THE DOUBLE-EDGED SWORD: DEMOCRATIC HISTORIES AND METHODS OF NEGOTIATING WITH TERRORISTS

Lisa M. Hailey*

I. INTRODUCTION ........................................................................................................... 61

II. ANALYSIS OF THE UNITED STATES’ NEGOTIATION POLICIES AND ACTIONS .......................................................................................................................... 63
   A. United States’ History of Negotiations with Terrorists ........................................... 64
      1. The Vietnam War ................................................................................................. 64
      2. The Iran-Contra Affair ........................................................................................ 66
         a. Background ....................................................................................................... 66
         b. Legal Ramifications .......................................................................................... 69
   B. Analysis of the United States’ Negotiations in Exchange for the Release of Sgt. Bergdahl .................................................................................................................... 70

III. ANALYSIS OF THE UNITED KINGDOM’S NEGOTIATION POLICIES AND ACTIONS .................................................................................................................. 71
   A. The Executive’s Powers .......................................................................................... 71
   B. The Irish Republican Army ..................................................................................... 72
   C. The United Kingdom’s Response to and Negotiations with the Irish Republican Army ............................................................................................................................. 73
   D. The Effect of the Belfast Agreement ....................................................................... 75

IV. ANALYSIS OF ISRAEL’S NEGOTIATION POLICIES AND ACTIONS .............................................................................................................................. 75
   A. The Oslo Accord ...................................................................................................... 77
   B. Gilad Shalit .............................................................................................................. 78
   C. Does Jewish Tradition Require Negotiation and Ransom? .................................... 79

V. COMPARISON OF THE UNITED STATES’, THE UNITED KINGDOM’S, AND ISRAEL’S NEGOTIATION POLICIES AND ACTIONS .................................................................................. 81

VI. CONCLUSION: FORECAST OF POTENTIAL LEGAL RAMIFICATIONS DUE TO PRESIDENT OBAMA’S NEGOTIATIONS BASED ON THE FOREGOING .................................................................................. 84

I. INTRODUCTION

“We do not negotiate with terrorists.” On May 31, 2014, Sergeant Bowe Bergdahl, the only American prisoner of war (POW), was released by his captors after five years of captivity.1 Sgt. Bergdahl’s release came at

* Lisa M. Hailey, Florida State University Class of 2012, Nova Southeastern University Shepard Broad Law Center Class of 2016.

a steep price. Five Taliban members were released from Guantanamo Bay in exchange for Sgt. Bergdahl. All five Taliban members were detained for war crimes and terrorism against Americans. President Obama negotiated with Sgt. Bergdahl’s captors as well as with the government of Qatar to determine the terms of the exchange. Qatar has agreed to house the five Taliban members within the country for one year, and then monitor them once the year is up.

As one might expect, the return home of an American POW after five years of captivity should spark parades, celebration, and praise. However, President Obama is under fire for his actions in negotiating Sgt. Bergdahl’s release. Dozens of high-ranking politicians throughout the country are not only furious about the exchange, but also claim that President Obama broke the law in the process. President Obama faced potential impeachment due to his efforts to uphold an age-old American tradition of never leaving a soldier behind.

Other nations such as the United Kingdom and Israel stand against negotiating with terrorists, but have done so anyway in a variety of situations. After years of violent episodes in Northern Ireland and other parts of Great Britain, the United Kingdom actually reached a favorable result with the Irish Republican Army (IRA) and successfully established the nation of Northern Ireland. On the other hand, Israel has taken a variety of actions, including negotiations and violence, against several enemies who wish to rid Israel from the map.

This article will discuss the legal basis that an executive has in negotiating with “terrorists” as well as limitations on such power. Additionally, this article will compare and contrast several instances in which the United States, the United Kingdom, and Israel have negotiated with terrorists, and the social and legal ramifications of such negotiations. First, this article will address the United States’ policies and powers that the president has in negotiating with terrorists as well as historical examples of

2. Id.
3. Id.
4. Id.
5. Drehle, supra note 1, at 30.
6. Id.
7. Id.
9. Id.
10. Id.
negotiations. Next, it will discuss the United Kingdom’s policies and powers that the Prime Minister has in negotiating with terrorists as well as how it was able to reach a peaceful negotiation with the IRA. Furthermore, it will discuss Israeli police and powers the Prime Minister has in negotiating with terrorists, as well as analyzing the Oslo Accords with Palestine, and the release of Gilad Shalit. Finally, this article will compare and contrast three negotiation situations from the United States, the United Kingdom, and Israel. These negotiations, as well as U.S. policy, will be used to predict what legal ramifications President Obama faces for negotiating the exchange for Sgt. Bergdahl’s release.

II. ANALYSIS OF THE UNITED STATES’ NEGOTIATION POLICIES AND ACTIONS

Article II of the United States Constitution grants the executive the power to be Commander in Chief of the nation’s military. Additionally, the President has the power to pardon, regardless of Congressional approval. Throughout U.S. history, this power enumerated in Article II has given the executive wide latitude in which to act under this section.

The law that so many congressmen have accused President Obama of violating in securing Sgt. Bergdahl’s release is from the National Defense Authorization Act of 2013, Section 1033. Under Section 1033, the Secretary of Defense must notify Congress thirty days or more prior to a transfer or release of a prisoner of Guantanamo Bay. Part of the criticism of President Obama is that he himself, signed the National Defense Authorization Act. There is no evidence that President Obama or the Secretary of Defense gave such notice. The constitutionality of this law in general is questionable. Because of the executive’s power to pardon criminals, any restriction on the pardon power might be unconstitutional.

---

12. Id.
15. Id.
A. United States’ History of Negotiations with Terrorists

1. The Vietnam War

In an analogous situation, the United States once fought the Viet Cong in South Vietnam during the Vietnam War.17 The Viet Cong was an organization similar to the Taliban in that they were in a power struggle to take over Vietnam.18 From 1959–1975, the United States was involved in this conflict.19 The capture of United States military members was a high priority to the South Vietnamese. Nicknamed “hotels,” vast POW compounds were used as prisons for hundreds of Americans who were captured.20 There is no exact figure for the amount of U.S. soldiers who were held captive during the Vietnam War, but it ranges up to 1205.21 Prisoners held in “hotels” were subject to relentless physical and mental torture inflicted by their captors.22 American captives endured brutal physical torture, such as beatings, flaying with whips, and stretching joints with rope.23 Additionally, the Vietnamese employed psychological torture tactics, such as cutting off communications with other prisoners and family members.24 It was not uncommon for a U.S. POW to be held for a period of several years.25 Because the South Vietnamese housed the “hotels” in well-defended areas, rescue missions were overwhelmingly unsuccessful.26

Capturing U.S. servicemen very much characterizes the Vietnamese tactical position in the War. Since rescue was not a viable option in returning the POWs home, the U.S. was forced to take a different route.

Arizona Senator and one-time presidential candidate, John McCain, is in a unique position for analyzing the legality of negotiations with the


21. Id.

22. Id.

23. Id.

24. Id.


26. Id.
enemy. Senator McCain was a POW in Vietnam for five and a half years.\textsuperscript{27} He addresses his value as a bargaining tool of the Vietnamese in his memoir, \textit{Faith of My Fathers}:

They never seemed to mind hurting us, but they usually took care to not let things get so out of hand that our lives were put in danger. We strongly believed some POWs were tortured to death, and most were seriously mistreated. But the Vietnamese prized us as bargaining chips in peace negotiations, and, with tragic exceptions, they usually did not intend to kill us when they used torture to force our cooperation. In my case, I felt pretty certain that no matter how rough my periodic visits to the interrogation room were, my father's rank gave me value as a potential propaganda opportunity and as a proffer in peace negotiation, and thus restrained my captors from killing me.\textsuperscript{28}

Senator McCain was the son of a U.S. Navy Admiral and was also a Navy officer himself.\textsuperscript{29} Because of his father's military status and rank, Senator McCain was spared of death during his captivity. The Vietnamese had a great incentive to keep the highly ranked servicemen, or servicemen from prestigious military families, because it was only a matter of time until they could be used to bargain with the U.S. Failed rescue missions only incentivized the Vietnamese more.

There was severe political pressure on the President during the Vietnam War to bring all of the POWs home.\textsuperscript{30} In 1972, a tentative ceasefire agreement was reached with the North Vietnamese.\textsuperscript{31} The agreement called for a halt on fighting and for the U.S. to withdraw from Vietnam in exchange for the return of all captive American POWs.\textsuperscript{32} A separate agreement was to be negotiated for the future of South Vietnam politically; however, these agreements deteriorated.\textsuperscript{33} In 1973, negotiations finally yielded the Paris Peace Accord in which the core of the agreement

\begin{footnotes}
\item[29.] McCain, supra note 27, at 5.
\item[30.] See generally Cole, supra note 17.
\item[32.] Id.
\item[33.] Id.
\end{footnotes}
was the same as the negotiations of the year before.\textsuperscript{34} Although the 1973 negotiation yielded the release of captured U.S. soldiers, it was met by criticism from political conservatives.\textsuperscript{35} The criticism was not that the U.S. negotiated with the Vietnamese, nor because they believed that negotiation with the enemy was against U.S. policy or law, but because negotiations like this had not taken place since the very early 1900s.\textsuperscript{36} It is reported that around 1300 U.S. soldiers were never released from Vietnamese captivity.\textsuperscript{37}

2. The Iran-Contra Affair

a. Background

In 1979, the United States and Iran had an amicable relationship and Iran was the United States' ally in the Middle East.\textsuperscript{38} However, when the Shah was expelled from Iran the Ayatollah ushered in the Revolution in Iran, and turned it into an "Islamic Republic."\textsuperscript{39} Iran became openly anti-American following the Revolution.\textsuperscript{40} The Ayatollah publicly severed ties with the United States and declared Israel as an illegitimate state.\textsuperscript{41} During the 1980s, Iran was viewed as a state that funded terrorism and the U.S. employed all of its influence to ensure that Iran was prevented from buying arms.\textsuperscript{42} The soured relationship between the United States and Iran took a hostile turn on November 4, 1979.\textsuperscript{43} On that day, a radical group took over the U.S. Embassy in Tehran, Iran.\textsuperscript{44} Fifty-three hostages were taken and the Iranian government tacitly showed signs of support for the radical group.\textsuperscript{45}

\begin{itemize}
  \item \textsuperscript{34} Paris Accords, U.S.-Viet. art. II, Jan. 27, 1973, 24 U.S.T. 1699.
  \item \textsuperscript{35} Cole, supra note 17.
  \item \textsuperscript{36} See generally id.
  \item \textsuperscript{37} Id.
  \item \textsuperscript{38} Understanding the Iran-Contra Affairs, The Beginning of the Affair, BROWN.EDU, http://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/i-thebeginning.php (last visited Oct. 17, 2014) [hereinafter Beginning of the Affair].
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Understanding the Iran-Contra Affairs, BROWN.EDU, http://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/index.php (last visited Oct. 17, 2014) [hereinafter Iran-Contra Affairs].
  \item \textsuperscript{41} See Understanding the Iran-Contra Affair, Iran Timeline, BROWN.EDU, http://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/timeline-iran.php (last visited Oct. 17, 2014) [hereinafter Iran Timeline].
  \item \textsuperscript{42} Id.
  \item \textsuperscript{43} Iran Timeline, supra note 41.
  \item \textsuperscript{44} Beginning of the Affair, supra note 38.
  \item \textsuperscript{45} Id.
\end{itemize}
The Iranian extremist groups held hostages in Lebanon. Among the hostages held in Beirut, Lebanon, was CIA chief William F. Buckley, and President Reagan needed to find a way to bring the hostages home.

Also occurring at this time was a political uprising in Nicaragua by Contras. President Reagan was on a mission to democratize the world and the Nicaraguan plight was near and dear to his heart. However, in the aftermath of the Vietnam War, the American public was wary of foreign intervention in the Nicaragua/Contra situation. In 1982, Congress passed the Boland Amendment, which barred "the use of funds 'for the purpose of' overthrowing the government of Nicaragua or provoking a war between Nicaragua and Honduras." In 1984, the Boland Amendment was strengthened to the point where any type of aid to the Contras was illegal.

President Reagan enlisted the help of National Security Advisor Robert McFarlane to find a way around Boland to fund the Contras. More specifically, President Reagan requested that McFarlane "keep the [rebels alive] body and soul." Oliver North, a National Security Council member, reported directly to McFarlane and was seen as the mastermind behind the Iran-Contra Affairs, and allegedly gave the Contras financial aid.

McFarlane convinced President Reagan that there was a solution to both the Iran and Contra problems. In order to free American hostages held by Iranians, the United States would sell arms to Iran. In return, Iran

---

46. See generally id.
47. Id.
50. Nicaragua Timeline, supra note 48.
51. Id.
52. Id.
54. Id.
56. Beginning of the Affair, supra note 38.
57. Id.
would pay into a privately-owned bank account. The funds would be partially used for expenses in brokering the deal, but largely to fund the Contras. Hostages would be freed, the Contras would be funded, and sour relations between the United States and Iran would improve. The only pitfall to this entire exchange is that it violated the law. At that time, there was an embargo against selling arms to Iran. Furthermore, the Boland Amendment prohibited fundraising for the Contras.

In 1985, Israel was brought into the affair between Iran and the United States. Thereafter came the idea to sell U.S. arms to Iran via Israel. Israel gave Iran their own TOW missiles and the United States gave Israel replacement TOWs. Negotiations took place between the National Security Council, representatives from Iran, and representatives from Israel. The three parties were working towards reaching an agreement on an arms deal in exchange for the release of American hostages. In order to transact the deal, the Stanford Technology Trading Group (Enterprise) was established by the National Security Council and an account was opened in an Enterprise-owned Swiss bank; this account was used to deposit Iranian funds. In 1986, President Reagan signed a presidential decree that allowed an arms exchange through the Enterprise account, releasing the United States from liability.

On July 1, 1985, President Reagan gave a speech concerning the American hostages in Lebanon:

59. Id.
60. American Experience, supra note 49.
61. See Nicaragua Timeline, supra note 48.
62. Beginning of the Affair, supra note 38.
63. Id.
64. See generally TOW 2 Wire-Guided Anti-Tank Missile, United States of America, ARMY-TECNOLOGY.COM, http://www.army-technology.com/projects/tow/ (last visited Oct. 18, 2014) (TOW is commonly used to refer to a heavy anti-tank missile used in anti-armour, anti-bunker, anti-fortification, and anti-amphibious landing roles).
65. Iran Timeline, supra note 41.
66. See Beginning of the Affair, supra note 38; see also Expansion and the End, supra note 58.
67. See generally Beginning of the Affair, supra note 38; see also Expansion and the End, supra note 58.
68. See generally Beginning of the Affair, supra note 38; see also Expansion and the End, supra note 58.
69. Iran Timeline, supra note 41.
No Rewards for Terrorists. This drama has reminded us how precious and fragile are the freedoms and standards of decency of civilized societies; how greatly civilized life depends on trust in other human beings. But how those values we hold most dear must also be defended with bravery, a bravery that may lie quiet and deep but that will rise to answer our call in every time of peril. Freedom, democracy and peace have enemies. They must also have steadfast friends. The United States gives terrorists no rewards and no guarantees. We make no concessions. We make no deals. Nations that harbor terrorists undermine their own stability and endanger their own people. Terrorists be on notice: we will fight back against you in Lebanon and elsewhere. We will fight back against your cowardly attacks on American citizens and property.70

However, behind closed doors, President Reagan was fully rewarding the Iranians for their acts of terror. The first arms exchange occurred on August 20, 1985.71 The United States gave Iran ninety-six TOW missiles; however, Iran failed to release any hostages.72 A second exchange was arranged for September 15, 1985 in which the United States sent 408 TOW missiles and Iran finally secured the release of Benjamin Weir, an American hostage.73 The next month, 1000 TOW missiles were sent to Iran and again no hostages were released.74

b. Legal Ramifications

In November 1986, a Lebanese newspaper published an article informing the world of the Iran-Contra Affair.75 President Reagan, along with his enlisted agents, was exposed for violating U.S. law.76 This revelation triggered Congress to investigate and hold hearings on the matter.77 National Security Advisor Robert McFarlane pled guilty to four

71. Iran Timeline, supra note 41.
72. Beginning of the Affair, supra note 38.
73. Iran Timeline, supra note 41.
74. Expansion and the End, supra note 58.
75. Iran Timeline, supra note 41.
76. Id.
misdemeanors of withholding information from Congress, was sentenced to two years of probation, 200 hours of community service, and a fine of $20,000. President Reagan later pardoned McFarlane.

National Security Council member Oliver North faced an even more grim punishment. North had the reputation of being the brains behind the Iran-Contra Affair. Among the twelve counts against North were obstruction, making false statements to Congress, aiding the Contras, and making false reports on Iran arms deals. In his trial, North defended that his actions were a result of commands from his supervisors. Moreover, North claimed that President Reagan approved of diverting the Iranian funds to the Contras. Other than North's testimony, there was no other evidence that President Reagan was aware of, or authorized the use of, Iranian funds to be diverted to the Contras. President Reagan was never subpoenaed in North's trial. North was found guilty of several of the counts against him and was sentenced to two years of probation, 1200 hours of community service, and a fine of $150,000. North appealed his conviction and the U.S. Court of Appeals for the District of Colombia reversed.

B. Analysis of the United States' Negotiations in Exchange for the Release of Sgt. Bergdahl

Presently, with the conflicts in Afghanistan and Iraq, the instances of U.S. soldiers being held captive are almost non-existent. Sgt. Bergdahl was the only U.S. soldier in captivity at the time of his release. However, the political climate surrounding Sgt. Bergdahl's release is much more hostile because of the five Taliban members who were released from Guantanamo Bay in exchange for his freedom. President Obama has initiated an exit

---

78. Id.
79. Id.
80. See generally Oliver North Profile, supra note 55.
81. Id.
82. Id.
83. Id.
84. Id.
85. Oliver North Profile, supra note 55.
86. Id.
87. Id.
88. Id.
89. Drehle, supra note 1, at 28.
90. Id.
strategy for the U.S. Mission in Afghanistan. Although it is unsettling that five Taliban members are free in exchange for one soldier, who may have walked away from his unit, it is not nearly as steep of a cost as in the examples above. President Nixon agreed to a ceasefire in the Vietnam War in order to bring home POWs. President Reagan gave thousands of arms to a country that openly hates the United States and everything it represents. When examined in light of historical considerations, President Obama secured a great deal in order to assure the release of Sgt. Bergdahl.

President Nixon’s efforts to come to an agreement for a ceasefire and bring hundreds of POWs home after years of captivity were seen as a political victory. President Reagan only suffered punishment in the form of public opinion for his role in the Iran-Contra Affair. President Reagan had participated in a negotiation with enemy countries that violated the Boland Amendment as well as the arms embargo against Iran.

President Obama, by contrast, legally exercised his pardoning power enumerated in Article II of the Constitution to arrange an exchange for the release of the sole American POW in Afghanistan. Just like his presidential predecessors, President Obama did not face legal repercussions for his prisoner swap.

III. ANALYSIS OF THE UNITED KINGDOM’S NEGOTIATION POLICIES AND ACTIONS

A. The Executive’s Powers

The United Kingdom’s executive branch differs from the United States’ executive branch in a few key areas. First, the British Prime Minister is not only the head of the executive, but also is the leader of the majority party in the legislature. Despite this, it is often said the president of America is the “world’s most powerful person.” The British Prime Minister may dismiss, appoint, or shuffle cabinet members, and may also withhold information from the Houses of Parliament as he or she sees fit.

91. Id.
93. American Experience, supra note 49.
94. Id.
96. Id.
97. Id.
The political culture in the United Kingdom is stemmed from the monarchy. Unlike the United States, the Legislature in the United Kingdom is not given strict parameters on which it has power. The Prime Minister is the one who molds the legislature into the direction that the majority party wants it to go in.

B. The Irish Republican Army

The United Kingdom has extensive experience in negotiating with terrorists. In the 1920s, the British Parliament separated Ireland into two parts: the Irish Republic and Northern Ireland. The Irish Republic was awarded independence and Northern Ireland was to be a part of Great Britain. Not only was there a geographical divide between the Irish Republic and Northern Ireland, but there was also a religious divide. The Irish Republic was almost all Protestant, while Northern Ireland was Catholic. After the division, growing unrest spread over Northern Ireland. The IRA, an organization which used violence to achieve its political goals, began attacks on the Irish Republic and even on the Great Britain mainland. The IRA was made up of Catholics who were fighting against religious discrimination and also aimed to unify Ireland and become independent from Great Britain.

The history of the IRA and the United Kingdom is marked with violence and bloodshed. January 30, 1972 will forever be referred to by citizens of the British Isles as “Bloody Sunday.” British soldiers had been deployed to Northern Ireland since 1969 to monitor violent outbreaks and keep the peace. A crowd formed in Londonderry, Northern Ireland,

98. Id.
99. Id.
100. See generally Trueman, supra note 95.
102. Id.
103. Id.
104. Id.
105. Id.
108. Id.
for a civil rights demonstration. There are conflicting accounts on what took place next; however, it is certain that British forces killed thirteen Northern Irishmen and injured several others. The Northern Irish claim that the killings were in cold blood, while the British claim they were reacting to attacks. The IRA answered back with its own “bloody day” on Friday, July 21, 1972. The IRA detonated over twenty bombs across Belfast, Northern Ireland, killing nine people and injuring 130. The goals motivating such a horrific attack on its own soil, comprised of an effort to complicate everyday life in Northern Ireland. Thirty years after the events that took place on “Bloody Friday,” the IRA issued an apology for its actions:

While it was not our intention to injure or kill non-combatants, the reality is that on this and on a number of other occasions, that was the consequence of our actions . . . . [I]t is, therefore, appropriate on the anniversary of this tragic event, that we address all of the deaths and injuries of non-combatants caused by us.

C. The United Kingdom’s Response to and Negotiations with the Irish Republican Army

In 1974, the Prevention of Terrorism (Temporary Provisions) Act was passed. Under this Act, those who are suspected of participating in terrorist activities may be prohibited from entering the United Kingdom or may be expelled from the country. Additionally, the Act includes an entire schedule on how to deal with IRA members. It also allows for warrantless searches, and detentions spanning from forty-eight hours to five

109. Id.
110. Id.
111. Id.
113. Id.
114. Id.
117. Id. at § II (3).
118. Id. at Schedule 1.
days in length, before being heard by a judge for suspicion of IRA involvement.\(^\text{119}\)

There were several different Prime Ministers during the time that the IRA was wreaking havoc, leading to several different British leadership styles.\(^\text{120}\) From 1970 to the late 1990s, the IRA was receiving weapons from other nations, such as Libya and Palestine.\(^\text{121}\) Prime Minister Margaret Thatcher, nick-named “the Iron Lady,” was in office from 1979–1990 and had been on the front lines of the conflict with the IRA.\(^\text{122}\) Prime Minister Thatcher took a rigid stance against negotiating with the group.\(^\text{123}\)

In the early 1980s, IRA members in British prisons participated in a hunger strike, demanding to be transferred to prisons in Northern Ireland.\(^\text{124}\) Ten IRA members died due to starvation because Prime Minister Thatcher refused to give in to their demands.\(^\text{125}\)

A cease-fire was finally declared in 1997 because IRA political wing-leader, Sinn Fein, began peace negotiations with British Prime Minister John Major.\(^\text{126}\) In 1998, the U.S. Senate Majority Leader helped broker a deal between the IRA and the United Kingdom called the Belfast Agreement.\(^\text{127}\) In the Belfast Agreement, the IRA renounced violence and the United Kingdom agreed to establish a new legislature in Northern Ireland and release prisoners.\(^\text{128}\) In the years since the Belfast Agreement it seems as though peace has remained between the United Kingdom and Northern Ireland. This is an example of negotiations gone right. The role of the Prime Minister, as the leader of the country, is vital in ushering an agreement with the enemy.

\(^{119}\) America Responds to Terrorism, supra note 101; see also Prevention of Terrorism Act, supra note 116.

\(^{120}\) Neumann, supra note 8.

\(^{121}\) IRA, supra note 106.

\(^{122}\) See generally Con Coughlin, Margret Thatcher: It was an Iron law that there would be no surrender to terrorism, TELEGRAPH.CO.UK (Apr. 13, 2013), http://www.telegraph.co.uk/news/politics/margaret-thatcher/9990306/Margaret-Thatcher-It-was-an-Iron-law-that-there-would-be-no-surrender-to-terrorism.html (last visited Oct. 17, 2014).

\(^{123}\) Id.

\(^{124}\) Id.

\(^{125}\) Id.

\(^{126}\) See generally IRA, supra note 106.


\(^{128}\) IRA, supra note 106.
D. The Effect of the Belfast Agreement

The Belfast Agreement may be viewed as a triumph in negotiations and foreign policy. Decades of violence and failed negotiations culminated in a successful, enduring agreement that benefits both sides. The United Kingdom recognizes Northern Ireland as a legitimate state and allows it to make its own decisions for its political future. Since the Belfast Agreement, the IRA has for the most part lost its status as a terrorist organization. The IRA used violence in order to eventually reach its goals and the British government agreed to negotiate with the group despite their violent tactics. However, the United Kingdom was successful, through its negotiation with the IRA, to convince the group to disarm and transition into a peaceful existence. This instance of diplomacy and negotiation can be used as an example to the international community that peaceful resolutions are possible, even with the bloodiest of histories. Prime Minister John Major was open to talks with the IRA, starkly in contrast to the unyielding Prime Minister Thatcher’s philosophy on how peace was to be reached. Prime Minister Major never saw political or legal consequences for his role in the negotiations that led up to the Belfast Agreement. To the contrary, he was actually knighted, one of Britain’s highest honors.

IV. ANALYSIS OF ISRAEL’S NEGOTIATION POLICIES AND ACTIONS

Israel is known as a holy land that is surrounded by hostile enemies. Despite the United States being across the Atlantic, it is in America’s best interest to help ensure that the Jewish state is safe, strong, and secure. The Israeli Prime Minister is elected by the Knesset, the legislature. Similar to the U.S. President, the Israeli Prime Minister does have certain

130. IRA, supra note 106.
132. Gregory, supra note 127.
immunities, such as immunity from any legal action.\textsuperscript{137} Akin to the U.S. President, the Israeli Prime Minister has the authority to pardon criminals or reduce penalties.\textsuperscript{138}

Israel has been the target of several terrorist organizations whose goals are to erase the state from the map.\textsuperscript{139} Hezbollah and Hamas are just two of the terrorist groups who carry out attacks on Israel and its citizens.\textsuperscript{140} Hezbollah is a Lebanon-based terrorist organization that is heavily supported by Syria and Iran.\textsuperscript{141} Hamas is a Palestinian terrorist organization that was founded at the time of the Palestinian uprising in Gaza and the West Bank.\textsuperscript{142} When it comes to the subject of negotiating for the release of captive soldiers and citizens, Israel has perhaps more experience than any other country.\textsuperscript{143} There have been instances where the Israeli Prime Minister has made grand announcements that it will not negotiate with terrorists (like most other democracies claim at one time or another).\textsuperscript{144} However, Israel has made several costly negotiations with groups like Hezbollah and Hamas in order to secure the lives or bodies of captured Israelis.\textsuperscript{145}

\begin{flushleft}
\textsuperscript{136} Basic Law: The President of the State, ISRAELLAWRESOURCECENTER.ORG (Feb. 2007), http://israellawresourcecenter.org/israellaws/fulltext/basiclawpresident.htm (last visited Oct. 17, 2014) [hereinafter Basic Law].
\par
\textsuperscript{137} See id.; see also U.S. CONST. art. II § 2.
\par
\textsuperscript{138} See Basic Law, supra note 136; see also U.S. CONST. art. II § 2.
\par
\par
\textsuperscript{140} See generally id.
\par
\textsuperscript{141} Id.
\par
\textsuperscript{142} Id.
\par
\par
\par
\textsuperscript{145} Id.
\end{flushleft}
A. *The Oslo Accord*

The Oslo Accord was a treaty that was negotiated in complete secrecy.\(^{146}\) Israel and Palestine both acknowledged each other’s existence and took steps to achieve peace in their troubled region.\(^{147}\) Israel’s side of the accord was to recognize Yasser Arafat as the leader of Palestine and to recognize Palestinian autonomy in Gaza and the West Bank.\(^{148}\) Arafat and Israeli Prime Minister Yitzhak Rabin later won the Nobel Peace Prize for negotiating this agreement.\(^{149}\)

Although the Oslo Accord was historic, it was not long-lived. In a second Oslo Agreement, Israel was to withdraw its forces from the West Bank, but still maintained a substantial influence over the area.\(^{150}\) On the other hand, Palestine agreed to combat terrorist activities, but there was no evidence of any effort to stop the violence against Israel.\(^{151}\)

A series of other meetings and negotiations, some led by President Clinton, had taken place subsequent to the original agreement.\(^{152}\) However, neither side really ever fulfilled their side of the bargain.\(^{153}\) When Ariel Sharon was elected as the new Israeli Prime Minister, he abandoned the agreement due to his history of being anti-Oslo.\(^{154}\)

On March 29, 2002, a Palestinian suicide bomber killed thirty Israelis.\(^{155}\) Prime Minister Sharon then ordered that Israeli forces reenter Palestine.\(^{156}\) Subsequent suicide bombings then caused Israel to renounce its positions in the Oslo Accord and direct its efforts into reclaiming land in the West Bank.\(^{157}\)

---


147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Shattered Dreams of Peace, supra* note 146.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Shattered Dreams of Peace, supra* note 146.

157. *Id.*
B. Gilad Shalit

One of the most notable negotiations that Israel has ever made with Hamas was the release of Gilad Shalit.\footnote{158}{See generally Baruch S. Davidson, Is Prisoner Exchange A Jewish Value?, CHABAD.ORG (2011), http://www.chabad.org/library/article.cdo/aid/1668252/jewish/Is-Prisoner-Exchange-A-Jewish-Value.htm (last visited Oct. 17, 2014).} Shalit was a soldier in the Israeli Defense Force.\footnote{159}{Gilad Shalit, JEWISHVIRTUALLIBRARY.ORG, http://www.jewishvirtuallibrary.org/jsource/biography/Gilad_Shalit.html (last visited July 30, 2014).} In 2006, Hamas abducted Shalit.\footnote{160}{Gleis, supra note 144.} The abductors burrowed under the border of Gaza and attacked the tank that Shalit and others were traveling in.\footnote{161}{Id.} Immediately following the capture of Shalit, Israel took a public stance against negotiating with Hamas for his release.\footnote{162}{Id.} Instead, Israel initiated the military campaign named Summer Rains to attempt a rescue mission.\footnote{163}{Id.} In 2011, after five years of captivity, Israel announced a deal that it had reached with Hamas in exchange for Shalit.\footnote{164}{Id.} Israel ultimately agreed to release over 1000 Palestinian prisoners, most of which were dangerous terrorists.\footnote{165}{Id.}

Palestinians cheered and celebrated the release of the prisoners in the streets, many carried signs that read "We want a new Gilad Shalit."\footnote{166}{See generally Gilad Shalit, supra note 159.} This prisoner negotiation yielded Hamas a beneficial outcome.\footnote{167}{The Kidnapper's Handbook by Hamas, MFA.GOV.IL (June 29, 2014), http://mfagov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/The-Kidnapper-Handbook-by-Hamas.aspx (last visited Oct. 17, 2014).} Hamas is also attempting to get in on the profitable business of capturing Israeli soldiers.\footnote{168}{Id.} In 2010, Hamas released a handbook, which gives instructions and tips to anyone who wishes to abduct their own Israeli soldier.\footnote{169}{Id.} The rationale behind the handbook is to make profitable exchanges with Israel in order to regain imprisoned Palestinians.\footnote{170}{Id.} Such advice as targeting a frail-looking soldier and learning to speak Hebrew fluently are just some of
the many suggestions of Hamas. This is not the first handbook of its kind.

C. Does Jewish Tradition Require Negotiation and Ransom?

Israeli law is heavily influenced by halachah (Jewish Law). A major facet of halachah is that prisoner exchange is a Jewish value. There are several sources in the Torah and other religious sources in which it is a moral obligation to ransom or take whatever measures necessary to secure the release of captive Jews. Back in biblical times, it was the law for Jewish communities to hold funds for the sole purpose of ransoming captured Jews.

Pidyon Shevuyim is the Jewish doctrine commanding to “redeem captives.” This doctrine dates back to the time of Abraham. According to the Book of Genesis:

The four kings seized all the goods of Sodom and Gomorrah and all their food; then they went away. They also carried off Abram’s nephew Lot and his possessions, since he was living in Sodom. A man who had escaped came and reported this to Abram the Hebrew. Now Abram was living near the great trees of Mamre the Amorite, a brother of Eshkol and Aner, all of whom were allied with Abram. When Abram heard that his relative had been taken captive, he called out the 318 trained men born in his household and went in pursuit as far as Dan. During the night Abram divided his men to attack them and he routed them, pursuing them as far as Hobah, north of Damascus. He recovered all the goods and brought back his relative Lot and his possessions, together with the women and the other people.

171. Id.
172. Id.
173. Davidson, supra note 158.
174. Id.
175. Id.
176. Id.
178. Davidson, supra note 158.
179. Genesis 14:11–16 (King James).
The Mishneh Torah describes pidyon shevuyim as a higher moral obligation than feeding the poor. Additionally, it goes on to say that there is "no duty more meritorious than the redeeming of captives, for not only is the captive included in the generality of the hungry, the thirsty, and the naked, but his very life is in jeopardy." Money that had been raised, even for a religious purpose, was permitted for use in paying ransoms.

Israel has made it a national priority to protect its citizens and places a very high value on their safe return. According to publications by the Israeli Ministry of Foreign Affairs, Israel’s large prisoner exchanges are "an expression of Israel’s deep reverence for human life and of its respect for the fallen. This principle stems from Israel’s sense of morality as well as from Jewish ethics. It is a demonstration of Israel’s moral and physical strength."

Another source of Israel’s high value for the lives of its citizens may arise from its mandatory conscription laws. Upon turning eighteen years old, every Israeli man and woman is mandated to serve three and two years respectfully. Due to the fact that the military is not made up of 100% volunteers, like the U.S. Armed Forces, Israel may hold itself to a higher standard when it comes to negotiating to secure the release of captured soldiers.

As stated above, Israel is surrounded by its enemies. What works for the United States and the United Kingdom may not translate into sound foreign policy for Israel. Israel is in the midst of a conflict with Hamas. Rockets are being launched over the border into Israel every day, even during periods of ceasefires. The Israeli Prime Minister is immune from legal ramifications and essentially free from consequences when making...
deals such as the one reached to free Gilad Shalit. The Israeli Prime Minister first and foremost, needs to ensure that the state survives. Negotiations, prisoner exchanges, and even treaties with groups who once or still do with for Israel’s demise is just another way to ensure survival.

V. COMPARISON OF THE UNITED STATES’, THE UNITED KINGDOM’S, AND ISRAEL’S NEGOTIATION POLICIES AND ACTIONS

In any analysis of foreign affairs such as negotiations with terrorists, the information that the general public has access to may not be the absolute truth. Many of these types of deals take place behind closed doors and are only announced after the deals have been made. This discussion is based on information readily available to the public and is in no way a fully informed analysis due to lack of security clearance.

Negotiations with terrorists carry a double-edged sword to those who partake. Negotiations may lead to a more peaceful future and diplomacy. Conversely, critics of negotiating with terrorists claim that giving in to organizations opens the door to more kidnappings so that targeted governments meet terrorist demands. A hard-and-fast policy for or against negotiations may not be the answer for a modern democracy such as the United States, the United Kingdom, or Israel.

When negotiating with terrorists or enemy nations, leaders need to do so in a way that minimizes violent repercussions. By analyzing the consequences of such negotiations, one could determine whether it was safe and legal. Of course hindsight is 20/20, but if executives learn from past situations, then there is a better chance that future negotiations can have a positive result. A strong argument against negotiating with terrorists is that it gives them the incentive to continue behavior, such as taking hostages in order to achieve its goals. As history has shown, eventually, such negotiations must be made, most often to return hostages and POWs home.

In the aftermath of the Vietnam War, there is no evidence that the released Viet Cong prisoners had caused the United States any more harm. In fact, at the end of the war both sides arranged to free POWs in order to reach a true ending. President Nixon faced no legal consequences for his, or his subordinates’, participation in the Paris Accords. In fact, it was a high point in his administration because the

---

189. See generally Basic Law, supra note 136.
190. Drehle, supra note 1, at 31.
191. See Cole, supra note 17.
193. See generally Paris Accords, supra note 34.
war was in such disfavor to the American public.\textsuperscript{194} It is unlikely that any other method could have ended the Vietnam War in such peaceful and timely means. Before the invasion of Afghanistan, the Vietnam War was the United States' longest conflict.\textsuperscript{195}

President Reagan went a different route when trying to secure the release of the American hostages in Lebanon.\textsuperscript{196} Instead of a prisoner-for-hostage-exchange, President Reagan allowed for an arms sale in exchange for hostages.\textsuperscript{197} Iran was in the middle of a war against Iraq and the Soviet Union was giving the Iraqis large amounts of weaponry.\textsuperscript{198} The United States gave Iran over a thousand anti-tank TOW missiles.\textsuperscript{199} Legally, because there was an arms sale embargo against Iran, President Reagan should not have been spared of consequences. Rather than using his pardoning power to trade prisoners for hostages, President Reagan broke the law by allowing the arms deal to occur.\textsuperscript{200} Arming the enemy can cause long-term consequences that outlast the term of a single U.S. president.

Iran has a reputation of funding terrorism.\textsuperscript{201} The United States was aware of that reputation before it negotiated an “arms-for-hostages” trade.\textsuperscript{202} There is a big difference between releasing terrorists from captivity in order to secure the release of an American hostage and arming states that sponsor terrorism. By arming such a dangerous and extremely fundamentalist country, it is obvious that such weapons could then be diverted to terrorist organizations. During the time of the Iran-Contra Affair, Iran was at war with Iraq.\textsuperscript{203} The United States may have felt that it needed to arm Iran because its Cold War rival, the Soviet Union, was heavily arming Iraq. However, weapons that survive the war will not be tossed in the trash as a frivolous relic of a past war. Weapons will always be desirable if they are in working order. President Reagan and his Iran-Contra collaborators should have investigated other ways in which to bring

\begin{thebibliography}{99}
\bibitem{194} Id.
\bibitem{196} \textit{American Experience}, supra note 49.
\bibitem{197} Id.
\bibitem{198} \textit{Iran-Iraq War}, supra note 192.
\bibitem{199} \textit{Nicaragua Timeline}, supra note 48.
\bibitem{200} \textit{American Experience}, supra note 49.
\bibitem{201} Id.
\bibitem{202} Id.
\bibitem{203} Id.
\end{thebibliography}
home the American hostages instead of risking countless lives by arming such a dangerous and extreme state.

The United Kingdom's final negotiation with the IRA was unique. The conflict in Northern Ireland had been going on for generations. Northern Ireland wished to be released from Great Britain and allowed to negotiate a possible unification of Ireland. The IRA used violence to achieve its goals, and eventually, the United Kingdom realized that the only way to alleviate the violence was to give the IRA what it wanted. The United Kingdom did not just roll over and allow the IRA to walk away victorious. It was apparent that the group's goal was to be released from British control. In order to appease the Northern Irish, the British agreed to the detachment from the United Kingdom, for a price. By demanding that the IRA relinquish all weaponry, the British took a tactical step in ensuring a peaceful future. Absent a few minor outbreaks, the IRA has mostly maintained a peaceful existence in the British Isles. The Belfast Agreement serves as a living document that negotiations with terrorists can yield a positive result.

Finally, Israel is a unique country to analyze when it comes to negotiating with terrorists because of the hostile geographical location in which it is housed. Coupled with the fact that the Prime Minister is immune from legal action and also has pardoning powers, it can be argued that Israeli negotiations are not like any democracy in the world. Now embroiled in a new conflict with Hamas, rockets are being launched from both sides of the border every day. Israel places a high value on the lives of its citizens. The high rate of conflict along with the mandatory conscription laws cause Israel to go to great lengths to bargain for the release of captured citizens. No other democracy in the world is subject to as much constant violence than Israel and if making deals with terrorists can save some lives in a time of turmoil, Israel will take the risk.

204. See generally Neumann, supra note 8.
205. Id.
206. Id.
207. IRA, supra note 106.
208. See generally id.
209. Id.
210. See generally Basic Law, supra note 136.
212. See generally The Return of Israel's Abducted Soldiers, supra note 183 (describing Israel's duty to protect drafted Israeli soldiers by negotiating for their return with terrorist organizations like Hezbollah).
Israel agreed to release over a thousand Palestinian prisoners (most of whom had been arrested for terrorist activities) in exchange for a single Israeli soldier. In the aftermath of the exchange, there was no evidence of increased violence. Additionally, there has not been a spike in abductions of Israelis since the release of Gilad Shalit. Unlike the Belfast Agreement, Israel's negotiation with Hamas has hardly led to enduring peace or even civility. However, opening the doors to negotiation now may be a step in the right direction in order to finally find peace in the troubled region.

Based on the foregoing, it seems that the best way to go about negotiating with terrorists is to bargain for a prisoner exchange as opposed to other methods. By negotiating for prisoners, democratic executives may maintain a legitimate exchange by using their pardoning powers in order to bring home nationals who have been captured abroad. Making legitimate and legal exchanges may lead to a higher chance of public approval and a lower risk of future violence. Arming an enemy in exchange for hostages puts firepower behind radical groups who are still embroiled in their passions. However, releasing terrorist prisoners, who may have been in captivity for years on end, does not have as explosive an effect as blindly arming them. Released terrorists may have grown tired of fighting for their cause or may be disconnected with their group's mission due to years of imprisonment. Releasing the terrorist characters back into society does not equate to arming current terrorists who may be anxious to act. In all, negotiating with terrorists is very unappealing to any democracy. However, if and when it has to be done, the prisoner-for-hostage model may lead to less residual violence in the future.

VI. CONCLUSION: FORECAST OF POTENTIAL LEGAL RAMIFICATIONS DUE TO PRESIDENT OBAMA'S NEGOTIATIONS BASED ON THE FOREGOING

President Obama brought home the sole American POW in the Afghanistan War. Five years of captivity was ended when five Taliban members were released from Guantanamo Bay in exchange for Sgt. Bergdahl's freedom.

President Obama was threatened with impeachment due to the widespread outrage by Congress and other national politicians over the

213. Gilad Shalit, supra note 159.
214. See generally Davidson, supra note 158.
215. Id.
216. Drehle, supra note 1, at 28.
217. Id.
By passing legislation mandating that Congress be notified thirty days before the release of a prisoner from Guantanamo Bay, Congress might have violated the Constitution. Article II grants the executive the power to pardon criminals and that power is not to be questioned by another branch. By placing a limitation on the executive branch's enumerated power, Congress is encroaching on what the Constitution designated to another branch.

Prisoner exchanges are not a new tactic when it comes to negotiating with terrorists. In fact, it is most likely the best route to take when trying to negotiate because of the low chances of violence in the aftermath. If President Reagan could escape liability from his actions (or inactions) during the Iran-Contra Affair, then it was extremely unlikely that President Obama would have faced any charges.

In conclusion, President Obama acted like any other American president would have in this situation. Leaving a soldier behind, especially when his release is possible to secure, is contrary to American values. This instance of negotiation with terrorists was not the first in United States' history and most definitely may not be the last.

---

