BOOK REVIEW

JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW.

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Although the United States generally is considered a violent nation, at no time in its history has America turned from its civilian government to seek salvation from the leader of a military force. There has never been a serious attempt by the American military to seize control of the government by force. Doubtless there are complex historical reasons for this good fortune, but one of the best is the Constitution's requirement of civilian control of the military.¹

On a different level, a major reason for the absence of political power in the military is the traditional ambivalence of Americans toward military service. On the one hand, few Americans relish the prospect of taking orders, obeying petty disciplinary rules, paying elaborate courtesies to strangers distinguished only by seniority in rank, and being subjected to risks they might consider unnecessary. This is consistent with the strong American tradition of individual freedom of choice in which the military symbolizes, perhaps more clearly than any other institution except prisons, the loss of personal liberty to the control of the state. On the other hand, Americans in uniform traditionally have served well in times of war and national emergency. This is consistent with what I believe to be the fundamental recognition of most Americans that the raison d'etre of the military is to defend freedom and democracy in a world where those institutions are the exception rather than the rule.

The public's view of the military is affected by innumerable interdependent factors. Instances of monumental waste, bungling, arrogance, and corruption are hardly unknown.² In-

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¹ U.S. CONST. art. I, § 8; art. II, § 2.
² Consider, for example, the case of U.S. Air Force General John D. Lavelle, the commander of Air Force units in southeast Asia who was relieved of command for ordering unauthorized bombing attacks on North Vietnam in violation of orders from the President. He was subsequently retired at the reduced rank of lieutenant general; however, he managed to qualify for a seventy percent physical disability rating and thereby avoided the effect of the punishment. See N.Y. Times, June 2, 1972, at 1, col. 2.
stances of courage, selflessness, and devotion to duty, however, clearly are admired by the majority of Americans.\(^3\) The importance of each such instance to the overall public standing of the military depends in large measure on the amount and tone of coverage given to it in the media. From this emerges a single truth: The public image of the American military fluctuates dramatically but rarely reaches total approval or total condemnation. One aspect of the military establishment, however, consistently is distorted in the public perception: law and justice in the American military. This subject is known to the public almost exclusively through courts-martial that receive heavy coverage in the media,\(^4\) and the resulting image tends not to reflect the realities of this "special kind of justice."\(^5\)

Responding to "popular polemics"\(^6\) on military law which he considers "worthless"\(^7\) and "baloney,"\(^8\) Professor Joseph W. Bishop, Jr. has written *Justice Under Fire: A Study of Military Law* to correct the distorted image of military justice held by most of the public. Professor Bishop's objective is to describe and discuss [military law's] constitutional basis, its procedures and peculiarities, its jurisdiction, and its relation to the rest of our policy with as much objectivity and fairness as [he] can muster and to suggest some ways in which it could further approximate civilian norms without compromising military efficiency.\(^9\)

Although many will question Professor Bishop's "objectivity and fairness," and most will note that he expends far more effort on the former than the latter objective, *Justice Under Fire* offers a strong argument in favor of maintaining a separate and distinct body of "Rules for the Government and Regulation of the land and naval Forces."\(^10\)

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\(^{3}\) Consider, for example, the respect and admiration demonstrated by Americans for American prisoners of war who were released by the North Vietnamese in 1973. See, e.g., N.Y. Times, Apr. 7, 1973, at 23, col. 4.

\(^{4}\) E.g., N.Y. Times, Jan. 6, 1973, at 23, col. 1 (the Kitty Hawk incident).

\(^{5}\) Sherman, Book Review, 84 Yale L.J. 373 (1974). Professor Sherman, one of the leading scholars in the field of military law, has written a thorough and fair-minded review of *Justice Under Fire*, which has obviated the need for a detailed analysis of the book. I commend his review to anyone interested in this field of law. Professor Sherman's review, like Professor Bishop's book, nevertheless, tends to overlook the practical realities of military justice.


\(^{7}\) Id. xiii.

\(^{8}\) Id. xiv.

\(^{9}\) Id. xv.

\(^{10}\) U.S. Const. art. I, § 8.
The book is divided into eight chapters which address the historical background of American military law, the structure of the court-martial system, the jurisdiction of courts-martial, the individual rights of members of the armed forces, the war power, martial law, and the international law of war. The concluding chapter all too briefly offers several intelligent recommendations for continued reform of the military justice system. Unfortunately, the book does not achieve great depth in any of the topics it considers, and, contrary to the opinion of another reviewer, it is not a "classic of intelligent scholarship." On the contrary, the book is based on a conception of the military justice system that is out of date and out of touch with reality.

*Justice Under Fire* arrives at a moment when there may be a climate of sufficient sanity "to take a long and unemotional look at the military law of the United States and to consider what changes might really improve it." The period immediately following a war almost inevitably is conducive to a higher degree of self-evaluation than is possible when men are dying on foreign battlefields or when the memory of military excesses is no longer fresh in the public mind.

The aim of this Review is not only to evaluate Professor Bishop's book, but also to provide a commentary on the realities of representing military clients and to suggest additional areas for analysis and change. The focus of this Review will be on the second, third, fourth, and concluding chapters of the book. The other chapters, which constitute almost half the book, doubtless will be of great interest to the historian and political scientist, but they have little relevance to the practice of military law.

Although it is not the common practice, it might be useful to reveal several of my own biases before analyzing those of Professor Bishop. First, I believe that criminal justice in the American military is for the most part fundamentally fair, at least in the

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12 Bishop, supra note 6, at 299.
13 This Review is intended to supplement that published recently by Professor Sherman, see note 5 supra, by providing first-hand evidence based on personal experience with the workings and problems of military justice. As such, this Review contains many statements of fact and opinion based solely on my recollections.

I recently completed a tour of duty as a lieutenant in the Judge Advocate General's Corps of the U.S. Navy. Over three years of this tour were served at the Naval Legal Service Office (formerly Law Center), Naval Base, Philadelphia, Pennsylvania. While there, I served successively as a defense counsel, trial counsel (prosecutor), and military judge and participated in over 700 courts-martial, 500 of those as a military judge. As will rapidly become evident, the views stated in this Book Review are personal and should not be construed as necessarily reflecting the policies or opinions of any department, branch or official of the United States Government.
conduct of special and general courts-martial. This view is the product of three years' experience as a Navy lawyer during which I served as defense counsel, prosecutor, and special court-martial military judge, at a command handling in excess of five hundred special and general courts-martial per year. The young lawyers who administer the military justice system generally exhibit a high degree of integrity, often to the detriment of their personal interest as military officers. The initial inexperience of these young attorneys rapidly is remedied by the assignment of a heavy caseload within days of reporting for duty after their training in military justice. Almost none of the young lawyers I have encountered has the slightest interest in a military career, and they tend not to care to any great extent about the fitness reports made about them by their superiors. This is not to say that they are irresponsible idealists who try causes rather than cases; rather, they perform their function honestly in an institutional setting not conducive to the adversary process, where they find their efforts often viewed with disrespect if not outright disdain.

The second reason that leads me to believe American military justice is fair is that the "jurors" (officers and enlisted personnel)...

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The summary court-martial has become somewhat more fair with the requirement that the accused must be represented by counsel or confinement cannot be imposed. See United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973). See also Betonie v. Sizemore, 496 F.2d 1001 (5th Cir. 1974).

Something that is usually overlooked in commentary on nonjudicial punishment and summary courts-martial is that they are among the best tools available to the defense counsel in bargaining with a convening authority who has referred a case to trial by special or general court-martial. It is quite common for a defense counsel to try to persuade a convening authority to withdraw a case and handle it through nonjudicial punishment or a summary court-martial (preferably the latter, because it does not constitute a "federal conviction" as does a court-martial). See United States v. Montgomery, 20 U.S.C.M.A. 35, 42 C.M.R. 227 (1970). I have seen many serious cases reduced to nonjudicial punishment because a defense counsel persuaded a convening authority that the accused deserved leniency or that the defense would deplete the convening authority's budget by bringing witnesses to trial from distant locations. The convening authority was offered the attractive alternative of saving time and expense without letting the accused escape punishment. I believe that few defense counsel would vote for the abolition of nonjudicial punishment or summary courts-martial.
sonnel) are honest, even though they are hand-picked by the commander who convenes a court-martial.\(^\text{15}\) They decide cases on the basis of evidence presented in open court rather than what they know to be the general desires of the commander. As a rule, "jury duty" in the military is considered a waste of time and not useful in furthering one's interests or career. Obtaining members for a court-martial board is one of the least rewarding tasks in the military, because almost every potential member has several excuses why his time can be used more profitably doing something else. The panel usually is drawn from the ranks of junior officers and senior enlisted personnel, and as far as I have been able to tell, there is an affirmative desire among military commanders to include members of minority groups, including females, on these boards. It may be that the convening authorities consider the time of those appointed less valuable than that of those not chosen. Nonetheless, I have found military juries generally to be well-educated, honest, attentive to the evidence, obedient to the instructions of the military judge, more likely to acquit than to convict, and more lenient in sentencing than most military judges. Thus, the military defendant's loss of a right to trial by a civilian jury is not a significant loss.

Finally, I think military justice fair because of the procedural safeguards of the Uniform Code of Military Justice\(^\text{16}\) (UCMJ) and the enforcement of those safeguards by those reviewing courts-martial in the military's appellate system.\(^\text{17}\) It is undeniable that the accused in the military has more procedural protection of his constitutional rights than his civilian counterpart.\(^\text{18}\) The absence of the fifth amendment right to indictment by a grand jury is the most prominent omission in military law,\(^\text{19}\) but the presence of article 32 of the UCMJ,\(^\text{20}\)

\(^\text{19}\) The fifth amendment specifically exempts from its requirements "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." U.S. Const. amend. V. As Professor Bishop states, "The grand jury is, of course, unknown to military law." Bishop, supra note 6, at 35; see Ex parte Quirin, 317 U.S. 1, 40 (1942).
\(^\text{20}\) Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1970). Article 32(b) sets forth the basic rights of an accused in a pretrial hearing as follows:

The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At
unquestionably the best pretrial discovery device for the defense 
known to American criminal law, makes this omission more a 
benefit than a burden. Professor Bishop correctly says that "in 
most matters of procedure and evidence the rights of the soldier 
defendant, if they differ from the civilian's, are likely to differ 
for the better." The military system of appellate review, at least 
in matters of form and questions of admissibility of evidence, is 
rigorous. As a military judge, I decided close questions of evi-
dence in favor of the defense on many occasions, because I 
firmly believed that ruling for the government might lead to an 
unnecessary reversal of an otherwise fair trial.

that investigation full opportunity shall be given to the accused to cross-examine 
witnesses against him if they are available and to present anything he may desire 
in his own behalf, either in defense or mitigation, and the investigating officer 
shall examine available witnesses requested by the accused. If the charges are 
forwarded after the investigation, they shall be accompanied by a statement of 
the substance of the testimony taken on both sides and a copy thereof shall be 
given to the accused.

These protections are superior to those available to an accused facing a grand jury. 
On the other hand, an article 32 investigation is required only as a predicated to a 
general court-martial and does not apply to cases referred to trial by special court-
martial. In such cases, a "preliminary inquiry" usually is made, but this is merely an 
informal inquiry to determine the sufficiency of the evidence. See MCM, supra note 14, 
¶ 32-33.

The article 32 investigating officer "should be a mature officer, preferably an officer 
of the grade of major or lieutenant commander or higher, or one with legal training and 
experience." MCM, supra note 14, ¶ 34. As a general rule investigating officers are line 
officers without legal training. In such cases the Government counsel tends to have a very 
free rein to present whatever evidence he can find that points to the guilt of the accused. 
If the investigating officer is particularly taciturn, he may permit the Government counsel 
to threaten, cajole, or even intimidate witnesses. He is invariably advised prior to the 
hearing that he can prevent any possibility of having the case returned simply by stating, 
"Your objection is noted," whenever either counsel makes an objection.

At least in the Navy, it is not uncommon for the article 32 investigating officer to be 
a lawyer, often one serving as a special court-martial military judge. In these cases the 
hearing tends to be much more a quasi-judicial proceeding in which incompetent evi-
dence is rejected and proper decorum is maintained. Having sat as an article 32 inves-
tigating officer in over twenty-five serious cases, I feel confident in recommending that, 
baring exigent circumstances, the investigating officer in all cases should be an attorney.

21 There is sound reason to believe that the fifth amendment guarantee of the right 
to indictment by grand jury is of little value to an accused. See Note, American Grand Jury: 
commented: "The grand jury, once viewed as a valuable constitutional right and de-
defender of personal liberty, has come to be an agency of the government prosecutor and a 
potential threat to civil liberties. Its accusatory role greatly overshadows its protective 

22 Bishop, supra note 6, at 38; see Moyer, supra note 18.

23 Perhaps because of the technical statutory nature of military law and perhaps 
because most reviewing authorities in the military justice system tend to be bureaucrats, 
there is an almost overwhelming emphasis on matters of form in the hundreds of deci-
sions by the Courts of Military Review and the Court of Military Appeals that I have had 
ocasion to read.
The second bias I shall mention is my belief that justice in the American military is fairer than civilian justice, again with the proviso that I refer only to special and general courts-martial. First, as mentioned above, the military defendant has extensive rights to pretrial discovery such that he almost always has notice of the Government's entire case against him. Second, in the military, unlike the civilian world, the right of the accused to a speedy trial is not a hollow promise. Partly in response to the absence of bail in the military, the Court of Military Appeals (COMA) has decreed that all charges and specifications against an accused must be dismissed unless his trial has begun within ninety days of the commencement of pretrial confinement, absent extraordinary circumstances or proven defense delay. Moreover, again on pain of dismissal, COMA has decreed that the record must be typed, certified by the military judge, and reviewed by the convening authority within ninety days of completion of the trial if the accused has been in post-trial confinement for ninety days.

The military defendant not only is tried more promptly than his civilian counterpart, but he is likely to be better represented. Although the Code permits the use of non-lawyer defense counsel in special courts-martial when a lawyer cannot be obtained "on account of physical conditions or military exigencies," the prosecutor in such cases also must be a

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24 See note 14 supra.
25 See text accompanying notes 19-21 supra.
27 Article 13 of the UCMJ provides that the conditions of pretrial restraint cannot be "more rigorous than the circumstances require to insure [the accused's] presence." Uniform Code of Military Justice art. 13, 10 U.S.C. § 813 (1970). The Court of Appeals for the Eighth Circuit recently ruled that the UCMJ test is sound, but that the procedures for obtaining release from pretrial confinement are unconstitutional as a denial of due process. DeChamplain v. Lovelace, 43 U.S.L.W. 2349 (8th Cir. Feb. 25, 1975). The accused, an Air Force master sergeant, was held in pretrial confinement on espionage charges for almost four years. The court found that the military's procedure for release from pretrial confinement denied the accused due process for three reasons. First, the decision whether pretrial confinement was necessary was made not by a neutral officer or judge but by the convening authority who instituted the investigation and urged the prosecution of the accused. Second, the accused was not permitted to appear before a neutral officer or judge before being ordered into confinement, or within a reasonable time thereafter, so that he might present evidence relevant to the necessity for pretrial confinement. Third, the system required the accused to show why he should not be confined rather than requiring that the government bear the burden of proving that pretrial confinement was necessary. Id.
non-lawyer. In fact, I neither saw nor heard of an accused being represented by non-lawyer counsel in a special court-martial during my years in uniform, although I saw many instances of non-lawyers struggling as prosecutors in minor cases when lawyer-prosecutors were unavailable.

The lawyer who defends the accused usually is not from the latter's command and has little or no interest in the goodwill of the convening authority. Unlike most civilian public defenders, he will have sufficient time to prepare his case, and he will not see the accused for the first time on the morning of trial. An unprepared defense counsel is not unknown in the military, but I know of no denial of a continuance when a defense counsel requested additional time for preparation. In lieu of or in addition to his detailed military lawyer, the accused can be defended by either civilian counsel at his own expense or by any other military lawyer at government expense if the requested lawyer is "reasonably available." Finally, military justice is better than civilian justice because the military confinement facilities and programs for pretrial and post-trial restraint are superior. Persons awaiting trial must be segregated from those who have been convicted of crimes. "If

20 Id.
21 See Uniform Code of Military Justice art. 40, 10 U.S.C. § 840 (1970); MCM, supra note 14, ¶ 58. Whether a continuance should be granted is an interlocutory question on which the ruling of the military judge is final and not subject to review by the convening authority. See United States v. Kinard, 21 U.S.C.M.A. 300, 305-07, 45 C.M.R. 74, 79-81 (1972).

Depending on the circumstances, the right to individual military counsel can be a potent weapon for the defense. Because the expense of bringing individual military counsel to trial is borne by the government, the defense can "raise the ante" substantially by making such a request. But there is broad latitude for corruption in this area, because the decision whether a requested military lawyer is available is made by that lawyer's commanding officer, subject to review by the next higher authority. MCM, supra note 14, ¶ 48(b). There tends to be a form of reciprocity in these cases whereby senior lawyers assure that a requested individual military counsel is too busy to be relieved of his present duties for even a brief period of time. See United States v. Barton, 48 C.M.R. 358 (N.C.M.R. 1973).

24 See Uniform Code of Military Justice art. 13, 10 U.S.C. § 813 (1970); MCM, supra
practicable," those serving sentences rendered by courts-martial must be segregated from those serving nonjudicial punish-
ishment. The persons administering military confinement facilities are trained and, more importantly, the facilities and personnel are inspected regularly. The atmosphere of a military confinement facility is marked by order and discipline, but there is almost no brutality, homosexual rape, or arbitrary additional punishment, although occasionally there are cases of interracial conflict. From what I have seen, military confinement facilities are clean, the food is good, the medical care is better than that given to those not in confinement, and psychiatric, religious, and legal aid are readily available. There appears to be at least some desire to rehabilitate or at least to help all interested confinees avoid future antisocial behavior, whether they are staying in the military or being discharged. In essence, the military's system of restraint and confinement has many features most civilian penologists desire to see implemented at civilian confinement facilities.

The final bias I will mention here is my belief that the fairness of the military justice system and its superiority to its civilian counterpart do not excuse failure to examine it critically, reveal its corruptions and failures, experiment with unconventional alternatives, and strive to perfect the best possible system for resolving criminal cases and rehabilitating those convicted. Herein lies the great flaw of Justice Under Fire, for, despite a few suggestions for continued reform, Professor Bishop fails to identify the true weaknesses of the military justice system or even to recommend comprehensive solutions to those problems he has identified.

Justice Under Fire is bottomed on its author's belief that modern military justice "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." Although one must concede that military criminal law has origins different from its civilian counterpart, Professor Bishop is wrong about its purposes. Military law is simply a branch of American criminal law, with the same general goals of maintaining order in society by the deterrence of antisocial be-


35 See MCM, supra note 14, ¶ 131(c)(4).
36 BISHOP, supra note 6, at 5.
behavior and the rehabilitation of offenders. The military justice system is required to resolve the same fundamental questions as every other system of criminal justice. Those questions are: (1) what conduct should be defined as "criminal"; (2) what decisions should be made by which methods before a person can be convicted of a criminal offense; and (3) what should be done with persons who are found guilty. Professor Bishop focuses on the second problem, mentions the first, and neglects the third. The last is particularly unfortunate, because the most defensible aspect of military justice is its corrections system. In any case, it is fair to say that Justice Under Fire is concerned primarily with the form and function of American military law and not with its substance.

Although no true believer in the righteousness of American military law will find complete solace in Justice Under Fire, in the final analysis the book defends and advocates the maintenance of that separate system of criminal justice. In that limited sense, it can be viewed as a defense of the status quo, an enormously difficult and unpopular undertaking these days. The logical starting point for evaluation is Professor Bishop's argument for the continued separation of military law from the rest of American criminal law.

Purporting to describe rather than advance the arguments in favor of a separate system of military justice, Professor Bishop presents what he considers the "best statement" of the "military discipline argument." The argument is that the military's "demands justify a procedure that does lessen the chance of unjust acquittal, while it need not, and should not, increase the possibility of unjust conviction." The rationale of this argument is based on the unprovable assumption, accepted by Bishop, that there is a compelling "need to maintain efficiency, obedience and order in an army, which is an aggregation of men (mostly in most criminally prone age brackets) who have strong appetites, strong passions, and ready access to deadly weapons." According to Professor Bishop's logic, the danger posed by this group is the justification for its separate treatment. He states:

38 Professor Bishop does discuss the problem of the bad conduct discharge and recommends its abolition. Bishop, supra note 6, at 95, 301-02.
39 See notes 33-36 & accompanying text.
40 Professor Bishop states: "I do not favor abolition of the separate system of military justice, nor even complete elimination of the military commander's role in it." Bishop, supra note 6, at 300.
41 Id. 23.
42 Id.
An army without discipline is in fact more dangerous to the civil population (including that of its own country) than to the enemy. The public interest in discipline is therefore entitled to greater weight, and the rights of the accused to lesser weight, in the military than in the civilian context.\textsuperscript{43}

Hence, the conclusion: "Military discipline cannot be maintained by the civilian criminal process, which is neither swift nor certain."\textsuperscript{44}

I find the logic of the "military discipline" argument unsound. There is a compelling need to maintain order and the rule of law in every segment of society, but that need does not justify imposing a separate judicial system on any group found to be "dangerous."\textsuperscript{45} The crimes committed by "dangerous" persons against civil rights workers in the South in years past generally went unpunished, but they did not provoke an outcry for the use of military tribunals to stem the problem.\textsuperscript{46} It can be argued that in a free society open to constant changes in values and lifestyles, the discipline and order of a standing military establishment, when permitted to become substantially different from that of the public, render that institution "dangerous" to the very freedoms it was created to protect. The examples of military takeovers in Greece\textsuperscript{47} and more recently in Chile\textsuperscript{48} come to mind. Philosophical problems of this variety are not resolvable with any degree of certainty, for the currents of the disagreement run deeply into political philosophy, personal experience, and behavioral assumptions. My experience as a military lawyer has convinced me that there is no compelling reason for the continued maintenance of a separate system of military justice.

Still, certain realities must be recognized. One characteristic of nationhood in this imperfect world is the ability to wage war, and war is waged for the purpose of imposing, albeit defensively,
one nation's will upon another. "[T]he primary business of armies and navies [is] to fight or be ready to fight wars should the occasion arise." Stated differently, members of the military are called upon to kill, to be killed, and to order others to do the same. No matter how bitter this task and its attendant risks may be, such is the duty of all persons in uniform. As the Supreme Court recently recognized:

While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community. The military establishment is subject to the control of the civilian commander in chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.

Since the military's primary function is to carry out orders to subdue or kill an enemy, "[i]ts law is that of obedience." Whether this situation merely "is" or "should be" is beyond the scope of this Review. But the question is surely one of the most perplexing and important in the area, and it deserves more analysis than Justice Under Fire provides.

Having established reasons he considers sufficient to justify the continued existence of the separate system of military law, Professor Bishop attempts to give the reader an overview of American courts-martial and their procedures, contrasting those proceedings with their civilian counterparts. The author briefly considers the military's equivalent to the civilian system of jury selection, describing it as "the major difference between military and civilian practice." He notes that permitting the commander who has referred the accused to trial to select the members who will decide the merits and, if necessary, the sentence, lets the commander "pack the jury." Professor Bishop then mentions the strictly construed requirement that a court-martial be convened in letter perfect compliance with the applicable statutes, lest the judgment be reversed for lack of jurisdiction.

\[51\] In re Grimley, 137 U.S. 147, 153 (1890).
\[52\] BISHOP, supra note 6, at 26-44.
\[53\] Id. 27 (emphasis in original).
\[54\] Id. 29. But see text accompanying notes 15-16 supra.
Having conceded that the system for selecting military juries is unfair (which it is, although, as a rule, fair-minded "jurors" are eventually selected), Professor Bishop sets forth his major defense of the military justice system, the role of the military judge. He makes his view of the military trial judiciary clear from the outset:

A long step in the process of assimilating military trials to the civilian variety has been the creation and expansion of the powers of the Military Judge, who resembles a civilian trial judge much more closely than the members of the court resemble jurors.

The essential reason why the military judge's presence renders the system defensible, in Bishop's view, is that the judge is free from that oldest bugaboo of military law, command influence. The commander who convenes the court-martial selects the members; designates the trial judge, prosecutor, and defense counsel; and refers the accused to trial cannot influence the military judge directly (by the use of adverse fitness reports or other means), and the accused can choose to be tried before the military judge sitting alone. For these reasons, according to Bishop, the system is fair. I think Professor Bishop is wrong, both about the inherent independence of the military judge and the ultimate fairness resulting from his presence.

In the final analysis every legal institution depends on the integrity and honesty of the men who administer it. Yet there are ways to limit and control the independence of any judicial institution. Federal judges are appointed for life "during good Behaviour," and Congress has no power to reduce their compensation during their tenure on the bench. As a general rule, civilian judges are successful and experienced attorneys who

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56 See text accompanying note 15 supra.
57 Bishop, supra note 6, at 30-33.
58 Id. 30.
59 Id. 31, 100, 300; see Uniform Code of Military Justice arts. 26, 36, 10 U.S.C. §§ 826, 836 (1970); MCM, supra note 14, § 38. See also United States v. Cordova, 42 C.M.R. 466, 470 (A.C.M.R. 1970). Even Justice Douglas has noted that the military has made "strenuous efforts to eliminate the danger [of command influence]." O'Callahan v. Parker, 395 U.S. 258, 264 (1969) (footnote omitted).
61 Bishop, supra note 6, at 100.
62 U.S. Const. art. III, § 1.
63 Id.
enter the judiciary after years of private practice in which they have earned some degree of distinction. Many accept a major reduction in income to accept a judicial position. The quality of civilian judges varies but is usually high enough to maintain the respect of the civilian bar. Civilian judges seem to have little difficulty detaching themselves from prior connections they may have had with the state or federal government. This may be due in part to civilian judges' lack of interest in returning to government positions outside the judiciary.\textsuperscript{64}

In contrast, the process by which certain officers are selected for the military trial judiciary is a mystery. There are no qualifications defined by statute or regulation. No selection board meets to review the records of candidates. There is no solicitation to determine interest among available judge advocates. Positions are filled as the need arises, and choices may be based on such criteria as the expense of transferring a particular military lawyer to a distant post or a lawyer's winning a major case for the prosecution. One becomes a military judge by being certified by his armed service's Judge Advocate General.\textsuperscript{65} One can come to the attention of his Judge Advocate General in many ways, but usually he is nominated by his local commanding officer.\textsuperscript{66} While some surely will contest the point, my experience suggests that military judges are selected on the basis of career orientation and success as prosecutors. I know of no military judge who attained certification on the basis of a winning record as a defense counsel, although I know of many military judges who earned their jobs by consistently winning cases for the Government.

Once certified as a military judge, one awaits orders to sit on courts-martial. Such orders come from the convening authority, who supposedly can designate any certified military judge.\textsuperscript{67} In practice, the convening authority can do very little "judge shopping" because he can detail only those military judges who are "available." The convening authority usually has no choice and must detail the judge who has been assigned by the Judge Advocate General to hear courts-martial in that particular geographical area.

\textsuperscript{64} Consider, for example, the case of Federal District Judge Matthew Byrne who was offered the position of Director of the Federal Bureau of Investigation when he happened to be in the midst of trying Daniel Ellsberg. Judge Byrne declined the offer without hesitation.


\textsuperscript{66} See text accompanying notes 85-86 infra.

\textsuperscript{67} See Uniform Code of Military Justice art. 26, 10 U.S.C. § 826 (1970); MCM, supra note 14, ¶ 4(e)-(g).
The military judge administers justice in courtrooms that are usually inadequate if not degrading, particularly in special courts-martial. Only in the Army is the military judge permitted to wear a judicial robe; judges from the other services sit in uniform. By and large, the military judge hears a plethora of unauthorized absence charges, occasionally interrupted by a case of alleged assault, larceny, disobedience of orders, disrespect to a superior, or violation of the drug laws. He can order charges dismissed, but his ruling is subject to reversal by the convening authority whose decision then is reviewed after trial, by which time the accused may have served any period of confinement to which he has been sentenced. Depending on the defense counsel’s assessment of the judge’s honesty, fairness, and leniency, the military judge is likely to hear most of his cases sitting alone. Most cases involve guilty pleas, leaving sentencing as the major function of the trial judge. The military judge cannot order the release of an accused from pretrial confinement, suspend any sentence or order probation, or stay the execution of a sentence pending appeal. He can only recommend such actions to the convening authority as matters of leniency. In essence, he administers justice for junior enlisted personnel in a misdemeanor court lacking the usual trappings and authority of the American civilian judiciary.

The military trial judiciary is made up largely of “regular” or “career-oriented” legal officers whose tenure on the bench is no more than one tour of duty spanning, at most, a few years in a long military career. Although appointments to the trial judiciary are sought after by young military lawyers and often are used as an incentive to persuade individuals to remain in uniform, the military judiciary is a dead-end for the ambitious military lawyer. This is because every military judge, no matter how prosecution-oriented, sooner or later must rule against the
interests of the Government on an important matter, thereby disappointing or frustrating someone at the command level who may exert a negative influence on the judge’s career. In essence, the military is a poor place in which to be neutral and a very poor place in which to rule in favor of the defense regularly.

Thus, the linchpin of Professor Bishop’s defense of the fairness of the military justice is open to serious question. Although many talented and intelligent military judges perform their function with great integrity, no military judge has sufficient judicial independence to administer a criminal justice system fairly. At best, he can be honest and try to overcome the gnawing suspicion that he may be transferred to some forgotten corner of the globe if he rules for the accused too often. Contrast that situation to the action of Chief Judge Sirica in ordering the President of the United States to produce for inspection and possible disclosure tape recordings of secret discussions involving the President, or the action of Judge Matthew Byrne in dismissing criminal charges against Daniel Ellsberg on the basis of the Government’s nondisclosure of an illegal entry into the office of Ellsberg’s psychiatrist. That contrast is too stark to support Professor Bishop’s conclusion that

[s]o long as the soldier has the option of trial by a military judge, with a minimum of ‘command influence,’ he gets much the same process he would get, for instance, in the courts of Japan or France or Germany, whose juryless criminal justice is, pace Justice Douglas, no less civilized than ours.

The author next discusses the position of the military defense counsel in the court-martial system. He attempts to rebut the charge “that defense counsel are (a) systematically selected for incompetence and (b) too afraid of the commander’s displeasure to make a vigorous defense” with the unsupported comment that “military lawyers vigorously deny the charge” and the personal insight that he has seen “very little evidence of such incompetence or timidity in the records [he has] examined.” He notes further that “military defense counsel

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74 Bishop, supra note 6, at 100.
75 Id. 33-35.
76 Id. 34.
77 Id.
78 Id.
seem to me to raise as many defenses, and push them as hard, as lawyers in civilian trials."  

On the other hand, Professor Bishop implicitly admits that the effectiveness of the military defense counsel in recent years may be a temporary phenomenon attributable to the draft. Because most military defense counsel in recent years have been young lawyers who "are merely fulfilling their military service obligation by three years or so of active duty, they are neither bucking for promotion nor in much fear of the commander's displeasure." Ending the draft probably portends that "most military lawyers will be career officers" who will be susceptible to influence from above. Bishop therefore supports the suggestion that appointed military defense counsel, like military judges, should be assigned to a central organization, independent of the command which convenes the court-martial." That Bishop himself perceives a need to restructure the organization of military defense counsel, to give them the independence enjoyed fortuitously by conscripts, weakens his defense of the present system.

As a defense, Professor Bishop's view of the situation of military defense counsel will not wash. His recommendation for change, although an improvement, is not based on accurate facts and does not go far enough. The Manual for Courts-Martial, in defining the duties of defense counsel in military trials, states that the defense counsel "will perform such duties as usually devolve upon the counsel for a defendant before a civilian court in a criminal case, will guard the interests of the accused by all honorable and legitimate means known to the law . . . [and will] represent the accused with undivided fidelity . . . ." In practice, these noble ideals are realized only partially and only by the consistently high integrity of military defense lawyers, without any institutional support.

Professor Bishop's fundamental error lies in his misconception of the command structure in which the military defense counsel operates. Every lawyer in uniform is ultimately responsible to some regular officer of the line. In almost all cases the defense counsel is detailed by the line officer who has convened the court-martial. Yet, the military defense lawyer's immediate superior and actual boss is usually another attorney who is serving either as a Staff Judge Advocate under a flag or general

79 Id.
80 Id.
81 Id.
82 Id. 34-35.
83 MCM, supra note 14, ¶ 48(c).
officer or as an Officer in Charge of a local law office under the control of the Judge Advocate General of his branch of the service. The direct influence of line officers of any rank on a defense counsel's handling of a court-martial trial is nil. In the well over seven hundred military criminal cases in which I participated, I never saw a line officer attempt to influence a defense counsel directly. Moreover, I never saw a defense counsel demonstrate any concern for the feelings of a convening authority about his zeal in conducting a defense, except when he believed the best interests of his client called for such concern.

But military defense counsel are not free from "outside" influence. The influence exerted upon the military defense lawyer, particularly in serious cases involving major felonies, comes from his immediate superiors, the career military lawyers under whom he must serve on a day-to-day basis. These senior military lawyers often are directly responsible to more senior line officers, and their self-interest rarely, if ever, lies with the acquittal of an accused. As a result, they have little or no incentive to place their most competent lawyers in criminal defense work or to support those who are assigned there. As a general rule, the youngest lawyers with the least experience and the least resistance to pressure from superiors are assigned as defense counsel. And the pressure is soon applied by the senior lawyers.

This influence rarely is applied directly. It may consist of such minor abrasions as transfer to a less desirable office, public reminders to conform more closely to military grooming and dress standards, denial of access to secretarial assistance, assign-

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84 There are five situations in which a defense counsel may seek to involve line officers in aid of the accused. First, he may seek to obtain a pretrial agreement (plea bargain) from the convening authority. See United States v. Troglin, 21 U.S.C.M.A. 183, 44 C.M.R. 237 (1972); United States v. Sanchez, 40 C.M.R. 698 (A.C.M.R. 1969). Second, the defense counsel may seek immunity from prosecution from a line officer with the authority to grant it. See MCM, supra note 14, ¶ 68(h). Third, a defense counsel may assist an accused in attempting to "resign" from the service by accepting an administrative discharge in lieu of prosecution. In such cases, the character of the discharge is usually less than honorable. See Lunding, Judicial Review of Military Administrative Discharges, 83 Yale L.J. 33 (1973); 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 (1974). Fourth, a defense counsel may attempt to persuade a convening authority to reduce a case to a summary court-martial or nonjudicial punishment after it has been referred to trial by special or general court-martial. See note 14 supra. Fifth, a defense counsel may seek clemency from the convening authority after a sentence has been announced, by requesting recommendations for clemency from court members or other line officers. See MCM, supra note 14, ¶¶ 48(k)(1), 77(a).

85 For example, a defense counsel, faced with overwhelming evidence of guilt, who failed to obtain a pretrial agreement acceptable to the accused might behave very cooperatively and flexibly if the accused's best hope for a reduction of sentence was a post-trial clemency petition. See MCM, supra note 14, ¶¶ 48(k)(1), 77(a).
ment to time-consuming collateral duties such as purchasing supplies or standing "phone watches," or denial of leave or special liberty. Once a defense counsel has truly fallen from grace with his superiors, he may find himself handling legal assistance or claims matters, transferred to another command, or simply given a low rating on his fitness report. These informal devices are usually within the sole discretion of the defense counsel's immediate commander, and they are used more commonly than Professor Bishop might expect.

In all fairness, I must add that on two occasions lethargic and incompetent military defense attorneys were relieved and transferred to other duties on my recommendation as a military judge. Even then my recommendation was followed only after I advised that my conscience would not permit the imposition of otherwise appropriate sentences upon individuals represented by these two lackluster attorneys. On the other hand, I also saw several excellent and zealous military defense counsel transferred to "less rigorous" duties after raising the blood pressure of the wrong senior lawyer.

Professor Bishop half-heartedly recommends the severance of defense counsel from the foreboding omnipresence of the Staff Judge Advocate or local law office commander as a means of ensuring continued good performance by military defense counsel after the "draft-induced volunteer" lawyers are replaced by a more homogenous "career-oriented" group. Although the recommendation has merit, it ultimately would fall short of establishing and protecting the independence and adversary spirit essential to the adequate representation of an accused. A separate defense organization might be effective to some extent if it were funded adequately, if it were staffed by trained investigators responsible only to the defense, if it were responsible only to the Judge Advocate General, if its members were guaranteed promotions proportionate to those in other parts of the military-legal community, and if its personnel were guaranteed that they would not be transferred, even within the defense organization, for a reasonable period of years, except upon their own request or upon a finding of incompetence by a neutral and detached group of defense attorneys. Nothing short of this would suffice to guarantee, as an institutional matter, independence and adversary spirit among military defense lawyers sufficient to permit them "to represent the accused with undivided fidelity."
One of the more noteworthy omissions of *Justice Under Fire* is Professor Bishop's failure to discuss the difficult position of the trial counsel (prosecutor) in courts-martial. The *Code of Professional Responsibility* states: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." Although the military prosecutor surely is subject to this maxim, the means available to him for compliance are limited.

The military prosecutor is a classic example of the man in the middle. He is selected and appointed by the convening authority to represent the Government throughout the proceedings, but he has little or no discretion on any significant matter related to the trial of a case other than the choice of how and in what order to present the evidence. He cannot refuse to prosecute regardless of his opinion of the evidence. He cannot demand a witness or issue a subpoena without the permission of the convening authority. He cannot negotiate a plea bargain with the defense that is binding on the Government, because only the convening authority can enter into an enforceable pretrial agreement.

Although he has no real discretion on many of the most significant matters in a court-martial, the trial counsel is the natural object of the ire of the military judge displeased with the conduct of a case. Usually the only representative of the Government in the courtroom, the military prosecutor often faces the hapless task of explaining, for example, why the convening authority refused to release an accused from pretrial confinement even though twenty bishops have sworn that he is neither a danger to the community nor an escape risk. He often is forced to argue why the military judge should not order the production of a witness located in a distant command when he...

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88 Professor Bishop mentions the trial counsel only once, in reference to the power of the convening authority to select the trial counsel. See Bishop, *supra* note 6, at 33. For an interesting statement of a trial counsel's views on his situation, see Rehyansky, *Military Law is to Law as . . ., 4 Juris Doctor*, Dec. 1974, at 15.

89 *ABA Code of Professional Responsibility*, Ethical Consideration 7-13 (1971).

90 See *Uniform Code of Military Justice* arts. 27, 38, 10 U.S.C. §§ 827, 838 (1970);

MCM, *supra* note 14, ¶ 6, 44.

91 "[A] pretrial agreement is merely a voluntary limitation by the convening authority, in advance of trial, upon his statutory discretion regarding the adjudged sentence." United States v. Sanchez, 40 C.M.R. 698, 699 (A.C.M.R. 1969).

92 See MCM, *supra* note 14, ¶¶ 18, 20-22, 30(h). See also note 26 *supra*.

93 The military judge has authority to order the production of a witness after a refusal by the convening authority, and his ruling is not subject to reversal by the convening authority. See *Uniform Code of Military Justice* art. 46, 10 U.S.C. § 846 (1970);

firmly believes that the witness can provide evidence material to the charges before the court. Moreover, he is subject to the same pressures, probably more overtly, as the defense counsel.

Thus the military prosecutor is expected to perform the same function as his civilian counterpart, although he has less discretion than a civilian attorney in a civil suit. The result is a schizophrenic situation in which the trial counsel’s “duty” to “seek justice”⁹⁴ is subservient to the desires of his client, the convening authority. Although the rights of victims of crime and the community in general should loom large in the considerations of any prosecuting attorney, the total absence of meaningful discretion in the military prosecutor skews the balancing of considerations in the military.

One can only speculate why Professor Bishop omitted the problem of the role of the trial counsel from *Justice Under Fire*, but its absence diminishes the already limited usefulness of the book. The reason probably lies in Bishop’s view of the role of the military commander, who is the convening authority.⁹⁵ In formulating one aspect of the military discipline argument, he states, “Since discipline is a responsibility of the military commander, he should have some control of the machinery by which it is enforced . . . .”⁹⁶ The false premise upon which this view is based is that the commander cannot have discipline unless he has control of the mechanism for enforcing it. This Sands-of-Iwo-Jima rationale is out of touch with reality and retards reform of the military justice system.

First, this view overlooks the all too obvious fact that the modern military does not consist of “an aggregation of men (mostly in the most criminally prone age brackets) who have strong appetites, strong passions, and ready access to deadly weapons.”⁹⁷ As another reviewer of *Justice Under Fire* noted, “[Today’s military] is composed of relatively well-educated personnel trained in highly technical jobs and enjoying more individual rights than ever before in history.”⁹⁸ With the change in modern warfare from a manpower-intensive to a hardware-intensive situation, the military now must recruit persons with the intellectual ability to understand and operate highly sophisticated equipment. But the young recruit who is capable of operating a computer that controls a missile guidance system is also likely to be capable of analyzing the reasons that call for its use.

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⁹⁴ ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-13 (1971).
⁹⁵ Bishop, supra note 6, at 24, 27-30, 300.
⁹⁶ Id. 24.
⁹⁷ Id. 23.
⁹⁸ Sherman, supra note 5, at 377-78.
This inevitably produces a different relationship between the commander and his troops than inheres when the commander is ordering his men, on pain of being sent to prison, to charge a machine gun emplacement.99

Regardless of whether the changed nature of modern warfare and the higher intellectual capability of today's military personnel justify elimination of the role of the commander in military justice, the military commanders themselves have little or no interest in maintaining their pervasive involvement with the military criminal justice system. My experience indicates that most military commanders care little about military justice except in the most serious cases, and that they delegate the disciplinary function to the most junior or most incompetent officer in their command. Most commanders never want to hear a word from the discipline officer. Discussions with numerous commanding officers have convinced me that they would prefer to have the entire matter of criminal justice reassigned to an organization controlled by the Judge Advocates General, with its own police force, detention facilities, prosecutors, defense counsel, and military judges. Most commanders would rather call a military police officer and have an offender removed from their command, than handle the matter themselves. If the commanders are ready to abandon the present system, Professor Bishop's defense of it may be even more hollow than it appears.

The military system of appellate review receives brief treatment in Justice Under Fire.100 Again, however, this treatment is out of touch with reality. Of review at the lower levels, Professor Bishop states:

Even the least serious cases—those in which the sentence does not exceed six months' confinement—must be reviewed by the convening authority and his Staff Judge Advocate or (if he has none) by a military lawyer in a higher command. Of such automatic review it may at least be said that it is free, that it is more than the accused would get in civilian courts, and that he has nothing to lose.101

This is not only the "least" that can be said for the system; it is also the most.

100 See Bishop, supra note 6, at 38-43.
101 Id. 38-39 (footnote omitted).
Military defendants usually are tried by special courts-martial and, if convicted, given a sentence that does not include a bad conduct discharge. Unless they petition the Judge Advocate General of their service branch pursuant to article 69, the only review of the summarized record of their case will be by the convening authority and the supervisory authority, a flag or general officer. Since only the convening or supervisory authority can stay the execution of confinement adjudged at trial, the defendant will be likely to have served any period of confinement to which he was sentenced long before completion of review at the local level.

With the exception of the rare case in which findings and sentence are disapproved or the sentence is reduced as a matter of clemency, the convening and supervisory authorities generally uphold the findings and sentences placed before them. On the other hand, they do reduce sentences below the level requiring review by the Court of Military Review in order to avoid reversals of trial court errors or unfavorable publicity for the local command.

Military appellate review at the local level is largely a waste of time and money. A more efficient and honest system would eliminate automatic post-trial review and place the responsibility of appealing on the defense. At the conclusion of a trial resulting in conviction, the accused should be informed of his right to appeal by giving notice of appeal within ten days. No transcript should be prepared except upon notice of appeal by the defense, provided, however, that once such notice is given, those portions of the record of trial requested by the defense or the prosecution should be produced verbatim regardless of the severity of the sentence adjudged.

To give meaning to such an appellate system, the military judge should have the authority to stay, conditionally or uncon-
ditionally, execution of the sentence pending appeal. In seeking a stay, the burden should be on the defense to demonstrate by a preponderance of the evidence that the accused "will not flee or pose a danger to any other person or the community." Decisions on stay of execution of a sentence should be appealable by either side to the Judge Advocate General, and the defense should have the right to appeal an adverse ruling to the Court of Military Review.

My personal knowledge of the military appellate system does not extend to review of cases by the Courts of Military Appeals. My association with attorneys assigned to the Naval Appellate Review Activity indicates that they face many of the same problems found at the trial level. The judges assigned to the Courts of Military Review are, like their counterparts at the trial level, merely serving a single tour of duty in a long military career. Most of the judges are former staff judge advocates who primarily are interested in saving convictions. The usual ground for reversal of a conviction is some defect in the form of the convening order or the post-trial review, and it is unusual to read a decision of a Court of Military Review that comes to grips with a major issue of law.

Appellate defense counsel are subject to the same subtle and overt pressures that affect trial defense counsel. As the percentage of appellate defense counsel who are "career oriented" increases, with the end of the draft, the likelihood of a more cooperative attitude on their part also increases. Moreover, the judges of the Courts of Military Review often sit on the selection board that chooses the director and assistant director of the appellate defense sections. Finally, the appellate defense lawyers have no separate funding and rely completely on the Judge Advocate General's office for lawyers, support personnel, and other necessary resources. In short, the appellate review system of the military is no better or worse than the trial system it reviews. It has the same corruptions and requires the same type of reform.

No review of Justice Under Fire can fail to note Professor Bishop's omission of the two most common forms of "punishment" meted out by the military—nonjudicial punishment and administrative discharges. Although neither carries the stigma attached to a conviction by a court-martial, both constitute sig-

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108 FED. R. CRIM. P. 46(c).
110 Professor Bishop mentions the use of administrative discharges only as an alternative to maintaining court-martial jurisdiction over retired regular officers. See Bishop, supra note 6, at 76, 107 n.49.
Significant disciplinary measures that can have serious consequences for an individual. Both topics have received extensive discussion elsewhere, and they are noted here only because their omission constitutes a major flaw in Justice Under Fire.

Professor Bishop's style may be the best feature of his book, and it tends to make up for much of what is lacking in substance. It is a style that will grate on the liberal and tickle the conservative. Although Bishop is defensive at times and tends to overreact to the rhetoric of the more strident critics of military justice, by and large Justice Under Fire is lucid, easy reading. This is no small accomplishment in an area filled with highly technical legal structures and a language of its own. Throughout the book, Bishop demonstrates a sincere respect for history and tradition; but in spite of an admirable sense of rationalism, he rarely demonstrates a willingness to recognize that fundamental changes have occurred in the mission, methods of warfare, and personnel makeup of the military in recent years, and that changes in military justice should also come about. Surely the worst aspect of Professor Bishop's style is his unbecoming use of ad hominem innuendo in describing the critics of military justice.

The usefulness of Justice Under Fire is open to serious doubt. The book has no substantial value as an aid to training attorneys in the representation of military clients. Besides being too general, it is out of date and out of touch with current military practice. For the student, the book could serve as an introduction to a well hidden cul-de-sac of American law, but it is an unreliable source on almost every real issue in the field. The scholar is not likely to find much of interest in this volume, for it is not the product of new or original research. The book is probably most useful as general background reading for military lawyers and legislators. The former can always benefit from a better understanding of the context of military law. The latter can use anything that goes beyond the pablum disseminated by the Pentagon and its more vocal adversaries.

Justice Under Fire can best be characterized as a book that is well worth reading but not to be taken too seriously. It provides no significant insights into means of improving the condition of justice in the military. On the other hand, it offers a well-drawn and, at times, forceful argument for the traditionalist viewpoint. On balance, Justice Under Fire is likely to have some influence on the future of American military law, but that influence will probably not be sufficient to persuade a well-informed Congress to retain the present system of military justice.

\[111\text{ See Imwinkelried & Gilligan, supra note 14; Lunding, supra note 84; Comment, supra note 84; Note, supra note 14.}\]
BOOKS RECEIVED


