

## The US Air Force Attacks Free Speech and Due Process

In the current presidential contest both parties claim the other is violating the constitution. A CBS poll released on July 1, 2024 showed that more than half the voters in the US believe that Democracy and the Rule of law are not safe, no matter who wins the election. One party believes their opponents have led an assault on freedom of speech and the other party claims their opponents tried to mount a coup. No matter who you believe, or if you believe neither, the defense of the Constitution at home is now a crucial topic for the future of America.

The last bulwark for the defense of that Constitution rests with the men and women in our armed forces. It is they that have sworn an oath to defend the Constitution against all enemies, foreign and domestic, and it is they who will put their lives on the line to do that.

Thousands of young women and men join the US Air Force each year because they believe in that oath. They have decided to dedicate a portion of their lives to supporting and defending the Constitution. They take seriously the Air Force core value of "Service before self" and believe that their fellow citizens and their country are worth that service.

Unfortunately, they are betrayed by an Air Force leadership led by politically minded generals and civilians who believe that the service most worth defending is the Air Force, above all else. No one can be selected for leadership in the Air Force without a firm commitment to the primacy of service not to the Constitution but to the Air Force itself. For these men and women, when it comes to a decision between what is best for the Air Force, or the constitutional rights of citizens, the AF is triumphant. This article presents a clear example of that.

Dr. Schultz was a professor at the Air Force Institution of Technology (AFIT) for six years. He taught a class on human behavior including the problems with decision biases, including racial and sexual stereotypes. He was accused of an Equal Opportunity violation for using an example of a bias to as part of that class discussion. Over the next 6 months the AFIT and its leadership clearly violated the Constitution on at least four separate issues. The violations were obvious and purposeful. Over the next 6 years the US Air Force refused to recognize that anyone (other than Dr. Schultz) had done anything inappropriate.

The Graduate School of Engineering and Management, a part of the Air Force Institute of Technology (AFIT), offers Masters and PhDs in engineering, mathematics and management to Air Force and allied officers and civilians. Dr. Schultz was a professor in the Supply Chain Management program. On January 10<sup>th</sup>, 2017, as part of a course in Human Behavior including human decision biases, Dr. Schultz led a discussion on how using racial or sexual stereotypes were a poor basis for decision making. In that class he used a stereotype as an example for that discussion. His example referred obliquely to a stereotype two of his African American students at Syracuse University had told him was the only stereotype that didn't offend anyone, that African American men had large feet. During class, one of his students was offended.

Let us establish up front that the offended student was not one of the many people who violated their oath to defend the Constitution. Firstly, she was a lieutenant and, as a general rule, lieutenants are learning the job and should be given great leeway and generally aren't allowed to make important, unreviewed, decisions anyway. Secondly, she did not violate the constitution. She thought there was a problem and she reported it up her chain of command, as she was supposed to do. If we wish to blame someone here, let us rather blame all the people who allowed her to make it to graduate school, as an

officer in the United States Air Force, without a thorough understanding of the Constitution she had sworn to defend.

Protected free speech means that the discussion of controversial subjects, especially in a classroom, is protected government interference. This has been made unabashedly clear in a long history of Supreme Court decisions. *Hardy v. Jefferson Community College*, (1) has very similar characteristics to the Dr. Schultz's case. The Sixth Circuit Court held for Mr. Hardy. In doing so they quoted the Supreme Court "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

The USAF leadership is concerned that it be seen favorably in the media and all commands are encouraged to show that they are taking steps to curb racial and sexual discrimination. AFIT has done this to the extent that the former unit Equal Opportunity (EO) officer was replaced for not pursuing spurious cases.

Dr. Stewart, the chancellor of AFIT, was a member of the Senior Executive Service, a General Officer equivalent, and as such a member of the leadership of the Air Force. During a meeting in his office after the class in question, Dr. Stewart reportedly, made it entirely clear that an investigation was to be conducted and Dr. Schultz was to be punished. Further events demonstrated that the US Constitution was not to be a restraint on the punishment. Dr. Schultz was pulled from his classroom, informed that an investigation had started, but was not informed of any specific allegations until a month later.

On May 25, 2017 Dr. Schultz was given a Notice of Proposed Suspension by the Department Chair, Dr. Joseph Pignatiello in a meeting. (2) The Dean, Dr. Badiru, published his Decision on July 17, 2017. (3) Most of the evidence collected in the investigation was withheld from Dr. Schultz. He was given 5 of the collected statements, his own, two from students who had been in the classroom, and two from officers who had received the complaint but were not witnesses in the classroom. Statements from other students were taken but withheld. The report itself was withheld, although it was quoted in the Notice.

Dr. Schultz was told that none of this other evidence was relevant since it was not used to make the decision. Think about that. The Air Force claimed that most of the investigation was not used in making a decision. They claimed that most of the eye witness statements were irrelevant, that any positive statements supporting Dr. Schultz's claims were not used, that the report itself, which was cited in the Notice, was not used. Dr. Schultz repeatedly asked for copies of the report and was ignored. Obviously, they were lying, and they knew it.

Dr. Schultz was charged with making two statements in class on January 10<sup>th</sup>. One of those was saying "high rho" in a "manner to mock Asians." Not a single person ever made any claim that the words "high rho" were said in any manner in that class. Not even the original complainant ever made such a claim. Dr. Schultz informed Dr. Pignatiello verbally in the meeting and in writing to Dr. Badiru in his defense statement that there was no evidence to support the claim. Dr. Schultz was found guilty anyway.

"High rho" was used in a class the previous quarter with the same group of students. One of the two students claims Dr. Schultz said the term "in a manner to mock Asians" at some point during that

previous quarter. No date or other facts were given. Dr. Schultz denies having used the term in that manner. Of course “in a manner to mock Asians” is subjective and open to listener interpretation. We might know more if we had statements from the other 20 students in class, but that evidence was suppressed.

Dr. Schultz was also charged with using a stereotype as an example of a stereotype in a class on stereotypes. During the discussion someone asked if the stereotype was accurate and how would they know. Dr. Schultz answered that he had seen no research on the topic and, to find out, they’d have to measure feet. The two statements (that the AF used) claim that Dr. Schultz said you’d have to measure their feet ‘in the bedroom’. Dr. Schultz does not recall saying ‘in the bedroom.’ Once again, it would be informative to know what the other 20 students heard but, once again, that evidence was suppressed by the Air Force. In the end however, it was an on-topic discussion of an important social issue in a college classroom and the discussion was protected speech.

If you’ve ever received a traffic ticket you may have noted that the officer tells you exactly what paragraph of what law you violated. You have the right to know what law you allegedly violated. It is very difficult to mount a defense if you don’t know what the law actually says. The Air Force never charged Dr. Schultz with any violation of any specific regulation. The only reference to any Air Force regulation was that the actions were “in compliance with” AFI 36-704, which is the regulation guiding how disciplinary actions are to be done. (And even that claim was false.)

The Proposal cited that one of the students was offended. Students are often offended, usually over grades, and offending them is no crime. Offending a student over a racial or sexual comment *could* be a crime if it violates the Equal Opportunity regulation, AFI 36-2706. The allegations, even if they were valid, do not meet the standards of a violation of that regulation. This fact that was most likely pointed out by the required legal review since AFI 36-2706 was not raised after that point but, again, we’ll never know because that evidence was also suppressed. Neither the Proposal nor the Decision made any argument that Dr. Schultz had violated the EO Regulation.

The Proposal claims the actions were “unprofessional” and “inappropriate” but no reference of any kind that the actions were illegal. No reference to law or regulation was made to support these claims. These allegations amount to “We don’t like what you said.” Dr. Badiru mentions that the actions were taken to promote the efficiency of the Air Force. This could be a reason for disciplinary action but was clearly not, as regulations require any such efficiency be established and explained. No attempt was made to do so. Nor was efficiency of the Air Force mentioned in the Notice as a basis for the action.

Dr. Schultz was found guilty of both charges. He argued there was no evidence to support one of the charges, but was ignored. He argued that his actions were protected free speech but was ignored. He repeatedly asked for access to the investigation report, but he was ignored. He repeatedly asked to know what regulation was violated, but he was ignored. The Air Force cannot claim it was a simple oversight, it cannot be a simple misunderstanding, it cannot be simply a missing date. Dr. Schultz repeatedly brought these issues to the attention of the AF and was ignored. The AFIT leadership was aware of what they were doing, they knew it was illegal. They acted blatantly in violation of the Constitution with full faith that, whatever they did, their misdeeds would be covered by the leadership of the USAF.

For the next 7 years the Air Force has steadfastly denied that there were any mistakes. They have repeatedly covered for those members of AFIT who disgraced their oath and failed to defend the Constitution. Dr. Schultz appealed the decision to the Chancellor. Dr. Stewart admitted that the topic was important and within the scope of the class but claimed case law permitted the actions, without

citing any cases or presenting any specifics. He recognized that there was no evidence to support the charge of saying “high rho” and dismissed that charge without making any changes to the rest of the case, including the punishment. In other words, Dr. Stewart recognized that two of his leadership had knowingly and falsely found someone guilty of a charge *without any evidence* yet he took no action against these perpetrators. He knew they violated one of the fundamental tenets of the Bill of Rights and he made no attempt to defend the Constitution as he had sworn to do. When did the United States become a country where agents of the government can find you guilty of a charge they knew you didn’t commit and be protected for doing so?

Dr. Schultz appealed for legal protection in the courts. By law, cases involving employment of Federal employees go to the Merit Systems Protection Board (MSPB). Unfortunately, the MSPB is a travesty which protects only the government.\* The MSPB requires that complaints be filed within 35 days or the complainant loses.\* All cases go to the Office of the Special Prosecutor for investigation and they can elect to discard the case\* and the complainant loses essentially without recourse. If the case goes to the board, and the decision is favorable, the government can appeal. Since the appeal goes to the full board of 3 judges, and there haven’t been 3 judges appointed at the same time for quite a while, the appeal is never heard and the complainant loses. Even if someone would manage to win a case through all that, the executive branch is notorious for not paying claims for court judgments, and the complainant loses. According to AFI 36-704 the AF is required to inform those subject to discipline that they may appeal to the MSPB. The AF did not do so. Because of that, Dr. Schultz missed the filing deadline. This system allows the USAF, or any Federal employer, to completely ignore the legal rights of employees because they know there is nothing to fear from the legal system\*. (The author’s next article may be on the MSPB. If you have experience with them, please drop him a note with MSPB as the subject line.)

Dr. Schultz asked his Congressional Representatives for help with the case. His representatives sent an inquiry to the USAF and the USAF sent the inquiry to Dr. Stewart, one of the people Dr. Schultz was accusing of having violated the Constitution. Dr. Stewart’s reply did not address the Constitutional issues in any way, and instead generally took the approach that “Dr. Schultz deserved it.” Perhaps the worst argument for the loss of Constitutional protections one can formulate. If anybody else in the USAF reviewed the charges or the response, there is no evidence of it in the record.

Finally, Dr. Schultz filed a complaint with the Inspector General, the IG. This complaint was sent to three different places. Since the Dean and the Chancellor were Special Executive Services (SES) positions, the complaint was sent to the part of the IG that handles SES complaints. Nothing was ever heard from them. It was also sent to arbitration for Whistle Blower complaints. The arbiter was chosen and contacted Dr. Schultz. However, arbitration is completely voluntary and AFIT, despite having a new Chancellor, chose not to arbitrate, nor is there any evidence they did any kind of an internal review. All evidence suggests they ignored the request.

The third part was sent to the IG office at Air University, the people for whom AFIT work. A LtCol was assigned and he contacted Dr. Schultz to investigate and gather further information. In the end, his boss told him to drop it and there would be no investigation.

The documented evidence is clear. The Air Force knew Dr. Schultz was found guilty of one charge despite the lack of any evidence at all, yet never took action against the perpetrators. The Air Force was told multiple times that the statement in class was protected free speech but chose to do nothing. The Air Force was told multiple times that Dr. Schultz had been denied access to the evidence,

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\* Unless you are a protected category.

and yet would not provide the documents and denied that anything illegal had been done. Dr. Schultz has never been told what regulation he allegedly violated and all efforts to find out have been denied.

Dr. Schultz suffered greatly from the finding. While the initial punishment was small, two days pay and the cost of legal representation, the long-term cost was high. Having been accused of an Equal Opportunity violation (even though he was convicted of some other, unknown, offense) Dr. Schultz has subsequently been unable to find a job in his field.

More important than that however, is the systematic violation of the US Constitution by the United States Air Force. The culture of the USAF needs to change. Violations of our core freedoms can no longer be callously tossed aside by the USAF. Those who become aware of such violations must rise to its defense. Defending the US Constitution must be the priority.

You can help. I urge to write to your Congressman <https://www.house.gov/representatives/find-your-representative> and Senator <https://www.senate.gov/senators/senators-contact.htm>. Ask for an investigation into Dr. Schultz's case and that those responsible for violating the Constitution be held responsible. Ask that they keep you informed of the progress of that investigation. Ask them to commit to action to Defend the Constitution requiring that those in our military have education in the US Constitution appropriate for their grade, that violators of the Constitution be banned from further civil service or military employment, and that those who become aware of violations must act to defend the Constitution. A sample text for the email can be found at the website <https://github.com/KennethLSchultz/Freedom-of-Speech-and-Due-Process>

This is not, nor should it be, a partisan issue. We should all agree that it is essential that all members of our military understand that the words "Defend the Constitution against all enemies, foreign and domestic." The Oath of Office is a commitment to what we, regardless of political party, should hold dear.

#### References:

References and a more complete statement of the actions of the Air Force can be found at <https://github.com/KennethLSchultz/Freedom-of-Speech-and-Due-Process> .

1. *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001)
2. Memorandum: Notice of Proposed Suspension, 05/23/d019, signed Joseph J. Pignatiello, PhD, Head, Department of Operational Science.
3. Memorandum: Decision to Suspend, 07/13/2017, signed Adedeji B. Badiru, PhD, PE, Dean, Graduate School of Engineering and Management
4. Memorandum: Formal Grievance Decision, 10/19/2017, signed Todd I. Stewart, PhD, Director and Chancellor
5. Framed Allegations

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