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Professor Dave Schlueter

AFJAGS Podcast: Episode 46

The Commander's Role in the Military Justice System with Professor Dave Schlueter -Part 1

HOST: MAJOR RICK HANRAHAN

GUEST: PROFESSOR DAVE SCHLUETER

Two part interview with Professor David Schlueter on the role of commanders in the military justice system, his analysis on some of Congress' main proposals and his forecast on how military justice may look with some of these changes.

MAJOR RICK HANRAHAN:

In this two part interview, we speak with Professor David Schlueter, a subject matter expert on the role of commanders in the military justice system. This topic is at the forefront of many legal practitioners minds, as Congress and senior government officials have endorsed removing commanders authority to prosecute sexual assault in similar felony level cases. Assuming these reforms take effect, this will be another large change in the practice of military justice. [short intro music]

In this interview, Professor Schlueter discusses the history of the commander's role in the military justice system. His analysis on some of Congress's main proposals and his forecast on how military justice may look with some of these changes. Here are a few clips from part one of the interview.

SHOW EXCERPTS

PROFESSOR DAVE SCHLUETER:

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And so what we're really shifting toward is a similar bifurcated system. Some offenses will be handled by the new prosecution office, some will not.

ANNOUNCER:

Welcome to The Air Force Judge Advocate General's Reporter Podcast, where we interview leaders, innovators, and influencers on the law, leadership, and best practices of the day. And now to your host from [The Air Force Judge Advocate General's School](https://www.jagreporter.af.mil/).

GUEST INTRODUCTION

MAJ HANRAHAN:

Welcome to another episode from The Air Force Judge Advocate General's School at Maxwell Air Force Base. I'm your host, Major Rick Hanrahan. Remember, if you like the show, please consider subscribing on Apple Podcasts, Spotify, or your favorite podcasts platform and leaving a review. This helps us grow in outreach to the JAG Corps and beyond.

In this interview, we're going to tackle one of the most hot button and followed issues in the military today concerning the role of commanders in the military justice system. And we have a distinguished guest and renowned expert on the topic, Professor David Schlueter. Sir, thank you for coming on the show today.

PROFESSOR SCHLUETER:

Good morning. It's my pleasure.

MAJ HANRAHAN:

Professor Dave Schlueter received his B.A. degree from Texas A&M University in 1969 and his JD degree from Baylor University School of Law in 1971. In 1981 he received an LL.M. from the University of Virginia. He served on active duty as an Army JAG Corps officer from 1972 until 1981. During that time he served as an appellate counsel at the Army's Government Appellate Division as Chief of Criminal Law at Fort Belvoir, Virginia, and as a faculty member in the Criminal Law Division at the Army Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

He resigned his regular Army Commission in 1981 to accept an appointment by Chief Justice Warren Burger to the Office of Legal Counsel to the U.S. Supreme Court. In that position he provided General and Special Counsel advice to Chief Justice Burger, the Court and the individual justices. He retired with the rank of Lieutenant Colonel in 1997 from the United States Army Reserve JAG Corps.

In 1983, Professor Schlueter accepted a position on the law faculty at Saint Mary's University in San Antonio, Texas, where he continues to teach and publish today. During his career he has taught in multiple areas with an emphasis in evidence, trial advocacy, constitutional law, criminal law and criminal procedure.

He has won multiple awards for his teaching and publishing excellence and currently sits as the Hardy Chair Emeritus and Professor of Law at Saint Mary's. From 1985 to 2005. He served as the reporter to the Federal Rules of Criminal Procedure Advisory Committee, a position to which U.S. Supreme Court Justice William Rehnquist appointed him. He is an elected Fellow in the American Law Institute and is a Life Fellow of the American Bar in Texas Bar Foundations, and is regularly listed in *Who's Who in American Law*.

And as to publications, Professor Schlueter has published extensively over his career to include numerous articles and 12 books such as the *Military Rules of Evidence Manual*, Ninth Edition, 2020 (LexisNexis); the *Military Criminal Justice: Practice and Procedure*, 10th Edition, 2018 (LexisNexis); and *Military Evidentiary Foundations*, Sixth Edition, 2016 (LexisNexis).

His articles and books have been cited over 1500 times by state and federal courts, including the U.S. Supreme Court, in three cases. And for today's interview, we're going to work off one of his more recent article publications titled *Taking Charge of Court-Martial Charges: The Important Role of the Commander in the Military Justice System*. A 2020 publication in [New York University Journal Law and Liberty](#), with co-author Lisa Schenck.

Well, sir, it is evident that a remarkable career and legacy that you've left and I know that you're nearing retirement there, but with that, please feel free to elaborate a little bit on your bio, your current position and what you're focusing on right now for our listeners.

PROFESSOR SCHLUETER:

Well, thank you very much for that introduction. I've been very blessed to have held a number of different positions, an opportunity to work with a lot of individuals, and I think as it relates to today's topic, I probably got really interested in this when I was teaching at the Army JAG School and was teaching a seminar for what was then the advanced class, it's now the LL.M. program, on the analysis of the military justice system. And it was kind of, it was a seminar that was designed to challenge the thinking of the participants in the seminar as to the various aspects of military justice. And one of the classes focused on the role of the commander. And I remember in those days, we still had I think they were green chalkboards in one of the lecture rooms of the JAG School, and I put it a chart on the board and listed the various functions that a commander currently exercised. And had yes, no, maybe. And I think there were about 20 people in the seminar at the end of the two-hour seminar. We all looked at the chart in silence and I erased it and I said, "Okay, that's for the purpose of discussion." Because the results were astounding.

These were all JAGs probably with four or five years experience. I'd had probably eight or nine at that point, and we had talked about the issues and we had checked off on the role of the commander, probably half of them were X's, where it wasn't absolutely essential that a commander take a part. And I didn't record the chart. I just remember that everyone just kind of looked there, thought, you know, this is potential heresy, because at that point the commander's role was firmly embedded.

And I've never forgotten that experience and then as I progressed through my career and started doing more writing, I gave a lecture at The Air Force JAG School for the 50th anniversary of the UCMJ, and I had read an article by a Herbert Packer that I had studied when I was doing my LL.M. work and it really intrigued me. And he talked about the policies, the competing policies in the criminal justice system. On the one hand, we have the crime control model and you have the due process model. And I use that and translated that into justice

versus discipline. I gave the speech, I kept all my notes and really didn't do anything with it until about four or five years ago when I dug out my notes and decided to do a Law Review article on it titled [The Military Justice Conundrum: Justice or Discipline?](#) Then I really dug into the issue like I had never dug it before. And I concluded when I finished that article that the primary purpose of military justice had been and should be enforcement of discipline. In other words, more of a crime control model. That doesn't mean that there's not a role for justice, but that article got a lot of traction. It's been read a lot, it's been cited a lot.

And so you have the two sides of the coin, is the purpose of our system justice or is it discipline? And I think that's what's coming to the floor now in this debate in Congress about the role of the commander and the role of JAGs.

OVERVIEW

MAJ HANRAHAN:

So sir, maybe we could just start off kind of very broadly with hopefully maybe a simple but could be a tougher question, sometimes even answers, to provide an overview on the role of the commander military justice system and what is the importance of the commander's role in that system?

PROFESSOR SCHLUETER:

You know, I've talked with a number of people and they always ask me, "Well, could you show us any statistics to show that taking the commander out of the system will have an adverse impact on good order and discipline?" And I say "I don't know of any studies. I suppose you could run a survey." But at the core of all of this, is that the commander has always been an integral part of the military justice system. And I think it's really important in talking with commanders, they understand that if they have a command presence in the unit, if the unit knows that they are taking an interest in disciplinary matters, if they've got a handle on what's going on on the weekends in the barracks, or in the apartments, or the dorms, or wherever they're all housed, that has a positive impact on the unit.

They know that the commander cares. And I think this is especially important. What they tell me, is that it's especially important in terms of the unit knowing and understanding and believing that the commander will take swift action if they do anything wrong. And so that's always been a part of the system. But it's an elusive part because you can't quantify it. You can't say if you take that power away, then things are going to go downhill.

And I think it's really just a question, in the past that position has not really been challenged on the Hill. Because there were a lot of people serving in Congress who had prior military experience. The Pentagon had credibility. If the Pentagon went over and told the members of Congress that it was really important to keep the role of the commander in the system, Congress generally listen. There were some naysayers. There were those who, and one of the ones, Senator Gillibrand, because she's been pushing this issue since about 2013, 2012. But the Pentagon was trusted. I think that trust has eroded.

And I think that probably explains in part why there's an increasing momentum to remove the commander from the system. And I might just add, I think, I apologize if I'm being overly broad about removing the commander, because if you talk to the proponent of these changes, it's really only affecting a very small percentage of commanders and they focus on the convening authority.

Well, that may be true, but the military justice system depends very heavily on the chain of command, starting with the company grade officers all the way up through the chain of command, with JAGs advising along the way. And as I understand it, in this proposal, it would basically remove from all commanders the ability to weigh in on what should be done with court-martial charges.

MAJ HANRAHAN:

Yes, sir. So would it be safe to say that the role of the commander has been something that's been imperative to our military justice system, going back to even Colonial

America through a major wars, you know, through American expansion, even into the Information Age?

PROFESSOR SCHLUETER:

Absolutely. Absolutely. As I discussed in that *Conundrum* article, I talked about the historical roots of the court-martial. And the court-martial procedures have changed they've changed for the better over the decades. There have been major periods where there were reforms. The UCMJ itself resulted from complaints by service members returning from World War Two about how their commanders had summarily punished them without giving them in due process.

So the commander's role has always been there. And from my point of view and I don't know if you want to follow up on this, but I, I always view the commander as my client. I gave the commander the best legal advice that I could. I was the Chief of the Criminal Law Division at Fort Belvoir, for a while, and I had contact with commanders, and there were a couple of cases where I recommended that they not go to trial because the evidence was weak or credibility was an issue. And we took alternative approaches. We generally walk them down the hallway to the administrative board office where they could work on potentially boarding the individual out.

But I always viewed the commander as the one who had the say on what should happen with a service member who had committed an offense. And I think some of that changed over the years because I think more and more JAGs—and so we may be responsible for this in many ways—we convinced ourselves and the commanders that we were the ones that were really in charge, that we really were the ones that held the winning deck and the cards in the deck. And so I think a lot of commanders came to trust the JAGs and said, "Okay, whatever you think, it's fine with me, just give me the papers."

And so I think over the course of time and this pretty much traces the due process developments, even in the civilian community, that as the rights of the accused

have been expanded, the rights of the accused and the military had been expanded as well. But I always maintain that regardless of whether you agree that the purpose of the system is justice or discipline, the commander has a key role in that.

MAJ HANRAHAN:

Yes, sir. And, you know, as we discussed, you and I kind of before this interview to talk about this issue as a neutral and objective as we can from both sides, right? To list the pros and cons of this. With that kind of backdrop, you mentioned earlier that there's less members in Congress maybe today that have military backgrounds. Do you think that has had a factor or a bigger factor in this issue now rising to the level where it seems to have support on the Hill?

PROFESSOR SCHLUETER:

Yes and no. I just mentioned that I've talked with commanders who believe strongly that it's really important for them to continue to have a role. But I also talk with commanders, and I hear this anecdotally. There are commanders that would be more than happy to give up that power. So if you have former commanders, if you have former military in Congress and in this environment where there's just kind of an eroding trust in the military's ability to take care of sexual assault cases, you might very well have former military members in Congress who believe strongly that it's time for a major change, that the lawyers really ought to take their hand at it and take the commanders out of the system.

But my sense also is in talking with staff members at Congress, that there still is always this kind of a cloud around, there's a mist hanging around the military justice system, because they've watched old movies. They watched a *Few Good Men*, they watched the *Cain Mutiny*. And so for them, military justice is potentially an archaic system.

So in all my years of writing, I've always in my audiences, I talk about the need for respect in the system. So if there are former military officers or enlisted who are currently

serving in Congress, it can cut both ways. But at least if they've been in the military, they probably understand more fully what the system looks like and how it works. They probably have at least one or two instances in their experiences where they can remember. One person, for example, is Senator Lindsey Graham, Retired Air Force JAG. And I haven't reached out to him, but I'd be curious to see what he thinks about all of this and what position he's taking.

HOT BUTTON ISSUE

MAJ HANRAHAN:

Right, and that would also probably get into the second, third and fourth order effects, which we're also going to talk about here as well, because if you have that military background, you're probably thinking about those additional impacts that it could have by taking away commanders' authority. And just to be clear for our listeners, right, the hot button issue right now is to remove commanders' authority from prosecuting sex assault cases and high level felony offenses. Is that accurate, sir?

PROFESSOR SCHLUETER:

Yes. And there are I think every last I've heard, I think there are two proposals. I think Congress, at least of Senator Gillibrand and her supporters are trying to address, perhaps behind closed doors, some of the concerns that have been raised about mixed offenses, bifurcating this system. So it may be that they're attempting to consider the unintended consequences. But right now, that's the hot button subject—sexual offenses in the military.

MAJ HANRAHAN:

Yes, sir. And your article gets into three main proposed categories to the changing the commander's role in military justice. Could you maybe elaborate on that for our listeners?

PROFESSOR SCHLUETER:

Now, you're talking about the three potential approaches to the role of the commander in the system?

MAJ HANRAHAN:

Yes, sir. The three potential approaches in what it looks to be, the way that Congress likely will be going.

PROFESSOR SCHLUETER:

Well, the one that I think that's getting the most attention right now is to take the commander out of the preferral and referral stage and put it in the hands of a legal office that would be outside the chain of command and it would be staffed by an O-6 who has trial experience. Another proposal would be to shift all of military justice to civilian prosecutors. And I'm trying to remember the third one that I had in my article. You'll have to refresh my memory. I believe it had to do with giving the JAGs more control within the system, but keeping them in the chain of command.

So the one that's getting all the attention right now is to let the military JAGs continue to prosecute the cases, not to shift it to the civilian community, but to shift it to an office that's outside the chain of command, which in the article we refer to is really an ivory tower. It's going to be an office that's going to be geographically distant simply because you're going to need a central office for prosecuting if you're looking for an O-6. One of the staffing problems is where do you find enough O-6's who are willing at the end of their career to now go back and in an affect, be trial counsel? That's really what they're doing. They're going to be prosecutors. There might be a few that would really love to do that and see that as a transition into civilian life. But I think they're going to be a clear staffing problem. So I think those were the three that I talked about.

MAJ HANRAHAN:

Yes, sir. And obviously, you know, there's there can be pros and cons to all this. And as military we have to remain apolitical and we're going to do whatever Congress tells us.

PROFESSOR SCHLUETER:

Absolutely.

STRENGTHS AND WEAKNESSES

MAJ HANRAHAN:

What are some of the, I guess, strengths and weaknesses of the proposed changes versus kind of the way we've been doing business?

PROFESSOR SCHLUETER:

Well, on the pro side, I have to hand it to the individuals who have been pushing this reform. They've been tireless. This is, I should say, historically, this is not the first time that we'll push to take the commanders out of the preferral and referral process. Senator Birch Bayh back in the seventies, I believe, pushed very hard for this. And the New York City Bar Association in the seventies pushed hard for it. I remember being an active duty JAG and thinking, what are they thinking? Well, they have been persistent. And I think, the argument I think that probably carries greater weight is that when you lose trust in the system, when you lose trust in the military's ability to handle a particular problem, then you look for alternate solutions.

And the most ready alternate solution that's been pushed for years and is now gaining traction as well. You just put all of this in the hands of lawyers. Now, lawyers are going to be very sensitive to the legal issues involved. And so on the one hand, there may be an unintended consequence for the proponents, because I believe they're pushing because they really want to see more prosecutions for sexual assaults. But I don't know that putting it in the hands of lawyers is necessarily going to answer that. The lawyers are going to look at it with the same approach that the lawyers in the field do now, and that is, is there sufficient evidence to prove beyond a reasonable doubt, that the accused committed the alleged offense.

So I think there's something to be said for putting it in legal hands without having to consult with commanders. On one hand, that's going to be easier to do. And I think there might be unintended consequences in terms of someone in a distant location trying to assess the witness' credibility. In opposition to that, I think I just

don't think it's wise to create a bifurcated system. I've been thinking more about this lately. My co-author and I wrote an op-ed for The Hill about a month ago, and we got some pushback from some of the proponents of the change.

And in our op-ed, we had cited the service-connection requirement that existed in the military for a number of years, that was established in 1969 by the U.S. Supreme Court and O'Callahan. And that service-connection requirement, and I remember it because I tried cases, I argued cases on appeal, had the prosecutors had to show, the commanders had to show that the offenses in question were service connected.

And the court and the lower courts developed a complicated series of factors to be considered. We had the Relford factors, there were 12 of them. And so when the United States Supreme Court and Solorio finally did away with the service-connection requirement, there was a great sense of relief because it had really taken a lot of expenditure at times, we had an overseas exception. So the O'Callahan rule didn't apply overseas.

And so what we're really shifting toward, is a similar bifurcated system. Some offenses will be handled by the new prosecution office, some will not. And anytime you do that, there are going to be questions about, all right, well, where do you decide or when do you decide or how you decide, where the court is going to go, where the charges are going to go? Did they go to the system where the commander is out of it, or they go to the system where the commander are still very much part of it.

So I think that's one of them, that's one of the counterarguments against it. But as I said, I can see the argument for just putting this in the hands of lawyers and letting them make those decisions and letting them make the final decisions.

DOES THE SYSTEM NEED REFORM

MAJ HANRAHAN:

Yes, sir. And one question, that might be hopefully an obvious one. It's probably a simple one and a service question, is the system in its current form, does it need reform?

PROFESSOR SCHLUETER:

Well, in my opinion, no. I think there are some things that could be tweaked. I've always believed in a random selection of members. We have that now modified. I gave a speech at the Army JAG School about a legal system looking for respect, and I propose that we've got the computer systems now. There should be no reason why we couldn't select the panel completely at random.

But I don't think that's a great weakness of the system. It's an aspect of the system that gets a lot of attacks. I think that we've come a very long way in terms of, especially with the 2016 Military Justice Act. It's looking more and more like a civilian trial system where the military judge has more powers. Rightly or wrongly, the military judge has the final say on the case, rather than the convening authority issuing the promulgating order as in the old days, the military judge signs a judgment which is very similar to what takes place in federal courts.

But having looked at the system and studied it and written about it, I tend to be a defender of the system. And I understand that there are a lot of question marks about it. But I found that when I'm teaching my military law course, if I have two thirds of the students who are completely unfamiliar with the system, they reach the end of the semester, and I give them an opportunity to do a paper. And most of them believe that at its core, the military justice system is a sound system.

They could always find areas where they could tweak it a bit. But for the most part, they come into the system, they're interested in it, to see what it's like. They read about it, and when at the end of the semester, I say, you know, I keep asking them, "So what do you think of military justice? What would you change, if anything?"

So they generally are of the view that the system is not needed, it does not need major reform. And that's generally where I fall on this question.

REFORM IMPACT

MAJ HANRAHAN:

And with respect to the reform I know there are some folks saying, well, you know, it sounds like the reform may be coming. Again, military, we're apolitical. Whatever happens, happens, and we will we will work through it. But if the reform does occur, how might that impact some of those second, third and fourth order effects, such as non-judicial punishment, pretrial confinement, speedy trial, pleas, working with local civilian agencies and prosecutors, etc.

PROFESSOR SCHLUETER:

Then you have to add to that grants of immunity. I just skimmed through the 366 page report from a subcommittee of the Joint Service Committee. I don't know that it's widely available. I had a friend e-mail me a month ago, and I can't recall ever hearing that a report even existed. It was a report that was prepared at the direction of the Secretary of Defense in 2020. And it was in response to Section 540, I believe the National Defense Authorization Act of I think it was 2020, where Congress directed that the Department of Defense look at potentially establishing a pilot program. And in that report, I thought I had come up with an exhaustive list. They came up with what you call third and fourth order. They listed all of the articles of the UCMJ that would have to be changed, another list of articles that would probably have to be changed. And then they also addressed the Manual for Courts-Martial.

So the downside of all of this is that I could see Congress saying, okay, this is the easy fix. We're taking charge. We're tired of hearing about sexual assaults and so go do it. And the job will then fall on the shoulders of the folks in the Pentagon, the policymakers, to scramble and I'm hoping that if this goes through, that they would at least wait one or two years, as they did with the Military Justice Act, because it's going to take that long to work through all of this.

And as we as I identified in that article, there are a number of areas where the commanders have a say: Article 15, pretrial confinement, immunity, dealing with the local establishment as to where to bring charges. And so if you take the commander's power on those issues, then I assume Congress thinks that those should all be handled by this new legal prosecution office. And if that's the case, then you're going to be dealing with all these questions at a great distance.

And for those in the audience who are currently practicing military justice, you're probably in an installation, maybe not always, but you may be at an installation where you're 5 minutes away from talking to the commander. Where you can arrange a phone call or you can arrange a meeting in your office, go over the evidence, look to the case files, you can interview the witnesses, look them eye to eye, make an assessment of credibility, make an assessment on pretrial confinement.

And so if Congress decides that they want to take the commander completely out of the system, and I'm not sure I want to be sure that I'm not overly dramatizing the potential effect, I think these proposals would take the commander out of the system in terms of decisions to prefer and refer charges. Okay, that's one step.

But then you have all these other areas where it's not clear what Congress really wants to do with a commander. So unless there's legislation to the contrary, I'm assuming the local commander would still be involved in pretrial confinement, maybe even grants of immunity, but those would all have to be coordinated with the legal office.

MAJ HANRAHAN:

That concludes part one of our interview with Professor Schlueter. Please stay tuned for part two in the next episode for the remainder of this interview. Thank you for listening.

[background music]

ANNOUNCER:

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[music ends]

GLOSSARY

- **AFJAGS:** Air Force Judge Advocate General's School
- **JAG:** judge advocate general
- **O-6:** military officer rank; colonel in U.S. Air Force, Army and Marine; captain in the Navy and Coast Guard
- **UCMJ:** Uniform Code of Military Justice