

Military Justice: A Very Short Introduction (Book Review)

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As Eugene Fidell points out in his recently published book, *Military Justice: A Very Short Introduction*¹ there is just *something* about military justice that makes it a fascinating subject for almost everyone.² Both military and non-military members can quote Marine Colonel Jessup (played by Jack Nicholson) in *A Few Good Men* – “You can’t handle the truth!”³ And people well outside the military justice universe have an opinion about the future of the Guantanamo Bay detention center and are generally aware of the recent sexual assault crisis within the military.

Enter Eugene Fidell, an esteemed military justice practitioner and professor at Yale Law School with this short military justice book. He is the right person to write such a book and has the scholarly and practice chops to deliver. It also fills an existing gap in academic military justice literature: while there has been a short *Nutshell* book on Military and National Security Law for a generation,⁴ there is not a similarly condensed book focused on military justice alone. So this is a welcome addition.

What’s more, the author’s text is lively, his examples compelling, and his insights piercing. Indeed, he has the uncanny ability to cut through the “noise” and get to the heart of the most pressing and compelling issues in military justice. This is particularly important in this pint-sized book

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¹ EUGENE R. FIDELL, *MILITARY JUSTICE: A VERY SHORT INTRODUCTION* (2016).

² *See id.* at xix (2016).

³ *A FEW GOOD MEN* (Castle Rock Entertainment 1992).

⁴ *See* CHARLES A. SHANOR & L. LYNN HOGUE, *NATIONAL SECURITY AND MILITARY LAW IN A NUTSHELL* (2003).

(retailing for just \$11.95 – a true bargain) where space is at a premium. There just isn't much space to dawdle – indeed, while the book is small, it packs an enormous scholarly “punch.”

A JAG, non-lawyer military officer, senior enlisted leader, or interested citizen would benefit from making this small investment. This is not the *Manual for Courts-Martial (MCM)*, with its behemoth size (and no user manual, I might add – young JAGs must make do). Nor does it try to be. Mr. Fidell's book is slightly larger than the palm of your hand, weighs in at just over 100 pages and has an easy-to-read style that encourages you to take it all in during one leisurely sitting. It is also a book for all levels of interest and experience and can (and should) be read by both a non-military and military audience. For example, journalists and members of the media reporting on military justice matters who operate on a tight deadline and need substantive information in a hurry should have this book close by. To that end, this book review is fairly short to reflect the book's size. But I'd like to highlight five key points, discussed below.

First, the book is particularly well organized and, despite its size, does not skimp on substantive detail. Nor does it try to tackle *all* the outstanding military justice issues – to do so would infuse a certain amount of superficiality to any chosen topic within military justice. But it does “go deep” on select issues and Mr. Fidell curated those topics quite carefully. It includes eleven chapters ranging from the basics of military command and discipline to more controversial topics such as the detention center at Guantanamo Bay and the future prospects for military justice reform.⁵ His chapters on who is subject to trial by court-martial and the substantive reach of court-martial jurisdiction are particularly illuminating. For example, as

⁵ The eleven chapters include “Military command and military discipline,” “The arc of civilianization,” “Who is subject to trial by court-martial?,” “The substantive reach of court-martial jurisdiction,” “Command influence, lawful and unlawful,” “Conduct unbecoming and all that,” “The military judiciary,” “Military lawyering,” “Military justice in the field,” “What about Guantanamo?,” and “Peering Ahead.” It also includes ten illustrations, a glossary, references, further reading, websites and index. See FIDELL, *supra* note 1, at xii-xv.

Professor Fidell astutely points out, Congress has actually expanded military justice jurisdiction over civilians and contractors accompanying the force.⁶ Rest assured, difficult issues are not set aside.

Second, *Military Justice: A Very Short Introduction* is a self-aware book. It includes a glossary, references, a section on further reading, and a list of neatly curated military justice websites.⁷ You may read this “very short introduction” and be hungry for more. Mr. Fidell has you covered.

For example, who knew that there were so many blogs and websites dedicated to military justice? I didn’t. The author counts nearly twenty.⁸ The glossary, in particular, is quite helpful.⁹ As anyone who has cracked open the MCM can attest, key terms in military justice are weighed down with jargon, acronyms, and insider-speak. What, exactly, is unlawful command influence? Convening authority? Non-judicial punishment? It’s a different language. Even experienced military justice practitioners would benefit from the author’s thoughtful distillation of key terms. Non-JAG officers and senior enlisted leaders – who implement much of military justice without the assistance of a lawyer at the ready – must be familiar with the military justice vernacular. Like a hot knife through butter, Professor Fidell provides a concise, *plain language* glossary of core military-justice terms to get you started on the right path.

Third, the book’s tone has a bit of – shall we say – “swagger” or “attitude.”¹⁰ And with good reason: this *Oxford* “very short introduction” reflects the author’s deep experience as a practitioner, scholar, and teacher of military justice. Mr. Fidell is a former Coast Guard JAG who lectures at Yale Law School while maintaining a robust military justice law practice. He also chairs the Committee on Military Justice of the International Society of

⁶ This occurred via the Military Extraterritorial Justice Act (MEJA) of 2000 and 2006 amendments to the UCMJ. FIDELL, *supra* note 1, at 31-32.

⁷ FIDELL *supra* note 1, at 107-26.

⁸ FIDELL *supra* note 1, at 123-26.

⁹ See generally FIDELL *supra* note 1, at 107-13.

¹⁰ FIDELL *supra* note 1, at xx.

Military Law and the Law of War¹¹ and has served as civilian defense counsel for several high-profile military justice cases (for example Bowe Bergdahl and Army Chaplain James Yee).¹² He also writes books, law review articles, blogs on this subject, and is routinely called upon by national media outlets to offer his expertise. In sum, he has thought deeply about military justice with experience and insights that can only be gained through deep practical experience and academic scholarship. He has strong, well-reasoned opinions and he is not afraid to share with the reader.

Indeed, Mr. Fidell has the credibility and experience of the U.S. military justice system to pinpoint its deficiencies and highlight its achievements. Take, for example, his chapter on Military Lawyering.¹³ The author discusses the unique challenges faced by military justice defense counsel who are charged with zealously advocating for their client. While doing so, they often draw the ire of convening authorities and trial counsels (who they might work for one day). Often out-ranked and out-resourced, how does a young defense counsel manage this professional reality while providing zealous client representation?

Another example: the book touches upon professional responsibility issues, a critically important but not well-understood component of military justice that has recently been in the news. While we have a *Uniform Code of Military Justice (UCMJ)*¹⁴ that applies to all the military services to include the Coast Guard, each service is expressly *not* uniform when it comes to their individual professional responsibility guidance. Why? Unlike state bar disciplinary actions, military professional responsibility matters “are conducted largely outside of public view” and remains shrouded in mystery. Again, why? As the book points out, it “remains a mystery” why the services

¹¹ *Eugene R. Fidell*, INT’L SOC’Y FOR MIL. L. & L. OF WAR, <http://www.ismllw.org/PDF/CV%20Eugene%20R%20Fidell.pdf> (last visited May 25, 2018).

¹² See, e.g., *Defending Bergdahl: Can Eugene Fidell Clear Freed Soldier’s Name?*, NBC NEWS (Jul. 17, 2014 10:45 AM), <https://www.nbcnews.com/storyline/bowe-bergdahl-released/defending-bergdahl-can-eugene-fidell-clear-freed-soldiers-name-n157731>.

¹³ FIDELL, *supra* note 1, at 74-81.

¹⁴ 10 U.S.C. §§ 806–947 (2012) (emphasis added).

have been unable to agree on a uniform set of professional responsibility rules.¹⁵ If the services can come together for substantive criminal law and procedure, it follows that a uniform professional responsibility guidance should exist. Building upon this professional responsibility example, perhaps we should move to a more fluid military justice “joint” model where, for example, U.S. Navy judge advocates find themselves in Army courtrooms and vice versa. Right now, that is a rare occurrence.

Fourth, the author also provides a unique and helpful military justice lens via comparative law. How is the United States military justice system performing compared to other nations of the world? And how should this be measured? The book addresses how other militaries of the world wrestle with military justice matters while also struggling to comply with rapidly evolving human rights standards. He has a deep understanding of the Canadian and British military justice system in particular, and how these systems compare with the U.S. system.¹⁶ The book’s global perspective showcases where the U.S. is both aligned and out of step with its allies. Through this international comparative law perspective, he places a bucket of cold water on any superficial notions of American military justice exceptionalism.

For example, the U.S. commander-centric approach to military trials and sentencing owes itself to the British system that emphasized the role of the sovereign while empowering commanders with broad discretion in military justice matters. At the time of the nation’s founding, the “sovereign reigned supreme.”¹⁷ This produced a commander-centric system where prosecution decisions and core military justice decisions are made by non-lawyer convening authorities that are advised by JAGs. But the modern United Kingdom military justice system has largely abandoned this commander-centric approach to military justice with considerable success.

¹⁵ FIDELL, *supra* note 1, at 79.

¹⁶ E.g., FIDELL, *supra* note 1, at xxi.

¹⁷ FIDELL, *supra* note 1, at xx.

Meanwhile, the U.S. military justice system and its commander-centric approach are increasingly out of step with contemporary international standards. As the author wryly observes, today's U.S. military justice system "is more British than the British."¹⁸

Fifth, I relished the author's insights and the questions he raises on particularly tough military justice topics. Take his chapter on "Military Justice in the Field."¹⁹ Deciding how and where to prosecute misconduct that occurred at sea or in a deployed environment are particularly important decisions for a convening authority and somewhat unique to the U.S. military which has a large operational footprint overseas. How, exactly, should alleged misconduct that took place in the field be prosecuted? In-country where you have better access to witnesses but where a trial could distract from the operational mission and place a strain on resources? Or stateside where a trial would be less of an operational distraction but will undoubtedly create evidentiary and witness issues. There may not be a right or wrong answer, but the author is asking the right questions.

Relatedly, how do you incentivize compliance with the law of armed conflict in an operational environment? As Fidell points out in one chilling statistic, only "40% of Marines indicated they would report a unit member for injury or killing of an innocent non-combatant."²⁰ How can we improve on this number?

Finally, if there are any criticisms of this book, they are but small ones. First, the book may already be in need of an updated version to reflect the implementation guidance of the Military Justice Act of 2016, described by Senator John McCain (R-AZ) as the "most significant reform to the Uniform Code of Military Justice since it was enacted."²¹ Second, I came away hungry

¹⁸ FIDELL, *supra* note 1, at xx.

¹⁹ Fidell, *supra* note 1, at 82-88.

²⁰ FIDELL, *supra* note 1, at 86.

²¹ Shane Reeves & Mark Visger, *The Military Justice Act of 2016: Here Come the Changes*, LAWFARE (Aug. 29, 2017, 9:00 AM), <https://www.lawfareblog.com/military-justice-act-2016-here-come-changes>.

for more of Mr. Fidell’s reasoning in his military justice reform prescriptions in his brief chapter on “Peering Ahead.”²² Some of his prescriptions, while seemingly credible, would likely face challenges in their implementation. Why should military judges be given nonrenewable ten-year terms, and is that reasonable in the face of a current 20-year retirement cliff set in place by the Defense Officer Promotion Management Act?

Clearly, the author has thought about technology and its relationship with military justice. He spends some time highlighting the challenges and opportunities posed by technology.²³ But I wanted to know more about technology’s relationship within the military justice system with an eye toward ensuring public trust and bridging a civil-military divide. For example, how, exactly, should the military incorporate technology and the advantages (and disadvantages) of technology and electronic filing in the military justice system? Does he advocate for a PACER-stylized military justice filing system where court filings, motions, and decisions are publicly available?

But, alas, the book is – by its own admission – a *Very Short Introduction* and perhaps I am asking too much. If you are looking for a quick and easy military justice primer or refresher that does not shy away from difficult topics in a short amount of time, look no further: you will not be able to find a more efficient, pithy, and credible perspective on the subject.

²² See FIDELL, *supra* note 1, at 95-105.

²³ See FIDELL, *supra*, note 1, at 102-03.