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Professor Dave Schlueter

AFJAGS Podcast: Episode 47

The Commander's Role in the Military Justice System with Professor Dave Schlueter -Part 2

HOST: MAJOR RICK HANRAHAN

GUEST: PROFESSOR DAVE SCHLUETER

Part two of the 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:

This is part two of the two part interview with Professor David Schlueter on the role of commanders in the military justice system. If you didn't listen to part one, consider listening to the previous episode. Here are a few clips from part two of the interview.

[short intro background music]

SHOW EXCERPTS

PROFESSOR DAVE SCHLUETER:

And so while it might be helpful to look at other systems in other countries, I don't find that persuasive.

What big of a change that will be? I think it will be a big change. I have no doubt about it. But I'm also confident that we'll adjust to it. We'll go forward.

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](#).

TAKING AUTHORITY FROM COMMANDERS

MAJ HANRAHAN:

Yes, sir. And maybe to give some context to this, I know that these kinds of issues of looking to take authority from commanders has popped up in our history, right, before? I think you had mentioned back in the sixties and seventies with drugs, that was an area that Congress was looking at that point. Is that something we can look at to kind of see how that played out? Maybe to give us some context to this to the current climate?

PROFESSOR SCHLUETER:

Yes and no. My personal view is I know that when I started giving lectures on this, LexisNexis had me involved giving some speeches in Washington, D.C., at the National Press Club. And I started talking about how the military could address this issue of sexual assault. And as someone who is very proud to have been associate with military justice, it's been extremely frustrating for me that the military cannot seem to solve this problem.

And I have told people over the years, we handled the drug problem. There were a variety ways of doing it. One was kind of a zero tolerance. There were a lot of cases that involved drug prosecutions. It's rare now to see a case dealing with Military Rule of Evidence 313 that deals with inspections. But back in the day, that was being litigated all over the place. Dog searches were being litigated because that's where the military was. It was dealing with drug offenses.

And I have always maintained, although I'm less optimistic now than I was three or four years ago, that the military could solve it. Because the latest statistics show that the sexual assault rate continues to rise slightly. And so I know there are a lot of people in the Pentagon that are probably as frustrated with this as the members in Congress.

So I continue to say to Congress, before you make any changes, think very, very carefully about the downsides. Think carefully about that the unintended consequences, because the military has resolved these issues in the past. And I think at some point, from what I hear and talking with staffers on the Hill, the senators and the members of the House of Representatives, they just said, "We've had it."

They're just not even willing to listen to the statistics anymore. That's why I think their minds are pretty well made up. They figured that there's nothing to lose. And on the whole, it's better to make these changes and then see what happens. That's an unfortunate approach, unfortunately.

SEXUAL ASSAULT CRISIS

MAJ HANRAHAN:

So, sir, do you think that it's your understanding that on the on the Hill and in kind of with our senior leaders in government, that the idea is that we haven't solved the sexual assault crisis yet, even with all the things we've done from the Special Victims' Counsel, to the updates with the Military Justice Acts, that we're still not there yet, at least from our senior leaders' perspective.

PROFESSOR SCHLUETER:

I think so. And we all, my co-author and I, Lisa Schenck who's at GWU [George Washington University] as an associate dean, we did another article. It was published in the Gazette Law Review this last spring as well. And I've got to take my hat off to Lisa. She did a lot of the heavy lifting on the statistical studies. But in that article, we concluded that the military's conviction rate is higher than it is in large counties and states, Texas, New York and California. That the statistics are better than they are at major universities such as the University of Texas. Now, those statistical studies obviously they don't fit perfectly because you're looking potentially at a different demographic group.

But sexual assaults are a problem in our nation. They're not unique to the military. And for those of us who are involved in the military, we see it all the time. And I think we can become easily affected and say, well, we must really have a problem that's unique to the military, but it's not.

I recently attended a CLE conference where lawyers were dealing from a university general counsel's office, we're talking about the problems they face with Title Nine and what happens when a victim comes forward and claims that a fellow student sexually assaulted her or harassed her in terms of the due process rights. And in talking with them afterwards, they were extremely interested in our statistical studies because they said, they see it from a university standpoint and they think that they've got it really bad, and they haven't really looked around to see it's bad everywhere.

So it's a national problem. And I don't know that that argument is going to carry the day right now with Congress, because if they believe that it's a national problem, they can say, "Well, other states can deal with it, our focus is on the military." We've lost confidence in the military's ability to solve this because for the last seven or eight years, representatives from the Pentagon go over and say, "We're working on it, we're working on it." And I think Congress' patience is finally run out.

OTHER COUNTRIES' LEGAL SYSTEMS

MAJ HANRAHAN:

And I know in your article you talk about other, at least there's been arguments that other legal systems in other countries have these special prosecutorial units or they're more civil in their approach within their military systems. But I know in your article, you kind of, you discuss that. Can you elaborate on that a little bit?

PROFESSOR SCHLUETER:

Sure. I'd be happy to. One of the arguments that was made by the proponents of these changes, and I haven't heard them lately on the Hill, and by proponents, I mean former JAGs, law professors, who are out there, who have for years championed removing the commander from the system. And one of the arguments that they've made is that we should be looking to what our allies do. We should be looking at England, Germany, Israel, Canada, Australia.

And so in the article, we did look at those. And we made some arguments. And I think there's more statistical studies out there that would support our position. Is that, okay, you can look at those systems, but first of all, take into account how many service members do they actually have on active duty? What are they dealing with? What is the geographical distribution of any of those forces? And for example, in Israel, they've got what amounts to a separate prosecution office, civil prosecution office. Germany has the same thing. Well, they don't have worldwide deployment of troops. They're essentially dealing with a very small country

where distances are short and you don't have a high rate of indiscipline. And so it's one thing to say, well, that system works well in Israel or that system works well in Canada, or works well in Germany. But that doesn't mean that it's going to work well in the United States.

And I had a friend tell me a year ago that part of this is European envy that we went through that stage even in Supreme Court decisions in the last few years where one or more Supreme Court justices would say, "Well, in deciding this issue, we really need to take a look at what's going on in the European Union" or "We need to take a look at what's going on in similar countries with similar demographics."

And I, I don't accept that proposition. We are an exceptional nation. We are an exceptional military. And I think we should take great pride in that. And so while it might be helpful to look at other systems in other countries, I don't find that persuasive. I think the statistical studies show that just the number of people involved, the number of courts-martial involved, their historical setup, for example, in Germany, they're coming from a history where the military was too powerful. So there's always been a little bit of distrust in the military and in the military justice system in countries like Germany. In Canada, the civilian component or the separate prosecution component was really driven by some of their judicial opinions, which called into question the due process rights provided in the Canadian military justice system.

And we don't suffer from that in the United States. The U.S. Supreme Court and Ortiz in 2018, I like to think that was somewhat of a blessing on the military justice system. There are still debates going on about whether the Supreme Court fully blessed military justice, but it was pretty clear that when you get to the end of those opinions—even the dissenting opinions—that military justice has risen, in their opinion, as being a legitimate system.

But I just don't think it's worth looking at what other countries are doing. I think there are too many differences. And I think that we can certainly look at ours. That doesn't mean we can't make improvements. But I certainly wouldn't recommend adopting wholesale what's being done in Italy or excuse me, in Germany or Israel or the U.K.

SUPREME COURT

MAJ HANRAHAN:

Yes, sir. So it sounds like to you it's more of an apples and oranges kind of argument.

PROFESSOR SCHLUETER:

It is.

MAJ HANRAHAN:

So, sir. You obviously also, as I mentioned your bio, you had this incredible opportunity where you worked for Chief Justice Warren Burger for legal counsel to the U.S. Supreme Court. So you've actually had this intimate role working within the court. From your perspective, how has this U.S. Supreme Court viewed the commander's role in the military justice system?

PROFESSOR SCHLUETER:

Well, I don't know that in Ortiz. I guess in Ortiz, the majority, the dissent not so much, although Justice Alito, I think, cited one of my articles on the historical roots or the history of the courts-martial. He focused on the role of the commander as the enforcer of discipline, as the commander as part of the executive branch, because the question in Ortiz was whether the court had jurisdiction over decisions coming from the United States Court of Appeals for the Armed Forces.

The majority talked about the role of the commander, but ended up emphasizing the judicial component or the judicial aspect or the judicial side of the coin; the justice side of the coin, if you will. So they didn't say anything, really, that I think would support taking the commander out of the system. I was probably neutral in that regard.

I think it's really important. One of the things just a side note, a professional anecdotal reflection, we don't call them "war stories" in my class [laughter] or professional reflection. When I got to the [inaudible] I was amazed with how many people there were prior military. I was one of two legal officers. Both of us were Reserve JAGs. The special assistant to Chief Justice Burger was an Army JAG reservist. In the clerk's office, there were several retired service members. In the police department, there were retired service members. In the marshal's office, the deputy marshal was the former Army JAG sergeant major.

And so I remember talking with, I think it may have been with Justice Powell, who was alive at the time, was a real, real gentleman. And he had prior military experience. I think Justice White had prior military experience, if I'm not mistaken. And the impression I got from talking with them is that there was just a high regard for the military. That the military it could be viewed, they were mission oriented. They knew what had to be done. They were top drawer quality, as a friend told me, so that when a problem arose they knew to attack it. They did it with confidence and their military training was actually paying off in that court because of their dedication.

Now, I can't tell you what the composition is today, but I think that brought a lot to the court. So they understood what military justice was. There were some naysayers in the court, but for the most part, I think even back in the eighties, and the majority of the justices understood that military justice was alive and well and doing well.

FUTURE

MAJ HANRAHAN:

Well, sir, that's a fascinating account. Thank you for sharing that. It's interesting to hear how kind of things happen behind the scenes sometimes. You know, as we kind of discuss this and we remain neutral and objective to this issue. If the Congress does make changes to how we kind of do business in the military, might you be able to offer any insights into how the future might look?

I don't know, five, ten years from now in the military justice system. And I know that's going to be predicated on what those changes are. But let's assume that they do take away some command authority, at least for sex assault and high-level felony offenses. How might that look in the future?

PROFESSOR SCHLUETER:

I have every confidence that we'll handle. You know, on a personal note, I've been thinking about this a lot over the last six months because those skies got darker and darker, and it looked like the more the Congress is going to actually make these changes, because we fought this battle before. Since I fought the battle, I guess I did some white papers for the Senate Armed Services Committee, I think about five or six years ago. And as the skies got darker, I started thinking back to the history of the court-martial, and I remember reading that in the 1950s there were some old timers that grumbled a lot about the new UCMJ [laughter] as opposed to the—in other words, they had served for 20, 30 years under the Articles of War. They served during the World War Two. And now Congress decides to change the whole system and turn it upside down. And I remember reading that there was a lot of grumbling in the ranks from the old timers. And I thought to myself, I'm getting to be an old timer [laughter] and I going to grumble about this, or am I going to take the stack of wood that's been put in front of me and cut it?

I worked for a general once who told me, "Schlueter, just cut the wood put in front of you." And there are probably some people out there who know who I'm talking about. And I've always remembered that and I pass that advice on. So my goal for the last number of years in my writing and my lecturing is to help JAGs. They're near and dear to my heart. I realize the challenges that they face I love being able to do it. And so I'll just dig in and I'll say, "Okay, what is it that we can do to help you?" Maybe write an article, maybe make significant changes in the books. But I have every confidence that there are a lot of bright JAGs in the Pentagon who will fix this and will respond to it and work with it.

We did it with the 2016 Military Justice Act. Now we had time to do it. A lot of training was required. Will the system look different? I think it will. It's also occurred to me, that there may actually be a drop in courts-martial. Sexual offenses I think will probably remain about where they're at. I think there's going to be tremendous political pressure on this new JAG office to prosecute.

I understand from talking to folks in the Air Force JAG that if a victim says that he or she was sexually assaulted, that that case is almost certainly going to go to trial. And so there have been recent studies from the Defense Advisory Committee on, it's called [DAC-IPAD](#). It's the investigation, prosecution, defense. They studied a number of cases and found that in about 95% of the cases, prosecutorial discretion was reasonable.

So I don't know that it's going to result, even with the changes, I don't know that it's going to result in any more sexual assault prosecutions. And I could see that for even some of these offenses where they fall within the purview of this independent JAG office, we don't know the impact it's going to have on administrative discharges.

It could be that the local level rather than if it's just not worth going forward, they'll consult with the O-6 and say, "Look, we just want we just want to get this kid out of here. Let's administratively board him. We'll give him a general discharge or Other Than Honorable." So we may actually see a rise in administrative boards, but I'll do what I can to support or the system.

And I think, I think as you mentioned earlier, the handwriting seems to be on the wall. I have talked with staffers with a couple of senators. I'm going to be talking this week with some staffers for a U.S. congressman who is a former Army JAG, who I know well. And I'm just going to get his ideas on what, if anything, more can be done. But we're also hearing back from staffers in Congress that the handwriting is on the wall, that at this point, you know, their attention span is basically short lived.

I really will add to this and you haven't raised this. My sense is in talking with the people on the Hill, that the Fort Hood incident really switched a lot of votes. Our Senator John Cornyn, took part in that. They renamed one of the gates at Fort Hood after Vanessa Guillen. And although that wasn't a sexual assault prosecution, it was a tragic case. But the investigation apparently showed that there was a lot of bias and a lot of insensitivity among the commanders. And I think that probably switched a lot of votes. I think a lot of just said when they heard that, "That's it. We've given the military seven or eight years to fix this problem".

So what big of a change would be? I think it would be a big change. I have no doubt about it. But I'm also confident that we'll adjust to it. We'll go forward.

LEADERSHIP

MAJ HANRAHAN:

Thank you for that, sir. And as we kind of move into the final questions, as you may know, our show focuses on leadership and innovation. And I just want to offer this question to you. How will leadership play a role in this emerging topic?

PROFESSOR SCHLUETER:

Oh, I think they've got a critical role. I think they've got a critical role. I think especially at the higher levels, I think they need to, they need to make sure that everybody in the chain of command understand the JAG unit chain of command. I always talk about JAGs, that we're going to solve this problem. We've got our marching orders from Congress. We respect Congress. That's the way the Constitution is set up. They get the final say. And we're going to do everything within our power to make sure that we carry out their mandate and to make it, to make it a better system. If that's what they believe is required, we'll do it. We've done it before. We've done it every time there were major changes. We did it with the Military Justice Act of 2016.

It occurred to me on the one hand, the leadership has a critical role to play. But if, for example, they enact this law and it goes into effect let's say January 1st 2022 or 2023, that the young JAGs going through the basic class or the basic training at Maxwell aren't going to know any different. They're going to learn the system as it's been revised and they'll sit around a coffee table and they hear the old timers complain about the good ol' days, right?

And I remember when I went on active duty in '72. I would just cut in that pile of wood in front of me, but there were older JAGs there that remembered what the system was like before the 1968 Military Justice Act, when they were still trying cases without military judges. And for me it really did the difference. I had my coffee and donut and I went back to work in terms of what was going on at that point.

So at some point we are very resilient. But the leadership I think needs to instill confidence in the subordinates that we'll get through this. And I think they need to set the example. You know, the military typically we do a lot of bellyaching and complaining, right? The food's not right. The money isn't getting in the bank on time, but for the most part, we're pretty proud of what we're doing. And so I would encourage leaders to take pride in the challenge. This is a challenge. It'll take a lot of work. It'll take a lot of innovation. So whether you're a major in the Pentagon working on a draft of some change in the RCM or on a military rule of evidence or whatever it is, you just do the best job you possibly can and take pride in it.

RESOURCES

MAJ HANRAHAN:

Yes, sir. Thank you for that. And much appreciated.

Obviously today, how we've discussed a good bit on this and we couldn't possibly go over all this. And I will definitely refer listeners and readers to your article in the

New York University Journal and Law with co-author Lisa Schenck that we referenced earlier. But outside of that article and I know there's other articles on this topic. Are there any other places where you think listeners could learn more about the topic?

PROFESSOR SCHLUETER:

Well, I mentioned the [Gonzaga Law Review](#) article It's I've got it right here. It's volume 56 and it just came out and it's page two eighty-five [285]. That's one place. You can go to [CAAFlog](#). And there are a lot of conversations taking place. There are a lot of papers. There are a lot of blog entries that C A A F L O G. Some of your listeners may be familiar with that. And so they're currently taking a more pro-reform position. But your listeners can certainly, in fact, I just checked up this morning to see any recent developments, and I think they listed something like ten or 12 pieces with links to them. And we're on that list. But there are many others who have weighed in, who've talked about the system and have talked about why the reforms are necessary or why the reforms are not necessary.

I would say it's probably pretty evenly divided. I've looked at their articles I just finished annotated a number of them for our 2020 supplement for military criminal justice. But one of the things we've been doing in that book is annotating a lot of your articles to try to get as many in there as we can. And I'm amazed at how many articles cover both sides. Or at least there'll be one article about why commanders need to be taken out of the system. There are other articles that say the commanders should be left in the system.

So I think if you just get started on doing the research on either on blog entries or on the two articles that we've written, because in our footnotes, we cite a number of law, the articles pro and con in the introductory pages to those articles. So that the reader understands that a lot has been written on it.

MAJ HANRAHAN:

Yes, sir. And I will mention that your footnotes were extensive, are very well researched and extensively research. I read the article and I started to kind of work through some of the footnotes, but there is a lot there for our listeners. So I think that would keep any person interested in this topic quite busy for a while if they were to read all those footnotes.

PROFESSOR SCHLUETER:

Put you to sleep, either way [laughter].

FINAL THOUGHTS

MAJ HANRAHAN:

Yes, sir [laughter]. It's a great spot to start, I think, if you're looking to learn more about the topic. And with that, sir, any final thoughts or takeaways on today's topic for our listeners?

PROFESSOR SCHLUETER:

Let's assume for the purposes of argument that the handwriting is on hold and that within the next six months or next year, the military justice system will be changed. Now, it may not go into effect for some period of time. I think for the most part, for the for the average JAG, it's not going to really affect him or her. They've got cases they need to try. They've got issues they need to deal with. They're helping a service member through a tough patch with the separation agreement or they're writing wills, or they're taking care of advising the commander on whether protesters can enter the base or not. So I think for the most part, there will be interest, but I don't know that it's going to stop everybody from working.

I think there will be a little bit of angst, probably in the senior leadership because I think the people inside the Pentagon fully understand that their work is going to be cut out for them. And so on for all of them, whatever your rank or whatever you are working on, I just encourage you to hang in there.

Now, I have another life as well. I'm currently teaching evidence by Zoom two days a week. So military justice is not my entire life, but I will continue to keep a high interest in it. So even as I go into retirement, I'm hoping that I continue to write and lecture on military justice. I've been doing it since 1972 and I don't intend to quit now.

MAJ HANRAHAN:

Well sir, thank you so much for spending an hour with us today. Thank you for all you've done on your research and publications and everything for military justice has been quite an extensive career and I wish you the best as you move on into the next chapter of your life with retirement, which I know is coming up here in the not too distant future, sir.

And that'll be it for today's interview.

PROFESSOR SCHLUETER:

Thank you.

CLOSING

MAJ HANRAHAN:

That concludes our interview with Professor Schlueter. Here in the summer of 2021, it appears that Congress and senior government officials have endorsed removing commanders' authority to prosecute sexual assault and similar felony level cases. Assuming these reforms take effect, military legal practitioners should become apprized of this ongoing development and prepare to work with their commanders, staff, support agencies and others for these anticipated changes in order to ensure as smooth a transition as possible for continued mission accomplishment.

[background music]

Thank you for listening from The Air Force Judge Advocate General's School. We'll see you on the next episode.

ANNOUNCER:

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[music ends]

GLOSSARY

- **AFJAGS:** Air Force Judge Advocate General's School
- **CAAF:** Court of Appeals for the Armed Forces
- **CLE:** continuing legal education
- **DAC-IPAD:** Defense Advisory Committee on Investigation, Prosecution, and Defense
- **JAG:** judge advocate general
- **RCM:** Rules for Courts-Martial
- **UCMJ:** Uniform Code of Military Justice