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BOOK REVIEW

JUSTICE UNDER FIRE. By Joseph W. Bishop, Jr.[1] New York: Charterhouse. 1974. Pp. 315.

Reviewed by Joseph Remcho[2]

This is indeed a fitting time to explore the relationship between military and civilian criminal justice. Our current Commander-in-Chief has just pardoned our most recent past Commander-in-Chief for "any and all crimes" which he may have committed during his tenure in office. President Ford's pardon of Richard Nixon was made in the civilian context, of course, but it certainly supports the theory of those like Mr. Bishop who argue that military justice is in the main not much worse than civilian justice.[3] It has long been painfully obvious that a primary purpose of the criminal law is to protect the rich and powerful—who, after all, make the law in the first place—from the less rich and the less powerful. Unless he is very stupid or very unlucky the well-to-do white collar criminal or government official has little to fear from the criminal law. It is not simply a matter of very rich against very poor. At every stage of the economic and social ladder one has just a little more protection and a little less to fear from the criminal law than the person below and similarly a little less protection and a little more to fear than those above in station. And, for the most part, criminal laws continue to be arbitrary, judges capricious and insensitive, and defense attorneys often uncaring as well as overworked. Injustice and unequal treatment are clearly more exaggerated in the military—where rich and poor alike must constantly wear symbols of their caste—but they spring from the same distorted ordering of systems of criminal justice.

To say that military justice is no worse than civilian justice, however, is no more comforting to the military accused than assurances that strangulation

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3. Although Bishop disclaims the "intention of portraying military law as a system of justice that ought to serve as a model for civilians" (p. xiv), the book itself, especially chapters 2 and 4, is a defense of that system and a comparison of its virtues with those of civilian models.

is no worse than electrocution are to a man condemned to hang. Sadly, one can always find nasty parallels. Those of us who are concerned with military law should spend our time addressing the evil at hand rather than justifying it by selected comparisons. The fact is that military justice is worse than civilian justice. Ask any enlisted man.

We start with the system in which one man, the accused's commanding officer, appoints an officer to investigate a crime (the officer's recommendations are not binding); and with the aid of his Staff Judge Advocate prefers charges, appoints counsel for the government and for the accused and then selects the members of the "jury" which will try the case, maintaining virtually absolute authority to appoint those whom he feels are "best qualified."[4] No bail is available. After the trial the same man determines whether or not the proceedings were proper; he may also reduce or suspend sentence or overrule findings of guilt.[5]

If all that is not enough, the commanding authority has the power to overrule a military judge on a question of law.[6] And, as Mr. Bishop notes, if the accused elects not to be tried by the commander's handpicked jury and elects trial by a military judge sitting alone, "that judge is an officer of the service, with a professional interest in its discipline, and he is not altogether independent of the Judge Advocate General and the civilian officers of the Department" (p. 44). Even Mr. Bishop admits that this familiar litany of a commander's powers leaves "no doubt that his unique interests and powers create at least a possibility of unfairness" (pp. 43-44).

In an effort to place this review on at least as high a plane as Mr. Bishop would have us believe *Justice Under Fire* rests,[7] I too will make some small concessions to the other side of the military justice question. In keeping with *Catholic University Law Review* policy[8] and common sense,[9] however, let

4. *See* Uniform Code of Military Justice art. 22-32 [hereinafter cited as UCMJ], 10 U.S.C. §§ 822-32 (1970). *See also* United States v. Kemp, 22 U.S.C.M.A. 152, 46 C.M.R. 152 (1973).

5. *See* UCMJ art. 64, 10 U.S.C. § 864 (1970). The power of the convening authority to reduce sentences does not necessarily work in favor of the accused. Courts might impose longer sentences on the assumption that the commander can reduce them if he wishes. *See Hearings on S. 857 and H.R. 4080 Before a Special Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 87 (1949). For a definitive and comprehensive review of the evolution of the UCMJ, see Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3 (1970).

6. *See* UCMJ art. 62, 10 U.S.C. § 862 (1970).

7. Professor Bishop characterizes critics of military justice as purveyors of baloney and promises to spare his readers "more baloney of a different flavor" (p. xiv).

8. The *Review*'s "information for authors" enjoined me to "disclose any financial,

me first disclose my prejudices. Professor Bishop's book jacket informs us that he spent time as an officer in the military in World War II and later with the Department of Defense. His experience, like his conclusions, suggests that he spent his time discussing the problems of officers. Indeed, he is clearly sympathetic with their concerns. As a criminal defense attorney with the Lawyers Military Defense Committee in Vietnam and with the American Civil Liberties Union in the United States, I work with the subjects rather than the masters of the criminal justice system. I have seen the military justice system hopelessly wreck the lives of young men who joined the service to defend the Constitution and found to their own bewilderment that they were asked to forfeit the protections of that document while fighting to defend it. I have seen generals extol the virtues of war at taxpayers' expense while privates go to jail for taking a contrary view. I have seen the effects of institutionalized racism and oppression on military personnel, and I get a little impatient with Mr. Bishop's bland defense of military justice.[10]

Nevertheless, *Justice Under Fire* is in many ways a useful overview of military law. Mr. Bishop gives us a brief historical background and a general discussion on the functioning of the court-martial system. He provides a historical analysis of the jurisdiction of courts-martial, an area of law which took on new significance with the decision in *O'Callahan v. Parker*[11] limiting court-martial jurisdiction to cases which were "service connected," and giving rise to Justice Douglas's famous statement that a court-martial remains "a specialized part of the overall mechanism by which military discip-

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economic or professional interests or affiliations that may have influenced positions taken or advocated in their articles."

9. *See* Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228-29 (1965).

10. I should disclose one other ground for bias. Bishop writes that

> [i]n the eyes of professional staffers of the American Civil Liberties Union, for example, the typical court-martial is a kangaroo proceeding in which a wretched conscript is dragged before a panel of sadistic martinets, convicted on the basis of perjured evidence and his own confession (which has been extracted by torture), and sentenced to fifty or sixty years of solitary confinement, chained to the wall of a subterranean dungeon, and fed on bread and water.

(Pp. 19-20). Mr. Bishop obviously had an axe to grind with "professional staffers" of the ACLU, of which I am one, but his statement is of course inaccurate, in part because few of our clients are convicted on the basis of extracted confessions. On the contrary, they tend to be people who quite openly and forthrightly express their outrage at the powers that be and find themselves marched off to the stockade. Well, Mr. Bishop promised not to give us "more baloney" and I promise not to let his views of the ACLU interfere with a serious discussion of his work.

11. 395 U.S. 258 (1969).

line is preserved."[12] Bishop goes on to discuss the Bill of Rights and the serviceman in a chapter better titled "The Bill of Non-rights." Finally, he devotes the last third of his book to the war powers, to the international law of war and to the power of the military to interfere in domestic matters. Since my primary interest is in the criminal justice system I leave for others a critique of the latter points. I note only that his views of a war crime (pp. 267-68, 278), and of the power and duties of the military to intervene in peaceful demonstrations (p. 250), are characterized by the same knee-jerk defense of the military and adamant refusal to recognize that human lives are at stake that characterize his view towards the Bill of Rights and the serviceman.

In fairness, Mr. Bishop is not among those who claim that military justice is always as good as civilian justice. Although he argues that the military courts give the accused a "slightly better break" (p. 37) procedurally than civilian courts,[13] he implicitly recognizes that the military accused will not do as well in the final analysis as his civilian counterpart. However, he rejects the suggestion of Professor Edward Sherman[14] that offenses military should be tried by civilian courts. His reasons are worth discussion. First, Bishop argues that military necessity justifies sidestepping the Bill of Rights because

> the doctrine that it is better that ninety-nine (or nine hundred and ninety-nine)[15] guilty men go free than that one innocent be convicted is not easily squared with the need to maintain efficiency, obedience and order in an army, which is an aggregation of men [sic] (mostly in the most criminally prone age brackets) who have strong appetites, strong passions, and ready access to deadly weapons.

(p. 23). Nonsense. The senior class in any high school in the nation will be full of people with strong appetites, strong passions and ready access to deadly weapons, if only automobiles. Yet high school students are not for that reason deprived of the protection of the Bill of Rights.

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12. *Id.* at 265.

13. There is some truth to his claim. Military discovery is indeed better than most civilian discovery. *Compare* MANUAL FOR COURTS-MARTIAL ¶ 15 (rev. ed. 1969) *with* FED. R. CRIM. P. 16. Pre-trial warnings must be more complete. *Compare* Harris v. New York, 401 U.S. 222 (1971) *with* UCMJ art. 31, 10 U.S.C. § 831 (1970). The lack of bail in military law has led to real enforcement of the right to a speedy trial. *See* United States v. Burton, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971). These procedural aids may be illusory, however, for all the procedural devices in the world don't help much when the other guy picks the jury. *See* UCMJ art. 25, 10 U.S.C. § 825 (1970).

14. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398 (1973).

15. Bishop never misses a chance to exaggerate.

Second, Bishop argues that since "discipline is the responsibility of the military commander, he should have some control of the machinery by which it is enforced—to decide, for instance, whether a particular offender should be prosecuted and what degree of clemency will best promote the efficiency of his command" (p. 24). The argument begs the question and would apply to any police chief.

Third, Bishop contends that certain military offenses such as insubordination, cowardice, mutiny and the like have no civilian analogues and therefore civilians should not sit in judgment. But jurors are constantly called upon to make judgments outside of their personal experiences. Unless he is either a murderer or has been murdered a juror has no more knowledge and experience about murder than he has about insubordination.

Finally, Bishop argues that since soldiers may be stationed and commit crimes outside the jurisdiction of American civilian courts it makes no sense to grant American civilian courts jurisdiction (p. 24). As he notes, however, there is no constitutional reason why federal district courts cannot be given extraterritorial jurisdiction. And if this difficulty is for some unknown reason insuperable, at the least servicemen ought to be entitled to trial by civilians while they are within the jurisdiction of federal courts.

Throughout his discussion of the court-martial system Bishop does make brief concessions to inescapable facts, such as the fact that an accused's right to trial by a jury composed of one-third enlisted men[16] is worthless because of the commander's habit of appointing tough senior non-commissioned officers when enlisted persons are requested (p. 28), but his defense of the facts is hardly persuasive. He argues, for example, that an accused has a simple way to avoid the danger of being tried by a hand-picked jury—he can waive the jury (p. 32). He notes that if the accused cannot afford to hire a civilian lawyer, military defense counsel will be appointed by the commanding officer. That procedure passes muster, he says, because the counsel "must be a qualified lawyer" (p. 33).[17]

With respect to the Bill of Rights, Bishop argues that "[i]t is as certain as any historical proposition can be that men who were contemporaries of the framers of the Bill of Rights . . . never supposed that soldiers were included within its protection" (p. 115). His principal support for that proposition is citation to two articles by Frederick Bernays Wiener.[18] In fact,

16. *See* UCMJ art. 25, 10 U.S.C. § 825 (1970).

17. In practice, of course, the commanding officer rarely takes the time to appoint the defense attorney directly. Assignments are usually made by the Staff Judge Advocate who, anticipating his commander's feelings about the need for discipline, generally errs on the side of overzealous prosecution rather than defense. Typically, the defense attorney who wins too many cases will quickly find himself assigned to prosecute cases.

18. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pts.

however, special consideration for the military is mentioned only in the fifth amendment guarantee to a grand jury, from which armed forces personnel are excluded. The language of the rest of the Bill of Rights applies to all persons and no convincing case has been made that servicemen and women can or should be denied those rights. Here, however, Bishop clearly has the United States Supreme Court on his side. As he notes, even Justices Black and Douglas have conceded that the right to trial by jury does not apply to military personnel (p. 128).[19] Although there is some evidence that the rest of the country is beginning to take a somewhat more critical attitude toward the military's conclusory declaration of insulation from the Bill of Rights, any hope for further movement by the Supreme Court was scotched in *Parker v. Levy*.[20] Compare Mr. Justice Rehnquist's decision in *Levy* with Mr. Justice Douglas' in *O'Callahan v. Parker*,[21] and it is clear that Mr. Bishop and his friends now have the upper hand.

Not surprisingly, Bishop concludes that he does not favor abolition of the separate system of military justice. He does suggest a few changes, however. Some are useful and are to be applauded, but for the most part they are merely cosmetic and do not reach the fundamental unfairness of the system. Others appear to be steps backward. For example, he would do away entirely with the military jury (p. 300). As poor as that system is, with a court consisting of officers or senior non-commissioned officers, it has to be better than a professional judge or judges as the exclusive tribunal. Bishop is also in favor of reducing the power of the commander and he would remove the commander's power to set aside a conviction or order a new trial (p. 301). But he suggests no change in the commander's power to control a court-martial except insofar as his power to appoint a jury would be limited by the absence of juries. A system of professional military judges, he says, "would relieve line officers of a burdensome and time-consuming task, retain the benefits of military expertise in the trial of military cases, and ensure adequate consideration of the needs of military discipline" (*id.*).

What of the rights of the accused? He suggests that the accused should have the services of a qualified lawyer in *all* cases (*id.*). As he notes, however, this is generally true as a practical matter. Thus the suggestion, although

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1-2), 72 HARV. L. REV. 1, 266 (1958). The opposite position, however, has been argued with, in my view, greater force in Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

19. *See* O'Callahan v. Parker, 395 U.S. 258, 261 (1969); Reid v. Covert, 354 U.S. 1, 37 n.68 (1957). *But see* Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 INDIANA L.J. 193 (1972).

20. 94 S. Ct. 2547 (1974).

21. 395 U.S. 258 (1969).

a good one, is largely cosmetic. He also recommends that defense lawyers should be responsible only to the Judge Advocate General and should include a substantial proportion of civilian employees (*id.*). This would be a step forward, but a better step would be to have all civilian defense counsel responsible to no one in the military. He would abolish the bad conduct discharge but would leave the dishonorable discharge (pp. 301-02). This is, as he notes, another cosmetic change since bad conduct and dishonorable discharges have equally unfavorable consequences. A better course would be to abolish all designating types of discharges. A military conviction should be stigma enough, without the need to carry the added disabilities of a bad discharge for the rest of one's life. Bishop, happily, would repeal the general articles—Articles 133 and 134 (p. 302).[22] These have just been upheld in *Parker v. Levy*,[23] but are indeed an abomination. Specific crimes now charged under the general articles could be charged under a specific article, and a commander's discretion to charge any unpleasant conduct under the general articles would be reduced. Bishop would also repeal Article 88[24] which prohibits an officer from using contemptuous words against the President (p. 303). The repeal of these articles makes good sense. It likewise makes good sense, as Bishop suggests, to repeal military criminal jurisdiction over reservists not on active duty (p. 302). This jurisdiction is not often invoked, but never should be. Finally, Bishop would make decisions of the Court of Military Appeals reviewable by the Supreme Court by a petition for certiorari in the same way decisions of state supreme courts are (p. 303). Unless the Supreme Court takes a more expanded view of the protections which the Bill of Rights offers servicemen, however, the right to petition for certiorari will be of little value.

Although scholars such as Edward F. Sherman have long been proponents of removing virtually all military jurisdiction to the civilian courts,[25] I have heretofore been reluctant to embrace that view. Servicemen are often moved far from home, and since major military bases are generally in provincial

22. UCMJ art. 133, 10 U.S.C. § 933 (1970), applies only to officers and cadets and proscribes "conduct unbecoming an officer and a gentleman." UCMJ art. 134, 10 U.S.C. § 934 (1970), prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital." Even Bishop admits their "phraseology may fairly be described as downright nebulous" (p. 87).

Prior to the Supreme Court's decision upholding the general articles in Parker v. Levy, 94 S. Ct. 2547 (1974), they were held unconstitutionally vague in their entirety by one court, *see* Levy v. Parker, 478 F.2d 722 (3d Cir. 1972), and partially void for vagueness by another, *see* Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973).

23. 94 S. Ct. 2547 (1974).

24. UCMJ art. 88, 10 U.S.C. § 888 (1970).

25. Sherman, *supra* note 14.

areas, local residents might not be terribly sympathetic to the problems of servicemen generally, let alone a volunteer force composed largely of urban minorities. I have felt that substantial revision of the military justice system, particularly in the area of an expanded right to trial by jury, would do far more to protect the rights of servicemen and women than moving to a completely civilian system. But it is clear that the Supreme Court is unwilling to put even the most minimal constraints upon the operation of the military justice system. Congress seems disinclined to legislate reform on a piecemeal basis. And, when the Supreme Court will not go even as far as Joe Bishop suggests, we cannot hope for much in the way of constitutional protections for servicemen.

I am now persuaded—to some extent by *Justice Under Fire*—that civilian control over courts-martial is essential. If military discipline requires abandonment of civilian safeguards, then military tribunals without confinement power should be enough. Crimes for which more serious punishment is deemed necessary should then be turned over to the civilian courts. Such a system would indeed "insure adequate consideration of the needs of military discipline" (p. 301). It would also secure just a little more justice for men and women in uniform.

Justice Under Fire is a literate book and generally well researched. But for all the author's assertions that this will be the book that deals with practicalities, its essential flaw is a failure to come to grips with the human beings who struggle to maintain some sense of dignity in an army which even Bishop suggests is run in the main by "Philistines" (p. xiii). If ever a book suffered from an overdose of pedagoguery and the ivory tower, it is this one. Mr. Bishop enjoys his professional sarcasm and no doubt countless Yale law students were subject to his witty put-downs of critics of the military justice system before this book saw print. But cheap jibes at Ramsey Clark[26] do not obscure Bishop's failure to come to grips with what it is really like to be an enlisted man in this or any other army. The system crushes human initiative and dignity. It teaches only obedience and fear. And it leaves its toll on the entire society. Vast numbers of our citizens are taught a lesson that Mr. Bishop has learned so well. They learn to accept without question those in authority, not because they are right or wise or decent, but only because they are in authority. It is a sorry lesson.

26. Mr. Bishop characterizes Ramsey Clark as one "who is said by many people to be a better lawyer than Miss [Jane] Fonda" (p. 259). No one has suggested that Mr. Bishop is a better lawyer than Ms. Fonda.