



Written by [Charles Scaliger](#) on June 4, 2014

## Bergdahl, Gitmo Detainees, and the Rule of Law

With the narrative of Bowe Bergdahl, the American POW from Idaho held by the Taliban for five years, changing by the hour, it is perhaps premature to pass judgment on the actions of the recently freed soldier or on the Obama administration's actions to secure his release. The exchange of five Afghani prisoners held at Guantanamo for Bergdahl has raised an unprecedented political firestorm, with congressional Republicans (and a few Democrats, such as Senator Dianne Feinstein) accusing the Obama administration of acting illegally by failing to notify Congress of their intent to release the Afghani POWs at Gitmo, and some of Bergdahl's former platoon comrades accusing him of desertion and even treason. Given the acrimony and the seriousness of some of the accusations, Bergdahl's actions and those of the Obama administration will surely be scrutinized minutely in the weeks and months ahead.



In the meantime, here are a few of the facts and relevant issues as we currently understand them. PFC Bowe Bergdahl, 28, is a man of varied interests, having studied martial arts, fencing, and ballet dancing. Homeschooled and raised as an Orthodox Presbyterian, Bergdahl appears to have grown uncomfortable with his faith; he practiced Buddhism at a monastery in 2007 and 2008. After graduating from infantry school in the fall of 2008, Bergdahl was deployed to Afghanistan, at an outpost in the eastern part of the country not far from Pakistan called Mest-Malak. Bergdahl displayed a strong interest in the local language and culture and began learning Pashto, the language of many Taliban. He also allegedly began expressing skepticism to friends over the validity of the military mission.

Bergdahl disappeared from his base on the night of June 30, 2009, leaving behind his military gear. In the ensuing effort to find him, as many as six American soldiers lost their lives to Taliban attacks. A few days before his disappearance, he is alleged, in an article in *Rolling Stone* magazine in June 2012, to have sent an e-mail to his parents sharply criticizing the U.S. military and its role in Afghanistan. "I am ashamed to be an American," Bergdahl wrote, adding that "the future is too good to waste on lies." This e-mail has not been substantiated by other media sources, and, while professing disgust with the military, does not indicate any plans to desert, defect, or betray the United States.

On the other hand, as CNN announced on June 3, the Pentagon, after investigating Bergdahl's disappearance, did conclude in 2010 that the soldier left the base without authorization, though the circumstances of his subsequent capture by the Taliban are still unclear. It therefore appears that there are grounds for accusing Bergdahl of going AWOL, although claims of treason appear premature, to say



the least.

On May 31, 2014, Bergdahl was released by the Taliban to American Special Forces in return for the release of five Taliban prisoners who had been held at Guantanamo for more than a decade. Bergdahl was handed over to Special Forces in Afghanistan's Khost Province and spirited away by helicopter; the "Taliban Five" were turned over to government custody in Qatar, where they are required to remain for one year. The five men released in exchange for Bergdahl are Mohammad Fazl, the Taliban Army chief of staff; Khairullah Khairkwa, the Taliban governor of Herat province and former interior minister; Abdul Haq Wasiq, the Taliban deputy minister of intelligence; Norullah Noori, a senior Taliban military commander; and Mohammad Nabi Omari, another senior Taliban official. All rhetoric aside about these men being the "worst of the worst," it is far from clear what crimes any of them may have committed against the United States; none of them has been officially accused of other than belonging to the Taliban, nor has any been tried for any of their alleged crimes.

This, of course, is the situation with all of those detained at Gitmo — a facility of such dubious legality that it is maintained, not on American soil, but on the soil of one of the world's last Stalinist dictatorships. It is more than likely that the "Taliban Five" are not nice men, but running an odious Islamist theocracy on the other side of the planet is a far cry from committing actionable crimes against the United States, its citizens, and its laws. Even accused Nazi war criminals had their day in court. German and Japanese POWs were repatriated at the war's end, as has been the practice of civilized nations for thousands of years. On the other hand, the ongoing undeclared war in Afghanistan — which has been cast as part of a larger, ongoing, open-ended, and undeclared "War on Terror" — is not only constitutionally illegitimate (any justness of its cause notwithstanding) for being undeclared, but there is also little prospect that it will ever end (and less still that there will ever be a peace treaty of any kind). This means that Gitmo detainees will be in legal limbo the rest of their lives, to be tortured and interrogated at the whim of the U.S. government, while the crusade against a never-ending succession of terrorist bugbears around the world goes on and on.

In fact, [a large number of Gitmo detainees have been shown to be innocent](#), yet still were made to languish for years in America's military gulag.

It is possible that Bergdahl, during his time serving in Afghanistan, became aware of the many vexing moral contradictions and outright illegalities in America's War on Terror. He was certainly not the first U.S. soldier to experience strong misgivings about our actions in Iraq and Afghanistan. Bergdahl may indeed have deserted his post and his comrades, and possibly gone over willingly to the Taliban — contemptible acts regardless of the morality or legality of the conflict. But none of this has yet been proven. For now, we know little of what his motivations may have been, or of the choices he made prior to his disappearance.

As for the actions of the Obama administration, their legality is still murky. Obama himself signed legislation requiring a 30-day presidential notice to Congress before the release of any Gitmo prisoners, notice that was not given for the Bergdahl exchange. But the Obama administration is claiming that the legislation allowed for exceptions to that provision if the situation were urgent — and in this case, Bergdahl's alleged failing health required exceptional actions to be taken to guarantee his safe return. Given the blatant illegality of the entire Guantanamo prison camp and of the way in which the War on Terror has been conducted, truckling over the legality of Obama's actions is very selective solicitude for the rule of law.



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