MILITARY JUSTICE
CASES AND MATERIALS
Second Edition
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MILITARY JUSTICE
CASES AND MATERIALS

Second Edition

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As we noted in the acknowledgements to the first edition of this book, assembling these materials would have been impossible without the assistance of officials, scholars and practitioners around the world.

We are indebted to the Honorable Edmond P. Blanchard, Chief Justice of the Court-Martial Appeal Court of Canada, for kindly agreeing to write the preface to this edition. We remain grateful to those who helped us at the outset of this endeavor, including the late Chief Judge and Professor Robinson O. Everett, Sr. (whose foreword for the first edition appears in this book as well), Legal Advisor of the Department of State and former Dean of Yale Law School Harold Hongju Koh, and Professor Michael F. Noone, Jr.

This edition has been much improved by our students and others who have studied from the first edition around the world. We are indebted to them for their interest and insight into military justice. The individuals listed below also assisted us in a variety of ways, including suggesting, providing, and translating materials, as well as sharing ideas and serving as sounding boards: Major R.A. Allen, British Army; Gilbert Blades; Commander Philip D. Cave, JAGC, USN (Ret); Prof. Alfred C. Aman, Jr., Indiana University School of Law; Colonel R.S.B. Bello-Fadile, Nigerian Army (Ret); Biblioteca Juridica Digital, Colombia; Frank Bridgewater and the Honolulu Star-Advertiser; Mary Caldera, Head of Arrangement and Description, Manuscripts and Archives, Yale University Library; Centro de Documentacion del Consejo General del Poder Judicial, Madrid; Niels Christiansen, Deputy Judge Advocate General, Copenhagen; Hagay Cohen; Prof. Guido M. Coolen; Arne Willy Dahl, Judge Advocate General, Oslo; Agustina Del Campo, American University Washington College of Law; Lisa Cook, Office of Public Affairs, Yale Law School; Kathleen A. Duignan, former Executive Director, National Institute of Military Justice; Prof. Alison Duxbury, Melbourne Law School; M. Miguel Fobe, International Society for Military Law and the Law of War; Jacob Frisch; Joshua A. Geltzer; Prof. Robert K. Goldman, American University Washington College of Law; Steven Wiles and Jean Hannon, Harvard Law Library; Matias Hernandez, American University Washington College of Law; Commander Gordon Hook, RNZN; Stanislas Horvat, formerly Director, Military Law and Law of War Review, Brussels; Human Rights Watch; Prof. Peter A. Jaszi, American University Washington College of Law; Captain Abdullah Kaya, Turkish Army; Chief Justice J.L. Kheola, Lesotho; James R. Klein, The Asia Foundation, Bangkok; Major Gregory W. Kruse, USAF; General Seok Ko, Chief Judge of the High Military Court, Republic of Korea and his assistant, Lieutenant Seungbum Shin; Susan Lewis-Somers, Pence Law Library, American University Washington College of Law; Boonthip Pongjit Landgraf; L. Charles Landgraf, Dewey & LeBoeuf L.L.P.; Dr. Weihai Li, China University of Political Science and Law and his colleagues Dr. Leng Xinyu and Zheng Zhang; Philip Luther, Amnesty International; Prof. Ann E. Lyon, University of Swansea; John K. Mackenzie; Lieutenant Commander Sandra N. Macleod, Canadian Forces; Michelle Lindo McCluer, former Executive Director, National Institute of Military Justice; Manuel Michel, Office of the Military Attorney General, Bern; James Morgan; Albert E. Moses; Judge Oded Mudrik, Tel Aviv District Court; Krishan S. Nehra, Law Library of Congress; Col. Adele H. Odegard, U.S. Army (ret); Mr. Justice Devendra Pathik, Court of Appeal, Fiji; Ivan Y. Pavlov, The Bellona Foundation, St. Petersburg, Russia; Major-General (Ret) Jerry S.T.
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Steven D. Zansberg, Matthew S. Freedus & Eugene R. Fidell, The First Amendment in the Military Courts: A Primer for the Civilian Attorney, 23 COMM. LAW. 10, 13 (Fall 2005). Reprinted with the permission of the American Bar Association and the authors.

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Photograph of a detainee taken by U.S. troops at Abu Ghraib prison on Nov. 4, 2003, by permission of the Associated Press.
INTRODUCTION

Military justice has matured quickly in recent years, its growth hastened by the pace and scope of armed conflict around the world. Growing concern with potential violations of human rights during armed conflict has led to the development of new bodies of law as well as major revisions to existing legal systems. As we noted in the introduction to our first edition, the faster tempo and increased complexity of military operations, international attention focused on high-profile military crimes, and development of an international body of military justice jurisprudence have transformed the practice of military criminal law. Comparative study and citation of international precedents, or even opinions of foreign military courts, is no longer novel.

In the spring of 2011, in remarks that opened the first Global Military Appellate Seminar at Yale Law School, Dean Robert C. Post identified a convergence in military law across national boundaries. Dean Post attributed that convergence to global trends toward combined military operations, greater enforcement of human rights law, and the legalization of military operations.¹ Those three trends have brought both national militaries and national military justice systems into much closer alignment than in the past. Militaries of many countries and regions now share battlefields and undertake humanitarian missions together. They must harmonize not only military operations in the field, but norms and standards for handling misconduct and treating military personnel.

oversight, and proof of accountability. A well-functioning military justice system is critical to achieving each of those goals.

This new era in military justice has created challenges across the spectrum of national militaries, from the most sophisticated to the least. The military forces of European nations have been subjected to censure by the European Court of Human Rights for failing to maintain an independent and impartial military judiciary. The High Court of Australia ruled the Australian Military Court unconstitutional in 2009 in a case that began with sexualized horseplay among navy recruiters and ended in the dismantling of an entire judicial system. The United States’ court-martial system has been doubted for its performance in the field during the extended U.S. military engagements in Iraq and Afghanistan. Well-founded fears abound about the potential criminal activity of armed militias and rebel groups in civil wars in the Middle East and Africa. In addition to military crime and procedure within national militaries, the rise of war crimes prosecutions in international tribunals, civilian courts, and military commissions have pushed military justice to the forefront of international law.

The European Court of Human Rights, Strasbourg. Photograph credit, Council of Europe.

This book brings together materials from nations around the globe to reveal the

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common problems of military law and governance and to outline potential solutions. Our hope is to illuminate the critical issues that shape national and international policy and legal decisions about the proper sphere and substance of military law, to increase the availability of military justice source materials from around the world, and to provide a framework through which students of military law and history can begin to assess various approaches to issues of military discipline and punishment.

This book does not attempt to present a treatise on military justice. Rather than a comprehensive review of the field, we have selected what we believe are among the most important aspects of contemporary military justice in order to stimulate thinking about how military justice relates to core values in a democratic society. Similarly, we have not tried to be exhaustive in the sense of trying to incorporate materials from every country or even every linguistic, cultural, political or legal affinity group among nations. It is our hope that continued progress will be made towards a global appreciation of this field as legal information systems continue to improve through technology and shared interests.

Learning about foreign military justice developments is of value not simply for its own sake or to better understand events elsewhere. It is of practical value because, by showing that what we do is not necessarily the only way to do things, it helps us to understand our own system and to conduct what ought to be a periodic, if not continual, conscious process of reevaluation so that we can be sure our system reflects the best thinking in order to achieve our national goals. The same impulse that leads us to view the states’ role as laboratories for testing new ideas as part of the genius of the American federal system, or to view the various branches of the armed forces in something of the same light, ought to cause us to welcome any opportunity to know and potentially learn from the experience of other democratic countries in the administration of military justice. That experience should be discounted where the other country’s political or value system, strategic role, or other distinguishing features suggest a poor fit. But that discount can only be applied intelligently if we have first considered the pertinent data.\footnote{See Eugene R. Fidell, \textit{A World-Wide Perspective on Change in Military Justice}, 48 A.F. L. REV. 195, 201-02 (2000).}

The book presents these rich materials in five Parts. Part I, Foundations, sets the stage by exploring the origins and purposes of military justice; pointing out the many sources of law that govern; analyzing the unique and critical role of the commander in military justice; exploring the use of summary discipline; and assessing professional responsibility rules for military lawyers. Part II, Principles, steps further into legal analysis to study the jurisdiction of military courts, identify crimes and defenses that apply only in a military context, and analyze the extent to which the obligations of military service alter the protection of fundamental rights. Part III, Trials, brings students into the court-martial to meet military judges and juries, and to study the rules of procedure, evidence, sentencing, and appeal. Part IV, Contexts, assesses the challenges of multinational, peacekeeping, humanitarian operations, and legal reform as well as military commissions. It is our hope that students who have used this book for a course will, at the end, feel motivated to consider what changes, if any, ought to be made in their country’s military justice system, and beyond that, will possess a new awareness for the interconnectedness of developments in the field. To state it directly, it is our conviction that in a democratic society, the more lawyers, judges, law professors, legislators, and public officials charged with responsibility for national defense and the administration of justice who concern themselves with such matters, the better. While it is inevitable that the lion’s share of
learning in this field will continue to be possessed by the military bench and bar, it would be unhealthy if they had a monopoly over that learning.

These materials are presented to provoke discussion of the fundamental issues of military justice. These include: must the military be a separate society with its own governance and disciplinary procedures? How do the exigencies of war and military duty alter the balance of rights for servicemembers? What role should a commanding officer play in criminal investigation, prosecution, and appeal? How do personnel policies that require conscription, integration (along lines of race, gender, or sexual orientation), or behavioral modification (such as “zero tolerance” for sexual or other forms of harassment) affect military criminality and criminal prosecution? How should military justice draw the line between misconduct that warrants the full panoply of procedural protections and that which can be summarily addressed? Are there unusual policy and fairness issues when a military criminal conviction means not only punishment as witnessed in the civilian courts, but also loss of employment and possibly vested pension benefits? Can military justice be administered fairly where several nations cooperate in a single mission? During emergencies, does (and must) due process fall before concerns of national (or human) security? Our hope is that this book will serve as a powerful tool to introduce the dilemmas of military law while deepening our understanding of criminal law and procedure, comparative law, international law, constitutional law, and democratic governance.
PREFACE TO THE SECOND EDITION

Edmond P. Blanchard

The first edition of this book developed key themes that pervade the field of contemporary military justice. In doing so it tested the enduring values of a democratic society against the core principles of military justice. The first edition provided scholars, historians, and researchers alike a systematic case book treatment of these topics for the first time. The pace of change to military justice has not slowed since the release of the first edition in 2007 and its Supplement in 2010.

The scope and changing nature of armed conflict has led nations that are intent on preserving and protecting democratic values to move to combined military operations. This trend toward globalization of operations and greater enforcement of international human rights law has led to the development of new bodies of law. It will continue to have a significant impact on military justice in the years to come.

The second edition of “Military Justice Cases and Materials” continues the excellent work begun in the first edition. The three authors are accomplished individuals with wide ranging experience in military law and are uniquely suited for this enterprise. Eugene R. Fidell, a Coast Guard veteran, is a Senior Research Scholar in Law and the Florence Rogatz Visiting Lecturer in Law at Yale Law School. He is also president of the National Institute of Military Justice. Elizabeth L. Hillman is a Professor of Law at the University of California Hastings College of Law in San Francisco and president of the National Institute of Military Justice. She authored “Defending America: Military Culture and the Cold War Court-Martial.” Dwight H. Sullivan is a senior appellate defense counsel at the Air Force Appellate Defense Division. He is also a Colonel in the United States Marine Corps Reserve, and a leading expert on the military death penalty.

In this second edition, the three authors provide a comparative review of the field of contemporary military justice. The book brings together materials from around the world to underscore the common challenges faced by military justice systems. The book provides a framework for the student of military law to understand the critical issues that shape national and international policy relating to the scope and substance of military law.

I am confident this book will serve as an important research tool for students, journalists and historians alike. It reveals and assesses problems relating to military law and governance that are common to military justice systems around the world and explores potential solutions to these problems. In an era of increased convergence in military law across national boundaries, this book will most certainly have universal appeal. I congratulate its authors.

Edmond P. Blanchard
Chief Justice
Court Martial Appeal Court of Canada
November, 2011
FOREWORD

Robinson O. Everett, Sr.

For many years there has been a need to expand the study of military justice beyond national borders to include developments in other countries and the growing body of international human rights law. This timely volume, prepared by acknowledged experts in military justice, will go far to meet that need. The authors’ service in three branches of the United States armed forces (Air Force, Marine Corps, and Coast Guard) as well as their teaching experience in both civilian and service law schools uniquely qualifies them for the task.

Having a better understanding of military justice in other countries enables us to obtain a better understanding of their military cultures. This is especially helpful at a time when our own armed forces are often deployed in joint peace-keeping operations with troops from other nations. Even more important is that learning about other systems of military justice provides a sounder basis for evaluating and improving our own system.

Readers may even be led to ask whether a separate system of military justice is really necessary. If it is, what should be the jurisdiction of military tribunals? At one time our Supreme Court’s view was that service members could not be punished by court-martial for conduct that was not service connected; but less than twenty years later, the Court changed its position and ruled that under our Constitution, status as a service member is sufficient to confer jurisdiction on a court-martial. Nonetheless, the question remains where the line should be drawn as a matter of policy, and in this regard the new book provides useful information. Furthermore, after looking at foreign systems, we may conclude that various offenses now in our Uniform Code of Military Justice should be deleted or amended and that new offenses should be added.

When the Code took effect in 1951, it authorized courts-martial to try certain civilians who were closely connected with the armed forces. However, the Supreme Court later ruled that military jurisdiction hinges on military status — at least in peacetime. To what extent does that view conform with the position taken in other countries? Also, it is helpful to consider the views of foreign countries as to the extent of military jurisdiction over civilians in time of emergency or martial law. On several issues — such as whether consensual sodomy can be punished — the Supreme Court has considered the practices of foreign countries in interpreting and applying our own Constitution and statutes; this approach might be helpful in future cases concerning military justice.

The book addresses a variety of other topics. For example, the authors deal not only

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8 Authors’ note: A beloved educator and accomplished jurist, Robinson O. Everett (1928-2009) altered the course of military justice in the United States. At Duke Law School, where he taught for 53 years, Professor Everett sparked students’ interest in military justice. On the U.S. Court of Appeals for the Armed Forces, where he sat for 12 years (10 as chief judge, 2 as an active senior judge, with many more appearances as a senior judge through 2008), Chief Judge Everett authored seminal opinions and raised the status of military judges. As counsel to the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary in the 1960s, Mr. Everett helped to pave the way for the modernization of the U.S. military court system. Like so many practitioners and students of military justice, we miss him. See In Memoriam: The Honorable Robinson O. Everett, 59 DUKE L.J. 1433 (2010), for a series of moving tributes.
with some of the peculiarly military offenses, but also with some of the defenses that may
be asserted — such as condonation, necessity, obedience to orders, and the “good
soldier” defense. They examine the free speech, associational and other rights of service
members, which vary substantially from country to country.

The major role of commanders in military justice is a key focus of the book. Also, trial
procedure is compared — which inevitably raises the question of who should preside
over military trials. One alternative — now used in American courts-martial — is to have
military judges who are legally trained members of the armed forces. Another possibility
is to use civilians — either as presiding judges or as advisors for courts-martial. Of
course, in some systems military courts still operate under the direction of military
officers without legal training.

The extent of civilian involvement in administering military justice also varies with
respect to the appellate process. In the United States, there was no direct civilian review
of military trials until 1951. Then a civilian court of military appeals was established with
the sole task of reviewing courts-martial; and in 1983 the decisions of that court were
made subject to direct review by the Supreme Court. In some other countries, there also
are courts of military appeals composed of civilian judges — who, unlike the American
system, usually serve also on other courts or in other legal capacities. Of course, in some
countries, review by civilian courts is either totally lacking or confined to collateral
review.

Of special interest is the treatment of sentencing by military courts. What punishments
are authorized? Is the death penalty permitted and, if so, under what circumstances?
Information relevant to such questions may be found in this outstanding book.

The authors have done a remarkable job of assembling cases and materials about
military justice. One result of their extraordinary efforts is to provide a better
understanding of the function of military justice and of the alternatives available in
administering it. Hopefully, this understanding will lead to improvements of military
justice — both in the United States and elsewhere. Therefore, profound thanks are due to
the authors for their valuable contribution.

Robinson O. Everett, Sr.
Duke University School of Law
Durham, North Carolina
July 2007
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EDITORS’ NOTE

For easier reading and to conserve space, we have eliminated without notation many citations and footnotes, as well as most parallel citations, from excerpted materials. For citation format, we have relied on A UNIFORM SYSTEM OF CITATION (19th ed. 2010).

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