

Military Justice Instruction in Civilian Law Schools

Eugene R. Fidell

A year after 9/11, Prof. Elizabeth Lutes Hillman and I wrote in *Legal Times* that “[t]here are many ways that the legal academy can help to solve the dilemmas of the war on terrorism. One little-mentioned but relatively easy-to-implement tactic needs to be explored: We should be learning, studying, teaching, and writing about the U.S. military and its law in our law schools. We must not continue the neglect that has drained away interest and expertise in this area over the last 30 years.”¹ The dilemmas to which we referred concerned the choice among competing forums: federal district courts, courts-martial, and military commissions. The heated debate that developed over whether Khalid Shaikh Mohammed and other so-called “high-value detainees” should be tried in the United States District Court as opposed to a military commission² and whether Umar Farouk Abdulmutallab should have been given *Miranda* warnings after attempting to detonate explosives hidden in his underwear (as well as whether he should be treated as an enemy combatant)³ demonstrates that these dilemmas remain at the forefront. Any law student today will graduate with an understanding of federal or state criminal law and procedure; few will graduate with an appreciation of the military alternatives. Without that appreciation, it is difficult to see how they will be capable of making informed judgments, as citizens and as leaders of our society, on these issues of great moment.

The tumultuous years since our *Legal Times* article appeared have indeed presented tremendous challenges for American society and American law. They have also presented unusual opportunities for the legal academy. Many law schools have risen to the occasion with respect to instruction in military justice and more will do so as this era continues on its unfortunate trajectory. To some extent this evolution will be internally generated based on the personal and

Eugene R. Fidell is Senior Research Scholar in Law and Florence Rogatz Lecturer in Law at Yale Law School and president of the National Institute of Military Justice.

1. Elizabeth Lutes Hillman & Eugene R. Fidell, Teaching the Art of War: After Sept. 11, Schools Can Serve the Nation with Lessons on Military Law, *Legal Times*, Sept. 9, 2002, at 30.
2. *E.g.*, Scott Shane & Benjamin Weiser, U.S. Drops Plan for a 9/11 Trial in New York City, *N.Y. Times*, Jan. 30, 2010, at A1.
3. *E.g.*, Peter Baker, Obama Challenges Terrorism Critics, *N.Y. Times*, Feb. 8, 2010, at A12.

professional interests of teachers. In the next several years, however, I predict, for reasons to be stated below, that market forces will contribute powerfully to this trend.

First, though, it is appropriate to define the universe of concern. Above all, it does not include the law schools run by the armed forces. There are three: the Judge Advocate General of the Army's Legal Center and School in Charlottesville, Virginia; the Naval Justice School in Newport, Rhode Island, and the Air Force Judge Advocate General's School in Montgomery, Alabama.⁴ The first of these is an LL.M.-granting institution. As excellent as these schools are, they have not been focused on education of the civilian bar other than through their law reviews,⁵ which, unfortunately, are not widely read outside the armed forces.

What, then, of the civilian law schools? Historically, very few offered courses in military law.⁶ Yale Law School, where I teach, did so for a number of years thanks to the personal interest of Joseph W. Bishop, whose book⁷ remains worthwhile albeit increasingly dated. During the Vietnam War, Harvard Law School offered a student-led course,⁸ and more recently offered the subject again on what seems to have been an experimental basis. For many years, Robinson O. Everett Sr. taught a military law course at Duke Law School, a task in which he was ably assisted by Professor Scott S. Silliman and Judge Walter T. Cox III of the U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces). Fredric I. Lederer, David A. Schlueter, John Paul Jones, Edward F. Sherman, Joseph D. Cronin, and Michael F. Noone, Jr. also regularly taught military law at William & Mary, St. Mary's, Richmond, Tulane, Suffolk, and Catholic, respectively. My co-author Beth Hillman has taught it to large classes at Rutgers-Camden and, more recently, Hastings. Nor

4. Are three needed? Military lawyers defend their separate existence zealously although I have been skeptical. The core area of military justice, of course, is basically the same for all branches of the service. Internal administrative and personnel law differ in a variety of respects from one service to another.
5. The Army publishes the *Military Law Review* and *Army Lawyer*, the Navy publishes the *Naval Law Review* and *JAG Magazine*, and the Air Force publishes *The Air Force Law Review* and *The Air Force Reporter*. All are available online.
6. A 1962 University of Florida survey turned up only sixteen courses. Walter B. Raushenbush, *Military Law Courses Can Serve Scholarly Objectives*, 16 *J. Legal Educ.* 191 & n.2 (1963), noted in John Jay Douglass, *Military Law—Stepchild of Legal Education*, 26 *J. Legal Educ.* 467, 480 & n.41 (1974). Research by Prof. Raushenbush (who taught a military law course at Wisconsin for a number of years) identified twenty such courses when writing for this journal nearly half a century ago. Raushenbush, *supra*, at 191 n.2, 197. For earlier commentary on the subject see Robert E. Joseph, *The Need for Including a Course on Military Justice in the Law School Curriculum*, 7 *J. Legal Educ.* 79 (1954); Frederick Bernays Weiner, *The Teaching of Military Law in a University Law School*, 5 *J. Legal Educ.* 475 (1953).
7. Joseph W. Bishop Jr., *Justice Under Fire: A Study of Military Law* (Charterhouse 1974).
8. Committee for Legal Research on the Draft, *Basic Resource Materials on Military Law* (3d ed. 1970). I am grateful to Professor Detlev F. Vagts for a copy of the materials prepared by students for the course. Readers familiar with the current cost of law textbooks will be struck by the \$2.50 price tag of this 285-page multilithed set of materials.

is this an exhaustive list. Currently, between twenty and thirty accredited law schools offer courses in military law, meaning the system of criminal justice applicable to military personnel and, perhaps,⁹ certain categories of civilians. The number seems to have risen in the last several years but plainly the vast majority of schools still do not offer courses in military law. Should they, or is this subject fated to be the perennial “stepchild of legal education,” as Dean Douglass called it in the immediate aftermath of the Vietnam War and conscription?¹⁰

For a subject to take root as a law school staple four things are required. First, there has to be student interest. Second, there has to be a competent instructor. Third, there has to be a good text or readily available materials. And fourth, there has to be support from the institution’s faculty and dean. These factors are increasingly coming into alignment, and I anticipate that we are on the verge of a golden age of civilian law school interest that has not been experienced since the Vietnam Era. Let’s consider them one at a time.

Student interest sufficient to support regular offering of a course in military justice can safely be predicted.¹¹ At schools that have offered these courses, I have never heard of one being cancelled for lack of interest. Although typically these are seminar size courses, it is far from unheard of for them to attract sizable class levels on a par with required courses or popular electives. If anything, there is reason to expect increased interest. For one thing, the subject is, quite simply, an interesting one, even if four justices were surprisingly dismissive of courts-martial in a 2009 case, suggesting that they remain only a “rough form of justice.”¹² The issues military justice can raise run the gamut from constitutional law to substantive criminal law, evidence, criminal procedure, professional responsibility, capital litigation, the law of armed conflict, international humanitarian law, and human rights. The cases encompass decisions of the courts created by the UCMJ, of course, as well as occasional cases decided by the Supreme Court on direct review¹³ or by the Article III courts on collateral

9. Compare *Reid v. Covert*, 354 U.S. 1 (1957), with 10 U.S.C. § 802(a)(10) (Uniform Code of Military Justice (“UCMJ”) art. 2(a)(10)).
10. Douglass, *supra* note 6.
11. Schools will, of course, want to gauge student interest and course success when making decisions about whether to make military justice (like any other course) a regular part of the curriculum. However, schools should view this as more than a one-shot project. To maintain teacher competence and currency, the course should be offered regularly. Moreover, the benefit of word-of-mouth among students is lost if the interval between offerings is excessive.
12. *United States v. Denedo*, 129 S.Ct. 2213, 2225 (2009) (Roberts, C.J., dissenting) (quoting *Covert*, 354 U.S. at 35–36 (plurality opinion)).
13. *E.g.*, *Denedo*, 129 S.Ct. 2213; *Weiss v. United States*, 510 U.S. 163 (1994); *Solorio v. United States*, 483 U.S. 435 (1987). Some decisions of the Court of Appeals for the Armed Forces have been eligible for Supreme Court review since 1984. 28 U.S.C. § 1259; 10 U.S.C. § 867a (UCMJ art. 67a).

review of courts-martial.¹⁴ The subject lends itself to comparative law analysis as well, especially given the ready availability of foreign materials through the worldwide web. As a result, students can be learning from a variety of perspectives in a single semester, and this tends to make the course attractive. My own practice has been to inject comparative materials whenever possible, using the U.N. *Draft Principles Governing the Administration of Justice through Military Tribunals*¹⁵ as a matrix, while still emphasizing the structure and main themes of American military justice. Thanks to the Internet, it is possible to monitor international developments in real time and adjust reading assignments as necessary. Some instructors adopt a domestic comparative perspective that contrasts military justice with civilian criminal law, while others tend to take a more nuts-and-bolts approach, focusing on how specific issues are presented to and resolved by various players in the military justice system.

Many students simply want a little variety in their legal education, and military justice meets that need. Few areas of legal activity have engendered as much interest in the post-9/11 era as military justice, including not only the accountability issues that have arisen from misconduct by our own forces (the current proceedings against Army Dr. Nidal Malik Hasan arising at Ft. Hood, Texas,¹⁶ are a case in point) and civilian contractor personnel, but also the related field of military commissions. Because military commissions build on core concepts of military justice,¹⁷ an understanding of military justice facilitates—indeed, is critical to—the study of military commissions, which, despite years of controversy, seem fated to remain a part of the legal scenery.

The armed forces continue to send active duty officers to law school as part of their funded legal education programs. Other students may attend law school while their ROTC-incurred active duty obligations are deferred. Both groups are excellent prospects for participation in law school courses in military justice, just as they are for courses in the law of war.¹⁸ The same may be true of veterans of the current conflicts in Iraq and Afghanistan who remain interested in military legal matters even if they have no immediate plan to return to active duty.

We also live in a time of increased public-spiritedness among law students. Despite the dangers, and despite the “All-Volunteer Force” environment in which the armed services have functioned for two generations, students are

14. *E.g.*, *Sanford v. United States*, 586 F.3d 28 (D.C. Cir. 2009) (constitutionality of four-member court-martial panel in non-petty-offense case).
15. U.N. Commission on Hum. Rts., *Issue of the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 (Jan. 13, 2006) (prepared by Mr. Emmanuel Decaux).
16. James C. McKinley, Jr., *Major Held in Fort Hood Rampage Is Charged with 13 Counts of Murder*, *N.Y. Times*, Nov. 13, 2009, at A14.
17. *See generally* Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, 2005-DEC *Army Law* 47.
18. *See generally* J. Jeremy Marsh, *Teaching a Law of War Class*, 2010-JUN *Army Law* 50.

increasingly willing to consider joining the various JAG Corps, as one of a number of options for service in the broad area of national security. For such students, a course in military justice may help them gain admission to one of the JAG Corps programs as well as enrich their understanding of a key part of their future duties if they do enter the service. Negative incentives may also play a role in the uptick in student interest in the JAG Corps after graduation: with the downturn in the economy, some students will be driven in that direction by economic considerations. This will likely continue until the economy recovers, law firms find a new equilibrium, and the current chaos in judicial clerkships is remedied. But even for students with no particular interest in service in the armed forces, experience teaches that courses in military law can be quite attractive because they meld so many other areas of legal study and at times afford students an opportunity to examine their personal political values. The range of student perspectives makes it unlikely that a course in military justice will be dull.

There is no shortage of competent military justice teachers. Increasing numbers of JAG Corps officers have made their way into the civilian legal academy, often after having taught at one of the service law schools. In addition, many former JAG Corps officers as well as those who have attended law school after completing military service may be highly qualified to teach the subject as adjunct faculty; a number already do. But service in one of the JAG Corps, while of course desirable, is not essential. Because military justice has come increasingly to resemble civilian federal criminal procedure, talented civilian defense counsel have found it entirely possible to work within the court-martial system, and at times have achieved exceptional results for their clients. Many, if not most, of the civilian practitioners who have successfully litigated military commission and Guantánamo detention cases have done so without prior military service, whether as JAG Corps officers or otherwise. Yet other candidates will have pertinent experience through work as civilian prosecutors with one of the international criminal tribunals, or even as a civilian defense contractor. Taken together, and armed with the proper materials, time, and personal commitment, these diverse groups furnish an ample pool of talent from which to draw for instructional staff. In general, engaged and experienced teachers can master most subject matters in which they manifest a genuine interest—and learning along with the students can be an especially rewarding experience.

Having veterans in the faculty mix, incidentally, can serve valuable additional purposes. Many of those who are interested in teaching military justice have a broad range of legal experience that may qualify them for other subjects, such as trial practice, evidence, international law, and environmental law. Moreover, veterans on the faculty can be an important source of disinterested, knowledgeable career advice for students who are considering military service after graduation. This will be more important at some schools than at others, but should not be overlooked.

Plainly, it is a lot easier to teach a course from an available textbook than it is to rely on a collection of handouts or materials posted on a course website (although given the pace and sweep of developments even a course in which there is a good, current textbook is likely to benefit substantially from supplemental materials, whether in hard copy or digital format). There have been a number of efforts over the years to provide a military justice casebook,¹⁹ although the current offerings are limited. To my knowledge, there is only one current commercially-published law school casebook on the market.²⁰ Several supplementary sources are available that would be useful to both students and teachers.²¹ Military justice cases are readily available online from both Westlaw and LexisNexis as well as (for free) from the government.²² In addition to the services' law reviews,²³ there are numerous useful current treatises²⁴ as well

19. At times, all one could hope for were multilithed materials. Some of these were (or are) excellent, such as Ed Sherman's *Cases and Materials on Military Law: The Scope of Military Authority in a Democracy* (LexisNexis 1972) and Fred Lederer's *Military Law, Cases and Materials*, which has gone through a number of desktop-published editions. *See also* Douglass, *supra* note 6, at 482 & n.45, citing Albert P. Bloustein & Allan R. Koritzinsky, *Law and the Military Establishment* (Univ. of Wisc. Law School 1970). Others were commercially-published and highly insightful, but have inevitably become obsolete. *E.g.*, Homer E. Moyer, Jr., *Justice and the Military* (Public Law Educ. Inst. 1972); Donald N. Zillman, Albert P. Blaustein, Edward F. Sherman, Duane L. Faw, Murl A. Larkin, Joe H. Munster, Jr., Jordan J. Paust, Robert D. Peckham & Albert S. Rakas, *The Military in American Society: Cases and Materials* (LexisNexis 1978); Willis E. Schug, *United States Law and the Armed Forces: Cases and Materials on Constitutional Law, Courts-Martial, and the Rights of Servicemen* (Praeger Pub. 1972); Robinson O. Everett, *Military Justice in the Armed Forces of the United States* (Military Service Pub. Co. 1956).
20. Full disclosure: I am one of its authors. *See* Eugene R. Fidell, Elizabeth Lutes Hillman & Dwight H. Sullivan, *Military Justice: Cases and Materials* (LexisNexis 2007 & Supp. 2010-11).
21. *E.g.*, Charles A. Shanor & L. Lynn Hogue, *National Security and Military Law in a Nutshell* (West 2003); *Evolving Military Justice* (Eugene R. Fidell & Dwight H. Sullivan, eds., US Naval Inst. Press 2002); Michael J. Davidson, *A Guide to Military Criminal Law* (US Naval Inst. Press 1999); Brent G. Filbert & Alan G. Kaufman, *Naval Law: Justice and Procedure in the Sea Services* (3d ed. US Naval Inst. Press 1998).
22. The Court of Appeals for the Armed Forces website is www.armfor.uscourts.gov. It has links to the service courts of criminal appeals. Decisions of the military commissions and the U.S. Court of Military Commission Review are available, after a fashion, on the Department of Defense website. The National Institute of Military Justice ("NIMJ") has instituted an unofficial Military Commission Reporter, which is available both in hard copy and on the NIMJ website, www.wcl.american.edu/nimj/military_commission.cfm.
23. *See supra* note 5.
24. *E.g.*, Francis A. Gilligan & Fredric I. Lederer, *Court Martial Procedure* (3d ed. LexisNexis 2007); David A. Schlueter, *Military Criminal Justice: Practice and Procedure* (7th ed. LexisNexis 2008); Stephen A. Saltzburg, Lee D. Schinasi & David A. Schlueter, *Military Rules of Evidence* (6th ed. LexisNexis 2006); David A. Schlueter, Ken Jansen & Kevin J. Barry, *Military Criminal Procedure Forms* (3d ed. LexisNexis 2009); Lee D. Schinasi, David A. Schlueter, Edward J. Imwinkelried & Stephen A. Saltzburg, *Military Evidentiary Foundations* (LexisNexis 2007); Christopher Behan, David A. Schlueter, Charles H. Rose III & Victor M. Hansen, *Military Crimes and Defenses* (LexisNexis 2008).

as several blogs.²⁵ Without even going into the possible pedagogical uses of literature and film,²⁶ there is no shortage of tools for effective, interesting teaching. Moreover, military justice lends itself to clinical education. The Court of Appeals for the Armed Forces has accepted many *amicus curiae* briefs from law students, and even has a formal rule on the subject.²⁷ At times, it has been willing to hear argument by law students.²⁸ Someday, some law school will set up a clinic specifically focused on military justice,²⁹ but until that happens more modest, *ad hoc* clinical efforts remain possible.

Finally, law deans and faculty play a pivotal role. Few full-time civilian law teachers today have served in uniform. At times, and at some schools, there has been an undercurrent of hostility to the entire military enterprise. For an older generation this may have been a vestige of youthful resistance to the Vietnam War and the draft. For younger academics it is more likely to have reflected views about ROTC, on-campus military recruiting,³⁰ and the “Don’t Ask, Don’t Tell” statute.³¹ Whatever its basis, this hostility will continue to abate as progress is made toward abandoning that policy, thereby lifting the primary impediment to tolerance, if not embrace, of the military as an institution on university campuses. The country objectively needs a robust national defense

25. Notable blogs include CAAFlog, www.caaflog.com, administered by my co-author Col. Dwight H. Sullivan, and the National Institute of Military Justice blog, www.wcl.american.edu/blog/nimj/. Col. Sullivan’s now-famous post on CAAFlog drew attention to the fact that in counting jurisdictions in the child rape case, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), the parties and the Court had overlooked a pertinent provision of the UCMJ. The tale is told in Rachel C. Lee, Note, *Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 *Stan. L. Rev.* 1535, 1537-40 (2009). In the end, the Court denied rehearing, *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008).
26. For example, from time to time I have assigned Melville’s *Billy Budd* when teaching military justice. The cinematic offerings are extensive, including *The Caine Mutiny*, *A Few Good Men*, and *Breaker Morant*.
27. United States Court of Appeals for the Armed Forces Rules of Practice and Procedure, Rule 13A.
28. See generally Eugene R. Fidell, *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* 88-89 (13th ed. Nat’l Inst. of Military Just. 2010) (collecting cases).
29. Clinical programs at Duke University School of Law, American University Washington College of Law, and Case Western Reserve University School of Law have assisted counsel in military commission cases. A number of law schools have established clinical programs geared to the legal needs of military personnel and veterans. These include Widener, Marquette, North Carolina Central, Thomas Jefferson, John Marshall, Stetson, and Detroit Mercy. George Mason University School of Law’s Clinic for Legal Assistance to Servicemembers, led by Joseph C. Zengerle, does not furnish legal assistance for court-martial or other criminal cases. Yale Law School recently established a Veterans Legal Services Clinic.
30. See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006).
31. 10 U.S.C. § 654.

capability in this post-9/11 era, military justice is part of effective national defense, and it is not healthy in a democratic society for the military to have a monopoly on learning in this field. Law school leaders should take all of this into account as they make the curriculum decisions that will influence legal education in this still-young century. Finding (or growing) the scholarly and personnel resources needed to offer high-quality instruction in military justice should be a priority in that process.