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ANALYZING BRITTNEY GRINER'S DETENTION AND RELEASE

Zach Knoop

Editor's Note: The following article has two parts. The first part was written prior to the prisoner swap that brought Britney Griner back to America. The second part was added by the author after the swap.

I. Britney Griner's Detention

On February 17, 2022, a week before Russian troops invaded Ukraine, Brittney Griner was arrested at a Moscow airport for possession of vape cartridges containing cannabis oil.¹ Cannabis oil is banned in Russia.² In August, Griner was sentenced to 9.5 years in prison.³ Her legal team attempted to appeal the charges, but they have been upheld.⁴ The latest update in Griner's detention came on November 9th, when she was moved to a Russian penal colony.⁵ This move further reinforces the importance of getting Griner out of Russia as soon as possible. Russian penal colonies are unlike western prisons and have been described as resembling Soviet Gulags, where human rights violations, torture, and manual labor are common.⁶

President Biden has continuously stated that he is “determined to get her home and get her home safely” and has condemned her detention in Russia as wrongful.⁷ Many are arguing that

¹ *Brittney Griner: Joe Biden Vows to 'Get Her Home' from Russian Penal Colony*, THE GUARDIAN (Nov. 9, 2022), <https://www.theguardian.com/us-news/2022/nov/09/brittney-griner-us-basketball-star-transferred-to-penal-colony> [<https://perma.cc/2R7B-6KE9>].

² *Id.*

³ AlBaroudi et al., *Britney Griner Situation Explained: WNBA star gets Visit from U.S. Embassy Officials in Russian Prison*, CBS SPORTS (Nov. 3, 2022), <https://www.cbssports.com/wnba/news/brittney-griner-situation-explained-wnba-star-gets-visit-from-u-s-embassy-officials-in-russian-prison/> [<https://perma.cc/HJ7S-W76Q>].

⁴ *Id.*

⁵ Phillip & Mogul, *Brittney Griner Begins Transfer to Russian Penal Colony, Attorneys say*, CNN (Nov. 9, 2022), <https://www.cnn.com/2022/11/09/europe/brittney-griner-transfer-to-russian-penal-colony-intl-hnk> [<https://perma.cc/748N-NZ34>].

⁶ Picheta, *Russia's Penal Colonies Are Often Grim, Cramped Facilities. Here's What Could Await Brittney Griner*, CNN (Nov. 9, 2022), <https://www.cnn.com/2022/11/09/europe/brittney-griner-russia-penal-colony-explainer-intl> [<https://perma.cc/Y7ER-CC77>].

⁷ THE GUARDIAN, *supra* note 1.

Griner is being used as a political pawn in Russia's war against Ukraine.⁸ Experts now say that a prisoner exchange, which has successfully happened between the U.S. and Moscow in the past, may be the only path to release for Brittney Griner.⁹

There have been several U.S.-Moscow prison swaps in history, stretching from the height of the Cold War to the latest prisoner swap, which occurred in April 2022.¹⁰ For the purposes of understanding Brittney Griner's situation and potential opportunities for her release, there are two particularly relevant prison swaps to analyze: the prisoner swap for Francis Gary Powers in 1962 and the prisoner swap for Trevor R. Reed in 2022.¹¹ Francis Gary Powers was a CIA pilot flying a spy mission over the Soviet Union when his plane was shot down. Powers was apprehended by the KGB when he reached the ground.¹² Powers was sentenced to 10 years in prison. In 1962—the height of the Cold War—the United States successfully arranged for his release.¹³ Trevor Reed, a Marine from Texas, was in Russia during summer 2019 with his girlfriend to learn the language.¹⁴ He was arrested for intoxication, taken to jail to sober up, and later sentenced to 9 years in prison.¹⁵ The U.S.-Moscow relationship during both successful prisoner swaps is similar to today's relationship between the two governments.

The idea of a prisoner swap for Britney Griner was first proposed by the Biden administration in late July 2022, but the administration has been unable to get Moscow to respond

⁸ Picheta, *supra* note 6.

⁹ Medina, *Here are some Prisoner Swaps That Freed Americans*, THE NEW YORK TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/world/europe/prisoner-swaps-exchanges-us.html> [https://perma.cc/LH5F-E5G8].

¹⁰ *Id.*

¹¹ *Id.*

¹² Caffrey, *Gary Powers: The U-2 Spy Pilot the US Did not Love*, BBC WORLD SERVICE (Jan. 3, 2016), <https://www.bbc.com/news/magazine-35064221> [https://perma.cc/BES3-UJS5].

¹³ *Id.*

¹⁴ Livingston, *Trevor Reed, Former Marine from Texas, Freed from Russia in Prisoner Swap*, TEXAS TRIBUNE (Apr. 27, 2022), <https://www.texastribune.org/2022/04/27/trevor-reed-texas-russia-prison-swap/> [https://perma.cc/6SY2-TZEV].

¹⁵ *Id.*

positively to the offer.¹⁶ After the midterm elections, Biden said at a press conference that he now hopes Putin will talk more seriously about a prisoner exchange.¹⁷ The Kremlin responded to Biden's comments by saying that the idea of a prisoner exchange between the U.S. and Russia remains open, and that Russia would like to use discreet, existing channels to discuss the matter rather than "megaphone diplomacy."¹⁸ Megaphone diplomacy is defined as making public statements regarding a dispute, such as press releases, announcements, or social media posts, with the goal of forcing the other party into adopting a desired position.¹⁹ The Kremlin believes that Biden is using the media to gain support and achieve his goals rather than engaging in the traditional process and channels used to negotiate prisoner swaps. Griner, like Trevor Reed, is a civil prisoner, and the protocol for exchanging civil prisoners differ from the protocol for exchanging prisoners of war.²⁰ In these situations, the State Department will negotiate with the other country, in this case Russia, to determine an appropriate prisoner exchange.²¹ If the United States is going to successfully arrange for the release of Griner, they must continue using the channels of negotiation that have succeeded in the past, especially in other times of high tensions between the two countries.

II. Britney Griner's Release

¹⁶ Pamuk, *Biden Expects Russia to get More Serious About Prisoner Swap for Griner*, REUTERS (Nov. 10, 2022), <https://www.reuters.com/legal/us-basketball-star-griner-her-way-penal-colony-lawyers-say-2022-11-09/> [<https://perma.cc/9BS5-E6WY>].

¹⁷ *Id.*

¹⁸ Faulconbridge, *Russia Takes Prisoner Swap Proposals with U.S. Seriously – Kremlin*, YAHOO! NEWS (Nov. 11, 2022), <https://www.yahoo.com/news/russia-takes-prisoner-swap-proposals-094517166.html> [<https://perma.cc/YR33-3MCY>].

¹⁹ Malindog-Uy, *Megaphone Diplomacy and the South China Sea*, THE ASEAN POST (May 9, 2021), <https://theaseanpost.com/article/megaphone-diplomacy-and-south-china-sea/> [<https://perma.cc/C6NE-LKFV>].

²⁰ Waxman, *How Trevor Reed, the American just Released from Russian Custody, fits into the History of Prisoner Swaps*, TIME (April 27, 2022), <https://time.com/6171310/trevor-reed-prisoner-swap-history/> [<https://perma.cc/NC2S-823Y>]. See also The Geneva Convention (explains how to treat and negotiate prisoners of war) (<https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-treatment-prisoners-war>) [<https://perma.cc/R42A-PCMG>].

²¹ Waxman, *supra* note 20.

Britney Griner was released from Russia and returned to the U.S. in early December in one-for-one prisoner exchange.²² In return for Griner’s release, Russia received Victor Bout, an international arms dealer referred to as “the Merchant of Death” who was serving a 25-year prison sentence in the United States.²³ The swap was completed at the Abu Dhabi airport, and it is reported that Griner and Bout passed each other on the tarmac.²⁴ While the United Arab Emirates reported afterwards that their joint mediation efforts helped enable Griner’s release, Biden and the White House Press Secretary played down the idea that the UAE played a formal mediation role.²⁵

In my earlier analysis above, I stated that Russia was refusing to engage in Biden’s attempts at “microphone diplomacy,” and using the press to pressure Russia into a favorable response. Like past successful prisoner swaps, the talks that ultimately culminated in the Griner-Bout deal were kept secret and done discreetly. CBS News learned a few days before the deal was made official that the trade was likely to happen but agreed to a White House request to hold reporting. White House officials were worried that a CBS report would hinder the success of the then-fragile deal.²⁶ This request by the White House demonstrates that using secret, discreet channels to negotiate prisoner swaps remains a successful method.

²² Triay et al., *Brittney Griner Arrives in U.S. Following her Release by Russia in Prisoner Swap for Arms Dealer Viktor Bout*, CBS NEWS (Dec. 9, 2022), <https://www.cbsnews.com/live-updates/brittney-griner-back-us-release-russia-prisoner-swap-viktor-bout/> [<https://perma.cc/2Q3W-S9KJ>].

²³ *Viktor Bout: Who is the Merchant of Death?*, BBC NEWS (Dec. 8, 2022), <https://www.bbc.com/news/world-europe-11036569> [<https://perma.cc/MS4G-PUMP>].

²⁴ Usher, *How the Brittney Griner Prisoner Swap with Russia was Done*, BBC NEWS (Dec. 8, 2022), <https://www.bbc.com/news/world-us-canada-63908670> [<https://perma.cc/6BCQ-H4S4>].

²⁵ *Id.*

²⁶ Triay et al., *supra* note 22.