PURSUING MILITARY JUSTICE[1]

REVIEWED BY MAJOR WALTER M. HUDSON[2]

I. Introduction

As we celebrate the Fiftieth Anniversary of the Uniform Code of Military Justice (UCMJ), it makes sense to look at the court most responsible for its interpretation, the United States Court of Appeals for the Armed Forces (USCAAF or simply CAAF). Fortunately, the court now has the services of its own historian, Dr. Jonathan Lurie, who has provided a second volume of his history of the CAAF, *Pursuing Military Justice*. This second volume deals with the important and turbulent years, from 1951 to 1980, following the creation of the Uniform Code of Military Justice (UCMJ), and the formation of the court, originally known as the United States Court of Military Appeals (USCMA). Using Lurie's book to look back at this nearly thirty-year period may help all those involved with military justice better chart a course for the future of military justice.

Moving into a new century of military justice, important questions and concerns exist before us. Is military justice still overly "military"? Should we not continue the steady civilianization of military justice that really began with the passage of the UCMJ and the creation of the USCMA in 1951? On the other hand, is the UCMJ and its interpretations by the court symptomatic of an already over-civilianized system? Is it just another example of the kind of the "corporatizing" of the military that occurred throughout the 1950s and early 1960s (epitomized by men such as Robert MacNamara), and that had such disastrous consequences in Southeast Asia? Is it a kind of elaborate bureaucracy, an ever-widening labyrinth of rules and procedures created by and only understood by lawyers, that further and further removes the commander from the soldier? Furthermore, what about the military courts, and especially the CAAF, the entity that inteprets, and to a large extent, decides what military justice is? What is its function and its place in the military, federal, and judicial com-

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1. JONATHAN LURIE, PURSUING MILITARY JUSTICE: VOLUME 2, THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980 (1998).

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munities? Since its status will to a large degree decide its influence over military justice, what should its status be?

These are important questions that neither huge sums of money nor the most sophisticated technology can sufficiently answer. But after readers have finished *Pursuing Military Justice*, they will understand that these vexing questions have been raised and debated several times among various important figures and agencies in the UCMJ's and USCMA/CAAF's history. Professor Lurie, a scholar trained at Harvard and Wisconsin, guides us with the hand of an expert historian through the years 1951-1980, and lets us see some of these disputes as well as their causes.

Lurie is a history professor, not a lawyer, much less one with military experience. This is not necessarily a disadvantage. Unlike many lawyers, whose writing tend to be polemical and judgmental (perhaps a pernicious influence of brief writing), Lurie stands back and, for the most part, lets the details of history do the talking. For Lurie, the history of the court consists not so much in pivotal public events, much less watershed cases, but more in telephone conversations, interoffice memoranda, and sometimes even lost paperwork. As one might expect, this is not history Macauley or Gibbon-style: this is not the Roman Empire, after all, but one specialized federal court.

II. Judges v. JAGs

Lurie's history reveals a theme of conflict between the court and the armed services. The first period of conflict extended throughout the 1950s. As Lurie points out, the first conflict "burst open" in 1954-1955[3] and extended throughout the decade. The UCMJ, and to a lesser extent, the USCMA, was bitterly resisted. In 1956, the Chief of Naval Personnel, Vice Admiral J.L. Holloway, testified to Congress that the UCMJ "has not only hamstrung the commanding officer with administrative minutiae, but it has weakened his historical role . . . that of a wise, just fatherly mentor, quick to punish the sinners and equally quick to help a man redeem himself and start afresh."[4] The following year, the outgoing Army Judge Advocate General, Major General Eugene Caffey, stated in an annual report that some sections of the UCMJ, "while burdensome in peacetime, could seri-

3. LURIE, *supra* note 1, at 74

4. *Id.* at 120 (quoting Vice Admiral J.L. Holloway, *House Armed Services Committee on H.R. 6583*, 84th Cong., 1st Sess., March 15, 1956, 8443, 8445).

ously impair the effective administration of military justice in time of war."[5]

The USCMA, as then conceived, also came under criticism. Caffey's successor, Major General George Hickman Jr., joined the chorus of complaint in a 1959 annual report. In the report Hickman noted "an increasing lack of confidence in the present system of military justice because of its growing complexity and difficulty of administration."[6] Another report from that year attacked the three judge composition of the court, claiming the need for more stability and consistency, and proposed a five judge court instead, but with the two additional judges selected from military officers with at least fifteen consecutive years of judge advocate experience![7]

According to Lurie, by the mid-1960s, "doctrinaire opposition" to the existence of the Court and Code seemed to have been abandoned.[8] When Senator Sam Ervin proposed legislation that would result in the Military Justice Act of 1968, the most comprehensive military justice legislation other than the UCMJ itself, the Army Judge Advocate General's (JAG) Corps, instead of total resistance and rejection, came up with a series of counter-proposals to Ervin's legislation.[9] Perhaps as a result, the Military Justice Act of 1968 represented something of a compromise. While it firmly established the presence of the military judge, some of the more extreme "civilianizing" proposals, such as having the USCMA review administrative discharges and abolishing the summary court-martial, never materialized.[10]

Yet, near the conclusion of the book, Lurie notes that conflict burst open again. Indeed, it might be said that the late 1970s were a renewal of the "Judges v. JAGs" conflict as intense and bitter as anything in the 1950s. Indeed, the conflict between the Court and the military community (not just JAGs) became so intense in 1978 that the General Counsel of the

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5. *Id.* at 136 (quoting Major General Eugene Caffey, 5th Annual USCMA Report File (1956), at 33-34).

6. *Id.* at 154 (quoting Major General George Hickman, Jr., 8th Annual USCMA Report File (1959), at 43).

7. *Id.* at 155. Of course, CAAF is currently a five judge court. However, the prohibition against it having members with more than twenty years of military service still stands.

8. *Id.* at 191.

9. *Id.*

10. *Id.* at 192-94.

Department of Defense (DOD), Deanne Siemer, sought to have the USCMA abolished altogher![11]

This second conflict began with the arrival of Judge Albert Fletcher Jr., appointed as Chief Judge by President Ford in 1975. The difference this time, was that, rather than reacting to attacks from JAGs and the military community, the "Fletcher Court" went on an offensive to "civilianize" military justice. In a series of cases, the Fletcher Court sought to expand significantly the authority of the military judge (and accordingly minimize the convening authority's role), supervise to a much greater extent the military justice system, and intepret "broadly the rights of individuals" in areas such as Fourth and Fifth Amendment law and jurisdiction.[12]

To some readers, Fletcher's goals may appear laudable, though his methods lacking in political tact. To other readers, Lurie's portrait of Judge Fletcher may reveal an arrogant and insufferable man. In a 1977 interview in the *Army Times*, Judge Fletcher said of the court: "We don't serve the military. The civilians created us. We have no responsibility to the military. Our responsibility is to the civilian community called Congress."[13] Some may find even more insulting his comments made the following year to the Senate Appropriations Committee, when he asserted that the heavier caseload was largely a "natural by-product of the tremendous number of courts-martial which still are being tried in the Armed Forces as an easy substitute for good leadership."[14] In the end, Fletcher was replaced by Robinson Everett in 1980 and the controversy faded. Ironically, while many of Fletcher's proposals for reform took hold in the military courts, his ultimate goal to make the military justice system an "exact mirror" of the civilian system[15] was, in the end, rejected by the Supreme Court itself, which in a series of important cases in the 1980s, stressed the "separateness" of the military, and the unique role discipline plays in everyday military life.[16]

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11. *Id.* at 257-58.

12. *Id.* at 244.

13. *Id.* at 247 (quoting *Army Times*, Nov. 28, 1977, at 30).

14. *Id.* at 256 (quoting United States Senate, Senate Committee Hearings, vol. 3390, 884 (1978)).

15. *Id.* at 248.

16. *See, e.g.*, Solorio v. United States, 483 U.S. 435 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); Brown v. Glines, 444 U.S. 348 (1980).

III. The Struggle for Identity and Respectability

Reading Lurie's book certainly reveals that the court's struggle for identity and respectability contributed to the problems between it and the military. This struggle is a theme that runs continuously throughout the book. How is the court viewed by other federal agencies? What is the court anyway? Is it comparable to a federal district court, a specialty court such as the U.S. Tax or Claims Courts, or simply a glorified administrative agency? Should its judges receive life tenure? Lurie examines these questions and others in charting the court's journey of its first thirty years.

Lurie's history, again and again shows examples of the court being derided in some fashion as being unimportant or less than competent. Comments from various government officials in Lurie's book indicates the court had to struggle to overcome a reputation as second rate: for example, during the search for Chief Judge Quinn's successor, White House Personnel Director, John Macy commented that while the job "pays well," it was "not very demanding" and finding a replacement was "low priority."[17] And, in a letter written in 1952, the Chairman of the Senate Judiciary Committee wrote that the USCMA was "not now actually a 'court' in the Constitutional sense at all, but is merely a sort of a review board of last resort for the purpose of considering appeals from court-martial convictions."[18]

Even in the early 1970s, various efforts to equate itself with a U.S. District Court, much less a U.S. Court of Appeals, did not convince: as Lurie points out, Robert Duncan, the first black to sit on the court, resigned to accept a Federal District Judgeship in Ohio, after just three years on the court, stating that work on the court was not sufficiently intellectually challenging.[19] Yet undoubtedly the worst blow to its prestige and esteem must have come from the Supreme Court itself, in the 1969 opinion *O'Callahan v. Parker.*[20] In an opinion dripping with scorn—Justice Douglas stating at one point that courts-martial are "singularly inept in dealing with the subtleties of constitutional law"[21]—the Supreme Court held that "service-connection" was required for an offense to be triable in military court.[22]

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17. *Id.* at 201.

18. *Id.* at 78 (quoting Letter from William Langer to Leverett Saltonstall, Apr. 29, 1953, (on file in Life Tenure Files, USCMA)).

19. *Id.* at 220.

20. 395 U.S. 258 (1969).

21. *Id.* at 265. *O'Callahan v. Parker* is discussed in chapter 9 of *Pursuing Military Justice*. *See* LURIE, *supra* note 1, at 209-14.

22. *O'Callahan*, 395 U.S. at 274.

If not as outright in their dismissiveness, the legislative and executive branches of the government often displayed indifference toward the court. The Military Justice Act of 1968 effected significant change to military justice. Yet, as Lurie points out, when it was ultimately passed, the "most important changes to the UCMJ since its adoption in 1950 were enacted by Congress without any sort of floor debate, let alone a formal roll call. . . . The thoroughness of congressional consideration was conspicuous by its absence."[23] If the legislative branch showed indifference through silence, the executive could do so through sheer ineptitude. Nothing reveals governmental clumsiness better than Lurie's subtly droll recounting of the saga of Chief Judge Quinn's "lost retirement letter." Chief Judge Quinn was due to retire in 1965, after serving his fifteen year term, though his service was extended until 1968. Yet when it came time to resign in 1968, the White House claimed it never received Quinn's resignation letter, though according to Lurie, at least two copies of Quinn's resignation letter are in President Johnson's papers.[24] With the letter apparently misfiled, Johnson, for some reason (perhaps overwhelmed by other issues), never acted on the resignation. As a result, Quinn not only continued to serve after Johnson left the White House, but even after President Nixon resigned in 1974.[25]

If finding respect and self-identify were difficult, the USCMA, especially in the early years, nevertheless performed heroically in defining the UCMJ as we now know it. After reading Lurie's book, readers will probably conclude that the court, during its first two decades of existence, did an admirable job in fashioning rules that seem commonsensical now (such as prohibiting court members from consulting the *Manual for Courts-Martial* during deliberations), as well as answering critics within the military and satisfying Congress. In particular, Chief Judge Robert Quinn, despite his failed quest to obtain life tenure for the judges, seems to have been the right man to guide the court through the first twenty years of its existence. Quinn's prudent and shrewd leadership illustrates that often it is better to have a veteran politician, adept at deal-making and handshaking, than a jurisprudential scholar at the helm.[26] To a great degree because of his per-

23. LURIE, *supra* note 1, at 199.

24. *Id.* at 203.

25. *Id.* at 205.

26. *Id.* at 16-19 (discussing Quinn's background). Quinn had been heavily involved in Rhode Island politics which included a term as governor before being appointed Chief Judge.

suasion and charm, the USCMA survived as a viable entity during the first difficult years of its inception.

IV. The Problems with "Microhistory"

As indicated earlier, *Pursuing Military Justice* is not a book of watershed cases and sweeping public pronouncements. In fact, one could call the book a "microhistory," as opposed to a "metahistory," if the latter term refers to a sweeping survey of "great" historical events. It is history discovered in documents and letters between civil servants whose names have not been remembered, if they were known to the public at all. Lurie's challenge as a historian is making this compelling. At times he succeeds splendidly, as in his chapter dealing with the short tenure and untimely death of Judge Paul Brosman.[27] Brosman's untimely death did not bring about any day of national mourning. He was one of thousands of members of a massive federal bureaucracy. But Lurie movingly records his death simply by letting Brosman's colleagues speak for themselves.

Sometimes this microhistorical approach also allows the reader to understand the book's larger themes in a more convincing way. For example, the parts of the book dealing with whether the court and its employees are subject to the Civil Service Commission—an executive agency—may seem maddeningly irrelevant. Yet, this dispute serves as a synecdoche for the larger struggle for identity by the court. Lurie's discussion of the dispute reveals that this struggle was not just fought out in Congress or with JAGs, but spilled over into everyday decisions about employee status.[28]

Of course Lurie's approach has some obvious disadvantages. As might be expected, its major deficiency is that it fails to connect with the larger world, and fails to put the events in the larger picture. The reader may feel at the end of *Pursuing Military Justice* that he knows much about what the court is—its internal structure, its relationship with the military and Congress, its struggle for identity. Yet there is much less a sense of what the court does, much less the ramifications of its decisions on the military. Numerous watershed cases go by unmentioned, such as United States v. Fisher, the first case which applied concepts from federal civilian law to military law.[29] Other cases, such as *United States v. Jacoby*, which

27. *Id.* at 104-06
28. *Id.* at 40-42, 124-26, 138-42, 249-50.
29. 4 U.S.C.M.A. 152 (1954).

held that the Constitution could apply to service members and thus superceded provisions of the UCMJ, are mentioned only in passing.[30]

There is also too little mention of other federal court decisions and their impact on the court and the UCMJ. *Toth v. Quarles*, the first major Supreme Court decision on military justice, is mentioned only as a footnote to the *O'Callahan* case.[31] Furthermore, Lurie does not indicate what effect *O'Callahan* had on the military justice system, except with a brief overview of the follow-up *Relford v. Commandant* decision.[32] While *United States v. Calley* is examined in *Pursuing Military Justice*, no mention is given to the battles over Calley's conviction in the federal district court. Specifically, that Calley was granted a writ of habeus corpus by the U.S. District Court in Columbus, Georgia on "constitutional grounds," and the subsequent opinion by the Fifth U.S.Circuit Court of Appeals, which ultimately upheld the conviction.[33]

Professor Lurie may have purposely chosen to leave case analysis to lawyers, and indeed excellent work has already been done on many of the court's cases by distinguished military practitioners such as Brigadier General John Cooke (as Lurie himself acknowledges).[34] Yet, many extra-legal events occurred during the court's early years as well, and they must have had major impacts on the debates concerning both it and the UCMJ. The reader is hardly aware, for instance, that in the summer of 1950, shortly after the UCMJ was enacted and while the court was settling in, Americans were fighting for their lives in the Pusan Perimeter. If such a "hot war" goes by without much attention, the forty-year long Cold War goes by totally unreferenced.

Of course the Cold War is a gigantic chunk of history that could easily overload a simple history of the court, but without it as a context, it may be hard to assess the various arguments that were made at the time about the proper direction of military justice. If a JAG officer was vehemently opposed to the UCMJ in 1954, would it be fair just to say that he was just

30. 11 U.S.C.M.A. 428 (1960).

31. 350 U.S. 11 (1955) *cited in* LURIE, *supra* note 1, at 209 n.14.

32. 401 U.S. 360 (1971) *quoted in* LURIE, *supra* note 1, at 212. Furthermore, no mention is made in the book to cases such as *United States v. McCarthy*, 2 M.J. 26 (1976), in which USCMA applied *O'Callahan* and *Relford.*

33. LURIE, *supra* note 1, at 218-20. The Fifth U.S. Circuit Court of Appeals opinion is *United States v. Calley*, 519 F.2d 184 (1975).

34. LURIE, *supra* note 1, at 243 n.50. Lurie relied on (then) Captain Cooke's analysis of USCMA decisions from 1975-80.

a product of a reactionary and slow-moving military culture? Or perhaps by looking at the times he lived in—a brutal "hot" war with Korea just ended with tens of thousands of American dead, a tension-filled Cold War with the Soviet Union and China in continuous escalation—might one concede somewhat his points that, discipline, after all, is what is first and foremost important in a military justice system?

I suggest that a more inclusive view of historical events can be found in one of Professor Lurie's own books—the one that gained him prominence in his field, *The Chicago Board of Trade, 1859-1905.*[35] In that book, Lurie not only writes about the Chicago Board of Trade, he extensively examines the so-called "bucket shops," the ramshackle trading houses that were little more than speculative casinos.[36] In his study of these shops, Professor Lurie reveals a fascinating counterpart to the Board of Trade. He examines the various efforts the Board took to suppress the shops, the bucket shops' reactions to the Board's efforts, and public reaction to the conflict.[37] Thus we come to learn not just about the Board's internal practices, but how the Board influenced the society it operated in. While much of *Pursuing Military Justice* is superb, this reader came away wishing Professor Lurie could have applied his considerable historical skills in similarly revealing the Court's interaction—and impact—in facets of military society.

V. Conclusions

At the end of this second volume on the USCMA/CAAF, Lurie notes that a central theme in his book has been the "tension between the JAGs and the Court . . . [It] is a dominant theme in this volume, and one that has not yet been played out. In fact, it may never be resolved."[38] To a certain degree this is true. Yet most current practitioners would surely agree that there is little tension today between JAGs and the court—at least not of the kind during the 1950s and late 1970s. Few JAG officers doubt the necessity and the overall effectiveness of the UCMJ, and while JAG officers

35. JONATHAN LURE, THE CHICAGO BOARD OF TRADE, 1859-1905: THE DYNAMICS OF SELF-REGULATION (1979).

36. *Id.* at 75-104, 139-67, 175-98.

37. *Id.*

38. LURIE, *supra* note 1, at 274.

question court decisions on a daily basis, few question the court's basic legitimacy.

There is, however, much current debate over the future of the UCMJ as well as the court. At the end of the book, Professor Lurie also points to what he perceives are some of the problems: "Traditionally and unnecessarily clothed with a reputation for the arcane, contemporary appellate military justice still suffers from a lack of critical civilian scrutiny, constructive interplay with civilian jurisprudence, an effective and functioning bar, and finally from a jurisprudence-in the post-Fletcher era-increasingly has tended to benefit the prosecution." There is some truth to this. While the reputation of the court is undoubtedly better than what it was during the *O'Callahan* era,[39] this should not cause anyone to rejoice too quickly. Questions and problems still remain.

Still, one may question some of Lurie's conclusions. After all, some may challenge Lurie's assertion that a jurisprudence that tends to "benefit the prosecution" is a problem that the court "suffers" from—some may see this simply as a restoration of sanity and common sense. One may further question how much good an "effective bar" would do for the court: some would view the civilian bars in the American legal system as at best complacent and at worst complicitous in permitting the free-fall spiral that the legal profession has been in (at least in the public's eyes) for the past three decades. Finally others may argue, that, if anything, it is the *over*-civilianization of the system—a system designed to please commanders, congressmen, civilians and Sixty Minutes at the same time—that is causing military justice to immolate publicly in one major investigation and prosecution after another.

Nevertheless, while one may question Lurie's conclusions, and may feel that his study of the court is not as comprehensive as it could have been, *Pursuing Military Justice* provides a superb history of USCMA/CAAF's first thirty years. Professor Lurie has performed a service for all military justice practitioners and scholars. This second volume and the first, *Arming Military Justice*,[40] are the best books on their subject. This reader hopes that soon Professor Lurie will provide us with a third volume in the series.

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39. *Id.* at 276.

40. JONATHAN LURIE, ARMING MILITARY JUSTICE: VOLUME 1, THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1775-1950 (1992).