

12-1-2015

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Recommended Citation

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

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol63/iss5/6>

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COMMENT

Leave No Soldier Behind? The Legality of the Bowe Bergdahl Prisoner Swap

STEVEN M. MAFFUCCI†

INTRODUCTION

On May 31, 2014, President Obama announced the recovery of the lone American prisoner of war from the Afghan conflict, U.S. Army Sergeant Bowe Bergdahl.¹ This seemingly momentous occasion, however, was quickly shrouded in controversy.² Most notably, there were assertions from members of Bergdahl's unit that he had deserted, and that fellow soldiers had needlessly died in the search following Bergdahl's disappearance.³ There were complaints that the cost associated with recovering Bergdahl, particularly the five Taliban prisoners for whom Bergdahl was exchanged, was too high, and that the Obama

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1. 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.

2. Tom Hamburger & Kevin Sieff, *Joy About Bergdahl Release Gives Way to Questions*, WASH. POST (June 1, 2014), https://www.washingtonpost.com/world/national-security/hagel-discusses-details-of-us-operation-to-exchange-taliban-detainees-for-captive-soldier/2014/06/01/551c21f8-e95f-11e3-a86b-362fd5443d19_story.html.

3. 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/soldier-srgt-bowe-bergdahl-of-idaho-pow-vanished-angered-his-unit.html?_r=0.

Administration had violated a central foreign policy directive to not negotiate with terrorists.⁴ Above all, however, members of Congress argued that the Obama Administration had broken the law by failing to notify Congress thirty days before the release of the Taliban prisoners, as required by the National Defense Authorization Act for 2014.⁵

This claim by members of Congress raises a novel question: Does the President have exclusive authority to secure the release of U.S. service members taken captive during combat operations in a foreign country? This Comment evaluates two prominent legal theories, one statutory and the other constitutional, proffered by the Obama Administration in response to its critics. This Comment concludes that the Administration's theories fail to provide definitive authority for the President's exchange for Bergdahl. In light of that conclusion, this Comment argues that policy concerns, most importantly the military ethos to leave no soldier behind, necessitate that Congress and the judiciary recognize exclusive authority for the executive branch in this area.

This Comment will proceed as follows: Part I will present the available information concerning the circumstances surrounding the exchange for Bergdahl. Part II explains the relevant provisions of the National Defense Authorization Act for 2014 and outlines the legal theories put forth by the Obama Administration in defense of its action. Part III will evaluate the efficacy of the Administration's theories. Part IV discusses the important policy concerns that support recognizing unilateral authority for the executive branch in securing the release of U.S. service members taken captive during combat operations in a foreign country.

4. Hamburger & Sieff, *supra* note 2.

5. *Id.*; see National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

I. THE CIRCUMSTANCES SURROUNDING THE EXCHANGE

Sergeant Bergdahl⁶ left his unit's outpost in Paktika Province, Afghanistan sometime after midnight on June 30, 2009.⁷ A frantic search for Bergdahl followed, and resources would continue to be diverted to the search for ninety days after his disappearance without success.⁸ Following the failed search, direct talks between the United States and the Taliban over the release of Bergdahl began in November 2010 in Munich but failed to progress for a variety of reasons.⁹ Direct talks soon ended and, instead, the two sides began a negotiation process using intermediaries starting in early 2012.¹⁰ The government of Qatar was the primary intermediary during this process and would prove pivotal in reaching a final agreement.¹¹

From the start, the central piece of any deal between the two sides involved an exchange for five Taliban detainees held by the United States at Guantanamo Bay, Cuba.¹² Though the deal was far from complete, the Obama Administration briefed congressional leaders in late 2011 and early 2012 of this potential exchange, but the plan was met with strong concerns.¹³ Despite these views, the

6. Bergdahl was actually a Private First Class at this time and was promoted while in captivity. See Schmitt et al., *supra* note 3.

7. *See id.*

8. *Id.*

9. 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>.

10. *Id.*

11. *Id.*

12. *Id.*

13. 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 Press Release, John Boehner, Speaker of the House, Statement on Congressional Concerns Raised About Prisoner Exchange (June 3, 2014), <http://www.speaker.gov/press-release/boehner-statement-congressional-concerns-raised-about-prisoner-exchange> [hereinafter Press Release] ("More than two years ago, Members of Congress were briefed on the possibility of such an

Administration continued the negotiation process to secure Bergdahl's release. Although talks bogged down in late 2012, the potential for an agreement gained promise in September 2013 when the Taliban sent a message through the Qataris that they were ready to re-engage in negotiations.¹⁴ Following that message, a proof of life video sent by the Taliban to the United States government in January 2014 sparked a sense of urgency within the Obama Administration, as Bergdahl appeared to be in severely declining health.¹⁵ Over the next few months, meetings between U.S. officials and the Taliban through Qatari intermediaries produced the framework for the agreement, and terms of the deal came together a few days before the exchange took place.¹⁶

Although the Administration had previously acknowledged the need to inform Congress prior to any exchange involving Guantanamo detainees,¹⁷ congressional leaders were not notified of the Bergdahl swap until the day of the exchange.¹⁸ Accordingly, after United States Special Forces confirmed that Bergdahl was in hand, guards at Guantanamo simply transferred the five former Taliban

exchange, and the chairmen at the time and I raised serious questions to the administration.”).

14. Entous & Barnes, *supra* note 9.

15. *Id.*

16. *Id.*

17. See 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).

18. See U.S. GOV'T ACCOUNTABILITY OFFICE, 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). However, there is some dispute as to when and how notice was provided. See *id.* at 4; 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-briefedprisoner-deal-white-house-107373>.

commanders¹⁹ to the team from Qatar.²⁰ Immediately following the exchange, several members of Congress expressed their anger at not having been informed prior to the trade.²¹ Chief among the concerns raised was that the Obama Administration had broken the law by failing to notify Congress thirty days prior to releasing any detainee from Guantanamo as required by the National Defense Authorization Act for 2014.²²

II. THE NATIONAL DEFENSE AUTHORIZATION ACT AND THE ADMINISTRATION'S POSITION

The National Defense Authorization Act for 2014 (“2014 NDAA”) is an appropriations bill that authorizes funding for the Department of Defense.²³ Beginning in 2011, this bill became a vehicle to restrict the President’s ability to transfer detainees out of Guantanamo Bay.²⁴ In 2014, Congress eased some of the restrictions on transferring detainees to foreign countries; however, the remaining restrictions form the basis of the charge that the Obama Administration broke the law. Specifically, the 2014 NDAA authorizes the Secretary of Defense “to transfer or release any individual detained at Guantanamo to the individual’s country of origin, or any other foreign country” provided that certain conditions are

19. Schmitt & Savage, *supra* note 1. The detainees were Mohammed Nabi Omari, Mullah Norullah Noori, Mullah Mohammed Fazl, Abdul Haq Wasiq, and Khirullah Said Wali Khairkhwa. *Id.* For a brief description of each, see *The Gitmo Detainees Swapped for Bergdahl: Who Are They?*, CNN (May 31, 2014), <http://www.cnn.com/2014/05/31/us/bergdahl-transferred-guantanamo-detainees>.

20. Entous & Barnes, *supra* note 9.

21. Schmitt & Savage, *supra* note 1.

22. *See id.* Notably, two other laws may also have been implicated here, Section 8111 of the Fiscal Year 2014 Consolidated Appropriations Act as well as the Anti-Deficiency Act. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 18, at 1. Because violations of each of these acts are dependent on a violation of the NDAA, this Comment does not expressly address them.

23. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

24. *See* David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash Over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179, 203 (2012) (noting that the 2011 National Defense Authorization Act was the “final nail in the coffin” of President Obama’s plan to close Guantanamo).

met.²⁵ First, section 1035(b) requires that the Secretary of Defense ensure that steps have been taken to “substantially mitigate the risk of such individual engaging or reengaging in any terrorist or hostile activity that threatens the United States or United States persons or interests” and that “the transfer is in the national security interest of the United States.”²⁶ Although some members of Congress have questioned the adequacy of the security measures taken,²⁷ the Administration has largely not been accused of violating this section. The section of the 2014 NDAA that is regularly noted by critics of the Bergdahl swap, section 1035(d), reads as follows: “The Secretary of Defense shall notify the appropriate committees of Congress of a determination of the Secretary under subsection (a) or (b) not later than 30 days before the transfer or release of the individual under such subsection.”²⁸

As in previous years, President Obama signed the 2014 NDAA into law accompanied by a signing statement that addressed several concerns about its restrictions on Guantanamo detainees.²⁹ In particular, President Obama noted that section 1035 “in certain circumstances, would violate constitutional separation of powers principles. The

25. National Defense Authorization Act § 1035(a).

26. *Id.* § 1035(b)(1)-(2).

27. Brian Knowlton, *Administration Defends Swap With Taliban to Free U.S. Soldier*, N.Y. TIMES (June 1, 2014), <http://www.nytimes.com/2014/06/02/us/politics/bowe-bergdahl.html>.

28. National Defense Authorization Act § 1035(d).

The term “appropriate committees of Congress” means— (A) the Committee on Armed Services, the Committee on Foreign Relations, the Committee on Appropriations, and the Select Committee on Intelligence of the Senate; and (B) the Committee on Armed Services, the Committee on Appropriations, the Committee on Foreign Affairs, and the Permanent Select Committee on Intelligence of the House of Representatives.

Id. § 1035(e).

29. Notably, President Obama did not raise constitutional issues with the restrictions on the transfer and release of Guantanamo detainees until his signing statement accompanying the 2012 National Defense Authorization Act, and at least one commentator believes that this change in attitude was the result of ongoing negotiations to trade for Sgt. Bergdahl. Frakt, *supra* note 24, at 244.

executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers.”³⁰ He went on to assert that, in circumstances where section 1035 violates separation of powers principles, “my Administration will implement [section 1035] in a manner that avoids the constitutional conflict.”³¹

Presidents have used signing statements throughout history as a way to offer their interpretations of legislation they are signing into law,³² and the President’s signing statement here provides the basis for the Administration’s defense of the Bergdahl swap. Although different members of the Administration have given various rationales for failing to notify Congress, the Administration clearly articulated its stance in a response to a Government Accountability Office Report that concluded a violation of law had occurred.³³ The Administration’s defense is best understood in terms of two distinct legal theories, one statutory and the other constitutional.³⁴ The statutory theory, heretofore the “implied

30. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2014, 2013 DAILY COMP. PRES. DOC. 876, at 1 (Dec. 26, 2013).

31. *Id.* at 2.

32. Neal R. Sonnett, AM. BAR ASS’N, ABA REPORT OF THE TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 6 (2006).

33. See Benjamin Wittes, *Administration Response to GAO Report on Bergdahl*, LAWFARE BLOG (Aug. 23, 2014, 12:00 PM), <http://www.lawfareblog.com/administration-response-gao-report-bergdahl> (follow “this document” hyperlink for a cloud version of the Administration Response).

34. The Administration also provides another statutory explanation, specifically, that its failure to notify Congress did not make its action “unlawful” under the National Defense Authorization Act. *Id.* The GAO Report convincingly finds this theory unpersuasive and, therefore, this Comment does not address it. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 18, at 4. A third statutory theory, articulated by Ohio State Law Professor Peter M. Shane, observes that the 2001 Authorization for the Use of Military Force in Afghanistan and the Hostage Act may give the President the authority needed for the exchange, and that the 30-day notice requirement in the 2014 NDAA could not, by implication, repeal the statutory authority already given to the President by those acts. Peter M. Shane, *The Non-Constitutional Non-Crisis*, SLATE (June 5, 2014, 4:41 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/06/stop_saying_that_the_exchange_of_prisoners_for_bergdahl_was_illegal_the.html. Although similar to the Administration’s implied exception argument, this

exception” theory, construes the section 1035(d) 30-day notice requirement as being inapplicable to circumstances where the transfer of a Guantanamo detainee would secure the release of a captive U.S. soldier *and* the Secretary of Defense determines that providing the requisite notice to Congress could endanger the soldier’s life.³⁵ The constitutional theory, heretofore the “constitutional override” theory, asserts that, even if the 30-day notice requirement applies in situations such as the Bergdahl swap, it is unconstitutional as applied to those circumstances because the notice requirement impinges on the President’s constitutional mandate to protect the lives of American citizens and soldiers.³⁶

III. DID THE OBAMA ADMINISTRATION BREAK THE LAW?

A. *The Implied Exception Theory*

The idea that the Bergdahl swap is excepted from the 30-day notice requirement presents a question of statutory interpretation. Immediately following the exchange, the Obama Administration consistently noted that a primary reason for ignoring the notice requirement was because they were concerned with Bergdahl’s health and that any leak of the deal could cause the Taliban to withdraw.³⁷ These concerns form the foundation of the Administration’s assertion that the notice requirement did not apply in this circumstance. In particular, the Administration noted:

delaying the transfer in order to provide the 30-day notice would interfere with the Executive’s performance of two related functions that the Constitution assigns to the President: protecting the lives of Americans abroad and protecting U.S. soldiers. Because such interference would significantly alter the balance between

Comment does not address this theory as it was not expressly articulated by the Administration.

35. See Wittes, *supra* note 33; see also E-mail from the NSC Press Office, to Caitlin Hayden, NSC Spokesperson, National Security Council, (June 3, 2014, 1:27 PM), <https://www.documentcloud.org/documents/1180482-nsc-statement-on-30-day-transfer-notice-law.html>.

36. See National Security Council, *supra* note 35; Wittes, *supra* note 33.

37. Schmitt & Savage, *supra* note 1.

Congress and the President, and could even raise constitutional concerns, we believe it is fair to conclude that Congress did not intend that the Administration would be barred from taking the action it did in these circumstances.³⁸

In making this argument, the Administration relied on the “clear statement” principle of statutory construction.³⁹ Clear statement rules have been used by the Supreme Court to protect important constitutional principles in a number of contexts.⁴⁰ In general, these rules require Congress to clearly announce its intention to intrude on some constitutional value, such as disrupting the constitutional balance between the states and federal government or between the branches of the federal government.⁴¹ This principle allows the Court to avoid tackling a constitutional question head-on.⁴² Accordingly, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”⁴³

Here, the Obama Administration argues that Congress did not make its intent clear on whether the notice requirement was meant to intrude on the President’s constitutionally assigned authority to protect U.S. civilians and soldiers (“power to protect”). Therefore, because “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,” a court would apply the clear statement rule and read an implied exception into the requirement.⁴⁴ On its face,

38. National Security Council, *supra* note 35.

39. See Wittes, *supra* note 33 (quoting *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991)).

40. See Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 *FORDHAM L. REV.* 1715, 1720-24 (2013); see also John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 *WIS. L. REV.* 771, 771-72 (1995).

41. See Metzger & Morrison, *supra* note 40; Nagle, *supra* note 40.

42. See Metzger & Morrison, *supra* note 40; Nagle, *supra* note 40.

43. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1998).

44. See Wittes, *supra* note 33.

the Administration's rationale appears sound. However, a closer look at this principle of statutory construction leads to the conclusion that this analysis is far from certain.

Much of the scholarship on the issue of clear statement rules demonstrates that the Supreme Court's use of these rules is not all that clear.⁴⁵ Notably, some clear statement rules are stronger than others.⁴⁶ For example, the clear statement rule that governs statutory interpretation questions involving the abrogation of state sovereign immunity is widely considered the strongest articulation of these rules.⁴⁷ On the other hand, a clear statement rule "against congressional curtailment of the judiciary's 'inherent powers'" is viewed as less strong.⁴⁸ In order to accept the Administration's application of the clear statement principle, one would have to believe that in cases where the Executive's power to protect is potentially implicated, the Court would require an "unmistakably clear" statement that Congress intended to restrict this power.⁴⁹ In other words, it would require the strongest form of the clear statement construct.

There is some reason to believe that this is an accurate formulation of the issue. In *Department of the Navy v. Egan*, the Supreme Court recognized that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."⁵⁰ Such strong language can be read as articulating a clear statement rule against congressional interference with presidential

45. See Nagle, *supra* note 40, at 771-73; see also Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1212-15 (2006).

46. See Nagle, *supra* note 40, at 772-73.

47. See *id.* at 771-73; see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

48. WILLIAM N. ESKRIDGE JR., *DYNAMIC STATUTORY INTERPRETATION* 325 (1994) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991)).

49. See *Atascadero*, 473 U.S. at 242.

50. *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

authority over foreign affairs and national security that is equivalent to that of the “[s]uper-strong” rule against abrogation of state sovereign immunity.⁵¹ Since the Bergdahl exchange may fairly be considered an exercise of the President’s authority over foreign affairs and national security, the Administration may be correct in asserting that Congress had to note specifically that that 30-day notice requirement covers situations that implicate the President’s power to protect.

On the other hand, it can be argued that interpretation of this statute under any clear statement principle is unwarranted. The point of such a statutory construction tool is to maintain the status quo in the face of an ambiguous statute.⁵² In other words, if a statute is unambiguous and, consequently, has no plausible alternative meaning, then there is nothing for the clear statement rule to engage. Here, the statute is not ambiguous as it pertains to restricting the President’s ability to release detainees from Guantanamo. The language of section 1035(d) of the 2014 NDAA is unequivocal—“[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.”⁵³ Therefore, the plain language of the statute leaves no understanding of Congress’s intent other than that the notice requirement applies in all situations concerning the release of Guantanamo prisoners—regardless of any independent authority the President may have over wartime detainees in exercising his power to protect. As such, it is unnecessary to interpret the statute under the lens of a clear statement rule.

The plain text of the statute further disputes any argument for an implied exception under a clear statement rule when one considers that there are exceptions throughout the statute in consideration of time sensitive issues.⁵⁴ “When Congress provides exceptions in a statute, it does not follow

51. ESKRIDGE, *supra* note 48, at 325-26.

52. See Nagle, *supra* note 40, at 802-03.

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

54. See, e.g., *id.* § 1041(a)(1).

that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.”⁵⁵ Therefore, combined with the absence of any ambiguity in the statute’s terms, and contrary to the Administration’s argument, any exception to the notice requirement, including that of a time-sensitive prisoner exchange, would actually need to be express. This argument is buttressed by the fact that Congress was notified of a possible swap for Bergdahl as early as late 2011, and congressional leaders expressed concern at having to release the five Taliban detainees as part of the deal.⁵⁶ As a result, Congress understood that there was a potential exchange of Guantanamo detainees for an American prisoner of war prior to writing the 2014 NDAA and, therefore, could have incorporated this exception when it wrote the bill. Whether they considered this in drafting the provisions for section 1035 is certainly debatable, however, it is a difficult argument to make.

In sum, for the Administration’s implied exception theory to hold true, the 30-day notice requirement must be subject to the strongest form of the clear statement construct. Although such construction cannot be ruled out entirely, several factors weigh heavily against it. In particular, the statute unambiguously restricts the authority that the executive branch has over the release of Guantanamo detainees without exception. Such language makes it difficult to get to the clear statement principle since where a statute is clear and unambiguous, the plain meaning of its language controls.⁵⁷ Furthermore, when placing the statute in the context of what Congress knew when it wrote the bill, the Administration’s use of the implied exception reasoning appears especially weak. Therefore, while the Supreme Court’s uncertain use of clear statement rules leaves open the possibility for the implied exception theory to stand, the Administration’s first theory in defense of its action fails to definitively answer whether the swap was lawful.

55. *United States v. Johnson*, 529 U.S. 53, 58 (2000).

56. Press Release, *supra* note 13.

57. *See, e.g., Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

B. *The Constitutional Override Theory*

The second theory used by the Administration to justify the legality of the Bergdahl swap is its constitutional override theory. Specifically, the Administration stated:

[i]f section 1035(d) were construed as applicable to the transfer, the statute would be unconstitutional as applied because requiring 30 days' notice of the transfer would have violated the constitutionally-mandated separation of powers. Compliance with a 30 days' notice requirement in these circumstances would have "prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions," *Morrison v. Olson*, 487 U.S. 654, 695 (1988), without being "justified by an overriding need" to promote legitimate objectives of Congress, *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443 (1977).⁵⁸

In other words, the Administration argues that executive branch power overrides the 30-day notice requirement in situations such as the Bergdahl swap. This assertion of executive power implicates the third category of the executive-legislative power dynamic suggested by Justice Jackson in his concurrence to *Youngstown Sheet & Tube Co. v. Sawyer*.⁵⁹ Category Three of Justice Jackson's analysis addresses situations where the President has taken action that is "incompatible with the expressed or implied will of Congress."⁶⁰ Jackson concludes that in such situations the President's power is at its "lowest ebb," and the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."⁶¹ Although Jackson's mathematical formulation is rather straightforward, his analysis does not provide any guidance on how to determine which presidential powers would survive Category Three scrutiny.⁶² Therefore, a framework

58. Wittes, *supra* note 33.

59. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

60. *Id.*

61. *Id.*

62. See *id.* at 638-40; William M. Hains, Comment, *Challenging the Executive: The Constitutionality of Congressional Regulation of the President's Wartime Detention Policies*, 2011 BYU L. REV. 2283, 2293.

must be identified to analyze the relevant executive and legislative powers at play in the Bergdahl exchange and ultimately determine the veracity of the Administration's override claim.

In determining that it had acted lawfully, the Administration applied a framework from *Morrison v. Olson* and *Nixon v. Administrator of General Services*, whereby the President's constitutional prerogative is balanced against the interests of Congress.⁶³ In applying this framework, the Administration concluded that:

Congress's desire to have 30 days to weigh in on the determination that the Secretary had already made, in accordance with criteria specified by Congress, that the transfer did not pose the risks that Congress was seeking to avoid, was not a sufficiently weighty interest to justify this frustration of the Executive's ability to carry out these constitutionally assigned functions.⁶⁴

The Administration provided scant analysis to support its assertion, and the relative ease with which its argument dispatches with Congress's restriction is an example of why this separation of powers test has been dismissed as an approach in "drawing a clear line between the President's Commander in Chief power and Congress's war powers."⁶⁵ In addition, this framework has been criticized for failing to explain "why certain core executive powers . . . cannot be infringed, even though it is generally understood that such inviolable cores might exist," and, therefore, "not actually resolv[ing] the question that arises in a *Youngstown* Category Three case."⁶⁶

For these reasons, the Administration's separation of powers approach fails to adequately assess its constitutional override theory and, accordingly, a different framework must

63. Wittes, *supra* note 33 (citing *Morrison v. Olson*, 487 U.S. 654, 695 (1988); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

64. *See* Wittes, *supra* note 33.

65. Jules Lobel, *Conflicts Between The Commander in Chief and Congress: Concurrent Power Over the Conduct of War*, 69 OHIO ST. L.J. 391, 406-07 (2008).

66. 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) [hereinafter *Framing the Problem*].

be used. Although there are many theories with which to address the constitutional powers question at issue here,⁶⁷ the “core/periphery” framework established by Professors David J. Barron and Martin S. Lederman allows for a comprehensive and complete assessment of the Administration’s constitutional override theory.⁶⁸ This framework relies on the understanding that the Constitution affords the President “at least two types of constitutional powers: those that he may exercise on his own but that are regulable by statute, and those that form the ‘core’ . . . of the Executive’s powers.”⁶⁹ In other words, there are those powers that the President may exercise absent congressional authorization, or independent powers, and those powers “that establish not only a power to act in the absence of legislative authorization, but also an infeasible scope of discretion,” or preclusive powers.⁷⁰ Furthermore, in attempting to determine the extent of the President’s preclusive wartime authority under this framework, Barron and Lederman examined Supreme Court doctrine, founding-era views, historical practice of both the legislative and executive branches, and a range of scholarly commentary.⁷¹ This Comment follows a similar analytical path.

Now that a framework to assess the Administration’s override theory has been chosen, the issues to which it applies must be defined. As the core/periphery framework suggests, the President must have had preclusive power to execute the Bergdahl exchange for the Administration’s override theory to prove correct. Since the Administration characterized the Bergdahl swap narrowly—“a time-sensitive prisoner exchange designed to save the life of a U.S. soldier”⁷²—there are two questions worth addressing in the

67. For a discussion of alternative theories, see *id.* at 737-50.

68. *Id.* at 726.

69. *Id.*

70. *Id.*

71. See generally *id.*; David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter *A Constitutional History*].

72. Wittes, *supra* note 33.

context of the Administration's override argument: (1) does the President have preclusive authority over all prisoner of war exchanges;⁷³ and, if not, (2) does the President, at the very least, have preclusive authority over prisoner of war exchanges where a U.S. soldier's life is in imminent danger?⁷⁴

1. The President's Authority over Prisoner of War Exchanges

The debate over the extent of the President's war powers has been in full swing since the George W. Bush Administration and its affirmation of broad presidential war powers that asserted for the President near total exclusivity in wartime decisions regardless of congressional legislation.⁷⁵ Over the last several years, this articulation of the President's war powers has been called into question by many scholars⁷⁶ and has also been avoided by the Obama Administration.⁷⁷ If anything, the pendulum has swung in the opposite direction. What was once considered conventional wisdom, that Congress could not restrict day-to-day conduct of authorized military operations, is now met with deep skepticism.⁷⁸ However, although recent examinations of historical and Supreme Court precedent mostly conclude that Congress and the President have

73. As will be discussed below, this question involves the implication of a power not expressly addressed by the Administration in its override rationale. However, examination of this issue lays the groundwork for the overall constitutional questions at issue here.

74. Though it could be argued that any potential prisoner of war exchange where a U.S. soldier is held captive necessarily involves a threat to that soldier's life, based upon the Administration's decision to color the Bergdahl situation as a "unique circumstance[]," this Comment accepts a distinction between a prisoner exchange where the executive branch has determined that there is an imminent threat to a U.S. soldier's life and one that does not. Wittes, *supra* note 33.

75. See *Framing the Problem*, *supra* note 66, at 694; see also Frakt, *supra* note 24, at 233.

76. See, e.g., *Framing the Problem*, *supra* note 66; Hains, *supra* note 62; Lobel, *supra* note 65.

77. Frakt, *supra* note 24, at 237.

78. See *id.* at 233-37.

concurrent war powers,⁷⁹ it is still generally accepted that there remains a preclusive core to the President's war powers.⁸⁰

With respect to the President's authority over prisoner of war exchanges, it is widely understood that such power comes from the Commander in Chief clause.⁸¹ More specifically, the President's authority over wartime detainees, and by corollary his authority over prisoner of war exchanges, is an incidental power under the Commander in Chief clause that activates following congressional authorization of an armed conflict.⁸² In the context of the Bergdahl exchange, the Authorization for Use of Military Force of 2001 ("AUMF")⁸³ activated the President's detention authority over prisoners from the Afghan conflict.⁸⁴ As such, there is little doubt that, absent the 2014 NDAA, the

79. See, e.g., *Framing the Problem*, *supra* note 66; Frakt, *supra* note 24; Hains, *supra* note 62; Lobel, *supra* note 65, at 463.

80. See *Framing the Problem*, *supra* note 66, at 800 (finding the preclusive core of the President's Commander-in-Chief authority to include only that of "superintendence"); Lobel, *supra* note 65, at 393 (concluding that "the only Commander in Chief power that Congress cannot override is the President's power to command").

81. See *Ex Parte Quirin*, 317 U.S. 1, 28 (1942); Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 123, 147-49 (2011).

82. See *Ex Parte Quirin*, 317 U.S. at 28; Hathaway et al., *supra* note 81; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting *Ex parte Quirin*, 317 U.S. at 28, 30).

83. See Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF was passed by Congress 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

84. *Framing the Problem*, *supra* note 66, at 731.

President had the authority to exchange the five Taliban prisoners for Bergdahl.

What is less clear, however, is whether the President's authority over prisoner of war exchanges via the Commander in Chief clause is part of the preclusive core of presidential war powers. As one might expect, there is no clear answer to this question. The recent scholarship that has acknowledged concurrent war powers between the executive and legislative branches would likely argue that it is not part of the preclusive core. For instance, multiple studies have concluded that the only preclusive power provided by the Commander in Chief clause is the power of superintendence.⁸⁵ Such determinations leave no room to argue that the power to conduct prisoner of war exchanges is preclusive, as it cannot be logically argued that the power is somehow contained in the President's hierarchal superiority in the military chain of command. Furthermore, two other commentators have specifically concluded that the restrictions on the release of Guantanamo detainees placed in various iterations of the NDAA are a constitutional exercise of Congress's concurrent war powers.⁸⁶

However, such analyses do not completely disqualify the override theory. With regard to detention authority, these analyses focused solely on what authority, if any, Congress had over wartime detainees.⁸⁷ In particular, they were concerned with certain transfer restrictions contained in prior iterations of the NDAA as well as evaluating claims made by the Bush Administration concerning its authority over the treatment and disposition of detainees from the

85. See *id.* at 800; Lobel, *supra* note 65, at 393. Barron and Lederman describe the power of superintendence as the President's "control over the vast reservoirs of military discretion that exist in every armed conflict, even when bounded by important statutory limitations; and thus Congress may not assign such ultimate decisionmaking discretion to anyone else (including subordinate military officers)." *Framing the Problem*, *supra* note 66, at 696-97.

86. Frakt, *supra* note 24, at 236-37; Hains, *supra* note 62, at 2283.

87. See generally *Framing the Problem*, *supra* note 66; Frakt, *supra* note 24; Hains, *supra* note 62; Lobel, *supra* note 65.

Afghan conflict.⁸⁸ In concluding that Congress did have concurrent authority over wartime detainees, these commentators found the power in various sources, including the Captures Clause, Law of Nations Clause, the Declare War Clause, and the power of the purse.⁸⁹ Clearly, these analyses provide strong evidence that Congress has concurrent authority over wartime detainees. In fact, the Obama Administration has even acknowledged such authority by accepting the general constitutionality of the restrictions on Guantanamo detainees in the 2014 NDAA.⁹⁰ However, none of the aforementioned analyses dealt specifically with exchanging wartime detainees for an American prisoner of war. The mere fact that Congress has concurrent authority over wartime detainees does not itself foreclose the potential that the more nuanced issue of exchanging wartime detainees for a captive U.S. soldier lies exclusively with the executive branch. Thus, while the 30-day notice requirement in the 2014 NDAA may be constitutional in general, recent scholarly work does not provide a definitive answer as to whether it may be unconstitutional in situations where Guantanamo detainees are exchanged for an American prisoner of war, and, more generally, whether the President has preclusive authority over all prisoner of war exchanges.

A brief look at Supreme Court doctrine is similarly unhelpful. In particular, “the Court has yet to resolve definitively the precise contours of Congress’s powers to control the President’s war powers.”⁹¹ Fairly recently, in *Hamdan v. Rumsfeld*, the Court seemingly reiterated support for a somewhat broad preclusive core to the President’s war powers when the majority quoted Chief Justice Chase’s concurrence to *Ex Parte Milligan* to describe

88. See *Framing the Problem*, *supra* note 66; Frakt, *supra* note 24; Hains, *supra* note 62; Lobel, *supra* note 65.

89. *Framing the Problem*, *supra* note 66; Hains, *supra* note 62.

90. Wittes, *supra* note 33 (“Thus, even though, as a general matter, Congress had authority under its constitutional powers related to war and the military to enact section 1035(d), that provision would have been unconstitutional to the extent it applied to the unique circumstances of this transfer.”).

91. *Framing the Problem*, *supra* note 66, at 766.

the interplay between the President and Congress's war powers.⁹² In no small part, Chief Justice Chase noted, "Congress cannot direct the conduct of campaigns."⁹³ However, in *Hamdan*, this acknowledgement came amidst a decision where the Court found military commissions established by the Bush Administration to try Guantanamo detainees invalid in the face of a congressional restriction, specifically the Uniform Code of Military Justice.⁹⁴ Thus, the potential acceptance of a broad preclusive core to the President's war powers placed in the context of the ultimate decision in *Hamdan* ends up muddying the waters as to the Court's true belief.⁹⁵ Other Court decisions related to Bush Administration policies as well as past decisions unrelated to the Afghan conflict provide similarly inconclusive information as to the Court's characterization of a preclusive core.⁹⁶ Thus, while the Court "surely has not ruled out the modern consensus of war powers scholars that the President does retain some, not fully specified, preclusive control,"⁹⁷ its decisions have simply not provided any insight into the specific preclusive authority of the President and, consequently, the President's authority over prisoner of war exchanges.

Since the Supreme Court offers precious little help at coming to a conclusion on this issue, it is prudent to look at historical practices concerning prisoner of war exchanges for insight into how this power has been utilized in the past. In all of the wars fought by the United States, there are only two instances where Congress has sought to impose its will on prisoner exchanges. The first occurred during the Quasi-War with France in the 1790s. During this conflict, Congress passed several statutes regarding the taking of prisoners.⁹⁸

92. *Hamdan v. Rumsfeld*, 548 U.S. 557, 591-92 (2006).

93. *Id.* at 592 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)).

94. *Id.* at 620-25; see also *Framing the Problem*, *supra* note 66, at 766.

95. See *Framing the Problem*, *supra* note 66, at 766.

96. *Id.* at 761-67.

97. *Id.* at 766.

98. For a summary of these statutes' provisions, see Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L.

Of particular note, one statute provided 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.”⁹⁹ Another statute passed by Congress during this time required the President “to cause the most rigorous retaliation to be executed on any such citizens of the French Republic, as have been or hereafter may be captured.”¹⁰⁰ During the War of 1812, Congress passed similar provisions indicating some inherent power over prisoners of war. In particular, one statute authorized the President “to make such regulations and arrangements for the safe keeping, support and *exchange of prisoners of war* as he may deem expedient.”¹⁰¹

There are two competing theories as to how one should consider these statutes in terms of the executive-legislative war powers debate. One commentator has argued that Congress was simply trying to encourage the President to use prisoners as bargaining chips, and since the statutes do not place any substantive restrictions or requirements on the President, they amount to nothing more than a symbolic gesture.¹⁰² In contrast, another commentator reasoned that early Congresses believed that the Constitution granted Congress power over prisoner of war policy and, as such, they were simply exercising that authority.¹⁰³ Although both arguments appear credible, in attempting to argue for a preclusive presidential power over prisoner of war exchanges, it is difficult to ignore the fact that Congress has previously exercised at least some authority over prisoner of

REV. 299, 339-40 (2008); John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1206-10 (2004).

99. Act of Feb. 28, 1799, ch. 18, 1 Stat. 624, 624 (emphasis added).

100. Act of Mar. 3, 1799, ch. 45, 1 Stat. 743, 743.

101. Act of July 6, 1812, ch. 128, 2 Stat. 777, 777, *repealed by* Act of Mar. 3, 1817, ch. 34, 3 Stat. 358 (emphasis added).

102. Yoo, *supra* note 98, at 1209.

103. Prakash, *supra* note 98, at 340.

war policy.¹⁰⁴ However, the significance of the laws passed during the Quasi-War with France and the War of 1812 diminishes when one considers that:

in none of the major wars of the twentieth and twenty-first centuries in which U.S. detention operations are now concluded—World Wars I and II; Korea and Vietnam; and the 1991 and 2003 Iraq Wars—has Congress imposed any such restriction [as the 2014 NDAA] on the exchange, transfer, or release of prisoners, during or after the period of armed conflict.¹⁰⁵

In fact, it could be argued, in the words of Justice Frankfurter in his concurrence to *Youngstown*,¹⁰⁶ that such executive action coupled with congressional inaction with regard to prisoner exchanges over the last two hundred years should be “treated as a gloss on [E]xecutive Power vested in the President,” as it embodies a “systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government.”¹⁰⁷ One point, however, weighs heavily against coming to such a conclusion. Specifically, Congress likely avoided becoming entangled in prisoner of war matters not because it is unconstitutional, but rather because it was the pragmatic thing to do. As one commentator noted, “[i]t is undisputed that as a general matter Congress should not manage in detail military campaigns, and historically Congress has not done so. . . . But Congress has the power to do so, and political (not constitutional) considerations have prevented Congress from doing so.”¹⁰⁸

104. *See id.*

105. Deborah N. Pearlstein, *How Wartime Detention Ends*, 36 CARDOZO L. REV. 625, 629 (2014); *see also* Yoo, *supra* note 98, at 1221 (“With the exception of the statutes passed during the Quasi-War with France, and the War of 1812, authorizing the President to take and retaliate against prisoners of war, Congress has never sought to regulate the disposition of POWs or asserted that it has any authority over them.”).

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

107. *Id.* at 610-11 (internal quotation marks omitted).

108. Lobel, *supra* note 65, at 415.

In sum, recent scholarly work, Supreme Court doctrine, and historical practice fail to provide a definitive answer to the issue of whether the President has preclusive authority over all prisoner of war exchanges. While there are strong arguments that support concurrent war powers between Congress and the President as well as clear historical examples of Congress freely exercising some authority over prisoner of war policy, there is simply not enough evidence to be certain that preclusive executive authority over prisoner of war exchanges does not exist. Likewise, however, this sentiment prevents one from definitively concluding that the Bergdahl exchange was a constitutional exercise of the President's general authority over prisoner of war exchanges.

2. The President's Authority over Prisoner of War Exchanges Involving Imminent Danger to a U.S. Soldier's Life

Perhaps the uncertainty regarding the extent of the President's authority over prisoner of war exchanges is why the Obama Administration, as it did with its implied exception argument, seems to rely solely on the President's constitutionally mandated "power to protect" to support its constitutional override theory.¹⁰⁹ The President's power to protect has long been recognized as an independent, substantive power granted to the President as the Chief Executive and Commander in Chief of the Armed Forces that allows the President to take unilateral military action to protect the lives of American citizens and U.S. soldiers abroad.¹¹⁰ Therefore, on its face, the Administration can readily justify the application of this power because the Bergdahl swap took place in the context of Bergdahl's severely declining health, which allowed the Administration to argue that abiding by the 30-day notice requirement would

109. Wittes, *supra* note 33.

110. SOLICITOR, DEP'T OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES: MEMORANDUM OF THE SOLICITOR FOR THE DEPARTMENT OF STATE, OCT. 5, 1912, at 43 (2d ed. 1929) [hereinafter RIGHT TO PROTECT CITIZENS].

jeopardize Bergdahl's life.¹¹¹ Furthermore, as the previous Section noted, the action taken by the President to effectuate Bergdahl's release, the exchange of five Taliban detainees, was clearly within the President's power in light of congressional authorization for the Afghan conflict.¹¹² Of course, this power over wartime detainees was found to be insufficient to decisively conclude that the President's action was lawful. Thus, the second question posed earlier is now at hand: Does the President have preclusive authority over prisoner of war exchanges where a U.S. soldier's life is in imminent danger? Or, more precisely, does the power to protect grant the President an extremely narrow preclusive power to transfer wartime detainees to save the life of a captive U.S. soldier?

Supreme Court doctrine regarding the President's power to protect is somewhat ambiguous, but a few cases are worth addressing. First, in *The Slaughterhouse Cases*, the Court recognized that a "privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when . . . within the jurisdiction of a foreign government."¹¹³ Additionally, in *In re Neagle*, the Court articulated the general idea that the Constitution provides the executive branch an inherent power to protect.¹¹⁴ Specifically, in finding that the Attorney General had lawfully assigned a U.S. Marshal to protect a federal judge, the Court reasoned that the President's constitutional mandate to "take care that the laws be faithfully executed" is not limited to "the enforcement of acts of congress or of treaties of the United States according to their express terms," but necessarily includes "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

111. See Wittes, *supra* note 33 ("[T]he Administration had determined that providing notice as specified in the statute would undermine the Executive's efforts to protect the life of a U.S. soldier.").

112. See *supra* Part III.B.1.

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

114. 135 U.S. 1, 67 (1890).

Constitution.”¹¹⁵ However, the most express judicial recognition of this power occurred outside of the Supreme Court in *Durand v. Hollins*, an 1860 case from the Circuit Court for the Southern District of New York.¹¹⁶ In upholding presidential authority to order a naval commander to bombard Greytown, Nicaragua in retaliation for a riot that injured U.S. citizens, the court noted “as it respects the interposition of 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 [P]resident.”¹¹⁷ Therefore, while judicial doctrine does not establish the extent of the power to protect American lives abroad, it clearly recognizes it as an independent power of the President.¹¹⁸

To understand whether the power to protect is a preclusive power, then, historical assertions of this power should be examined. Although there is no example directly on point, history is ripe with situations where the President has taken unilateral military action pursuant to this mandate.¹¹⁹ For instance, this power has been utilized at least as far back as Thomas Jefferson’s presidency, when in 1805 he instructed military officers to protect U.S. citizens from Spanish attacks despite lacking any express grant of authority from Congress.¹²⁰ More recently, the administrations of Presidents Ford, Carter, Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama have all in

115. *Id.* at 64 (emphasis removed).

116. 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186).

117. *Id.* at 112.

118. See Michael P. Kelly, *Fixing the War Powers*, 141 MIL. L. REV. 83, 142 (1993) (“[*Durand*] exemplifies judicial recognition of an early, longstanding practice. No court has declared this authority a ‘constitutional fact,’ but it meets the criteria of one.”).

119. 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).

120. RIGHT TO PROTECT CITIZENS, *supra* note 110. This may not have even been President Jefferson’s first assertion of this power. See Kelly, *supra* note 118, at 139-40.

one form or another asserted the constitutional authority to act unilaterally in protecting the lives of Americans abroad.¹²¹

Two of the more relevant examples come from the Administrations of Presidents Ford and Carter. In 1975, at the close of the Vietnam War, a number of U.S. citizens and foreign nationals needed evacuation from South Vietnam and Cambodia.¹²² However, “[s]tatutory limitations barring the use of funds for the involvement of U.S. armed forces in combat activities and hostilities in Southeast Asia arguably prohibited the use of armed forces to rescue U.S. nationals and foreigners.”¹²³ After convening a joint session of Congress to plead for clarification on the extent of the limitations, President Ford took action without waiting for congressional approval.¹²⁴ He ordered U.S. troops to evacuate thousands of U.S. citizens and foreign nationals from both locations.¹²⁵ Two weeks later, Ford took similar unilateral action in ordering U.S. troops to rescue the crew of a U.S. merchant ship, the *Mayaguez*, which had been seized by Cambodia.¹²⁶ Although the Ford Administration did not explicitly refer to the President’s power to protect in defense of its actions, President Ford did “reference . . . both his inherent ‘executive power and his authority as Commander in Chief.’”¹²⁷ Furthermore, the Ford Administration implied that the powers it had utilized were preclusive.¹²⁸

121. See Garrison, *supra* note 119, at 428-78 (discussing examples of such assertions for each of these Presidents).

122. *A Constitutional History*, *supra* note 71, at 1072.

123. *Id.* at 1072 & n.530 (internal quotation marks omitted).

124. *Id.*

125. *Id.*

126. *Id.* at 1073.

127. Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 916 (1994) (quoting *Text of President Ford's Report to Congress on Ship*, N.Y. TIMES, May 16, 1975, at 15).

128. See *id.* (“State Department Legal Advisor Monroe Leigh supported President Ford’s claim and asserted that these inherent powers could not constitutionally be restricted.”).

The Carter Administration exercised similar executive power in 1979, during the Iran hostage crisis.¹²⁹ After Iranian students had taken sixty-three members of the U.S. embassy hostage, the Carter Administration used the President's constitutional obligation to protect American lives to justify several operations in an attempt to save the hostages.¹³⁰ Notably, the Carter Administration asserted this power to override congressional notification requirements in two different statutes.¹³¹

The actions of both the Ford and Carter Administrations are the closest scenarios to the Bergdahl exchange that provide some evidence that the power to protect is part of the preclusive core of executive war powers. One important difference between them, however, is that the actions of the Ford and Carter Administrations involved deploying troops in attempts to save the lives of American citizens and soldiers, while the Bergdahl exchange involved the release of wartime detainees to protect Bergdahl's life. Thus, it is important to square the two uses of authority. The President's power to deploy troops absent congressional authorization pursuant to the power to protect is clearly established, and this exercise of authority is understood as deriving from the Commander in Chief clause.¹³² Similarly, the President's authority over wartime detainees also comes from the Commander in Chief clause—with the added caveat

129. Garrison, *supra* note 119, at 433.

130. *Id.*

131. See Geoffrey Corn, *Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality*, 14 LEWIS & CLARK L. REV. 687, 732 (2010) (noting that the Carter Administration did not believe it needed to abide by the notification requirement in the War Powers Resolution); Robert F. Turner, *The Constitution and the Iran-Contra Affair: Was Congress the Real Lawbreaker?*, 11 HOUS. J. INT'L L. 83, 123-24, 113 n.111 (1988) (noting that the Carter Administration did not abide by the "timely" notification requirement of section 501 of the National Security Act of 1947); Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 89 (1984) ("There were those in the [Carter] administration who favored consulting congressional leaders in accordance with section 3 of the War Powers Resolution before our units were set in motion. However, concerns for secrecy prevailed.").

132. See Kelly, *supra* note 118 ("Congress generally concedes that the Commander-in-Chief clause includes this independent power.").

that congressional authorization must activate that power.¹³³ Here, because the AUMF activated the President's authority over the five Taliban detainees, his decision to release them requires no further grant of authority than did the deployment of troops by the Ford and Carter Administrations in the situations discussed above. Thus, one could argue that, like the Ford and Carter Administrations' deployment of troops in contravention of established law, the release of the five Taliban detainees without following the 2014 NDAA's 30-day notice requirement was a valid exercise of the President's preclusive authority to protect American citizens and U.S. soldiers abroad.

The Administration's constitutional override theory appears to have some promising weight to it. However, the idea that the actions of the Ford and Carter Administrations were exercises of preclusive authority is not without its critics. For instance, while acknowledging the significance of President Ford's exercise of power in the evacuation and rescue in Vietnam and Cambodia, two commentators characterized the situation as an exception to historical presidential action and still concluded that the only preclusive core to the President's war powers was the power of superintendence.¹³⁴ Furthermore, Ford's actions were criticized by "then-Assistant Senate Legal Counsel Glennon, who had argued that the funding restrictions prohibited the evacuations and *Mayaguez* operations, [and] asserted that '[t]he power of the President to commit the armed forces to hostilities is subordinate to the power of the Congress to deny funds.'"¹³⁵ Finally, in discussing the protective power of the presidency generally, another commentator acknowledged that while a President's authority to act in a true emergency is a question that has existed since the founding, "no

133. See *supra* Part III.B.1.

134. See *Framing the Problem*, *supra* note 66, at 800; *A Constitutional History*, *supra* note 71.

135. Raven-Hansen & Banks, *supra* note 127, at 917 (quoting Letter from Michael J. Glennon to Sen. Thomas F. Eagleton (May 4, 1976), in 3 MICHAEL J. GLENNON & THOMAS M. FRANCK, UNITED STATES FOREIGN RELATIONS LAW 368, 368 (1981)).

presidential authority to act *contra legem* exists.”¹³⁶ Therefore, while the Obama Administration’s use of the power to protect to justify the Bergdahl swap does not appear unprecedented, arguments against this theory persist and, accordingly, definitive preclusive authority in this situation remains elusive.

C. Conclusion

The Obama Administration proffered two distinct legal theories in defense of its decision to ignore the 2014 NDAA’s 30-day notice requirement in executing the Bergdahl exchange. Its statutory, implied exception theory argued for a narrow construction of the notice requirement that excepted situations such as the Bergdahl swap. On the other hand, its constitutional override theory asserted that the notice requirement was unconstitutional in circumstances where it might impinge on the President’s constitutional mandate to protect the lives of American citizens and soldiers. An examination of these two theories revealed that, while both are colorable arguments, neither one provides the sort of definitive authority necessary to determine whether the Obama Administration’s action was lawful.

Notably, a genuine answer to this question is unlikely to surface. First, neither Congress nor the President is likely to take any definitive action surrounding this issue. While the executive branch will no doubt continue to write legal opinions while Congress holds hearings and conducts investigations, history has shown that the stalemate surrounding this type of authority will not break. Additionally, the courts are unlikely to ever hear a case of this kind.¹³⁷ There will never be any litigation pertaining to the Administration’s conduct in the Bergdahl exchange because the injuries are not personal and therefore “not

136. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993).

137. Jack Goldsmith, *One or Two Other Statutes the President Likely Disregarded in The Bergdahl Deal*, LAWFARE BLOG (June 2, 2014, 7:45 PM), <http://www.lawfareblog.com/2014/06/one-or-two-other-statutes-the-president-likely-disregarded-in-the-bergdahl-deal>.

sufficient for standing.”¹³⁸ Specifically, releasing inmates from Guantanamo does not harm a specific person, and though it is feasible to argue that the public at-large is somehow injured, that alone is insufficient.¹³⁹ Although there is a case currently before the D.C. Circuit that argues, among other things, that the transfer restrictions on Guantanamo detainees are an unconstitutional impingement of the President’s Commander in Chief power, the prospects for the case are not promising.¹⁴⁰ For one, the trial court dismissed the original case for lack of standing.¹⁴¹ Furthermore, time and again courts have refused to “resolve definitively the precise contours of Congress’s power to control the President’s war powers.”¹⁴² Thus, even if this case is heard on the merits, it is hard to believe that any ruling as to that particular argument is forthcoming.

Clarity on this subject will continue to be elusive, an unsettling reality because the question directly affects the life of any U.S. soldier taken captive. Therefore, it is incredibly important to provide a definitive answer to the constitutional question at issue—not just for the soldiers that we are sending off to war in increasingly non-traditional circumstances, but also for the public and our political leaders. The final Part of this Comment proposes a solution to this problem by arguing that important policy considerations necessitate the recognition of exclusive presidential authority over prisoner of war exchanges.

IV. THE PRESIDENT SHOULD HAVE EXCLUSIVE AUTHORITY TO CONDUCT PRISONER OF WAR EXCHANGES

As this Comment has shown, there is simply no definitive answer to the legal question implicated by the Bergdahl

138. Zack Beauchamp, *A New Report Says Obama’s Bowe Bergdahl Prisoner Swap Was Illegal. Here’s What It Missed*, VOX (Aug. 21, 2014, 5:32 PM), <http://www.vox.com/2014/6/9/5786834/obama-law-bergdahl> (quoting University of Chicago Law Professor Eric Posner).

139. *Id.*

140. *Ahjam v. Obama*, 37 F. Supp. 3d 273 (D.D.C. 2014), *appeal dismissed*, No. 14-5116 (D.C. Cir. 2015).

141. *Id.* at 277.

142. *Framing the Problem*, *supra* note 66, at 766.

swap. However, the political and public uproar following the exchange demonstrates that providing such an answer is of considerable importance. Accordingly, this Comment suggests that policy concerns warrant the recognition of an exclusive authority for the executive branch to perform prisoner of war exchanges. There are three major policy concerns that are relevant in arriving at this conclusion: (1) concerns that granting this limited power could lead to a grab for more expansive wartime power by the President; (2) the potential that unilateral decision making in this context may lead to undesirable or even dangerous results; and (3) the military ethos to never leave a soldier behind.

A. *Expanding Executive Power*

There is a valid concern that congressional and judicial acquiescence to presidential authority in this narrow context could bleed over into more expansive wartime powers. For instance, some commentators have expressed concerns over the Supreme Court ever expressly acknowledging preclusive wartime authority for the executive branch because of the potential for a President to use it to justify expansive powers akin to those asserted by the Bush Administration.¹⁴³ However, such concerns seem unwarranted in the context of a narrowly tailored power that gives the President the authority to exchange enemy combatants captured during an armed conflict for a U.S. soldier taken captive during that conflict. In particular, such a power does not impliedly give the President the exclusive authority to set wartime detention policies, nor does it run the risk of justifying detainee abuse.¹⁴⁴ By simply accepting this narrow, exclusive authority in the President, the legislature and judiciary provide no statutes or legal opinions to interpret nor any constitutional powers to balance. There is no doubt that creative legal minds in the executive branch could challenge this seemingly straightforward authority. However, the only obviously arguable facts would be whether the detainee(s) and the exchanged-for soldier(s) were taken captive during

143. *A Constitutional History*, *supra* note 71, at 1106-07.

144. These were two major concerns that arose as a result of the Bush Administration's legal philosophies. *See id.* at 1110-11.

the same conflict. That determination is a more difficult question than it may initially seem considering the complexities of the global war on terror, but not an impossible task. Such a rule would apply only to soldiers (as opposed to civilians) taken captive during an identifiable conflict—a qualification that necessarily restricts where and by whom a soldier could be taken captive.¹⁴⁵

Other issues raised along with this concern include the contention that Congress's participation in the process helps to legitimize it¹⁴⁶ and prevents errors in judgment by the President.¹⁴⁷ While such points are valid, the type of considered, drawn-out debate that Congress provides is not suited to time-sensitive prisoner exchanges, such as the Bergdahl swap. Furthermore, when more time is available, there is no reason to believe that the executive branch would be any more prone to making an unwise or hasty decision than Congress. In fact, leaving the decision solely up to the President allows him or her to face any public or political scrutiny on his or her own, while preventing any political games from being played with an American soldier still in enemy hands. The idea that the President and Congress could play politics to the detriment of a captive U.S. soldier is not far-fetched considering the hyper-partisan environment in Washington.¹⁴⁸ While there is certainly a traditional influence that a President carries during wartime,¹⁴⁹ the expansive power wielded by the Bush Administration and constant calls of executive overreach leveled against the Obama Administration may have withered that influence away. In the end, the concern that a limited grant of preclusive power in this context could bleed

145. While this leaves open the possibility that special operators taken captive during covert activities not associated with a more overt conflict would slip through the cracks of this authority, such circumstances implicate a different set of policy issues than those addressed here.

146. See Lobel, *supra* note 65, at 413-14.

147. *A Constitutional History*, *supra* note 71, at 1110.

148. One need only look at the flip-flopping reaction of several congressmen following the Bergdahl swap to illustrate this point. See Catalina Camia, *Oops! Praise for Sgt. Bergdahl Tops Deleted Tweets by Politicians*, USA TODAY: ON POLITICS (Dec. 31, 2014, 12:30 PM), <http://onpolitics.usatoday.com/2014/12/31/twitter-bergdahl-deleted-sunlight-foundation>.

149. See, e.g., *A Constitutional History*, *supra* note 71, at 1109.

over into more expansive powers is insufficient on its own to discourage recognizing such authority.

B. *Potential for Disproportionate or Dangerous Results*

A second policy concern that is relevant in examining whether an exclusive executive power over prisoner of war exchanges should be recognized is the potential for disproportionate or dangerous results. In particular, two major criticisms that have been leveled at the Obama Administration regarding the Bergdahl exchange are that the President negotiated with terrorists and that the price of five Taliban detainees for one U.S. soldier was too high.¹⁵⁰ However, a reasoned look at these criticisms only serves to demonstrate the type of political squabbling that can occur with a soldier's life in the balance. First, regarding the concern that the Administration paid too high a price, a brief look at past prisoner exchanges reveals that disproportionate results are a rather common occurrence. For example, in 1953, 6670 Communist prisoners were exchanged for only 684 UN-affiliated personnel as the Korean War was winding down.¹⁵¹ In this instance, despite intense political and public debate surrounding the disposition of war prisoners, Congress passed no laws and the exchange was handled by executive agreement.¹⁵² Additionally, in 1973, the Paris Accords that ended the U.S. conflict in Vietnam "brought 591 Americans back home, including now-Sen. John McCain, in exchange for the release of 2,600 NVA soldiers."¹⁵³ Finally, in a more recent example not involving the United States, longtime ally Israel traded 1027 Palestinian prisoners for *one* Israeli soldier.¹⁵⁴ Thus, it is safe to conclude that criticisms of the "5 for 1" Bergdahl swap are somewhat overstated.

150. Ed Payne & Tom Cohen, *Hagel on Bergdahl Deal: "We Could Have Done a Better Job" of Informing Congress*, CNN (June 13, 2014, 8:36 AM), <http://www.cnn.com/2014/06/12/politics/bowe-bergdahl-release/index.html>.

151. Pearlstein, *supra* note 105, at 646.

152. *Id.*

153. Dan Lamothe, *And You Thought 5-for-1 Was Lopsided? The Bowe Bergdahl Deal, Visually Compared*, WASH. POST: CHECKPOINT (June 9, 2014), <http://www.washingtonpost.com/news/checkpoint/wp/2014/06/09/and-you-thought-5-for-1-was-lopsided-the-bowe-bergdahl-deal-visually-compared>.

154. *Id.*

Importantly, however, these examples are not intended to justify or legitimize the Bergdahl swap, as that question is correctly left to political and public debate. Instead, they are meant to put this particular criticism into perspective and show that disparate results in prisoner exchanges are a well-established cost of war. As such, this concern should not weigh heavily against recognizing exclusive executive power in this arena.

Another criticism pertaining to the cost of the Bergdahl exchange involves the dangerousness of the released Taliban detainees and the concern that they could re-engage in militant activities.¹⁵⁵ While this apprehension is understandable,¹⁵⁶ it is not unique to the Bergdahl exchange. As one commentator notes:

The notion of returning prisoners to a homeland of violent political instability, for example, is not new. We returned prisoners twice to post-war European nations whose economic, political, and state security systems had been decimated by what were then the most destructive wars history had ever known. Neither is it the case that we would never release prisoners who still harbor violent intentions toward the United States. In World War II, among the first prisoners released were those Nazis whose enmity was “most hardened” against us. Nor can it be contended that we would never release prisoners as long as they have ideological brethren with whom they might again affiliate in re-engaging the fight. We returned thousands of communist prisoners to communist nations—for a half-century our most feared, most hated ideological opponents—at the height of a half-century long war that was “hot” (in Korea and Vietnam) almost as often as it was cold, and that was defined by the standing deployment of U.S. armed forces to countries all over the world.¹⁵⁷

The United States has also not differentiated state from non-state enemies in the exchange of prisoners.¹⁵⁸ During the Vietnam War, the U.S. unilaterally released Viet Cong

155. Payne & Cohen, *supra* note 150.

156. See Dan Lamothe, *Taliban Official Swapped For Bowe Bergdahl Could Return to Battlefield, General Says*, WASH. POST: CHECKPOINT (Feb. 3, 2015), <http://www.washingtonpost.com/news/checkpoint/wp/2015/02/03/taliban-official-swapped-for-bowe-bergdahl-could-return-to-battlefield-general-says>.

157. Pearlstein, *supra* note 105, at 664-65.

158. *Id.* at 665.

prisoners with the hope that it would inspire better treatment of our soldiers taken captive.¹⁵⁹ Additionally, during the Civil War, the President “negotiated terms for the exchange of civilian prisoners captured by the Union army during military operations.”¹⁶⁰ Again, such examples are not meant to lend merit to the Bergdahl swap, but simply offer further perspective of the critique that there is something wholly different about current detainees that requires congressional oversight.

The final criticism that implicates the potential for undesired results should exclusive presidential authority over prisoner exchanges be recognized is the claim that the President broke a central foreign policy directive to not negotiate with terrorists.¹⁶¹ Because of the unique facts surrounding Bergdahl’s capture and subsequent release, this claim is a little murky. However, it has been one of the most consistent critiques of the swap. The main issue concerns Bergdahl’s initial disappearance. In particular, the Taliban captured Bergdahl after he left his unit’s outpost.¹⁶² Then, shortly after that initial capture, it is widely believed that the Taliban transferred Bergdahl into the control of the Haqqani network.¹⁶³ After this transfer, Bergdahl likely spent the majority of his captivity under Haqqani control in northwest Pakistan.¹⁶⁴

The uncertainty about Bergdahl’s whereabouts during his captivity drives much of the argument in favor of this claim. Specifically, while the Taliban is not considered a terrorist organization by the U.S. government, the Haqqani network is.¹⁶⁵ What further muddies the waters of this claim is that the deal for Bergdahl was brokered directly with

159. *Id.*; Yoo, *supra* note 98, at 1220-21.

160. Yoo, *supra* note 98, at 1222 n.167.

161. Michael Crowley, *Obama Didn’t Negotiate With ‘Terrorists’ for Bergdahl*, TIME (June 2, 2014), <http://time.com/2809612/bowe-bergdahl-obama-taliban>.

162. Schmitt & Savage, *supra* note 1.

163. *Id.*

164. *See id.*

165. *Foreign Terrorist Organizations*, U.S. DEPT STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Aug. 25, 2015).

Qatar, a recognized sovereign nation.¹⁶⁶ In short, those who choose to believe that the Administration negotiated with terrorists have a point; especially when considering that Bergdahl was primarily held by a well-known terrorist organization. However, it is also not a stretch to characterize the exchange as a fairly standard prisoner of war negotiation with a non-state enemy force.¹⁶⁷

Even if one believes that the Administration violated the foreign policy directive to not negotiate with terrorists, a look at past practice again undermines this critique. For instance, the federal government has negotiated with terrorist organizations as far back as 1784 when Congress appropriated about \$80,000 as tribute to the Barbary nations to prevent pirate attacks on U.S. ships.¹⁶⁸ The Carter Administration engaged in negotiations with Iranians, who took Americans hostage in Iran, and achieved their release only after unfreezing about \$11 billion in assets.¹⁶⁹ President Reagan notoriously traded arms to the Iranians to secure the release of Americans held in Lebanon,¹⁷⁰ while President Clinton met with Gerry Adams of the Irish Republican Army, an organization that, at the time, was on the State Department's terror list.¹⁷¹ Finally, the Bush Administration cut deals with Sunni insurgents in Iraq's Anbar province, working with and paying people who had been killing American soldiers.¹⁷² This is not to condone any of these actions nor debate the relative merits of negotiating with unsavory organizations. However, to criticize the Administration's action in this instance as violating some sacred principle is disingenuous. Furthermore, to use it as a reason against recognizing exclusive executive power over prisoner exchanges—while making for an attention grabbing

166. Schmitt & Savage, *supra* note 1.

167. Entous & Barnes, *supra* note 9.

168. Kurt Eichenwald, *The Truth Behind the Bowe Bergdahl POW Prisoner Swap*, NEWSWEEK (June 3, 2014, 6:00 AM), <http://www.newsweek.com/truth-behind-bowe-bergdahl-pow-prisoner-swap-253218>.

169. Crowley, *supra* note 161.

170. *Id.*

171. *Id.*

172. *Id.*

headline—only serves to distract from the group that serves to benefit the most, captive U.S. soldiers.

C. *The Military Ethos to Leave No Soldier Behind*

While the above policy concerns may cause some to question the wisdom of recognizing exclusive executive authority over prisoner of war exchanges, the military ethos to leave no one behind should put those concerns to rest. The President, as Commander in Chief of the Armed Forces, bears this obligation to all of those under his command. It is a sacred principle that American service members hold dear,¹⁷³ and it is irresponsible to send troops into battle without a clear understanding of what steps will be taken to ensure they are not left behind. The most direct way of doing so is to give the Commander in Chief a clear mandate over all prisoner exchanges, thus enabling him or her to take swift, unilateral action when circumstances require it.

Although the Bergdahl case comes with the emotionally charged element of his alleged desertion, this authority must exist regardless of the circumstances surrounding the service member's capture. It would be unwise to allow this fact to condition the President's exclusive authority to negotiate for service members' release. Specifically, there are any number of circumstances that could call a service members' capture into question and require a legal review.¹⁷⁴ John Bellinger, a former State Department lawyer under President George W. Bush, may have put this controversial issue best when he said, “[w]e don't leave soldiers on the battle field under any circumstance unless they have actually joined the enemy army . . . [Bergdahl] was a young 20-year-old. Young 20-year-olds make stupid decisions. . . . [I]f you make a stupid decision [we do not] leave you in the hands of the Taliban.”¹⁷⁵

173. Eric Schmitt et al., *Critics Are Questioning American Military Credo of Leaving No One Behind*, N.Y. TIMES (June 3, 2014), http://www.nytimes.com/2014/06/04/world/critics-questioning-credo-of-leaving-no-one-behind.html?_r=2.

174. See 10 U.S.C. § 899 (2012) (“cowardly conduct”); § 911 (“reckless operation of a vehicle”); § 913 (“sleeping upon his post”).

175. Schmitt et al., *supra* note 173; see also Ryan Goodman, *Joint Chiefs of Staff: Bergdahl Exchange Vital to Keeping Faith with American Service Members*, JUST SECURITY (June 11, 2014, 10:39 AM), <https://www.justsecurity.org/12788/joint->

The then-chairman of the Joint Chiefs of Staff, General Martin Dempsey, and the Secretary of the Army, John McHugh, as well as many other military officials, agree with this sentiment.¹⁷⁶ While there is no doubt that Bergdahl should face military justice if he did, in fact, desert,¹⁷⁷ a solid prisoner of war policy should rest on the non-partisan legal principle that, like any other American citizen and soldier in the armed forces, one is entitled to the presumption of innocence. Granting the President unilateral authority to secure a soldier's release does not and should not affect any eventual adjudication process.

Finally, also relevant to this discussion is that soldiers are being sent into increasingly unconventional conflicts. Except for the first Gulf War and the initial invasion in Iraq, the United States military has not fought a traditional, large-scale conflict with another nation-state in decades.¹⁷⁸ Accordingly, the era of large, traditionally negotiated prisoner exchanges that were commonplace in the major wars of the past are, for the foreseeable future, unlikely to take place. What is more probable is that non-state enemies that provide, at best, uncertain captivity conditions will take smaller numbers of our soldiers captive. This sets up circumstances that will more likely than not replicate those of the Bergdahl swap, where a drawn-out congressional debate and the inevitable political squabbling that goes along with it could work to the detriment of a captive soldier.

chiefs-staff-bergdahl-exchange-vital-keeping-faith-american-service-members. In addition, Department of Defense policy for retrieving missing soldiers does not differentiate between deserters and non-deserters. See Timothy Matthews, *Sgt. Bergdahl and the High Priority to Recover Missing Soldiers*, JUST SECURITY (June 9, 2014, 9:04 AM), <http://justsecurity.org/11384/guest-post-sgt-bergdahl-high-priority-recover-missing-soldiers>.

176. *Id.*

177. See Dan Lamothe, *Army Sets Court Date in Desertion Case Against Bowe Bergdahl*, WASH. POST: CHECKPOINT (Apr. 3, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/04/02/army-sets-court-date-in-desertion-case-against-bowe-bergdahl>.

178. See ROBERT M. GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR* 209 (2014) ("American use of military force since Vietnam—with the sole exceptions of the Gulf War and the first weeks of the Iraq War—had involved unconventional conflicts against smaller states or nonstate entities . . .").

D. Conclusion

The focus of prisoner of war exchanges should not be on devising creative legal arguments used to justify the actions, but on doing what is necessary to bring captive soldiers home. The uproar following the Bergdahl exchange included several scathing critiques that provide salient policy concerns relevant to the proposed solution of recognizing exclusive executive authority over prisoner exchanges. However, an examination of these concerns, including the potential expansion of presidential wartime powers and the fear of undesirable or even dangerous results, demonstrates that they are mostly overstated and represent, at best, politicians playing political games with soldiers' lives, and, at worst, a precursor to more restrictive conditions on future exchanges. Granting the executive branch exclusive authority to make prisoner exchanges removes the threat of potentially dangerous congressional restrictions, prevents critics from arguing that the President has broken the law by negotiating for the release of a U.S. soldier, and tempers the ability of politicians to use our captive soldiers to score political points. Furthermore, the military ethos to leave no soldier behind represents a meaningful policy that deserves some authority. Simply put, that ethos should stand for the principle that our soldiers can go off to war believing that their Commander in Chief has the authority to negotiate their release without the fear of restrictive laws standing in the way.

CONCLUSION

When President Obama announced the recovery of Sgt. Bowe Bergdahl from the Taliban in exchange for five Taliban detainees, a public and political uproar ensued. While the emotionally charged element of Bergdahl's alleged desertion stirred a fair amount of anger, the bulk of the criticism leveled at the Administration consisted of policy concerns and the Administration's disregard of the 30-day congressional notice requirement contained in the 2014 NDAA. As this Comment has shown, the question of whether the Administration actually broke the law is incredibly difficult to answer. Although recent scholarship has reimagined the structure of executive and legislative war powers, there is no doubt that some preclusive core to the

President's wartime authority still exists. However, a precise definition of those powers is elusive, and even the recognition of a narrow authority to conduct a prisoner exchange to save the life of a captive U.S. soldier is unclear.

To bring clarity to this issue and to prevent a President from having to choose between a captive soldier's life and a constitutionally questionable law, Congress and the judiciary should recognize exclusive authority for the President to negotiate prisoner of war exchanges. The recognition of such power is not without its concerns, but the overriding need to keep the political branches from engaging in a futile dispute over constitutional authority in this arena compels the recognition of such power. Doing so will provide the President with the flexibility to deal with prisoner exchanges in unconventional circumstances and ensure our soldiers can go off to war under any context knowing their Commander in Chief has the authority to make every effort to bring them home.