

The Prisoner Swap Dilemma

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U.S. Presidents face significant political and social pressures to bring home Americans unjustly detained in foreign countries, as illustrated by the exchange of Viktor Bout, “the Merchant of Death,” for Brittney Griner. Griner was the first U.S. civilian with no alleged war crimes on her record to be detained by a foreign country with the politically motivated goal of effectuating a prisoner exchange. Griner had been sentenced to nearly a decade in a Monrovia prison camp for having a few ounces of marijuana oil in her travel bag. Following Griner’s release, there have been other seemingly unjust detentions, which indicates that each time the executive branch arranges such a swap with a detaining country, it weakens our national security, and simultaneously puts Americans abroad at heightened risk for unjust detention by foreign powers. This “prisoner swap dilemma” finds its roots and solution in game theory. This Article first examines the theory of the prisoner’s dilemma—a paradigmatic example of how strategic thinking between individuals can lead to suboptimal outcomes for both players. Through exploration and analysis, the Article offers a solution to the prisoner swap dilemma: reinstate Congressional involvement in the prisoner exchange process. This will help curb executive overreach, deter future unjust detentions, and save the President from the impossible choice between protecting our national security at the expense of their own approval rating and political future.

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INTRODUCTION

“The prisoners’ dilemma is the best-known game of strategy in social science.”¹ The formulation of the dilemma is attributed to Professor Albert Tucker, a mathematician at Princeton University, who first described the game theory paradox in 1950.² A classic example of the dilemma is as follows:

Two suspects are taken into custody and separated. The district attorney is certain that they are guilty of a specific crime, but does not have adequate evidence to convict them at trial. He points out to each prisoner that each has two alternatives: to confess to the crime the police are sure that they have done, or not to confess. If they both do not confess, then the district attorney states he will book them on some very minor trumped-up charge . . . and they will both receive minor punishment; if they both confess they will both be prosecuted, but he will recommend less than the most severe sentence; but if one confesses and the other does not, then the confessor will receive lenient treatment . . . whereas the latter will get “the book” slapped at him.³

Thus, “the only strategy that can be called a solution to the game is to defect always despite the seeming paradoxical outcome that both do worse than they could have.”⁴ In other words, due to a lack of trust in the other prisoner, the safest and most logical solution is to choose the least optimal outcome.⁵ Each prisoner is incentivized to pick some jail time, to avoid the worst possible outcome of a significant amount of jail time.⁶

In what this Article refers to as the “prisoner swap dilemma,” a similar paradoxical mental calculation occurs in the mind of the U.S. President when contemplating a prisoner swap. In the prisoner swap dilemma, the two sides are not prisoners but rather the U.S. President and the American people. The prevailing expectation among Americans is that a U.S. President will feel compelled to make a prisoner exchange if an American citizen is unjustly detained; in fact, according to the executive branch, “the U.S. Department of State and our embassies and consulates abroad have no greater priority than

1. Avinash Dixit & Barry Nalebuff, *Prisoners’ Dilemma*, ECONLIB, <https://www.econlib.org/library/Enc/PrisonersDilemma.html> [<https://perma.cc/VNS8-U5C9>].

2. Enrique Guerra-Pujol & Orlando I. Martínez-García, *Does the Prisoner’s Dilemma Refute the Coase Theorem?*, 47 J. MARSHALL L. REV. 1289, 1291–92 (2014).

3. *Id.* at 1293.

4. *Id.* at 1297.

5. *See id.*

6. *See id.*

the safety and security of U.S. citizens overseas.”⁷ Presidents are also self-interested in being re-elected; they care about their legacy, and thus have a strong desire to satisfy the will of the American people.⁸ As such, “political ambitions, stimulated by the desire for reelection, encourage a President to be in contact with various elements of public opinion.”⁹ In order to appease the American public, Presidents are therefore incentivized to make a prisoner exchange for an unjustly detained citizen overseas, even if that exchange poses a threat to national security. In other words, “concern for reelection causes presidents to engage in activities designed to increase short-run benefits and appeal to narrow, special interests at the expense of the long-run good of the country as a whole.”¹⁰ For example, President Biden’s release of international war criminal Viktor Bout, nicknamed the “Merchant of Death,” for professional women’s basketball player Brittney Griner, was not in the best interests of national security.¹¹ Releasing convicted war criminals makes the country less safe. Worse still, signaling to other countries that America is willing to swap war criminals for civilians not accused of any war crimes only increases the chances that more American civilians will be taken in a non-war context, in the hopes for another similar prisoner exchange.¹² President Biden elected to pursue this ostensibly precarious course of action, a decision that can be better explained when examined through the lens of the prisoner’s dilemma.¹³

The mental calculation of the prisoners in the prisoner’s dilemma leads them to pick a suboptimal outcome, because neither prisoner can trust the other to not act in their own best interest.¹⁴ U.S. Presidents make a similar mental calculation in the prisoner swap dilemma. The optimal outcome—for both the President, as Commander in Chief, and for the American public, is for the President to protect national security. This would almost certainly

7. See Josh Pennington et al., *US Citizen Detained on Drug Charges in Moscow Identified as Rock Band Manager Travis Leake*, CNN (June 12, 2023, 5:46 PM), <https://www.cnn.com/2023/06/10/europe/us-citizen-detained-russia-intl-hnk/index.html> [https://perma.cc/C63G-RE8T].

8. Lawrence L. Schack, *Note: A Reconsideration of the Single, Six-Year Presidential Term in Light of Contemporary Electoral Trends*, 12 J.L. & POL. 749, 750 (1997).

9. David C. Nice, *In Retreat from Excellence: The Single Six-Year Presidential Term*, 13 CONG. & PRESIDENCY 211 (1986).

10. *Id.* at 209.

11. See generally Tania Ganguli et al., *What We Know About Brittney Griner’s Release from Russia*, N.Y. TIMES (Dec. 17, 2022), <https://www.nytimes.com/article/brittney-griner-russia.html>.

12. *Id.*

13. See generally Dixit & Nalebuff, *supra* note 1.

14. See *id.*

require that a President not swap dangerous war criminals for civilians. Yet the President will choose the suboptimal outcome of effectuating the prisoner exchange, because the President cannot trust the other party—in this case, the American public—to understand the more nuanced idea that not turning over someone like the Merchant of Death keeps America safer in the long run. Furthermore, when the President exchanges war criminals for civilians, it encourages foreign powers to unjustly detain more Americans in the future. Despite this, since their political future is threatened, Presidents, like prisoners, are too self-interested to not make the exchange and choose the suboptimal outcome to bring the American home.¹⁵ In this way the prisoner swap dilemma poses a threat to America's national security—a threat that is increasing as a result of the expansion of executive powers.

This Article seeks to resolve the prisoner swap dilemma, by reintroducing Congress into the prisoner exchange process, thereby removing Presidents from the situation wherein they alone make the suboptimal decision. As will be explored later in this Article, Congress was still involved in the prisoner exchange process as recently as 2014.¹⁶ Reinvolving Congress will make the effectuation of a civilian prisoner exchange less likely in circumstances where the exchange threatens national security, and overall unlikely, unless there is a bi-partisan reason for the swap. This will undoubtedly slow down, or potentially halt the process, thereby achieving the most optimal outcome of keeping America safe—both as a nation, and for Americans traveling abroad. Because if other countries are required to convince the U.S. Congress to turn over a war criminal for a detained American civilian, rather than one person (the President) whose immediate political future is directly dependent on public approval, a foreign power is less likely to unjustly detain Americans in the first place.

This Article begins with the most recent prisoner exchange that highlights the decision-making paradox involved in a prisoner swap dilemma: the exchange of Brittney Griner for Viktor Bout.¹⁷ It will explore the political benefits of bringing Brittney home, including the role that race, sexuality, and gender played in the President's decision and its consequences for national

15. See Guerra-Pujol & Martínez-García, *supra* note 2. As discussed in more detail later in this Article, the American public clamored for President Biden to bring Brittney Griner home. See Tara Sullivan, *Brittney Griner Is Finally Coming Home. There's Joy and Relief Right Now—but Grief Remains*, BOS. GLOBE (Dec. 8, 2022), <https://www.bostonglobe.com/2022/12/08/sports/brittney-griner-russia-reaction>.

16. See, e.g., Conor Friedersdorf, *President Obama's Prisoner Swap Weakened the Rule of Law*, ATLANTIC (June 4, 2014), <https://www.theatlantic.com/politics/archive/2014/06/president-obamas-fraught-prisoner-swap/372111> [<https://perma.cc/C9RM-BRPP>].

17. See Ganguli et al., *supra* note 11.

security and American civilians abroad because of the seemingly unfair and unsafe prisoner exchange. This illustrates the dilemma U.S. Presidents face when confronted with the decision to leave American civilians in the hands of foreign powers—the choice between protecting national security and their own political future. The Article then discusses the expansion of executive power in prisoner exchanges, from President Obama, to President Trump and culminating with President Biden, that has allowed Presidents to make civilian prisoner exchanges without Congressional involvement.¹⁸ Finally, the Article examines the consequences of this executive overreach, including the abuse of power that has already occurred,¹⁹ before concluding that the answer to the prisoner swap dilemma—and executive overreach in this area—is to meaningfully involve Congress in the process.

I. FREE BRITTNEY

Brittney Griner is a professional women's basketball player for the Phoenix Mercury of the Women's National Basketball Association.²⁰ She is no ordinary player, but rather a two-time Olympic Gold Medalist for Team U.S.A. who is highly sought after by European teams to play for them.²¹ But Brittney's life changed dramatically on February 17, 2022, when she was detained and then arrested in Moscow, Russia, for traveling with vape cartridges containing oil derived from cannabis.²² Brittney remained in Russia until December 7, 2022, when U.S. President Joe Biden effectuated a prisoner swap to send convicted war criminal Viktor Bout back to Russia in exchange for Brittney Griner.²³

Brittney's release was a positive to many people of color, the LGBTQ+ community, supporters of the BLM, and more. For many people, it marked the first time in American history the U.S. government made a such a public and significant effort to support a member of the LGBTQ+ community who

18. See Friedersdorf, *supra* note 16.

19. See Michele Catanzaro & Sara Reardon, *Iranian Biologists Face US Trial for Trying to Take Proteins Out of the Country*, NATURE (June 24, 2019), <https://www.nature.com/articles/d41586-019-01901-4>.

20. Ganguli et al., *supra* note 11.

21. *Id.*

22. Eric Tucker & Matthew Lee, *State Dept.: Brittney Griner Considered Wrongfully Detained*, ASSOCIATED PRESS (May 3, 2022, 5:18 PM), <https://apnews.com/article/russia-ukraine-sports-business-phoenix-mercury-united-states-b6aaeee14b825bd247e2d853a9d708c> [<https://perma.cc/K3CP-HY9U>]. Brittney was in Russia to play professional basketball, the significance of which will be explored in further detail later. See *infra* Part III.

23. See Ganguli et al., *supra* note 11.

is also a person of color.²⁴ This moment in history should not be underestimated or forgotten.

Thus, the following Part explores the benefits of bringing Brittney home, as well as the backlash, because Brittney is a black, gender-nonconforming lesbian.²⁵

A. Timeline

On February 17, 2022, Brittney Griner was detained at a Moscow airport after Russian authorities said a search of her bag revealed vape cartridges containing cannabis oil.²⁶ Brittney was detained in a Russian prison until her trial in June 2022, where according to Brittney's attorney, she decided to plead guilty.²⁷ Her decision to plead guilty was part of a legal strategy for leniency and, according to her statement, "she decided to take full responsibility for her actions as she knows that she is a role model for many people."²⁸ But leniency did not come. Of the possible ten-year maximum sentence, Brittney was sentenced to nine years in a Russian penal colony.²⁹

The distinction between jail and a Russian penal colony is not an insignificant one. Derived from the old Soviet gulag system, the Russian penal colonies are far harsher than the typical prison system.³⁰ Thus, when Brittney was transferred to the penal colony after sentencing, she "likely entered a system of isolation, grueling labor and psychological torment."³¹ Moreover, according to a 2021 U.S. State Department report, "overcrowding, abuse by guards and inmates, limited access to health care, food shortages,

24. Lindsay Schnell, *To Free Brittney Griner from Russia, WNBA Sisters and LGBTQ Community Got Loud*, USA TODAY (June 5, 2023), <https://www.usatoday.com/story/sports/wnba/mercury/2023/06/05/brittney-griner-russia-wnba-lgbtq-community-got-loud/70175337007> [<https://perma.cc/N8E3-G7ZU>].

25. See, e.g., Kent Somers, *Brittney Griner Comes Home in a Prisoner Trade That Produces Mixed Feelings*, AZ CENTRAL (Dec. 8, 2022, 11:47 AM), <https://www.azcentral.com/story/sports/wnba/mercury/2022/12/08/somers-trade-for-brittney-griner-is-both-joyful-and-heart-breaking/69712461007> [<https://perma.cc/TNF7-LQYR>].

26. Ganguli et al., *supra* note 11.

27. Anna Chernova et al., *Brittney Griner Pleads Guilty to Drug Charges in Russian Court*, CNN (July 7, 2022, 5:24 PM), <https://www.cnn.com/2022/07/07/europe/brittney-griner-russia-pleads-guilty/index.html> [<https://perma.cc/96JX-Z6NL>].

28. *Id.*

29. Ganguli et al., *supra* note 11.

30. Phil McCausland & Curtis Bunn, *Griner Likely Faced Difficult Conditions at Russian Penal Colony, Former Prisoners and Advocates Say*, NBC NEWS (Dec. 8, 2022, 6:45 AM), <https://www.nbcnews.com/news/us-news/griner-russian-penal-colony-difficult-prisoners-say-rcna54180> [<https://perma.cc/8H32-3MHZ>].

31. *Id.*

and inadequate sanitation were common” in these types of penal colonies.³² In sum, did President Biden have any real choice from a political standpoint? Because of the “growing pressure on the Biden administration to do more to bring Griner home,” he had to effectuate a prisoner swap for Brittney or risk political suicide, which is precisely the prisoner swap dilemma this Article seeks to resolve.³³

The President’s self-interested and less-optimal choice was rewarded too, with the immense outpouring of support and joy when Brittney Griner returned home.³⁴ According to Brittney Griner’s wife Cherele, “The most overwhelming emotion I have right now is just sincere gratitude.”³⁵ Many Americans across the country echoed this sentiment and lauded Brittney’s return, for understandable reasons.³⁶ Assuming that Brittney did enter into Russia carrying an illegal substance—which by all accounts was a very small amount of cannabis oil—the punishment of nine years hard labor in a grueling and desolate penal colony does not fit the crime. Given the principles of justice and fairness, it is not hard to argue that Brittney Griner did not deserve nine years in a Russian penal colony. This is what made her detention unjust. Brittney’s return home, though suboptimal from a national security standpoint, did indicate progress on important cultural issues of race and sexual orientation in America.

B. *Brittney Griner Is a Black Woman*

American history is riddled with the idea of the damsel in distress. These historical notions, however, almost universally involve, directly or indirectly, a white woman in distress. For example, in 1915, D.W. Griffith’s film *Birth of a Nation* encapsulated this racism, the fear of white women in trouble at the hands of Black men.³⁷ In the wildly popular film, it is the KKK that routinely ride to the rescue, cementing the stereotypes that a white female in

32. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., RUSSIA 2021 HUMAN RIGHTS REPORT 10 (2021), https://www.state.gov/wp-content/uploads/2022/04/3136152_RUSSIA-2021-HUMAN-RIGHTS-REPORT.pdf [<https://perma.cc/W8EX-D9MQ>].

33. See *Russian Court Upholds WNBA Star Brittney Griner’s 9-Year Prison Sentence*, CBS NEWS (Oct. 25, 2022, 7:08 PM), <https://www.cbsnews.com/news/brittney-griner-wnba-appeal-russian-court-against-9-year-sentence> [<https://perma.cc/LAR7-RTYP>].

34. See Sullivan, *supra* note 15.

35. *Id.*

36. See Somers, *supra* note 25.

37. See NPR Staff, *100 Years Later, What’s the Legacy of ‘Birth of a Nation’?*, NPR: CODE SWITCH (Feb. 8, 2015, 5:56 PM), <https://www.npr.org/sections/codeswitch/2015/02/08/383279630/100-years-later-whats-the-legacy-of-birth-of-a-nation> [<https://perma.cc/ETG5-AJYV>].

distress needs saving, and by white men.³⁸ Unfortunately the opposite is also too often true. When a person of color in America is in danger, in particular a Black woman, the white men in charge have not traditionally come to the rescue. In 2004, journalist Gwen Ifill labeled this phenomenon “missing white woman syndrome.”³⁹

In 2021, when a twenty-two-year-old blond-haired, blue-eyed white woman named Gabby Petito went missing on a road trip with her boyfriend, she became the latest in a long history of white women in distress that garnered not only full-scale media attention, but full-scale resources devoted to her recovery.⁴⁰ Unfortunately, Gabby was not returned home safely, but what Gabby’s father said during the search for his daughter remains true:

I want to ask everyone to help *all* the people that are missing and need help . . . It’s on all of you, everyone that’s in this room, to do that, and if you don’t do that for other people that are missing, that’s a shame. It’s not just Gabby that deserves that. So look to yourselves for why that’s not being done.⁴¹

Gabby’s father seemingly realized the imbalance in coverage and concern for white women over women of color and made an effort to make such a statement to the press *while* his daughter remained missing, which is laudable. Yet, as Professor Masullo notes, the cause of the continued imbalance is simple: “The same reason why media coverage is different for white women than for women of color is the same reason this is getting so much attention. We live in a system that puts white women at a higher value.”⁴²

Because we live in an America that historically and continuously signals that it values white women above women of color, Brittney Griner’s prisoner exchange is extraordinary. President Biden exchanged Viktor Bout, literally dubbed “the Merchant of Death,” for a Black female civilian.⁴³ Not a Black female war hero with purple hearts and silver stars, not a Black female police officer or FBI agent, but a Black female basketball player, who does not have blond hair or blue eyes. This undoubtedly made America less safe, and it was

38. *See id.*

39. Matt Pearce, *Gabby Petito and One Way to Break Media’s ‘Missing White Woman Syndrome,’* L.A. TIMES (Oct. 4, 2021, 5:00 AM), <https://www.latimes.com/entertainment-arts/story/2021-10-04/gabby-petito-and-breaking-the-white-missing-women-syndrome> [<https://perma.cc/BCE5-MVXV>].

40. *See id.*

41. *Id.*

42. *Id.* (statement of Gina Masullo, Assoc. Professor of Journalism and Media at the Univ. of Tex. Austin).

43. *See* Ganguli et al., *supra* note 11.

also undoubtedly a heroic and momentous occasion in American history. Both can be true at the same time. According to Victoria Kirby York, director of public policy and programs at the National Black Justice Coalition, “the deluge of texts and phone calls she[] received . . . about Griner’s release showed her that a collective sigh of relief [was] let out among many Black Americans.”⁴⁴

To be sure, Brittney’s return does not signal the end of racism in America or even the end of missing white woman syndrome. But it is a significant cultural step—one which all Americans can be proud of—that the President of the United States, an eighty-year-old white man, risked strong political backlash and perhaps even endangered the nation to bring a Black woman home.⁴⁵ Thus, even though the decision made America less safe, there were some real benefits to the exchange. It showed Americans that Brittney Griner’s life mattered.

It is also encouraging and rewarding because thousands of Black women came together in support of Brittney’s release, and then it actually happened.⁴⁶ Had the prisoner swap not been effectuated, or if it was made for someone else instead (like Paul Whelan, a former Marine discharged for bad conduct⁴⁷), that would have been seen as a slap in the face to many in the Black community and beyond.⁴⁸ As such, the significance of her return, and the message it sent to women and young girls of color in America, cannot be overstated. “Although Griner’s imprisonment took place overseas, it mirrors the experiences of many black people who are unjustly imprisoned in the United States and shows what it feels like when someone is actually able to come back home.”⁴⁹ Thus, bringing her home “is a huge moment, and we

44. Orion Rummier, *‘We Can’t Take This for Granted’: Black LGBTQ+ Women and Nonbinary Leaders Celebrate Brittney Griner’s Release*, 19TH (Dec. 8, 2022, 2:02 PM), <https://19thnews.org/2022/12/brittney-griner-black-lgbtq-women-russia> [<https://perma.cc/6YP3-HY63>].

45. See Ganguli et al., *supra* note 11.

46. See Char Adams, *Black Women Played a Critical Role in Helping to Free Brittney Griner*, NBC NEWS (Dec. 13, 2022, 2:57 PM), <https://www.nbcnews.com/news/nbcblk/black-women-played-critical-role-helping-free-brittney-griner-rcna61020> [<https://perma.cc/83TW-DRUK>].

47. See *infra* notes 80–85 and accompanying text.

48. See *id.* (stating that the Win with Black Women Collective sent President Biden 1,200 signatures of women in a letter of support for Griner).

49. Rummier, *supra* note 44.

must acknowledge and celebrate it”⁵⁰—because Brittney Griner is the first Black woman America thought was important enough to rescue.⁵¹

C. Brittney Griner Is a Member of the LGBTQ+ Community

Monica Simpson, executive director of SisterSong, noted: “Black, queer, trans, women and many communities that are pushed to the margins by systems rooted in white supremacy and patriarchy are constantly navigating violence, unjust criminalization and threats to our human rights. Brittney’s treatment is just one example among too many of this reality.”⁵² As Ms. Simpson observed, Brittney Griner’s story is not just a victorious one for the Black community, but for the queer community as well. Brittney Griner is a gay Black woman, making her return even more remarkable as a direct rebuke to missing white woman syndrome, which implicitly presumes that the missing white woman is heterosexual.⁵³ It was Gabby Petito’s boyfriend who was the prime suspect in her death; had it been her *girlfriend* instead, the media coverage would likely have been different and less intense.⁵⁴ The reality is many gay women in America are not prioritized in the same way straight white women are prioritized, valued, and appreciated.⁵⁵

Thus, when news of Brittney’s return reached leaders in the LGBTQ+ community, they felt it. For example, Kierra Johnson, Executive Director of the National LGBTQ+ Task Force, said she started crying when she heard the news.⁵⁶ “I was like, why am I crying? I do not know this woman. I am acting like my cousin is coming back,” Johnson said.⁵⁷ But then Johnson realized why: she was experiencing what many in the Black and queer communities were experiencing—a sense of relief.⁵⁸ Brittney had been detained for nearly ten months; for nearly ten months there was talk of her

50. Adams, *supra* note 46 (statement of Monica Simpson Exec. Dir., SisterSong, a national organization dedicated to reproductive justice for women of color).

51. See Keith Reed, *Brittney Griner Is the 1st Black Woman America Thought Was Important Enough to Rescue*, ROOT (Dec. 8, 2022), <https://www.theroot.com/brittney-griner-is-the-1st-black-woman-america-thought-1849871178> [<https://perma.cc/7YPC-92J2>].

52. Adams, *supra* note 46.

53. See Pearce, *supra* note 39.

54. See *id.*

55. See generally Raelynn J. Hillhouse, *Reframing the Argument: Sexual Orientation Discrimination as Sex Discrimination Under Equal Protection*, 20 GEO. J. GENDER & L. 49, 49 (2018) (explaining existing ambiguity around “how courts should treat sexual orientation under” the Equal Protection Clause and offering a solution).

56. See Rummler, *supra* note 44.

57. *Id.*

58. See *id.*

release, and yet it still had not occurred.⁵⁹ Even after she was sentenced to the Russian penal colony in June 2022, there was some hope a deal could be done before she actually went there.⁶⁰ But that did not happen. Imadé Nibokun Borha, founder of the nonprofit Depressed While Black, said that “watching Griner’s verdict reminded her of what the United States has done to Black people for centuries.”⁶¹ “It’s really triggering to see a queer Black person in a cage,” she said.⁶² “It makes me think about how Black women, Black queer women, how we’re considered disposable in our society.”⁶³

It was not until four months later, in December 2022, that Brittney was released from the penal colony and came home.⁶⁴ Johnson, the leader of the National LGBTQ+ Task Force, was crying because, historically, American Black and queer women do not come home. She explained: “I started to question if this was going to stay a priority of our own government, because she literally embodies the identities that are under greatest attack right now: Black, queer, woman.”⁶⁵ York also got a text from her mother asking if Brittney was really coming home.⁶⁶ Because York’s mother (like myself) wondered if Brittney’s release was actually going to happen as “she was too Black, too lesbian, too gender non-conforming.”⁶⁷

D. Troubling Backlash

Unfortunately, those fears were grounded in reality. Many people who objected to the Brittney Griner prisoner exchange did not do so out of safety concerns, but rather in opposition to exchanging for Brittney Griner instead of including someone else.⁶⁸ That someone else was ex-Marine Paul

59. See Ganguli et al., *supra* note 11.

60. See Chernova et al., *supra* note 27.

61. Orion Rummmler, ‘I See Myself in Her’: Brittney Griner’s Russia Trial Resonates with Queer Black Women and Nonbinary People, 19TH (Aug. 4, 2022, 12:15 PM), <https://19thnews.org/2022/08/brittney-griner-verdict-russia-trial-black-women> [<https://perma.cc/HR6L-XK9W>].

62. *Id.*

63. *Id.*

64. See Ganguli et al., *supra* note 11.

65. Rummmler, *supra* note 44.

66. *Id.*

67. *Id.*

68. See Michael Collins, ‘Still A Hostage’: Critics Slam Biden Over Griner Prisoner Swap That Left Paul Whelan in Russia, USA TODAY (Dec. 9, 2022, 5:17 PM), <https://www.usatoday.com/story/news/politics/2022/12/08/joe-biden-brittney-griner-prisoner-swap-criticism-paul-whelan/10858405002> [<https://perma.cc/84J6-7MDF>].

Whelan.⁶⁹ Whelan has been serving a sixteen-year jail sentence since being arrested in Russia on suspicion of spying in 2018.⁷⁰ Whelan is a white, heterosexual male in his fifties.⁷¹

Brittney Griner is not only a black gay woman, but also presents as traditionally masculine, with her six-foot eight muscular frame and deep voice.⁷² She wears men's clothes and dominates people physically for a living, and as such has had to endure years of ridicule and scorn for not conforming to traditional gender roles and stereotypes.⁷³ Someone (or a bot?) even created a fake CNN post about Russia doing a DNA test to see if Brittney Griner was really a man before they sent her to the women's penal colony.⁷⁴ The post received thousands of likes before it was debunked.⁷⁵

As such, issues of race, gender norms, and sexuality all intersected with the Brittney Griner prisoner exchange situation, and some people wanted the straight, white, ex-Marine to come home as part of any prisoner exchange.⁷⁶ There are undoubtedly many valid reasons for this, but it is hard to surmise that any strong preference for Whelan over Brittney does not involve at least some amount of explicit or implicit bias. It is dangerous to play the deserving game, because any American unjustly detained deserves to come home. But to be so critical of any deal for the black gay woman that did not include the straight white man is concerning.⁷⁷ Not only is Brittney a role model for

69. See *Who Is Paul Whelan, the Former US Marine Who Russia Branded a Spy?*, BBC (Aug. 1, 2024), <https://www.bbc.com/news/world-us-canada-46757119> [<https://perma.cc/6UET-D9Z3>].

70. *Id.*

71. *See id.*

72. See Laurie Abraham, *How Slam-Dunking, Gender-Bending WNBA Rookie Brittney Griner Is Changing the World of Sports*, ELLE (Nov. 4, 2013), <https://www.elle.com/culture/career-politics/interviews/a12606/brittney-griner-profile> [<https://perma.cc/97LT-C2NH>].

73. *See id.* (referencing various social media posts about Griner before her detention, such as “Brittney Griner is now the first man to play in the WNBA,” “Brittney Griner threw down two dunks last night. One for each of her testicles,” and “Brittney Griner suspended for first three games next season after testing positive for a penis”).

74. Tom Norton, *Fact Check: Was Brittney Griner Ordered by Russia to Take DNA Gender Test?*, NEWSWEEK (Dec. 8, 2022, 8:40 AM), <https://www.newsweek.com/fact-check-was-brittney-griner-ordered-russia-take-dna-gender-test-1731778> [<https://perma.cc/AZ2R-BCST>].

75. *Id.*; @The Real Fly, X (Aug. 7, 2022, 2:21 AM), https://x.com/the_real_fly/status/1556161386962714625 [<https://perma.cc/48AR-5PA3>].

76. *See Collins, supra* note 68.

77. *See id.*

thousands of young girls everywhere,⁷⁸ but she took responsibility by admitting to bringing some cannabis oil into Russia.⁷⁹

Paul Whelan, by contrast, was notably discharged from the U.S. military for bad conduct.⁸⁰ “Dishonorable discharges are handed down for what the military considers the most reprehensible conduct,” and bad conduct discharges like Whelan’s are a similar, but less severe, punitive discharge.⁸¹ As an illustration of the rarity and seriousness of these punishments, less than 1% of military service people are bad conduct or dishonorably discharged.⁸² Moreover, Mr. Whelan is not only American, but he is also a Canadian, British, and Irish citizen, and was convicted of spying on Russia.⁸³ Is it really outside the realm of possibility that a bad-conduct-discharged Marine, who is a citizen of three other countries, could be spying on Russia for someone?⁸⁴ And yet House Minority Leader Kevin McCarthy stated “[l]eaving Paul Whelan behind for this is unconscionable.”⁸⁵

For these many aforementioned reasons, actually securing Brittney Griner’s release from Russia and return to the United States was in part a triumph. A triumph for the Black community, for the queer community, and for non-binary, gender nonconforming people everywhere. A powerful straight white man—one of the most powerful men in America—made that happen.⁸⁶ Americans cannot take this for granted.⁸⁷

But part of the *why* is troubling, and so is the *how*. To fulfill his duties as Commander in Chief, the most optimal outcome for the President is to keep America safe from attack and Americans abroad as a whole safe from future unjust detentions, which would mean not effectuating a prisoner exchange of an American civilian for a war criminal. Thus, the *why* is problematic because

78. See Katie Takacs, *10 Reasons Brittney Griner Is Our New Role Model*, GIRL’S LIFE (Feb. 1, 2016), <http://www.girlslife.com/fitness/wellness/21607/10-reasons-brittney-griner-is-our-new-role-model> [<https://perma.cc/PW6N-NKHY>].

79. See Chernova et al., *supra* note 27.

80. BBC, *supra* note 69.

81. See *Military Discharge in the United States*, VETVERIFY, <https://www.vetverify.org/javafx.faces.resource/images/VOSB-Military-Discharge-Overview.pdf.xhtml?ln=default> [<https://perma.cc/N6KY-U5A8>]; U.S. DEP’T OF LAB., VETS USERRA FACT SHEET #3, at 4, <https://www.dol.gov/sites/dolgov/files/VETS/files/USERRA-Fact-Sheet-3-Separations.pdf> [<https://perma.cc/75V4-32WE>].

82. See SENIOR VETERANS SERV. ALL., *How Do You Correct a Bad Discharge?*, https://www.veteransaidbenefit.org/correcting_military_discharge.htm [<https://perma.cc/ES9G-4XHH>].

83. BBC, *supra* note 69.

84. See *id.*

85. Collins, *supra* note 68.

86. See Ganguli et al., *supra* note 11.

87. See Rummler, *supra* note 44.

President Biden was incentivized to effectuate the exchange to secure his political future amidst “growing pressure on the Biden administration to do more to bring Griner home.”⁸⁸ It is similar to the prisoner’s dilemma, where the actor paradoxically chooses a suboptimal outcome out of their own self-interest and lack of trust in the other actor.⁸⁹ Here, President Biden was incentivized to effectuate the prisoner exchange to bring Brittney home, despite it making America less safe on two fronts: (1) he released a dangerous Russian war criminal, and (2) he signaled to the rest of the world that “if you capture an American civilian having nothing to do with war, America may send a war criminal back in exchange.” This messaging will encourage future unjust detentions of American civilians, making the world less safe for Americans.⁹⁰ This is the prisoner swap dilemma.

Presidents cannot be allowed to act alone because they are incentivized to act in their own political best interest of approval and re-election, which in the prisoner swap scenario conflicts with their duty as Commander in Chief to keep America safe on a national security level. The fact that the Commander in Chief of the military is incentivized in prisoner exchange scenarios to act inconsistently with the best security interests of the nation is beyond troubling.

The *how* is further troubling, because the growing power of the Executive in prisoner exchanges has allowed the President to essentially be the sole actor in the exchange.⁹¹ This exacerbates the prisoner swap dilemma, with the President alone being faced with an impossible choice of leaving an American behind. But what if the Executive were to share some of this power and responsibility for making prisoner exchange decisions? The result would be a more democratic process, which also helps resolve the prisoner swap dilemma.

On cultural and historic levels, the Brittney Griner exchange was a triumph. But on another level, the fact that our democracy allows for one man to release the Merchant of Death for an American civilian outside of wartime

88. See CBS NEWS, *supra* note 33. Brittney’s return did not stop President Biden from wanting to keep making prisoner exchanges, as the State Department recently noted with respect to Paul Whelan, “I can assure him and I can assure his family members that we have no higher priority than returning him safely home to the United States.” Caitlin Yilek, *Paul Whelan, Wrongfully Detained in Russia, Says He Thinks “The Wheels Are Turning” Toward Release*, CBS NEWS (May 22, 2023, 5:01 PM), <https://www.cbsnews.com/news/paul-whelan-update-cnn-interview-russia/#> [<https://perma.cc/2WAK-53SW>]. In sum, the presidential incentive present in the prison swap dilemma is real, regardless of the prisoner.

89. See Dixit & Nalebuff, *supra* note 1; Guerra-Pujol & Martínez-García, *supra* note 2, at 1291–92.

90. See Pennington et al., *supra* note 7.

91. See, e.g., Exec. Order No. 13,698, 3 C.F.R. 347 (2016).

should scare Americans.⁹² The Executive has the sole power to make that kind of exchange, in a situation where they are incentivized to endanger the nation, in a legal arena where there are supposed to be shared powers.⁹³ In this way, the entire Brittney Griner prisoner swap situation highlights an ongoing threat to democracy—the increasingly unchecked power of the executive branch.

II. THE EVOLUTION AND ABUSE OF PRESIDENTIAL PRISONER SWAPS

A. *President Obama and the Legality of Prisoner Exchanges*

The problematic unfettered discretion President Biden wielded in executing the Brittney Griner prisoner exchange, without any Congressional input, was possible in large part because of earlier expansions of executive power.⁹⁴ On May 31, 2014, President Obama announced U.S. Army Sergeant Bowe Bergdahl, the lone American prisoner of war from the war in Afghanistan, was coming home.⁹⁵ This seemingly momentous occasion was quickly shrouded in controversy, however, as it was part of a prisoner swap for five Guantanamo Bay detainees.⁹⁶ Some questioned the wisdom of President Obama's seemingly paradoxical authorization to exchange five Taliban detainees for one American soldier.⁹⁷ Releasing five Guantanamo Bay detainees does not make America safer, yet President Obama felt compelled to make the exchange. He was in the prisoner swap dilemma, where the only "solution" to the game is to choose the suboptimal option.⁹⁸

President Obama could have involved Congress in the process—or rather, Congress was *supposed* to be involved.⁹⁹ But the self-interest to bring the American home was too strong. So strong, in fact, that some argued "the Obama Administration had broken the law by failing to notify Congress thirty

92. See Ganguli et al., *supra* note 11.

93. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1282 (2008).

94. See 3 C.F.R. 347.

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

96. *Id.* at 1325, 1327.

97. Tom Hamburger & Kevin Sieff, *Joy About Bergdahl Release Gives Way to Questions*, WASH. POST (June 1, 2014, 7:33 PM), 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.

98. See Guerra-Pujol & Martínez-García, *supra* note 2, at 1297.

99. See Friedersdorf, *supra* note 16.

days before the release of the Taliban prisoners, as required by the National Defense Authorization Act for 2014.”¹⁰⁰ This was a significant step in the extension of executive power in prisoner swap situations, by deliberately controverting the law to exclude Congress entirely from the process.¹⁰¹

Beyond the shared powers between Congress and the Executive, diplomacy rests in the hand of the President, who is often referred to as the “sole organ” in international affairs.¹⁰² Interestingly, this famous saying, attributed to then-Representative John Marshall in 1800, likely never occurred.¹⁰³ But regardless, most scholars understand that the President takes the lead in international diplomacy.¹⁰⁴ The President is thus often the spokesperson for the country, but ultimately, under the shared powers doctrine, Congress has a role in final decisions when it comes to treaties, war powers, and international relations.¹⁰⁵

The National Defense Authorization Act of 2014, signed into law by President Obama himself, required the Secretary of Defense to notify Congress of any Guantanamo Bay prisoner exchange within thirty days.¹⁰⁶ Yet President Obama failed to do so.¹⁰⁷ President Obama justified this seemingly blatant disregard of a rule he had just signed into law by using the time honored tradition of claiming the law did not apply to him or the situation.¹⁰⁸ This is a dangerously common practice of the Executive since September 11, 2001: to avoid any appearance of overstepping their authority, they simply argue the laws do not apply to them or the situation (even when they do).¹⁰⁹ The National Security Council Press Office, on behalf of the Executive, explained as follows:

100. See Maffucci, *supra* note 95, at 1329.

101. See *id.* at 1338.

102. See Louis Fisher, *The Law: Presidential Inherent Power: The “Sole Organ” Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 139 (2007).

103. See *id.* at 140.

104. See, e.g., Jennifer M. Haidar, *Challenging Federalism: How the States’ Loud Constitutional Provocation Is Being Met with Silence*, 45 J. LEGIS. 102, 104 (2019).

105. See generally Hathaway, *supra* note 93 (examining the history and evolution of international lawmaking by the Executive and Congress).

106. National Defense Authorization Act of 2014, Pub. L. No. 113-66, § 1035(d), 127 Stat. 672, 851–53.

107. See E-mail from Nat’l Sec. Council Press Off. to Caitlin Hayden, Spokesperson, Nat’l Sec. Council (June 3, 2014, 1:27 PM), <https://s3.documentcloud.org/documents/1180482/nsc-statement-on-30-day-transfer-notice-law.pdf> [<https://perma.cc/6E96-XETR>].

108. See *id.*

109. See, e.g., Timothy Lockwood Kelly, Comment, *Politics and the Tortured Question of Dignity: Maintaining the Separation of Powers in Times of Emergency*, 91 TEMP. L. REV. 585, 600–01 (2019) (“John Yoo, one of the most infamous defenders of torture, has relied on this

The notification requirement should be construed not to apply to this unique set of circumstances, in which the transfer would secure the release of a captive U.S. soldier and the Secretary of Defense, acting on behalf of the President, has determined that providing notice as specified in the statute could endanger the soldier's life. In these circumstances, 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.¹¹⁰

In other words, a "statute can be ignored so long as the secretary of defense determines that violating it is necessary to protect Americans abroad or U.S. soldiers."¹¹¹ The dangerousness of this practice cannot be overstated. If the Executive is allowed to claim the law does not apply anytime it does not want to follow it, then there is practically no real separation of powers. The slope away from representative democracy towards an authoritarian regime could not be more slippery.

This also increases the gravity of the problem the prisoner swap dilemma creates if nothing is done. Presidents, left to their own devices, will go to great lengths—even misconstruing the law—to make the self-interested yet suboptimal choice to carry out the prisoner exchange.¹¹² Without clear and more extensive involvement by Congress in the prisoner swap process, U.S. Presidents will continue to make the choice to keep America less safe by exchanging war criminals for civilians, thereby also increasing the likelihood more American civilians will be unjustly detained in the future.

Thus, before President Biden unilaterally decided to exchange the Merchant of Death for Brittney Griner,¹¹³ President Obama had already set a dangerous precedent for him and all other Presidents to follow when he exchanged five Guantanamo Bay detainees for Sergeant Bergdahl.¹¹⁴ But President Obama did not stop there.

implied power more than once. In one of the earliest of what would come to be known as the torture memos, Yoo, who served in the Department of Justice's (DOJ) Office of Legal Counsel (OLC), argued that given the United States' dangerously uncertain situation in the wake of September 11, any criminal statute apparently limiting the President's exercise of war powers under the Commander in Chief Clause would have to be interpreted so as not to reach the exercise of those war powers.").

110. E-mail from Nat'l Sec. Council Press Off. to Caitlin Hayden, *supra* note 107.

111. Friedersdorf, *supra* note 16.

112. See Maffucci, *supra* note 95, at 1353.

113. See Ganguli et al., *supra* note 11.

114. See Friedersdorf, *supra* note 16.

B. Obama Officially Expands the Power of the Executive

President Obama not only set the example of ignoring Congress with respect to prisoner exchanges—he codified the principle into law. After executing the prisoner swap for Sergeant Bergdahl without notifying Congress, President Obama drafted Executive Order 13,698.¹¹⁵ Executive Order 13,698 created the Hostage Recovery Fusion Cell, “a single United States Government operational body to coordinate all efforts for the recovery of U.S. nationals taken hostage abroad.”¹¹⁶ It is no accident that this single operational body is wholly within the purview of the executive branch.¹¹⁷ With his Executive Order, President Obama successfully—without Congressional approval—expanded the power of the Executive to negotiate on behalf of America in prisoner swaps with U.S. nationals abroad.

In and of itself, this one executive order does not appear to be a monumental overreach. But it is another step in the expansion of executive power.¹¹⁸ Some have argued the Executive should have a great deal of power in international affairs.¹¹⁹ Why not have the President more involved—if not solely involved—in prisoner swap detainee situations? In other words, is there any reason to believe that Congress will be more adept at prisoner swap scenarios than the Executive? Or as famed scholar John Hart Ely put it: “Is there any reason to suppose, given their respective performances, that Congress will prove wiser on issues of war and peace than the president?”¹²⁰ Yet without any checks on the executive power, Executive Order 13,698 opened the door for the next President of the United States to rely on this power to unjustly detain a foreign citizen in order to effectuate the prisoner swap *he* wanted.

115. 3 C.F.R. 347 (2016).

116. *Id.* at 347–49.

117. *See id.* at 348–49.

118. *See* Ryan T. Williams, *The Road Most Travel: Is the Executive’s Growing Preeminence Making America More like the Authoritarian Regimes It Fights So Hard Against?*, 6 ALA. C.R. & C.L. L. REV. 139, 140 (2015).

119. *See* Craig Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 347 (1955).

120. *See* JOHN HART ELY, WAR AND RESPONSIBILITY 9 (1993). *But see infra* Section IV.B (arguing that Congress should have some role in the prisoner exchange process).

C. *President Trump Misuses the Expanded Executive Power*

Masoud Soleimani is “a world-renowned scholar, professor, and doctor in the field of stem cell research, hematology, and regenerative medicine.”¹²¹ He was arrested by the U.S. Government and detained in October 2018 for allegedly exporting biological items from the United States to Iran in violation of the terms of a newly enacted treaty between the two countries.¹²² There was no debate that Dr. Soleimani had the chemicals on him, which are “known as growth factors . . . commonly used in medical research.”¹²³ Eight months after attempting to transport the chemicals, Dr. Soleimani was arrested while traveling to Minnesota to start a research position at the prestigious Mayo Clinic.¹²⁴ Dr. Soleimani claimed he did not know he was doing anything illegal and that there was no criminal intent.¹²⁵

Normally, Dr. Soleimani’s alleged offense would result in a fine; but the executive branch may have had its own agenda.¹²⁶ Dr. Soleimani was ultimately imprisoned and spent eight months in jail awaiting trial on criminal charges.¹²⁷ The Trump administration went after him vigorously, baffling legal experts, of which at least one was “mystified as to why the Trump administration did not simply fine the researchers for violating export rules,” speculating that “politics played a part in government prosecutors’ decision to bring criminal charges.”¹²⁸

That speculation proved to be well founded. In December 2019, more than a year after Dr. Soleimani began his detention, the Trump administration effectuated a prisoner swap, agreeing to free Dr. Soleimani in exchange for Xiyue Wang, a Chinese-American graduate student detained in Iran since 2016.¹²⁹ To be clear, Xiyue Wang was a Princeton University student who likely never should have been imprisoned in Iran in the first place.¹³⁰ But

121. Defendant’s Motion to Dismiss at 2, *United States v. Soleimani*, No. 18-CR-00216 (N.D. Ga. Mar. 1, 2019), 2019 WL 6455585.

122. *Id.* at 1–2.

123. Catanzaro & Reardon, *supra* note 19.

124. *Id.*

125. *See id.*

126. *See id.*

127. *Id.*

128. *Id.*

129. Jesse Byrnes, *Iran Releases American Graduate Student in Prisoner Swap [on Xiyue Wang]*, CAMPUS WATCH (Dec. 7, 2019), <https://www.meforum.org/campus-watch/60064/iran-releases-american-graduate-student-in> [<https://perma.cc/TY4P-DJQ2>].

130. *See* Colin Dwyer, *Released from Iranian Prison, U.S. Student Xiyue Wang Says He Was Held as a ‘Hostage,’* NPR (June 11, 2020, 5:00 AM), <https://www.npr.org/2020/06/11/874079626/released-from-iranian-prison-u-s-student-xiyue-wang-says-he-was-held-as-a-hostage> [<https://perma.cc/X6JG-LYEM>].

allowing the Executive to use “ends justify the means” logic takes America further away from democratic governance.¹³¹ Here, Mr. Wang was taken by Iran and labeled a spy even though he was not.¹³² Mr. Wang was sentenced to ten years in prison for espionage, “[b]ut the officials who interrogated him . . . did not seem to care much about what he did or didn’t know.”¹³³ In short, “he was being held for different reasons.”¹³⁴ Mr. Wang explained: “They told me quite explicitly just that ‘we need a deal with America’ They were very straightforward about that They said, ‘We want our money back from the United States. We want our detainees back, and you have to be a spy in order for that to happen.’”¹³⁵ Mr. Wang was not taken because he was a spy; he was taken because Iran wanted to negotiate with the U.S., and they knew the President—wielding sole authority over prisoner exchanges—would only consider a deal if an American was taken.

Second, and equally troubling, is that the broadened presidential powers in prisoner swap scenarios from Executive Order 13,698 enabled President Trump to trump up charges (pun intended) on an individual in order to exchange him for the American he wanted out of jail overseas.¹³⁶ Dr. Soleimani was not a spy: he was a scientist who did not even realize he was breaking a law.¹³⁷ Yet he was imprisoned and criminally charged because President Trump wanted to use him as a political pawn.¹³⁸ The inherent problems in allowing our Presidents to have this much power are numerous. What if the President fabricates a reason to detain someone donating to a rival campaign? Or to detain a personal enemy? Or to detain an innocent person to exchange for an American war criminal who is *justly* imprisoned abroad? Thus, giving the Executive absolute power not only facilitates unfair deals that make the country less safe, but also incentivizes improper detentions and exchanges by the President in America.

Unfortunately this is not just a theory because, despite the thousands of researchers and scientists who signed a petition asking President Trump to

131. See David E. Campbell, *How Civic Education Can Help Us Keep the Republic*, JUDGES’ J., Spring 2023, at 13.

132. See Dwyer, *supra* note 130.

133. *Id.*

134. *Id.*

135. *Id.*

136. See Exec. Order No. 13,698, 3 C.F.R. 347 (2016) (creating two hostage response groups, chaired by executive agency personnel, that have the independent power to navigate hostage recovery situations).

137. See Catanzaro & Reardon, *supra* note 19.

138. See Michele Catanzaro, *United States Drops Charges Against Two More Scientists After Iran Prisoner Swap*, NATURE (Dec. 13, 2019), <https://www.nature.com/articles/d41586-019-03856-y>.

release Dr. Soleimani from prison, Trump refused.¹³⁹ President Trump did not release him from imprisonment for this fineable offense until he could be exchanged for the person Trump wanted to bring home, suggesting this was the whole point of imprisoning Dr. Soleimani in the first place.¹⁴⁰ In some ways, the absolute power taken by the executive branch in the prisoner exchange process, combined with the self-interest created by the prisoner swap dilemma, has enabled U.S. Presidents to behave like the leaders we deride other countries for having—unconstrained, authoritarian dictators with out-of-control and untrustworthy leadership. If we do nothing about this, America will continue to slide further away from democracy and toward those authoritarian regimes that our country is trying hard to fight against.¹⁴¹

D. The Dangers of the Xiyue Wang Prisoner Exchange

Despite the problematic nature of this seeming abuse of power, many Americans applauded the move by President Trump.¹⁴² The logic being that if other countries are going to manufacture reasons to detain our citizens, we should do the same and bring them back. The prisoner swap dilemma creates such a strong incentive for the President to make the prisoner exchange that now the unchecked power of the Executive can sometimes even lead to the unjust detention of foreign citizens in America just to set up the entire situation and receive all that goodwill from the American people.¹⁴³ This current nightmare scenario has set a dangerous precedent, not only for our future Presidents, but for other countries to follow. Now, other countries are on notice—this is the way. Feel free to unjustly detain our citizens because even though America purports to be a democracy with separation of powers,¹⁴⁴ we are playing the same game. Our Presidents can and will bend the law to detain your citizens—and punish them harsher than the crime usually warrants—in order to effectuate their desired prisoner exchange as well.¹⁴⁵

139. See Catanzaro & Reardon, *supra* note 19.

140. See *id.*

141. See Williams, *supra* note 118, at 140.

142. See, e.g., Byrnes, *supra* note 129 (statement of Princeton Pres. Christopher Eisgruber) (“The entire Princeton University community is overjoyed that Xiyue Wang can finally return home to his wife and young son, and we look forward to welcoming him back to campus.”).

143. See generally Guerra-Pujol & Martínez-García, *supra* note 2 (explaining how prisoners are more likely to bargain with each other if each has reason to mutually cooperate in order to obtain higher collective payoff); Catanzaro & Reardon, *supra* note 19.

144. See, e.g., Kelly, *supra* note 109.

145. See, e.g., Catanzaro & Reardon, *supra* note 19.

In other words, the wide latitude afforded the executive branch in prisoner swap scenarios has allowed the Executive to abuse the system. This is antithetical to democratic governance. Yet that is the power taken by the executive branch, power we allowed it to have, and power that makes the world less safe for all U.S. citizens. Against this backdrop, is it really all that surprising that less than two years after President Trump imprisoned Dr. Soleimani, Russia detained and subsequently sentenced Brittney Griner to nine years of hard labor in a Monrovia prison camp for a few ounces of marijuana oil in her bag?¹⁴⁶ Russia knew it only had to convince one person—our President—to agree to exchange a war criminal for a basketball player.¹⁴⁷ This should scare all Americans because the current state of the law makes everyone, at home and abroad, less safe.

E. President Biden Expands the Executive Power Again

The increase and abuse of the growing executive power in the prisoner exchange arena did not end with President Trump. As Vice President during Obama's terms, President Biden witnessed firsthand the expansion of the executive branch in many areas, including prisoner exchanges with Executive Order 13,698.¹⁴⁸ Thus, as Brittney Griner's case got closer to trial in the summer of 2022, President Biden had yet to secure a prisoner exchange for her release, so he sought to further broaden the powers of the Executive.¹⁴⁹ On July 19, 2022, President Biden signed into law Executive Order 14,078, which declared: "I therefore determine that hostage-taking and the wrongful detention of United States nationals abroad constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. I hereby declare a national emergency to deal with this threat."¹⁵⁰

By declaring the "wrongful detention" of U.S. nationals overseas a national emergency, President Biden broadened the reach of the Executive to negotiate and bring home Americans without any oversight from Congress,

146. See McCausland & Bunn, *supra* note 30.

147. See Ganguli et al., *supra* note 11.

148. See 3 C.F.R. 347 (2016).

149. See Kylie Atwood et al., *CNN Exclusive: Biden Administration Offers Convicted Russian Arms Dealer in Exchange for Griner, Whelan*, CNN (July 28, 2022, 8:13 AM), <https://www.cnn.com/2022/07/27/politics/griner-whelan-biden-offer-viktor-bout-exchange-russia-arms-dealer/index.html> [<https://perma.cc/QUR7-RCJR>] ("Biden's support for the swap overrides opposition from the Department of Justice, which is generally against prisoner trades.")

150. Exec. Order No. 14,078, 87 Fed. Reg. 43389 (July 19, 2022).

the Judiciary, or any other branch or agency in government.¹⁵¹ More specifically, Executive Order 14,078 allows for those in the executive branch alone “to work to secure the safe release of United States nationals held hostage or wrongfully detained abroad.”¹⁵² In other words, it does not have to involve any allegations of spying on the part of the American, nor does the citizen have to be in any way connected to the military. This moves beyond presidential war powers and into the civilian realm. U.S. Presidents can now exchange anyone they like for any American citizen—during peacetime and even if the citizen is a civilian unaccused of any international or war crimes—without any involvement from any other branch of government.¹⁵³

Less than six months after the passage of Executive Order 14,078, Brittney Griner came home.¹⁵⁴ The Brittney Griner prisoner exchange represents yet another extension of executive power,¹⁵⁵ as President Biden exchanged Viktor Bout, an international arms dealer,¹⁵⁶ for a civilian basketball player with no military ties whatsoever.¹⁵⁷ Brittney was not accused of spying or espionage, unlike Princeton University student Xiyue Wang or ex-Marine Paul Whelan, and thus this exchange involved—for the first time in American history—an international war criminal for a civilian who plays basketball.¹⁵⁸ By trading for someone with nothing to do with the military or spying, the U.S. is now telling the world that the President has the authority to effectuate prisoner exchanges for anyone they feel like, beyond the scope of their enumerated or shared war powers. It also signals to the world something more sinister—just take any American citizen and maybe America will trade a serious international war criminal for them. All you have to do is convince the President to make it happen, and that one person is incentivized to make the exchange due to the prisoner swap dilemma.

151. *See id.* at 43389.

152. *Id.* at 43390.

153. *See generally id.* (expanding the power of the hostage response groups to secure the release of U.S. nationals in hostage situations); Exec. Order No. 13,698, 3 C.F.R. 347 (2016) (creating two hostage response groups tasked with navigating hostage situations).

154. *See* Ganguli et al., *supra* note 11; Exec. Order No. 14,078, 87 Fed. Reg. at 43389.

155. *See generally* Williams, *supra* note 118, at 157 (illustrating a possible previous example of executive power overreach in the detentions of certain suspects without trial or charge).

156. *See* Valerie Hopkins & Alan Yuhas, *Who Is Viktor Bout, the Arms Dealer in the Swap for Brittney Griner?*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2022/12/08/world/europe/viktor-bout-brittney-griner.html>.

157. *See* Ganguli et al., *supra* note 11.

158. *See id.*; Somers, *supra* note 25; Dwyer, *supra* note 130.

III. THE CLEAR AND PRESENT DANGER

Thus, the evolution of American prisoner exchange laws, culminating in the Brittney Griner prisoner exchange, means literally anyone could be next. America went from President Obama swapping five Guantanamo Bay detainees for one U.S. servicemen detained abroad,¹⁵⁹ to President Trump suspiciously jailing a scientist for eight months in order to exchange him for a college student accused of spying,¹⁶⁰ to President Biden trading an international arms dealer¹⁶¹ for a civilian female basketball player.¹⁶² What is the next logical extension? A foreign nation detaining an average, non-famous American citizen in the hopes of a prisoner exchange? It is not hard to imagine uproar in America for a hard-working single mom detained abroad, or a father of five wrongfully detained for inadvertently leaving their passport behind, or any other non-violent offense, etc.

Unfortunately, another American civilian has already been detained. About six months after Brittney Griner's release from the Russian prison camp, American Travis Leake was captured and detained in Russia.¹⁶³ Travis is not a famous basketball player like Brittney Griner. He is a band manager, has no ties to war or the military, is not being charged with spying or espionage, and, in his own words, has no idea of the legal basis for his continued detention: "I don't understand why I'm here. I don't admit guilt, I don't believe I could have done what I'm accused of because I don't know what I'm accused of."¹⁶⁴ Nonetheless, these considerations proved inconsequential, and in July 2024, Travis was sentenced to thirteen years in a Russian penal colony.¹⁶⁵ The apprehension that ongoing prisoner exchanges will result in more Americans being taken and unjustly detained is no longer a mere hypothetical.¹⁶⁶ To safeguard all Americans, immediate action is imperative.

Even if American support for bringing an ordinary citizen home is not initially very strong, perhaps foreign inference with our social media could promote interest. Is it outside the realm of possibility that Russia or some

159. See Maffucci, *supra* note 95, at 1327–29.

160. See Dwyer, *supra* note 130.

161. See Hopkins & Yuhas, *supra* note 156.

162. See Ganguli et al., *supra* note 11.

163. See Pennington et al., *supra* note 7.

164. *Id.*

165. See Sergey Gudkov, *US Rock Band Manager Travis Leake Sentenced to 13 Years in Russian Penal Colony, Following Drug Charges*, CNN (July 18, 2024, 10:57 AM), <https://www.cnn.com/2024/07/18/europe/american-citizen-travis-leake-russia-penal-colony-intl/index.html> [<https://perma.cc/63XZ-V3VA>].

166. See *id.*

other country could use bots or artificial intelligence to falsely generate a groundswell of support for an American detained abroad, such that a U.S. President would feel compelled to act for political purposes? Prior experience has shown Russia may indeed have this capability.¹⁶⁷

In sum, U.S. national security is weakened by the executive branch's broad, unchecked latitude in this area, which also makes travel unsafe by incentivizing the detention of foreigners with the expectation of trading them. Moreover, just remaining home or staying out of potentially dangerous nations is not a viable solution. How many countries would Americans have to stay away from? Americans have law-abiding friends and relatives in every nation that one might consider hostile to the United States. Is the answer simply to tell the American public from now on that it is no longer safe to visit their homeland? Once more, even if Americans do drastically reduce international travel, what are the economic impacts of such actions, both to the potential host countries and on the worldwide economy as a whole? Finally, even if Americans stopped traveling to potentially hostile nations altogether, it would not keep America safe, as the continued release of war criminals threatens American security.

Despite the many benefits of bringing Brittney Griner home, doing so is also an example of trading an international arms dealer for a civilian basketball player.¹⁶⁸ Releasing international war criminals from American prisons makes America a less safe place. Or, as some officials have proclaimed, the Brittney Griner exchange “is a gift to Vladimir Putin, and it endangers American lives.”¹⁶⁹ The executive branch has seized the power to grant U.S. Presidents virtually unquestioned authority in prisoner exchanges,¹⁷⁰ even if doing so imperils America as a whole. Thus, regardless of whether Americans avoid travel altogether, America remains less safe.

167. See generally William J. Aceves, *Suing Russia: How Americans Can Fight Back Against Russian Intervention in American Politics*, 43 *FORDHAM INT'L L.J.* 1, 11 (2019) (illustrating the capacity of the Russian government to engage in information warfare against the United States by using fictitious social media pages and accounts).

168. See Ganguli et al., *supra* note 11.

169. Collins, *supra* note 68 (statement of Kevin McCarthy).

170. See Exec. Order No. 13,698, 3 C.F.R. 347 (2016); Exec. Order No. 14,078, 87 Fed. Reg. 43389 (July 19, 2022).

IV. SOLVING THE PRISONER SWAP DILEMMA

A. *International Law Solutions?*

The world has noticed this growing problem of taking foreign citizens and essentially imprisoning them for ransom. The Universal Declaration of Human Rights previously attempted to address this by stating “[n]o one shall be subjected to arbitrary arrest, detention or exile.”¹⁷¹ Similarly, the International Covenant on Civil and Political Rights requires that “[n]o one shall be subjected to arbitrary arrest or detention.”¹⁷² But in 2021, Canada took it one step further by attempting to codify these principles and enacted the Declaration Against Arbitrary Detention in State-to-State Relations (“the Declaration”) “in order to enhance international cooperation in deterring the detention of foreign and dual nationals for the purpose of diplomatic coercion.”¹⁷³

The Declaration marks the first time any international law specifically addresses the imprisonment of foreign nationals for use as “bargaining chips in international relations.”¹⁷⁴ It is important to remember, however, that “the Declaration reaffirms the established principle that arbitrary arrest and detention is contrary to international human rights law.”¹⁷⁵ Over sixty-eight countries, including the United States, have signed on and agreed to follow the tenets of the Declaration.¹⁷⁶ Beyond that, Canada also released a “Partnership Action Plan establishing six voluntary measures that States may take in demonstrating their commitment to this initiative.”¹⁷⁷ The United States has signed onto this as well and has vowed to continue the fight against wrongful detention for political purposes.¹⁷⁸

171. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 9 (Dec. 10, 1948).

172. International Covenant on Civil and Political Rights, art. 9(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force for the United States Sept. 8, 1992).

173. Leigh T. Toomey, *The Declaration Against Arbitrary Detention in State-to-State Relations: A New Means of Addressing Discrimination Against Foreign and Dual Nationals?*, 35 HARV. HUM. RTS. J. 233, 234 (2022).

174. *Id.*

175. *Id.*

176. Press Statement, Antony J. Blinken, Sec’y of State, U.S. Dep’t of State, First Anniversary of the Declaration Against Arbitrary Detention in State-to-State Relations (Feb. 15, 2022), <https://www.state.gov/first-anniversary-of-the-declaration-against-arbitrary-detention-in-state-to-state-relations> [<https://perma.cc/S6ST-TEEH>].

177. *See* Toomey, *supra* note 173, at 248.

178. *See* Press Statement, Anthony J. Blinken, *supra* note 176.

But the Declaration, though a positive first step, has not resolved the problem of arbitrary detention for several reasons.¹⁷⁹ First, the largest country in the world (China), the second largest country in the world (India), and the country with the most nuclear weapons (Russia) have not signed the declaration.¹⁸⁰ Nor have Iran, Syria, Afghanistan, and North Korea.¹⁸¹ Moreover, whether member states actually adhere to these rules “may be purely a matter of self-interest, depending on whether the State’s own nationals are arbitrarily detained abroad or there is a well-founded concern that they may be subjected to arbitrary detention.”¹⁸² This is a legitimate concern for America in particular, as President Trump’s not-so-subtle detention of Dr. Soleimani for political purposes would have likely undermined the Declaration.¹⁸³ As such, the current expanded executive powers to negotiate on behalf of whomever the President wants to be freed (or detained) are not likely to be constrained by international law.

B. Congress Is the Answer (Seriously)

If international law is not sufficient to restrain the Executive—to stop the presidential incentive to make the suboptimal choice—then Congress needs to be involved in some way. Whether prisoner exchanges require notification by the President or a majority vote approval of Congress, the Senate, or a Senate subcommittee, the key is that Congress needs to be involved in some meaningful way, precisely because Congress is not the most efficient at resolving issues.

The idea that the President is more effective than Congress in the area of shared war powers and diplomacy is debatable. In fact, “history does support, if slightly, the founders’ judgment that Congress (if only because it is necessarily more deliberate) tends to be more responsible in this area than the

179. See generally Toomey, *supra* note 173, at 250 (illustrating that some of the limitations on the Declaration are lack of enforceability and the absence of a mechanism for addressing arbitrary detention for foreigners).

180. See *Initiative Against Arbitrary Detention in State-to-State Relations*, GOV’T CAN. (July 15, 2024), https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/arbitrary_detention-detention_arbitraire.aspx [https://perma.cc/4R5G-PLB6]; Hans Kristensen et al., *Status of World Nuclear Forces*, FED’N AM. SCIENTISTS (Mar. 29, 2024), <https://fas.org/initiative/status-world-nuclear-forces> [https://perma.cc/VYL7-XUVU]; *U.S. Census Bureau Current Population*, U.S. CENSUS BUREAU (July 1, 2024), <https://www.census.gov/popclock/print.php?component=counter> [https://perma.cc/NXA8-3C7A].

181. See GOV’T CAN., *supra* note 180.

182. Toomey, *supra* note 173, at 252.

183. See Catanzaro & Reardon, *supra* note 19.

executive.”¹⁸⁴ More importantly, “[t]o answer the question on its own (comparative) terms, however, is to miss the point.”¹⁸⁵ Regardless of which political branch is actually more effective in any one circumstance, the Founding Fathers wanted collective input in the area of war powers and diplomacy, rather than relegating all of the power to one man.¹⁸⁶ As famed constitutional law expert Alexander Bickel once said: “Singly, either the President or Congress can fall into bad errors So they can together too, but that is somewhat less likely, and in any event, together they are all we’ve got.”¹⁸⁷ Thus the issue is not whether Congress is more adept, but rather whether these decisions are too important to leave to one branch alone.

It is for this reason that Congress is also the answer to the prisoner swap dilemma, taking a cue from game theory rationale.¹⁸⁸ Including Congress in the prisoner swap decisions will inevitably bog the entire process down and may never result in a consensus decision to make the exchange. Under this theory, the result would be a diminished incentive for foreign states to detain Americans overseas if, to effectuate the desired prisoner exchange, a foreign state would have to convince a majority of Congress (or a congressional committee). It is often difficult for Americans to get Congress to agree in general, so expecting them to routinely agree to seemingly unfair prisoner exchanges would be folly. In sum, if foreign heads of state know they only have to convince the President to do a prisoner exchange, then they are more likely to unjustly detain Americans to make that happen. But if they have to convince all or part of Congress, they will be disincentivized from unjustly detaining Americans in the first place.

Another benefit of involving Congress in the decision-making process is to prevent U.S. Presidents from unjustly detaining foreign citizens here in America in order to get the prisoners they want released from other countries. Unfortunately, this is not a hypothetical concern. After President Obama seemingly defied the law and then, one year later, officially drafted an Executive Order to further expand executive power with respect to prisoner exchanges,¹⁸⁹ President Trump was then empowered to unjustly detain Dr.

184. ELY, *supra* note 120, at 9.

185. *Id.*

186. *See id.*

187. *Id.* (quoting *War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, Int’l Sec. & Sci. of the H. Comm. on Foreign Affs.*, 99th Cong. 69 (1986) (statement of J. Brian Atwood, Dir., Nat’l Democratic Inst.))

188. *See* Guerra-Pujol & Martínez-García, *supra* note 2, at 1297.

189. *See* Maffucci, *supra* note 95, at 1355; *see also supra* Section II.B.

Soleimani, a foreign citizen, as a bargaining chip for Xiyue Wang, an American citizen imprisoned abroad.¹⁹⁰

If there is a clear case that a particular prisoner exchange is fair, and for some reason would not make America less safe, then a majority of Congress (or subcommittee) will likely recognize that and vote in favor of the exchange. Thus, including Congress in the process does not close the door on the possibility that an American citizen will be returned home, and if it is a clear case they probably will. But if the foreign state is demanding the release of arms dealers in exchange for an American civilian, then congressional inefficiency and an inability to come to a consensus diminishes the likelihood of such a prisoner exchange, resulting in the best long-term safety outcome for the United States, including the deterrence of future unjust detentions.¹⁹¹

In the short term, this proposed solution to the prisoner swap dilemma could lead to less U.S. travel abroad to certain countries if people know that it would be up to some congressional oversight committee to determine their fate if detained. But traveling to certain countries is already discouraged under the current legal paradigm of supreme presidential power in this arena.¹⁹² Including Congress in the process would not be transforming the situation from totally safe, to suddenly dangerous. It is already substantially perilous to travel to certain countries, and thus, at most, in the short term this adds to the already clear and present danger, rather than creating a dangerous situation out of a safe one.

Moreover, any increased danger traveling to potentially hostile nations should lessen over time. If foreign states come to believe they cannot successfully negotiate unfair prisoner swaps in their favor, they will be disincentivized from unjustly detaining Americans. In time, this should make it safer for Americans to travel to potentially hostile nations. This would also potentially benefit foreign visitors, as international citizens should feel safer travelling to America, and help to boost our tourism and economy. If noncitizen visitors know that our Presidents do not have supreme authority to unilaterally effectuate prisoner exchanges, then our Presidents will likewise be less likely to unjustly detain visitors for a future prisoner exchange they cannot unilaterally effectuate.

190. See generally Catanzaro & Reardon, *supra* note 19; see also *supra* Section II.C.

191. See Ganguli et al., *supra* note 11.

192. See *Travel Advisories*, U.S. DEP'T STATE, <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html> [<https://perma.cc/U46B-VWUB>].

V. CONCLUSION

When the Founding Fathers drafted the Constitution, they divided the powers of governance in an effort to avoid a monarchy and instead enact a democracy.¹⁹³ But the more we allow power to be consolidated in one branch—and in one person—the further we move away from the democratic principles upon which this country was established. In a time when democracy is already under attack,¹⁹⁴ that is not something we can afford to do. Moreover, the democratic principle of shared powers would be particularly useful in the prisoner exchange arena, because of the prisoner swap dilemma. Presidents cannot be allowed act alone because they are incentivized to act in their own political best interest, which, in the prisoner swap scenario, conflicts with their duty as Commander in Chief to keep America safe on a national security level. Involving Congress in the prisoner exchange process decreases the likelihood of facing the prisoner swap dilemma, while simultaneously promoting democracy.

193. See Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMPAR. L. 531, 533–34 (2009).

194. See Campbell, *supra* note 131, at 13.