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How Wartime Detention Ends

Deborah N. Pearlstein
Benjamin N. Cardozo School of Law, dpearlst@yu.edu

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INTRODUCTION

In the past year, scholarly and political consensus has become near uniform that the armed conflict Congress recognized in enacting the statutory Authorization for Use of Military Force (AUMF) after the terrorist attacks of September 2001 has materially changed.[1] By its text

† Associate Professor of Law, Benjamin N. Cardozo School of Law. The author wishes to thank Christopher Chyba, Eugene Fidell, Martin Flaherty, Steve Vladeck, and Sabin Willett for helpful comments.

1 *See, e.g.*, ROBERT CHESNEY ET AL., A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS (Hoover Inst. ed., 2013), *available at* http://www.hoover.org/research/statutory-framework-next-generation-terrorist-threats; Robert M. Chesney, Essay, *Postwar*, 5 HARV. NAT'L SECURITY J. 305, 315–22 (2014) (discussing Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)); Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SECURITY J. 115 (2014); Harold Hongjuh Koh, Sterling Professor of Int'l Law, Yale Law Sch., Statement before the Senate Foreign Relations Committee Regarding Authorization for Use of Military Force After Iraq and Afghanistan (May 21, 2014), *available at* http://www.foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf; Michael B. Mukasey, Written Statement before the Senate Foreign Relations Committee Regarding Authorization for Use of Military Force After Iraq and Afghanistan (May 21, 2014), *available at* http://www.foreign.senate.gov/imo/media/doc/Mukasey_Testimony.pdf; President Barack Obama, Remarks at the National Defense University (May 23, 2013) [hereinafter Obama NDU

and the interpretation subsequently given it by successive administrations, Congress,[2] and the courts,[3] the AUMF authorizes the President to detain and lethally target individuals who are "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[4] Today, the Taliban no longer controls the Afghan government, and the U.S. military is set to withdraw the bulk of its combat forces from Afghanistan by the end of 2014.[5] The United States has long since handed over control of its major in-theater detention facility to the Afghans.[6] The core of the terrorist organization al-Qaeda that attacked the United States in 2001 has been substantially destroyed.[7] And while dozens of new radical Islamic terrorist groups have emerged in the past decade—many of which share an ideological affiliation or even part of a name with the original al-Qaeda, some of which pose a threat to the United States—none of these actors were the focus of the original AUMF, aimed at those who perpetrated the attacks, or harbored the attackers, of September 11, 2001.[8]

Speech], *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

2 National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat 1298 (2011) (codified as amended in scattered sections of the U.S. Code).

3 Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (O'Connor, J., plurality opinion) ("There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF."); Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010), *reh'g denied en banc*, 619 F.3d 1 (D.C. Cir. 2010).

4 *Al-Bihani*, 590 F.3d at 872 & n.1 (quoting Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), *available at* http://www.defense.gov/news/Jul2004/d20040707review.pdf); *see also id.* ("The AUMF 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.'" (quoting AUMF § 2(a))).

5 *See* President Barack Obama, Statement on Afghanistan (May 27, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/05/27/statement-president-afghanistan (noting that the United States will conclude combat operations in Afghanistan by the end of 2014).

6 *See, e.g.*, Richard Leiby, *U.S. Transfers Control of Bagram Prison to Afghan Officials*, WASH. POST (Sept. 10, 2012), http://www.washingtonpost.com/world/us-transfers-prison-control-to-afghan-officials/2012/09/10/7edf7496-fb17-11e1-875c-4c21cd68f653_story.html. The United States still retains control over a small number of non-Afghan prisoners held at the Bagram facility. *See id.* ("The United States also will retain custody of nearly 50 foreign nationals at Parwan—many of them Pakistanis accused of fighting for the Taliban."); *see also* Spencer Ackerman, *Revealed: The Hunger Strikes of America's Most Secret Foreign Prisoners*, GUARDIAN (July 16, 2014, 9:19 AM), http://www.theguardian.com/world/2014/jul/16/bagram-detainees-hunger-strikes-revealed (reporting that the United States continues to hold thirty-eight non-Afghans at the facility).

7 *See* Obama NDU Speech, *supra* note 1.

8 *See, e.g.*, JAMES R. CLAPPER, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, STATEMENT FOR THE RECORD: WORLDWIDE THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 4–5 (2014), *available at* http://www.dni.gov/index.php/newsroom/testimonies/203-congressional-

Yet of all the complex problems associated with moving the United States away from the al-Qaeda–related "perpetual wartime footing," as the President has urged,[9] perhaps none has proven more vexing than that of resolving detention operations at the U.S. Naval Base at Guantanamo Bay. The vast majority of the 149 detainees still held there arrived at the prison from Afghanistan well over a decade ago,[10] and no new detainees have been brought to the prison for six years.[11] Indeed, Presidents George W. Bush and Barack Obama—as well as former presidential candidate John McCain and a host of senior military leaders and policy officials of both political parties—have called for the prison's closure.[12] Despite this, achieving the prosecution, transfer, or release of the remaining detainees has proven to be an extraordinary challenge.

The reasons why it has proven so difficult to close Guantanamo are varied: the diplomatic need to find host countries for those who cannot be repatriated without facing the risk of torture or persecution, a step that would today violate settled law;[13] the legal difficulty of prosecuting cases for which sufficient evidence was never gathered, or for which

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testimonies-2014/1005-statement-for-the-record-worldwide-threat-assessment-of-the-us-intelligence-community.

9 *See* Obama NDU Speech, *supra* note 1.

10 Charlie Savage, *Decaying Guantánamo Defies Closing Plans*, N.Y. TIMES, Sept. 1, 2014, at A1.

11 *See* FINAL REPORT: GUANTANAMO REVIEW TASK FORCE 1–2 (2010) [hereinafter GUANTANAMO TASK FORCE FINAL REPORT], *available at* http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf.

12 *See, e.g.*, Senator John McCain, Speech on Foreign Policy at the World Affairs Council (Mar. 26, 2008), *available at* http://www.cfr.org/elections/mccains-speech-foreign-policy-march-2008/p15834; President Barack Obama, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09; Julian E. Barnes, *Retired Military Brass Press Obama on Guantanamo Closure*, WALL ST. J. (June 4, 2013), http://blogs.wsj.com/washwire/2013/06/04/retired-military-brass-press-obama-on-guantanamo-closure; Melissa McNamara, *Bush Says He Wants to Close Guantanamo*, CBS NEWS (May 8, 2006), http://www.cbsnews.com/news/bush-says-he-wants-to-close-guantanamo; Thérèse Postel, *How Guantanamo Bay's Existence Helps Al-Qaeda Recruit More Terrorists*, ATLANTIC (Apr. 12, 2013), http://www.theatlantic.com/international/archive/2013/04/how-guantanamo-bays-existence-helps-al-qaeda-recruit-more-terrorists/274956 (citing statements by Generals Petraeus and Powell favoring the closure of Guantanamo).

13 *See* GUANTANAMO REVIEW TASK FORCE FINAL REPORT, *supra* note 11, at 26–27; *see also* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 1242(a), 112 Stat. 2681, 2822 (codified as amended in scattered sections of 8 U.S.C. (2012)) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Apr. 18, 1988, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

evidence has been made unusable by prisoner torture or abuse;[14] perennial problems with novel military commission trials, which have prolonged some war crime prosecutions for years;[15] and the administration's own concerns that some fraction of prisoners cannot be lawfully prosecuted but are nonetheless too dangerous to release.[16]

Yet if some of the foregoing challenges are historically familiar problems of prisoner repatriation at the end of war,[17] one significant contemporary obstacle to Guantanamo closure is without identifiable precedent. Beginning in 2009, Congress has attached spending restrictions to the National Defense Authorization Act (NDAA), barring the transfer of Guantanamo detainees into the United States for any purpose,[18] and barring the transfer of any Guantanamo detainee to any other country unless the Secretary of Defense determines that actions have or will be taken to "substantially mitigate the risk of such individual engaging or reengaging in any terrorist or other hostile activity that threatens the United States or United States persons or interests," and that the transfer affirmatively "is in the national security interest of the United States."[19] While the 2014 NDAA somewhat loosened the restrictions placed on transfers of detainees outside the United States,[20] the prohibition on the use of funds for transferring any of the detainees to the United States under any circumstances remains.[21]

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14 *See, e.g.*, GUANTANAMO REVIEW TASK FORCE FINAL REPORT, *supra* note 11, at 5 ("[T]he Task Force's initial responsibility was to collect all government information, to the extent reasonably practicable, relevant to determining the proper disposition of each detainee. The government did not have a preexisting, consolidated repository of such information."); *id.* at 22–23; *see also* Joint Appendix at 103–05, Al Odah v. United States, 551 U.S. 1161 (2007) (No. 06-1196) (quoting declaration of Lt. Col. Stephen A. Abraham as describing one Guantanamo hearing system as relying on incomplete evidence, scattered across agencies, and consisting only of statements of a "generalized nature—often outdated, often 'generic,' rarely specifically relating to the individual subjects of the [combatant status review tribunal hearings] or to the circumstances related to those individuals' status").

15 S*ee, e.g.*, Al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014) (holding that it is unconstitutional for military commissions to try the offense of "providing material support for terrorism" for conduct occurring before 2006).

16 GUANTANAMO REVIEW TASK FORCE FINAL REPORT, *supra* note 11, at 12.

17 *See infra* Parts I–VI.

18 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1034, 127 Stat. 672, 851 (2013) [hereinafter 2014 NDAA] ("No amounts authorized to be appropriated or otherwise made available to the Department of Defense may be used during the period beginning on the date of the enactment of this Act and ending on December 31, 2014, to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions of Khalid Sheikh Mohammed or any other detainee . . . ."); s*ee also* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351; Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103(d), 123 Stat. 1859, 1920–21.

19 2014 NDAA, *supra* note 18, § 1035(b).

20 *Id.* § 1035(a) (additionally authorizing transfer if pursuant to court order, or if the Secretary determines "that the individual is no longer a threat to the national security of the United States").

21 *Id.* § 1034.

As a result, options the President might otherwise have for handling the cases of certain detainees—including criminal prosecution in a U.S. federal district court, or the release of detainees or transfer for continued detention to another prison facility inside the continental United States —are not available.

As this Article demonstrates, 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 on the exchange, transfer, or release of prisoners, during or after the period of armed conflict.[22] Rather, for the hundreds of thousands of prisoners held during the course of these wars, the disposition of prisoners held pursuant to wartime authorities has always come to an end, and has always been handled by the executive branch. Among the most common mechanisms for the resolution of detention are executive agreements that provide for prisoner exchange, transfer, or release, negotiated with a wartime enemy, often through a neutral third-party intermediary.[23] For all the controversy surrounding the Executive's prisoner exchange agreement that resulted in the transfer of five Guantanamo detainees to Qatar and the release from Taliban custody of U.S. Army Sergeant Bowe Bergdahl,[24] such arrangements are, from a historical perspective, prevailing U.S. custom.

Does this historical practice matter? Should it? In separation-of-powers debates, arguments based on historical practice have been central to Presidents' claims that they enjoy broad authority under Article II of the Constitution to enter, for example, into executive agreements with foreign powers without gaining the advice and consent of the Senate needed to conclude a treaty.[25] Indeed, the Supreme Court has famously held that a long-standing executive practice, coupled with congressional "acquiescence" to the practice, may be enough in some

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22 *See infra* Parts I–VI. This Article uses the term "prisoners" rather than, for example, "prisoners of war," to indicate that it encompasses a broader set of detainees held by the United States during these armed conflicts, rather than only those formally entitled to prisoner of war status as that term is defined by the modern Geneva Conventions. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 3406, 75 U.N.T.S. 135 (entered into force with respect to the United States on February 2, 1956). While many of the detainees described here were indeed entitled to prisoner-of-war status, and were treated as such, the United States also held many other prisoners during these conflicts—detainees ultimately determined to be civilians or otherwise not entitled to POW status per se. *See, e.g.*, *infra* Part IV.

23 *See infra* Parts I–VI.

24 *See, e.g.*, Sarah Almukhtar et al., *Key Questions in the Release of Bowe Bergdahl*, N.Y. TIMES (June 5, 2014), http://www.nytimes.com/interactive/2014/06/05/world/asia/key-questions-in-the-release-of-bowe-bergdahl.html.

25 *See, e.g.*, Brief for the Federal Respondents at 40–41, Dames & Moore v. Regan, 453 U.S. 654 (1981) (No. 80-2078), 1981 WL 390302.

cases to lend a "gloss" to the meaning of the executive power under Article II—a reflection of the common understanding of both political branches as to the substantive scope of constitutional authority.[26] To the extent the Obama Administration and others have questioned the constitutionality of the NDAA restrictions on executive power to conclude agreements resulting in the release of Guantanamo detainees,[27] there is little doubt that claims from practice would figure centrally in any elaborated argument.[28]

Yet as the Supreme Court and scholars have long recognized, reliance on congressional acquiescence to past practice as an indicator of constitutional meaning is problematic at best. Congressional silence on any particular executive action may be a reflection of congressional approval; it might also be a reflection of congressional ignorance, uncertainty, or indifference.[29] Further, it is rarely entirely clear to what extent either Congress or the President has acted based on an understanding of its own constitutional power. In the foreign relations context, it may be especially unclear whether a particular executive action is taken pursuant to an executive understanding of *statutory* delegation, or based on the Executive's view of its own Article II authority. Moreover, elevating practice to the level of constitutional significance also poses a serious, formal problem of interpretation; it seems unlikely that the same legal effect should attach both to

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26 *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Pink, 315 U.S. 203 (1942).

27 *See* President Barack Obama, Statement by the President on H.R. 3304 (Dec. 26, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304 ("Section 1035 of this Act gives the Administration additional flexibility to transfer detainees abroad by easing rigid restrictions that have hindered negotiations with foreign countries and interfered with executive branch determinations about how and where to transfer detainees. Section 1035 does not, however, eliminate all of the unwarranted limitations on foreign transfers and, in certain circumstances, would violate constitutional separation of powers principles. The executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers."); *see also* Brief of Petitioner-Appellant at 38–40, Ajam v. Butler, No. 14-5116 (D.C. Cir. July 8, 2014), *available at* http://justsecurity.org/wp-content/uploads/2014/07/Ajam-Brief.pdf ("By conditioning the substance of any agreement with a transferee nation . . . and addressing the nature and conduct of the transferee nation . . . Congress intrudes upon the President's management of delicate foreign relations." (internal citations omitted)).

28 Important additional questions surround the constitutionality of the Executive's action in the *Bergdahl* case. In particular, the President apparently failed to comply with the current NDAA restrictions on detainee transfers, requiring the President give Congress thirty days' notice before the transfer or release of any detainee release from Guantanamo Bay. *See* 2014 NDAA, *supra* note 18, at § 1035(d) ("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.").

29 *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 414–16 (2012) (summarizing arguments against reliance on congressional acquiescence to past executive practice).

congressional silence, and to affirmative legislation that has satisfied the express hurdles of bicameral passage and presentment to the executive.[30]

In any case, one need not embrace historical practice as evidence of constitutional meaning to conclude that such a practice has salience in current statutory and policy debates. Arguments surrounding the present extraordinary congressional involvement in the disposition of the Guantanamo prisoners seem to rely in some measure on a sense that current circumstances are uniquely challenging because prisoners' home countries are politically unstable or in the midst of continuing conflict themselves; prisoners still harbor violent intentions toward the United States; the United States continues to face short- and long-term threats from groups that share ideological commitments with the men at Guantanamo; prisoner exchanges empower the enemy; and so forth.[31] Such factors are challenges indeed. But, as this Article seeks to demonstrate, they are deeply and historically familiar features of the end of war.

This Article offers a brief account of when and how the United States has handled the release of prisoners held in its custody during and after periods of armed conflict in the past century. It is not meant to endorse the wisdom or legality of all such efforts. On the contrary, some of the practices described, such as the transfer of German prisoners of war (POWs) to Allied nations following World War II for use as labor in national reconstruction projects, were and are unquestionably problematic as a matter of law.[32] Rather, it is meant principally to describe how the United States has concluded its prisoner operations in past armed conflicts—conflicts involving thousands and often tens of thousands of prisoners, including (during World War II) hundreds of thousands held inside the continental United States.[33] A handful of these

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30 *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 91 (1988) ("For every case where the Court rhapsodizes about deliberative inaction, there is a counter-case subjecting such inferences to scathing critique. 'To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities[']. . . ." (quoting Helvering v. Hallock, 309 U.S. 106, 119–20 (1940))).

31 *See, e.g.*, GUANTANAMO REVIEW TASK FORCE FINAL REPORT, *supra* note 11, at 12; David E. Sanger & Matthew Rosenberg, *Critics of P.O.W. Swap Question the Absence of a Wider Agreement*, N.Y. TIMES, June 9, 2014, at A7 (quoting Representative Mike Rogers (R-MI), chairman of the House Intelligence Committee, as arguing that exchange of Taliban prisoners for American POW has "empowered" the Taliban by giving them U.S. government recognition).

32 *See infra* Part II. The relevant international law regulating the repatriation of prisoners in the current armed conflict is treated separately elsewhere. *See* Deborah N. Pearlstein, *Law at the End of War*, 99 MINN. L. REV. (forthcoming 2014).

33 *See infra* Part II. Although the focus of this Article is on armed conflicts of the twentieth and twenty-first centuries, the history of U.S. prisoner detention during wartime manifestly begins in the revolutionary era. *See, e.g.*, GEORGE G. LEWIS & JOHN MEWHA, HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776–1945, at 1–16 (facsimile ed. 1988); PAUL J. SPRINGER, AMERICA'S CAPTIVES: TREATMENT OF POWS FROM THE

prisoners were eventually tried for crimes, including war crimes under international law. But the vast majority of them were simply released, either while hostilities were still ongoing or shortly after hostilities came to an end, and were repatriated to their home countries, transferred to other nations, granted asylum in the United States, or exchanged for American prisoners held by still deeply distrusted enemies. These arrangements were made by the executive branch—often by the military directly, sometimes through more formal executive agreement—and were generally informed by overarching treaty obligations previously undertaken by the United States. While the disposition of wartime prisoners has regularly been the subject of intense public attention at the end of war, particularly to the extent the fate of our own prisoners was at stake, Congress' current engagement on disposition of a handful of particular prisoners held at one facility in this armed conflict is without precedent in the past century.

I. WORLD WAR I

From the time the United States entered World War I on the side of its European allies in April 1917, until the signing of the Treaty of Versailles in June 1919, the United States held tens of thousands of prisoners in both Europe and the United States. Between June 1918 and March 1919 alone, the Army's Department of the Provost Marshal General (PMG) reports handling 48,280 enemy prisoners.[34] Pursuant to regulations adopted in the months before the United States declared war, the War Department (today, the Department of Defense) was given

REVOLUTIONARY WAR TO THE WAR ON TERROR (2010). For a particularly insightful history of the treatment and disposition of Civil War–era prisoners, see JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

34 LEWIS & MEWHA, *supra* note 33, at 59 (describing the PMG as an office that has existed in wartime since the Revolutionary War); JOHN J. PERSHING, FINAL REPORT, H.R. DOC. NO. 66-626, at 85 (1920) [hereinafter PERSHING REPORT], *available at* https://archive.org/details/finalreportof gen00unit ("All prisoners taken by the American troops were kept at least 30 kilometers behind our lines under guard by the Provost Marshal General's Department . . . ."). In addition, the U.S. Justice Department interned approximately 4000 civilian "alien enemies" inside the United States pursuant to Congress' declaration of war and a series of presidential proclamations imposing restrictions on enemy alien activities. *See* President Woodrow Wilson, Proclamation No. 1443, Extending Regulations Prescribing the Conduct Toward Alien Enemies to Include Women (April 19, 1918); President Woodrow Wilson, Proclamation No. 1408, Setting Forth Additional Regulations Prescribing Conduct toward Alien Enemies (Nov. 16, 1917); President Woodrow Wilson, Proclamation No. 1364, Declaring the Existence of a State of War with the German Empire and Setting Forth Regulations Prescribing Conduct toward Alien Enemies (April 6, 1917). These civilian prisoners were interned in the same War Department camps as the war prisoners, and held in separate quarters. RICHARD B. SPEED III, PRISONERS, DIPLOMATS, AND THE GREAT WAR: A STUDY IN THE DIPLOMACY OF CAPTIVITY (1990).

responsibility for holding all captured war prisoners in U.S. custody.[35] While the U.S. Secretaries of War and State initially debated where captured prisoners should be held—the War Department was interested in preserving prisoner labor for use by allied forces in Europe, while the State Department was concerned that holding its prisoners outside the United States might violate existing treaty obligations—it was the Army that ultimately prevailed. Most prisoners captured by the United States in France would be held in theater, and only officers would (for a time) be sent to the United States for detention.[36] Total figures vary somewhat, but in the end, approximately 1400 war prisoners were held in United States—a population that included officers seized in Europe as well as crews from German ships found near U.S. ports, many at the opening of hostilities.[37]

At the broadest level, a series of international agreements shaped the disposition of prisoners at the end of the war. For example, most of the belligerent states (including the United States, the United Kingdom, France, and Germany) had ratified the Hague Convention of 1907; it provided, consistent with then-recent international practice, that "[a]fter the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible."[38] According to the final report prepared for Congress by the Commander-in-Chief of the Allied Expeditionary Forces, General John Pershing, the PMG was, thus, "instructed to follow the principles of The Hague and the Geneva conventions in the treatment of prisoners," although the United States hedged on whether these treaties were legally binding upon it "in the present war."[39]

More specific to the instant conflict, the belligerent parties entered into an Armistice agreement to bring about a ceasefire on the western front on November 11, 1918; the terms of the agreement were negotiated by President Wilson on behalf of the United States. As the President publicly explained to a joint session of Congress on the day of

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35 LEWIS & MEWHA, *supra* note 33, at 50–51. The December 14, 1916 "Regulations Governing the Transfer of Prisoners of War from the Custody of the Navy to that of the Army" provided that the War Department would hold all war prisoners in its custody. *Id.* at 50. These regulations were later formally promulgated as Special Regulations No. 62, "Custody of Prisoners of War" 1917, shortly before the United States declared war. *Id.* at 51.

36 LEWIS & MEWHA, *supra* note 33, at 52–53; *see also* SPEED, *supra* note 34, at 126–27.

37 LEWIS & MEWHA, *supra* note 33, at 57 (indicating 1346 prisoners held in the United States). The War Department's Annual Report of 1918 cites 1411 POWs as being held in the United States at Ft. McPherson, Georgia as of June 30, 1918. WAR DEP'T, ANNUAL REPORT OF THE SECRETARY OF WAR: 1918, at 189–90 (1918).

38 Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land art. 20, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention]; Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

39 PERSHING REPORT, *supra* note 34, at 85.

the signing, the Armistice required Germany immediately to repatriate all allied prisoners; Germany, in contrast, would enjoy no such immediate reciprocity.[40] The disposition of remaining war prisoners would be a topic of negotiation in connection with a broader peace treaty; the allied governments agreed that these negotiations would remain secret until the final settlement was announced.[41] In the end, the Treaty of Versailles indeed included detailed provisions setting forth the terms for prisoner exchanges and repatriation, including the requirement that "repatriation of prisoners of war and interned civilians shall take place as soon as possible after the coming into force of the present Treaty and shall be carried out with the greatest rapidity."[42] Ratifications of the Treaty of Versailles were finally exchanged by the European governments on January 10, 1920, prisoners were released, and Allied Expeditionary Forces headquarters in France was shut down by August 31, 1920.[43]

Perhaps ironically, in the face of this vigorous international diplomacy, neither the Armistice nor the Treaty of Versailles turned out to guide U.S. prisoner repatriation significantly in practice. The Armistice imposed essentially no obligations on the United States to repatriate prisoners. And, caught up in irresolvable debate over President Wilson's League of Nations proposal, the U.S. Senate never succeeded in ratifying the Versailles Treaty.[44] Despite this, the United States remained highly motivated to end its prisoner operations in the United States and abroad, driven by the intense cost of maintaining its prison infrastructure and its desire to demobilize from war in general.

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40 WOODROW WILSON, TERMS OF ARMISTICE SIGNED BY GERMANY: ADDRESS OF THE PRESIDENT OF THE UNITED STATES TO THE JOINT SESSION OF CONGRESS, H.R. DOC. NO. 65-1139, at 5–6 (1918).

41 *Military Terms for Germany*, N.Y. TIMES (Nov. 1, 1918), http://query.nytimes.com/mem/archive-free/pdf?res=9807EED61539E13ABC4A53DFB7678383609EDE.

42 Treaty of Versailles art. 214, June 28, 1919, 2 U.S.T. 43, 2 Bevans 43; *see also, e.g.*, *id.* art. 216 ("From the time of their delivery into the hands of the German authorities the prisoners of war and interned civilians are to be returned without delay to their homes by the said authorities. Those amongst them who before the war were habitually resident in territory occupied by the troops of the Allied and Associated Powers are likewise to be sent to their homes, subject to the consent and control of the military authorities of the Allied and Associated armies of occupation."); *id.* art. 220 ("Prisoners of war or other German nationals who do not desire to be repatriated may be excluded from repatriation; but the Allied and Associated Governments reserve to themselves the right either to repatriate them or to take them to a neutral country or to allow them to reside in their own territories."); *id.* art. 221 ("The Allied and Associated Governments reserve the right to make the repatriation of German prisoners of war or German nationals in their hands conditional upon the immediate notification and release by the German Government of any prisoners of war who are nationals of the Allied and Associated Powers and may still be in Germany.").

43 LEWIS & MEWHA, *supra* note 33, at 63.

44 *Senate Defeats Treaty, Vote 49 to 35; Orders it Returned to the President*, N.Y. TIMES (Mar. 19, 1919), http://www.nytimes.com/learning/general/onthisday/big/0319.html.

Indeed, the United States began repatriating war prisoners before any other allied nation.[45] Repatriation was handled entirely through the executive branch and largely in accordance with the provisions of the broad instructions of The Hague and Geneva Conventions.[46] Enemy medical officers and other "sanitary personnel" were repatriated first, followed on April 9, 1919, by prisoners who were determined to be "permanently unfit for further military duty" or could otherwise not perform useful labor.[47] Full repatriation of German prisoners held in Europe began September 7, 1919 and—perhaps in light of the relatively small number of prisoners by then under American control—took just seventeen days to complete.[48] By the close of 1919, the U.S. Army held just over 1300 prisoners in the United States.[49] In the following year, the number would drop to forty-four (including both POWs and interned "enemy aliens")—all of these in hospitals receiving treatment, nearly all to be soon deported or released.[50]

Critically, throughout this period, Congress evinced essentially no interest in engaging questions regarding the release or repatriation of the vast bulk of enemy prisoners. This was hardly for lack of interest in the handling of the war or the enemy in general, or for lack of concern about the security threat posed by German nationals in the United States and abroad. Galvanized by aggressive propaganda campaigns and the 1916 explosion of a munitions facility in New York Harbor, rumors abounded domestically throughout the period of the threat posed by a broad network of German spies and saboteurs preparing to attack America from within.[51] Congress thus adopted statutes such as the 1917 Trading with the Enemy Act, providing for, among other things, the temporary seizure of enemy property in the United States until disputes surrounding its ownership could be resolved.[52] Congress likewise passed various laws during the war providing for the appropriation of stipends

45 SPEED, *supra* note 34, at 178–79.

46 PERSHING REPORT, *supra* note 34, at 85; SPRINGER, *supra* note 33, at 140.

47 PERSHING REPORT, *supra* note 34, at 85.

48 SPRINGER, *supra* note 33, at 140.

49 WAR DEP'T, ANNUAL REPORT OF THE SECRETARY OF WAR: 1920, at 289 (1920).

50 WAR DEP'T, REPORT OF THE ADJUTANT GENERAL OF THE ARMY TO THE SECRETARY OF WAR 94 (1921).

51 SPEED, *supra* note 34, at 156.

52 Trading with the Enemy Act of 1917, ch. 106, § 7(c), 40 Stat. 411 (current version at 50 U.S.C. § 7(c) (2012)) (providing that "[i]f the President shall so require, any money or other property . . . held . . . for the benefit of, an enemy" be conveyed to an Alien Property Custodian, who would hold all rights in the property unless and until any disputes involving the legitimate ownership of the property required its return). President Wilson later issued a presidential proclamation clarifying that any prisoner of war counted as an "enemy" within the meaning of the law. Proclamation No. 1427, Proclamation Including Germans and Austro-Hungarians in the Custody of the War Department Within the Term "Enemy" for the Purposes of the Trading with the Enemy Act (Feb. 5, 1918).

for American POWs held by the enemy, as well as provisions for the hospitalization of prisoners determined to be insane.[53]

As the war moved toward a close, Congress had additional cause for concern about the security impact of the release of its prisoners: conditions in post-war Germany were the opposite of stable. The German economy had collapsed, along with its political order; Allied blockades had left swaths of the population near starvation.[54] Thousands of Russian prisoners held by Germany during the war set out to flee the country, mostly on foot, and thousands of them died en route—some of cold or hunger, many of ongoing violence.[55]

Yet while Congress proved itself more than willing and able to block the executive's wishes in some matters—the Senate's refusal to ratify the Treaty of Versailles was seen as a particularly devastating blow to President Wilson[56]—Congress passed no laws regarding U.S.-held POWs, and no laws so much as mentioning the Armistice.[57] Indeed, even as Congress debated various aspects of the Treaty of Versailles extensively, and the Treaty itself contained detailed provisions regarding the disposition of war prisoners, there was essentially no discussion in Congress of prisoner issues surrounding the debates on the Treaty.[58]

II. WORLD WAR II

Congress evinced a similar disinclination to engage in such questions at the end of World War II. Here, the relative lack of

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53 *See, e.g.*, Act of Apr. 16, 1918, ch. 55, 40 Stat. 530 (providing $80,000 for Americans taken POWs); Act of Oct. 6, 1917, ch. 79, 40 Stat. 373 (authorizing Secretary of War to transfer internees and POWs to civilian hospital for mental health care).

54 SPEED, *supra* note 34, at 171.

55 *Id.* Many of those who survived returned to Russia to join the Bolshevik forces, staunchly opposed by the Allies, ultimately contributing to the ascendancy of the Communists, who would become America's primary ideological enemy for the second half of the century. *Id.* at 172–73.

56 *See* JOHN MILTON COOPER, JR., WOODROW WILSON: A BIOGRAPHY 7 (2011) ("Tragically, his greatest triumph sowed the seeds of his greatest defeat. . . . [The Treaty of Versailles] might have had the chance to work if the victors had stuck by it in years to come, but they soon showed they would not. The first of the victors to renege was the United States, which never ratified the Treaty of Versailles and never joined the organization that Wilson helped establish to maintain the peace . . . ."); *see also Senate Defeats Treaty, Vote 49 to 35; Orders it Returned to the President*, *supra* note 44.

57 This conclusion is based on a search of U.S. Statutes at Large database, for any laws enacted between 1918 and 1919 that included the terms "prisoners of war" or "armistice" in the text of the statute. *See United States Statutes at Large*, U.S. GOV'T PRINTING OFFICE, http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=STATUTE (last visited Oct. 18, 2014).

58 This conclusion is based on a search of HeinOnline's U.S. Congressional documents collection, for any documents (from 1918–1920) including the terms "armistice" and "prisoner." *See U.S. Congressional Documents*, HEINONLINE. This conclusion is also based on a search of ProQuest's Congressional publications collection, for any publications (from 1918–1919) including the terms "prisoner" and "Versailles." *See Congressional Publications*, PROQUEST.

congressional engagement on questions of prisoner release was perhaps even more surprising. The United States held more than seven million prisoners during the course of World War II—more POWs than in every other American conflict combined.[59] Almost 400,000 of these prisoners were brought to the United States for detention during the war,[60] to be housed in prisoner camps erected across the American heartland.[61]

The vast population of prisoners held in the United States generated a host of domestic political debates, and Congress was far from disengaged. Between 1940 and 1947, Congress passed several statutes relating to the handling of POWs, from criminal laws to deal with prisoners who might escape,[62] to labor laws regulating how prison labor could best be utilized.[63] Indeed, perhaps no issue related to the housing of prisoners in the United States garnered more attention than whether and how war prisoners should be used to aid the economy at home. The 1929 Geneva Convention permitted the use of prisoner labor under various conditions,[64] and agriculture, industry, and various agencies of the U.S. federal government quickly came to rely on prisoner labor heavily.[65] Labor leaders in turn regularly engaged members of Congress in efforts to limit the use of such labor, out of growing concern that the employment of prisoners was taking jobs away from American citizens.[66]

Congress also had additional reason to engage on prisoner issues: the prospect of prisoner release in this conflict did not wait until the end of the war. Arranged primarily with the aid of neutral Swiss intervention, Germany and the United States carried out prisoner exchanges throughout the war. More than 1000 German POWs were

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59 SPRINGER, *supra* note 33, at 143.

60 *Id.* at 146.

61 ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA 26–31 (Stein & Day 1979) (listing major German prisoner of war internment camps in states from Massachusetts and Maine, to Wisconsin, Missouri and Oklahoma, to Texas, California, and Wyoming).

62 *See, e.g.*, Act of Apr. 30, 1945, ch. 103, 59 Stat. 101 ("An Act [r]elating to escapes of prisoners of war and interned enemy aliens"); *see also* S. COMM. ON JUDICIARY REP. NO. 180 (1945) (statement of Sen. McCarran, describing problem of civilians helping prisoners of war to escape, and lack of prosecution options in these cases short of treason).

63 *See* Act of July 16, 1943, ch. 242, 57 Stat. 566 (provides for use of POWs on conservation and water projects until six months after cessation of hostilities in the present war as determined by proclamation of the President or concurrent resolution of Congress).

64 Convention Relative to the Treatment of Prisoners of War art. 27, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1929 Geneva Convention] ("Belligerents may employ as workmen prisoners of war who are physically fit, other than officers and persons of equivalent statue, according to their rink and their ability.").

65 *See id.* arts. 27–34. *See generally* LEWIS & MEWHA, *supra* note 33, ch. 11.

66 SPRINGER, *supra* note 33, at 160–61.

returned in five separate exchanges.[67] In Europe, U.S. military command in the field further repatriated large numbers of prisoners throughout the conflict; indeed, near the end of the war, many German prisoners were captured, disarmed, and immediately released without being formally processed into prison camps.[68]

Despite the inescapable political salience of prisoner issues, it was the War Department that again took responsibility for—indeed, insisted upon—the relatively rapid post-war repatriation of all U.S.-held prisoners.[69] As in previous conflicts, prevailing treaties provided some broad guidance on the repatriation of prisoners post-conflict. Similar to the Hague Convention before it, the 1929 Geneva Convention on Prisoners of War provided that the "repatriation of prisoners shall be effected with the least possible delay after the conclusion of peace."[70] Also, as in previous conflicts, executive branch agreements with our wartime enemies set further terms for prisoner repatriation.[71] Initial armistice agreements with Italy and Japan required the defeated powers to effect the immediate handover of all Allied prisoners, with no reciprocal commitment by the Allies to return prisoners held.[72] An agreement between the Allied powers and Germany—drafted by the Allied powers—also required the release of all Allied prisoners without making any reciprocal commitment for the unconditional release of Allied-held German prisoners.[73] A subsequent peace treaty with Italy

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67 KRAMMER, *supra* note 61, at 229.

68 SPRINGER, *supra* note 33, at 146 (citing EARL F. ZIEMKE, THE U.S. ARMY IN THE OCCUPATION OF GERMANY 1944–1946, at 291 (1975)).

69 KRAMMER *supra* note 61, at 229, 233–35.

70 1929 Geneva Convention, *supra* note 64, at art. 75.

71 *See* Craig Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 352–56 (1955) ("A familiar exercise of the Commander in Chief power has been the conclusion of armistice agreements with defeated enemies. Perhaps the first use of this power was the agreement terminating the Spanish-American War.").

72 *See* Italian Military Armistice, U.S.-It., Sept. 3, 1943, 61 Stat. 2740 (agreement between General Eisenhower, Commander in Chief (CINC) of the Allied Forces, and Marshal Pietro Badoglio, Head of Italian Government, requiring immediate handover of all prisoners to CINC Allied Forces without commitment regarding return of prisoners by Allied side); *see also* Surrender by Japan: Terms between the United States of America and the other Allied Powers and Japan, Sept. 2, 1945, 59 Stat. 1733 ("We hereby command the Japanese Imperial Government and the Japanese Imperial General Headquarters at once to liberate all allied prisoners of war and civilian internees now under Japanese control and to provide for their protection, care, maintenance and immediate transportation to places as directed."); Armistice Agreement between the United States of America, and the Union of Soviet Socialist Republics, and the United Kingdom of Great Britain and Northern Ireland and Hungary, Jan. 20, 1945, 59 Stat. 1321; Agreement between the United States of America, the Union of Soviet Socialist Republics, and the United Kingdom, and Bulgaria, Respecting an Armistice, Oct. 28, 1944, 58 Stat. 1498; Agreement between the United States of America, the Union of Soviet Socialist Republics, and the United Kingdom and Rumania Respecting an Armistice, Sept. 12, 1944, 59 Stat. 1712.

73 *See* Declaration Regarding Germany by the United States of America and the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Social Republics, and the

committed the Allies to repatriate Italian prisoners "as soon as possible in accordance with arrangements agreed upon by the individual Powers detaining them and Italy."[74] An executive agreement reached on July 26, 1945 between President Truman, U.K. Prime Minister Winston Churchill, and Chairman of the Nationalist Government of China Chiang Kai-shek, likewise promised the repatriation of Japanese prisoners following Japan's surrender in the war.[75] As for Germany, the initial agreement among the parties remained the prevailing instrument in force regarding prisoners; it provided that repatriation of German POWs should be delayed until the end of the war with Japan, until the conclusion of a formal peace treaty with Germany, or for such time as prisoner labor remained needed for rebuilding and restoration, or for other security considerations.[76]

Even as these agreements were being negotiated, in May 1945, the Department announced its policy of returning all POWs in the United States to Europe "as rapidly as possible 'consistent with' the need for their labor on essential military and contract work, and the military situation abroad."[77] The "consistent with" exception was a concession to those in U.S. agriculture and industry who feared losing so much free labor precipitously. For a brief time, those needs actually succeeded in delaying the repatriation of some prisoners; the President announced a sixty-day deferment in the return of contract prisoners to address a temporary labor shortage in various agricultural sectors.[78] While some members of Congress pushed for further extensions, President Truman stuck with the War Department schedule,[79] and Congress took no further action on the issue.[80]

Provisional Government of the French Republic, June 5, 1945, 60 Stat. 1649, T.I.A.S. No. 1520 [hereinafter Declaration Regarding Germany] (providing (in Article 15) for cessation of hostilities, assumption of provisional authority over Germany by victorious Allies, and requiring (in Article 6) release of all Allied prisoners to Allies under terms set by Allies without reciprocal promise); *see also* Surrender by Germany: Terms between the United States of America and the other Allied Powers and Germany, May 7–8, 1945, 59 Stat. 1857.

74 Treaty of Peace with Italy, U.S.-It., art. 71, *ratified* June 14, 1947, 61 Stat. 1245 (entered into force Sept. 15, 1947) ("Italian prisoners of war shall be repatriated as soon as possible in accordance with arrangements agreed upon by the individual Powers detaining them and Italy.").

75 The Potsdam Declaration outlined the terms of surrender for the Empire of Japan, and provided that POWs would be returned to their homes after surrender to effect. LEWIS & MEWHA, *supra*, note 33, at 258.

76 Declaration Regarding Germany, *supra* note 73.

77 KRAMMER, *supra* note 61, at 231 & n.12 (quoting ARMY SERVICE FORCES, CIRCULAR NO. 191 (1945)); *see also* LEWIS & MEWHA, *supra* note 33, at 172.

78 LEWIS & MEWHA, *supra* note 33, at 173.

79 *Id.* (describing Truman's urging that POW labor be replaced with returning U.S. war veterans).

80 Allied prisoners were not always sent directly home. The United States entered into agreements with several of its European allies providing that U.S.-held prisoners would be sent first to, for example, France, for use in post-war reconstruction projects. Despite sharp objections

Repatriation efforts of prisoners held inside the United States thus proceeded at a relatively brisk pace. The War Department designated so-called Italian Service Units, volunteer units of Italian POWs in the United States, for the earliest repatriation as reward for their wartime service; all Italian POWs were returned home by March 1946.[81] Beginning as early as 1944, some members of Congress began pushing the President to accelerate efforts to secure prisoner exchanges with Japan, out of concern for the treatment of American soldiers held by the Japanese.[82] But the House Foreign Affairs subcommittee, tasked with evaluating legislative options, ultimately recommended against congressional action on the grounds that the State Department was already taking all possible steps to secure the release of American prisoners. And indeed, in accordance with the Potsdam Declaration, half of all U.S.-held Japanese prisoners were home by end of 1945, all by the end of 1946.[83]

The release of German prisoners was handled on somewhat different terms, but ultimately with similar results. The War Department unsurprisingly prioritized the repatriation of especially young, old, and sick prisoners; perhaps more surprising, the Department also prioritized the repatriation of prisoners deemed "hardened Nazis" as "useless" for labor purposes and therefore readily returnable.[84] With some exceptions —for prisoners to be held for war crimes prosecution and for prisoners deemed to be providing essential labor—German detainees were given the option of repatriation or rehiring as voluntary civilian workers.[85] By July 1946, with the exception of 141 Germans serving prison sentences, and near that number still held in hospitals or psychiatric wards, all German prisoners had left the United States.[86]

In Europe, repatriation was generally carried out by regional commands,[87] with the Mediterranean Theater of Operations Prisoner of War Command tasked with repatriating on the order of 100,000 German POWs,[88] and the Supreme Headquarters Allied Expeditionary

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by the International Committee of the Red Cross (ICRC), approximately 700,000 prisoners were transferred by the United States to France pursuant to such an agreement. *Id.* at 240–41.

81 SPRINGER, *supra* note 33, at 148; *see also* LEWIS & MEWHA, *supra* note 33, at 190.

82 *See* SUBCOMM. OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 78th Cong., EXCHANGE OF AMERICAN CITIZENS INTERNED OR HELD PRISONERS OF WAR BY THE JAPANESE 1 (Comm. Print 1951).

83 SPRINGER, *supra* note 33, at 149.

84 KRAMMER *supra* note 61, at 237.

85 *Id.* at 249.

86 *Id.* at 255.

87 LEWIS & MEWHA, *supra* note 33, at 259–60 (noting that repatriation efforts were suspended for several months in early 1946 due to labor shortages, to resume again in August 1946).

88 LEWIS & MEWHA, *supra* note 33, at 192.

Force in Europe (SHAEF) (commanded by General Dwight D. Eisenhower) responsible for repatriating hundreds of thousands more.[89] As in the United States, by summer 1945, SHAEF was releasing all young, old, and female prisoners, along with those prisoners deemed of insufficient labor value. Repatriation was slowed to an extent by the active interest of various allied European powers in securing the use of prisoner labor for post-war rebuilding efforts, and for a time U.S. forces undertook negotiations to hand over some of its prisoners to allied governments in exchange for assurances that the prisoners once transferred would be treated in accordance with Geneva standards. But these programs were ultimately short lived, rejected in the face of the ICRC's sharp criticism over post-war use of prisoner labor, U.S. concerns with managing the planned return to Europe of 260,000 additional prisoners who had been held in the United States, and desires to speed U.S. troop withdrawal from Europe generally. SHAEF was thus keen to schedule the complete closeout of its prison operations by end of June 1947, a goal it effectively achieved.[90] In the end, the United States was the first Allied nation to free its war prisoners in Europe.[91]

Yet again, for all of Congress's active involvement in other war-related (including prisoner-related) issues, and despite the vast social and economic impact that holding that many prisoners had on the domestic United States,[92] Congress enacted no laws throughout this period respecting whether or how any of the prisoners were to be released.[93] As in World War I, it was hardly as if the U.S. public or its representatives were oblivious to the matter of transfer or release. On the contrary, public debates over the disposition of prisoners were active, dominated in the first instance by concerns about finding replacement labor for the prisoners who were now to be returned home.[94] Others raised serious security concerns that Nazis sent home would again pose a security threat,[95] or that the return of so many

89 Exact numbers of prisoners captured and repatriated from European-based detention facilities remain difficult to ascertain, in part because some detainees were captured and released without formal processing. *See* SPRINGER, *supra* note 33, at 146.

90 LEWIS & MEWHA, *supra* note 33, at 242–43 (noting that the last American-held POW was released on June 30, 1947).

91 KRAMMER, *supra* note 61, at 249.

92 *See, e.g.*, *id.* at xiii–xv.

93 This conclusion is based on a search of U.S. Statutes at Large for any laws (from 1940–1947) including "prisoners of war" in the text, as well as a search of ProQuest Congressional (all sources, same time period) for documents including the term "prisoners of war"; *see also id.* at 232–34.

94 Labor interests demanded prisoners' immediate repatriation to avoid concerns they would continue to occupy jobs better given to returning American soldiers. Entities that had effectively employed POW labor, particularly the Department of Agriculture as well as various agencies of the United States government, resisted repatriation. *Id.* at 231–33.

95 *Id.* at 235–36.

prisoners to Germany at once would risk destabilizing still fragile post-war Allied rule in sectors across the country.[96] But no one appeared to question the basic scheme—that the executive, and in particular the military, would make the security and policy calculations necessary to determine the terms by which wartime detention came to an end.

III. KOREA

From the beginning of U.S. combat operations in Korea in July 1950, prisoner operations figured centrally in the U.S. mission leading U.N. military forces in opposing the Chinese and Soviet-backed North Korean invasion of the South.[97] The South Korean government had vigorously argued that any prisoners taken in the conflict should be ideologically segregated—many North Korean fighters were in fact South Koreans who had been conscripted by the North's army, and the South maintained they should be classified not as POWs, but released as civilian internees.[98] When U.S. command initially resisted this approach, South Korea removed itself from critical aspects of prisoner operations; South Korea continued to supply guards for prison operations, but refused to provide food, logistical, or any other form of support.[99] By 1950, the primary responsibility for maintaining the prisoners was thus with the United Nations Command (UNC), led by the United States.[100] And while thousands of Chinese and North Koreans taken prisoner by U.N. forces during the war indeed surrendered without fight,[101] the South Koreans had been right to anticipate that UNC prisoner camps would be plagued by violence, with prisoners organizing into communist and anti-communist factions.[102] Worse, dealing with these clashes, and with other aspects of prisoner operations, was no small-scale problem. Within the first year of United States engagement, U.S. personnel had handled more than 150,000 prisoners.[103]

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96 *Id.* at 233.

97 The United States led U.N. Command military forces, and generally dominated policy regarding the treatment of prisoners captured during the conflict. SPRINGER, *supra* note 33, at 167.

98 *Id.* at 168–69.

99 *Id.* at 167.

100 *Id.*

101 *Id.* at 167–68.

102 *Id.* at 168–73.

103 *Id.* at 168; *see also* 99 CONG. REC. 4271, 4275–76 (1953) (letter from Thruston B. Morton, Assistant Sec'y of State, to Sen. William F. Knowland, submitted into record) (reporting that the UNC notified the ICRC of approximately 175,000 prisoners taken over the course of the conflict).

The subject of repatriation was likewise fraught from the outset. The Communist parties took the position that all prisoners must be repatriated "without delay" at the end of hostilities, pursuant to the terms of the then-newly adopted 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War.[104] Indeed, while the United States in 1950 had signed, but not yet ratified, the 1949 Convention, General Douglas McArthur had made it clear that not only U.S. military personnel, but also all UNC forces would adhere to the treaty's provisions.[105] Yet despite its commitment to abide by the treaty's terms, the United States, as well as the other U.N. forces, sharply resisted the Communists' unconditional claim to prompt repatriation at the end of hostilities. The notion that U.N. forces would simply return all captured prisoners outright was unattractive for a host of reasons. For one thing, the United States suspected Communist forces of having committed numerous atrocities against captured prisoners, in manifest violation of other provisions of the Geneva Conventions.[106] Further, in security terms, a wholesale prisoner exchange surely worked to the Communists' military advantage.[107] U.N. forces held more than fifteen times the number of prisoners Communist forces held (making repatriation a major security interest of the Communists).[108]

More, and indeed swamping all of these issues in importance at the time, was the reality that substantial numbers of prisoners taken by the United States and its U.N. allies had no desire to be returned, having been conscripted into service in the first place or having surrendered to the Americans or their allies on the battlefield.[109] Following the much-criticized Allied decision after World War II to forcibly repatriate thousands of Russians and Eastern Europeans who had fought against communism, President Truman in particular was not prepared to force the repatriation of prisoners against their will.[110] It was for this reason

104 *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364. The Communists also invoked Article 7 of the Convention, prohibiting POWs from renouncing any of the rights the Convention guaranteed. SPRINGER, *supra* note 33, at 173–74.

105 SPRINGER, *supra* note 33, at 168.

106 WILLIAM STUECK, THE KOREAN WAR: AN INTERNATIONAL HISTORY 244 (Princeton Univ. Press 1st prtg. 1995).

107 *Id.*

108 *Id.* at 212 (explaining that an "all-for-all" exchange, sought by the Communists, would "give the Communists a much greater opportunity to strengthen their forces," compared to the one-for-one exchange the Americans favored); *see also* SPRINGER, *supra* note 33, at 174 (noting the UNC recommended a one-for-one exchange of prisoners).

109 SPRINGER, *supra* note 33, at 167; *see also id.* at 174–77 (describing thousands of prisoners' refusal of repatriation).

110 *Id.* at 163; STUECK, *supra* note 106, at 245, 264; *see also, e.g.*, Hanson W. Baldwin, *Next Steps in Far East Pose Big Dilemma for U.S.: Military Pressure Might Speed a Truce But West is*

that prisoner exchanges and release became a central topic of peace discussions from the commencement of talks not long after the U.S. entry into the war in July 1951, until the conclusion of the Armistice agreement temporarily halting fighting in July 1953.[111] Indeed, the disposition of prisoners was the single unresolved issue between the negotiating sides for the last fifteen months of the war.[112]

Given the centrality of prisoner issues to the President's decision to continue to fight a bloody and stalemated war,[113] the subject could hardly have gone unnoticed on the domestic political scene. Peace negotiations were followed regularly on the pages of the *New York Times*, with prisoner repatriation issues in the foreground.[114] With the fate of prisoners forcibly repatriated after World War II still somewhat fresh in memory, domestic political support seemed initially behind Truman's disinclination to force repatriation.[115] Yet it need hardly have been thus. It is difficult to imagine today any such public consensus around a President's insistence on prolonging an unpopular war for more than a year, including the ongoing imprisonment of Americans held captive by the other side, in the interest of upholding a principle against the forced repatriation of Chinese and North Korean nationals. Indeed, the Democrats suffered a sweeping political defeat in 1952, in part over the Truman administration's handling of the prolonged war.[116]

When Republican President Eisenhower took office in January 1953, he likewise faced a fraught political climate, this time from within his own party. Republicans held the barest of majorities in the U.S.

Reluctant to Use It, N.Y. TIMES, Jan. 20, 1952, at E3 (describing concerns that anti-communist prisoners face torture or death upon repatriation).

111 STUECK, *supra* note 106, at 225 (citing "arrangements relating to prisoners of war" as one of the five items identified by the parties to negotiate the withdrawal of all foreign armed forces from Korea); *see also* SPRINGER, *supra* note 33, at 173.

112 Barton J. Bernstein, *The Struggle Over the Korean Armistice: Prisoners of Repatriation?*, *in* CHILD OF CONFLICT: THE KOREAN-AMERICAN RELATIONSHIP, 1943–1953, at 261–62 (Bruce Cumings ed., 1983); *see also id.* at 306 (noting that during this period, American forces suffered an additional 32,000 casualties).

113 Bernstein, *supra* note 112, at 263; *see also id.* at 276, 278–80 (discussing reasons why the President and many in the military opposed forced repatriation, including its effects in undermining the willingness of enemy armies to surrender to U.S. forces; the moral injustice of the practice; the Cold War political consequences of being seen to pursue a morally suspect policy; and the prospect of enjoying a propaganda victory over the Communists).

114 *See, e.g.*, Lindesay Parrott, *Reds Earlier for Study*, N.Y. TIMES, Jan. 3, 1951, at 1; Lindesay Parrott, *Reds Must Also Agree Not to Limit Cease-Fire Inspectors to the 'Ports of-Entry,'* N.Y. TIMES, Dec. 12, 1951, at 1; Lindesay Parrot, *U.N. Planes in Area of Prisoner Camp, Ridgeway Concedes*, N.Y. TIMES, Jan. 16, 1952, at 1.

115 STUECK, *supra* note 106, at 264; *see also, e.g.*, Bernstein, *supra* note 112, at 280 (noting significant, if not overwhelming, congressional support for opposing forced repatriation); Baldwin, *supra* note 110 (describing concerns that anti-communist prisoners face torture or death upon repatriation).

116 DAVID MCCULLOUGH, TRUMAN 913 (Simon & Schuster 1992).

House and Senate, and a sizable faction on the Republican right opposed armistice negotiations at all.[117] Communist governments at the time continued to back the North Korean cause, and indeed political tensions on the Korean peninsula, erupting sporadically in shows of military force, remain high to this day.[118] Further, armistice negotiations had been carried out since 1951 with active congressional debate over the Bricker Amendment in the background—a series of attempts led by Republican Senator John W. Bricker, with strong Republican support in the Senate, to amend the Constitution to restrict executive power to conclude treaties and executive agreements—the very process President Eisenhower soon vigorously engaged in to bring about a cessation of hostilities on the Korean peninsula. For different reasons, Truman or Eisenhower might well have come to a different position on the significance of repatriating communist war prisoners.

Yet despite the public and highly politically salient debate surrounding the disposition of war prisoners, the continued (and projected indefinite) state of tension between the ideologically opposed parties, and opportunities for Congress to learn more and engage further through regular consultations with the White House over armistice negotiations,[119] Congress in the end took no action restricting executive arrangements on the exchange or repatriation of enemy prisoners.[120] On a few occasions, Congress requested and was provided information about reported prisoner insurgencies in various Korean prison camps.[121] Toward the end of armistice negotiations, some members expressed concern about the role of India as a proposed neutral party that could receive prisoners who expressed a desire not to return.[122] But Congress passed no laws, and otherwise took no significant legislative action, related to the subject of prisoners held by the United States or UNC forces throughout the period.

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117 STUECK, *supra* note 106, at 317–19.

118 *See generally* Beina Xu & Jayshree Bajoria, *The China-North Korea Relationship*, COUNCIL ON FOREIGN REL.—BACKGROUNDERS (Aug. 22, 2014), http://www.cfr.org/china/china-north-korea-relationship/p11097.

119 STUECK, *supra* note 106, at 323.

120 This finding is based on a search of U.S. Statutes at Large between 1950 and 1954 for any textual reference to "Korea and prisoner," and searches of ProQuest Congressional (including the Congressional Record, CRS reports, and other legislative documents) during the same period for textual mentions of "Korea and prisoners" and "Korea and Armistice."

121 *See, e.g.*, H.R. Res. 661, 82d Cong. (1952) ("Requesting the Secretary of the Army to furnish to the House of Representatives full and complete information with respect to insurgency in prisoner-of-war camps in Korea and Communist-inspired disturbances of the peace in Japan"); H.R. REP. NO. 2128 (1952).

122 *See* 99 CONG. REC. 4271, 4275–76 (1953) (statement of Sen. William F. Knowland, and letters between Sen. Knowland and Thruston B. Morton, Assistant Secretary of State, submitted into record).

In the end, prisoner exchanges and repatriation were, again, handled by executive agreement. As in previous conflicts, the United States had affected multiple exchanges and repatriations before the end of the war.[123] Consistent with that practice, the U.S. military in the field, and the Department of State and the White House in Washington, took the lead in crafting U.S. negotiating positions on repatriation at the end of the war, and it was through this hard-fought interagency process that the U.S. government settled on pursuing the principles supporting the prisoner repatriation plan that was ultimately adopted.[124]

In spring 1953, the multinational delegates to the armistice talks agreed on the exchange of all sick and wounded prisoners in so-called "Operation Little Switch," resulting in the swap of 6670 Communist prisoners for 684 United Nations-affiliated personnel.[125] It was not until that summer that parties reached agreement on the bulk of the remaining detainees—an agreement memorialized in Terms of Reference for the Neutral Nations Repatriation Commission (NNRC) (a document later annexed to the full armistice agreement that brought about a cease-fire in the war).[126] Under the Terms of Reference supporting what became "Operation Big Switch," each side agreed to turn over any prisoner who refused repatriation to the NNRC, a specially created international organization to be run by delegates from India.[127] The NNRC could hold these prisoners for up to ninety days to allow representatives of the prisoners' home countries to explain to the prisoners their rights of repatriation. If after this period, a prisoner still declined to accept repatriation, he would be released from prison and would assume civilian status.[128] Ultimately, approximately 23,000 Chinese and North Korean prisoners refused repatriation, while more than 82,000 agreed to return home.[129] The UNC would exchange 76,000 North Korean and Chinese prisoners for 12,700 allied prisoners then

123 For example, between July and October 1952, the United States released approximately 38,000 prisoners, who, according to the Secretary of State Dean Acheson, were deliberately misclassified as civilian internees so they could be released notwithstanding ongoing negotiations over the fate of POWs who did not wish to be repatriated to the Communist North. Bernstein, *supra* note 112, at 307 n.121.

124 STUECK, *supra* note 106, at 259–61.

125 SPRINGER, *supra* note 33, at 175–76 (describing "Operation Little Switch" as at the instigation of U.S. General Mark W. Clark).

126 Agreement on Prisoners of War, U.S.-China-Kor., June 8, 1953, 28 DEP'T ST. BULL. 866, *reprinted in* 47 AM. J. INT'L L. SUP. 180; *see also* SPRINGER, *supra* note 33, at 176.

127 SPRINGER, *supra* note 33, at 176.

128 *Id.*

129 WALTER G. HERMES, TRUCE TENT AND FIGHTING FRONT app. B-1, B-2 (Stetson Conn ed., 1966).

held by the North.[130] The final prisoners—repatriates or not—were released from detention by January 1954.[131]

IV. VIETNAM

Vietnam differed from earlier twentieth century conflicts in a variety of respects, the U.S. approach to prisoner detention among them. Although U.S. military engagement in Vietnam began at low levels during the Eisenhower administration, and both U.S. military and intelligence activities in the country increased over the ensuing decade, the first U.S. combat troops did not arrive in Vietnam until 1965.[132] The same year also marked a key shift in the handling of prisoner operations in the conflict, a shift important for understanding the nature of eventual release and repatriation decisions. Before 1965, the South Vietnamese government handled all detention operations, treating captured insurgents, fighters, and Communist loyalists of all kinds as criminals, and integrating them into the existing domestic prison system.[133] Although the South Vietnamese had no formal classification system, prisoners fell broadly into three categories: (1) uniformed Viet Cong or North Vietnamese Army personnel engaging in military actions; (2) sympathizers, collaborators, and various clandestine supporters of the North, who were neither uniformed nor engaged in direct military action; and (3) prisoners of various affiliations wishing to defect to the South Vietnamese.[134]

This initial South Vietnamese detention program was fraught with problems. Civilian jails quickly became overwhelmed, lacking the space and personnel to manage the intense prisoner traffic.[135] Despite worsening violence throughout the period, limited prison capacity meant that there was little choice but to release fighters regularly; as new prisoners came in, others were quickly discharged.[136] Further, the ICRC,

130 SPRINGER, *supra* note 33, at 177.

131 HERMES, *supra* note 129, at 496.

132 *See* H.R. MCMASTER, DERELICTION OF DUTY: JOHNSON, MCNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM (1998).

133 *See* ROBERT C. DOYLE, THE ENEMY IN OUR HANDS: AMERICA'S TREATMENT OF PRISONERS OF WAR FROM THE REVOLUTION TO THE WAR ON TERROR 302–03 (2010); SPRINGER, *supra* note 33, at 182.

134 CHERYL BENARD, ET AL., RAND NAT'L DEF. RESEARCH INST., THE BATTLE BEHIND THE WIRE: U.S. PRISONER AND DETAINEE OPERATIONS FROM WORLD WAR II TO IRAQ 34 (RAND Corp. 2011) [hereinafter RAND REPORT], *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG934.pdf.

135 SPRINGER, *supra* note 33, at 181–82; *see also* RAND REPORT, *supra* note 134, at 37.

136 RAND REPORT, *supra* note 134, at 37. In 1965, 24,878 political prisoners passed through the detention facilities, and 15,987 were released. Average time of confinement for prisoners,

the United States, and other Western nations raised serious concerns about prison conditions and severe prisoner mistreatment.[137] Abuses of prisoners committed by the South Vietnamese were seen at least as partly the responsibility of the United States, the main supporter of the South's effort to contain the insurgency.[138] By 1965, increasing U.S. military engagement in the conflict, and growing concerns that brutal South Vietnamese treatment of Communist prisoners might worsen the treatment of U.S. soldiers captured by the North, led the United States to engage more aggressively in detention operations in South Vietnam.

In 1965, the United States established the Military Assistance Command Vietnam (MACV) under the direction of General William Westmoreland to support South Vietnamese detention operations.[139] While the United States continued to turn captured detainees over to the South Vietnamese and considered South Vietnam the detaining power throughout the conflict,[140] the United States was responsible for constructing five new prison camps in theater and assisting in their administration; the United States insisted that all prisoners be afforded POWs status at least until their formal status could be determined; and it provided training and guidance to troops on compliance with Geneva restrictions on prisoner treatment.[141] Further, throughout the conflict, the United States urged the parties to pursue a reciprocal program of prisoner repatriation—usually in the face of strong resistance by both North and South Vietnamese in a position to facilitate prisoner exchanges.[142] The South Vietnamese government argued that only those

including Viet Cong, was six months. *See generally* DALE ANDRADÉ, ASHES TO ASHES: THE PHOENIX PROGRAM AND THE VIETNAM WAR (1990).

137 RAND REPORT, *supra* note 134, at 35–36.

138 *See* GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964–1973, at 63 (1975), *available at* http://www.history.army.mil/books/Vietnam/Law-War/law-04.htm (noting that the United States maintained that "the hostilities constituted an armed international conflict, that North Vietnam was a belligerent, that the Viet Cong were agents of the government of North Vietnam," and that, therefore, the Geneva Conventions were fully applicable); *see also* Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 12, Aug. 12, 1949, 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364 (stating that "Detaining Power" is responsible for the treatment of POWs even if it transfers those prisoners to another power).

139 DOYLE, *supra* note 133, at 191–92.

140 *See id.* at 311; SPRINGER, *supra* note 33, at 180; *see also* RAND REPORT, *supra* note 134, at 35.

141 RAND REPORT, *supra* note 134, at 39.

142 The South Vietnamese proposed returning sixty-two sick and wounded prisoners of war to North Vietnam at the Paris Peace Talks of November 13, 1969, but the offer never received a response. A January 1971 offer to repatriate all sick and wounded prisoners to North Vietnam, and an April 1971 request to North Vietnam to conclude a bilateral agreement for the repatriation or internment in a neutral country of those prisoners of war who had been held captive for a long period of time, were both ignored. In May 1971, North Vietnam finally agreed to accept 570 sick and wounded prisoners. The ICRC ultimately interviewed 660 sick and wounded prisoners, only thirteen of whom wished to be repatriated. Before they could be released, North Vietnam canceled the agreement, and they were returned to Da Nang. PRUGH, *supra* note 138, at 71.

prisoners who renounced their allegiance to North Vietnam or the Viet Cong should be eligible for release before war's end; the Communists refused even to furnish a list of the prisoners they held, and the Viet Cong had no committee authorized to conduct negotiations over prisoner exchanges.[143] Yet even in the face of these hurdles, some prisoners were repatriated for medical reasons during the conflict.[144] Indeed, at times U.S. commanders unilaterally released enemy prisoners in the hope the North would reciprocate, a result achieved on rare occasion.[145] Not that such exchanges remotely kept pace with the volume of prisoners overall. By the end of 1971, South Vietnam held 35,665 prisoners, one-third of whom had been captured by U.S. forces.[146]

While Congress was relatively silent on prisoner issues in the early years of U.S. military involvement in Vietnam, it did become more actively engaged as the conflict lengthened.[147] On several occasions, Congress legislated out of concern for the mistreatment of U.S. prisoners held by the North—in order to ensure American prisoners' families had sufficient benefits[148]—to express concern for the treatment of American POWs, and to condemn enemy violations of the Geneva Conventions.[149] Indeed, between 1969 and 1971, the House Foreign

143 SPRINGER, *supra* note 33, at 181.

144 *See* DOYLE, *supra* note 133, at 309–10. For instance, in April 1967, a screening program was started to identify POWs who, because of illness, were qualified for release under Articles 109 and 110 of the Geneva Conventions. The screening team included two Swiss physicians under contract to the ICRC. Of the 286 prisoners screened, 135 qualified medically for repatriation. Of those qualified for repatriation, only thirty-nine wished to return to North Vietnam. To this group was added a female prisoner of war who had given birth in a South Vietnamese hospital. The forty prisoners and the infant were repatriated to North Vietnam through the demilitarized zone on June 12, 1967; on the same day, four Viet Cong-United States prisoners were released in South Vietnam. During 1967, a total of 139 POWs were released in South Vietnam or repatriated to North Vietnam. PRUGH, *supra* note 138, at 71.

145 SPRINGER, *supra* note 33, at 188. For example, in February 1967, twenty-eight North Vietnamese prisoners of war were released to return to North Vietnam through the demilitarized zone. The following month, two Viet Cong prisoners of war captured by U.S. forces were released in response to the release of two U.S. POWs. A few months later, three more Viet Cong captured by U.S. forces were released in exchange for the release of two U.S. prisoners and one Filipino captured by the Viet Cong. DOYLE, *supra* note 133, at 309.

146 PRUGH, *supra* note 138, at 67.

147 Search: all statutes at large [1959–1976] for reference to Vietnam and prisoner or P.O.W., and Congressional Record for mentions of Vietnam and prisoner or POW. Searched ProQuest Congressional for mentions of "Vietnam" and "prisoner or POW" returned thousands of results. Limited search to "repatriat!" within that search, and turned up little, and nothing of huge import.

148 *See, e.g.*, Act of Mar. 28, 1974, Pub. L. No. 93-256, 88 Stat. 52 (expanding the period during which Social Security Act benefits may be paid); Funeral Transportation and Living Expense Benefits Act of 1974, Pub. L. 93-257, 88 Stat. 53 (providing benefits to families of U.S. POWs who died in prison); Act of June 24, 1970, Pub. L. No. 91-289, 84 Stat. 323 (amending War Claims Act of 1948 to include prisoners of war captured during the Vietnam conflict).

149 Act of Oct. 31, 1972, Pub. L. No. 92-607, 86 Stat. 1948 (making supplemental appropriations for the fiscal year ending June 30, 1973); Proclamation No. 4115, 86 Stat. 1613

Affairs Subcommittee on National Security Policy and Scientific Developments alone held at least sixteen days of hearings on multiple bills and resolutions relating to American POWs in Southeast Asia.[150] In 1970, Congress passed two concurrent resolutions, which dealt with American prisoners in Indochina, and again protested the treatment of American prisoners by the North and called for justice on their behalf; Congress also endorsed efforts to obtain better treatment and release of U.S. prisoners.[151] Later, the legislature passed "sense of Congress" and other hortatory legislation urging the full withdrawal of American troops from Vietnam as soon as U.S. prisoners could be recovered.[152] Near the end of U.S. combat presence in Vietnam, Congress passed a rider on an appropriations bill prohibiting the use of funds after August 1973 "to support directly or indirectly combat activities" in Vietnam and surrounding countries.[153]

(Mar. 10, 1972) (highlighting enemy's Geneva violations and refusal to exchange or repatriate prisoners).

150 *See* NAT'L ARCHIVES & RECORDS ADMIN., REFERENCE INFORMATION PAPER NO. 90: A FINDING AID TO RECORDS RELATING TO AMERICAN PRISONERS OF WAR AND MISSING IN ACTION FROM THE VIETNAM WAR ERA, 1960–1994 app. O, *available at* http://www.archives.gov/publications/ref-info-papers/90/appendix-o.html; *see also* CONGRESSIONAL QUARTERLY ALMANAC, 91st Cong., 2d Sess., at 436–37 (1970).

151 *See* H.R. Con. Res. 582, 92d Cong. (1970) (enacted) (designating May 1, 1970, as a day for an appeal for international justice for Americans held prisoner or missing in action in Southeast Asia); H.R. Con. Res. 454, 91st Cong. (1970) (enacted) (protesting the treatment given prisoners by North Vietnam and the Viet Cong and endorsed efforts to obtain better treatment and release).

152 In 1971, Congress passed two amendments related to United States withdrawal from Vietnam—"sense of Congress" and "policy of the United States"—in order to withdraw U.S. forces from Vietnam by a date subject to the release of American prisoners. When signing one of them (Military Procurement Authorization, Pub L. No. 92-156, 85 Stat. 423 (1971)), President Nixon issued a statement emphasizing that he was not bound by the policy language in the amendment. COMM. ON FOREIGN AFFAIRS, 92d Cong., U.S. FOREIGN POLICY FOR THE 1970'S: A COMPARATIVE ANALYSIS OF THE PRESIDENT'S 1972 FOREIGN POLICY REPORT TO CONGRESS 51–52 (Comm. Print 1972). The Senate later tried and failed to pass the Mansfield Amendment, binding legislation that would require the withdrawal of U.S. forces conditional on release of U.S. prisoners of war. For an overview of legislative activity surrounding U.S. foreign policy of the area, see COMM. ON FOREIGN AFFAIRS, 92d Cong., U.S. FOREIGN POLICY FOR THE 1970'S: A COMPARATIVE ANALYSIS OF THE PRESIDENT'S 1973 FOREIGN POLICY REPORT TO CONGRESS 51–52 (Comm. Print 1973) [hereinafter 1973 FOREIGN AFFAIRS COMPARATIVE ANALYSIS REPORT].

153 An Act Making Supplemental Appropriations for the Fiscal Year Ending June 30, 1973, and for Other Purposes, Pub. L. No. 93-50, 87 Stat. 99 (1973) (prohibiting the use of funds after August 1973 "to support directly or indirectly combat activities" in or around Vietnam); *see also* 1973 FOREIGN AFFAIRS COMPARATIVE ANALYSIS REPORT, *supra* note 152. Notably, a contemporary report by the U.S. Government Accountability Office rejected the Defense Department's recent argument that this Vietnam-era statutory restriction on "combat activities" meant to include prisoner operations as well. SUSAN A. POLING, U.S. GOV'T ACCOUNTABILITY OFFICE, DEPARTMENT OF DEFENSE—COMPLIANCE WITH STATUTORY NOTIFICATION REQUIREMENT, NO. B-326013 (2014), *available at* http://www.gao.gov/assets/670/665390.pdf (concluding that the Defense Department violated "section 8111 of the Department of Defense Appropriations Act, 2014 when it transferred five individuals detained at Guantanamo Bay, Cuba, to the nation of Qatar" in exchange for Bowe Bergdahl without providing at least thirty days' notice to relevant congressional committees).

But in none of this legislative activity is there evidence of Congress acting to restrict what authority or influence the President or the U.S. military had over the release or exchange of Communist prisoners held by the South Vietnamese (whether to accelerate or slow repatriation efforts). On the contrary, in 1970, three years before the last American combat troops left Vietnam, President Nixon called for the immediate and unconditional release of all prisoners by both sides; the reaction to the proposal on Capitol Hill was "heavily favorable."[154]

Ultimately, as in previous conflicts, the disposition of the vast majority of prisoners of both sides captured during the conflict was addressed through executive negotiation and conclusion of agreements with the enemy. The Paris Peace Accords, negotiated and signed by the United States as an executive agreement, entered into force on January 17, 1973, and were only subsequently submitted to Congress.[155] The Accords provided for a cessation of all hostilities and required the parties to exchange complete lists of all captured military personnel and foreign civilians on the date of its entry into force.[156] Prisoner repatriation would be carried out "simultaneously with and completed not later than the same day as" the withdrawal of American troops from South Vietnam.[157] Remaining prisoner issues, including the return of North Vietnamese civilians still held by South Vietnam, were to be resolved by a separate agreement between the Vietnamese parties in the months following the adoption of the Accords.[158]

For the Americans, the Paris Peace Accords were indeed effective in securing the return of then-known U.S. POWs; repatriation of 588

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154 *See* Robert B. Semple, Jr., *Nixon Urges Supervised Truce in Vietnam, Cambodia and Laos and a Wider Peace Conference*, N.Y. TIMES, Oct. 7, 1970, at 1 (describing congressional reaction to speech that evening from both sides of the aisle as "heavily favorable"); *see also* President Richard Nixon, Address to the Nation About a New Initiative for Peace in Southeast Asia (Oct. 7, 1970), *available at* http://www.presidency.ucsb.edu/ws/?pid=2708.

155 WILLIAM GIBBONS & ALLAN FARLOW, CONG. RESEARCH SERV., CONGRESS AND THE TERMINATION OF THE VIETNAM WAR 9–10 (1973).

156 Agreement on Ending the War and Restoring Peace in Vietnam art. 5, U.S.-Viet., Jan. 27, 1973, 24 U.S.T. 1 ("Within sixty days of the signing of this Agreement, there will be a total withdrawal from South Viet-Nam of troops, military advisers, and military personnel . . . .").

157 *Id.* art. 8(a) ("The return of captured military personnel and foreign civilians of the parties shall be carried out simultaneously with and completed not later than the same day as the troop withdrawal mentioned in Article 5. The parties shall exchange complete lists of the above-mentioned captured military personnel and foreign civilians on the day of the signing of this Agreement.").

158 *Id.* art. 8(c) ("The question of the return of Vietnamese civilian personnel captured and detained in South Viet-Nam will be resolved by the two South Vietnamese parties on the basis of the principles of Article 21 (b) of the Agreement on the Cessation of Hostilities in Viet-Nam of July 20, 1954. The two South Vietnamese parties will do so in a spirit of national reconciliation and concord, with a view to ending hatred and enmity, in order to ease suffering and to reunite families. The two South Vietnamese parties will do their utmost to resolve this question within ninety days after the cease-fire comes into effect." (footnote omitted)).

American prisoners (including twenty-four civilians) was speedily and successfully carried out between February and April 1973.[159] For the Communist prisoners held by the South, success was less uniform. According to the records kept by U.S. Forces, the South Vietnamese held approximately 37,000 POWs at the end of American involvement in the war, including about 10,000 North Vietnamese Army (NVA) troops; the remainder were thought to be primarily Viet Cong.[160] While the NVA troops were repatriated in the months following the Paris Accords, thousands of the remaining detainees (exact numbers are substantially disputed), many of whom were South Vietnamese nationals sympathetic to the insurgency, remained in southern custody of one form or another.[161] When NVA troops later succeeded in capturing Saigon in 1975 and established a unified communist government in Vietnam, the remaining detainees were freed.[162] Without American protection, however, many of those thought to have resisted repatriation or collaborated with the enemy were subsequently executed.[163]

V. 1991 GULF WAR

The brief duration of the first Gulf War might create the misimpression that detention operations in that conflict were relatively inconsequential. On the contrary, the U.S. military described the 1991 conflict as the United States' largest war prisoner operation since World War II.[164] Between January 22, 1991, when the first prisoner was captured, and May 2, 1991, when the United States transferred the final prisoner from its custody, U.S. detention facilities processed nearly

159 FLOYD S. PARLIN, CONG. RESEARCH SERV., THE RETURN OF AMERICAN PRISONERS OF WAR FROM SOUTHEAST ASIA (1975).

160 SPRINGER, *supra* note 33, at 189 (citing REPATRIATION OF ENEMY PRISONERS OF WAR, Box 18, Entry PMG POWD, RG 472, RECORDS OF THE UNITED STATES FORCES IN SOUTHEAST ASIA, 1950–1975 (1973)).

161 SPRINGER, *supra* note 33, at 189; *see also* DOYLE, *supra* note 133, at 289; STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 93d Cong., VIETNAM—A CHANGING CRUCIBLE: REPORT OF A STUDY MISSION TO SOUTH VIETNAM 40 (Comm. Print 1974) (reporting on a mission conducted by Rep. Peter H. B. Frelinghuysen (R-NJ), Feb. 25–28, 1974, to South Vietnam evaluating fate of remaining Communist "political prisoners" held by South); *id.* at 36 app. 5 (reprinting of Airgram-296, Dec. 26, 1973 from American Embassy Saigon to U.S. Department of State assessing number of remaining prisoners).

162 DOYLE, *supra* note 133, at 289.

163 *Id.*

164 U.S. DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF CONFLICT: AN INTERIM REPORT TO CONGRESS (1991) [hereinafter U.S. DEP'T OF DEF. INTERIM REPORT], *available at* http://www.dod.mil/pubs/foi/operation_and_plans/PersianGulfWar/305.pdf.

70,000 detainees,[165] including through the use of battlefield hearings on prisoner status pursuant to Article 5 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War.[166] At the outset of hostilities, the United States quickly secured military-to-military agreements with allies France and the United Kingdom, setting forth the procedure to be followed by any capturing forces in processing POWs or other detainees, initially through U.S. detention or medical facilities in theater.[167] Although American military police and combat engineers raced to build prison facilities in theater from scratch,[168] the United States also undertook a separate agreement with Saudi Arabia that authorized the subsequent transfer of many of these prisoners to existing Saudi facilities.[169] By the end of the conflict, more than 35,000 prisoners were held in U.S. facilities, with 63,000 more held in Saudi Arabia.[170]

Almost immediately after U.S. and coalition forces ceased offensive operations on February 28, the Iraqis agreed to attend military-to-military talks to discuss terms for the cessation of hostilities and the return of captured prisoners.[171] While the Iraqis were prepared promptly to return coalition prisoners, they were unprepared to manage the influx of the much greater number of Iraqi prisoners held by the coalition.[172] Furthermore, as quickly became evident to U.S. and coalition forces, thousands of Iraqis did not wish to be repatriated, with many Iraqi soldiers reportedly saying that they had been conscripted into the Iraqi military during visits to Iraq.[173] The phenomenon was now familiar in U.S. conflicts of the twentieth century.

Yet despite such potentially complicating circumstances, the repatriation or transfer of prisoners following the conflict proceeded

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165 *Id.* at 12-4. U.S. forces captured more than 60,000 of these; the remainder were seized by French and British allies and then transferred to U.S. control.

166 U.S. DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF CONFLICT: FINAL REPORT TO CONG, 102ND CONG., L-3 (1992) [hereinafter U.S. DEP'T OF DEF. FINAL REPORT], *available at* http://www.dod.mil/pubs/foi/operation_and_plans/PersianGulfWar/404.pdf.

167 *Id.*

168 Michael R. Gordon, *Iraqi War Prisoners Now Find Themselves Men Without a Country*, N.Y. TIMES (May 5, 1991), http://www.nytimes.com/1991/05/05/world/after-the-war-iraqi-war-prisoners-now-find-themselves-men-without-a-country.html (ultimately housing 15,241 prisoners, guarded by 1550 Americans).

169 U.S. DEP'T OF DEF. FINAL REPORT, *supra* note 166, at L-3.

170 *War Chronology: March 1991*, NAVAL HISTORY & HERITAGE COMMAND, http://www.history.navy.mil/wars/dstorm/dsmar.htm (last visited Oct. 18, 2014) (reporting that an additional 3000 or more prisoners were held in Turkey).

171 *See* U.S. DEP'T OF DEF. FINAL REPORT, *supra* note 166, at L-3.

172 *See id.* at L-16.

173 KENNETH KATZMAN, CONG. RESEARCH SERV., 93-893 F, IRAQ: ADMISSION OF REFUGEES INTO THE UNITED STATES (1993); Gordon, *supra* note 168 (reporting that others asked the Americans to take them into custody because they thought it would be the best way of escaping from Iraq).

with remarkable speed. Iraq and coalition forces reached a memorandum of understanding by early March detailing administrative procedures for prisoner repatriation to be carried out under the auspices of the ICRC. On March 4, Iraq released the first group of coalition prisoners, including six Americans. Two days later, the United States responded by releasing 294 prisoners to the ICRC for repatriation to Iraq.[174] Follow-on procedures provided for repatriation of detainees to Iraq at a planned rate of approximately 5000 a day.[175] Of the approximately 14,000 prisoners who did not want to return to Iraq, the United States initially embraced only two: one who had dual Iraqi and American citizenship and another who had previously resided in the United States.[176] The remaining prisoners were returned to Saudi Arabia,[177] with coalition governments taking the position that the non-repatriating Iraqis should be reclassified as refugees.[178] Ultimately, the vast majority of prisoners in Saudi Arabia were repatriated to Iraq under ICRC auspices after Saddam Hussein issued a general amnesty.[179] In all events, all prisoners had been transferred from U.S. custody by May 2, 1991.[180] On August 23, the ICRC announced that the repatriation of Iraqi prisoners was complete.[181] And the ICRC concluded that the "treatment of Iraqi prisoners of war by U.S. forces was the best compliance with the Geneva Convention by any nation in any conflict in history."[182]

Despite the relative speed with which the United States and its allies carried out both the build up to war and its denouement, congressional engagement was hardly impossible. On the contrary, in the few months leading up to war, Congress managed to enact multiple pieces of legislation variously supporting economic sanctions after Iraq's invasion of Kuwait, authorizing the deployment of forces to defend Saudi Arabia, authorizing the use of force in Iraq, authorizing arms sales to the Saudis, and appropriating funds to support all of these

174 *War Chronology: January 1991*, NAVAL HISTORY & HERITAGE, http://www.history.navy.mil/wars/dstorm/dsjan2.htm (last visited Oct. 18, 2014).

175 *See* U.S. DEP'T OF DEF. FINAL REPORT, *supra* note 166, at L-17.

176 *See id.* at app. O-20; Gordon, *supra* note 168.

177 *See* U.S. DEP'T OF DEF. INTERIM REPORT, *supra* note 164, at 12-5; *see also* DOYLE, *supra* note 133, at 297.

178 *See* U.S. DEP'T OF DEF. FINAL REPORT, *supra* note 166, at L-17. The ICRC urged that the non-repatriating Iraqis be treated as civilians protected under the Fourth Geneva Convention. *See* SPRINGER, *supra* note 33, at 180.

179 Richard Serrano, *Iraq POWs Paid to Resettle in U.S.; Lawmakers Protest*, L.A. TIMES (Aug. 24, 1993), http://articles.latimes.com/1993-08-24/news/mn-27486_1_united-states.

180 *See* U.S. DEP'T OF DEF. FINAL REPORT, *supra* note 166, at L-17.

181 *See id.* at L-17.

182 *See id.* at L-1.

activities.[183] Congress was likewise far from blind to the issue of wartime detention; just two days after the first capture of Iraqi troops by coalition forces, the Senate agreed to a resolution condemning Iraqi treatment of its POWs.[184] Yet once again, even as the military and executive branch negotiated the series of international agreements with U.S. allies and eventually the Iraqis themselves for the handling and prompt repatriation of Iraqi prisoners, Congress took no steps to regulate the executive's handling of prisoners in our custody.[185]

It was only well after the United States had handed its detainees over to other international authorities that Congress reawakened to the question of our former prisoners. In 1992, the United Nations High Commissioner on Refugees expressed concern that some of the ex-Iraqi soldiers (about 4000 had remained in refugee status in Saudi Arabia) could not be safely returned to Iraq in light of a well-grounded fear of persecution.[186] In response, the George H. W. Bush Administration joined a multinational resettlement effort and decided to admit a number of Iraqi refugees into the United States pursuant to existing U.S. Immigration and Naturalization Act authorities.[187] Recalling that many Iraqi soldiers had surrendered to U.S. forces during the conflict, that some had even provided valuable services to U.S. forces in the aftermath of the war, and maintaining that all such admissions were within the existing United States ceiling for refugees from Near East and South Asia, the Bush and then Clinton Administrations admitted close to 10,000 Iraqi refugees into the United States between 1992 and 1994, many of them former war prisoners of the United States.[188]

Members of Congress soon raised a variety of concerns: that the former detainees were being resettled in cities across the United States at

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183 *See* CLYDE R. MARK, CONG. RESEARCH SERV., 91-156 F, IRAQ/KUWAIT CRISIS: CONGRESSIONAL ACTION THROUGH JANUARY 1991, at 1–2 (1991) (summarizing congressional action on the Persian Gulf crisis through January 1991, including sanctions against Iraq, authorization of force, military funding and aid, and arms transfers).

184 S. Con. Res. 5, 102d Cong. (1991).

185 This conclusion is based on a search of U.S. Statutes at Large (from 1991–1992) for any text containing "prisoner and Iraq or Gulf," as well as a search of ProQuest Congressional Publications between Jan. 1, 1990 and Jan. 1, 1992 for any text containing "prisoner and Iraq."

186 REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, NO. A/47/12 (1992), *available at* http://www.unhcr.org/3ae68c860.html.

187 *See* KATZMAN, *supra* note 173, at 2 (citing 8 U.S.C. §§ 1101–1107 (2012)); *see also* Serrano, *supra* note 179.

188 *See* KATZMAN, *supra* note 173, at 2; *see also* William Claiborne, *Resettling Iraqi POWs in U.S. Criticized; Lawmakers Urge Clinton to End 'Potentially Dangerous*,' WASH. POST, Aug. 25, 1993. In 1992, the United States admitted 3442 Iraqis—956 from Saudi camps, about 300 of whom were former soldiers and their families. KATZMAN, *supra* note 173, at 3. In 1993, the United States admitted 4600 Iraqis, including 533 former soldiers and their families. *Id.* In 1994, the United States admitted approximately 3000 Iraqis, including about 1000 former soldiers and their families. *Id.*

public expense (including in California, Florida, Texas, Michigan, and Illinois); that the U.S. government was thus placing the interests of these former Iraqi soldiers ahead of those of U.S. veterans; and that the Iraqis were a potential terrorist threat.[189] Ultimately more than eighty legislators called on President Clinton to end the "potentially dangerous and unfair policy of resettling captured Iraqi soldiers in the United States along with deserving civilian Iraqi refugees."[190] Administration officials tried to allay these concerns, pointing out that before entering the United States, the Iraqis had to be cleared by the FBI and sign a promissory note to reimburse the U.S. government for their transportation costs after they became self-sufficient.[191] Yet even under these circumstances, Congress took only the most limited action—a non-binding Sense of the Senate resolution expressing the Senate's view that no Iraqi ex-soldier be resettled in the United States unless the President certified to Congress that the individual had assisted the coalition after capture and had not committed war crimes.[192] While the Clinton Administration continued working to reassure Congress of the program's adequate checks, resettlement efforts pressed ahead. In 1994 alone, close to 5000 Iraqi refugees were resettled in the United States.[193]

VI. 2003 IRAQ WAR

Although the United States no longer holds any detainees in its custody in Iraq, the history of U.S. detention operations following the 2003 invasion there is still very much being written. Despite the extraordinary public attention focused on detention operations following the public revelations of the torture of U.S.-held prisoners

189 *See* KATZMAN, *supra* note 173, at 4; *see also* Claiborne, *supra* note 188.

190 *See* Claiborne, *supra* note 188 (internal quotation marks omitted); *see also id.* ("According to a State Department memorandum sent to congressional offices skeptical of the resettlement program, 'many of those persons had provided valuable services to U.S. forces in the aftermath of the war.'").

191 Serrano, *supra* note 179 ("They eventually were repatriated to Iraq under the auspices of the International Red Cross after Saddam Hussein issued a general amnesty. But 4,000 remained in the camps. Most apparently had surrendered after reading leaflets dropped by U.S. planes that guaranteed their safety.").

192 National Defense Authorization Act for Fiscal Year 1994, H.R. 2401, 103d Cong. § 1164 (1993) ("It is the sense of the Senate that no person who was a member of the armed forces of Iraq during the period from August 2, 1990 through February 28, 1991, and who is in a refugee camp in Saudi Arabia as of the date of enactment of this Act should be granted entry into the United States under the Immigration and Nationality Act unless the President certifies to Congress before such entry that such person—(1) assisted the United States or coalition armed forces after defection from the armed forces of Iraq or after capture by the United States or coalition armed forces; and (2) did not commit or assist in the commission of war crimes.").

193 UNITED NATIONS HIGH COMM'N FOR REFUGEES, IRAQI REFUGEE AND ASYLUM-SEEKER STATISTICS (2003), *available at* http://www.unhcr.org/3e79b00b9.pdf.

there—or perhaps because of these and other extraordinary features of U.S. operations[194]—there is as yet no final, official public report documenting the number and status of detainees held in U.S. custody in Iraq from 2003 to 2011, when the final U.S.-held prisoners were transferred or released.[195] There are, however, multiple official interim reports on various topics, as well as press reports based on periodic official statements, which make it possible to draw at least a rough sketch of the overall picture of U.S. prisoner operations in Iraq.

According to a Brookings Institute study of press reports, the United States held on the order of 90,000 detainees in Iraq between 2003 and 2010.[196] The numbers fluctuated substantially over the course of the conflict. In October 2003, for example, Defense Department investigations show that the United States held about 7000 prisoners at one of its main in-theater detention facilities at Abu Ghraib.[197] The number of U.S.-held detainees hit an apex in late 2007, with approximately 26,000 detainees (and another approximately 24,000 individuals in Iraqi government custody).[198] By May 2010, according to the U.S. Defense Department, the number was down to under 3000.[199]

While it is thus apparent that the United States was both capturing and releasing detainees throughout the period, to understand why it remains less than clear exactly how those decisions were made requires some brief background. As post-Abu Ghraib Pentagon investigations uniformly concluded, "pre-war planning [for Iraq did] not include[] planning for detainee operations."[200] While the Administration stated

194 For an account of the early legal and policy decision-making that shaped U.S. detention operations in Iraq, and set the conditions for the widespread abuses there, see Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L. J. 1255 (2006).

195 Charlie Savage, *U.S. Transfers Its Last Prisoner in Iraq to Iraqi Custody*, N.Y. TIMES, Dec. 17, 2011, at A11 [hereinafter Savage, *Iraqi Custody*]; *see also* Qassim Abdul-Zahra & Rebecca Santana, *Iraq: US Hands Over Detainees Save Hezbollah Agent*, BOS. GLOBE (Nov. 22, 2011), http://www.boston.com/news/world/middleeast/articles/2011/11/22/iraq_us_hands_over_detainees_save_hezbollah_agent ("The U.S. handed over all of the remaining detainees in U.S. custody in Iraq Tuesday, except for a Lebanese Hezbollah commander linked to the death of four American troops, Iraqi and American officials said.").

196 MICHAEL E. O'HANLON & IAN LIVINGSTON, IRAQ INDEX: TRACKING VARIABLES OF RECONSTRUCTION & SECURITY IN POST-SADDAM IRAQ 12 (Brookings Inst. ed. 2011).

197 JAMES R. SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 11, 59–60 (2004), *available at* http://www.defense.gov/news/aug2004/d20040824finalreport.pdf.

198 O'HANLON & LIVINGSTON, *supra* note 196, at 12; *accord* RAND REPORT, *supra* note 134, at 67, fig. 5.4.

199 U.S. DEP'T OF DEF., MEASURING STABILITY AND SECURITY IN IRAQ 46 (2010) [hereinafter DOD 2010 IRAQ REPORT], *available at* http://www.defense.gov/pubs/pdfs/June_9204_Sec_Def_signed_20_Aug_2010.pdf.

200 ANTHONY R. JONES, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND THE 205TH MILITARY INTELLIGENCE BRIGADE 24 (2004), *available at* http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf (marked "Unclassified").

publicly that it would only hold detainees under the protection of the Geneva Conventions,[201] the United States early in the conflict began housing thousands of detainees in Iraq it classified with a shifting range of terms unfamiliar in Geneva-based Army doctrine at the time: enemy combatants, unprivileged enemy combatants, security internees, criminal detainees, military intelligence holds, persons under U.S. forces control, and low-level enemy combatants.[202] Traditional categories such as prisoner of war were used for only a handful of the thousands of prisoners the United States held in its custody.[203] At the same time, Administration lawyers pursued novel interpretations of various Geneva provisions. For instance, Article 49 of Geneva IV broadly prohibits the removal of "protected persons from occupied territory."[204] Yet in the investigations following Abu Ghraib, it became clear that some prisoners had been removed from U.S.-occupied Iraq.[205] It also eventually became clear that U.S. forces in Iraq were holding prisoners without recording their identity or existence on official Army records, again a violation of Geneva treaty rules and U.S. implementing regulations.[206]

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201 *Briefing on Geneva Convention, EPW's and War Crimes*, U.S. DEP'T OF DEF. (April 7, 2003), http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2281.

202 GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 11–12 (2004), *available at* http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf (marked "Unclassified," with sections redacted) [hereinafter FAY REPORT]; DEP'T OF THE ARMY INSPECTOR GEN., DETAINEE OPERATIONS INSPECTION 44–47 (2004) [hereinafter DAIG REPORT] (unmarked, unclassified). Established military doctrine implementing the Geneva regime had recognized four categories of detainees: enemy POWs, retained personnel, civilian internees, and a catch-all "other detainee" category. *See* DAIG REPORT, *supra*, at 44–47; FAY REPORT, *supra*, at 11–12.

203 DEBORAH PEARLSTEIN, HUMAN RIGHTS FIRST, ENDING SECRET DETENTIONS 9–17 (Michael Posner ed., 2004) [hereinafter SECRET DETENTIONS], *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/EndingSecretDetentions_web.pdf; *Enemy Prisoner of War Briefing from Kuwait City*, U.S. DEP'T OF DEF. (May 8, 2003), http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2588.

204 Article 49 of the Fourth Geneva Convention categorically prohibits the forcible transfer or deportation of "protected persons" outside occupied territory. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force with respect to the United States Feb. 2, 1956) ("Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."); *see also* Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1; Memorandum from Jack L. Goldsmith, Assistant Attorney Gen., on the Permissibility on Relocating Certain "Protected Persons" from Occupied Iraq to Alberto R. Gonzales, Counsel to the President (Mar. 19, 2004) [Goldsmith Memorandum], *available at* http://www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf.

205 In March 2004, Assistant Attorney General Jack Goldsmith wrote a confidential memo to Alberto Gonzales, arguing that the CIA could secretly transfer prisoners out of Iraq, despite Article 49 of the Fourth Geneva Convention. *See* Dana, *supra* note 204; Goldsmith Memorandum, *supra* note 204.

206 SECRET DETENTIONS, *supra* note 203, at 7.

Despite the resulting gaps in public knowledge of some details, the significant fluctuation in the number of prisoners held make it clear that the United States was engaged in Iraq, as it had been in every previous conflict, in prisoner release, transfer, and repatriation efforts throughout the conflict. More, these arrangements proceeded under terms set almost entirely by the executive branch and America's international partners. For prisoners held in-country immediately following the collapse of the Baghdad regime in 2003, detainee policy was set in substantial part by the Coalition Provisional Authority (CPA), established in Iraq about one month after U.S. and allied forces took control of Baghdad on April 9, 2003.[207] While the CPA's actual institutional status remains uncertain—Congress understood it as a U.S. federal agency while the Army described it as an international organization run by a multinational coalition—the CPA was headed by a U.S. presidentially appointed civilian administrator and staffed by a mix of U.S. and allied military and civilian personnel.[208]

Beginning in 2004, when the Iraqi government re-established sovereign control, and continuing until 2008, detention operations were governed by United Nations Security Council Resolution (UNSCR) 1546, adopted pursuant to the Council's authority under Chapter VII of the United Nations Charter. UNSCR 1546 established the authority of a coalition of multinational forces to support the Iraqi government (MNF-I).[209] Under this authorization, U.S. military-led Task Force 134 (TF-134) had responsibility for U.S. detention operations in Iraq.[210]

While the description of who could be detained—and subject to what set of procedural protections—pursuant to these shifting authorities varied over time,[211] both CPA rules and Defense Department

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207 L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL32370, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES (2005) [hereinafter HALCHIN CRS REPORT], *available at* http://fas.org/sgp/crs/mideast/RL32370.pdf. The CPA was charged with a broad mission: "to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future (including by advancing efforts to restore and establish national and local institutions for representative governance) and facilitating economic recovery, sustainable reconstruction and development." *Id.* at 1 (quoting U.S. OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS PURSUANT TO SECTION 1506 OF THE EMERGENCY WARTIME SUPPLEMENTAL APPROPRIATIONS ACT, 2003 (PUBLIC LAW 108-11), at 2 (2003)).

208 *Id.* at 5 (noting that it was unclear whether the CPA was established under the President's authority, the U.S. military's authority, or pursuant to UN Security Council authorization).

209 S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004); *see also* Brian J. Bill, *Detention Operations in Iraq: A View from the Ground*, 86 INT'L L. STUD. 411, 416 (2010). This initial resolution was set to expire in 2005; subsequent resolutions extended its authority until the end of 2008. *See* S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007); S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006); S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 8, 2005).

210 Bill, *supra* note 209, at 417–18.

211 In its initial detention policy memorandum, issued in June 2003, the CPA identified two categories of detainees: (1) security detainees, who were to be provided periodic administrative

implementing directives provided for some form of periodic review of the continued need for detention.[212] Release decisions could be made at multiple levels of review, with final release recommendations made—if not earlier—by a joint U.S.-Iraqi committee, and releases carried out subject to the approval of the U.S. Deputy Commanding General for Detention Operations.[213]

Throughout the U.N. mandate period, both detention and release of prisoners were commonplace. At times, releases were pursued for relatively isolated reasons. The Iraqi government, for example, announced that it intended to release some 2000 prisoners in time for the Eid holiday in 2006 as a goodwill gesture, and U.S. commanders felt little choice but to help comply.[214] More common were regular recommendations for and approvals of release, a rate that varied during the period (depending on the applicable review systems, the strategic environment, and so forth) from 12–15% of detentions reviewed early in the period, to 25–40% of detentions reviewed toward the end of the United Nations-authorized detention operations.[215] Beyond this, some detainees suspected of criminal activity were transferred to the Iraqi criminal justice system for prosecution.[216] Further, as U.S. counterinsurgency strategy in Iraq evolved through 2007, U.S. commanders pursued the creation of local "reconciliation" centers, where recently released detainees would be provided civic and vocational training. Both these post-detention support opportunities

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hearings, including by a joint Iraqi-U.S. Combined Review Board, based on Geneva Convention provisions regarding detention during occupation; and (2) criminal suspects, who were to be transferred to Iraqi domestic authorities for prosecution. RAND REPORT, *supra* note 134, at 51–52. From 2004 to 2008, under the UNSCR 1546 scheme, coalition forces were permitted to pursue "internment where this is necessary for imperative reasons of security," again modeled after Geneva rules for circumstances of occupation. S.C. Res. 1546, *supra* note 209, at 11. TF-134's detention operations soon expanded to include not only the categories of detainees recognized by the CPA, but also individuals who were wanted for questioning more broadly, or who were perceived as obstructing military operations. RAND REPORT, *supra* note 134, at 58.

212 *See* U.S. DEP'T OF DEF., DIRECTIVE 2310.01E: THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM ¶ 4.8 (2006) [hereinafter DoDD 2310.01E], *available at* http://www.defense.gov/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf; L. PAUL BREMER, COAL. PROVISIONAL AUTH., MEMORANDUM NO. 3 (REVISED): CRIMINAL PROCEDURES, CPA/MEM/27 (2004) [hereinafter CPA MEMO 3], *available at* http://www.iraqcoalition.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf. For a description of the procedures followed in practice, see Bill, *supra* note 209.

213 Bill, *supra* note 209, at 427–28, 431.

214 RAND REPORT, *supra* note 134, at 59 (reporting these releases took place even as TF-134 struggled, sometimes unsuccessfully, to keep track of its remaining prisoners).

215 Bill, *supra* note 209, at 432.

216 RAND REPORT, *supra* note 134, at 60 (noting that the Iraqi criminal justice system suffered a variety of problems and did not always succeed in prosecution justifying continued custody).

and prisoner release ceremonies in particular became important tools of counterinsurgency strategy touted by U.S. officials to the Iraqi press.[217]

After 2004, it can hardly be doubted that Congress was acutely aware of U.S. detention operations in Iraq. The revelations of torture at Abu Ghraib had been followed by an intense flurry of legislative activity, hearings and legislation, geared toward addressing issues of prisoner treatment.[218] Congress also engaged vigorously over what was to be done about an insurgency that appeared to be gaining strength. Yet on the question of who could be transferred or released from U.S. custody in Iraq under the baseline processes in effect from 2003 to 2008, Congress was, characteristically, silent. Perhaps even more remarkably, Congress' relative non-involvement on detention issues held even as the United States undertook negotiations beginning in 2008 over the framework agreement for continued U.S. presence in—and eventual withdrawal from—Iraq. With the question of what to do with the remaining detainees regularly on the front page of the *New York Times*,[219] and the operative U.N. mandate for U.S. forces in Iraq set to expire at the end of that year,[220] Congress did not hesitate to take on a range of issues regarding the terms of any agreement with the still fragile Iraqi government for continued U.S. participation.[221] Members of Congress proposed a series of measures demanding that the President get congressional authorization for any agreement he might reach.[222] Indeed, Congress succeeded in enacting several conditions on the expenditure of defense funds in 2007 and 2008 bearing directly on the agreement—conditions prohibiting the use of any funds to enter into a

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217 *Id. at* 72–74.

218 *See, e.g.*, Detainee Treatment Act of 2005, H.R. 2863, 109th Cong. § 1003(a) (2005) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."); *see also* Harold Hongjuh Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2006) (describing activities surrounding passage of legislation).

219 *See, e.g.*, Alissa J. Rubin, *A Puzzle Over Prisoners as Iraqis Take Control*, N.Y. TIMES, Oct. 25, 2008, at A1.

220 S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007); *see also* Press Release, The White House, Fact Sheet: U.S.-Iraq Declaration of Principles for Friendship and Cooperation (Nov. 26, 2007), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071126-1.html.

221 *See* MATTHEW C. WEED, CONG. RESEARCH SERV., RL34568, U.S.-IRAQ AGREEMENTS: CONGRESSIONAL OVERSIGHT ACTIVITIES AND LEGISLATIVE RESPONSE 7 (2009), *available at* http://fpc.state.gov/documents/organization/125517.pdf (listing proposed and enacted legislation).

222 As senators, both Vice President Biden and Secretary of State Clinton introduced legislation to require consultation with, and approval from, Congress before the Agreements with Iraq were finalized. Then-Senator Obama was a co-sponsor of then-Senator Clinton's bill, S. 2426, 110th Cong. (2007).

permanent basing rights agreement with Iraq;[223] prohibiting the use of funds for any agreement that would subject members of the U.S. Armed Forces to the jurisdiction of Iraq criminal courts or punishment under Iraq law;[224] and requiring the post hoc reporting to Congress of any agreement reached with Iraq bearing on those subjects, or on the rules of engagement under which U.S. troops operate in Iraq, or on any longer term security commitment with Iraq.[225] The post hoc reporting provision even required "[a]n assessment of authorities under the agreement" for U.S. and coalition troops "to apprehend, detain, and interrogate prisoners and otherwise collect intelligence."[226] Yet none of these conditions in any way restricted the military's authority to continue its prisoner release and repatriation programs as it saw fit.

Ultimately, the United States negotiated two significant instruments with Iraq as executive agreements on November 18, 2008: the Strategic Framework Agreement for a Relationship of Friendship and Cooperation Between the United States of America and the Republic of Iraq,[227] and an Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq (the Security Agreement).[228] The impact of these agreements on U.S. detention operations in Iraq would be substantial. Pursuant to the Security Agreement, U.S. forces would no longer be permitted to detain any person unless Iraqi officials requested it, or the arrest was otherwise in accordance with Iraqi law.[229] Any detainees picked up pursuant to these rules would have to be turned over to the Iraqi authorities within twenty-four hours of their arrest.[230] Further, the United States committed to "release all the remaining detainees in a safe and orderly manner unless otherwise requested by [the Iraqi government]."[231] Pursuant to the terms of the Security Agreement, the United States released or transferred more than 8000

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223 Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 680, 121 Stat. 1844, 2359 (2007.).

224 *Id.* § 612.

225 Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 1212(a)(1), 122 Stat. 4356, 4627 (2008).

226 *Id.* § 1212(b)(4).

227 Strategic Framework Agreement for a Relationship of Friendship and Cooperation Between the United States of America and the Republic of Iraq, U.S.-Iraq, Nov. 17, 2008, *available at* http://www.usf-iraq.com/wp-content/uploads/2012/12/security-agreement-2.pdf.

228 Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008 [hereinafter Security Agreement], *available at* http://www.state.gov/documents/organization/122074.pdf.

229 *Id.* art. 22 ¶ 1.

230 *Id.* art. 22 ¶ 2.

231 *Id.* art. 22 ¶ 4.

prisoners between January 2009 (when the Security Agreement went into effect) and June 2010.[232]

It was only beginning in 2009, as U.S. operations in Iraq drew to a close, that Congress began to focus more directly on prisoner transfer and release operations. But in no case did Congress impose actual restrictions on U.S. release and transfer efforts, which continued apace. Most concrete among congressional activities during this period was to impose additional post hoc reporting measures in 2009, including for the first time requiring the Administration to keep it informed of how many prisoners the United States transferred or released from its custody in Iraq.[233] As the Administration worked through the final prisoners in its custody in 2011, several members of Congress expressed concern about the handling of a few discrete cases.[234] Some had argued that certain U.S.-held prisoners in Iraq, suspected of criminal activity, should be transferred to Guantanamo Bay and prosecuted in military commissions, rather than left to the Iraqi authorities for prosecution, even if it meant secreting the detainees out of the country against the wishes of the new Iraqi Prime Minister.[235] Yet these expressions of concern were ultimately unproductive; Congress took no particular action on individual cases either. And by the end of December 2011, the United States was out of the detention business in Iraq.[236]

CONCLUSION

For the majorities of Congress who have voted repeatedly to embrace stark restrictions on the President's authority to transfer,

232 DOD 2010 IRAQ REPORT, *supra* note 199. DOD filed reports with Congress providing this information in September and December 2009, and in March and July 2010, which are all available online. *See id.* While press reports make clear that additional detainees were released following July 2010, there is no similar record of subsequent reports to Congress.

233 *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1227(b)(4), 123 Stat. 2190, 2526 (2009) (requiring assessment of, inter alia, total number of detainees held by the United States in Iraq, number of detainees transferred to Iraqi authorities, the number of detainees who were released from U.S. custody and the reasons for their release, and "the number of detainees who having been released in the past were recaptured or had their remains identified planning or after carrying out attacks on United States or Coalition forces").

234 *See, e.g.*, Liz Sly & Peter Finn, *U.S. Hands over Hezbollah Prisoner to Iraq*, WASH. POST (Dec. 16, 2011), http://www.washingtonpost.com/world/national-security/us-hands-over-hezbollah-prisoner-to-iraq/2011/12/16/gIQABm2oyO_story.html (reporting several Members' concern over the transfer to Iraqi criminal authorities of Ali Musa Daqduq, a senior member of the Lebanese Shiite Hezbollah movement, suspected of killings five U.S. soldiers in 2007).

235 *See, e.g.*, *id.*

236 Savage, *Iraqi Custody*, *supra* note 195; *see also* Abdul-Zahra & Santana, *supra* note 195 ("The U.S. handed over all of the remaining detainees in U.S. custody in Iraq Tuesday, except for a Lebanese Hezbollah commander linked to the death of four American troops, Iraqi and American officials said.").

prosecute, or release prisoners at Guantanamo Bay in recent years, the motives are undoubtedly varied. Some no doubt harbor sincere concerns about the security impact of releasing certain individual detainees, even to countries far removed from the United States—particularly when those individuals have stated they remain committed to doing America harm, and particularly when those individuals could only be sent to countries still in sufficient turmoil to lack well established security systems themselves.[237] Yet without discounting the significance of such concerns, history demonstrates that it is precisely such risks the United States has repeatedly embraced in order to reap the greater benefit of bringing wars to an end.

For many, the response (post-September 11) to any argument from historical example has been to insist on the uniqueness of current circumstances. Al-Qaeda and its affiliates are a different kind of enemy; the war we have been fighting since 2001 is a different kind of war.[238] In one sense, this is, of course, true.[239] But in key respects, there are important parallels. 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

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237 *See, e.g.*, Stacy Kaper, *Obama, Congress Bring Guantanamo Bay Prison Closer to Closed*, NAT'L J. (Dec. 23, 2013), http://www.nationaljournal.com/defense/obama-congress-bring-guantanamo-bay-prison-closer-to-closed-20131223 ("'While calling for the closure of Guantanamo Bay makes a great campaign talking point, doing so will undermine good intelligence collection and increase the risk that the dangerous detainees who are held there will be back on the streets plotting to kill Americans . . . .'" (quoting Senator Saxby Chambliss)). Others may vote in favor of such restrictions out of a sense of the necessity of political compromise; the restrictions have invariably been attached to mammoth defense spending bills, essential to fund a vast array of U.S. defense and security operations of which Guantanamo is but a small part. *See* Press Release, Statement by the President on H.R. 3304 (Dec. 26, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304.

238 *See, e.g.*, Memorandum from Alberto Gonzales, Counsel to the President, to President George W. Bush (Jan. 25, 2002), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf.

239 Indeed, many have argued that outside Iraq and Afghanistan, the United States' insistence on treating its engagements with al-Qaeda and affiliates as a "war" at all is without justification in any legal sense contemplated by the Geneva Convention regime; in combating terrorist organizations, the argument goes, the criminal law, not the law of war, is the appropriate framework. *See, e.g.*, NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 95–97 (2010).

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.[240]

Of equal relevance, we returned prisoners not only to state enemies, but also to non-state enemies as well.[241] In Vietnam, we at times unilaterally released Viet Cong prisoners, taking a calculated risk that any short-term tactical burden we might bear was outweighed by the long-term strategic benefit to the United States of acting, and being seen to act, in a manner consistent with the law.

History need not be understood as constitutionally binding to offer useful insights into contemporary problems. It may at the least offer reassurance that the United States has long experience in bringing wartime detention to an end.

240 *See generally* JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF AMERICAN NATIONAL SECURITY POLICY DURING THE COLD WAR (Oxford Univ. Press rev. ed. 2005).

241 Perhaps, a critic might respond, but the Viet Cong did not have access to nuclear or biological weapons, or modern means of delivering them, as terrorist groups of today might. *See, e.g.*, BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 3–4, 13–14 (2006); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1026–27 (2003). Yet, national security scholars and policymakers have been occupied with concerns that a non-state actor might acquire and deploy a weapon of such destructive potential since the Vietnam era and before. *See, e.g.*, U.S. OFFICE OF TECH. ASSESSMENT, NUCLEAR PROLIFERATION AND SAFEGUARDS, at iii, 30 (1977), *available at* https://www.princeton.edu/~ota/disk3/1977/7705/7705.PDF (concluding that "a clever and competent [non-state] group could design and construct a device which would give a significant nuclear yield"); *see also* JOHN MCPHEE, THE CURVE OF BINDING ENERGY: A JOURNEY INTO THE AWESOME AND ALARMING WORLD OF THEODORE B. TAYLOR (1974) (detailing threat of nuclear terrorism); Jeffrey T. Richelson, *Defusing Nuclear Terror*, BULL. ATOMIC SCIENTISTS, Mar./Apr. 2002, at 38, 39–43 (citing 1963 national intelligence estimate called The Clandestine Introduction of Weapons of Mass Destruction into the U.S. and describing series of meetings in 1972 hosted by then Chair of U.S. Atomic Energy Commission regarding prospect of terrorist attempts to steal weapons-grade material to make bomb for use against United States).