

TRANSCRIPT OF AUDIO FILE:

MILITARY JUSTICE: YOU CAN HANDLE THE TRUTH

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BEGIN TRANSCRIPT:

SPEAKER 1: Welcome to *A Hard Look*, the *Administrative Law Review* podcast from the Washington College of Law. We'll discuss how administrative law impacts your daily life from regulatory actions by agencies and the litigation over them to the balance of power among branches of the government. This is *A Hard Look*. [00:00:36]

EVA PEDERSEN: Hey, welcome or welcome back to *A Hard Look*. My name is Eva Pedersen, and I'm the podcast technology editor. I'm thrilled to be hosting this episode, and I'm grateful that you're here, too. Today we're discussing a fascinating developing and yet centuries old area of administrative law, the American military justice system. There are more than a million active duty members of the United States military. [00:01:00] And all of them are subject to the Uniform Code of Military Justice, also known as the UCMJ, a system of rules and procedures prescribed by the president that is distinct from the civilian justice system in many significant ways. Over the last couple of years, Congress has enacted a number of dramatic reforms to the UCMJ. But constitutional issues remain as the Department of Defense aims to balance the objectives of protecting individual liberties, promoting military discipline, and ensuring that justice is served. [00:01:34]

We've brought on the perfect guest to discuss this topic. Please welcome Martin Mitchell. Martin Mitchell was appointed in September 20, 22 by the Secretary of Veterans Affairs and approved by the President to be a veterans law judge on the Board of Veterans Appeals. Before he joined the board, Judge Mitchell served as a senior level commissioner at the United States Court of Appeals for the Armed Forces. [00:02:00] He served in the United States Air Force as a JAG officer for over 21 years. His career included assignments as a trial defense counsel, circuit defense counsel, labor and employment law attorney, executive officer, chief circuit defense counsel, staff judge advocate on two occasions, military trial judge and senior appellate military judge. He was selected for an Air Force funded LLM at Georgetown University Law Center in labor and employment law.

During his assignment as a senior appellate military judge, he was appointed by President Obama to serve as a judge on the United States Court of Military Commission Review and his

final assignment before he retired as a colonel '06 was serving as the director of civil law and litigation. Judge Mitchell is also an adjunct associate professor of law at American University's Washington College of Law, where he teaches an experiential class on negotiation and mediation, and that is why I call him Professor Mitchell. [00:02:59] I'd like to remind our listeners that these are the personal views of Martin Mitchell and do not reflect the views of his employers, clients, organizations or other individuals under which these opinions can be imputed. Professor Mitchell, thank you so much for being here. It's truly a pleasure. [00:03:16]

MARTIN MITCHELL: Well, thank you, Eva, it's great to be here. As I tell all my students, right, feel free to reach out if you ever need me, and I was thrilled to get your phone call. As you know, I love podcasts, and I'm just excited to be here with you. [00:03:27]

EVA PEDERSEN: So, why don't we start at the beginning? What is the constitutional basis for military courts? Are they Article III courts or ...? [00:03:35]

MARTIN MITCHELL: Okay, so I'm going to take those in reverse order. First, they are not Article III courts. And then for the constitutional basis, I'm going to go back a little bit in time, and that is military courts actually even predate the Constitution. There's references to them in the Federalist Papers, in the Articles of Confederation. And then the constitutional basis is under Article I, Section eight, with Congress's power to make rules for the government and regulation of the land and naval forces, which nowadays also includes the Air Force and the Space Force and the President's authority as commander in chief under Article II [00:04:14] And as well, I'd like to point out that the Fifth Amendment does contain a specific exception for cases arising in the land naval forces. [00:04:21]

EVA PEDERSEN: Can you discuss specifically the history of the Uniform Code of Military Justice a little bit? When was that created and why? [00:04:29]

MARTIN MITCHELL: So, it was signed into law by President Truman and became effective in 1951. And it really came out of people's experiences with the military justice system through both World War One and World War Two. You had the draft. You had a lot more citizens who had not been involved in the military before, come into the military and experience some problems with the military justice system. [00:04:51] And there were a lot of complaints about the system. One example is a case called the Tapalina (sp?) case, where a military policeman was found not guilty by the court martial. Those results were reported to the appointing authority. I think it was a general officer, and the appointed authority is like, "No, hey, court, you didn't quite understand that the evidence here supports a finding of guilty. [00:05:17] So, send it back to the court with a memo along those lines."

And the court, what's called a court in revision, said, "Understood. Now you're found guilty," and you can imagine experiences like that caused citizens to have a lot of concerns about is the military justice system fair? And there were differences between the services as well. So, after World War II, a lot of complaints, a lot of investigations, a lot of reports ending up with what was called the Forrestal Committee, which had three tasks, essentially uniform rules across all the services, a protection of rights of individuals subject to military jurisdiction, but also without undue interference with military discipline and military functions. [00:06:01] And those last two,

you can see historically have been in tension and continue to be a little bit in tension throughout today. [00:06:08]

EVA PEDERSEN: Thank you for that. So, we're kind of crafting the policy rationale for the UCMJ then and some of its limitations and objectives. What's the jurisdiction of the UCMJ? What is it responsible for and who is subject to it? And I do realize that this is a little bit of a loaded question. [00:06:26]

MARTIN MITCHELL: Okay (laughter). So, I'm going to cover the main categories. So, first would be active duty members of the armed forces of the armed forces. So, if you're on active duty, regular active duty, you're subject to the UCMJ 24/7/365 whether you're wearing the uniform at the moment or not, throughout the whole time of your enlistment or your commissions subject to the UCMJ. [00:06:48] Reservists who are on orders are subject to the UCMJ. You have National Guardsmen when they are in a federal status, so not when they're called up by their governor, but if they're called up for a federal status, subject to the UCMJ. You have the cadets and midshipmen at the Naval Academy at the US Air Force Academy and at West Point, subject to the UCMJ. [00:07:09] And then you have retired members of the regular component. So, if you were active duty and you retired and you're entitled to pay, also subject to the UCMJ. Now, I also want to point out some people who are not subject to the UCMJ. So, family members of military members, even if you're living on base, not subject to the UCMJ and those who have left the military, and in the words of the one court, as they were described as civilian ex-soldiers who have severed all relationships with the military. [00:07:39] So, if you're completely out, completely a civilian, also not subject to the UCMJ. [00:07:45]

EVA PEDERSEN: Broadly, why do military members have different proceedings, rules, consequences than their civilian counterparts? What policy rationale does this serve, and does this pose constitutional problems in itself? [00:08:00]

MARTIN MITCHELL: So, I would go back to our first president and our first commander in chief, George Washington, who said, "Discipline is the soul of the army. It makes small numbers formidable, procures success to the weak and esteemed to all." And that is through the formative sense of why military justice is important. And that's repeated again in the preamble to the *Manual for Court Martial*, which states that the purpose of military law is to promote justice, to assist in maintaining of good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States, so to recognize that the military has unique mission and unique needs, and that's why it has a separate system.

Now, does this pose constitutional concerns? I think when we look at it historically, we can say the answer is yes, right, that there's questions about how much constitutional protections are provided to service members throughout the court martial process. [00:08:59] So, for example, military members have a due process, right to a fair and impartial panel of members, but do not have the full protections of the Sixth Amendment right to a jury trial. [00:09:10] Military court martials are required to have a unanimous verdict in a death penalty case, but currently it's the only system in the United States where a person could be sentenced to life in prison without parole by a non-unanimous panel. I would like to point out, because you never know when the

people are going to be listening to the podcast, that that issue was recently argued before the U.S. Court of Appeals for the Armed Forces. [00:09:33] So, stay tuned. That may have changed. [00:09:35]

EVA PEDERSEN: Hopefully, we'll be publishing soon enough to get ahead of it. [00:09:38]

MARTIN MITCHELL: Hopefully so (laughter). [00:09:39]

EVA PEDERSEN: So, what types of offenses are included in the UCMJ? Do these statutes mirror regular criminal statutes, civilian statutes, or are there some differences? [00:09:50]

MARTIN MITCHELL: So, I'm going to say both yes and no. Yes, it does mirror a lot of federal and state criminal laws. For example, murder, manslaughter, rape, sexual assault, theft, illegal use of drugs all contained within the UCMJ. But there's also a number of offenses that really have no civilian counterpart, for example, absence without leave. And if you're gone from the military for more than 30 days, it has a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances and confinement for a year. [00:10:22] And there's really no civilian counterpart to that, right? If you are unhappy with your job, wherever you're working and you just left your workplace, you're going to get fired, but you're not going to jail for a year for that. And you have others, too. like disrespect to a superior commissioned officer, which I think again ties into that unique nature of instilling discipline. [00:10:40]

So, again, right, if you're in a civilian job, you get frustrated with your boss. Maybe even you get frustrated with the CEO or for lawyers with a seat with a named partner. And you treat them with disrespect. You're probably getting fired. In the military, though, you could be court martialed and again, you could be sentenced to a bad conduct discharge, forfeiture of all pay and allowances and confinement for a year. [00:11:02] So, yes, there are a lot of offenses that are in both the federal criminal code and in state criminal codes and in the UCMJ, but also some very unique military-only offenses. [00:11:14]

EVA PEDERSEN: And then what about conduct unbecoming an officer? [00:11:17]

MARTIN MITCHELL: Oh, that's another great one, too. So, conduct unbecoming officer article 133 has essentially two elements. One, that an officer did or did not do a certain action. And then two, under the circumstances, the act or omission was conduct unbecoming an officer. So, there's further case law that defines that, but it's as you can understand it, and you can hear about it, right? [00:11:40] It's a pretty broad statute there. And then you have Article 134, which is known as the general article, which applies to both officers and enlisted. And for two of those clauses, it covers all disorders and neglects to the prejudice of good order and discipline in the armed forces and all conduct of a nature to bring discredit upon the armed forces. [00:12:02] So, if you engage in some action or you fail to engage in some action, and the military views it as bringing discredit upon the military, you can be brought to court martial on that offense. [00:12:16]

EVA PEDERSEN: Right and you said that there is case law there, but it does seem somewhat subjective. [00:12:21]

MARTIN MITCHELL: Yes. [00:12:21]

EVA PEDERSEN: And that I think that's a good lead in to the next question, which is, could prosecuting any of these uniquely UCMJ offenses implicate constitutional freedoms? [00:12:33]

MARTIN MITCHELL: Well, so if you think about our First Amendment freedoms, right, and the freedom of speech and really the freedom in political speech, that doesn't apply fully to military members, right? So, Article 88 of the Uniform Code of Military Justice prohibits any commissioned officer from using contemptuous words against the president, vice president, Congress, the secretary of defense, secretary of Homeland Security, and the governor of any state in which you're stationed. [00:12:59] And so right, again, right, you're at work wherever as a civilian, you want to say contemptuous things about the president. It is entirely your constitutional right to do so. In the military if you're an officer, no, that is a violation of the UCMJ. [00:13:16]

EVA PEDERSEN: So, let's talk about this practically. When some misconduct, whatever it may be, is allegedly committed, what happens next? Who decides whether a court martial will occur and what alternatives are available? [00:13:31]

MARTIN MITCHELL: In most cases, it's going to be the commanding officer who has court martial authority will make the decision about whether or not to go to court. They will also make decisions about progressive discipline. So, is this something that was a relatively minor offense and needs more of an administrative action? So, let's say a letter of counseling, a letter of reprimand, something more, a slightly more serious and not what we call a non-judicial punishment. [00:13:57] It's also known as an Article 15, or is it going to go up to the different levels of court martial, a summary court martial, a special court martial. and the most serious being a general court martial? Typically, the commander is going to work closely with the staff judge advocate, with the chief of military justice, with the attorneys for that commander to make that decision about whether or not to go forward to a court martial. [00:14:23]

EVA PEDERSEN: This isn't true in every case, but it does seem like a lot of discretion for an executive officer, for a military officer. Can you just briefly touch on the reasoning for that? Is it is it a resourcing issue? Are they better equipped to know their people and make those decisions, do you think? [00:14:44]

MARTIN MITCHELL: So, I think it goes back to what we talked about, about the reason why we have a military justice system and why it separate than the civilian justice system. Again, the commander is responsible for their troops, right, and is responsible for ensuring good order and discipline. And so as a as a commander and responsible for good order and discipline, one of the ways you effectuate that duty is to hold people accountable for when they engage in misconduct and to make appropriate calls as to what level of response is necessary, right?. [00:15:16] Is this a low level response where I can get this person back on the right track and have a successful military career, or is it such a serious offense that needs to go to court martial and they potentially need to go to jail? [00:15:29]

EVA PEDERSEN: So, in the National Defense Authorization Act or NDAA of 2022, Congress created this list of covered offenses, and the list was expanded just recently in 2023. Can you explain what covered offenses are and how they impact the discretion of commanding officers? [00:15:49]

MARTIN MITCHELL: Yeah, so, this is a big change for the Uniform Code of Military Justice, for military justice overall. So, as you mentioned, with the 2022 NDAA, create the office of the Special Trial Counsel for each service. And this special trial counsel is reporting directly to each branch's civilian service secretary. So, the Secretary, the Army Secretary of the Air Force and the lead special trial counsel will be a JAG at the rank of brigadier general or rear admiral in '07 and has exclusive of authority over covered offenses to withdraw and dismiss charges, to refer to court martial, to enter into plea agreements. And it was sort of a recognition I think, by Congress of concerns about certain offenses and how they were being treated within the military justice system.

So, the covered offenses include the wrongful broadcast or distribution of intimate visual images, murder, manslaughter, rape and sexual assault, kidnapping, domestic violence, stalking, retaliation and child pornography offenses. And then, as you mentioned, with the 2023 NDAA, they added in death or injury of an unborn child, mailing obscene matter and sexual harassment. So, you have this new office where really, I would expect there's going to be some interactions between commanders and the special trial counsel, but it's rather than the commander making that final call, it's going to be this new JAG officer who's going to make that call. [00:17:16]

EVA PEDERSEN: So, there are pretrial agreements made in the military justice system. Can you talk about how plea bargaining is different here than in the civilian system? [00:17:27]

MARTIN MITCHELL: So, I used to be a prosecutor. I was also a defense counsel for a time within the military. And so let me talk to you about how it was at the time, back in the days when I was counsel. And that was either side could initiate the negotiations about a plea deal, whether it's the government or the defense. [00:17:48] And there'd be trade-offs about what offenses you're going to plead guilty to, maybe pleading guilty to a lesser included offense or maybe pleading guilty to only some of the offenses. Usually the government is waiving or is requesting a defense to waive certain things, such as if you're going to fully litigate it, the government pays for all the witnesses, both government witness and defense witnesses for their travel expenses. [00:18:14] They might say, "Hey, defense, part of the deal is you waive us paying for your witnesses."

And another issue that might happen is a decision to go military judge alone. That would often be an incentive, something that the government wanted so that there was not other military members called to be on that court martial panel, and what offenses were being pled to would be in the main portion of the pretrial agreement. [00:18:41] But then you had a separate portion, which was called the quantum portion, and that would be what the sentence cap was. And at the time when I was in service, right, the sentence cap was kept secret from the military judge. Both sides would present evidence, call witnesses, make argument about what they felt was the appropriate sentence in this case. [00:19:03] And then the military judge would take all the properly admitted evidence and make a decision as to what was the appropriate sentence.

And then after the judge made the decision, then there would be the reveal of the quantum portion, and the judge would see, okay, right, the sentence I just gave, which I felt was fair and appropriate, has now been limited potentially by the quantum portion, or sometimes as a judge, it may be that you gave a sentence that was even below the cap that the parties had agreed to, and the member would get the benefit of whichever was less. So, that process has now changed. Now a plea agreement is binding on the parties and on the court martial, so on the military judge, and that's under the new Article 53A of the Uniform Code of Military Justice. [00:19:50] So, when I was a defense counsel and you would reach a deal, there was you know,

if you wound up with a sentence that was much higher in court, obviously, your client was usually happy to have the deal, right, happy to have that cap. That net has now saved them months or even years in confinement. Conversely, when you had a deal and somehow you got a sentence in court that was less than the deal, you felt good about that, too. [00:20:21] So, your client felt good about it. So, it was there was always this sense of like how good of a bargain did we get, and how much protection does it have? And for a lot of clients, they would sometimes want a cap, even if it was above what I, as a defense counsel, expected to realistically happen at the court martial, because they just want that sense of protection, right? [00:20:45] They knew the evidence was there. They wanted it. They were willing to plead guilty. And they wanted to make sure that they weren't going to go away for the maximum amount of time. [00:20:56]

EVA PEDERSEN: That makes sense. So, now we are at trial. We're at war court martial. What is the proceeding like? Who can serve on a court martial, and has this changed over time? [00:21:07]

MARTIN MITCHELL: Yes. Yeah, so, I think the proceedings, if you went into the proceedings, they would look much like any other criminal justice proceeding, right, opening statements, well, voir dire, opening statements, pretrial motions. I realize I'm taking these a little bit out of order, presentation of evidence and the panel members are different, right? There's a difference with panel members and court martials than a jury in the civilian side. [00:21:33] So, the panel members of a court martial are active duty members, and they cannot be junior in rank or grade to the accused.

If you're an enlisted member who's been accused of a crime, you have the right to request a panel that will be composed of at least one third enlisted members, and then the main change is not necessarily who's serving on the court martial, but how they're being selected for the court martial. [00:21:57] So, before it was the convening authority or the general officer who made the decision to send a case to court martial would also be the one who's selecting the panel members who would serve on that court martial. Now it's moving to a system with the recent NDAA of requiring a randomized selection of military personnel. And because it's so new, we'll just have to see how that develops and how that changes military justice. [00:22:26]

EVA PEDERSEN: Yeah, that is a huge change. What does it actually take for court martial to secure a conviction, and how can a military member appeal that conviction under the UCMJ? And then what makes a case reviewable? [00:22:42]

MARTIN MITCHELL: To secure a conviction, you need proof beyond a reasonable doubt, the same as any other criminal justice proceeding. How are they sent up to review? Well, every service has a court of criminal appeals. If you have a sentence that's of a year or more confinement or can include a punitive discharge than the prior system was, by right, your case would go up to the Court of Criminal Appeals for a mandatory review. [00:23:07] And you could waive it as a service member, but you automatically got that review. And then you could petition the Court of Appeals through the armed forces, which oversees all the military branches, and they have a discretionary review function there. [00:23:23]

EVA PEDERSEN: The 2023 and NDAA expanded reviewability, right? [00:23:28]

MARTIN MITCHELL: So, the 2023 NDAA expanded reviewability and now judicial review is authorized for all general and special court martial convictions, regardless of the sentence imposed. [00:23:39]

EVA PEDERSEN: So, in 2018, the Supreme Court issued a ruling in Ortiz versus the United States. and this was a seemingly uncontroversial decision, 7 to 2. But the court addressed an important question regarding its own jurisdiction over appeals for military courts, in this case, the CAAF. First, could you explain your personal connection to the case? [00:24:02]

MARTIN MITCHELL: Yes. So, I was the military judge who the case was about whether I had acted in a manner that was appropriate. So, when you read the opinion, right, and you talked about Judge Mitchell, that's me. I was Judge Mitchell at that time. And it was very surreal to be able to attend the Supreme Court argument and to listen to these great counsel for both sides arguing about what I did. [00:24:30]

EVA PEDERSEN: (Laughter) And did you want to tell your story as well? [00:24:32]

MARTIN MITCHELL: Oh, yes. All right, so (laughter), at that — so my daughter was a teenager at the time, and I was getting ready to go to the Supreme Court. I was in a suit and ready to go. And it was not our normal morning routine. and she was asking what was happening. I tried to explain some of the case a lot and she looked at me and she's like, "Wait. Wait. [00:24:53] So, there is a trial about you. Are you going to jail?"

EVA PEDERSEN: (Laughter).

MARTIN MITCHELL: And I said, "No, no, no, (laughter) I can guarantee, no matter what the outcome is of today's proceeding, the Supreme Court is not sending me to jail." And so, I explained it a little more. And I said, "Well, it's a question in part about whether I acted in a manner that violated the Constitution." [00:25:14] And my daughter looks at me and says, "But you're a judge. Isn't that worse?" And I really had no answer for her at that point/ [00:25:23]

EVA PEDERSEN: Man (laughter). So, what was the actual question about your conduct? [00:25:28]

MARTIN MITCHELL: All right. So, the heart of the case was whether as a military officer, I could hold two appointments at the same time, first as a an appointment as a military officer who was assigned to the Air Force Court of Criminal Appeals, and then simultaneously as a judge on the U.S. Court of Military Commission review, where I had been appointed by the President with the advice and consent of the Senate, and that that was the question. Could I hold both jobs and both appointments at the same time? [00:25:58] And the argument was essentially twofold. The argument was it violated a specific law that prohibits military officers from holding certain federal civilian offices unless specifically authorized by the law. And then the second prong was that the appointments clause was violated by being appointed as a principal officer on the U.S. Court of Military Commission Review and then as an inferior officer on the Air Force Court of Criminal Appeals. [00:26:25] And you couldn't serve as both a superior officer and an inferior officer at the same time. Now, luckily for me, the Supreme Court ruled that neither provision was violated. So, I was able to keep both my jobs. [00:26:38]

EVA PEDERSEN: And you didn't go to jail either? [00:26:40]

MARTIN MITCHELL: And I didn't go to jail.

EVA PEDERSEN: (Laughter).

MARTIN MITCHELL: Always a good outcome, right (laughter)? [00:26:44]

EVA PEDERSEN: (Laughter) So, interestingly also, there was a question in the case as to whether these entities, these I guess they're military courts of appeal or executive bodies that review military cases, whether they're courts at all, and whether their function and authority is essentially judicial or executive in nature. Can you discuss the arguments here on both sides? [00:27:11]

MARTIN MITCHELL: Oh, yeah. So, this is one where an amicus brief raised the issue of whether the Supreme Court had jurisdiction to review the opinions from the U.S. Court of Appeals for the Armed Forces, and the argument in part was that the Court of Appeals for Armed Forces is not an Article III court, which, as we discussed, is true. But the argument was that because it wasn't an Article III court that therefore, the Supreme Court lacked jurisdiction to hear these cases directly from that court. [00:27:39] However, the Supreme Court looked at other non-Article III courts such as the non-Article III courts of the District of Columbia Courts and the Territorial Courts. Supreme Court also looked, discussed the nature of the military justice system, and that is that it is judicial in nature, and that there was a long constitutional basis for this military justice system and essentially found, no, that the Supreme Court does have jurisdiction to hear these cases that arise out of the U.S. Court of Appeals for the armed forces. [00:28:11]

EVA PEDERSEN: And so given that the Supreme Court made a ruling about its own jurisdiction when it comes to an executive agency and judicial decisions made within an executive agency, are there other implications for quasi-judicial decisions by other executive agencies? [00:28:31]

MARTIN MITCHELL: So, I think part of that answer is going to be the very scholarly answer of maybe, right, that the Supreme Court made a lot of argument and a lot of points of talking about the judicial nature of the military justice system. Certainly, if I were arguing different cases and challenging other courts, maybe I would argue that they are not as much of a constitutional history and not as much of a criminal justice, judicial nature of an entity. [00:29:02] And the Supreme Court really tried to, in my opinion, seem to distinguish the Court of Appeals for the Armed Forces and the subordinate courts of criminal appeals and trial level military courts martial with that historical approach, that constitutional approach, and that judicial nature of that system. So, does it have implications for other federal agencies that are quasi-judicial, to use your words, in system? [00:29:38] Maybe, right, because maybe they're on a different footing than the military justice system. [00:29:42]

EVA PEDERSEN: Great and you kind of touched on it already, but does this have implications for service members, and are there questions left unanswered here? [00:29:51]

MARTIN MITCHELL: So, I think the main implication for service members is that it reaffirms the judicial nature of the military judicial system and provides for the potential Supreme Court review in court martial cases when the Court of Appeals for the Armed Forces has acted upon a case. [00:30:09]

EVA PEDERSEN: We are past trial. We're past you not going to jail. You're no longer an active duty member of the Air Force. So, it would it would be intuitive that you'd no longer be subject to the UCMJ, right? [00:30:23]

MARTIN MITCHELL: You would think so, but I am a retired military officer of the regular component, and so I remain subject to the UCMJ. [00:30:31]

EVA PEDERSEN: Can you expand on that? What's the reason for that? And what First Amendment issues might this pose? [00:30:39]

MARTIN MITCHELL: Okay. So, the rationale for it is that retired members of the armed forces who are authorized pay are still members of the land and naval forces. So, in the event of a national emergency, we may be one of the first set of people who have that military nexus, that military connection to be recalled to active duty. And in fact, during both of the Iraq wars, retired officers, well retired members, I should say, were called back to duty. [00:31:11] So, the same policy implications in terms of why military justice applies for active duty members. That's some of the same justification as to why retirees are also subject to the UCMJ. Now, when you ask about constitutional concerns, as we talked about, right, there's First Amendment limitations, or maybe I should say the First Amendment is limited in some ways in terms of its protection for military members. [00:31:39]

And so, for example, again, going to Article 88 talks about any commissioned officer who uses contemptuous words against the president and vice president, Congress, right. You have a system now where certainly there's a lot of heated political debate, right? You turn on the news. There's a lot of heated political debate. And so, I think there's a question about whether retired military officers are subject essentially to this lifetime ban of speaking contemptuous words about certain

officeholders at a certain time. [00:32:16] And now, do I think it's likely that any retired officer would ever be recalled for saying mean things about the president? No, I don't (laughter) think that's likely at all. And certainly in recent history, you have times where there were some very outspoken retired officers who were saying, I would say contemptuous words against the sitting president at various times, and none of them were recalled for a court martial process. [00:32:42] But I do think that it's an interesting question in terms of does that same justification for active duty officers still apply, and should it apply to retirees as well? [00:32:55]

EVA PEDERSEN: Right and even if those particular individuals weren't court martialed, there could be a chilling effect on free speech there. Do you think that there is potential for change? What do you make of the argument that the military justice system is becoming more and more like the civilian justice system? [00:33:14]

MARTIN MITCHELL: Yeah, I think that's true, right? I mean, if you look at the long historical arc from even pre constitutional times to early court martials in the 1700s up through the as we talked about, the problems of the World War I and World War II systems and then through the 2022 and 2023 NDAs that you do see that this the military justice system becoming more closely aligned with the federal or state civilian criminal justice system as well. [00:33:47]

EVA PEDERSEN: And hopefully in a way that will protect the rights of victims and the people who dedicate themselves to serving our country. Well, thank you, Professor Mitchell, for this discussion today. I'd also like to thank the American Bar Association's Administrative Law Section, the *Administrative Law Review*. And of course, the podcast *Zone*, Alexander Nam for his support in creating this episode. [00:34:11] If you're new to our show and enjoyed the episode, please give the episode a like, and be sure to follow and share our podcast with your colleagues, friends and family. Thank you and you'll hear from us soon as we discuss other topics in administrative law.

END TRANSCRIPT