



Bergdahl As Deserter: Obama Administration Has Moral Duty To Punish, Convict With The Death Penalty

OVERVIEW:

The words could not be clearer: according to the Uniform Code of Military Justice (UCMJ), a deserter is any soldier who leaves his “place of duty with intent to avoid hazardous duty or to shirk important service.”

Desertion has been a violation of our military code since before America was an independent country. No matter how difficult the combat, desertion has resulted in some of the harshest punishments possible – including the death penalty.

When Sergeant Bowe Bergdahl left his observation post in Afghanistan in June 2009, he committed this exact crime. There is no debate about the circumstances. He did not disappear during a mission, nor was he taken against his will by enemy forces. He simply walked away, abandoning both his mission and his comrades.

This decision led to hundreds of soldiers risking their lives to search for him and the release of high-ranking Taliban officials in a lopsided prisoner trade by the Obama administration. It may have led to American deaths. The damage was far worse than deserters who fled to Canada before being deployed, and those deserters faced jail time when they returned to America. Yet reports have started to surface the Bergdahl will be allowed to go free, avoiding both execution and a prison sentence.

This shameful result would betray the values of our armed forces and the country they protect.

Quick Facts

- **Historically, the death penalty has been the traditional penalty for deserters under arms.**
- During the U.S. Civil War, nearly 150 Union soldiers were shot for desertion.
- In January 1945, SHAEF commander General Eisenhower had a U.S. Army soldier shot for desertion after the Battle of the Bulge.
- **SGT Bowe Bergdahl abandoned his post while deployed to Afghanistan in 2009.**
- By deserting in combat, **Bergdahl placed hundreds of soldiers in mortal danger** as they searched for him.
- **His desertion led to the release of high-ranking Taliban members and possibly to U.S. fatalities.**
- Other deserting soldiers have caused far less danger to American warfighters than Bergdahl, but many of these **others have been sentenced to prison terms.**
- **10 USC § 885 authorizes the use of the death penalty in times of war.**

A SERIOUS CRIME

When he left Observation Post Mest-Malak without permission, SGT Bergdahl became the latest in a line of those who failed to uphold the oath they swore when joining the military.

When dealing with this problem, the death penalty has been used sparingly, but it certainly *has* been used.

It is our position here that in the instance of SGT Bergdahl that the penalty of desertion is not only warranted but justified under 10 U.S. Code § 885.

A court-martial should indeed impose the maximum possible penalty against those who not only abandon their posts, but put the lives of Americans and American soldiers in grave danger. The only penalty that suffices is the maximum penalty -- death.

The first rules describing how the American military should conduct itself were adopted while George Washington was still commander-in-chief, and they dealt with desertion. Known as the Articles of War, the document consisted of 28 different sections discussing various aspects of discipline. Section VI covered deserters, and it was blunt:

"All officers and soldiers [who desert] shall suffer death, or such other punishment as by a court-martial shall be inflicted."¹

It was also a crime for any soldier to assist someone in deserting or persuade them to do so.

During the Civil War, desertion was common on both sides of the fighting, as soldiers were often embittered by shoddy equipment and leadership.² Union estimates run as high as 1-in-5 soldiers having deserted at some point, and Confederate ones as high as 1-in-3. Because of the sheer number of deserters and desperate need for manpower, only 147 of the approximately 250,000 Union deserters during the war were executed.

The last American executed for being a deserter was Private Eddie Slovik, a World War II soldier who actually deserted his unit *twice*.³ He was then given two additional chances to take back his statements and return to service, but he refused. He also refused to speak at his trial, which resulted in a guilty verdict and his death by firing squad near the village of Sainte-Marie-aux-Mines in northeastern France.

The death sentence was personally approved by then-Gen. Dwight D. Eisenhower.⁴ This sentence -- upheld just after the Battle of the Bulge where desertion was rampant in the wake of German panzer divisions, was a decision that was then criticized in the press as well as by military chiefs. Eisenhower, to his credit, never regretted the decision, seeing it as not only necessary to maintain discipline and morale, but believing that Slovik fit the precise definition of a

deserter and -- perhaps more importantly -- merited the punishment in a way few of his contemporaries did.

IN MODERN TIMES

Yet even if no soldier has been executed for desertion since 1945, plenty have been thrown in jail for it. This includes soldiers who joined the Army before the invasion of Iraq and whose cowardice has caused far less damage than that of Bergdahl.

In fact, the standard practice for the modern deserter has been to refuse to go to Iraq or Afghanistan at all.

Kevin Benderman, then a Sergeant in the U.S. Army, refused to deploy with his unit in 2005. The result was a 15-month prison sentence and demotion all the way to the lowest rank in the military: Private.⁵

In a similar instance, when Agustin Aguayo climbed out a bathroom window to avoid the military police knocking on his door, he also ended up demoted and in prison.⁶

A common strategy -- familiar to some with the last name of Clinton and Saunders -- has been to try and escape deployment by going to Canada. Yet even this tried and true tactic of many a hippie and shirker has ended up with the same result: jail time.

For instance, a 15-month prison sentence was given to Robin Long after he fled the country instead of going to Iraq, as Canada deported him back to the U.S. instead of granting him asylum.⁷ Even in these instances, the default condition of the military has been to impose punishment rather than permit desertions to become rampant, or earn the reputation of being a crime where no one is harmed and no consequences are felt.

NO EXCUSES

It is important to remember that those who deserted before Bowe Bergdahl often had reasons that were far

¹ Journals of the Continental Congress - Articles of War; September 20, 1776, available at

http://avalon.law.yale.edu/18th_century/contcong_09-20-76.asp

² "Deserters in the Civil War," *National History Education Clearinghouse*, available at: <http://teachinghistory.org/history-content/ask-a-historian/23934>

³ "The Example of Private Slovik," *American Heritage*, available at: <http://www.americanheritage.com/node/55767>

⁴ Norman Polmar and Thomas Allen, *World War II: the Encyclopedia of the War Years, 1941-1945*, page 738.

⁵ "Soldier Who Refused Iraq Duty is Sentenced," *Los Angeles Times*, available at: <http://articles.latimes.com/2005/jul/29/nation/na-briefs29.3>

⁶ "Army Medic Found Guilty of Desertion," *MSNBC*, available at: <http://www.nbcnews.com/id/17486019/#.VizP5d8rKCh>

⁷ "U.S. Army Deserter First to be Deported," *Toronto Star*, available at: http://www.thestar.com/news/canada/2008/07/16/us_army_deserter_first_to_be_deported.html

more plausible than his, but these deserters still faced punishment for their crimes.

Sometimes they were often conscripted against their will. During the Revolutionary War, it is estimated that perhaps half of the militia serving deserted at some point in time. Civil War soldiers sometimes went without pay, food, and basic equipment. Deserter Eddie Slovik told military prosecutors that he could not handle the constant shelling from Nazi forces. Deserter Kevin Benderman had already deployed to Iraq once when he refused to return.

In stark contrast, Bergdahl was paid regularly and fed well.

Bergdahl had never deployed before and faced nothing even remotely close to the horrors of World War II. Bergdahl volunteered to join the Army in 2008, well after the wars in both Iraq and Afghanistan had begun – and Bergdahl signed up for the infantry, the part of the military closest to combat. Anyone with any sense would have known exactly what that meant.

Bergdahl also should have known the consequences of his decision to desert. As a sergeant, Bergdahl had a moral duty to his unit and those serving underneath him -- this being no mere private taken from home and rushed to the front. At least a dozen different soldiers had been sentenced to prison terms for similar crimes before Bergdahl abandoned his post, something he could have discovered with a simple internet search.

Instead, Bergdahl threatened to desert his unit before he even arrived in Afghanistan, a fact not often repeated by purported defenders of Bergdahl's despicable act.⁸

As a result, thousands of soldiers faced extreme danger every day as search parties were sent out to try and find Bergdahl. During the search, the public was informed that Bergdahl more than likely had been taken prisoner rather than fleeing duty -- a fact that reinforced policy decisions to attempt to liberate and return Bergdahl to American hands.

Countless hours and dollars were spent that could have gone into counterinsurgency operations -- to save lives other than Bergdahl's.

⁸ "America's Last Prisoner of War," *Rolling Stone*, available at: <http://www.rollingstone.com/politics/news/americas-last-prisoner-of-war-20120607>

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According to one member of Bergdahl's unit, this meant resources were taken away from other units – and those units had soldiers killed as a result.⁹ If cowardice kills, then Bergdahl's example is perhaps the strongest case for such an argument.

The final insult came with the prisoner swap that resulted in Bergdahl's release. Five high-ranking Taliban members were freed in exchange for him, including the head of the Taliban army and a senior intelligence official for the dangerous terrorist group.

These men would remain in captivity if not for the decisions of Bergdahl, and only a travel ban enforced by Qatar is keeping them from rejoining the Taliban and again trying to kill American soldiers.¹⁰

PUNISHMENT THAT FITS THE CRIME

The military is a unique and special institution in America, and this status was earned by ensuring that those who wear the uniform represent this country well. They must uphold a certain set of values and perform under pressure that is different from any other kind of job.

Bowe Bergdahl volunteered for that conflict.

Bergdahl did so knowing America was a country at war. Bergdahl was deployed to a country that served as a base for the terrorists who caused 9/11, but instead of embracing the fight against them, Bergdahl complained

⁹ "We Lost Soldiers in the Hunt for Bergdahl, a Guy Who Walked Off in the Dead of Night," *The Daily Beast*, available at: <http://www.thedailybeast.com/articles/2014/06/02/we-lost-soldiers-in-the-hunt-for-bergdahl-a-guy-who-walked-off-in-the-dead-of-night.html>

¹⁰ "Qatar Extends Travel Ban for the 'Taliban 5'", *CNN*, available at: <http://www.cnn.com/2015/05/31/world/bergdahl-taliban-five-travel-ban-extended/>

before he even arrived and abandoned his post not too long after getting there.

Bergdahl's comrades looked day and night for him, sleeping in the mountains of Afghanistan for days on end and climbing those same mountains in 100-degree heat. This search used up limited military resources, and in doing so cost precious lives.

Those who deserted before going to war caused none of these problems, and yet they still went to jail as a result.

Though Bergdahl did endure years in Taliban captivity, that was his own doing. Previous deserters who were held prisoner for up to 40 years still faced prison when they finally returned.¹¹ No matter what occurred after Bergdahl deserted, there is no question that his punishment -- if there is one to be exercised -- must fit the crime he committed, the lives he cost, the men and women placed in jeopardy, and most of all restore the confidence placed in American's fighting men and women by ensuring their sacrifice is not sullied with the spirit of deserters who imperil American lives.

There is precedent for using the death penalty in cases of desertion, not only from a moral perspective but from a legal and historical one as well.

Given the uniquely reckless and selfish nature of Bergdahl's decision, a courts-martial would be entirely justified to impose that penalty here. Even if that is too much for those in charge, it would be iniquitous and wrong should Bergdahl never see the inside of a prison -- and the sentence should be much longer than those who fled to Canada before deploying at all.

What is worse, Bergdahl's example in an era of asymmetrical and hybrid warfare would send an example to American warfighters that the alternatives of perhaps not fighting, throwing down arms, matriculating to the enemy or worse developing a sense of Stockholm Syndrome is a choice that can be made with little consequence -- one that can be made with the expectation that the military will not react negatively, and that the American press will receptively and kindly return you home with honor.

This outcome should be naturally unacceptable, both to policy makers as well as military analysts. In an era where warfare takes on the mirage of insurgency, the lines between deserters such as Bergdahl and Slovik begin to blur when held in comparison to defectors such as Robert Hannsen and Aldrich Ames, two spies that offered the Soviets and Russians access to technology and methods that imperiled many American lives and jeopardized American personnel globally.

In an era where information and access are prized and illegal agents seek to pry away assets, Bergdahl's cowardice cannot be offered as an example to encourage further bad behavior by deserters and defectors. As a matter of policy, Bergdahl should be punished; as a matter of law, Bergdahl has merited the penalty of death.

Should Bergdahl not receive punishment, the question for policy makers becomes a quagmire of consequences. What is desertion, then? Who should be punished in the future and under what rubric? In an era of asymmetrical and hybrid warfare, what is the difference between a "shell shocked" soldier who just gets caught up in the wrong circumstances, and a defector that ties up valuable resources and costs brave American lives.

This is not merely a matter of setting examples, though in Bergdahl's case, the proposed punishment should fit the crime. Bergdahl's case now becomes a precedent, one that will be leveraged by America's enemies -- right or wrong -- against those in service to our country, either on the front lines or in the cubicles, to offer prospective gain in the face of lowered expectations and zero consequences.

To simply give Bergdahl a plane ticket home after what he has done is a slap in the face to the millions of soldiers who served honorably no matter the conditions, both in this war and wars past.

Bowe Bergdahl knew exactly what he was doing, and he must stand accountable for it.

¹¹ "The Defector," *The Atlantic*, available at: <http://www.theatlantic.com/magazine/archive/2013/09/the-defector/309436/>