BOOK REVIEWS

JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW. By Joseph W. Bishop, Jr. Charterhouse, New York, N.Y., 1974. Pp. 315. $8.95.

In recent years, military justice has often been described in unflattering terms. Books with titles such as *Military Justice Is to Justice as Military Music Is to Music*,[1] are typical of current popular writing on military law. Justice Douglas, writing for the majority in *O'Callahan v. Parker*,[2] alluded to "so-called military justice" and the "travesties of justice perpetrated" under the *Uniform Code of Military Justice*,[3] commenting that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[4]

Now the tide seems to have turned. Recognition has been given to the new look in military justice that has resulted from statutory changes, judicial decisions, and innovations within the armed services.[5] Additionally, the necessity of maintaining a separate system of military justice, a subject of much controversy, has been conceded. Upholding a hotly contested court-martial conviction, the Supreme Court observed in *Parker v. Levy*:[6] "The differences . . . first between the military community and civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice. That Code cannot be equated to a civilian criminal code."[7] The Court went on to reject a contention that articles 133 and 134 of the *Uniform Code of Military Justice*[8] are void for vagueness.

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1. R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1969). *See also* CONSCIENCE AND COMMAND (J. Finn ed. 1971); R. RIVKIN, G.I. RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW (1970).
2. 395 U.S. 258 (1969).
3. *Id.* at 266.
4. *Id.* at 265.
5. For a general discussion of these developments, see Everett, *The New Look in Military Justice*, 1973 DUKE L.J. 649.
6. 417 U.S. 733 (1974).
7. *Id.* at 749.
8. The *Uniform Code of Military Justice* [hereinafter cited as U.C.M.J.] contains 140 articles and appears in 10 U.S.C. §§ 801-940 (1970). Article 133 proscribes "conduct unbecoming an officer and a gentleman," while article 134 imposes sanctions on "all disorders and neglects to the prejudice of good order and discipline" and "all conduct of a nature to bring discredit upon the armed forces." *See* U.C.M.J. art. 133, 10 U.S.C. § 933 (1970); U.C.M.J. art. 134, 10 U.S.C. § 934 (1970).

In a similar vein, Professor Bishop's book develops the thesis that military justice "does have virtues as well as vices,"[9] that the system has evolved significantly in recent years, and that there is no occasion to conform military justice in every respect to the justice administered in the civil courts. At the same time, the author gives heed to valid criticisms of the court-martial system and makes constructive suggestions for change.[10]

Beginning with a presentation of the historical and constitutional background of American military law, the book then focuses on "The Court-Martial System: How Military Justice Works." Here Professor Bishop counters suggestions that the jurisdiction of federal civil courts be expanded to include the offenses now dealt with by military justice and makes clear his belief that a need exists for courts-martial. Arguments presented in support of a separate system of courts-martial include the difficulties of maintaining military discipline "by the civilian criminal process, which is neither swift nor certain";[11] the uniqueness of military offenses, such as unauthorized absence, desertion, or mutiny, so that the "adjudication of guilt or innocence and the assessment of appropriate punishment may require experience and knowledge not commonly possessed by civilian judges and jurors";[12] and, the problems that would exist in providing for trial in American civil courts of offenses committed by servicemen overseas. In attempting to give a balanced picture of military justice, Bishop also calls attention to safeguards now provided an accused serviceman which are not available to his civilian counterpart.[13] I concur fully that there is presently no need to scrap the separate system of military justice.

After evaluating the court-martial system, the author concludes that it "differs radically from the civilian in only one respect: the role of the military commander, the convening authority, whose responsibility it is to maintain discipline in the command, who decides which cases shall be prosecuted, and who selects the 'jury' that will decide guilt and assess punishment."[14] Professor Bishop does not—and really could not—dispute the charge that there is at least a possibility of command influence and resultant unfairness under this system.[15] He feels, how-

9. J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW at xi (1974).
10. *See id.* at 300-04.
11. *Id.* at 21.
12. *Id.* at 24.
13. *Id.* at 37, 137-38. *See also* Everett, *supra* note 5, at 663-97; Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970); Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A.L. REV. 1240 (1968); Comment, *Procedural Due Process in the Civilian and Military Justice Systems*, 14 ARIZ. L. REV. 345 (1972).
14. J. BISHOP, *supra* note 9, at 43.
15. Professor Bishop, however, obviously does not consider that command influence

ever, that this could be eliminated by the assignment of appointed military defense counsel, like military judges, "to a central organization, independent of the command which convenes the court-martial. Such a change would remove both the potential and the appearance of improper command influence."[16]

The book's third chapter treats the development of court-martial jurisdiction. In it the author examines cases such as *Toth v. Quarles*,[17] in which the Supreme Court held unconstitutional a congressional attempt to subject former servicemen to trial by court-martial for offenses committed prior to separation from the armed services; *Reid v. Covert*[18] and related cases,[19] invalidating court-martial jurisdiction over civilian dependents and employees accompanying the armed forces overseas in peacetime; and finally, *O'Callahan v. Parker*,[20] in which the court ruled that, with some possible exceptions,[21] a serviceman cannot be court-martialed for conduct which is not service-connected. Professor Bishop also discusses the amenability to court-martial of certain military-civilian hybrids, such as retired regulars and reservists not on active duty. Regardless of the constitutionality of such jurisdiction, he favors its elimination or limitation.[22]

Writing prior to the decision in *Parker v. Levy*,[23] the author declines to predict the Court's disposition of vagueness attacks on articles 133 and 134. He writes, however—in a passage from which Justice Blackmun was to quote in *Levy*[24] —that:

> It is, however, fair to say that in actual practice, the articles are not nearly so vague as they look. Almost all of the acts actually charged under these articles, notably drug offenses, are of a sort which ordinary soldiers know, or should know, to be punishable.[25]

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is a frequent or typical occurrence, as is implied by some commentators. *See* authorities cited note 1 *supra*. I share Bishop's appraisal in this regard. Of course, it must be recognized that the present system permits the appearance of evil.

16. J. BISHOP, *supra* note 9, at 34-35. Partly in response to recommendations submitted in 1972 in the *Report of the Task Force on the Administration of Military Justice in the Armed Forces*, the armed services have already taken steps towards removing all military defense counsel from command control and placing them under the authority of the Judge Advocate General. *See* Everett, *supra* note 5, at 662.

17. 350 U.S. 11 (1955).

18. 354 U.S. 1 (1957).

19. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

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

21. *See* J. BISHOP, *supra* note 9, at 93-99.

22. *Id.* at 78-79, 302. *See generally* Bishop, *Court-Martial Jurisdiction over Military-Civilian Hybrids: Retried Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317 (1964).

23. 417 U.S. 733 (1974), *discussed in* Everett, *Military Justice in the Wake of Parker v. Levy*, 67 MIL. L. REV., Winter 1975, at 1.

24. 417 U.S. at 763.

25. J. BISHOP, *supra* note 9, at 87-88.

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. . . In short, there seem to be few, if any, of those convicted under the general articles who can fairly claim surprise.[26]

Bishop goes on to say that "[c]onstitutional or not, the general articles in their present form seem at best unnecessary. . . . The genuine crimes usually charged under the general articles could as easily, and with much clearer constitutionality, be covered by explicit articles of the Code."[27]

In Chapter four, "The Bill of Rights and the Serviceman," Professor Bishop begins by acknowledging that the Supreme Court "has never to this day squarely held that a soldier has any constitutional rights when he is court-martialed, or indeed that he has any constitutional rights of any variety."[28] Moreover, he is convinced that the framers of the Bill of Rights "never supposed that soldiers were included within its protection."[29] The author then discusses *Burns v. Wilson*,[30] a case whose meaning is obscured by the absence of a majority opinion, but which has generally been cited for the proposition that servicemen do have some constitutional rights.[31] Although collateral attack in the civil courts on court-martial action is dealt with, the issue has lost some of its importance, as Bishop recognizes,[32] because the *Uniform Code of Military Justice*, as interpreted by the Court of Military Appeals, provides many of the safeguards that are guaranteed to civilians by the Bill of Rights. Professor Bishop also discusses the leading free speech cases decided by the Court of Military Appeals—those of an Army Lieutenant Colonel who published a book on the Korean War without obtaining the "policy" and "propriety" clearance required by military directives;[33] two Black Muslims charged with violations of the Smith Act;[34] a Navy seaman who distributed an inflammatory underground

26. *Id.* at 90.
27. *Id.*
28. *Id.* at 114.
29. *Id.* at 115. For support of this proposition, Professor Bishop places appropriate reliance on the articles of Colonel Frederick Bernays Wiener. *See* Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pts. 1 & 2), 72 HARV. L. REV. 1, 266 (1958).
30. 346 U.S. 137, *rehearing denied*, 346 U.S. 844 (1953).
31. *See* Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 187-88 (1962). The plurality opinion in Burns v. Wilson, 346 U.S. 137 (1953), would restrict collateral review of court-martial convictions by federal civil courts to those constitutional issues that had not been fully and fairly reviewed within the military justice system. *But see* Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970) (allowing a broader scope of collateral review).
32. J. BISHOP, *supra* note 9, at 137-38. Parker v. Levy, 417 U.S. 733 (1974), will probably reduce the occasions for civil court review of court-martial action.
33. United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).
34. United States v. Harvey, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970); United States v. Daniels, 19 U.S.C.M.A. 518, 42 C.M.R. 120 (1970).

newspaper at various military installations;[35] and an Army Lieutenant convicted for "contemptuous words" against President Johnson in an anti-Vietnam war demonstration.[36]

The book's fifth chapter concerns the War Power. Professor Bishop first notes that the threshold issue of defining "war" is obscurred in an era when hostilities may be conducted for years without any formal declaration of war. Then, he discusses *Youngstown Sheet & Tube Co. v. Sawyer*[37] and the limitations on the President's ability to act without congressional authorization, even in waging war. In this connection, Bishop concludes that, "[t]he plain fact is that the Supreme Court's willingness to apply constitutional brakes varies in exact proportion to the degree of the emergency in which the Commander in Chief acted and the distance of the decision from that emergency."[38] The author's comparison of *Ex parte Vallandigham*,[39] decided in 1864, with *Ex parte Milligan*,[40] decided after the Civil War had ended, supports his conclusion. Similarly, he believes that the decisive difference between *Milligan* and *Ex parte Quirin*,[41] which in 1942 allowed an ad hoc military commission to try seven German saboteurs who had landed on American shores, "is that the former was decided after the last army of the Confederacy had surrendered, and the latter when the nation was waging war with enemies who seemed uncomfortably near to winning."[42] In this chapter, Professor Bishop also deals with the Japanese Exclusion Cases,[43] the Pentagon Papers,[44] and challenges to the draft.

Since "government has, on occasion, resorted to the use of military force in its own territory, and against its own citizens,"[45] the author devotes his sixth chapter to martial law.[46] After describing sections 331, 332, and 333 of title 10 of the *United States Code*, which provide a

35. United States v. Priest, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972).
36. United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967). The accused also was convicted under U.C.M.J. art. 133, 10 U.S.C. § 933 (1970), which prohibits conduct unbecoming an officer and gentleman.
37. 343 U.S. 579 (1952).
38. J. BISHOP, *supra* note 9, at 188.
39. 68 U.S. (1 Wall.) 243 (1864).
40. 71 U.S. (4 Wall.) 2 (1866).
41. 317 U.S. 1 (1942).
42. J. BISHOP, *supra* note 9, at 196. Professor Bishop finds support for his conclusion in Duncan v. Kahanamoku, 327 U.S. 304 (1946). In *Duncan*, decided long after the last gun had been fired in World War II, the Supreme Court reaffirmed *Milligan* and held that the military trial of civilians in Hawaii was unjustified when the courts were open and able to function.
43. *Ex parte* Endo, 323 U.S. 283 (1944); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).
44. New York Times Co. v. United States, 403 U.S. 713 (1971).
45. J. BISHOP, *supra* note 9, at 225.
46. As Professor Bishop observes, the Constitution contains no express reference to martial law, but it does contain provisions that provide a basis for martial law. *Id.* at 227.

statutory basis to use troops to enforce the laws and suppress domestic violence,[47] Professor Bishop discusses cases in which the Supreme Court has imposed limitations on the use of martial law.[48]

Chapter seven, "The International Law of War," is only loosely connected to that which has preceded. In it, the author attempts to retrieve the distinction between illegality and immorality. Refuting sweeping charges about American war crimes in Viet Nam, he casts the discussion of war crimes in terms of violations of "international *law*—those rules which most nations have agreed . . . to obey and enforce."[49] The tone of Bishop's discussion may be illustrated by this sentence: "The fuzzy notion that every citizen of the United States (except the saints and martyrs of the anti-war movement) is guilty of the war crime of My Lai—that the unfortunate Lieutenant Calley was merely a scapegoat—is, to a lawyer, nonsense, and pernicious nonsense at that."[50] In connection with the Calley trial, the author also observes:

> In practice, of course, the common types of war crime, such as mistreating or killing prisoners of war, or noncombatants, are also violations of domestic law and can be tried as such by whatever ordinary courts have jurisdiction. Lieutenant William Calley, for example, was not tried by military commission for a war crime, but by a general court-martial for premeditated murder in violation of the Uniform Code.[51]

Noting that punishment of those who have commited war crimes is the most difficult problem, Professor Bishop believes that on some occasions the international law of war authorizes military jurisdiction that otherwise would be lacking. In his view, admittedly a minority one,[52] a former serviceman could, under proper circumstances, be tried by a military court on charges of violating the law of war, although, apart from the law of war, military jurisdiction would cease with discharge from the armed services.[53]

In his conclusion, Professor Bishop acknowledges that he favors neither "abolition of the separate system of military justice, nor even complete elimination of the military commander's role in it,"[54] but he recommends some changes in the present system. He would expand the role of the independent military judiciary by creating permanent mili-

47. *Id.* at 227-33.
48. Duncan v. Kahanamoku, 327 U.S. 304 (1946); Sterling v. Constantin, 287 U.S. 378 (1932).
49. J. BISHOP, *supra* note 9, at 261.
50. *Id.* at 293.
51. *Id.* at 262.
52. *Id.* at 292.
53. *See* Toth v. Quarles, 350 U.S. 11 (1955).
54. J. BISHOP, *supra* note 9, at 300.

tary courts consisting only of full-time, independent military judges. Military accused would be provided with defense counsel, responsible only to the Judge Advocate General and not to military commanders in the field. Bishop also recommends that some of the full-time judges and defense counsel be civilians, rather than, as at present, only military officers.[55] The author would abolish the bad conduct discharge and allow dishonorable discharge to be imposed only by a military court. He would repeal articles 133 and 134 of the *Uniform Code of Military Justice* and replace them by more specific criminal prohibitions.[56] Military criminal jurisdiction over certain hybrids—reservists not on active duty and retired regulars—would be eliminated or greatly curtailed. Article 88 of the Uniform Code, prohibiting an officer's use of contemptuous words towards the President or certain other officials, also would be abolished.[57] Decisions of the Court of Military Appeals would be made subject to review by the Supreme Court upon petition for certiorari.

Several of these recommendations are desirable and, to some extent, are being implemented. For instance, defense counsel are being insulated more thoroughly from influence by a military commander in the field. Use of a full-time military judge, now required by statute for the general court-martial,[58] is becoming more widespread in special courts-martial. I also favor Professor Bishop's suggestion that some civilians be employed as military judges and defense counsel. I doubt that such a proposal would prove palatable to the Judge Advocate General, however, who might view it both as an implied criticism of present military judges and defense counsel and a diversion to civilians of opportunities needed for career judge advocates.

I have reservations about some of Professor Bishop's other proposals, however. At this point, I am not convinced that it would be wise to abolish the military jury and have cases disposed of solely by military judges. Although the high percentage of waivers of trial by the court-martial members—military jurors—signifies that a large number of cases are already being tried by a military judge alone, cases may arise in the military, just as in civilian life, where the broad experience of jurors

55. Under the present provisions of the Uniform Code, only commissioned officers can serve as appointed military defense counsel or as military judges. See U.C.M.J. arts. 1(13), 26(b), 27, 10 U.S.C. §§ 801(13), 826(b), 827 (1970). However, a civilian may be a member of a Court of Military Review. U.C.M.J. art. 66(a), 10 U.S.C. § 866(a) (1970).

56. J. BISHOP, *supra* note 9, at 302. Professor Bishop would eliminate article 133 entirely.

57. *Id.* at 302-03. He comments that "the very rarity of its invocation shows that it is not needed to preserve military discipline. Soldiers ought to have as much right as civilians to cuss out the Government, so long as they obey its lawful orders." *Id.* at 303.

58. *See* U.C.M.J. art. 26, 10 U.S.C. § 826 (1970).

could make a significant contribution to the fact-finding process. For example, in the trial of an alleged combat offense, military jurors with combat experience might better understand the events involved than military judges, who might lack such experience. Concerning the proposal by Professor Bishop—and by many others—that direct review be available in the Supreme Court for opinions of the Court of Military Appeals, I have mixed sentiments. Occasions arise when a legal issue might be more promptly resolved if it could be considered directly by the Supreme Court upon a petition for certorari, instead of wending its way to the Court through the process of collateral attack in the federal civil courts. On the other hand, the availability of petitions of certiorari from the Court of Military Appeals might noticeably add to the Court's crowded docket.[59]

Professor Bishop's introduction recites that his "purpose in writing this book is to give to general readers, and to the many lawyers who lack familiarity with military law, a concise account of that law . . . ."[60] For this task, he is exceptionally well qualified by his experience as a member of the Judge Advocate General's Corps during World War II, legal advisor to a board of inquiry investigating alleged war crimes by members of a German SS division, and as Deputy General Counsel and Acting General Counsel of the Army in the Korean War period. Along with this background, he brings a writing style that is readable, indeed entertaining. As stated on the book's jacket cover, the result of Professor Bishop's labors "can and will be read with interest by the lay reader and by those who have a professional concern with law and the military."

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59. The number of petitions for certiorari might depend, in part, on the availability of appellate defense counsel for purposes of preparing such petitions and the extent to which such counsel felt ethically obligated to submit a petition whenever the accused requested. *Cf.* U.C.M.J. art. 70, 10 U.S.C. § 870 (1970). Article 70 provides for appellate defense counsel to represent the accused before the Court of Military Review or the Court of Military Appeals.

60. J. BISHOP, *supra* note 9, at xi.

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