
Over the past half century, the overriding trend in the military justice system in the United States (and elsewhere) has been the changing focus from a system concerned primarily with discipline to one concerned primarily with individual justice. *Evolving Military Justice* is a collection of seventeen chapters treating the past, present, and future of the military justice system. Although a few of the chapters appear for the first time, most have been previously published over the past decade, primarily in law reviews.

The book begins with former Senator Sam Nunn’s description of the Supreme Court’s military justice jurisprudence. That jurisprudence rests on the assumption that the military has special needs and must impose rules that would be intolerable in civilian society, and that the judgments of Congress—the branch constitutionally vested with the power to raise and support armies—are entitled to substantial deference. Nunn observes that the expansion of rights enjoyed by military personnel has come primarily from congressional oversight rather than judicial mandate.

Against this historical backdrop, several chapters deal with the evolution (some say civilianization) of the military justice system, dating from the adoption of the Uniform Code of Military Justice (UCMJ) in 1950. Since then, as Judge Andrew Effron notes, we have witnessed “the transformation of courts-martial from instruments of command into judicial tribunals” (p. 169). Much of that change was driven by widespread dissatisfaction with the military justice system during World War II, when upward of two million courts-martial were conducted and the influence of command was often palpable. The changes wrought by the adoption of the UCMJ led John Cooke to observe that “the criminal procedures that we used in World War II had more in common with those used in the Revolutionary War than the ones we used for most of the Korean War” (p. 177).

Eugene Fidell identifies the ascendancy of the military trial judiciary—and the concomitant decrease in power in the command structure—as the central feature of the modern military justice system. Acknowledging the devolution of power from command to the judiciary, Frederic Lederer and Barbara Hundley Zeliff propose that military judges be given greater protection from command influence.
The current system provides no formal tenure period for judges, creating a perception (and perhaps the reality) that judges might be influenced in their decisions by their desire to please their superiors. Lederer and Zeliff suggest that after a probationary period, military judges should serve at the level of O-6 (army colonel/navy captain) and be removable only for good cause. Although John Cooke would not go so far, he does recommend fixed three-year terms. Cook argues that military judges already effectively have tenure, but the military gets no credit for protecting the independence of judges because its policy is an unwritten one.

Several chapters deal with developments in other common-law countries (the United Kingdom, Canada, and Australia), and editor Eugene Fidell forcefully argues that military jurisprudence in the United States has neglected developments in other countries. This criticism reflects a general debate within the US legal community about the extent to which domestic courts should attend to foreign legal developments. Fidell maintains that only by examining what other countries have done can we “be sure that our system reflects the best thinking” (p. 213). Others, such as Justice Scalia, believe that comparative analysis is “inappropriate to the task of interpreting a constitution, though it [is] of course quite relevant to the task of writing one” (p. 211). This divide grows out of the deeper question of where legal policy should be made. Those in the former camp often see a greater role for judges in deciding on policy—in which case the “best thinking” is very relevant—while those in the latter camp are more inclined to the view that formulation of policy is primarily a function of the political branches, so that a court’s focus should be on what the architects of the policy had in mind, even if it is not the best—or even very good—thinking.

Some of the chapters deal with more discrete issues. Gary Solis defends the use of military commissions to try terrorists, noting that such commissions have a long pedigree in the United States. Virtually no terrorists satisfy the requirements of the Geneva Convention for prisoner-of-war status, he notes, yet neither are they common criminals. Military commissions enjoy several advantages over civilian trials, including a lesser likelihood of compromising intelligence sources and fewer security problems.

Elizabeth Lutes Hillman critiques the “good soldier” defense, which allows the accused to introduce evidence of “good military character” in the guilt phase of the proceeding. Although evidence of good character is often introduced in the sentencing phase of a civilian trial, it is not
generally admissible in the guilt phase, on the theory that the issue is whether the defendant committed the crime—not whether he is a good or bad person. Although Hillman questions the relevance of character evidence, at least outside the context of military offenses such as “conduct unbecoming,” her primary objection is that the defense disproportionately benefits those of high rank and those with combat experience. Thus, the beneficiaries are disproportionately male, and the defense may put their accusers—especially in sex offenses, which typically involve women of lower rank—at a disadvantage.

Not surprisingly in a book of this sort, those unhappy with features of the current system outnumber the system’s defenders. Nonetheless, John Cooke defends certain features of the current system that have drawn the criticism of others. For example, he supports the current vesting of the decision to prosecute in the convening authority rather than in lawyers, and he does not favor replacing the commander’s selection of court members with random selection. Both changes, he believes, would be ill-advised limitations on command authority.

It is impossible in a brief review to give each chapter individualized attention, so the focus here reflects the idiosyncratic reactions of a single reviewer. Other chapters, all worthwhile, examine the extent to which courts defer to the Manual for Courts-Martial, the method by which the Manual is amended, executive-branch review of death sentences, and Supreme Court review of decisions of the US Court of Appeals for the Armed Forces.

Although a laudable volume on the whole, this book is not without shortcomings. Its somewhat scattershot approach reflects a failing shared by many books consisting of contributed chapters, especially ones reprinted from other sources. There is some redundancy in coverage, and the mix of chapters seems somewhat serendipitous. Why, for example, is there a chapter criticizing the good-soldier defense and another defending the use of military commissions? Readers would have benefited from a more dialectic approach, so that Hillman’s critique of the good-soldier defense might have been paired with a piece supporting the defense, and Solis’s defense of military commissions might have been paired with one of the many articles critical of such institutions.

Another worthwhile perspective would have been a systematic comparison of the military and civilian justice systems. The comparisons that are made in the volume generally identify ways in which the military system is thought to fall short of the civilian system. In many respects, however, the military justice system provides greater protections than its civilian counterpart. For example, the familiar Miranda
warnings, which apply only during custodial interrogation in the civilian sector, are required even for noncustodial questioning in military investigations (and were required fifteen years prior to the Supreme Court’s *Miranda* decision). Moreover, the accused in a court-martial is provided counsel free of charge, while appointed counsel is provided only to indigent civilians. Also, civilian prosecutors have only a limited obligation to turn over the fruits of their investigation, while a military accused is entitled to virtually all of the information in the prosecutor’s possession, substantially reducing the “trial by ambush” often prevailing in the civilian world. Moreover, the accused may introduce evidence of good character in the guilt phase of a court-martial, a course generally not open to civilian defendants. At a court-martial, the accused is judged by personnel selected on the basis of their education, experience, and judicial temperament, rather than by a not-entirely-random selection of the population at large, and court members—unlike most civilian jurors—may question witnesses. On appeal, the Courts of Criminal Appeals may judge the credibility of witnesses and determine controverted questions of fact, an option generally not available to civilian appellate courts. These observations are not meant to suggest the overall superiority of the military system, but rather to note that at least in some respects the military system is actually more progressive—a fact that often gets lost among familiar refrains of “military justice is to justice . . .”

Perhaps some of these criticisms are unwarranted. Editors of volumes such as this one operate under a variety of constraints, and book reviewers often unfairly criticize authors for not having produced a different book—the book that the reviewer would have written had he addressed the topic. There can be no doubt that *Evolving Military Justice* is a useful collection of current thinking on the military justice system, and although one might not be moved to sit down and read it from cover to cover, the individual chapters provide valuable coverage of their respective topics.

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