



IN YOUR HOUSE, I LONG TO BE: CONGRESS, COMMANDER-IN-CHIEF, AND THE POWER TO CONDUCT PRISONER EXCHANGES

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There are few things more certain in politics than the desire for power. It lurks behind every decision. This Article examines the power struggle between Congress and the President regarding military decision-making over prisoner exchanges. This Article suggests that allowing Congress to share or take part in prisoner exchanges would damage national security interests because Congress is not structurally capable of implementing a prisoner exchange. The 2014 National Defense Authorization Act and exchange of Bowe Bergdahl are analyzed as case examples. This Article concludes by offering a legal and policy rationale to show that the national security interests of the United States are best served by allowing the President to maintain constitutionally unlimited control over the transfer of captured terrorists to the control and custody of foreign nations.

INTRODUCTION	99
HISTORY AND CONTROVERSY SURROUNDING THE BERGDAHL EXCHANGE.....	100
LEGALITY OF THE OBAMA ADMINISTRATION’S ACTIONS.....	104
THIRTY-DAY NOTICE REQUIREMENT AND ITS LEGALITY.....	106
HISTORY OF THE SPENDING POWER.....	106
CONSTITUTIONAL AUTHORITY: CONGRESS V. THE PRESIDENT	107
JUSTIFICATION OF THE OBAMA ADMINISTRATION’S ACTIONS UNDER THE IMMINENT THREAT THEORY	115

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EFFECTS ON NATIONAL SECURITY: LEGISLATIVE BRANCH CONSULTATIONS	118
CONGRESSIONAL APPROVAL WOULD VIOLATE THE 1947 NATIONAL SECURITY ACT AND GOVERNMENTAL STRUCTURE	124
CONCLUSION	125

INTRODUCTION

A disheveled and malnourished man emerges confused as his apparent captors escort him through the Afghan desert – a dry place with little to capture the eye besides occasional shrubbery.¹ As time passes, the blades of a helicopter can be heard as they disturb the otherwise silent desert.² Upon landing on the burning Afghan sand, a handful of passengers exit the helicopter and approach a truck in which the disheveled man is sitting.³ The helicopter passengers speak briefly with the disheveled man’s drivers before returning with him to the helicopter.⁴ Before the man is permitted to enter the helicopter, his new escorts pat him down – presumably to ensure that he is not carrying weapons.⁵ The escorts then board the helicopter with the apparently relieved man, and the helicopter slowly rises and disappears into the sky.⁶

The scene plays out like a Tom Clancy novel, but it is in fact the prisoner exchange of United States Army Sergeant Bowe Bergdahl. The situation described occurred in the Afghan desert and ended within minutes.⁷ It was the grand finale to a situation

¹ See Mark Thompson, *Watch the Bowe Bergdahl Video*, TIME MAGAZINE (June 4, 2014), available at <http://time.com/2822102/heres-what-that-bergdahl-video-really-shows/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

that extended over the course of several years and caused both political and legal tension.

This Article will focus on the President's constitutional ability to conduct prisoner exchanges, using the Bergdahl exchange and the 2014 National Defense Authorization Act ("NDAA") as examples. This Article will examine arguments in favor of Executive Branch and Legislative Branch control over prisoner exchanges, with a focus on the assertion that deference should be given to the Commander-in-Chief in exchanges like that of Bergdahl and the national security implications of this assertion. The paper will conclude with policy recommendations regarding the division of power and make a final argument as to why the President should enjoy constitutionally unlimited control over the transfer of captured terrorists to the control and custody of foreign nations.

HISTORY AND CONTROVERSY SURROUNDING THE BERGDAHL EXCHANGE

Sergeant Bergdahl deserted his unit's base in Paktika Province, Afghanistan on June 30, 2009 in the dead of night.⁸ A search for Bergdahl ensued shortly after his absence was noticed, and carried on for ninety days.⁹ After nearly three months, it was discovered that Bergdahl had been captured by the Taliban.¹⁰ The United States attempted to negotiate Bergdahl's release with the Taliban in November 2010, but talks soon ended.¹¹ Due to external pressure, the United States began to negotiate with the Taliban through the Qatar government.¹² The Taliban made it clear that any deal for Bergdahl must

⁸ Eric Schmitt et al., *Bowe Bergdahl's Vanishing Before Capture Angered His Unit*, N.Y. TIMES (June 2, 2014), http://www.nytimes.com/2014/06/03/us/us-soldier-srgt-bowe-bergdahl-of-idaho-pow-vanished-angered-his-unit.html?_r=0.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Adam Entous & Julian E. Barnes, *Behind Bowe Bergdahl's Release, A Secret Deal that Took Three Years*, WALL ST. J. (June 1, 2014), <http://www.wsj.com/articles/behind-bergdahls-release-a-secret-deal-that-took-three-years-1401673547>.

¹² *Id.*

include the release of five Taliban members detained at Guantanamo Bay, Cuba.¹³

Before striking a deal, the Obama Administration informed the Legislative Branch of the potential exchange and received a negative response to the proposal.¹⁴ Two main reservations were espoused by those opposed to a deal. First, making a deal with the Taliban would break the long-standing assertion that the United States government does not negotiate with terrorists.¹⁵ Second, the Taliban's demand for five prisoners in exchange for Bergdahl struck some as unreasonable and unbalanced.¹⁶ Despite these concerns, the Obama Administration continued attempting to secure Sergeant Bergdahl's release.¹⁷ In September 2013, talks increased once the Qatar government received a so-called proof-of-life video from the Taliban.¹⁸ The Taliban then sent a proof-of-life video to the United States in January 2014.¹⁹ This caused the Obama Administration to increase urgency in the talks, as Bergdahl's condition noticeably worsened.²⁰ The Obama Administration feared what would happen if Bergdahl expired while imprisoned by the Taliban.²¹ A few short months later, the Obama Administration secured Bergdahl's release, though doing so raised an assortment of legal questions.²²

¹³ *Id.*

¹⁴ Charlie Savage & David E. Sanger, *Deal to Free Bowe Bergdahl Puts Obama on Defensive*, N.Y. TIMES (June 3, 2014), <http://www.nytimes.com/2014/06/04/world/prisoner-deal-puts-president-on-defensive.html>; see also Alexander Bolton, *Prisoner swap blows up on White House*, THE HILL (June 3, 2014), <https://thehill.com/policy/defense/208163-prisoner-swap-blows-up-on-the-white-house> ("More than two years ago, Members of Congress were briefed on the possibility of such an exchange, and the chairmen at the time and I raised serious questions to the administration.").

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Schmitt et al., *supra* note 8.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

The Obama Administration had previously expressed a belief that Congress must be informed of a prisoner exchange and, although the Administration informed Congress the day of the exchange, it did not abide by the text of the 2014 NDAA.²³ The NDAA is a defense spending bill that Congress reviews annually to make specifications for how the Department of Defense can spend money.²⁴ To ensure the exchange went smoothly, the Obama Administration labeled Bergdahl a prisoner of war.²⁵ Under typical circumstances, this would have been enough to avoid legal issues. However, in the 2014 NDAA, Congress tried to establish a procedure by which it required the President to notify Congress of a prisoner transfer that utilized congressionally-approved funds.²⁶ Specifically, “[t]he Secretary of Defense *shall notify* the appropriate committees of Congress . . . *not later than 30 days before* the transfer or release of the individual [from Guantanamo].”²⁷ Congress added the passage in 2014 owing in part to a desire to prevent the United States from

²³ See also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law: United States Negotiates Prisoner Exchange to Secure Release of U.S. Soldier Held in Afghanistan*, 108 AM. J. INT’L L. 517, 519 (2014); see also U.S. Gov’t Accountability Off., B-326013, *Department of Defense--Compliance with Statutory Notification Requirement 3* (2014) (noting that the Secretary of Defense provided written notice on May 31, 2014 to the appropriate congressional committees); see also Burgess Everett & John Bresnahan, *Hill Leaders Didn’t Know of Swap*, POLITICO (June 3, 2014, 12:04 PM), <http://www.politico.com/story/2014/06/harry-reid-bowe-bergdahl-briefed-prisoner-deal-white-house-107373>; see also Eric Schmitt & Charlie Savage, *Bowe Bergdahl, American Soldier, Freed by Taliban in Prisoner Trade*, N.Y. TIMES (May 31, 2014), http://www.nytimes.com/2014/06/01/us/bowe-bergdahl-american-soldier-is-freed-by-taliban.html?_r=0.

²⁴ *History of the NDAA*, COMMITTEE ON ARMED SERVICES (the specific issue with the 2014 NDAA is the 30-day notice requirement that Congress attached via a rider in response to fears that the President was about to transfer Guantanamo Bay detainees for Bergdahl) <https://armedservices.house.gov/ndaa/history-ndaa>.

²⁵ Josh Rogin, *White House Changes Tune on Bergdahl, Says He Was a ‘Prisoner of War’*, THE DAILY BEAST (June 2, 2014), <http://www.thedailybeast.com/articles/2014/06/02/white-house-changes-tune-on-bergdahl-says-he-was-a-prisoner-of-war.html>; see also Justus Reid Weiner, *Leave No Man Behind: The United States and Israel Face Risks in Their Prisoner Release Policies*, 39 FLETCHER FORUM WORLD AFF. 7, 17 (Winter 2015).

²⁶ See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1035(d), 127 Stat. 672, 853 (2013).

²⁷ *Id.*

exchanging the five Taliban members for Bergdahl.²⁸ Those opposed to the transfer quickly used the 2014 NDAA to argue that the Bergdahl exchange was illegal.²⁹ However, if the proposition put forth by those opposed to the transfer is accepted, the 2014 NDAA would change the historical scope of the President's power.³⁰

Examination of the scope of the President's power over the exchange of prisoners began under by the George W. Bush Administration and its theory that the President has final authority regarding wartime decisions.³¹ Since Congress passed the Authorization for Use of Military Force of 2001 ("AUMF"), the President was given broad authority to make decisions concerning prisoners of war.³² This authority raises several questions pertaining to prisoner exchanges: is this what happened with the Bergdahl exchange? What impact will it have on national security? Should the Executive Branch be forced to consult the Legislative Branch, or does the President have "constitutionally unlimited control over the transfer of captured terrorists to the control and custody of foreign nations?"³³

²⁸ Celidon Pitt, *Fair Trade: The President's Power to Recover Captured U.S. Servicemembers and the Recent Prisoner Exchange with the Taliban*, 83 *FORDHAM L. REV.* 2837, 2843 (2015).

²⁹ 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, 738 (2008).

³⁰ *Id.*

³¹ Steven M. Maffucci, *Leave No Soldier Behind? The Legality of the Bowe Bergdahl Prisoner Swap*, 63 *BUFF. L. REV.* 1325, 1340 (2015).

³² See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

Congress passed the AUMF days after the September 11, 2001, attacks and signed by the President shortly thereafter. It authorizes the President to: use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons. See also *Ex Parte Quirin*, 317 U.S. 1, 28 (1942); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting *Ex parte Quirin*, 317 U.S. at 28, 30).

³³ Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def. (Mar. 13, 2002)

Significantly, what would be the impact on national security if the Executive must consult the Legislative Branch?

LEGALITY OF THE OBAMA ADMINISTRATION'S ACTIONS

The theory that the Obama Administration broke tradition by negotiating with terrorists is a complex one and largely depends on how "terrorist" is defined. As the adage goes, "one man's terrorist is another man's freedom fighter."³⁴ Terrorism is broadly defined from one source as "the systematic use of terror or unpredictable violence against governments, publics, or individuals to attain a political goal."³⁵ Under this definition, any number of individuals or groups could be considered a terrorist organization. Indeed, Syrian President Bashar al-Assad could be considered a terrorist for his use of chemical bombings on his own people.³⁶ Even though Assad's actions form a systematic use of terror in hopes of attaining a political goal, the United States considers him to be a war criminal and not a terrorist.³⁷ For the purposes of this Article, the definition provided by the Federal Bureau of Investigation will control: "Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."³⁸

The United States' recent foreign conflicts focused on the so-called "War on Terror," resulting in the "unusual entwinement with the home front, its heavy focus on preemptive action and intelligence collection, and its targeting of a diffuse, non-state

(regarding "The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations").

³⁴ Symposium, *Negotiating with Terrorists and Non-State Actors: The Journey to World Peace*, 4 CARDOZO ONLINE J. CONFLICT RES. 2 (2003)

³⁵ See ALEX P. SCHMID, THE ROUTLEDGE HANDBOOK OF TERRORISM RESEARCH 142 (2011).

³⁶ Anne Barnard & Michael R. Gordon, *Worst Chemical Attack in Years in Syria; U.S. Blames Assad*, N.Y. TIMES (Apr. 4, 2017), <https://www.nytimes.com/2017/04/04/world/middleeast/syria-gas-attack.html>.

³⁷ *Id.*

³⁸ See 28 C.F.R. § 0.85.

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.”³⁹ These conflicts are novel in nature, and it is likely that Congress will continue to pass regulatory statutes as a means to control some of the President’s power.⁴⁰ The courts have continued to resist implementing a brightline rule regarding whether Congress has this power to restrain the ease with which the Commander-in-Chief can negotiate and implement prisoner exchanges.⁴¹

Because there are multiple definitions of terrorism,⁴² the State Department has a significant amount of latitude and flexibility in deciding whether a group is labeled a terrorist organization.⁴³ It is important to note that the Taliban is not a single, cohesive group. The group responsible for capturing Bergdahl–Afghanistan’s Taliban⁴⁴–is not on the State Department’s list of Foreign Terrorist Organizations.⁴⁵ While this may seem counterintuitive, the Taliban group that is on the State Department’s list of Foreign Terrorist Organizations, the Tehri-I Taliban of Pakistan,⁴⁶ was not involved with Bergdahl’s capture nor the negotiations that ensued.⁴⁷

The biggest factor in these divergent State Department listings is that of political expediency.⁴⁸ The United States’ government made the calculation, over the course of multiple administrations, that naming the Afghan Taliban a terrorist group would impede both the United States and the Afghan consular links with the Taliban, thereby damaging prospects of a

³⁹ Barron & Lederman, *supra* note 27, at 945.

⁴⁰ Pitt, *supra* note 26, at 2843.

⁴¹ *Id.*

⁴² See 28 C.F.R. § 0.85.

⁴³ 8 U.S.C. § 1189 (2012).

⁴⁴ Eric Schmitt et al., *supra* note 8.

⁴⁵ Masood Farivar, *Why Isn’t Afghan Taliban on US List of Foreign Terror Groups?*, VOA NEWS (Feb. 20, 2017, 5:11 PM), <https://www.voanews.com/a/afghan-taliban-us-list-foreign-terror-groups/3732453.html>.

⁴⁶ *Id.*

⁴⁷ Schmitt et al., *supra* note 8.

⁴⁸ Farivar, *supra* note 4.

peace deal.⁴⁹ Under this decision, the Obama Administration was not, in a legal sense, negotiating with a terrorist organization when it engaged in discussions with the Afghan Taliban.⁵⁰ Thus, the tradition of refusing to negotiate with terrorists was not broken.

THIRTY-DAY NOTICE REQUIREMENT AND ITS LEGALITY

The question of whether the Bergdahl exchange defied the 2014 NDAA is still unanswered. Since Congress did not clearly state whether the thirty-day notice requirement was intended to overrule the President's constitutionally protected ability to transfer civilians and military personnel, "the notice requirement does not in its terms apply to a time-sensitive prisoner exchange designed to save the life of a U.S. soldier."⁵¹ There is no definitive view on how courts will rule on this issue, it is projected that courts will read an implied exception into the notice requirement.⁵²

HISTORY OF THE SPENDING POWER

The historical context of Congress's spending power is important in understanding how it was used regarding the 2014 NDAA. The Constitution grants the spending power to Congress as an "empowerment of the legislature [that] is at the foundation of our constitutional order."⁵³ This is a power given to the Legislative Branch in a broad swath of democratic countries, including the United Kingdom's Parliament, which the Founders used as a model to construct American branches of government.⁵⁴ Congress was given this power as a check on the President, though not necessarily to limit his powers as the Commander-in-Chief.⁵⁵ Rather, it was granted to prohibit the

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Jack Goldsmith, *Was the Bergdahl Swap Lawful?*, LAWFARE (Mar. 25, 2015, 9:19 PM), <https://www.lawfareblog.com/was-bergdahl-swap-lawful>.

⁵² Maffucci, *supra* note 28, at 1326.

⁵³ Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1374-77 (1988).

⁵⁴ *Id.* at 1344.

⁵⁵ *Id.*

President from using federal funds for his own purposes.⁵⁶ The spending power is specifically enumerated in Article I, Section 9 of the Constitution: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . .”⁵⁷

Congress originally applied its spending power strictly as it related to military spending through a process by which the Commander-in-Chief requested funds.⁵⁸ After the Commander-in-Chief made the request, Congress then authorized and stated the specific purpose for which the funds could be used.⁵⁹ This strict process watered down during the Civil War when Congress began to use less specificity in describing which aspects of war could receive funding.⁶⁰ This trend continued through World War II until the late 1950s, when Congress was concerned about covert operations that were not technically acts of war.⁶¹ Congress began to attach riders to bills, much like in the 2014 NDAA, in an attempt to curtail what they saw as Presidential overreach.⁶² It was generally understood the President could not use funds without recognizing the restraints Congress had attached to the funds.⁶³ The question remains as to whether Congress can use its spending power to constrain every detail of powers belonging to the Commander-in-Chief. To answer this, consideration must be given to the historical context of Commander-in-Chief powers, as well as how the Supreme Court has ruled in analogous situations.

CONSTITUTIONAL AUTHORITY: CONGRESS V. THE PRESIDENT

Even if the courts were to decide that the 2014 NDAA did not include an implied exception, the constitutionality of the NDAA’s thirty-day notice requirement is still on unstable ground.

⁵⁶ *Id.*

⁵⁷ U.S. CONST. art. I, § 9, cl. 7.

⁵⁸ Stith, *supra* note 51.

⁵⁹ *Id.*

⁶⁰ John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1214-18 (2004).

⁶¹ *Id.*

⁶² *Id.*; see also Celidon Pitt, *supra* note 26, 2843.

⁶³ Stith, *supra* note 51, at 1344.

This is because it is conceivable that Congress created this provision in an attempt to use its spending power to strip the President of his constitutionally protected powers. The Constitution grants the President broad powers as Commander-in-Chief.⁶⁴ Specifically, “[t]he President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States. . . .”⁶⁵ It is important to note the historical context of what the role of Commander-in-Chief entails.

Commanders-in-Chief historically decide when prisoners can have liberty.⁶⁶ No traditional limits were placed on how and to whom the Commander-in-Chief could transfer a prisoner.⁶⁷ The text, structure, and history of Article II powers show that the President maintains broad latitude over such transfers.⁶⁸ As Jay Bybee noted in his memorandum regarding the prisoner transfer:

Our constitutional history and practice confirm this: The President has since the Founding era exercised exclusive and virtually unfettered control over the disposition of enemy soldiers and agents captured in time of war. Indeed, on several occasions throughout American history, the President, either in furtherance of diplomatic or military goals or merely for the sake of convenience, has transferred POWs from the custody and control of the United States to the custody and control of other foreign nations.⁶⁹

Congress maintained a significant amount of control over the military in the early days of the United States, specifically over its structure and personnel.⁷⁰ However, regulating when the President can go to war and who may join the armed services is

⁶⁴ U.S. CONST. art. II § 2, cl. 1.

⁶⁵ *Id.*

⁶⁶ *See generally* Bybee, *supra* note 30.

⁶⁷ *Id.* at 8.

⁶⁸ *Id.*; *see also* U.S. CONST. art. II § 2, cl. 1.

⁶⁹ Bybee, *supra* note 30, at 2.

⁷⁰ David J. Barron & Martin S. Lederman, *The Commander and Chief at the Lowest Ebb-- A Constitutional History*, 121 HARV. L. REV. 941, 957 (2008).

distinct from military command duties.⁷¹ Congress first recognized this in the late 18th century during skirmishes with the French, when it passed an act providing that “the President ... is authorized to exchange or send away from the United States to the dominions of France, as he may deem proper and expedient, all French citizens that have been or may be captured and brought into the United States.”⁷² In 1812, Congress passed an act that endorsed the President’s ability to “make such regulations and arrangements for the safe keeping, support and exchange of prisoners of war as he may deem expedient.”⁷³

Rather than attempt to limit the power of the President as it relates to prisoner exchanges, Congress expanded the President’s Commander-in-Chief powers in 1947 when it passed an act “plac[ing] American governmental decisions regarding war making, intelligence, covert operations, military sales, and military aid under the executive’s unified and coordinated control.”⁷⁴ Until the Bergdahl exchange, sharp policy disagreements arose concerning whether the Commander-in-Chief had the power to enter war without Congressional approval; but Congress did not contest that the Commander-in-Chief had the ability to conduct tactical decisions at his discretion.⁷⁵ Because the Supreme Court left open the possibility that “independent war powers” are still subject to potential statutory limitations, legal scholars proposed that “Congress may constitutionally constrain the President as long as the legislative action does not violate a mandatory provision or express

⁷¹ Pitt, *supra* note 26, at 2843.

⁷² Captured French Citizens Act, ch. 18, 1 Stat. 624, 624 (1799).

⁷³ Safe Keeping and Accommodation of Prisoners of War Act, ch. 128, 2 Stat. 777 (1812).

⁷⁴ HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 78, 102 (1990); Pitt, *supra* note 26, at 2846; *see also* Louis Fisher, *Presidential Power in National Security: A Guide to the President-Elect*, 39 PRES. STUDIES Q. 347, 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.”).

⁷⁵ *See* Barron & Lederman, *supra* note 27, at 750-51; *see also* Pitt, *supra* note 26, at 2846.

restriction of the Constitution and does not impede on an exclusive presidential power.”⁷⁶

The watershed case, as it concerns the Commander-in-Chief’s foreign affairs power, is *United States v. Curtiss-Wright Export Corp.*⁷⁷ In *Curtiss-Wright*, the United States alleged that Curtiss-Wright colluded with Bolivia for the sale of fifteen machine guns while Bolivia was engaged in an armed conflict in the Chaco.⁷⁸ Curtiss-Wright’s actions were thus direct violations of a Joint Resolution of Congress and a proclamation issued by President Roosevelt.⁷⁹ While distinguishable from the Bergdahl situation in that the statute regarded the sale of arms in the Chaco War and not prisoner exchanges, the Court extrapolated on how Congressional power is limited in foreign affairs.⁸⁰ Justice Sutherland wrote:

In 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. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it.⁸¹

The Court also distinguished internal and external affairs, holding that the President must enjoy “freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”⁸²

The Court touched on national security-related policy concerns that exist when giving Congress the same power over

⁷⁶ William M. Hains, *Challenging the Executive: The Constitutionality of Congressional Regulation of the President’s Wartime Detention Policies*, 2011 BYU L. REV. 2283, 2284 (2011); see also Pitt, *supra* note 26, at 2847.

⁷⁷ See generally *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936); see Pitt, *supra* note 26, at 2847.

⁷⁸ *Curtiss-Wright Exp. Corp.*, 299 U.S. at 311.

⁷⁹ *Id.*

⁸⁰ *Id.* at 319.

⁸¹ *Id.*

⁸² *Id.* at 320.

international affairs as it has over domestic affairs.⁸³ The Court noted that foreign relations required caution and secrecy, which the Court explained are not attributes of Congress.⁸⁴ The Court further held that allowing Congress to be involved with negotiations would likely cause “danger and mischief” as Congress could be swayed by political reasons more so than the President.⁸⁵ The Court’s strongest argument against giving Congress more power with foreign affairs was in noting that all agencies were required to provide requested information to Congress, except for the State Department.⁸⁶ The State Department differs from other governmental departments in that it only has to provide the information if “not incompatible with the public interest.”⁸⁷ The Supreme Court further noted that the State Department’s decision not to release information it felt would be damaging to national security was rarely, if ever, questioned and that the same latitude should be given to the Commander-in-Chief.⁸⁸

Scholars who believe that the Supreme Court would find that Congress lacks authority to place restrictions on prisoner exchanges often point to *Youngstown Sheet & Tube Co. v. Sawyer*.⁸⁹ In *Youngstown*, the Supreme Court reviewed whether President Harry Truman acted within the scope of his power when seizing steel mills in the hope of avoiding a labor emergency during the Korean War.⁹⁰ While the Supreme Court ultimately held that Truman’s actions violated the Takings Clause of the Fifth Amendment, the Court also examined the relationship and power balance between the President and Congress.⁹¹ President Truman asserted that if Congress had its way, damage would be done to the ongoing war.⁹² President

⁸³ *Id.*

⁸⁴ *Id.* at 321.

⁸⁵ *Id.* at 320-21.

⁸⁶ *Id.* at 321.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see also Pitt, *supra* note 26, at 2848-51.

⁹⁰ *Youngstown*, 343 U.S. at 582-83.

⁹¹ *Id.* at 631-33.

⁹² *Id.* at 582-83.

Truman justified his actions as necessary to prevent the mills from closing.⁹³ Truman argued that support for his actions came from “the Constitution, by historical precedent, and by court decisions.”⁹⁴

The Court did not accept Truman’s argument.⁹⁵ Justice Black wrote in his majority opinion that “the President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”⁹⁶ Justice Black also stated that one reason for this was because Truman had been preempted by Congress as it expressly rejected using seizure as a means of solving labor disputes.⁹⁷ Hence, Truman’s only remaining argument was leaning on the Constitution as his source for power to seize the mills.⁹⁸ Justice Black struck down that argument using Article II of the Constitution and pointing out how it limits the President’s “functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”⁹⁹

The main lesson from these cases is that the President must always consult with Congress in domestic affairs, but not always in foreign affairs.¹⁰⁰ Those who rely on the *Youngstown* decision to assert that the President must consult with Congress before initiating a prisoner transfer miss the distinction the Court drew in *Curtiss*.¹⁰¹ Arguments based on *Youngstown* would likely be valid if the question was whether the President could use his power on domestic prisoners. It is hard to see how a serious argument could be made that the Bergdahl exchange

⁹³ *Id.* at 584.

⁹⁴ *Id.*

⁹⁵ *Id.* at 588-89.

⁹⁶ *Youngstown*, 343 U.S. at 585.

⁹⁷ *Id.* at 586-87.

⁹⁸ *Id.* at 587.

⁹⁹ *Id.*

¹⁰⁰ See *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319 (noting the difference between domestic and foreign affairs); *but see Youngstown*, 343 U.S. at 587.

¹⁰¹ See *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319; *but see Youngstown*, 343 U.S. at 587.

was not a foreign affair, and as such, within the scope of the President's Commander-in-Chief powers.¹⁰²

The biggest remaining question for the Supreme Court to answer is whether prisoner exchanges fall under the realm of "War Conduct."¹⁰³ The Supreme Court held in *Hamdan v. Rumsfeld* that Congress cannot be the orchestrator of the conduct of military campaigns.¹⁰⁴ The Court also held that the President cannot establish military commissions without consulting Congress, thereby ensuring that any answer, as it relates to dealings in foreign affairs, remained nebulous at best.¹⁰⁵ This means that the Supreme Court has expanded on its rationale in *Curtiss* by holding that even in foreign affairs there are limits to presidential power; but Congress cannot assume control of military operations.¹⁰⁶ The secretive nature of foreign affairs was one of the main reasons given for not allowing Congress to have more influence in foreign affairs.¹⁰⁷ Therefore, it seems the Court would be less likely to find that Congress could have say in a matter of utmost security like that of prisoner exchanges.

If the Supreme Court were to rule that the Commander-in-Chief must follow the 2014 NDAA notice requirement, or simply notify Congress at all, the Court would be ignoring the traditional Commander-in-Chief powers.¹⁰⁸ To realize this, one only needs to look at the history of how the Commander-in-Chief

¹⁰² See *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319 (explaining that the President does not need to consult with Congress in all foreign affairs because such matters are secretive, and Congress cannot be trusted to keep that secret).

¹⁰³ Maffucci, *supra* note 28, at 1340.

¹⁰⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006).

¹⁰⁵ *Id.*; see also Steven M. Maffucci, *Leave No Soldier Behind? The Legality of the Bowe Bergdahl Prisoner Swap*, 63 BUFF. L. REV. 1325, 1340 (2015).

¹⁰⁶ See *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319.

¹⁰⁷ *Id.*

¹⁰⁸ Barron & Lederman, *supra* note 27, at 738.

of the United States has previously acted with regards to prisoners.¹⁰⁹

The first Commander-in-Chief, George Washington, established local prisoner exchanges throughout the Revolutionary War.¹¹⁰ President Abraham Lincoln followed suit in the Civil War, but went further and exchanged soldiers who were legally considered to be “non-state actors.”¹¹¹ During World War II, Presidents Roosevelt and Truman initiated the transfer of enemy soldiers to domestic solitudes.¹¹² Furthermore, during the Vietnam War, there were thousands of reciprocal releases conducted by the United States government.¹¹³ A reciprocal release involved the United States freeing enemy combatants in exchange for expected Vietcong reciprocity.¹¹⁴ Essentially, an enemy combatant would be freed without overt assurances of reciprocity other than the enemy’s word.¹¹⁵ From this, it is clear that the President is given wide latitude to make decisions about the transfer of prisoners based on the Constitution and the history of the Commander-in-Chief powers. Congressional silence itself implicates an acknowledgment of the President’s Commander-in-Chief authority regarding the transfer of enemy prisoners during wartime.

Those opposed to the Bergdahl transfer have said that the history of the Commander-in-Chief powers should not be considered in his case, as the government broke precedent by “negotiating with terrorists” and paying the Qatar government 100 million USD for assisting in the exchange.¹¹⁶ As previously mentioned, the Taliban group that captured Bergdahl was not a legally designated terrorist organization by the State

¹⁰⁹ U.S. DOJ, Memorandum for William Haynes (2002) (regarding “[t]he President’s power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations”).

¹¹⁰ Barron & Lederman, *supra* note 27, at 738.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Pitt, *supra* note 26, at 2843.

Department.¹¹⁷ Furthermore, the United States has previously exchanged money to nation-states during prisoner exchanges.¹¹⁸ The Commander-in-Chief has been expected, at a bare minimum, to discuss the potential of conducting a prisoner exchange with the enemy in every kind of conflict.¹¹⁹ Factually speaking, the number of prisoner exchanges that occurred in both the Civil and Revolutionary wars are significantly higher than any exchanges that have occurred during the War on Terror, and the exchanges that occurred in those conflicts did not require Congressional approval.¹²⁰

Although the Constitution grants Congress the power to declare war, it does not grant it the enumerated power to force the Commander-in-Chief to consult Congress before conducting a prisoner transfer.¹²¹ While such a move could be made by passing a constitutional amendment, Congress did not attempt to do so, but simply attached a rider to the 2014 NDAA.

JUSTIFICATION OF THE OBAMA ADMINISTRATION'S ACTIONS UNDER THE IMMINENT THREAT THEORY

Those who believe that the President should be given more latitude in conducting prisoner exchanges have asserted the argument that if a soldier's life is in 'imminent danger,' the President has the power to conduct a prisoner exchange regardless of whether a relevant statute exists.¹²² There is little precedent regarding Presidential power to protect soldiers, and the law is, again, nebulous at best. However, protagonists of this argument often cite a select few which should be examined.¹²³

The *Slaughterhouse* cases provide an example. The Supreme Court held that a "privilege of a citizen of the United States is to demand the care and protection of the Federal

¹¹⁷ See Masood Farivar, *supra* note 45.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ U.S. Const. art. I § 8, cl. 11.

¹²² Maffucci, *supra* note 28, at 1347.

¹²³ *Id.*

government over his life, liberty, and property when . . . within the jurisdiction of a foreign government.”¹²⁴ This logic was expanded upon in *In re Neagle*. There, the Supreme Court formally recognized the idea that the Constitution gives the Executive branch the ability to protect American citizens.¹²⁵ Neagle, a U.S. Marshall, was assigned to protect Justice Field. Acting as Field’s bodyguard, Neagle fatally shot a man who Neagle believed was about to attack Field.¹²⁶ Following Neagle’s arrest, the United States sought his release via a writ of *habeas corpus*.¹²⁷ Finding that the Attorney General acted lawfully in giving Fields’s U.S. Marshal protection, the Court reasoned that the President’s power to “take care that the laws be faithfully executed” goes beyond “the enforcement of acts of congress or of treaties of the United States according to their express terms.”¹²⁸ This power contains “the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.”¹²⁹ The language used in this opinion supports the idea that foreign relations fall under an exclusive national security area in which the President may act exclusively.

Perhaps the clearest example of the recognition of the Commander-in-Chief power to protect a citizen in imminent danger took place in a New York circuit court.¹³⁰ In *Durand v. Hollins*, the court noted that “as it respects the interposition of

¹²⁴ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872).

¹²⁵ *In re Neagle*, 135 U.S. 1, 67 (1890).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 64.

¹²⁹ *Id.*

¹³⁰ *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (in which a group seeking to run the transport trade over the City of Greytown in what is now Nicaragua. During this time, the United States supported a rival company operated by Nicaraguans. This caused tensions which came to ahead when a group of Greytown citizens terrorized the American diplomat and wounded him. In response, the United States sent Captain Hollins to Greytown to collect reimbursement for injuries done to the property of the U.S. supported company and an apology for injuring the diplomat. Greytown elected to disregard Captain Hollins’s request, and Hollins reacted by bombing and burning down the city.).

the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President.”¹³¹ While courts have not specifically stated whether the President has the power to protect citizens, they did recognize that the President, at a minimum, has Commander-in-Chief powers of which some must be independent from congressional dictation.¹³²

From a historical and practical perspective, the power to protect is a power that the President uses unilaterally, indicating it is a power not shared with Congress.¹³³ While there is no situation totally analogous to that of the Bergdahl exchange, there are similar examples in which the President exercised the power to protect, which has been used at least since the Jefferson presidency.¹³⁴ Moreover, “the Administrations of Presidents Ford, Carter, Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama have all, in one form or another, asserted the constitutional authority to act unilaterally in protecting the lives of Americans abroad.”¹³⁵

While other scholars have justified the Obama Administration’s prisoner exchange for Bergdahl under the imminent threat exception,¹³⁶ the conclusion has not been formalized by the Supreme Court. Yet, the totality of Supreme Court cases regarding foreign affairs seem to support the conclusion that the Supreme Court will tolerate,¹³⁷ if not endorse, the President’s near-exclusive power to conduct foreign

¹³¹ *Id.* at 112.

¹³² Maffucci, *supra* note 28.

¹³³ *Id.*

¹³⁴ Arthur H. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, 43 CUMB. L. REV. 375, 458 (2013); *see also* Maffucci, *supra* note 28.

¹³⁵ *See* Maffucci, *supra* note 28, 1349-1350.

¹³⁶ *Id.*

¹³⁷ *See generally* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1305 (1988).

affairs, and thereby prisoner exchanges, free of Congressional restraint.¹³⁸

EFFECTS ON NATIONAL SECURITY: LEGISLATIVE BRANCH CONSULTATIONS

Aside from the fact that history points toward the conclusion that the Commander-in-Chief may conduct prisoner exchanges at his discretion, there are policy concerns that cannot be ignored pertaining to Congressional attempts to share this power mantle. First, Congress is notorious for its inability to keep a secret. This is a concern that has existed since the inception of Congress.¹³⁹ Congress is a body of individuals who are largely concerned with their own reelection and future political prospects.¹⁴⁰ While those concerns should not outweigh consideration that must be undertaken when conducting a prisoner exchange, it is far from certain that Congress takes those considerations as seriously as they should.¹⁴¹

As Alexander Hamilton noted in *Federalist No. 23*, the Commander-in-Chief powers should be as separated as possible from the powers executed by Congress.¹⁴² As described:

These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and

¹³⁸ *Id.* (After *Youngstown*, the Supreme Court broadly defined the United States foreign policy power to lean in the Executive Branch's favor. After the Court's decision in *Chadha* got rid of Congressional power with regards to the War Powers Resolution, the Arms Export Control Act, the Nuclear Non-Proliferation Act, the National Emergencies act, and IEEPA. See generally *Goldwater v. Carter*, 444 U.S. 996 (1979); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). These cases fused the Executive Branches power as it relates to treaties. More recently, *Dames & Moore v. Regan*, 453 U.S. 654 (1981) gave lower courts the ability to rule in the Executives favor if decisions were made of economic necessity.)

¹³⁹ 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, 22 (Paul Smith ed., 1979).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See ALEXANDER HAMILTON, THE FEDERALIST NO. 23, at 142 (Edward Earle ed. 1941).

variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed.¹⁴³

Hamilton indicates that Congress would not have the elasticity needed to wield the powers of the Commander-in-Chief. That is, Congressional actions need debate and compromise within its own body of members.¹⁴⁴ While this is useful for many other affairs, it would be impractical regarding the deft negotiation and urgent decisions required of the Commander-in-Chief. At the same time, having the Commander-in-Chief powers incorporated into one individual allows a quick response without the possibility of leaks and extreme debate. Simply put, Congress is incapable of having the ability to require the President to notify it before completing a prisoner exchange.¹⁴⁵

Additionally, Congress has a high turnover rate, leading to a lack of consistency concerning the establishment stable foreign policy, and does not allow members to gain the knowledge needed to handle specific international issues. In other words, the rider attached to the 2014 NDAA undermines the Founders' original intent for foreign policy. The Founders considered vesting only some power to conduct foreign affairs with Congress.¹⁴⁶ However, while the Founders purposely divided many other powers among the branches of government, they reached the conclusion that handling foreign affairs was unique to the Executive Branch because it was the only branch capable of adequately handling such issues. The Act ignores Hamilton's concerns about preventing the legislature from taking power from the Commander-in-Chief.¹⁴⁷ If Congress could force the Commander-in-Chief to give them a thirty-day notice

¹⁴³ *See id.* (emphasis added).

¹⁴⁴ *See generally id.*

¹⁴⁵ 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).

¹⁴⁶ *Id.* at 580-81.

¹⁴⁷ *See* HAMILTON, *supra* note 136, at 142.

before conducting a transfer, where would the line be drawn concerning the balance of powers between the Commander-in-Chief and Congress? Proponents of the 2014 NDAA rider put forth that Congress is using its spending power and is simply asking for notice before money is spent on transferring prisoners.¹⁴⁸ Even this argument fails, as Congress could then ask for notice on any Commander-in-Chief decision that requires the use of government funds.

Congress previously tried to take some of the Commander-in-Chief powers from the President.¹⁴⁹ Following the Iran-Contra affair, Congress proposed, and failed, to pass the Intelligence Oversight Act.¹⁵⁰ James Basile aptly noted that practicality is the best reason for opposition to the Act and why Congress should not attempt to strip inherent Commander-in-Chief powers from the President.¹⁵¹ Many legal experts have touched on the practical reasons why the Commander-in-Chief should have more power in situations with urgent national security interests.¹⁵²

Although the Assistant Attorney General spoke about the proposed Oversight Act,¹⁵³ the same logic is applicable to the

¹⁴⁸ William M. Hains, *Challenging the Executive: The Constitutionality of Congressional Regulation of the President's Wartime Detention Policies*, *BYU L. REV.* 2283, 2284 (2011).

¹⁴⁹ Intelligence Oversight Act, S. 1721, 100th Cong., 2d Sess. § 503 (1987).

¹⁵⁰ James F. Basile, *supra* note 139.

¹⁵¹ *Id.* at 599.

¹⁵² S. REP. NO. 276, 100th Cong., 2d Sess. 19-20 (1988) (statement of Charles J. Cooper, Assistant Attorney General "There may be instances where the President must be able to initiate, direct, and control extremely sensitive national security activities. We believe this Presidential authority is protected by the Constitution and that by purporting to oblige the President under any and all circumstances to notify Congress of a covert action within a fixed period of time, [the Act] infringes on this constitutional prerogative of the President. A President is not free to communicate information to the Congress if to do so would impair his ability to execute his own constitutional duties. Under some circumstances, communicating findings to Congress within 48 hours could and will frustrate the President's ability to discharge those duties.").

¹⁵³ Generally, the Oversight Act was a proposed piece of legislation which purported to give the President the ability to authorize special acts so long as the President notified Congress via a written record no later than forty-eight hours after reaching the decision to initialize a special act.

2014 NDAA and the Commander-in-Chief's ability to carry out a prisoner exchange. While the Oversight Act would have required the President to notify Congress within forty-eight hours of a proposed transfer, the 2014 NDAA went even further by forcing the President to notify Congress thirty days *prior* to the prisoner exchange. The fear that sensitive information was likely to leak if the President had to notify Congress within forty-eight hours of carrying a special action can only be rational if notification must occur thirty days prior. By requiring the President to notify Congress, in effect giving up some of the Executive Branch's inherent Commander-in-Chief powers, the President's ability to execute the national security interests of the United States would be irreparably damaged.

Proponents of allowing Congress to force the President into providing notice when conducting prisoner transfers point out that that it could lead to the President seizing even more Commander-in-Chief powers.¹⁵⁴ However, the scope of conducting prisoner exchanges is so narrow in nature that the possibility for the Executive Branch to use it as a means of furthering its power into other arenas should not outweigh the concerns of giving Congress the power of forcing consultation. While the slippery slope argument can be made whenever a new power is established, or whenever the Court is deciding whether the power always latently existed, such an argument should not carry the day. The Founders purposefully created a system of checks and balances, so that if one branch began to overstep its constitutional bounds, that branch would be limited accordingly.¹⁵⁵ There is no reason to believe that giving the President the clear ability to have total control over prisoner exchanges would not be checked if the power began to expand. If the President does so, either Congress or the Supreme Court can intervene and condemn the President's actions, as both have done in the past.

The remaining argument asserts that by having the President and Congress working in tandem, the process appears

¹⁵⁴ Cf. Maffucci, *supra* note 28, at 1356.

¹⁵⁵ See generally HAMILTON, *supra* note 136.

more legitimate to the general public.¹⁵⁶ This argument is rooted in Justice Jackson's frequently cited concurrence in *Youngstown*, in which he noted:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty.¹⁵⁷

Yet, Jackson carefully identified that the President could exercise power without Congress concurring or without a specifically enumerated power, if the Court scrutinized the situation in which it was occurring.¹⁵⁸ In prisoner exchanges, the Court adopting the position that Congress has concurrent power with the President would restrict Commander-in-Chief powers, and that is not found within the Constitution. While this should not be the only reason a Court would rule in such a manner, there are basic political issues that should be considered. The Founders recognized that allowing Congress and the President to share the Commander-in-Chief powers would lead to a lack of responsibility.¹⁵⁹ Hamilton clearly pointed out in *Federalist No. 70* that a rule allowing Congress to share Commander-in-Chief powers "tends to conceal faults and destroy responsibility."¹⁶⁰ Using the example proposed by Hamilton, the President would be forced to accept responsibility for his actions, and if the populace did not agree with the prisoner exchange, as some members of Congress did not with Bergdahl, he would take a political loss. Therefore, the President would be driven to act both dependably and with the interest of the public, as he could not shift blame to members of Congress.¹⁶¹

¹⁵⁶ *Id.*

¹⁵⁷ *Youngstown*, 343 U.S. at 635-36.

¹⁵⁸ *Id.* at 638.

¹⁵⁹ Basile, *supra* note 139, at 582.

¹⁶⁰ THE FEDERALIST NO. 70, AT 459 (ALEXANDER HAMILTON) (EDWARD EARLE ED., 1941).

¹⁶¹ THE FEDERALIST NO. 23, AT 162 (ALEXANDER HAMILTON) (EDWARD EARLE ED., 1941).

The totality of how the Court has outlined the President's Commander-in-Chief powers leads to the conclusion that the Court would look unfavorably upon an obvious attempt by Congress to seize some of that power. Previous cases have recognized the President's near- complete power over foreign affairs as well as the President's discretion concerning implementation of military strategy.¹⁶² In noting that the President has a duty to the lives of American citizens while they are out of the country, the Court implicitly states that the tools the President uses to protect American citizens cannot be abridged.¹⁶³ One of those tools is the ability to conduct a prisoner exchange. Congress cannot change the way the President utilizes his inherent powers and tools.¹⁶⁴ If the President's Commander-in-Chief powers were functionally impeded by Congress, those powers would be far less effective.¹⁶⁵ Thereby, the 2014 NDAA would be unlikely to pass constitutional muster as it practically prevents the President from exercising a fulfilling or Commander-in-Chief duty.

Additionally, because the President is elected by the people, and the United States vets his policies, it is more likely that the public will agree with his decisions regarding prisoner exchanges. On the other hand, the members of Congress are elected by a narrower portion of the public. Because of how voters select those members, it is more likely that the Congressional body would act out of partisanship, rather than the betterment of the Country.¹⁶⁶ In sensitive matters, like prisoner exchanges, tense partisanship could lead to disastrous consequences.

The very nature of the Legislative Branch dictates that it is against the national security interests of the United States for Congress to share the power of prisoner exchanges with the Executive Branch. For this reason, Congress should not be

¹⁶² Basile, *supra* note 139, at 596.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See generally Alex J. Whitman, *Pinpoint Redistricting and the Minimization of Partisan Gerrymandering*, 59 EMORY L.J. 211, 214 (2009).

allowed to take the power which currently exists exclusively with the President and erode it.

CONGRESSIONAL APPROVAL WOULD VIOLATE THE 1947 NATIONAL
SECURITY ACT AND GOVERNMENTAL STRUCTURE

Immediately following the conclusion of World War II, President Harry Truman pushed for the 1947 National Security Act to improve what he considered to be an “antiquated defense setup.”¹⁶⁷ There were several new tenets created in the 1947 National Security Act; however, one of the most central concepts was to define war making, intelligence, covert operations, and military strategy as included within the United States “national security” interests.¹⁶⁸ The Act further defined the national security interests as falling under the Presidential, rather than Congressional, powers.¹⁶⁹

There are two main components to the Act as it concerns defining the President’s national security power. First, President Truman and Congress envisioned the Act being implemented by a President with a great deal of latitude over foreign affairs powers.¹⁷⁰ Second, the Act intended the President to have the power not just in times of war, but also in times of “false peace.”¹⁷¹ In other words, Congress does not need to formally declare war for the President’s national security powers to materialize. Rather, the power continually exists. In contrast, the 1947 National Security Act did not award Congress any role in foreign affairs or in the national security arena.¹⁷² This is significant because it suggests that Congress acknowledged that the Executive Branch is better equipped to handle military strategy than Congress, and, thereby, better suited to handle prisoner exchanges.

¹⁶⁷ See generally Michael Warner, *Legal Echoes: The National Security Act of 1947 and the Intelligence Reform and Terrorism Prevention Act of 2004*, 17 STAN. L. & POL’Y REV. 303, 309 (2006).

¹⁶⁸ 50 U.S.C. §§ 401-405 (1982).

¹⁶⁹ See generally Koh, *supra* note 131, at 1269.

¹⁷⁰ *Id.* at 1280.

¹⁷¹ *Id.*

¹⁷² *Id.*

The President is singularly accountable to the country.¹⁷³ Because of the way the Founders structured the American government, the President is the only person able to make a quick decision, which is required in situations like the Bergdahl exchange.¹⁷⁴ Only the President can decisively initialize national security policy by using inherent Commander-in-Chief powers in a way that Congress cannot.¹⁷⁵ Unlike Congress, the structure of the Presidency allows the Executive to make such decisions in a secretive and decisive manner.¹⁶⁹

CONCLUSION

If the Supreme Court were to find that Congress acted within its constitutional means when it attached the rider to the 2014 NDAA, Congress would unconscionably eliminate an immense amount of power from the Commander-in-Chief. This would be complicated by Congress's inherent lack of suitability for handling this power. Congress is a slow-moving body, and decisions that are of vital importance to national security often require swift response. Congressional members would have difficulty learning the information needed to make specific decisions and would be susceptible to leaking information regarding prisoner exchanges to secure political advantage. There are simply some aspects of power that Congress is not equipped to handle. The Supreme Court has given the President tremendous power concerning foreign affairs and military strategy. The 2014 NDAA thirty-day notice requirement does not appear to pass constitutional muster.

Even if the Congress could constitutionally force the President to provide notice before initiating a prisoner exchange, there are national security reasons why such an action would be impractical. Congressional members are more likely to pay attention to the desires of their narrow base of constituents than the President. The fact that Congressional members are only directly accountable to a small portion of American citizens

¹⁷³ *Id.* at 1292.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

means that they may not always act in the best interest of the United States. This would severely, adversely affect the United States' national security interests, and render it nearly impossible for Congress to give full attention to the desires of the nation. The President does not have this problem.

The way that the Founders designed the branches government all but explicitly state that the power of prisoner exchanges is a power intended exclusively for the presidency. Historical practice bears this out from as early as the actions of President Washington. Early Founders, such as Hamilton, wrote as much in *The Federalist Papers*. From a practical standpoint, Congress would neither be able to act as quickly nor as secretly as prisoner exchanges require. The Bergdahl exchange took place over the course of several years. Over that time-period, Congressional membership changed. The changing of membership would negatively impact both sides' ability to strike a deal. The fact that Congress must debate matters, and that it has a reputation for not being able to keep sensitive matters secret, only improves the policy rationale for why the President should be given exclusive power over prisoner exchanges.

While Congress may desire to share the President's Commander-in-Chief powers over prisoner exchanges, it is simply a role for which Congress is ill-suited. Therefore, the President should enjoy constitutionally unlimited control over the transfer of captured terrorists to the control and custody of foreign nations.

