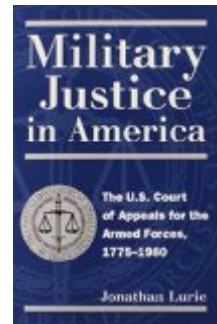


Jonathan Lurie. *Military Justice in America: The U.S. Court of Appeals for the Armed Forces, 1775-1980*. Lawrence: University Press of Kansas, 2001. xiv + 347 pp. \$25.00 (paper), ISBN 978-0-7006-1080-8.

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## Discovering Military Justice

### Discovering Military Justice

To most American historians, and indeed to most American lawyers, military law is terra incognita. It is as unfamiliar, and seems as distant and foreboding, as Antarctica. That which is unfamiliar is not necessarily unimportant. Antarctica's ice cap covers vast mineral resources, and likewise, although seemingly distant and inaccessible, military law is an important subject, which merits far more scholarly attention than it has received. President George Bush reminded the legal profession of its significance when, on November 13, 2001, he issued an order that authorized trying aliens suspected of membership in the al Qaeda terrorist organization before military tribunals.[1] Jonathan Lurie offers further evidence of the importance of this largely unknown area of the law in *Military Justice in America*.

Actually, he had already demonstrated its significance in *Arming Military Justice* (1992) and *Pursuing Military Justice* (1998), a two volume-history of the United States Court of Appeals for the Armed Forces (USCAAF). Unfortunately, Princeton University Press, which published those books, did not promote them heavily, and these expensive hardbacks were not as widely read as they should have been. The University Press of Kansas has now combined them into a single paperback volume, which it has included in its Modern War Studies series, edited by Theodore Wilson. In order to limit the length of the new book, Lurie omitted some portions of the origi-

nal text and abridged others. He also eliminated the footnotes entirely. Consequently, scholars wishing to probe deeply into the mysteries of military justice will need to consult the original Princeton University Press volumes. For those seeking a concise introduction to an unfamiliar subject, however, this book is ideal.

It introduces the reader to a little-known court that occupies a novel place in our legal system. The USCAAF exercises appellate jurisdiction over court martials in all branches of the armed forces. It is the capstone of a judicial system that bears a unique double burden, having to do justice while also maintaining discipline. Yet, while the USCAAF oversees military justice, all of its judges are civilians. That is not its only unusual feature. Although called a "Court of Appeals," USCAAF differs significantly from the similarly-named bodies that review district court decisions in the twelve geographically-defined federal judicial circuits. Although its decisions are now, like theirs, reviewable by the U.S. Supreme Court upon the granting of a writ of certiorari, it is not, like them, an Article III court. Created by Congress in the exercise of its power to make rules for the governance of the land and naval forces, USCAAF derives its authority from Article I of the Constitution. For administrative purposes it is part of the Department of Defense. Nor do its judges, despite repeated efforts to change what most of them have regarded as an unsatisfactory situation, enjoy life tenure. Instead, they serve fifteen year terms.

Besides having a number of unusual features, the United States Court of Appeals for the Armed Forces has a rather brief history. It came into existence as a result of congressional enactment of the Uniform Code of Military Justice (UCMJ) in 1950. Until then, the military was literally a law unto itself; more accurately, the Army and Navy was each a law unto itself. Although there were differences between the legal systems of the two services, both were designed primarily to enforce discipline. Commanders exercised a huge amount of control over courts-martial, and defendants enjoyed few procedural rights. There was no way for those who were convicted (and that was most of them) to appeal their convictions to a civil court, and only by petitioning for a writ of habeas corpus could they get any civilian judge to examine the legality of the treatment they had received. As countless wags observed, "military justice" was an oxymoron. As long as the armed services were small and largely segregated from the rest of society, the country tolerated its deficiencies, but during World War II mass mobilization subjected millions of Americans to this harsh and often unfair legal regime. "The magnitude of American involvement in World War II produced extensive interest and concern with the way military justice was administered," Lurie writes (p. 152). It also generated pressures for unification of the armed forces. Among the byproducts of the movement that led to creation of the Department of Defense were the UCMJ and the USCAAF (originally known as the Court of Military Appeals).

Although that court has been in existence for barely over half a century, the problems with and disputes over military justice that led to its creation reach back to the earliest days of the Republic. So does Lurie's book. Consequently, the main character in his drama does not appear on stage for the first time until page 169. Lurie devotes twelve chapters to the events and controversies that demonstrated the need for a body such as the USCAAF, the legislative process that created it, and the political considerations that determined who its first judges would be.[2] As a result, his book is much more than a history of one court. It is, at least for the period prior to 1951, what its title claims: a history of military justice in America. The early chapters are, to be sure, a chronicle with a purpose; they serve to make creation of the USCAAF seem not only desirable but almost inevitable. Yet, they also make this a much deeper and broader book than its somewhat deceptive subtitle implies.[3]

Although it does much more than simply chronicle the comparatively brief career of the United States Court of Appeals for the Armed Forces, *Military Jus-*

*tice in America* is above all an account of the development of that unique judicial institution. That makes it a rather uncommon kind of book, for institutional histories of American courts are relatively rare. There are, of course, two multi-volume monograph series and a documentary history that relate the development and decisions of the United States Supreme Court.[4] The rest of the federal judiciary has attracted far less scholarly attention. The teams of Tony Fryer and Timothy Dixon and Kermit Hall and Eric Rise have produced studies of the federal courts in Alabama and Florida respectively, and Charles Zelden has surveyed the work of the U.S. District Court for the Southern District of Texas during the period 1902-1960.[5] There is a dearth of monographs on district courts elsewhere, however. The federal courts of appeals have fared even worse. There are two excellent monographs on the Fifth Circuit, but each has a rather narrow and specialized focus.[6] David Fredericks's book on the Ninth Circuit Court of Appeals covers only the period 1891-1941.[7] For more comprehensive treatments, one must turn to commemorative works produced by the judiciary itself.[8]

Although vastly superior to those commemorative books, Lurie's *Military Justice in America* is also an authorized history. In 1987 the USCAAF invited him to become its official historian and archivist, a compensated position that he held for more than a decade. The existence of such a relationship between scholar and subject raises inevitable concerns about the objectivity of the resulting book. As other legal historians, among them Harold Hyman and this reviewer, can attest, it is difficult to maintain complete detachment when writing authorized books about institutions with whose current employees one is in day-to-day contact while doing the research.[9] Almost inevitably, the historian comes to identify at least a little with his subject and begins to feel at least a bit like part of the "team" rather than an outside observer. Lurie is not immune from these tendencies, but he has resisted them. For one thing, he chose to end his history with the appointment of Robinson O. Everett as Chief Judge in 1980, thus minimizing the need to assess the performance of people still working at the USCAAF. Also, he insisted upon editorial independence, a demand that the judges of the court respected, both by distancing themselves from his research and by allowing both the original two-volume work and this one-volume paperback edition to be published by independent and highly respected university presses. This is unquestionably a favorable treatment of the United States Court of Appeals for the Armed Forces, but it is not an uncritical one.

Lurie accurately reflects both the book's tone and his attitude toward his subject when he writes in the Preface that while "freely admitting that inexplicable and inexcusable lapses in military justice have indeed occurred..." he believes this "in no way diminishes the significance of impressive changes that have taken place since 1951" (p. xiii).

The changes that interest him are organizational rather than doctrinal. As Lurie acknowledges in the Preface, "While of necessity a number of important cases are discussed, my focus is not legal doctrine as much as institutional evolution" (p. xii). Unlike many recent histories of the U.S. Supreme Court, this book has little to say about judicial decision-making. It devotes far less attention to the internal deliberations of the USCAAF than to its judges' unsuccessful lobbying for life tenure and their perpetual conflicts with the Judge Advocates General of the Army, Navy and Air Force over who should set policy for the military justice system. This book actually deals more extensively with the legislative process than with the judicial process narrowly defined. It has considerably more to say about congressional legislation affecting military justice, (much of which never passed), than it does about the decisions of the USCAAF. Somewhat surprisingly for a history of a court, *Military Justice in America* does not include a table of cases.

Since Lurie is a disciple of the late J. Willard Hurst, his lack of interest in doctrinal development is hardly surprising.[10] Still, one wishes he had a bit more to say about the decisions of the USCAAF. Two members of that court resigned before the end of their terms in order to accept federal district judgeships, at least in part because they found its work boring. Consequently, the reader cannot help but wonder if what the USCAAF does is really all that important. Lurie obviously believes it is, but more discussion of the court's rulings and their impact on soldiers, sailors, and airmen would strengthen his case.

This would also be a better book if Lurie did not begin quite so many sentences with, "It will be seen..." As one can see from the nit-picking nature of this complaint, it is difficult to find fault with *Military Justice in America*. Jonathan Lurie has tackled a topic that even most legal historians find alien and forbidding and has managed to make it not only accessible and understandable but also interesting. Those are substantial achievements, and this is an important book. With Lurie's scholarship now readily available to lawyers and legal historians, American military justice is no longer terra incognita.

Notes

[1]. On the contemporary dispute over these military tribunals, as well as the role that military commissions have played in American history, see Michal R. Belknap, "A Putrid Pedigree: President Bush's Military Tribunals in Historical Perspective," 38 *California Western Law Review* (Spring 2001)(forthcoming).

[2]. The first eleven chapters cover the material dealt with in *Arming Military Justice*, the first volume of the two-volume hardback book published by Princeton University Press.

[3]. The subtitle is, of course, inaccurate because there was no U.S. Court of Appeals for the Armed Forces (or Court of Military Appeals) from 1775 until 1951.

[4]. The monograph series are the *Oliver Wendell Holmes Devise History of the Supreme Court*, currently edited by Stanley Katz and published by Macmillan, and the *Chief Justiceships of the United States Supreme Court*, edited by Herbert Johnson and published by the University of South Carolina Press. The documentary history is the *Documentary History of the Supreme Court of the United States 1789-1980*, edited by Maeva Marcus, et al. and published by Columbia University Press.

[5]. Tony Allan Freyer and Timothy Dixon, *Democracy and Judicial Independence: A History of the Federal Courts of Alabama, 1820-1994* (Brooklyn, N.Y.: Carlson Publisher, 1995); Kermit Hall and Eric W. Rise, *From Local Courts to National Tribunals: The Federal District Courts of Florida, 1821-1990* (Brooklyn, N.Y.: Carlson Publisher, 1991); Charles L. Zelden, *Justice Lies in the District: The U.S. District Court, Southern District of Texas, 1902-1960* (College Station: Texas A & M University Press, 1993).

[6]. Deborah J. Barrow and Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* (New Haven: Yale University Press, 1988); Jack Bass, *Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit who Translated the Supreme Court's Brown Decision into a Revolution for Equality* (New York: Simon and Schuster, 1981).

[7]. David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1881-1941* (Berkeley: University of California Press, 1994).

[8]. See for example, *Judicial Conference of the United States Bicentennial Committee, A History of the United States Court of Appeals for the Eighth Circuit* (Washington: Judicial Conference of the United States Bicentennial Committee, 1977) and *United States Court of Ap-*

peals, District of Columbia Circuit, *History of the United States Court of Appeals for the District of Columbia Circuit in the Country's Bicentennial Year* (Washington: United States Court of Appeals for the District of Columbia Circuit, 1977).

[9]. See Harold Hyman, *Craftsmanship and Character: A History of the Vinson and Elkins Law Firm of*

*Houston, 1917-1997* (Athens: University of Georgia Press, 1998); Michal R. Belknap, *To Improve the Administration of Justice: A History of the American Judicature Society* (Chicago: American Judicature Society, 1992).

[10]. Both Lurie and this reviewer studied with Hurst at the University of Wisconsin.

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