation Iraqi Freedom).

220. Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified in 42 U.S.C. §§ 2000dd, 2000dd-1).

221. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10 U.S.C.).

222. See David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash over Detainees and the Closure of Guantánamo*, 74 *U. PITT. L. REV.* 179, 187-89 (2012).

223. *Id.* at 183-84.

224. See *id.* at 185-86.

225. See Exec. Order No. 13,492, 3 C.F.R. 203 (2009).

226. Frakt, *supra* note 222, at 188.

of Congress expressed concern over the President's executive order requiring the closure of Guantánamo by January 2010.<sup>227</sup>

II. DID THE PRESIDENT HAVE THE CONSTITUTIONAL AUTHORITY TO EXCHANGE TALIBAN DETAINEES FOR AN AMERICAN PRISONER OF WAR DESPITE CONGRESSIONAL LIMITATIONS ON THE TRANSFER OR RELEASE OF GUANTÁNAMO DETAINEES?

The transfer of one million dollars and five Taliban detainees to Qatar in exchange for the release of Sergeant Bergdahl seems to fall into the third *Youngstown* category (i.e., executive authority at its nadir) because it appears to contravene express congressional will. The power to negotiate for the release of American prisoners of war, however, always has fallen squarely within the President's power as Commander in Chief,<sup>228</sup> as has his ability to determine the disposition of enemy captives.<sup>229</sup> There would be no question of the exchange's constitutionality had Congress not attached funding or notification restrictions to the transfer of detainees from Guantánamo. Based on this, which authority takes priority, Congress's power to spend or the President's power as Commander in Chief?

Part II.A considers the origins of the conflict between the Obama Administration and Congress over the transfer of detainees from Guantánamo to either domestic prisons or foreign control and describes the legislative environment underlying the passage of the 2014 NDAA. Part II.B looks at the Bergdahl-Taliban exchange itself, which was the culmination of several years of negotiation between the United States and the Taliban. Part II.C surveys the immediate congressional and executive responses to the exchange before addressing the competing constitutional claims made by Congress and the President.

A. *Congressional Attempts to Control Detainee Policy Through Its Power of the Purse*

The use of facilities at the American naval station at Guantánamo Bay for the detention of captives in the Global War on Terror was controversial from the start.<sup>230</sup> After diplomatic and security concerns led to the rejection of prisons throughout Eastern Europe, Southwest Asia, the Pacific, and even onboard ships at sea, the State Department also recoiled at transferring detainees to American soil.<sup>231</sup> The naval base at Guantánamo Bay, on the

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227. *See id.* at 192–93.

228. *See supra* Part I.C.3.

229. *See* Pearlstein, *supra* note 18, at 629. *But see* Frakt, *supra* note 222, at 233–37 (arguing that Congress has asserted control over detainee policy throughout U.S. history); Saikrishna Bangalore Prakash, *The Separation and Overlap of Military Powers*, 87 TEX. L. REV. 299, 304, 321–24 (2008) (concluding that Congress has ultimate authority over the scope of the President's powers as Commander in Chief).

230. *See* GREENBERG, *supra* note 218, at 21; BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 72–78 (2008).

231. *See* GREENBERG, *supra* note 218, at 4–6 (describing consideration of plans to transport several hundred al Qaeda and Taliban detainees to federal prisons in New York or military briggs in South Carolina and Kansas).

other hand, possessed several unique features—geographic isolation, preexisting infrastructure, and freedom from diplomatic wrangling with a potential host country—that could prove beneficial as the United States sorted out the detainees’ legal status.<sup>232</sup> As Secretary of Defense Donald Rumsfeld explained, “I would characterize Guantánamo Bay, Cuba, as the least worst place we could have selected.”<sup>233</sup>

Over the next several years, legal and human rights analysts challenged both the conditions of the detention site and the nature of the detention itself.<sup>234</sup> By the 2008 election, the issue had attracted so much attention that closing Guantánamo became a core component of then-candidate Barack Obama’s platform.<sup>235</sup> Seeking to fulfill his campaign promises, President Obama issued an executive order on his second full day in the White House directing the closure of the detention facilities at Guantánamo Bay within a year.<sup>236</sup> Obama also ordered a review of the detainees’ cases, with an eye toward filtering out detainees who no longer posed a threat or would not eventually be prosecuted.<sup>237</sup> Obama’s decision was praised by human rights groups but condemned by Republicans in Congress, who feared that the new policy could lead to the transfer of detainees to the United States.<sup>238</sup>

Part II.A.1 examines the ways in which Congress enshrined its opposition to Guantánamo’s closure in defense spending bills throughout Obama’s first term. Part II.A.2 looks specifically at the 2014 NDAA, which the administration allegedly violated by failing to notify Congress thirty days before transferring five Taliban detainees as part of the Bergdahl exchange.

#### 1. The Increasingly Contentious Legislative Environment Surrounding Guantánamo Detainees: 2009–2013

The program initially proceeded according to plan as various countries agreed to accept former Guantánamo detainees, and citizens of Afghanistan, Chad, Iraq, Kuwait, Saudi Arabia, Somalia, and Yemen were repatriated by their country of origin.<sup>239</sup> However, likely in response to the federal trial of

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232. *See id.* at 6–7.

233. Donald H. Rumsfeld, Sec’y of Def., Dep’t of Def., DOD News Briefing (Dec. 27, 2001), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2696>.

234. *See, e.g.*, WITTES, *supra* note 230, at 72–78.

235. *See The Candidates on Military Tribunals and Guantánamo Bay*, COUNCIL ON FOREIGN RELATIONS (Aug. 24, 2008), <http://www.cfr.org/world/candidates-military-tribunals-guantanamo-bay/p14751>.

236. *See* Exec. Order No. 13,492, 3 C.F.R. 203, 205 (2009).

237. *See id.* at 204.

238. *See* Peter Baker & David Johnston, *Guantánamo Deadline May Be Missed*, N.Y. TIMES, Sept. 29, 2009, at A27; Mark Mazzetti & William Glaberson, *Obama Will Shut Guantánamo Site and C.I.A. Prisons*, N.Y. TIMES, Jan. 22, 2009, at A1.

239. *See* Frakt, *supra* note 222, at 195–96; *The Guantánamo Docket: Timeline: 2009*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/timeline/2009> (last visited Mar. 25, 2015).

one of the embassy bombers,<sup>240</sup> Congress used the 2009 Supplemental Appropriations Act to prohibit the use of defense funds for the release or transfer of any Guantánamo detainees “into the continental United States, Alaska, Hawaii, or the District of Columbia.”<sup>241</sup>

The Act further required the President to submit—both to Congress and to the governor of the proposed host state—a plan for relocation or transfer to an American prison, taking into account such factors as cost and risk to national security.<sup>242</sup> The statute also placed limitations on the transfer of any detainee to his country of origin or any other foreign country, although the fifteen-day notification requirement for doing so was a significantly lower barrier than that applied to domestic transfers.<sup>243</sup> The President did not raise any objections to these measures in his signing statement.<sup>244</sup>

The effort to close Guantánamo lost significant momentum after an attempted terrorist attack on December 25, 2009, caused Obama to suspend the repatriation of scores of detainees to Yemen.<sup>245</sup> The flood of transfers and releases from Guantánamo, which peaked at 122 in 2007,<sup>246</sup> slowed to a trickle by 2010, when only twenty-four detainees left the compound permanently,<sup>247</sup> and dried up completely in 2011, when just one detainee was transferred (and none after January).<sup>248</sup> This trend likely reflected growing congressional opposition to such transfers.<sup>249</sup>

#### *a. The 2010 and 2011 NDAA's*

The 2010 NDAA included the same consultation and notification requirements contained in the 2009 Supplemental Appropriations Act, but it

240. See, e.g., Josh Gerstein, *Ahmed Ghailani Verdict Stirs Debate*, POLITICO (Jan. 26, 2011, 6:38 AM), <http://www.politico.com/news/stories/0111/48176.html>.

241. Supplemental Appropriations Act, Pub. L. No. 111-32, § 14103(a), 123 Stat. 1859, 1920 (2009). This restriction stood in marked contrast to the importation of hundreds of thousands of enemy captives into the United States during World War II. See *supra* Part I.C.3.c.

242. See § 14103(d), 123 Stat. at 1920–21.

243. See § 14103(e), 123 Stat. at 1921.

244. See Presidential Statement on Signing the Supplemental Appropriations Act of 2009, 1 PUB. PAPERS 910 (June 24, 2009). For a discussion of the validity of presidential signing statements, see Louis Fisher, *Signing Statements: Constitutional and Practical Limits*, 16 WM. & MARY BILL RTS. J. 183 (2007).

245. See Andrea J. Prasow, *The Yemenis at Guantánamo*, SLATE (Mar. 30, 2014, 8:15 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/03/salim\\_hamdan\\_and\\_the\\_yemeni\\_prisoners\\_who\\_can\\_t\\_leave\\_the\\_prison\\_at\\_guant.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/03/salim_hamdan_and_the_yemeni_prisoners_who_can_t_leave_the_prison_at_guant.html). Congress did not object to this unilateral exercise of presidential discretion over detainee policy, presumably because Obama was deciding to retain control over the detainees rather than send them back to Yemen. See *id.*

246. See *The Guantánamo Docket: Timeline: 2007*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/timeline/2007> (last visited Mar. 25, 2015).

247. See Frakt, *supra* note 222, at 202; *The Guantánamo Docket: Timeline: 2010*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/timeline/2010> (last visited Mar. 25, 2015).

248. See Frakt, *supra* note 222, at 203; *The Guantánamo Docket: Timeline: 2011*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/timeline/2011> (last visited Mar. 25, 2015).

249. See, e.g., Frakt, *supra* note 222, at 202, 205–06, 217–18 (identifying congressional restrictions as one of several factors contributing to the decline in transfers).

also lifted the repatriation ban.<sup>250</sup> This decision was indicative of Congress's underlying emphasis on barring transfers to the United States, which it considered an unnecessary security risk.<sup>251</sup> The following year, in the 2011 NDAA, Congress responded to the Justice Department's proposal to federally prosecute Khalid Sheik Mohammed, "the self-described mastermind of the Sept[ember] 11 attacks,"<sup>252</sup> by specifically naming him as one of the detainees who may not be transferred to America.<sup>253</sup> Additionally, section 1032 of the 2011 NDAA prohibited the use of funds for the construction of detainee facilities within the United States, again as an attempt to forestall Obama's announced plan to bring some of the detainees to U.S. territory.<sup>254</sup>

Yet the most significant change to congressional policy that year came in section 1033, which established strict certification requirements for the transfer of detainees to foreign countries.<sup>255</sup> Under this provision, the Secretary of Defense, with the concurrence of the Secretary of State, would have to ensure that the proposed recipient of the detainee, whether or not it was his country of origin, could effectively control the detainee and prevent him from posing a threat to the United States.<sup>256</sup> This certification was due no later than thirty days before the proposed transfer.<sup>257</sup> The only exception applied to transfers made "to effectuate an order affecting the disposition of the individual that is issued by a court or competent tribunal of the United States having lawful jurisdiction," which would only require "prompt[]" congressional notification.<sup>258</sup>

President Obama formally expressed his displeasure with these constraints in the signing statement that accompanied the 2011 NDAA.<sup>259</sup> He first deplored section 1032, which refused funding for construction or modification of detention centers in the United States, as "a dangerous and unprecedented challenge to critical executive branch authority to determine

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250. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041(b), (d), 123 Stat. 2190, 2455 (2009).

251. See, e.g., 156 CONG. REC. H8772-73 (daily ed. Dec. 17, 2010) (statement of Rep. Phil Gingrey) ("Those that seek to do us harm should never be transferred to our soil or tried in our Federal court system. . . . Simply put, the American people believe that bringing Guantánamo Bay detainees to American soil—for any purpose—puts Americans at risk and is a national security threat.").

252. Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1.

253. See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1034, 124 Stat. 4137, 4353 (2011). Some debate continues over whether this approach constitutes a "bill of attainder," which the Constitution expressly forbids Congress from issuing. See, e.g., Frakt, *supra* note 222, at 245-48 (evaluating the strengths and weaknesses of the bill of attainder argument).

254. See Pub. L. No. 111-383, § 1032, 124 Stat. at 4351; Peter Slevin, *Illinois Prison Picked for Detainees: Congress Must Vote on Plan*, WASH. POST, Dec. 16, 2009, at A3.

255. See Pub. L. No. 111-383, § 1033, 124 Stat. at 4351-52.

256. See *id.* § 1033(b), 124 Stat. at 4351-52.

257. See *id.* § 1033(a)(1), 124 Stat. at 4351-52.

258. *Id.* § 1033(a)(2), 124 Stat. at 4351-52.

259. Presidential Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 1 PUB. PAPERS 7 (Jan. 7, 2011) [hereinafter 2011 Statement].

when and where to prosecute Guantánamo detainees.”<sup>260</sup> With regard to section 1033, which laid out the certification requirements for transfer to foreign countries, Obama admonished Congress for “interfer[ing] with the authority of the executive branch to make important and consequential foreign policy and national security determinations regarding whether and under what circumstances” the President may transfer detainees.<sup>261</sup> Obama then placed the transfers within the context of his broader power to conduct foreign affairs, arguing that the executive branch must retain “the ability to act swiftly and to have broad flexibility” in negotiating with other countries, a power that section 1033 severely restricted.<sup>262</sup> Acknowledging the need to fund military operations in the midst of two wars, the President still signed the bill despite these objections, although he also vowed to dampen their impact while seeking their repeal.<sup>263</sup>

*b. The 2012 NDAA*

The 2012 NDAA included all of these provisions in exact or slightly modified form, even after some of the concerns Congress was guarding against dissipated.<sup>264</sup> In April 2011, the Department of Justice announced that it would no longer prosecute Khalid Sheik Mohammed and four of his coconspirators in federal district court, “reluctantly” handing the case back to DOD to be pursued via military commission instead.<sup>265</sup> Attorney General Eric Holder cited congressional opposition, and specifically the “series of barriers” erected through the preceding NDAs, as the primary reason for DOJ’s shift in strategy.<sup>266</sup> Senator Mitch McConnell, the Senate minority leader at the time, welcomed the news, announcing on the floor that Congress had achieved its primary objective of isolating dangerous detainees from the United States and keeping them out of the federal court system, where he feared they would be afforded too many protections.<sup>267</sup> He did not mention the transfer of detainees abroad, either for repatriation

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260. *Id.* For additional analysis, see Frakt, *supra* note 222, at 214–218 (“[T]he consensus among national security scholars and administration officials on the cumulative effect of these conditions is that Congress has made it nearly impossible to release detainees, at least to their home country.”).

261. 2011 Statement, *supra* note 259, at 7.

262. *Id.*

263. *See id.* at 7–8.

264. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1026 (prohibiting funds for construction or modification of detention facilities in the United States), § 1027 (prohibiting funds for transfer or release within the United States), § 1028 (requiring certification of recipient country and thirty days prior notification of proposed transfer), 125 Stat. 1298, 1566–69 (2011).

265. Peter Finn, *Sept. 11 Suspects Will Be Tried by a Military Panel*, WASH. POST, Apr. 5, 2011, at A1.

266. *Id.*

267. *See* 157 CONG. REC. S2064 (daily ed. Apr. 4, 2011) (“For the sake of the safety and the security of the American people, I am glad the President reconsidered his position on how and where to try these detain[ees].”).



or supervision by a third country, which seemed to have remained at most an ancillary concern.<sup>268</sup>

The Office of Management and Budget (OMB) voiced the White House's disapproval of the 2012 NDAA much earlier in the legislative process, issuing a "Statement of Administration Policy" regarding House Resolution 1540 (the precursor to the NDAA) in May 2011.<sup>269</sup> Reinforcing many of the arguments made in President Obama's earlier signing statement, OMB concluded that the proposed restrictions on the transfer of detainees to foreign countries would "interfere[] with the authority of the Executive branch to make important foreign policy and national security determinations regarding whether and under what circumstances such transfers should occur."<sup>270</sup> OMB also objected to the new review system, arguing that it would unnecessarily disrupt the framework the President instituted with his 2009 executive order.<sup>271</sup> In November, OMB issued a similar statement in response to Senate Resolution 1867, echoing the claims of interference with executive branch authority and cautioning that "the detention provisions in this bill micromanage the work of our experienced counterterrorism professionals, including our military commanders, intelligence professionals, seasoned counterterrorism prosecutors, or other operatives in the field."<sup>272</sup>

President Obama signed the 2012 NDAA into law on December 31, 2011, using his signing statement to further explain several of his reservations.<sup>273</sup> For the first time, President Obama also directly raised a separation of powers argument, writing that the legislature's move amounted to a usurpation of his executive authority while also advising Congress that his administration would interpret the NDAA provisions to avoid such a constitutional conflict.<sup>274</sup> The President's claims, however, did not speak to the congressional use of funding restrictions to achieve its ends of detainee policy oversight.<sup>275</sup> Meanwhile, four detainees left Guantánamo in 2011: one was transferred to Algeria and three died in detention.<sup>276</sup>

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268. *See id.*

269. The report also addressed other hot-button issues at the time, such as the pursuit of an alternative engine design for the F-35 Joint Strike Fighter and congressional efforts to impede the repeal of the Don't Ask, Don't Tell Repeal Act of 2010. *See generally* Statement of Admin. Policy, Office of Mgmt. & Budget, H.R. 1540—National Defense Authorization Act for FY 2012 (May 24, 2011), *available at* [https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r\\_20110524.pdf](https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf).

270. *Id.* at 2.

271. *See id.* at 2–3.

272. Statement of Admin. Policy, Office of Mgmt. & Budget, S. 1867—National Defense Authorization Act for FY 2012 (Nov. 17, 2011), *available at* [https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s\\_20111117.pdf](https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf).

273. Presidential Statement by the President on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 1 (Dec. 31, 2011).

274. *See id.*

275. *See id.*

276. *See The Guantánamo Docket: Timeline: 2011*, *supra* note 248.

c. *The 2013 NDAA*

The following year brought more of the same. The House introduced several new reporting requirements, such as notification within five days when individuals were detained onboard naval vessels<sup>277</sup> and notification no later than ten days before the transfer of detainees from a coalition facility in Parwan, Afghanistan, to either Afghan or foreign control.<sup>278</sup> OMB issued its response in May 2012, reminding Congress that the Obama Administration still opposed restrictions on the President's discretion to transfer or release detainees from Guantánamo.<sup>279</sup> Section 1041 (later ratified as section 1025), which restricted transfers from Parwan, particularly incensed the White House, which called it "an unprecedented, unwarranted, and misguided intrusion into the military's detention operations" that could "micromanage the decisions of experienced military commanders and diplomats . . . [and] compromise the Executive's ability to act swiftly and flexibly during a critical time for transition in Afghanistan."<sup>280</sup> This assessment seemed to be validated by reports that spring on the local, informal prisoner exchanges that regularly took place during Operations Enduring Freedom and Iraqi Freedom.<sup>281</sup>

The Senate's version of the bill, as well as the final form presented to the President, kept these new regulations mostly in place.<sup>282</sup> So, once again, President Obama signed the 2013 NDAA but expressed serious concerns about some of its provisions.<sup>283</sup> Section 1025 posed the most egregious constitutional violation, he posited, because it "could interfere with [his] ability as Commander in Chief to make time-sensitive determinations about the appropriate disposition of detainees."<sup>284</sup> The new requirements also ignored the long tradition of "[d]ecisions regarding the disposition of detainees captured on foreign battlefields" being made by military commanders and national security professionals, not members of Congress.<sup>285</sup> Finally, the President reiterated his objections to the

277. See H.R. 4310, 112th Cong. § 1040(a) (2012).

278. See *id.* § 1041.

279. See Statement of Admin. Policy, Office of Mgmt. & Budget, H.R. 4310—National Defense Authorization Act for FY 2013 (May 15, 2012), available at [https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr4310r\\_20120515.pdf](https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr4310r_20120515.pdf).

280. *Id.*

281. See, e.g., Michael Hastings, *America's Last Prisoner of War*, ROLLING STONE, June 7, 2012, available at <http://www.rollingstone.com/politics/news/americas-last-prisoner-of-war-20120607> ("Prisoner exchanges take place at the ground level all the time in Afghanistan, and Gen. David Petraeus, now the head of the CIA, has pointed out in discussions about [Bergdahl] that U.S. forces made distasteful swaps in Iraq.").

282. Notification for at sea detention extended to thirty days, for example. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1025, 126 Stat. 1632, 1913 (2012).

283. See Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 DAILY COMP. PRES. DOC. 1 (Jan. 2, 2013) [hereinafter 2013 Statement].

284. *Id.*

285. *Id.* For further analysis, see also REISS, *supra* note 71, at 11–12; Hastings, *supra* note 281; *supra* Part I.C.

restrictions on transfers or releases from Guantánamo because they hindered his ability to conduct foreign affairs and act decisively as Commander in Chief.<sup>286</sup> Four detainees were transferred from Guantánamo in 2012: one was repatriated to his home country of Sudan, one was transferred to Canada, and two resettled in El Salvador after being released by a federal judge.<sup>287</sup> The President seemed to have complied with the congressional notification requirements in each of these cases.<sup>288</sup>

## 2. The 2014 NDAA: Congressional Limitations on Guantánamo Transfers and the Obama Administration's Response

The 2014 NDAA loosened some of the transfer restrictions enacted in 2012 and 2013, most notably the prohibition on transfers to countries with even a single instance of recidivism among its hosted detainees.<sup>289</sup> Congress also enumerated several factors to be considered by the Secretary of Defense prior to determining the suitability of a detainee for transfer or release, which included the recommendations of the President's review task force.<sup>290</sup> Recognizing that these modifications were "an improvement over current law and . . . a welcome step toward closing" the Guantánamo detention facility, the President still objected to the notification requirement because of its potential to hinder negotiations with foreign countries regarding detainee transfers.<sup>291</sup> Obama also questioned the constitutionality of section 1034, which denied funds for the transfer of any detainees to the United States, on the grounds that its interference with his executive discretion on where to prosecute alleged terrorists violated separation of powers principles.<sup>292</sup> Just as in previous years, the President did not heed calls from his advisors to veto the bill,<sup>293</sup> instead writing that the

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286. 2013 Statement, *supra* note 283.

287. See Charlie Savage, *Pair of Guantánamo Detainees Freed, the First in 15 Months*, N.Y. TIMES, Apr. 20, 2012, at A8; *The Guantánamo Docket: Timeline: 2012*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/timeline/2012> (last visited Mar. 25, 2015).

288. See H.R. Res. 644, 113th Cong. (Sept. 9, 2014) ("Whereas the Obama administration has complied with the law in all other detainee transfers from GTMO since the date of the enactment of prevailing law . . ."); Savage, *supra* note 287 (noting that Congress knew about the September detainee transfer to Canada as early as April).

289. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1035, 127 Stat. 672, 851-53 (2013).

290. *Id.* § 1035(c), 127 Stat. at 851-53.

291. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2014, 2013 DAILY COMP. PRES. 1 (Dec. 26, 2013) [hereinafter 2014 Statement]. President Obama also reiterated several policy arguments for the closure of Guantánamo, such as its cost, effect on U.S. standing abroad, and incitement of violent extremists. See *id.* The President echoed this theme in his 2014 State of the Union Address, the first time he mentioned Guantánamo in that forum since his speech to the joint session of Congress five years earlier. President Barack Obama, State of the Union Address (Jan. 28, 2014); President Barack Obama, Address to Joint Session of Congress (Feb. 24, 2009).

292. See 2014 Statement, *supra* note 291.

293. OMB argued that transfer restrictions "in the context of an ongoing armed conflict may interfere with the Executive Branch's ability to determine the appropriate disposition of detainees and to make important foreign policy and national security determinations." Statement of Admin. Policy, Office of Mgmt. & Budget, H.R. 1960—National Defense Authorization Act for FY 2014 (June 11, 2013), *available at*

Administration would implement sections 1034 and 1035 “in a manner that avoids the constitutional conflict.”<sup>294</sup>

The 2014 Consolidated Appropriations Act,<sup>295</sup> passed shortly after the NDAA and including what the GAO refers to as the Department of Defense Appropriations Act, reinforced many of the NDAA’s transfer restrictions.<sup>296</sup> Of note, section 8111 of the CAA granted the Pentagon permission to use its appropriated funds to transfer a Guantánamo detainee to a foreign country only if the Secretary of Defense complied with section 1035 of the NDAA.<sup>297</sup> Section 1035, in turn, required congressional notification no later than thirty days before the transfer, including “[a] detailed statement of the basis for the transfer or release[,] . . . [a]n explanation of why the transfer or release is in the national security interests of the United States[,] . . . [and a] description of any actions taken to mitigate the risks of reengagement by the individual to be transferred or released.”<sup>298</sup>

These requirements, listed under the “Counterterrorism” subtitle of Section X in the NDAA, explicitly link congressional concerns about the closure of Guantánamo with the broader effort against al Qaeda and related groups.<sup>299</sup> The primary nonpolitical motivation for keeping Guantánamo open appeared to have been fear of recidivism, with members of Congress citing various cases of detainees returning to the battlefield after being released.<sup>300</sup> Although ongoing assessments by the Director of National Intelligence undermined many of these claims by showing that the recidivism rate had declined steeply since President Obama took office and instituted the review measures contained in Executive Order 13492,<sup>301</sup>

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[https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr1960r\\_20130611.pdf](https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr1960r_20130611.pdf).

294. 2014 Statement, *supra* note 291.

295. Pub. L. No. 113-76, div. C, tit. VIII, § 8111, 128 Stat. 5, 131 (2014).

296. *See id.*

297. *See id.*

298. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1035(d)(1)–(3), 127 Stat. 672, 853 (2013). This section designated each House’s Armed Services, Foreign Affairs/Relations, Appropriations, and Intelligence Committees as the recipients of the notification. *Id.* § 1035(e), 127 Stat. at 853.

299. *Id.* §§ 1031–1039, 127 Stat. at 849–856.

300. *See, e.g.*, 159 CONG. REC. S8162 (daily ed. Nov. 19, 2013) (remarks of Sen. Saxby Chambliss) (“The recidivism rate is nearly 29 percent and has been climbing steadily since detainees began being released from Guantanamo.”) Senator Chambliss also alleged that former Guantánamo detainees had connections to al Qaeda in the Arabian Peninsula and the 2012 attack on the U.S. Embassy in Benghazi, Libya. *See id.*

301. *See Summary of the Reengagement of Detainees Formerly Held at Guantánamo Bay, Cuba*, DIR. OF NAT’L INTELLIGENCE (Sept. 2013), available at [http://www.dni.gov/files/documents/September\\_2013\\_GTMO\\_Reengagement\\_UNCLASS\\_Release\\_FINAL.pdf](http://www.dni.gov/files/documents/September_2013_GTMO_Reengagement_UNCLASS_Release_FINAL.pdf); Glenn Kessler, *Spinning How Many Guantánamo Detainees Have “Returned to the Fight,”* WASH. POST (Nov. 21, 2013), <http://www.washingtonpost.com/blogs/fact-checker/wp/2013/11/21/spinning-how-many-guantanamo-detainees-have-returned-to-the-fight/>.

sensational cases still emerged.<sup>302</sup> Either way, the link between the viability of Guantánamo and ongoing military funding remained specious: of the nine provisions in the Counterterrorism subtitle, not one mentioned the conduct of military operations, which were addressed in detail throughout the rest of the NDAA.<sup>303</sup> The only mention of POWs came in section 581, under “Subtitle I—Other Matters,” which ordered an assessment of the economic efficiencies to be gained from shifting the Joint POW/MIA Command to the direct control of the Secretary of Defense.<sup>304</sup>

In contrast, Sensitive Military Operations, the subtitle that immediately followed Counterterrorism, established a new congressional oversight mechanism but provided a very different reporting framework for missions similar in scale to the Bergdahl recovery.<sup>305</sup> Defined as “a lethal operation or capture operation conducted by the armed forces,” a sensitive military operation required only post hoc notification to the House and Senate Armed Services Committees.<sup>306</sup> Furthermore, missions of this type conducted within “a theater of major hostilities” were entirely exempt from the reporting requirement.<sup>307</sup> Unlike the thirty-day lead time required for the transfer of a Guantánamo detainee, DOD did not have to inform Congress of a sensitive military operation until after it occurred, and there was no specific deadline by which the notification must have been sent.<sup>308</sup>

This effort toward executive accountability to the legislative branch was counterbalanced by the overall shift toward flexible funding in DOD budget apportionment over the same period.<sup>309</sup> Of the \$625.1 billion appropriated in the 2014 NDAA, for example, \$80.7 billion went to overseas contingency operations (OCO), a supplemental pot of money originally used only for the Global War on Terror.<sup>310</sup> Although the NDAA did not specifically define overseas contingency operations, DOD guidance

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302. See, e.g., Terrence McCoy, *The Mystery Man Who Is the World's Top Jihadist*, WASH. POST, June 12, 2014, at A15 (reporting that Abu Bakr al-Baghdadi spent four years in American custody in Iraq before assuming leadership of the Islamic State).

303. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1031–1039, 127 Stat. 672, 849–56 (2013).

304. See *id.* § 581(c)(2)(C)(ii), 127 Stat. at 774.

305. See *id.* §§ 1041–1043, 127 Stat. at 856–58.

306. *Id.* § 1041(d), 127 Stat. at 856.

307. *Id.* As one scholar notes, this was “presumably on the theory that Afghanistan for now at least remains a zone of combat operations, meaning that there would be both too many such operations to justify this sort of each-time reporting, and that the circumstances of such operations in [a] combat zone” do not warrant as high a degree of legislative scrutiny. Robert Chesney, *Important New Oversight Legislation for Military Kill/Capture Outside Afghanistan*, LAWFARE (May 9, 2013, 12:24 AM), <http://www.lawfareblog.com/2013/05/important-new-oversight-legislation-for-military-killcapture-outside-afghanistan/>.

308. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1041(a), 127 Stat. at 856 (“The Secretary of Defense shall promptly submit to the congressional defense committees notice in writing of any sensitive military operation conducted under this title following such operation.”).

309. See Julia Harte, *The Pentagon's Slush Fund*, POLITICO (Dec. 11, 2014), <http://www.politico.com/magazine/story/2014/12/omnibus-bill-pentagon-slush-fund-113517.html>.

310. 159 CONG. REC. H7894 (daily ed. Dec. 11, 2013).

suggested that the money must have some type of hook to a region of active combat operations, such as Iraq, Afghanistan, or “[g]eographic areas in which combat or direct combat support operations . . . occur.”<sup>311</sup> Over the years, however, the link between OCO spending and actual wartime needs has become increasingly tenuous, with some critics arguing that the base budget/OCO distinction is merely a trick to avoid mandatory spending caps.<sup>312</sup> In 2014, for example, Congress allotted \$5 billion more in OCO funds than the Pentagon had requested, much of it only tangentially related to the war.<sup>313</sup> Congress also scrutinizes less strictly OCO appropriations, presumably because the money is supposed to be supporting frontline operations.<sup>314</sup>

Title IX of the 2014 CAA, Overseas Contingency Operations, allotted approximately \$32.4 billion to the Army’s “operations and maintenance” fund, the account the Obama Administration used to pay the Qataris.<sup>315</sup> Section 9005 of this title granted \$30 million to the Commander’s Emergency Response Program, which was designed to give military commanders in Afghanistan the ability to respond to “urgent, small-scale” crises within their areas of responsibility.<sup>316</sup> In a nod to the discretion necessary on the battlefield, any expenditure below \$5 million would not trigger congressional notification, and expenditures over that amount only required fifteen-day notice to the relevant committees.<sup>317</sup> The Act also conditioned the use of OCO funds for aid to Pakistan on the satisfaction of certain prerequisites by that country, as certified by the Secretaries of State and Defense.<sup>318</sup> Congress waived those restrictions as long as the Secretaries submitted a report explaining that it was in the “national security interest” of the United States to do so, but the CAA did not define a timeline for the submission of such a report.<sup>319</sup>

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311. *Criteria for War/Overseas Contingency Operations Funding Requests*, MARINE CORPS LOGISTICS COMMAND, available at [http://www.logcom.marines.mil/Portals/184/Docs/Sites/prog\\_resources/files/afd/OCO-Guidance.pdf](http://www.logcom.marines.mil/Portals/184/Docs/Sites/prog_resources/files/afd/OCO-Guidance.pdf) (last visited Mar. 25, 2015).

312. See, e.g., Harte, *supra* note 309; Stephanie Gaskell, *Pentagon Wants to Keep Controversial War Budget Beyond Afghanistan*, DEFENSE ONE (Mar. 5, 2014), <http://www.defenseone.com/politics/2014/03/pentagon-wants-keep-controversial-war-budget-beyond-afghanistan/79972/>.

313. Statement, Office of Mgmt. & Budget, *supra* note 293, at 3.

314. See Harte, *supra* note 309.

315. See Pub. L. No. 113-76, div. C, tit. VIII, § 8111, 128 Stat. 5, 134 (2014).

316. *Id.* § 9005, 128 Stat. at 147.

317. See *id.* This plan was echoed in the \$63.8 million allotment to the Task Force for Business and Stability Operations to carry out “strategic business and economic assistance activities in Afghanistan in support of Operation Enduring Freedom.” *Id.* § 9011, 128 Stat. at 148–49.

318. The conditions included combating terrorist threats, dismantling improvised explosive device networks, and granting humanitarian assistance organizations access to the country. See *id.* § 9014(a)(1)–(7), 128 Stat. at 149–50.

319. *Id.* § 9014(b), 128 Stat. at 150.

*B. The Exchange of Five Taliban Detainees  
for a Captured U.S. Soldier in May 2014*

Questions remain over the exact circumstances of then-Private First Class Bergdahl's disappearance from his post in Paktika Province, Afghanistan, on June 30, 2009.<sup>320</sup> His unit and others conducted various unsuccessful searches over the next several months, growing in scope and duration to no avail.<sup>321</sup> The Taliban released two videos of Bergdahl during that time, demanding the release of a "limited number of prisoners" in exchange for his freedom.<sup>322</sup> Contact between the U.S. government and the Taliban remained intermittent, with no formal talks for the next two years.<sup>323</sup>

Yet the "Taliban Five," as they have become known, were no strangers to Congress.<sup>324</sup> Indeed, as early as January 2012 four of them had been identified by name in a House Resolution seeking to prohibit their release from Guantánamo until Mullah Mohammed Omar, the Taliban leader, entered U.S. custody.<sup>325</sup> This resolution came just days after the Obama Administration first briefed members of Congress on the proposal,<sup>326</sup> as well as premature reports that the United States had exchanged Bergdahl for three of the Taliban commanders.<sup>327</sup> A month later, the *Wall Street Journal* reported the "open secret" that Obama was considering releasing the five detainees as "a goodwill gesture" ahead of potential peace talks with the Taliban.<sup>328</sup> As the newspaper presciently noted, "Congress can't stop these transfers, but it can raise a fuss."<sup>329</sup>

The Obama Administration publicly confirmed the possibility of a Bergdahl-Taliban exchange for the first time in May 2012, releasing details of the proposed deal in response to reports that Bergdahl's family had begun communicating directly with the Taliban.<sup>330</sup> Many of the terms of this proposal, which were almost identical to those briefed to Congress in late 2011 and early 2012, ended up in the final agreement two years later.<sup>331</sup>

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320. Richard A. Opiel, Jr., *Bergdahl Details Disappearance to General Leading an Inquiry*, N.Y. TIMES, Aug. 7, 2014, at A15.

321. See Charlie Savage & Andrew W. Lehren, *Can G.I. Be Tied to 6 Lost Lives? Facts Are Murky*, N.Y. TIMES, June 4, 2014, at A1.

322. Alissa J. Rubin, *Taliban Release Video of American Soldier Captured in June in Afghanistan*, N.Y. TIMES, Dec. 26, 2009, at A4.

323. Bumiller & Rosenberg, *supra* note 18.

324. *The Taliban Five*, WALL ST. J. (Feb. 13, 2012), <http://www.wsj.com/articles/SB10001424052970204136404577209391708596680>.

325. H.R. Res. 529, 112th Cong. (2012).

326. According to Speaker of the House John Boehner, DOD informed the relevant committee chairs of the deal "in late 2011 and January 2012," but soon "deferred further engagement [with Congress] because the prospects of the exchange had diminished." Press Release, John Boehner, Speaker of the House, Statement on Congressional Concerns Raised About Prisoner Exchange (June 3, 2014), available at <http://www.speaker.gov/press-release/boehner-statement-congressional-concerns-raised-about-prisoner-exchange>.

327. See M.K. Bhadrakumar, *There's More to Peace Than Taliban*, ASIA TIMES ONLINE (Jan. 12, 2012), [http://www.atimes.com/atimes/South\\_Asia/NA12Df01.html](http://www.atimes.com/atimes/South_Asia/NA12Df01.html).

328. *The Taliban Five*, *supra* note 324.

329. *Id.*

330. See Bumiller & Rosenberg, *supra* note 18.

331. See *id.*

Negotiations remained intermittent over the next year and a half, stalling until a video proving that Bergdahl was still alive convinced the United States to relent to Taliban demands for the simultaneous release of all five detainees.<sup>332</sup> As the White House acknowledged, this was the only instance of a U.S. servicemember being formally exchanged with the enemy during Operations Enduring Freedom and Iraqi Freedom.<sup>333</sup>

The process accelerated over the several weeks preceding the exchange, as an agreement began to seem more plausible.<sup>334</sup> Neither side publicized the progress though, fearing that a leak could undermine the talks, nor did they inform the Afghan government ahead of time, likely for the same reason.<sup>335</sup> Despite this, the deal did not come as a surprise in Afghanistan once it was announced.<sup>336</sup> On May 31, 2014, the day of the transfer, the Secretary of Defense informed the required members of Congress of the exchange via letter.<sup>337</sup> Months later, DOD had not yet released details about how Bergdahl became separated from his unit in the first place, nor where and under what conditions he was held captive.<sup>338</sup>

### C. *The Controversy Surrounding the President's Ability to Conduct the Exchange*

The immediate euphoria surrounding Bergdahl's release quickly faded to ambivalence over the price paid for his freedom and the means used to secure it.<sup>339</sup> The congressional response focused on the White House's failure to notify leaders of the transfer of the Taliban Five from Guantánamo to Qatar, while the President emphasized the unique circumstances surrounding Bergdahl's recovery.

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332. Anne Gearan & Ernesto Londoño, *Taliban Prisoner Swap Possible: Goal Is to Free U.S. Soldier*, WASH. POST, Feb. 18, 2014, at A1; Schmitt & Savage, *supra* note 14.

333. This is a result of two factors: the relatively low number of American captives during the War on Terror and the absence of traditional governments with which to negotiate for their release. *See* Schmitt & Savage, *supra* note 14.

334. *See id.*

335. *See id.*

336. The Takeaway with John Hockenberry, *What Does the Bergdahl Swap Mean to Afghans?*, WNYC RADIO & PUB. RADIO INT'L (June 6, 2014), <http://www.thetakeaway.org/story/what-does-bergdahl-swap-mean-afghans/>.

337. *See* GAO REPORT, *supra* note 16, at 3. Some congressional leaders dispute the date, stating that they were informed telephonically between May 31 and June 1, and in writing on June 2. *See id.* at 3–4. Senator Harry Reid, the Senate Majority Leader at the time, said the administration informed him of the exchange “immediately before it happened.” Alexander Bolton, *WH Apologizes to Senate Intel Chief for Prisoner Swap Secret*, HILL (June 3, 2014), <http://thehill.com/policy/defense/208070-white-house-apologizes-to-senate-intelligence>. Either way, notification occurred well after the thirty-day advance period. *See* GAO REPORT, *supra* note 16, at 3–4.

338. Richard A. Opiel, Jr. & Eric Schmitt, *Bergdahl's Disciplinary Fate Is Placed in Hands of Army General*, N.Y. TIMES, Dec. 23, 2014, at A18.

339. *See* Schmitt & Savage, *supra* note 14.



### 1. Congress Objects to Not Being Properly Notified and the GAO Declares the Exchange Illegal

Representative Mike Rogers, chair of the House Intelligence Committee, raised concerns that “this decision will threaten the lives of American soldiers for years to come,” presumably because the exchange of five Taliban for one American seemed to reward the enemy for capturing U.S. personnel.<sup>340</sup> Representative Howard McKeon, chair of the House Armed Services Committee, and Senator James M. Inhofe, the senior minority member on the Senate Armed Services Committee, echoed this concern before also objecting to the exchange on constitutional grounds: “Our joy at Sergeant Bergdahl’s release is tempered by the fact that President Obama chose to ignore the law, not to mention sound policy, to achieve it.”<sup>341</sup>

Two weeks after the announcement of the exchange, Senate leaders requested that the GAO provide its opinion on whether DOD had violated the notification requirement and spending restrictions contained in the 2014 CAA.<sup>342</sup> Sidestepping the constitutional issues, the GAO concluded that DOD had, in fact, violated section 8111 by not notifying the appropriate congressional committees at least thirty days prior to the exchange.<sup>343</sup> The use of appropriated funds for a non-appropriated purpose, the GAO found, also violated the Antideficiency Act because DOD “incurr[ed] obligations exceeding an amount available in an appropriation.”<sup>344</sup> The House immediately voted to condemn the Obama Administration for failing to comply with its statutory notification requirements.<sup>345</sup>

### 2. The Obama Administration Argues That the Exchange Was a Valid Exercise of the President’s Power As Commander in Chief

Administration officials countered that delaying the exchange to comply with the notification requirements “would have left Bergdahl unacceptably

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340. *Id.*

341. Press Release, Rep. Howard P. McKeon & Sen. James Inhofe, Statement on Release of Sergeant Bowe Bergdahl in Exchange for Release of Five Guantanamo Detainees (May 31, 2014), available at <http://www.inhofe.senate.gov/newsroom/press-releases/mckeon-inhofe-statement-on-release-of-sergeant-bowe-bergdahl-in-exchange-for-release-of-five-guantanamo-detainees>.

342. GAO REPORT, *supra* note 16, at 1.

343. It also pointed to President Obama’s signing statement in connection with the spending bills, when he first raised concerns about legislative encroachment on executive prerogatives. *See id.*; see also Jack Goldsmith, *The Administration’s New (and Unconvincing) Reading of the Notice Requirement for GTMO Transfers*, LAWFARE (June 3, 2014, 11:04 AM), <http://www.lawfareblog.com/2014/06/the-administrations-new-and-unconvincing-reading-of-the-notice-requirement-for-gtmo-transfers/>; Transcript, Legal View with Ashleigh Banfield, CNN (June 2, 2014), available at <http://edition.cnn.com/TRANSCRIPTS/1406/02/lvab.01.html> (containing Jeffrey Toobin’s analysis of the issue and conclusion that “it’s pretty clear” that the Obama Administration violated the law).

344. *See* GAO REPORT, *supra* note 16, at 1, 6.

345. *See* H.R. Res. 644, 113th Cong. (Sept. 9, 2014).

vulnerable.”<sup>346</sup> This fear stemmed primarily from concerns over Bergdahl’s health, although it was not clear how his condition had changed since the last round of negotiations fell through.<sup>347</sup> In testimony to the House Armed Services Committee shortly after announcing the exchange, Secretary of Defense Chuck Hagel referred to the need for the executive branch to act quickly to ensure Bergdahl’s safety.<sup>348</sup> Confusion also exists over whether the Taliban had threatened to kill Bergdahl if the United States did not accede to its terms.<sup>349</sup> Supporters of the decision also questioned the logic that the deal would encourage future hostage-taking, arguing that the deal was odious but necessary and comported with a long tradition of “negotiat[ing] with terrorists.”<sup>350</sup>

In addition to the excuse of exigent circumstances, the White House soon offered two other more refined legal arguments: (1) the transfer was lawful regardless of notification because the Secretary of Defense complied with the certification requirement in section 1035(b), and (2) providing notice would have prevented the President from performing his functions as Commander in Chief, namely the safeguarding of American servicemembers.<sup>351</sup> Once the GAO rejected these approaches, the White House responded by reiterating its position that it forewent the notification requirement because it “had a fleeting opportunity to protect the life of a U.S. servicemember held captive and in danger for almost five years.”<sup>352</sup>

The White House also apologized to Senator Dianne Feinstein, the chair of the Senate Intelligence Committee, for committing “an oversight” by not informing her of the exchange before it happened.<sup>353</sup> Despite efforts by the House to prohibit all transfers or releases from Guantánamo for at least the next year,<sup>354</sup> seventeen detainees have left Guantánamo since the Taliban Five were transferred to Qatar,<sup>355</sup> including four more Taliban who returned directly to Afghanistan.<sup>356</sup> As it stands, neither Congress nor the President is conceding any authority, and the courts seem unlikely to step in.<sup>357</sup>

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346. Anne Gearan, *Sources Outline Conditions in Taliban Leaders’ Release in Exchange for Bergdahl*, WASH. POST, June 5, 2014, at A1.

347. *See id.*

348. *See* Calamur, *supra* note 22.

349. *See* Gearan, *supra* note 346.

350. *See* Alan Gomez, *Idea That U.S. Won’t Deal with Terrorists Hardly True*, USA TODAY, June 2, 2014, at A3.

351. DEP’T OF DEFENSE, *supra* note 27, at 1–2.

352. Benjamin Wittes, *Administration Response to GAO Report on Bergdahl*, LAWFARE (Aug. 23, 2014, 12:00 PM), <http://www.lawfareblog.com/2014/08/administration-response-to-gao-report-on-bergdahl/>.

353. Bolton, *supra* note 337.

354. *See* Josh Gerstein, *House: Stop Guantánamo Releases for a Year*, POLITICO (June 20, 2014), <http://www.politico.com/blogs/under-the-radar/2014/06/house-stop-guantanamo-releases-for-a-year-190808.html>.

355. *See The Guantánamo Docket: Timeline: 2014*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/timeline/2014> (last visited Mar. 25, 2015).

356. *See* Adam Goldman, *Four Afghan Detainees Sent Home from Cuba*, WASH. POST, Dec. 21, 2014, at A5.

357. *See* PRESIDENTIAL POWER STORIES, *supra* note 65, at 2 (“Numerically, disagreements about presidential authority that end without any litigation at all far outnumber those that end

III. THE PRESIDENT POSSESSED THE CONSTITUTIONAL AUTHORITY TO  
EXCHANGE TALIBAN DETAINEES FOR A CAPTURED U.S. SOLDIER  
DESPITE CONGRESSIONAL RESTRICTIONS ON GUANTÁNAMO TRANSFERS

Debates over the appropriate balance of legislative and executive powers have raged since colonial times, and the tension between the political branches is one of the defining features of American democracy. Within this broader discussion, evaluation of the competing congressional and presidential claims over defense policy has been a particularly thorny area. The controversy over the Bergdahl-Taliban exchange is therefore a mostly political dispute that also contains deep constitutional implications. The non-state nature of the enemy in the Global War on Terror also makes this case unique, with individual actors potentially having an outsized effect on the “battlefield,” minimal accountability for detainees after they have been released, and no definitive resolution to the war in sight. Under these circumstances, Congress arguably should have a greater role in setting military objectives due to the inherent blurring of tactics and policy.

Regardless, congressional attempts to retroactively dictate prisoner recovery policy through the use of spending restrictions is a radical departure from centuries of historical and judicial precedent. The exchange of detainees and transfer of funds fell solely within President Obama’s authority as Commander in Chief, and congressional attempts to limit those powers by financially handcuffing the President’s ability to repatriate an American servicemember were unconstitutional. Part III.A demonstrates how this conclusion is consistent with Supreme Court jurisprudence on the scope of executive authority. Part III.B places the Bergdahl-Taliban exchange within the longstanding tradition of presidential control over prisoner recovery policy and concludes that the use of appropriations riders and notification requirements regarding Guantánamo transfers were cases of legislative overreach.

A. *The Exchange Complied with Judicial Precedent*

Although not “every case or controversy which touches foreign relations lies beyond judicial cognizance,”<sup>358</sup> courts traditionally have been reluctant to consider cases involving an area they regard as primarily the domain of the political branches.<sup>359</sup> The same principle applies to cases that involve “the Constitution’s government-structuring provisions.”<sup>360</sup> With that said, a constitutional analysis remains relevant because “the Constitution [still] can influence policy even when it is not enforced by the courts.”<sup>361</sup> This part

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up in court . . . .”); Fisher, *supra* note 31, at 484–92; Lobel, *supra* note 28, at 409; Transcript, *supra* note 343 (Toobin concludes that “[t]here’s not going to be any lawsuit about this. Congress can’t sue the [P]resident for violating this aspect of the law.”).

358. Baker v. Carr, 369 U.S. 186, 211 (1962).

359. See Fisher, *supra* note 31, at 468; Lobel, *supra* note 28, at 409.

360. NLRB v. Noel Canning, 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring).

361. GRIFFIN, *supra* note 29, at 4; see Noel Canning, 134 S. Ct. at 2593 (“[P]olicing the enduring structure of constitutional government when the political branches fail to do so is one of the most vital functions of this Court.” (internal quotation marks omitted)); MARIAH

will illustrate how key Supreme Court decisions enhance the credibility of the White House's arguments in favor of the Bergdahl-Taliban exchange.

### 1. Operating Within *Youngstown's* Zone of Twilight

At first glance, the Bergdahl-Taliban exchange seems to fall into the third *Youngstown* category because President Obama directly contravened the appropriations rider's notification and funding requirements.<sup>362</sup> This admittedly would be the case if the President's only objective in transferring the Taliban Five were to hasten the closure of the Guantánamo detention facility, a process Congress had explicitly sought to stop. Yet this analysis falls short because it depends on a view of the exchange as the mere transfer or release of Guantánamo detainees, rather than what it actually was: an international agreement brokered to secure the safe homecoming of a U.S. soldier. The Bergdahl-Taliban controversy implicates the two competing priorities of presidential control over U.S. prisoner policy and congressional control over defense spending. Any analysis, including the GAO's, that approaches the issue from only one of these perspectives is incomplete. These dueling claims instead shift the conflict into the middle *Youngstown* category because both branches have legitimate claims to authority but are unable to share it.<sup>363</sup>

As the Court acknowledged, analysis within this category is highly contextual.<sup>364</sup> In *Youngstown*, for example, the Court struck down President Truman's seizure of steel mills because the seizure constituted a taking of private property by the federal government, an action that Congress had thoroughly considered and rejected.<sup>365</sup> Here, however, Congress did not consider the possible impact its Guantánamo restrictions could have on negotiations to repatriate U.S. captives, let alone evaluate and implement an overarching strategy for their recovery.<sup>366</sup>

Instead, Congress inadvertently undermined the President's ability to negotiate for the release of an American POW, a power that falls solely under the President's authority as Commander in Chief.<sup>367</sup> The "gloss" on executive power provided by a history of congressional acquiescence in matters of repatriation overcame the unrelated statutory restriction on Guantánamo transfers and permitted the President to recover Bergdahl, even if he had to exchange Taliban detainees to do so.<sup>368</sup> As the sun continues to set on the U.S. military presence in Afghanistan, the zone of

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ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 222 (2013) ("From impeachment, to the debt crisis, to appointments, to governance overseas, a vast universe of constitutional problems is handled not through judicial supervision or adherence to determinate text but rather as a result of legislative-executive interactions.").

362. See GAO REPORT, *supra* note 16, at 6–7 & n.7.

363. See *supra* note 73 and accompanying text.

364. See *supra* Part I.B.2.

365. See *supra* Part I.B.2.

366. See *supra* Part II.A.

367. See *supra* Part I.C.3.

368. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring).

twilight afforded the President will naturally shadow more areas.<sup>369</sup> His authority always has included the ability to recover a captured U.S. servicemember.<sup>370</sup>

## 2. *Dames & Moore's* Deference to Intent

The Court affirmed this approach in *Dames & Moore*, when it recognized the need for clear congressional intent to override an executive agreement negotiated and entered into as the resolution to a major foreign policy conflict.<sup>371</sup> In that case, the Court conducted its analysis in light of the presence of enabling legislation and the absence of any prohibitive statutes.<sup>372</sup> In the current controversy, Congress granted President Obama control over prisoner recovery efforts first by acquiescing to presidential control of that domain and second by not passing any legislation asserting congressional claims over that power.<sup>373</sup>

The Court also rejected *Dames & Moore's* allegation that the executive order was a presidential circumscription of the courts' powers, referring to clear contextual evidence that the intent of the executive order was to terminate an international dispute and not to seize control of the domestic judiciary.<sup>374</sup> Congress has raised similar concerns that President Obama usurped the spending power by ignoring the NDAA rider regarding notification and funds appropriation.<sup>375</sup> Once again, however, a court would look to the legislative history of the NDAA rider.<sup>376</sup> The purpose of the rider was to prevent the closure of Guantánamo while keeping detainees out of domestic detention facilities, not to prolong the captivity of a captured U.S. servicemember.<sup>377</sup> The NDAA rider, by setting conditions on the transfer of detainees from Guantánamo, did not somehow divest the President of his authority to negotiate for the release of U.S. prisoners of war.

## 3. Executive Discretion Under *Curtiss-Wright*

Finally, under *Curtiss-Wright*, the President retains a fair amount of discretion as the sole organ of American diplomacy.<sup>378</sup> As the Court noted, this is "especially . . . true in time of war."<sup>379</sup> The closure of Guantánamo has both foreign and domestic implications, but the repatriation of an American POW and the negotiations with the other state and non-state

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369. *See supra* Part I.B.2.

370. *See supra* Part I.C.3.

371. *See supra* Part I.B.3.

372. *See supra* Part I.B.3.

373. *See supra* Parts I.C.3, II.A.

374. *See supra* Part I.B.3.

375. *See supra* Part II.C.

376. *See supra* Part I.B.2–3.

377. *See supra* Part II.A.

378. It is important to note, however, that President Roosevelt acted in concert with congressional authorization, not in contravention of it. *See supra* Part I.B.1.

379. *See supra* note 87 and accompanying text.

actors involved in that process are purely foreign.<sup>380</sup> Furthermore, while it can be seen as a precursor to the conclusion of Operation Enduring Freedom, the exchange was not part of a broader pact with the Taliban or the government of Afghanistan.<sup>381</sup> Rather, it more closely resembled an executive agreement between President Obama and the Qatari emir, who sealed the deal by personally shaking hands with each other.<sup>382</sup> The Supreme Court has never declared an executive agreement unconstitutional on the grounds that it usurps Congress's authority to make treaties, a trend that, in turn, encourages the President to use executive agreements to achieve policy goals of narrow scope or limited duration.<sup>383</sup> For these reasons, the Bergdahl-Taliban exchange should be subject to much less congressional oversight than a domestic issue, such as the transfer of Guantánamo detainees to the United States, or a foreign issue relating to a treaty.

### *B. The Exchange Complied with Historical Precedent*

The Bergdahl-Taliban exchange seems unremarkable when it is placed in the historical context of wartime U.S. prisoner recovery policy. Once again, referring to the Bergdahl-Taliban controversy as a “release” or “transfer” of Guantánamo detainees mischaracterizes both its means and its end. The U.S. government *exchanged* enemy combatants, regardless of their status under the Geneva Conventions, for a captured U.S. servicemember. This section demonstrates that while the exchange is merely the latest instance of executive control over the recovery of a captured U.S. servicemember, the 2014 NDAA's restrictions on Guantánamo transfers are aberrational attempts at curtailing presidential discretion.

#### 1. U.S. Prisoner Recovery Policy Always Has Permitted Exchanging Captured Combatants with the Enemy

The President, acting as Commander in Chief of the armed forces, has customarily exercised control over efforts to repatriate captured U.S. servicemembers because that decision often depends on an alignment of strategic and tactical considerations that cannot occur via legislative oversight.<sup>384</sup> Throughout American history, the President, in consultation with his staff, has set an overarching recovery policy and then delegated its execution to his military commanders in the field.<sup>385</sup> This approach is based on an understanding that circumstances change rapidly during war and that bureaucratic micromanagement or overreach will often hinder recovery efforts.<sup>386</sup>

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380. *See supra* Part II.A–B.

381. *See supra* Part II.B.

382. *See* Gearan, *supra* note 346.

383. *See* HENKIN, *supra* note 134, at 222.

384. *See supra* Part I.C.3.

385. *See supra* Part I.C.3.

386. *See supra* Part I.C.3.

George Washington, acting as Commander in Chief of the Continental Army, established local prisoner exchanges during the Revolutionary War.<sup>387</sup> President Lincoln did the same during the Civil War, with the added wrinkle that the troops being exchanged for Union soldiers were technically non-state actors.<sup>388</sup> At the height of World War II, the United States transferred hundreds of thousands of enemy captives to domestic bases.<sup>389</sup> Reciprocal releases during the Vietnam War led to large numbers of Northern Vietnamese and Viet Cong captives leaving U.S. control without any guarantee that U.S. troops would be freed.<sup>390</sup>

Policy aspects aside, these practices demonstrate an unbroken chain of transfers of enemy captives to either enemy or third-party control in direct or indirect exchange for the recovery of U.S. prisoners.<sup>391</sup> In each case, the President saw prisoner exchanges as a tool, giving him leverage to more effectively wage war.<sup>392</sup> The exchange of the Taliban Five, a group of non-state actors transferred to a country not formally allied with either side of the conflict, for Sergeant Bowe Bergdahl, a U.S. soldier in Taliban captivity for five years, neatly complies with each of these precedents. Conversely, the notification requirements and spending restrictions included in the 2010–2014 NDAs constituted an unprecedented effort by Congress to dictate enemy detainee policy.<sup>393</sup>

Some critics have referred to the prisoner exchange as an unprecedented instance of the U.S. government negotiating with terrorists and to the one million dollars paid to the Qataris as a ransom.<sup>394</sup> As demonstrated above, the United States, from the President down to low-level military commanders, has repeatedly engaged in discussions with opposing forces over the recovery of its personnel during both conventional and unconventional conflicts.<sup>395</sup> Prisoner exchanges conducted during the Revolutionary and Civil Wars were far more widespread and far less controversial than the one-time deal conducted in Afghanistan.<sup>396</sup> In Vietnam, the U.S. military oversaw a system of releases of non-state actors—the Viet Cong—under far murkier conditions than those surrounding the exchange with the stateless Taliban.<sup>397</sup> Furthermore, unlike the ransoms paid to the Barbary States in the nineteenth century, the United States paid Qatar, not the Taliban, to accept the detainees.<sup>398</sup> Of note, the Taliban gained no financial or propaganda benefit from the

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387. *See supra* Part I.C.3.a.

388. *See supra* Part I.C.3.b.

389. *See supra* Part I.C.3.c.

390. *See supra* Part I.C.3.d.

391. *See supra* Part I.C.3.

392. *See supra* Part I.C.3.

393. *See supra* Part I.C.3.

394. *See supra* Part II.C.

395. *See supra* Part I.C.3.

396. *Compare supra* Part I.C.3.a–b, with *supra* Part II.B–C.

397. *Compare supra* Part I.C.3.d, with *supra* Part II.B–C.

398. *Compare supra* note 71 and accompanying text, with *supra* Part II.B–C.

transfer of one million dollars to the Qataris.<sup>399</sup> The exchange, while imperfect, might have been President Obama's "least worst" option.<sup>400</sup>

## 2. Notification Requirements and Spending Restrictions Had Never Before Impeded the Recovery of a Captured U.S. Servicemember

The 2014 NDAA's notification requirements, although rooted in the tradition of the War Powers Resolution and the Intelligence Oversight Act, are much more onerous than either of those pieces of legislation and overstep the bounds of appropriate congressional oversight. The notification requirements in the War Powers Resolution are purely retroactive, applying only after the introduction of U.S. forces to hostilities.<sup>401</sup> Likewise, under the Intelligence Oversight Act, the President need only inform Congress "in a timely fashion" after the execution of an especially sensitive covert action.<sup>402</sup> The 2014 CAA itself contains looser reporting restrictions for the assignment of billions of dollars in aid to Pakistan, providing no deadline for congressional notification if, after determining that it is in the nation's interests to do so, the Departments of Defense and State waive congressionally enumerated restrictions.<sup>403</sup>

Ex post congressional notification is the norm in cases as sensitive as the return of the last U.S. POW in the War on Terror, and the stringency of the preemptive notification requirements is unique to Guantánamo transfers.<sup>404</sup> Members of Congress knew about the exchange immediately before or immediately after it happened, and, either way, the exchange did not come as a surprise.<sup>405</sup> As several of the deal's most outspoken critics admit, relevant congressional leaders knew about the proposal as early as 2011.<sup>406</sup> Of note, none of the spending bills during this period implied that Congress could reject a proposed detainee transfer to a foreign country, nor did any of them provide a means for redress if the President did not comply.<sup>407</sup> Notification did not invite consultation, let alone provide an opportunity for denial. The President should have tried to comply with the statutory requirements to the maximum extent practicable, but, ultimately, Congress could not have disapproved of the exchange and intervened to stop it.<sup>408</sup> This reality is reflected in the other bedrocks of congressional oversight but curiously absent from the Guantánamo riders.<sup>409</sup>

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399. *See supra* Part II.B.

400. *See supra* note 233 and accompanying text.

401. *See supra* Part I.C.2.a.

402. 50 U.S.C. § 3093(c)(3) (2014); *see also supra* Part I.C.2.b.

403. *See supra* Part II.

404. *See supra* notes 305–08 and accompanying text (discussing sensitive military operations).

405. *See supra* Part II.B–C.

406. *See supra* note 326 and accompanying text. Although this notification did not comply with the standards laid out in the NDAA because talks with the Taliban were preliminary at the time, it satisfied a longstanding tradition of "informal" notification and gave Congress effective notice that a deal was in the works. *See* BAKER, *supra* note 29, at 67.

407. *See supra* Part II.A.

408. *See* KOH, *supra* note 58, at 62.

409. *Compare supra* Part I.C.1–2, with *supra* Part II.A.



Shifting the analytical framework from a detainee release to a prisoner exchange also alleviates the alleged violation of the Antideficiency Act because prisoner exchanges traditionally fall within the scope of the discretion granted to military commanders.<sup>410</sup> As evidenced in the 2014 CAA's funding for the Commander's Emergency Response Program and the Task Force for Business and Stability Operations, Congress acknowledged that oversight of wartime funding is necessarily looser than it would be under different circumstances.<sup>411</sup> Congress drew the line at \$5 million in these provisions, concluding that anything below that amount was not worthy of its consideration and recognizing the need to trust the discretion of local commanders in combat environments.<sup>412</sup> The one million dollars given to the Qataris fell well below the fiscal threshold of that discretion set by Congress in the 2014 NDAA and CAA.<sup>413</sup> Congress allotted the military more than enough money to secure Bergdahl's repatriation. Tying the Army's OCO funding for combat operations to the release of Guantánamo detainees, though, depended on a false conception of the Taliban as something other than a wartime enemy.<sup>414</sup>

### 3. Appropriations Riders Are a Means of Shaping Policy, Not Dictating Tactical Decisions

The NDAA riders prohibiting the transfer or release of Guantánamo detainees are fundamentally different from earlier congressional attempts to influence defense policy via its power of the purse because they directly interfered with the President's ability to carry out a solely executive function.<sup>415</sup> Unlike the prohibition on military aid to the Contras, the Bergdahl-Taliban exchange did not constitute a major policy decision subject to congressional deliberation.<sup>416</sup> It was a tactical decision properly made by the Commander in Chief.

Additionally, the Boland Amendments represented a compromise between the branches in an area of "shared congressional-executive authority," specifically military aid and covert operations.<sup>417</sup> The legislation was relatively narrow in scope, and President Reagan never voiced any opposition to it.<sup>418</sup> Consensus seemed to exist at the time that the United States should not become involved in Nicaragua.<sup>419</sup> On the contrary, short of vetoing the legislation, President Obama has opposed the Guantánamo transfer riders at every step of the legislative process, and Congress has never sought to tie the transfer restrictions to the recovery of

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410. *See supra* Part II.A–B.

411. *See supra* note 316 and accompanying text.

412. *See supra* note 317 and accompanying text.

413. *See supra* note 316 and accompanying text.

414. *See supra* Part II.A–B.

415. *See supra* note 73 and accompanying text.

416. *See supra* Part I.C.1.

417. KOH, *supra* note 58, at 113.

418. *See supra* Part I.C.1.

419. *See supra* Part I.C.1.

captured U.S. military personnel.<sup>420</sup> There have been no substantive policy agreements regarding the transfer of detainees from Guantánamo, and the NDAA rider stymied a major facet of President Obama's platform while also restricting his ability to conduct a war.<sup>421</sup> This trend does not represent a consensus on the way forward in Afghanistan, nor on the future of prisoner recovery policy.

#### CONCLUSION

President Obama's recent exchange of five Taliban detainees for a captured U.S. soldier stirred debate among policy and legal scholars alike. Congress immediately raised concerns over the constitutionality of the exchange, arguing that the White House failed to comply with statutory notification requirements contained in the most recent defense-spending bill. Congress also objected to the Pentagon's use of appropriated funds to effect the deal. Recognizing these concerns, the President and Secretary of Defense apologized for the lack of notice but defended their actions as permissible under the executive's authority as Commander in Chief of the armed forces. At Congress's request, the GAO conducted an investigation and concluded that the President had, in fact, violated the appropriations riders contained in the 2014 NDAA. The GAO, however, did not address the underlying conflict between congressional control of defense funding and presidential control of prisoner recovery policy.

Legal analysis of this conflict begins with the tripartite framework for evaluation of executive action expressed in *Youngstown*, which is in turn highly contextual. Despite congressional oversight of broader strategic objectives via its power of the purse, decisions over how to repatriate captured U.S. servicemembers always have been the President's prerogative. Furthermore, Congress attached the riders to the 2014 NDAA as a means of obstructing the closure of the Guantánamo detention facility, not in an effort to suddenly start overseeing prisoner recovery policy. Finally, the notification requirements and spending restrictions relating to the transfer of Guantánamo detainees were much more cumbersome than historical and contemporary precedents for operations of similar scale to the recovery of Sergeant Bergdahl. As such, the riders unconstitutionally impeded the President's ability to recover a captured servicemember, an area over which he has exercised sole control throughout U.S. history.

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420. *See supra* Part II.A.

421. *See supra* Part II.A.