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## Much ado, no matter what

Thu, 07/10/2014 - 10:38am [Field Notes From A Battleground](#) <sup>[1]</sup> [Opinion/Viewpoint](#) <sup>[2]</sup>

By Charles R Church — Part 1 of 2 (part 2 follows below)

What happens when the president faces an unusually difficult decision in these toxic political times? President Obama made such a decision when faced with a chance to obtain the release of Sgt. Bowe Bergdahl, the last POW from the Afghan conflict, captured nearly five years ago, in exchange for five Taliban prisoners at Guantanamo. According to a May 31 article in the New York Times, a video obtained last January showed him to be alert, but evidently in declining health. And the U.S. Army soon will depart from Afghanistan.

Some say Sgt. Bergdahl deserted. And how about the release of those five Taliban prisoners in exchange for one soldier? What's to prevent them, in a year or sooner if Qatar doesn't keep its promises, from returning to fight for control of Afghanistan? Finally, there's the statutory requirement that the administration provide notice to Congress 30 days before any transfer of Guantanamo detainees, balanced against its calculation that doing so would imperil the deal. Obama had quite a thorny dilemma on his hands.

Let's start with bedrock fact. Defense Department Directive 3002.01E, dealing with "Personnel Recovery..." sets policy with regard to "isolated" military personnel, those "in danger of becoming, or (who) already are ... captured, detained, interned, or otherwise missing ... while participating in U.S. sponsored activities or missions." In the Glossary, "isolated personnel" are those "who are separated from their unit ... while participating in a U.S. sponsored military activity or mission and are, or may be, in a situation where they must survive, evade, resist, or escape." That sounds a lot like Sgt. Bergdahl, whatever your politics. Crucially, the directive holds that preserving the lives and well-being of isolated personnel is "one of the highest priorities" of the Defense Department.

No determination has ever been made that Bergdahl deserted his outpost. The bottom line, then, was that we needed to get the soldier back, then deal with him appropriately. After all, he's a man who enlisted in the U.S. Army and served honorably for a time, placing his life on the line for us. The Washington Post on June 16 reported that an Army Major General has already been detailed to lead an investigation into Bergdahl's disappearance and capture, so the second step has begun.

On whether the Taliban got the better of the deal, consider this expert's opinion: John Bellinger, one of the highest-ranking lawyers in the Bush Administration, writing in [www.lawfareblog.com](http://www.lawfareblog.com) <sup>[3]</sup>

on June 1, found it likely that, as a matter of international law, the five would have had to be released shortly after 2014, when U.S. combat operations will have ceased in Afghanistan. After all, when an armed conflict ends, POWs go home, unless they are charged with war crimes. On June 15, according to the Miami Herald, Brigadier General Mark Martins, the Pentagon's chief prosecutor for Guantanamo's military commissions, commented that he had studied the files of those prisoners in 2011, and concluded that they could not be prosecuted in the U.S.

Next week, Church discusses the 30 days' notice Obama was required by statute to provide Congress before transferring any Gitmo detainee, his reasons for not doing so, and various responses by Congress.

Charles R. Church is an attorney practicing in Salisbury who focuses primarily on Guantánamo Bay, detention, torture, habeas corpus and related issues.

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## Much ado, no matter what (Part 2 of 2)

Thu, 07/17/2014 - 11:29am [Field Notes From A Battleground](#) <sup>[1]</sup> [Opinion/Viewpoint](#) <sup>[2]</sup>

By Charles R. Church

*Last week, Church described the thorny dilemma Obama faced when a chance to recover Sgt. Bergdahl in exchange for five Taliban prisoners presented itself, and his reasons for making the swap.*

Under the statute, the administration owed Congress 30 days' notice of the proposed trade, and without doubt did not provide it. But Obama, when he signed the bill, wrote in a signing statement directed to that requirement: "The executive branch must have the flexibility ... to act swiftly in conducting negotiations with foreign countries regarding ... detainee transfers.... In the event that the restrictions on the transfer of Guantanamo detainees ... operate in a manner that violates constitutional separation of power principles, my Administration will implement them in a way that avoids the constitutional conflict." In sum, he would interpret the restrictions in a manner consistent with his executive powers under Article II of the Constitution, particularly those arising from his role as commander-in-chief of our armed forces.

The White House had briefed Congress on the potential exchange opportunity in the past, but did not provide notice of the actual exchange until Bergdahl was in our possession and shortly before the prisoners left Gitmo. Defense Secretary Hagel's prepared remarks before the House Armed Services Committee stated that, basically, providing such advance notice was impossible under the circumstances. That is, "the exchange needed to take place quickly, efficiently, and quietly. We believed this was our last, best opportunity to free him." Among other things, Qatar — the deal's broker — had warned that any leak would end negotiations. We didn't even notify Hamid Karzai, the Afghans' president, the *New York Times* also said on May 31, given his history of throwing monkey wrenches into U.S. plans.

As for Obama and Congress sorting out their differences over this, everyone knew that the process would not be marked by statesmanship from our broken Congress. But its behavior

seems to get stranger nearly every day. Representative Tom Cotton (R) of Arkansas proposed an amendment to the pending Defense Department appropriations bill which stipulated that no funds can be appropriated to transfer or release any detainee at Guantanamo to his home country or any other foreign nation. Congress already has forbidden, you'll recall, transfer of any Gitmo detainee into the U.S., so this bill would, if passed, bar the release of a detainee to anywhere, even where a court already has ordered such release, or the executive branch has determined that it no longer has authority to hold a detainee. So wrote constitutional law professor Steve Vladeck at [www.lawfareblog.com](http://www.lawfareblog.com) [3] on June 19, before concluding that it's not "a remotely close question" whether this bill "would be constitutional as applied to such cases. It wouldn't be." Nonetheless, as reported by Politico on June 20, Cotton's amendment passed in the House on a largely party-line vote, 230-184. Add to the Cotton amendment's near-certain unconstitutionality the reality that the amended appropriations bill must be approved by the Senate with its Democratic majority, and signed by Obama himself, the yea voters in the House can only be seen as posturing. No surprise there; after all, an election is approaching.

But the story gets even weirder. On June 25, Speaker John Boehner (R-Ohio) announced his intention to introduce a bill authorizing the House to sue Obama, asserting that he has been "ignoring some statutes completely, selectively enforcing others, and at times creating laws of his own." (Sidebar: Those "laws" are called executive orders, Mr. Speaker, and George Washington issued the first of them. And, has the Bush/Cheney "unitary executive" doctrine already slipped your mind?). Such a bill, of course, stands zero chance of becoming law unless the makeup of the Senate changes vastly next November, and then both Houses muster two-thirds supermajorities to override Obama's veto. Beyond that, any hopes for success in the suit are fanciful, but I'll spare you discussion of its obvious legal defects.

Finally, more and more these days, impeachment comes up among Republicans in Congress and certain pundits. Now there's a real "twofer:" get an unparalleled stage on which to vilify the president they hate, while using taxpayers' scarce dollars to do it, rather than their party's.

No wonder that, as the recent Gallup Poll found, only 7 percent of Americans have significant confidence in Congress.

*Charles R. Church is an attorney practicing in Salisbury who focuses primarily on Guantánamo Bay, detention, torture, habeas corpus and related issues.*

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