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Mr. McCain's Irresponsible Remarks About Sgt. Bergdahl

By THE EDITORIAL BOARD OCT. 14, 2015

Two military officers who have conducted lengthy reviews of the circumstances that led to the abduction of Sgt. Bowe Bergdahl in Afghanistan in 2009 have concluded that he should not face jail time for having left his base.

Senator John McCain, the chairman of the Armed Services Committee, however, seems to think he knows better. Mr. McCain, a Navy pilot who was held captive for five years during the Vietnam War and tortured, told The Boston Herald that Sergeant Bergdahl is “clearly a deserter,” and threatened to hold a congressional hearing into the case “if it comes out that he has no punishment.”

The Army's decision to prosecute Sergeant Bergdahl for desertion and for violating rules that endangered his comrades was questionable, considering the abuse he suffered in captivity and the military's failure to recognize that he was not mentally fit to be deployed to a war zone. During his five years as a Taliban hostage, Sergeant Bergdahl was beaten with chains and endured severe chronic diarrhea that went untreated.

While much of the nation was relieved to see Sergeant Bergdahl return home last year, Republicans have exploited the case to criticize President Obama for the prisoner swap he authorized to secure the soldier's release. In exchange for his

freedom, the Obama administration freed five Taliban prisoners who were being held at Guantánamo Bay, Cuba.

Mr. McCain is certainly not the first politician to have spoken irresponsibly about the case. Donald Trump, the leading Republican presidential candidate, said recently that Sergeant Bergdahl is a “traitor” who should have “been executed.” But Mr. McCain’s remarks are particularly troubling because Gen. Robert Abrams, the top commander at Fort Bragg, N.C., who will make the final decision on the Bergdahl case, will most likely appear before Mr. McCain’s committee for confirmation should he be promoted to a higher post in the future.

General Abrams is expected to decide soon whether the case should go before a court-martial now that the military equivalent of a grand jury proceeding has concluded. He could decide to impose nonjudicial punishment or simply discharge him from the Army.

Mr. Bergdahl’s lawyer, Eugene Fidell, rightly protested that Mr. McCain’s remarks could constitute unlawful meddling by the legislative branch over a military prosecution. The senator should make it clear to General Abrams that he will respect his decision.

The Army, meanwhile, should waste no time in bringing this matter to a close, forgoing a court-martial, and allow Sergeant Bergdahl to get on with his life.

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A version of this editorial appears in print on October 14, 2015, on page A24 of the New York edition with the headline: Mr. McCain’s Irresponsible Remarks.

McCain's Hearing Threat and the Bergdahl Court-Martial

By Andy Wright and Megan Graham

Friday, November 6, 2015 at 9:33 AM

Last month, Sen. John McCain (R-Ariz.), chair of the Senate Armed Services Committee, stated his opinion that Army Sgt. Bowe Bergdahl, who is currently facing charges before a military court, is “clearly a deserter.” McCain’s comments have raised eyebrows for a number of reasons. For example, Bergdahl’s lawyer has asserted that they “constitute unlawful congressional influence” over the case. But beyond that, they highlight a particularly concerning set of issues — some constitutional and others statutory — in a case that is already showing a troubling lack of independence and transparency. (For more on this last point, check out Steve Vladeck’s posts here and here.)

On October 11, McCain told the *Boston Herald*:

If it comes out that [Bowe Bergdahl] has no punishment, we’re going to have to have a hearing in the Senate Armed Services Committee. ... And I am not prejudging, OK, but it is well known that in the searches for Bergdahl, after—we know now—he deserted, there are allegations that some American soldiers were killed or wounded, or at the very least put their lives in danger, searching for what is clearly a deserter. We need to have a hearing on that.

Notwithstanding McCain’s protest that he is “not prejudging” the issues, he also asserts Bergdahl is “clearly a deserter.” Members of Congress, like ordinary citizens, have been known to act like armchair jurors in criminal cases. Like all of us, McCain enjoys First Amendment protection for his opinions. Unlike most of us, he enjoys Speech or Debate Clause protections for his statements made in connection with legislative proceedings. He also serves as the powerful chairman of the Senate committee with legislative authorization and oversight jurisdiction over the military. When McCain speaks, people at all levels of the Pentagon and in uniform around the world pay attention — perhaps including uniformed military judges.

More troubling than his opinion of guilt, though, is McCain’s threat to hold a hearing if Bergdahl receives “no punishment.” A Senate Armed Services Committee spokesman later said that the committee has been conducting oversight not just of Bergdahl’s conduct, but also of the policies that led to the prisoner swap without prior congressional notice. He added that McCain “wants the legal proceedings to run their course before making a determination how best to continue the committee’s oversight work.” But both McCain’s original comments and the follow-up clarification do little to assuage concerns over the threatened hearing. Instead, they suggest that McCain may use his committee’s oversight function in a coercive manner — to threaten and, in the face of a court-martial judgment not to punish, to bring Bergdahl’s tribunal to a congressional hearing to face an unpleasant exercise in public shaming. Further, given that a hearing is only necessary if the result does not fit his perception of a just outcome, it maximizes the threat’s potential to improperly influence the court-martial itself.

There are a lot of issues to unpack in McCain's comments, some of which we tackle below the jump.

First, there is a question of whether Congress has the power to engage in the type of exercise McCain envisions. The power of legislative inquiry, of which congressional oversight is a component, is constitutional in origin as recognized by the Supreme Court in *McGrain v. Daugherty*. That power must be exercised in aid of the legislative function. Therefore, Congress must be conducting its oversight in order to consider potential legislation and evaluate existing law, including, where appropriate, the conduct of the other branches as it relates to Congress's legislative power. Here, perhaps McCain could argue that he wants to consider increased penalties for the class of offenses Bergdahl is alleged to have committed. However, the threat of a hearing designed to influence Bergdahl's trial itself would not be in aid of the legislative function; it would be meant to induce a specific outcome in a specific proceeding, not help Congress conduct appropriate oversight over the Defense Department, and Congress would have no power to do it as a matter of constitutional law. Though, as a practical matter, the congressional power issue would likely never be addressed in the absence of a criminal contempt prosecution of a resisting witness. (Andy's law review article *Constitutional Conflict and Congressional Oversight* addresses that issue in depth.)

Second, courts-martial, like judicial trials, raise acute due process concerns for the accused. While the Supreme Court has said that it has "played no role in [military law's] development," it has simultaneously acknowledged that military courts "have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." Given the Court's hesitance to supervise the development of military law, Congress and the Executive share responsibility for establishing appropriate procedural safeguards. Therein lies another pressing concern with McCain's comments.

The Constitution granted Congress "plenary control" over rights, duties, and responsibilities in the military context, including related to military discipline. Congress in turn has said that exerting undue influence from within the military command structure over a court-martial is unlawful. Why should this due process protection extend only to the direct chain of command? Isn't undue influence a concern no matter who exerts it? If the underlying principle is integrity of the proceeding without interference from powerful onlookers, then that rationale ought to extend beyond the chain of command to congressional overseers.

Third, aside from Congress's power to act, it may raise nontraditional separation of powers concerns to use congressional oversight to shape the outcome in a pending trial — regardless of whether that adjudication is housed in the executive or judicial branch. To be sure, Congress can affect pending matters by altering substantive law or passing jurisdiction-stripping legislation. But vindictive, threatening oversight designed to influence a trial would be, at best, political overreaching with possibly significant consequences. At worst, it could be constitutionally improper.

Just imagine the outcry if Congress summoned a federal judge to a Judiciary Committee hearing to account for her decision to depart downward from the Federal Sentencing Guidelines in a notorious criminal case. Remember that Chief Justice Rehnquist criticized

the Feeney Amendment as a violation of the separation of powers to the extent it even required a report from the judiciary containing downward sentencing departures broken down by individual judges.

True, military judges are not Article III judges. They are Article I judges, established by Congress. But, this lack of constitutionally designed *separation* of powers does not nullify independence concerns. The fact that military jurists are non-Article III judges doesn't render the essential independence function of the act of judging void or eliminate the need for protections to preserve that even-more fragile independence from extreme threats and abuses of power.

So, while Article III judges enjoy extra constitutionally embedded separation of powers protections, there are still lessons to be gleaned from a past instance of Congress using its compulsory oversight process on a sitting federal judge. In 1953, the House Judiciary Committee subpoenaed federal district court Judge Louis E. Goodman to testify about allegations of judicial and prosecutorial misconduct in a grand jury investigation of the then-Internal Revenue Bureau. Judge Goodman appeared before the committee and refused to answer questions due to grand jury secrecy as well as constitutional separation of powers. He read the following statement:

You have summoned a Judge of the United States District Court for the Northern District of California to appear before your Committee to testify at your current hearings. The Judges, signing below, being all the Judges of the Court, are deeply conscious, as must be your committee, of the Constitutional Separation of functions among the Executive, Legislative, and Judicial branches of the Federal Government. The historic concept that no one of these branches may dominate or unlawfully interfere with the others.

In recognition of the fundamental soundness of this principle, we are unwilling that a Judge of this Court appear before your Committee and testify with respect to any Judicial proceedings. The Constitution does not contemplate that such matters be reviewed by the Legislative branch, but only by the appropriate appellate tribunals. The integrity of the Federal Courts, upon which liberty and life depend, requires that such Courts be maintained inviolate against the changing moods of public opinion.

President Obama infamously criticized the *Citizens United* decision in his 2010 State of the Union. It had the unseemly effect of lecturing the Supreme Court over the decision as they sat in the well of the House while literally surrounded by the political branches. Similar separation-of-functions concerns underlie Bergdahl's court-martial. Each branch is supposed to serve as a check and balance on the others, but there are specific ways in which they are meant to fulfill those roles. When one branch is serving a function traditionally allocated to another, there may not be strict constitutional law issues, but concerns over the propriety of certain forms of overreach remain.

Here, Bergdahl's trial is happening in front of a tribunal without the kind of protections that insulate Article III judges from politics, such as life tenure and salary protections. (Not only do military judges not have these protections, Defense Department-related nominations and budgets go through McCain's committee.) Courts-martial are convened

to serve a judicial function, but they are housed entirely within the executive branch. The Supreme Court has specifically said that military courts are one of three established historical exceptions to federal judicial power residing exclusively within the judicial branch. And to be sure, this sort of structure doesn't always raise alarm bells. There are plenty of agencies with adjudicative bodies that serve judicial roles outside of the judiciary. Provided there are appropriate protections in place, they are constitutional. But whenever a judicial function is being exercised by one of the other branches of government, there is (and should be) an increased wariness of inter-branch overstepping.

Fourth, congressional proceedings raise concerns about the due process interests of those testifying before the committees (in this case, those conducting the court-martial), as well as those whose conduct is under scrutiny (both Bergdahl and his adjudicators). Oversight activities have direct reputational effects on such participants, and can have profound effects on parallel criminal, civil, and regulatory proceedings. As Andy argues in his draft article *Congressional Due Process*, Congress has not been taking those interests to heart. If McCain calls a parade of military officials to testify about their findings about Bergdahl's conduct and their exercise of discretion in the court-martial process, it would implicate the accused's due process interests in ways that could affect a court-martial appeal, future civil litigation, or administrative actions.

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We understand the palpable anger people feel about Bergdahl's alleged misconduct. Others shed blood in search and rescue efforts. During his military service, one of Andy's students was among those who risked life and limb hunting for Bergdahl. At the policy level, Bergdahl's capture created leverage that fueled the decision to release five Taliban members in a trade to free him. But none of those things has any bearing on Bergdahl's right to a fair, impartial determination of his guilt or innocence. An outcome-based threat to hold oversight hearings could exceed Congress's power of inquiry, undermine the integrity of the military tribunal, and erode due process rights for those accused of violating the Uniform Code of Military Justice.

Tags: [Congressional Oversight](#), [Courts Martial](#), [due process](#), [John McCain](#), [Senate Armed Services Committee](#), [Separation of powers](#), [Sgt. Bowe Bergdahl](#)

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McCain Should Stop Meddling in the Bergdahl Case

By MORRIS D. DAVIS AUG. 12, 2016

Washington — Sgt. Bowe Bergdahl is to appear this month at the next hearing in his court-martial at Fort Bragg, N.C. After Sergeant Bergdahl walked off his Army outpost in Afghanistan in 2009, he was abducted and tortured by the Taliban, who subjected him to nearly five years of harsh captivity.

Sergeant Bergdahl faces charges of desertion and misbehavior before the enemy, yet two senior military officers conducting separate, impartial investigations into his case have recommended no imprisonment. That outcome would be consistent with hundreds of other post-Sept. 11 desertion cases.

But that does not sit well with certain politicians who have treated Sergeant Bergdahl's case as if it were a political piñata. Foremost among them is Senator John McCain of Arizona, chairman of the Senate Armed Services Committee.

In March 2015, the Army warned the committee that holding any congressional hearing on Sergeant Bergdahl could undermine military justice. Two months later, after a senior McCain staff member raised the prospect of the senator's doing just that, an Army official repeated the warning against holding such a hearing. "To do so," he added, "would be unprecedented and deviate from defense oversight committees' longstanding practice of deference to allow ongoing military justice

matters to proceed to completion without direct congressional involvement.”

Yet, in October, just after the second investigator made his recommendation of no imprisonment, Mr. McCain said, “If it comes out that he has no punishment, we’re going to have to have a hearing in the Senate Armed Services Committee.”

Mr. McCain also declared that Sergeant Bergdahl was “clearly a deserter.” Such prejudgment of Sergeant Bergdahl’s case is only slightly less alarming than the statements of the Republican presidential nominee (and potential commander in chief) Donald J. Trump. He has said repeatedly that Sergeant Bergdahl is “a no-good traitor” who would have been executed 30 years ago.

The day after the senator’s statement, the Army asked that Mr. McCain make an announcement that would mitigate the appearance of improper influence on the military justice process. The Army even offered to assist in drafting it, but Mr. McCain stonewalled. Two months later, Gen. Robert B. Abrams, ignoring the advice of the investigative officers, sent the case to a court-martial, where Sergeant Bergdahl faces the possibility of life imprisonment — a punishment that presumably Mr. McCain would view favorably.

I was a chief prosecutor for the military commissions that President George W. Bush created to try terrorism suspects for war crimes. Senator McCain was the lead architect of legislation that revived the commissions after a Supreme Court ruling struck them down in 2006.

I had a meeting with Mr. McCain on Sept. 7, 2006, the day after President Bush announced that he had transferred the Sept. 11 mastermind Khalid Shaikh Mohammed and other high-value detainees to Guantánamo Bay to stand trial. The senator asked me, “What do you need to get the job done right?”

I told him that a lot of people were trying to interfere with the course of military justice, and what I needed most was to ensure that the process was insulated from political meddling. Mr. McCain asked me to draft language to prevent outsider interference. Section 949b of the Military Commissions Act of 2006 is the provision that I wrote — and which Senator McCain adopted verbatim: “No person may attempt to coerce or, by any unauthorized means, influence the action of a military

commission.”

The Bergdahl defense team has obtained emails between the Pentagon and congressional staff members showing Mr. McCain’s continual prodding of the Army about the case. That kind of involvement is inappropriate from any member of Congress, but it is especially egregious for the chairman of the Senate Armed Services Committee, since his committee has power over appointments to top Pentagon posts as well as military officer promotions.

As a result of Mr. McCain’s repeated attempts to put his thumb on the scales of justice, Sergeant Bergdahl’s lawyers have filed a motion to dismiss the charges against him or to limit his sentence to no punishment.

The Army deserves credit for recognizing the corrosive power of improper influence, and it must now send a clear message that partisan politics holds no sway over military justice. The Army should also approve the request by Sergeant Bergdahl’s lawyer.

The integrity of the military justice system must outweigh the pandering of politicians. Senator McCain should give Sergeant Bergdahl the same protection from meddling he afforded Khalid Shaikh Mohammed.

Morris D. Davis, a retired Air Force colonel, was the chief prosecutor of the military commissions at Guantánamo Bay from 2005 to 2007.

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A version of this op-ed appears in print on August 12, 2016, on page A23 of the New York edition with the headline: Stop Meddling in the Bergdahl Case.