Book Review. A Special Kind of Justice

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Book Reviews

A Special Kind of Justice


Reviewed by Edward F. Sherman†

I

In his classic analysis of the judicial process, Cardozo identified four forces which have shaped the development of the law—logic, history, custom, and social welfare—but observed that in a few areas of the law history has been paramount; the conceptions "embody the thought not so much of the present as of the past."1 History has played a prominent role in the development of military law, often to the exclusion of other forces, and Professor Joseph W. Bishop's Justice under Fire provides an admiring affirmation of that approach. Bishop, Acting General Counsel of the Army in the early 1950's and Professor of Law at Yale, is a traditionalist, a lover of the historical lore of military law. He is a believer in orthodox military notions that commanders require broad powers in matters of discipline and training, that civilian legal standards and procedures are often not transferable to the military, and that in matters of national security, war, and domestic disorder, the Executive must be given wide latitude in using military force. He is not a dogmatic defender of the military; rather he is a respecter of tradition with a good sense of history, a fine writing ability, and a decent regard for rationality, but with a marked distaste for the style of contemporary movements and ideas and a general unwillingness to admit of the need for legal and institutional changes in the military in response to them.

Bishop's thesis is that modern military law "is a variety of law that has developed to meet the particular requirements of a particular part of our polity,"2 and he concludes that distinctive military standards

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2. J. BISHOP, JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW xiv (1974) [hereinafter cited to page number only].

373
and procedures are generally necessary and reasonable. He addresses five major aspects of military law—military justice, judicial protection of servicemen’s rights, the war power in the military sphere, martial law and use of the military in non-war situations, and the international laws of war. This is an enormous undertaking, involving disparate and complex issues of criminal law, federal court procedure, constitutional law, administrative law, and international law, and it is not surprising therefore that Bishop does not provide a very comprehensive analysis of them in 304 pages. The best parts of the book are taken from earlier law journal articles on civilian court review of courts-martial and their jurisdiction. Bishop’s discussion of Vietnam War issues is occasionally marred by petulance and defensiveness, as he attempts to respond to “popular polemics” which he maintains have ignorantly and unfairly criticized military law. As a result, Justice Under Fire covers too much ground in too sketchy and argumentative a fashion to make a significant contribution to scholarship. Nonetheless, it has value in providing an intelligible integration of the branches of military law, in its sprightly discussion of complex issues in an understandable way, and in its forceful presentation of a pro-military argument in the contemporary debate over the quality of military justice and legal control over the military in our society.

II

Bishop’s defense of military justice is that it “is not a debasement and corruption of the ordinary criminal process in the interest of military discipline, but a very gradual and still partial homologization of civilian criminal justice by a penal system with totally different purposes and origins.” From this premise he concludes that the distinctive procedures followed in courts-martial, which sometimes fail to provide all the safeguards given in civilian trials, are justified. The premise itself is troubling. Military justice has different origins from civilian criminal law, but it is not at all clear today that it has or should have “totally different purposes.” The court-martial of a serviceman for murder, rape, larceny, or possession of marijuana has the same basic purpose as the trial of a civilian for the same offense—

5. P. 5.
to determine guilt or innocence according to due process of law. Even a court-martial for a typically military offense, such as absence without leave or disobedience of orders, is not appreciably different in its purposes from a civilian criminal trial. Once a commander chooses to go beyond his considerable “disciplinary” powers under nonjudicial punishment to a court-martial, he is operating in the sphere of criminal law, and an impartial determination of guilt or innocence should be the principal objective. A court-martial may aid the commander in maintaining discipline, but any deterrent effect should arise, as in a civilian trial, only from a just and impartial determination of guilt or innocence. Most Western nations have now come to accept the idea that the court-martial should be an impartial judicial proceeding rather than a disciplinary mechanism of the command.7

Professor Bishop takes the surprisingly rigid position that military courts with distinctive disciplinary features are essential today. He argues that military discipline cannot be preserved by the civilian criminal process “which is neither swift nor certain,”8 ignoring the possibility that divisions of federal courts could be created near military posts to provide civilian trials of servicemen9 and that strict rules as to “speedy trial” are as feasible in civilian courts as in military.10

6. Under Article 15(b), Uniform Code of Military Justice, 10 U.S.C. § 815(b) (1970) [hereinafter cited as UCMJ], a field grade officer (major or naval lieutenant commander, or above) may impose correctional custody for up to 30 days, forfeiture of up to one-half of one month’s pay for two months, reduction in rank, restrictions, and extra duties. An officer below field grade can impose correctional custody for up to seven days, forfeiture of up to seven days’ pay, reduction of one rank, restrictions, and extra duties. A serviceman may refuse nonjudicial punishment and demand a summary or special court-martial. MANUAL FOR COURTS-MARTIAL UNITED STATES (rev. ed. 1969) [hereinafter cited as MCM 1969], § 132, at 26-8.

7. See INTERNATIONAL SOCIETY OF MILITARY LAW AND THE LAWS OF WAR, THE SAFEGUARD OF INDIVIDUAL RIGHTS IN THE APPLICATION OF MILITARY LAW AND DISCIPLINARY REGULATIONS (LES GARANTIES DES DROITS INDIVIDUELS DANS LA REPRESSION DISCIPLINAIRE ET PENALE MILITAIRE) 19 (1966). General William C. Westmoreland, Army Chief of Staff, stated in a 1970 speech: A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.


10. In 1971 the Court of Military Appeals (COMA) adopted the rule that “in the absence of defense requests for continuance, a presumption of an Article 10 [requiring immediate steps to try a person placed in confinement] violation will exist when pretrial confinement exceeds three months.” United States v. Burton, 21 U.S.C.M.A. 112, 118, 44 C.M.R. 166, 172 (1971). This standard has been strictly applied, only permitting exceptions in “really extraordinary circumstances.” United States v. Marshall, 22 U.S.C.M.A. 431, 47 C.M.R. 409 (1973). This is consistent with the recommendation of the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 2.1, at 14 (app. draft 1968), that time limits be established for a speedy trial “expressed... in terms of days or months running from specified events.” A num-
He glosses over the fact that West Germany has abolished its court-martial system (as have Sweden, Austria and Denmark) with the claim that it was simply "reacting against a monstrous overdose of militarism, at a time when Germany had no armed forces and no spokesmen for the military point of view." He fails to note that the West German armed force is one of the largest in the world today, has an excellent record for efficiency, consistently scoring well in joint NATO exercises, and has generally found, after some 22 years without courts-martial, that the trial of servicemen in civilian courts has been fairer and has enhanced morale. Finally, Bishop’s argument that civilian judges and jurors lack the experience and knowledge to try military crimes overlooks the fact that jurors often decide cases in specialized areas of the law of which they have little personal knowledge and that European countries which have abolished courts-martial have found civilian judges competent to try military offenses.

Bishop also defends the distinctive features of the court-martial. "Since discipline," he says, "is a responsibility of the military commander, he should have some control of the machinery by which it is enforced." Thus he defends the most criticized aspect of military

ber of state courts have adopted specific time limit speedy trial rules. Note, Speedy Trial Schemes and Criminal Justice Delay, 57 CORNELL L. REV. 794, 802-12 (1972). The Second Circuit adopted rules in 1971 providing that if a defendant is detained, the government must be ready for trial within 90 days from detention, 8A MOORE'S FEDERAL PRACTICE § 48.03(1), at 48-11 n.1 (2d ed. 1974); federal district courts are now required to have a plan for prompt disposition of criminal cases, including specific time limits for trials. FED. R. CRIM. P. 50(b).

11. See INTERNATIONAL SOCIETY OF MILITARY LAW AND THE LAWS OF WAR, supra note 7, at 10, 46.


14. Bishop states that "[t]here is some evidence that in the West German army the incidence of absence without leave, desertion, and insubordination is so high as to raise serious doubt of its ability to defend the country." P. 21 (citing only an article in The Economist, Mar. 18, 1972, at 34). This does not jibe with other reports, both official and unofficial, of West German army performance. See Jerb, "Despite Gripes In and Out of Bundeswehr West German Soldiers Called Better Than Their Reputation," Louisville Courier-Journal, May 31, 1971, at B1, col. 1. There was an increase in unauthorized absences in the West German army from 2,705 in 1968 to 7,767 in 1972. FEDERAL MINISTRY OF DEFENSE, WHITE PAPER 1973/1974 ON THE SECURITY OF THE FEDERAL REPUBLIC OF GERMANY AND THE DEVELOPMENT OF THE FEDERAL ARMED FORCES 147. But this trend was reversed in 1973. Id. At the worst point in 1972, the absence rate was about 16.5 per 1,000 soldiers. In contrast, the rate in the U.S. army has been many times higher, reaching 62.6 per 1,000 in the fiscal 1971. Desertion Rate—Up, Up and Away, N.Y. TIMES, Aug. 15, 1971, § 4, at 4, col. 7; REPORT OF THE COMM. ON ARMED SERVICES BY THE SUBCOMM. ON TREATMENT OF DESERTERS FROM MILITARY SERVICE, 91st Cong., 1st Sess. 23-24 (1969).


16. See Sherman, supra note 9, at 1408.


18. Id.
justice—the power of the commander who is court-martialing one of his men to carry out what civilians would view as judicial functions. For example, the commander determines whether there is sufficient evidence to prosecute, selects court members and counsel from his subordinates, and reviews the conviction and sentence. Bishop concedes that "[t]here is no doubt that [the commander's] unique interest and powers create at least a possibility of unfairness," but in his modest recommendations for change at the end of the book, he suggests only that the commander's power to set aside a conviction or order a new trial be limited. Even members of the military have gone farther than this.

The commander's most controversial power—the selection of the court (the equivalent of a jury) by the commander from among his officers—causes Bishop little concern. He concedes that a commander has "a lot of leeway to select the sort of members most likely to do what he regards as justice—i.e., to pack the 'jury'." He also concedes that, although an enlisted defendant can request that the court be composed of one-third enlisted men, the enlisted men selected are almost always hard-boiled senior noncommissioned officers. But in what is surely one of the most dubious arguments in the book, he assures us that "the accused can eliminate such danger as really exists, or he thinks exists, that the commander will influence the result of the trial by handpicking or otherwise influencing the 'jury'" by waiving his right to trial by jury and being tried by a career officer military judge. Since military judges lack the independence of civilian judges, trial by a military judge is hardly an adequate substitute for a trial by jury of peers.

Bishop's assertion that commanders must control court-martial machinery has an anachronistic ring. Commanders may once have had to control their troops with the fear of personal retribution through court-martial, but today's military is not composed of ignorant men from the dregs of society. It is composed of relatively well-educated

19. Pp. 43-44.
20. P. 301.
21. For example, Major General Kenneth J. Hodson, former Army Judge Advocate General and Chief Judge of the Army Court of Military Review, has expressed support for removing the commander from the court-martial process except for post-trial clemency purposes, observing that "[t]he commander and his legal advisor are the 'government,' and their authority prior to and during trial should extend only to filing a 'complaint' with the court and providing a prosecutor." Hodson, Courts-Martial and the Commander, 10 SAN DIEGO L. REV. 51, 53-54 (1973).
22. P. 29.
24. P. 32.
personnel trained in highly technical jobs and enjoying more individual rights than ever before in history. Bishop’s view of servicemen as “an aggregation of men (mostly in the most criminally prone age brackets) who have strong appetites, strong passions, and ready access to deadly weapons”\(^2\) may fit into the military picture, but military leadership no longer maintains that the way to control them is with rigid discipline and the personal absolutism of the commander.\(^2\) Despite his interesting use of history in illuminating the court-martial system, Bishop makes no mention of the considerable body of post-World War II research into military motivation and deterrence.\(^2\) These studies have indicated that “buddy relations,” peer group standards, and a sense of purpose and self-esteem are more likely to produce combat proficiency and high morale than deterrence through discipline or the threat of court-martial.\(^2\)

The administration of the court-martial system by judges and counsel who are military officers has long troubled critics of military justice. Following World War II, Great Britain responded to this concern by providing civilian judges for courts-martial and civilian defense counsel through legal aid.\(^2\) Bishop is satisfied with the all-milit-
A Special Kind of Justice

tary administration of the American court-martial, recommending only that more civilians be used as defense counsel and military judges. He quite rightly observes that the independence of military judges has been strengthened by the Military Justice Act of 1968 which puts them under the Judge Advocate General rather than the commander convening authority. Military judges have also generally become more "judicial," wearing robes in some services. However, as Bishop admits, a military judge is still "an officer of the service, with a professional interest in discipline." The changes have not removed him from the ultimate command of a military officer or from the inherent career pressures towards accommodation in the officer society of a military installation. Sometimes pressure has been applied to military judges, especially lower-ranking special court-martial judges, ranging from criticism by commanders passed on to their superiors in the legal corps to sudden transfers or reassignment to nonjudicial duties.

This is the danger in having judges who are career officers and who can be reassigned to nonjudicial duties at any time.

30. P. 44.
31. Id.
32. See Testimony before Dep't of Defense Task Force on the Administration of Military Justice in the Armed Forces, May 24, 1972, that a special court-martial judge at Ft. Hood in 1971, whose commanding general complained of his dismissal of a case to the Army JAG, was later replaced by a career colonel and that a special court-martial judge in I Corps, Vietnam in 1971 was transferred because his sentences were considered to be too light. (Transcript of testimony on file with the Yale Law Journal.)
33. Bishop's defense of military defense counsel also fails to recognize the realities of pressure within the tight career structure of the military. He equates the situation of a serviceman represented by a military attorney with an indigent civilian defendant represented by a public defender, without acknowledging that a public defender is independent of the prosecutor and government while a military attorney is a subordinate officer under the commander who has ordered the court-martial and part of the command structure of the officer corps. Bishop recommends that defense counsel be put under the command of the Judge Advocate General rather than the commander, a proposal made by the 1972 Task Force which the services were ordered to implement. See Memorandum of Secretary of Defense Laird, Jan. 11, 1973, ordering that defense counsel be removed from local command and put under JAG's, 1 Mil. L. Rep. 1005 (1973); Memorandum of Army JAG, Providing Adequate Defense Services—The Defense Counsel, DAJA-MJ 1973/12018, suggesting, inter alia, separating defense counsel from other SJA offices, 1 Mil. L. Rep. 1067 (1974). Bishop's statement that "military defense counsel seem to me to raise as many defenses, and push them as hard, as lawyers in civilian trials," p. 34, is not supported by general experience. It was civilian attorneys who raised challenges to the constitutionality of provisions of the UCMJ, such as those alleging overbroad court-martial jurisdiction, see, e.g., O'Callahan v. Parker, 355 U.S. 228 (1968); Reid v. Covert, 354 U.S. 1 (1957); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955); Cole v. Laird, 468 F.2d 829 (5th Cir. 1972), and vague offenses, see, e.g., Parker v. Levy, 84 S. Ct. 2547 (1974), rev'd 478 F.2d 772 (5th Cir. 1977); Stolte v. Laird, 353 F. Supp. 1302 (D.D.C. 1972). Virtually all of the landmark cases of the Vietnam War era which struck down military justice practices, such as restrictive limitations on free speech, Allen v. Monger, Civil No. 73-745 RFP (N.D. Cal. Aug. 23, 1974); Carlson v. Schlesinger, 364 F. Supp. 626 (D.C. Cir. 1973); United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); cf. Yahr v. Resor, 431 F.2d 690 (4th Cir. 1970); United States v. Priest, 21 U.S.C.M.A. 564, 45 C.M.R. 398 (1972); United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967), invasions of personal privacy through drug abuse programs, Committee for G.I. Rights v. Callaway, 370 F. Supp. 934 (D.D.C. 1974), and denial of counsel in summary cours-
In the area of procedural due process, Bishop rightly notes that military justice compares favorably with civilian justice. The military equivalent to a grand jury, the Article 32 investigation, is far fairer, entitling the accused to be represented by an attorney, cross-examine witnesses, and present evidence. Bishop, however, does not mention that the Article 32 investigation is only required in a general court-martial, the commander having broad powers to determine whether to prosecute in special and summary courts-martial.

Bishop's discussion of military search and seizure is similarly incomplete. He observes that there are differences from civilian practices; for example, searches are authorized by the military commander. Betonie v. Sizemore, 496 F.2d 1001 (5th Cir. 1974); Henry v. Warner, 357 F. Supp. 495 (C.D. Cal. 1975), were filed and won by civilian attorneys. Although military counsel have been hesitant to challenge provisions of the UCMJ and have been timid on free speech issues, they have demonstrated commendable adversary zeal in most areas of due process, particularly concerning search and seizure and speedy trial. Command influence was rarely raised by military counsel despite widespread violations by commanders, see West, A History of Command Influence on the Military Judicial System, 18 U.C.L.A. L. Rev. 1 (1970), but in recent years it has been raised with increasing frequency. Military attorneys may not, without express permission, represent clients in federal courts, where constitutional issues must often be raised if adequate relief is to be obtained. Permission has generally been denied. See Army Reg. No. 27-40 (June 15, 1973); Attorney-Client Guidelines, Army Law., June 1973, at 15-19 (Pamp. 27-50-6). Without questioning the conscientiousness of military lawyers as defense counsel, one may still conclude that their emotional identification with the command and their concern for not making waves which will swamp their careers make them less than ideal advocates for a military defendant's cause.


35. General courts-martial account for less than 5 percent of the total courts-martial in the armed forces. See Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of Transportation Pursuant to the UCMJ 18 (1971).

Even in a general court-martial, the investigating officer's finding that there is insufficient evidence to prosecute is only a recommendation which can be ignored by the commander. In the 1969 Presidio courts-martial trials of 27 servicemen for participating in a sit-down strike to protest stockade conditions, the investigating officer was told by his superior that the commanding general felt strongly that the men should be prosecuted for mutiny and was warned "not to investigate too deeply." F. Gardner, The Unlawful Conscript: An Account of the Presidio Mutiny Case 99 (1970). He enraged the command by finding there was insufficient evidence and recommending that some of the charges be dropped. His recommendations were overruled by the commanding general and the men were tried and convicted of mutiny. The convictions were ultimately reversed by the Army Court of Military Review for lack of evidence of mutinous intent, but only after the men had spent considerable time in prison. United States v. Sood, 42 C.M.R. 635 (A.C.M.R.), petition for review denied, 20 U.S.C.M.A. 636, 42 C.M.R. 356 (1970).
A Special Kind of Justice

having jurisdiction of the premises rather than by a judge. This might seem a minor difference, except that the commander authorizing the search may be the person who suspects the serviceman of a crime and who will exercise all the powers described earlier over the serviceman's trial. In contrast, civilian practice requires a warrant to be issued by a "neutral and detached magistrate" and to be based upon a statement in writing or sworn to—a requirement not imposed on a military commander. Bishop also slides over the much criticized "administrative searches" such as inspections, inventories, and "shakedowns," some of which military courts have held are not subject to the requirements of the Fourth Amendment. Administrative inspections in civilian life, such as that of a health inspector or fire chief, are covered by the Fourth Amendment, although the standards may be less demanding than for a warrant in a criminal case. The military courts, however, permit unannounced "shakedowns" and inspections of servicemen's property not only for administrative purposes (such as ensuring that government property is accounted for or that standards of cleanliness are being followed) but also when a commander knows a crime has been committed and seeks the identity of the criminal. Evidence seized may be made the basis of a court-martial whether it relates to the purpose of the administrative search or not. There is obviously a capacity for abuse; it is difficult to prove that an inspection administered to all was really aimed at one individual or was just a "fishing expedition" by the commander.

Two features of military justice found by the 1972 Secretary of Defense's task force to be most criticized by minority group servicemen and to possess serious deficiencies—administrative discharges and non-

36. P. 37. Apparently, some Army search warrants are now issued by military judges. See Army Reg. No. 27-10, ch. 14 (Change No. 9, July 19, 1972); McNell, Jr., Recent Trends in Search and Seizure, 54 MIL. L. REV. 83, 94-95, 95 n.48 (1971).
43. The American Civil Liberties Union has urged that each serviceman be permitted a separate locker or section of it for personal use "protected by the same right of privacy that a civilian enjoys in his or her own home" and "subject to searches only under civilian Fourth Amendment standards." ACLU Board Res. No. 8, Special Comm. on Military Rights (1973). The ACLU seems to be one of Bishop's archvillains, along with the New York Times, Ramsey Clark, Justice Douglas, Jane Fonda, the Berrigans, George McGovern, Daniel Ellsberg, anti-draft lawyers, "pious liberals," and "polemists like Leonard Boudin." Pp. 9, 19, 22, 80, 140, 148, 200, 205, 250, 258, 259, 269, 272, 274, 278.
judicial punishment—are scarcely mentioned by Bishop. Some half-

million servicemen received less-than-honorable discharges during the 

Vietnam War, ranging from dishonorable and bad conduct discharges 
given by courts-martial to undesirable (and now clemency) discharges 
resulting from administrative proceedings. Bishop recommends abol-
ishing the bad conduct discharge (which he says is not appreciably less 
severe than dishonorable) and only empowering three-judge or five-
judge military courts to issue dishonorable discharges. But this 
does not reach the real problem. A high percentage of less-than-

honorable discharges result from administrative board proceedings which lack certain basic due process guarantees, and even these “bad” discharges have such an adverse impact upon employability as to constitute a continuing lifetime punishment.

44. Nonjudicial punishment administered by commanders under Article 15 of the UCMJ was found by the task force to provide “the greatest opportunity for the practice of racial discrimination.” It found that disproportionate numbers of blacks received nonjudicial punishment for major “military/civilian” and “status/confrontation” offenses and expressed concern as to “lack of uniformity among and within the Services in its use and review of its use; inappropriateness of some punishments; underutilization of alternative measures which might obviate the need for nonjudicial punishments; and the breadth of discretion.” It recommended extensive changes in nonjudicial punishment procedures, some of which have been implemented by the services. Dep’t of Defense Task Force, supra note 33, at 70. Its recommendations include greater utilization of normal aspects of command such as counselling, admonitions, and withholding of privileges rather than Article 15; standardization of nonjudicial punishment procedures among the services; the right to advice from a legally qualified military counsel before deciding whether to demand trial in lieu of nonjudicial punishment; the right to be accompanied by a representative, including a lawyer, at the hearing; opening hearings to spectators; calling witnesses when there are controverted questions of fact; not imposing both forfeiture of pay and reduction in grade as both carry a loss of income; requiring commanders imposing a reduction in grade upon a first offender to state reasons; and staying punishment pending appeal. Id.


46. The percentage of less-than-honorable discharges issued administratively, rather than through court-martial, in 1970-73, were 92.30 percent in the Army, 66.40 percent in the Navy, 80.50 percent in the Marine Corps, and 83.66 percent in the Air Force. Comment, Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates, 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 227, 276 n.211 (1974). It has not been uncommon to “board out” an individual with an undesirable discharge administratively when there was insufficient evidence to convict in a court-martial. Id. at 273-76.

47. An undesirable discharge is awarded after a hearing by a board of military officers, generally nonlawyers. A member of the service is entitled to legally trained military counsel if reasonably available. There is no presiding judge, verbatim record, or appeal to a formal tribunal (only review by the officer who convened the board). The defendant is not entitled to compulsory attendance of witnesses, and, as an administrative proceeding, the board is not bound by rules of evidence applicable in a trial. Defendants often waive their right to a board hearing; the waiver does not comply with safeguards required for a judicial plea of guilty. A general discharge can be awarded without a hearing in two services for servicemen with under eight years in the military, the serviceman only being entitled to make a statement in his own behalf. See id. at 288-99, 321-22; Fairbanks, Disciplinary Discharges—Restricting the Commander’s Discretion, 22 Hastings L.J. 291, 315-16 (1971).

A Special Kind of Justice

III

Professor Bishop completes his treatment of military justice with a separate chapter on court-martial jurisdiction. Although space is devoted to cases and issues of only historical interest, this sort of historical development finds him at his best and much more perceptive than when simply marshalling arguments to respond to the military’s critics. His criticisms of the 1969 landmark case of O’Callahan v. Parker, which struck down court-martial jurisdiction over offenses not “service-connected,” are adversary and hard-hitting, but he fairly concludes that military efficiency has not been harmed by O’Callahan.50

Bishop also includes in this chapter a discussion of the alleged vagueness and overbreadth of the “general articles.” He finds these quaint and historic offenses (“conduct unbecoming an officer and a gentleman” under Article 133, and under Article 134, “disorders and neglects to the prejudice of good order and discipline” and “conduct of a nature to bring discredit upon the armed forces”) “downright nebulous” and recommends their repeal. He notes that acts charged under Article 133 “that show unfitness for command are either chargeable as crimes [i.e., can be prosecuted under narrowly drawn offenses in the UCMJ], punishable by punitive discharge, or grounds for administrative elimination from the service” and that Article 134 conduct “should be replaced by articles specifically proscribing the offenses.” But he also comments that “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.”51 These comments found their way shortly after publication into Justice Blackmun’s concurring opinion in Parker v. Levy, the case which upheld the constitutionality of the general articles.52 Blackmun used this quote from Bishop to lead into an argument that “[t]he subtle airs that govern the command relationship are not always capable of...


50. It is hard to argue that much harm is done to military efficiency by removing from military control the sort of soldier who typically gets in trouble with the civilian authorities. If he is innocent, he is returned to the service; if he is guilty, the Army can probably get along without him.
P. 100.


52. 94 S. Ct. 2547, 2565 (1974).
of specification” and that the general articles are essential “to foster an orderly and dutiful fighting force.”53 This, of course, is inconsistent with Bishop’s judgment that the general articles are unnecessary because the conduct sought to be regulated by them can be specifically defined or made the ground for elimination from the service rather than criminal prosecution, but Blackmun was apparently interested in the assurance that the general articles provide military men adequate notice of what is criminal.

Bishop does not suggest how ordinary soldiers today “know, or should know” what acts are punishable under the general articles when, as the Third Circuit observed in Levy, they employ vague terms like “gentleman” which has no technical meaning and is “replete with its capacity for subjective interpretation.”54 Justice Stewart noted that Article 133 has recently been used to punish such disparate conduct as dishonorable failure to repay debts and having an extramarital affair, and Article 134 for windowpeeping in a trailer park, cheating at bingo, and having sexual relations with a chicken. The issue, as Stewart wrote in dissent in Levy, “is not whether the military may adopt substantive rules different from those that govern civilian society, but whether the serviceman has the same right as his civilian counterpart to be informed as to precisely what conduct those rules proscribe before he can be criminally punished for violating them.”55

Bishop provides an excellent historical discussion of the gradual expansion of federal court review of military determinations and enforcement of servicemen’s constitutional rights. His analysis of the 1953 landmark decision of Burns v. Wilson56 nicely relates the confusion resulting from the four different opinions, none commanding a majority. The case establishes at least that federal courts, on habeas corpus, will consider deprivations of constitutional rights in a court-martial which the military manifestly refused to consider. Noting that only a few lower federal courts have been willing to expand collateral review of courts-martial to the same extent as that of civilian criminal proceedings, he observes that the Supreme Court sooner or later will have to decide “whether there is any good reason why mili-

53. Id.
55. 94 S. Ct. at 2572-73. The Court held that because the military regulates conduct permissible in the civilian sphere the standard for review of a military offense is not that applicable to normal criminal offenses, but to criminal statutes regulating economic affairs, in which the same high standard of definiteness is not required.
56. 346 U.S. 137 (1953).
A Special Kind of Justice

tary tribunals should not be subject to the same quality of constitutional policing as state criminal courts. He seems to lean towards an affirmative answer, but with his ubiquitous qualification that “[t]he process that is due a soldier is not necessarily the same as that due a civilian.”

Bishop has a rather long list of constitutional rights which he finds “expressly or by necessary implication inapplicable” to the military. Bail, he says, has never been known in military law although the UCMJ and Manual for Courts-Martial “provide criteria for the accused’s rights to freedom pending trial and appeal, which to me make more sense than conditioning his freedom on his ability to raise high bail.” Resort by civilian courts in recent years to release on personal recognizance based on a finding that the individual is not likely to flee is certainly preferable to money bail. The difficulty with the military practice, however, which Bishop fails to mention, is that the commander determines whether a serviceman will be granted release pending trial or appeal and has broad discretion to impose confinement if “deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense” charged.

The overuse of pretrial confinement by commanders was one of the great scandals in military justice during the Vietnam War. Military courts have rarely been willing to overrule commanders’ decisions not to grant release. Similarly, the usual military practice is that a convicted serviceman begins serving his sentence immediately, and a 1968 amendment to the UCMJ giving commanders the power to defer serving of sentence pending appeal has also been interpreted as establishing broad discretion. As a result, a serviceman may serve all or part of his sentence before the appeals are completed, making reversal a hollow victory. A proposal to have military judges make the decision as to release pending trial and appeal has not been widely adopted.

57. P. 133.
58. Id.
59. P. 139.
60. P. 140.
61. MCM 1969, § 20c, at 5-3.
63. For example, a private charged in a special court-martial with making disloyal statements was unsuccessful in seeking to overturn his pretrial confinement although, as he argued to COMA, Lt. William Calley, charged with 102 murders in a general court-martial, was released pending trial. Horner v. Resor, 19 U.S.C.M.A. 285, 41 C.M.R. 285 (1970).
Rights of privacy and individuality have little place in Professor Bishop's conception of the military, nor does he have much trouble justifying most of the military's restrictions upon servicemen's free speech rights. The Supreme Court requires, at least for civilians, a clear and present danger of unlawful action rising to the level of incitement before speech can be suppressed. Bishop suggests that all that should be required in the military is "some substantial basis for the military commander's conclusion that the expression of opinion presented, in the particular circumstances, a clear and present danger to military discipline and efficiency." He does question the constitutionality of Article 88 forbidding officers from uttering "contemptuous words" against the President and other officials, at least as applied in the 1965 court-martial of Lt. Howe for carrying an anti-Johnson poster in an off-post peace rally. However, he finds that the 1967 court-martial of two black Marines for making antiwar statements in a bull session was a case in which the military courts could reasonably conclude that "the tinder was so dry that the defendants' sparks could really have started a fire."

All critical words, of course, are "sparks" which could conceivably result in members of the service disobeying orders, becoming disaffected, or slackening their discipline and efficiency. But service personnel are citizens and voters, and insulating them from the discussion of controversial public issues could result in a military cutoff from societal concerns and values, itself a threat to a democracy. And the view that the military can punish all statements deemed adversely to affect motivation and morale, as the D.C. district court observed in

65. Bishop notes that "[t]he Civil War was fought by generals so luxuriantly be-whiskered as to be practically lurking in ambush, many of them both brave and competent," pp. 144-45, but nevertheless raises no objection to contemporary regulations limiting the length and style of servicemen's hair. He sarcastically refers to recent suits challenging the military's right to forbid long-haired reservists to wear short-hair wigs at drills as raising a "momentous question." See p. 170 n.103. In fact, it is a matter of considerable import to the million reservists and national guardsmen whose appearance in civilian life is affected by the military's requirement that they wear their hair in a style incompatible with contemporary standards. Finding no military necessity for a ban on wigs at drills and no justification for permitting men to wear wigs to cover baldness but not to cover long hair, a number of courts have found these regulations unconstitutional. See Hough v. Seaman, 493 F.2d 298 (4th Cir. 1974); Friedman v. Frochike, 470 F.2d 1351 (1st Cir. 1972); Etheridge v. Schlesinger, 362 F. Supp. 198 (E.D. Va. 1973). But see Agrati v. Laird, 440 F.2d 683 (9th Cir. 1971).

A Special Kind of Justice

1972 in reversing a court-martial conviction for disloyal statements, "would render meaningless even that limited freedom of speech recognized by the military as a soldier's constitutional right."70 The test applied by the D.C. court, that "there must be truly direct and palpable prejudice to good military discipline,"71 provides a considerably tighter standard than Bishop's reliance upon a "commander's conclusion" that there is a "clear and present danger to military discipline and efficiency."

The military courts, in applying the clear and present danger test, have virtually excluded any requirement of proof by the military of an immediate likelihood that adverse conduct will result from the speech. Thus, the Court of Military Appeals (COMA) found a clear and present danger in Lt. Howe's participation in a small, off-post peace rally not observed by any servicemen except MP's72 and in some high-blown revolutionary language in an underground newspaper by Seaman Priest.73 Bishop asserts that "it is hard to see how any rational person could believe in revolution after reading Priest's effusions,"74 but is satisfied with COMA's finding that statements like "Today's Pigs Are Tomorrow's Bacon" and "Smash the State" constituted a clear and present danger to military order and discipline even though there was no evidence of disorder resulting from them. The long road back from the Dennis75 emasculation of the clear and present danger test in 1950 through the Yates76 and Brandenburg77 insistence that speech go beyond teaching and advocacy to incitement of imminent unlawful action has not been traversed by the military cases. Those cases, Professor Bishop's justifications notwithstanding, leave servicemen's First Amendment rights largely dependent upon the indulgence of the military.

IV

The chapters on the war power and martial law contain some insightful historical discussion, but there is a distinctly 1950's flavor to the analysis of current issues as Bishop defends the concept of a strong executive and powerful military against contemporary critics.

71. 353 F. Supp. at 1406.
74. P. 155.
He admiringly says that “‘[s]trong’ Presidents have moved far and fast without waiting for Congress,” and asks rhetorically whether Senator J. W. Fulbright and other such critics had considered “whether the national interest would have been better served if Congress could have kept Lincoln and Roosevelt on a shorter leash.” “The power to wage war,” he quotes Chief Justice Hughes, “is the power to wage war successfully,” and he finds little to criticize in the way Presidents Johnson and Nixon went about it in Vietnam.

Professor Bishop, as might be expected, is not a judicial activist, and his reading of the great cases in which the Supreme Court has dealt with the war power suggests a cautious and pragmatic approach. “The plain fact,” he says, “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.” Thus, he sees the difference between Milligan, holding that a civilian southern sympathizer in Indiana was improperly tried by a military commission, and Quirin, holding that German saboteurs could be tried by a military commission for violations of the laws of war, as being 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.” He also finds the 1967 Robel decision, holding unconstitutional the Subversive Activities Control Act making it criminal for Communists to work in a defense facility, distinguishable from the Japanese exclusion cases “only on the pragmatic ground that a great war was in progress in 1943, while there was no comparable crisis in 1967.”

There is a good deal of wisdom in Bishop’s skeptical view of the Supreme Court’s motivations in the war power cases, but it can lead to a judicial relativism which ignores the constitutional delegation of powers and guarantees of individual rights. For example, he argues that if Japanese-Americans had posed the same threat as did the Nazified “Sudetendeutsch” in Czechoslovakia, the action could not

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78. P. 182.
79. P. 183.
80. P. 175.
81. Ex parte Vallandingham, 68 U.S. (1 Wall.) 243 (1864); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866); Ex parte Quirin, 317 U.S. 1 (1942); the Japanese exclusion cases (Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
82. P. 188.
83. P. 196.
85. P. 200.
have been found to lack justification.\footnote{86} Similarly, he says that if a newspaper proposed to publish information which really might endanger national security, the Pentagon Papers case would have been decided differently.\footnote{87} He also questions the constitutionality of the 1973 War Powers Resolution\footnote{88} and doubts its practical effect on the grounds that “it will be very difficult for Congress to deny support to the President when the troops are actually fighting.”\footnote{89}

Bishop’s discussion of the power to conscript is heavily colored by his own predispositions. He dismisses the sophisticated (though unsuccessful) constitutional arguments that challenged the constitutionality of a peacetime draft in the Vietnam War\footnote{90} as simply an example that opponents of the draft “never give up.”\footnote{91} His arguments against the modest expansion of the conscientious objector category by the Supreme Court in the 1960’s are all but lost in derisive rhetoric. Seeger\footnote{92} held that a nonreligious person can be entitled to conscientious objector status based on “belief in a relation to a Supreme Being” if his beliefs occupy a parallel place in his life to that filled by orthodox belief in God;\footnote{93} Bishop dismisses the holding as a “statutory construction of unique implausibility.”\footnote{94} His arguments are not persuasive, and given the sizable number of nonreligious Americans and the First Amendment ban on establishment of religion, it does not seem likely that Seeger (and the more explicit Welsh decision)\footnote{95} will be overturned in the future.

Bishop’s chapter on domestic use of the military provides an interesting and useful historical development of martial law but omits discussion of the most serious contemporary abuse of military power in the civilian sphere—surveillance and intelligence gathering in the civilian community.\footnote{96} There is little to suggest that, apart from some misuse of military force in industrial disputes in the late 19th and early

\footnotesize{86. P. 199.}  
\footnotesize{87. Pp. 200-01.}  
\footnotesize{89. P. 181.}  
\footnotesize{90. See Amicus Curiae Brief on Behalf of the Constitutional Lawyers’ Committee on Undeclared War, Massachusetts v. Laird, 400 U.S. 886 (1970); A. D’Amato & R. O’Neil, The Judiciary and Vietnam (1972); cf. L. Friedman & B. Neuborne, Unquestioning Obedience to the President: The ACLU Case Against the Legality of the War in Vietnam (1972).}  
\footnotesize{91. P. 205.}  
\footnotesize{92. United States v. Seeger, 380 U.S. 163 (1965).}  
\footnotesize{93. Bishop refers to Seeger’s expression of a belief in “goodness and virtue” and “a cosmic order” as “mooncalf metaphysics,” p. 209, to Justice Douglas’s discussion of differing cultural approaches to God as “transcendental silliness,” p. 210, and to another CO litigant as “a sappy young man,” p. 211.}  
\footnotesize{94. P. 208.}  
\footnotesize{95. Welsh v. United States, 398 U.S. 333 (1970).}  
\footnotesize{96. See Laird v. Tatum, 408 U.S. 1 (1972).}
20th centuries, the role of the military in domestic affairs poses any threat in our society. Professor Bishop assures us that “[t]he military 'governs' the United States no more than does any other powerful bureaucratic or private lobby,” ignoring the fact that the military commands a large share of the national budget and has members serving in key positions in the White House and other government agencies.

As with his discussion of the war power, Professor Bishop is often willing to find that constitutional limitations on the use of military power are not applicable in crisis situations. The Milligan rule that civilians cannot be tried in military courts, even in an area under martial law if the civilian courts are functioning, is one of the bedrocks of our civil-military constitutional construct. But Bishop suggests that military trials could be substituted for civilian in cases of serious civil disorder in which local jurors might be biased towards one side. He proposes that the use of the military to arrest and confine, without charges, is an appropriate way to deal with domestic violence, suggesting that the Supreme Court would have upheld use of the armed forces in the 1971 Washington demonstrations if they had “simply arrested and detained for the duration of the emergency” the demonstrators who were trying to block traffic and disrupt normal conditions. This is not all; “had the occasion arisen,” he argues, the Emergency Detention Act of 1950 (finally repealed by Congress in 1971 on the initiative of Japanese-Americans after considerable testimony that it was unconstitutional) could have been constitutionally used in war, invasion, or insurrection for the arrest and detention of persons who there was reasonable ground to believe would probably engage in espionage or sabotage. One must have a strong and abiding faith in the good will of the executive and the military to be able to conclude so easily that we should dispense with constitutional processes.

V

A recurrent theme in Bishop’s final chapter on the international law of war is that “[l]aw and morality are not, and (in the present imperfect state of man) cannot be, coextensive.” He attacks critics

97. P. 226.
98. Pp. 248-49. Bishop’s reference to the practice in Ulster is unfortunate, as the use there of internment without trial has not only resulted in egregious violations of individual rights but seems to have exacerbated the conflict by creating causes célèbres out of violations of normal due process. See C. O’Brien, States of Ireland (1973); London Sunday Times Insight Team, Northern Ireland: A Report on the Conflict (1972).
100. Id.
of American tactics in the Vietnam War for improperly equating international law and morality and for condemning as illegal American actions which offend their own views of morality. The antiviar movement did give rise to loose charges of international illegality. However, international law and particularly the law of war is grounded not only upon consent but upon morality. Bishop's rigidly positivistic view is not entirely consistent with widely shared contemporary notions that states can become bound, without actual agreement or consent, by commonly held standards concerning the conduct of war. Thus, Richard Falk is quite right in arguing that "the sense of moral outrage widely shared by people and government is itself relevant to the identification of rules of international law. Such shared attitudes identify the limits of acceptable behavior and possess or come to possess the quality of law."102 The Nuremberg Judgment clearly established that neither a state nor a group of states is free to withdraw from treaty obligations nor to disclaim customary standards of warfare.

Bishop addresses most of the principal criticisms of American tactics in Vietnam, responding to critics such as Falk and Telford Taylor. He says that he disagrees with Taylor that "massive firepower, which necessarily inflicts great suffering on noncombatants, should not be used to resist guerillas."103 Actually, Taylor condemned "free fire" and "free strike" zones outright but questioned the use of massive firepower in situations in which there was intermingling of enemy and civilians unless steps were taken to minimize civilian casualties.104 Bishop argues that this reasoning logically leads to a conclusion that no resistance can be made to a terrorist group if it is ruthless enough to create conditions in which the innocent are endangered.105 But this argument misses the point. The ban on use of massive firepower in such situations is conditional, not absolute. It requires that the technologically superior force attempt to find alternative methods for achieving the military purpose which would not endanger civilians and that steps be taken to minimize civilian casualties through such devices as control of firepower, exact targeting, and warnings. American practice in Vietnam, as Taylor described, often fell short of those standards.

Bishop defends the area bombing of cities like Hamburg and Frankfurt in World War II as necessary because "the RAF had no other way to knock out . . . legitimate targets,"106 and concludes that Amer-

103. P. 260.
105. P. 260.
106. P. 267.
ican bombing in Vietnam, since it "undoubtedly had the military purpose of destroying enemy troops and supplies and interfering with their movement,"\textsuperscript{107} was legal. "[W]hether those goals could have been achieved by less and more discriminating force," he says, is "a military question which I am no more competent to decide than is Professor Falk or Mr. [Ramsey] Clark."\textsuperscript{108} The issue, however, is "proportionality," the international law doctrine that requires that the injury to noncombatants and their property by use of a particular means of warfare must not be disproportional to the military advantage to be gained. This determination is no more a solely military question than is unconstitutional resort to war by the executive. Civilians like Clark performed a useful service in bringing to public attention bombing having immensely serious consequences for the civilian population with little known military justification. It now appears that there was often insufficient consideration of proportionality by American bombing strategists in Vietnam and that the excuse that civilian casualties were an unavoidable "incidental" effect often masked a failure to search for alternatives to minimize the effect on civilians.

Bishop's defense of American use of chemical and biological weapons is virtually the official military justification, as are his discussion of forced relocation of civilians, treatment of civilians, and prisoners of war. He quite correctly criticizes the "preposterous" position of North Vietnam that American airmen were not entitled to POW treatment.\textsuperscript{109} But his concession that the South Vietnamese "were guilty of some mistreatment of POW's"\textsuperscript{110} is a classic understatement. He also concedes that "the fighting in Vietnam was unusually dirty, and the record of the American forces seems to me much worse than it was in World War II or the Korean War."\textsuperscript{111} He asserts, however, that the American record for compliance with the laws of war is better than that of any other nation in the world,\textsuperscript{112} an amazing claim given the amount of documented evidence of violations by American forces in Vietnam. "The United States was also guilty of some mistreatment of prisoners of war and of some degree of complicity in their mistreatment by the South Vietnamese," he says, but maintains that such guilt was not widespread and, besides, "the record of North Vietnam and the Viet Cong is much worse."\textsuperscript{113}

\textsuperscript{107} P. 268.
\textsuperscript{108} Id.
\textsuperscript{109} P. 272.
\textsuperscript{110} P. 273.
\textsuperscript{111} P. 286.
\textsuperscript{112} P. 292.
\textsuperscript{113} Pp. 286-87.
A Special Kind of Justice

Despite considerable skepticism as to the effectiveness of the laws of war, Bishop has no proposals for changes. He attacks the tendency of writers like Falk and Noam Chomsky to question rules which virtually foreclose successful guerilla warfare, but he does not consider proposals in the current rewriting of the Geneva Convention. These proposed changes extend the applicability of the conventions to certain wars of national liberation, attempting thereby to exact minimal compliance by organized guerillas in return for the privilege of POW status. Regarding prosecution for war crimes, Bishop accepts continued trial in the courts of the accused's own country. The My Lai experience, however, would seem to indicate that domestic military tribunals are inadequate for enforcement of the laws of war. Indeed, it would seem that, after My Lai, renewed efforts for an international criminal tribunal are very much in order.

115. Only Lt. Calley was successfully prosecuted, and even he has been released on a writ of habeas corpus because of infirmities in the court-martial process. Calley v. Calloway, 43 U.S.L.W. 2158 (M.D. Ga., Sept. 25, 1974). Lt. Calley has been released on bail by order of the Fifth Circuit Court of Appeals, and the Secretary of the Army has granted him parole. N.Y. Times, Nov. 9, 1974, at 1, col. 4.