

If tried by court-martial, senator accused of ‘seditious behavior’ would be deprived of several constitutional rights

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U.S. Sen. Mark Kelly, D-Ariz., speaks to reporters in Washington, D.C. on Dec. 4, 2025.

AP Photo/Kevin Wolf

The Department of Defense in late November 2025 announced that it would investigate U.S. Sen. Mark Kelly, a retired Navy captain and NASA astronaut, for what Secretary of Defense Pete Hegseth has called seditious behavior. The threat of investigation came after Kelly and five other Democrats, all with military backgrounds, released a video reminding U.S. service members they can disobey illegal orders issued by the Trump administration.

“No one has to carry out orders that violate the law, or our Constitution,” the lawmakers said, without specifying the orders the U.S. service members may have received. “Know that we have your back ... don’t give up the ship.”

In response to the video, President Donald Trump accused the lawmakers of “seditious behavior” that could be “punishable by death.”

Sedition is a federal crime, but as a military law scholar who served as a judge in the U.S. Air Force, I believe the Democratic lawmakers articulated a correct view of military law. That is, service members subject to the Uniform Code of Military Justice have a duty to not obey unlawful orders.

There are several unique features to military law that have no analog to civilian criminal law, and if Kelly were court-martialed he would be deprived of several fundamental constitutional rights.

Military justice

In a civilian criminal trial the government normally has the burden of proof on all matters. But in a court-martial, a service member who argues that an order is unlawful has the burden of proving its unlawfulness. And the Supreme Court, in its 1827 opinion in *Martin v. Mott*, gave this view some credence, arguing that the president, as commander in chief, should not be questioned during a national emergency.

Second, ordinary citizens are protected by a constitutional requirement that the prosecution must convince all jurors of the defendant’s guilt beyond a reasonable doubt. A court-martial has only a two-thirds threshold to establish guilt. And the jurors – called members – are not the accused service member’s peers.

Indeed, the court-martial members are military personnel who outrank the accused service member and are picked to serve by senior commanding officers. Military judges are also uniformed officers and, like the rest of the military, are subject to the chain of command.

At times, senior officers have inserted themselves into the military justice system and tried to direct a court-martial to convict an accused service member. This has created the problem of unlawful command influence, the improper use of superior authority to interfere with the court-martial process.



Defense Secretary Pete Hegseth has asked the Navy secretary to review Kelly's comments to troops for 'potentially unlawful conduct.'

AP Photo/Daniel Kucin Jr.

Kelly is still theoretically subject to the Uniform Code of Military Justice and could be court-martialed because he is a military retiree. This concept of a lifetime military jurisdiction did not exist when the Constitution was instituted in 1789. It came into existence during an emergency session of Congress in 1861.

The Supreme Court has never held that lifetime jurisdiction is constitutional. But in 2022 the U.S. Court of Appeals for the District of Columbia did, in a 2-1 decision.

It reasoned that if the Constitution's creators had thought such a jurisdiction were a threat to the republic, they would have prohibited it. The dissenting judge in that case pointed out the frightening possibility of a president using the Uniform Code of Military Justice to curb free speech.

Lines of defense

Kelly is different than an ordinary retiree, and this case is bigger than a single senator. That's because it goes to the heart of what the Constitution's framers intended by preserving liberty through a republican form of government.

In 1648, Oliver Cromwell, who had become a military dictator over England, used the army to curb the Magna Carta – a revolutionary basic rights document dating to 1215 – and the ability of Parliament to debate matters and pass laws. The Constitution is designed to prevent anything coming close to such an occurrence.

So, what would Kelly's defense likely be, other than that he exercised free speech and gave a correct recitation of the law?

Kelly's first defense might be that under the Constitution, the president, as commander in chief, has no power to court-martial or otherwise administratively penalize him. Doing so would diminish Congress' authority.

In 1974, the Supreme Court determined in *Schlesinger v. Reservists Committee* that although the Constitution prohibits a member of Congress from holding a position in the executive branch, citizens had no standing to sue in the federal courts to prevent this from occurring. Taken literally, the clause means that no member of Congress could hold a military commission and be beholden to the commander in chief, since this would erode Congress' independence and authority.

Kelly's second defense could be that after the Constitution and statutory law, the military law is governed by tradition, or the military's own past practices, which used to be referred to as "lex non scripta."

American history is replete with retired officers criticizing presidents or even joining in hate groups that accused a president of being beholden to subversive interests. Past presidents have ignored these men.

They include George Van Horn Moseley, who sided with pro-Nazi groups and accused President Franklin Roosevelt of being a communist. Retired generals Albert Coady Wedemeyer and Bonner Fellers formed organizations that undermined Presidents Harry Truman and Dwight Eisenhower.



Maj. Gen. Albert C. Wedemeyer greets Chinese military leaders in southwest China, on Jan. 18, 1945.

AP Photo

None of these men were court-martialed or administratively penalized.

Finally, Kelly could argue in federal court that the military has no jurisdiction over him because of the issue of unlawful command influence. One only needs to look at Hegseth's statements in the case to see the specter of this problem in regard to Kelly.

When Congress formulated the Uniform Code of Military Justice, it criminalized unlawful command influence. But as military law scholar Rachel VanLandingham has pointed out, no person has ever been prosecuted for violating the prohibition.

Kelly could argue that there are no safeguards in his case to ensure a fair hearing and that the case should move from military courts to federal courts. The federal judge assigned the case can then ponder whether siding with the administration's claims is a step toward establishing a Cromwellian future and away from the Constitution's protection of a republican form of government.

Of course, Congress could put a stop to any persecution of Kelly by informing the president that he is acting contrary to the Constitution and explaining to do so is a high crime or misdemeanor.

During the Vietnam War, scholar Robert Sherrill said that "military justice is to justice what military music is to music." In the past, military justice has been able to accomplish fair trials of military members, but it is dangerously open to influence by military leaders, all the way up to the commander in chief.

If there is to be an exercise in accountability for Kelly, it could more fairly be administered through a real constitutional analysis conducted by the independent federal judicial branch – or through a congressional intervention. Without either occurring, we may as a nation find ourselves a closer step toward a Cromwellian future.

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