



# Military Appellate Court: Presidential Comments Can Amount to Unlawful Command Influence

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In a set of divided opinions on August 27, the U.S. [Court of Appeals for the Armed Forces](#) (CAAF) [rejected](#) Sergeant Robert “Bowe” Bergdahl’s appeal in his desertion case, which he argued was invalid due to unlawful command influence. However, CAAF found that the President’s remarks about an ongoing court-martial trial can amount to unlawful command influence in violation of [Art. 37](#) of the [Uniform Code of Military Justice](#) (UCMJ). The court [reasoned](#) that the President is by [statute](#) a convening authority for general courts-martial and is therefore subject to the Rules for Courts-Martial (R.C.M.) [Rule 104\(a\)](#)’s prohibition on unlawful command influence, which implements Art. 37 of the UCMJ. The court also [held](#) that the late Senator John McCain’s actions as Chair of the Senate Armed Forces Committee regarding a pending court-martial could have violated [Art. 37](#) of the UCMJ because Senator McCain, as a retired member of the Armed Forces, was a [person subject to the UCMJ](#). However, under the facts of the case, a CAAF majority [held](#) there was no apparent unlawful command influence, [affirming](#) the lower court’s determination that appellant Bergdahl was not entitled to relief.

This Legal Sidebar explains the prohibition against unlawful command influence in military courts, describes the tests CAAF uses to decide whether unlawful command influence has occurred, and explains CAAF’s decision in the *Bergdahl* appeal. For more information about military courts-martial, see this [CRS Report](#).

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## Unlawful Command Influence

Congress enacted the UCMJ in 1950 in part to address a perception of unfairness in military justice due to command control, as documented in a 1946 [War Department study](#). Art. 37 of the UCMJ prohibits certain conduct that could unfairly influence the outcome of a military trial. Some prohibitions apply to commanders and convening authorities, while others cover all persons subject to the UCMJ. Convening authorities (officials who [designate](#) a court-martial to decide a case) and commanding officers may not “[censure, reprimand, or admonish](#)” any participant in a court-martial “with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding.” Nor may such officials “[deter or attempt to deter](#) a potential witness from participating in the investigatory process or testifying at a court-martial.” No person subject to the UCMJ may “[attempt to coerce](#) or, by any unauthorized means, attempt to influence the action of a court-martial . . . in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts. . . .”

CAAF has [recognized](#) that two types of unlawful command influence can arise in the military justice process: *actual* and *apparent*. Actual unlawful command influence [occurs](#) when “there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case.” To prove actual unlawful command influence, an accused must [demonstrate](#)

- (a) facts, which if true, constitute unlawful command influence;
- (b) the court-martial proceedings were unfair to the accused (i.e., the accused was prejudiced); and
- (c) the unlawful command influence was the cause of that unfairness.

Military courts have also [posited](#) that “the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.” Consequently, even if the accused cannot demonstrate all of the above factors, he may argue that the government’s conduct nonetheless raises questions serious enough to taint the public perception of fairness in the court-martial. To demonstrate the appearance of unlawful command influence over a trial, the accused must [demonstrate](#)

- (a) facts, which if true, constitute unlawful command influence; and
- (b) this unlawful command influence placed an “intolerable strain” on the public’s perception of the military justice system because “an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.”

Sergeant [Bergdahl](#) appealed his conviction based on the latter form of unlawful command influence. He therefore had the initial burden to put forth “[some evidence](#)” of conduct that would constitute unlawful command influence. To prevail, the government had to [prove](#) beyond a reasonable doubt that the conduct did not occur or that it did not amount to unlawful command influence. If unable to do so, the government could [prevail](#) by proving beyond a reasonable doubt that a fully informed disinterested observer would not harbor a significant doubt about the fairness of Sergeant Bergdahl’s court-martial.

## The Facts of the Case

On June 9, 2009, Sergeant Bergdahl [abandoned](#) his combat observation post in Afghanistan with the intent of walking twenty miles through hostile territory to an American forward operating base, where he intended to discuss with the commanding general what he perceived to be poor leadership at his platoon that endangered its troops. His plan, which the military attributed in part to mental illness, quickly went awry when within one day the Taliban captured him. Shortly after Bergdahl’s disappearance, the military launched a [search operation](#) on his behalf, during which several soldiers were injured, some severely. The Taliban held him in [deplorable conditions](#) for five years, during which time he [was not alleged](#) to have

collaborated with the enemy, and he made numerous escape attempts. The Obama Administration negotiated an exchange of five high-level Taliban prisoners from Guantanamo for Sergeant Bergdahl. He then returned to the United States to face charges for desertion and misbehavior before the enemy. He eventually pleaded guilty and received a sentence of dishonorable discharge and partial forfeiture of pay, but no prison time.

The Bergdahl-Taliban prisoner swap engendered criticism from some Members of Congress, in particular over concern that the President had failed to notify Congress beforehand despite a statutory mandate. Chairman McCain threatened to hold a hearing if Sergeant Bergdahl did not receive adequate punishment. The controversy also spilled into the 2016 presidential election while Sergeant Bergdahl's case was in the referral process. Then-candidate Donald J. Trump spoke at rallies about the case, referring to Sergeant Bergdahl as a "dirty, rotten, traitor" and implying that he should be "shot" as a "deserter." After the election and while Sergeant Bergdahl's sentence was under consideration, President Trump responded to a reporter's question by stating:

Well, I can't comment on Bowe Bergdahl because he's—as you know, they're—I guess he's doing something today, as we know. And he's also—they're setting up sentencing, so I'm not going to comment on him. But I think people have heard my comments in the past.

Sergeant Bergdahl argued at his court-martial and on appeal that Senator McCain's and President Trump's conduct created the appearance that his trial and sentence were unfair.

## Can a Senator or the President Commit Unlawful Command Influence?

As a threshold matter, CAAF had to determine whether Senator McCain and President Trump were subject to the relevant proscriptions against unlawful command influence. CAAF found that Senator McCain, as a U.S. Navy retiree, was subject to the UCMJ and covered by the plain language of Art. 37 of the UCMJ. It may be worth noting that this holding rested exclusively on Senator McCain's status as a retired servicemember. Although his status as Senator or Chairman of the Armed Services Committee had no bearing on his amenability to Art. 37, it was relevant to the analysis of whether his conduct could have the appearance of unfairly influencing a decision to court-martial or the trial process itself. Members of Congress who are not subject to the UCMJ cannot commit unlawful command influence, despite their possible positions of influence over the military justice system.

With respect to President Trump, CAAF interpreted the Art. 37 reference to a convening authority, as it was then codified, as limited to the individual who actually convened the specific court-martial in question. Art. 37 stated at the time that "[n]o authority convening a general, special, or summary court-martial, nor any other commanding officer" may engage in the prohibited conduct with respect to "the court-martial." However, different wording in the Manual for Courts-Martial in R.C.M. 104(a) applies more broadly. By contrast, it states that "[n]o convening authority or commander may" engage in relevant conduct with respect to "a court-martial." Over one dissent, CAAF read the R.C.M. language as applying to anyone authorized to convene a court-martial, including the President, and with respect to any court-martial. CAAF noted that the R.C.M. is more protective than the statute, but that this is entirely permissible under the relevant provision of the UCMJ for prescribing regulations. Congress has since amended Art. 37 to read similarly to R.C.M. 104.

## "Some Evidence"

CAAF held that Sergeant Bergdahl satisfied his burden to submit "some evidence" that unlawful command influence had occurred. Senator McCain's position as Chair of the Armed Services Committee, CAAF found, gave him "unique sway" over the military, noting that he could delay or block promotions and assignments of senior military personnel, presumably including those with the responsibility to determine whether and how to administer military justice. CAAF might have reached a different

conclusion if Senator McCain's threat to hold hearings had involved conduct of ordinary [congressional oversight](#) due to concerns about military justice in general. But CAAF emphasized that the remarks were "especially problematic" because they concerned Bergdahl's specific pending court-martial after the preliminary hearing officer had recommended a [special court-martial](#) and before the convening authority had made a decision. In contrast to the more severe general court-martial, a special court-martial is a streamlined trial available for misdemeanor-level charges that is not empowered to adjudge severe punishments, such as a dishonorable discharge. Consequently, Senator McCain's remarks could [appear to "coerce . . . or influence"](#) the outcome of the appellant's court-martial. One judge [disagreed](#) with this holding based on the view that Senator McCain's remarks were not intended to coerce anyone as that term is generally understood, nor would holding hearings be an unauthorized means to influence the outcome.

CAAF also [found some evidence](#) that President Trump's remarks could amount to unlawful command influence. [Although](#) President Trump made most of his "[inaccurate and inflammatory](#)" remarks about Sergeant Bergdahl while he was a candidate and thus [not subject to the UCMJ](#), CAAF viewed his later reference to those remarks while President to be a [ratification](#) of them that could appear to "censure or admonish" the court-martial during the sentencing phase. Similarly, a [subsequent presidential tweet](#) referring to the outcome of Sergeant Bergdahl's court-martial as a "complete and total disgrace to our Country and to our Military," according to CAAF, appeared to censure the court-martial's sentencing of Bergdahl and could have influenced subsequent actions on review.

## Views of an Objective and Fully Informed Person

Following its test for apparent unlawful command influence, CAAF next [addressed](#) whether the conduct described above placed an "intolerable strain on the military justice system." It concluded that a hypothetical disinterested and fully informed person would not question the fairness of the trial because, in essence, she would expect that a person guilty of the crimes to which Sergeant Bergdahl pleaded guilty were serious enough to result in his court-martial and punishment, with or without the conduct of Senator McCain and President Trump. At heart, CAAF seems to have concluded that the disinterested observer would not suspect that the remarks prejudiced the accused.

The following facts were among those imputed to the disinterested observer:

- Desertion and misbehavior before the enemy are [serious offenses](#) that can result in severe punishment.
- The convening authority [called](#) Senator McCain's statement "inappropriate" and denied it had any impact on his decision to subject Sergeant Bergdahl to trial by general court-martial instead of a special court-martial as recommended by the preliminary hearing officer.
- There is no requirement that a convening authority [adopt](#) the recommendation of the [Art. 32 preliminary hearing officer](#).
- The preliminary hearing officer who had recommended a less severe special court-martial [did not have all of the facts](#) regarding the number and nature of casualties that occurred during the search for the missing Sergeant Bergdahl.
- In contrast to the preliminary hearing officer, the convening authority, who at the time served as Commanding General of the United States Army Forces Command (FORSCOM), would have had [ready access](#) to information about casualties.
- As Commanding General of FORSCOM, the convening authority would have understood that convening a special court-martial to try Sergeant Bergdahl would have been ["devastating to military morale."](#)

- Sergeant Bergdahl “*chose to plead guilty* to the offenses of desertion with intent to shirk hazardous duty and misbehavior before the enemy,” admitting the charges accurately described what he had done.
- Mitigating evidence, including Sergeant Bergdahl’s *mental state*, *mistreatment* at the hands of the enemy, and his provision of *substantial intelligence* to the Army after his return, was insufficient to overcome the *court’s conviction* that the severity of the misconduct rather than political interference influenced the outcome of the trial.
- Sergeant Bergdahl *requested* a dishonorable discharge and received no prison time.

Consequently, CAAF *concluded*:

[A]n objective, disinterested observer would conclude that rather than being swayed by outside forces, the military judge was notably impervious to them. Indeed, it can be said that this result—whether one agrees with it or not—stands as a testament to the strength and independence of military justice system. Therefore, assertions of an appearance of unlawful command influence are once again unavailing.

Similarly, CAAF *concluded* that Sergeant Bergdahl’s post-trial treatment and appeal at the Army Court of Criminal Appeals was, based on similar factors, untainted by the appearance of unlawful command influence.

Two judges *dissented* from this holding. They would have *imputed* to the fictional observer “some basic understanding of the importance of the concept of unlawful influence and its potentially corrosive effect on the military justice system.” In their *view*, such an observer “would believe that—whether or not the result of Appellant’s trial were foreordained—the comments of Senator McCain and the Commander in Chief corrupted the trial process beyond repair.” Moreover, as they *saw it*,

Never in the history of the modern military justice system has there been a case in which the highest level figures, including the Commander in Chief, have sought to publicly demean and defame a specific military accused. The vilification of Sergeant Bergdahl before, during, and after his court-martial was unprecedented, hostile, and pernicious in the extreme. It both placed an intolerable strain on the military justice system and denied the accused his due process right to a fair trial.

Accordingly, they would have *dismissed* the charges with prejudice.

CAAF also *denied* Sergeant Bergdahl’s motion for reconsideration without prejudice to his right to file a writ of error *coram nobis*, which appears to be based on the *argument* that the military judge in the original court-martial was not impartial because during the trial he was seeking employment with the Justice Department and used his opinion in the case as a writing sample.

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