

Swords and Scales the Development of the Uniform Code of Military Justice

Frederick Bernays Wiener

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Frederick Bernays Wiener, *Swords and Scales the Development of the Uniform Code of Military Justice*, 59 Cornell L. Rev. 748 (1974)
Available at: <http://scholarship.law.cornell.edu/clr/vol59/iss4/10>

This Book Review is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

BOOK REVIEW

Swords and Scales. The Development of the Uniform Code of Military Justice. WILLIAM T. GENEROUS, JR. Port Washington, N.Y. and London: Kennikat Press. 1973. Pp. x, 250. \$12.50.

Two hundred and eighty-five years ago, the English Parliament of the Glorious Revolution, declaring that "it being requisite for . . . an exact Discipline to be observed . . . that Soldiers . . . be brought to a more exemplary and speedy Punishment than the usual forms of Law will allow," enacted the first Mutiny Act.¹ One hundred and ninety-seven years ago, the Continental Congress framed the Articles of Confederation and ratified a power it had already twice exerted: "To make rules for the government and regulation of the said land and naval forces."² Ten years later the Constitutional Convention conferred the same power in the same words on the new Congress;³ and when the Bill of Rights was adopted, the fifth amendment expressly exempted the active duty forces from any requirement of indictment by grand jury.⁴

The men who effected the Glorious Revolution in Britain, like the men who waged the long and arduous war for American independence, were not theoretical doctrinaires. They recognized, indeed they took for granted, the truism that whereas the object of a criminal code for a civilian community is to enable people to live together in peace and security, the object of a criminal code for the armed forces is to send men obediently to their death in conflict with the public foe.

As long as armies were small and essentially professional, the sharp contrast between the civil and military communities⁵ was primarily of academic interest. But when, as in the later American

¹ 1 W. & M. c. 5 (1689).

² Art. 9 of the Articles of Confederation, submitted to the States on Nov. 15, 1777 (9 J. CONT. CONG. 919). The Articles of War earlier adopted by the Continental Congress were those of June 30, 1775 (2 *id.* 111), which were soon superseded by those of Sept. 20, 1776 (5 *id.* 788).

³ U.S. CONST. art. I, § 8, cl. 14.

⁴ No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .

⁵ See *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian"). See also *Gibson v. United States*, 329 U.S. 338, 357 (1946) (reference to "vast gulf between civil and military jurisdiction").

wars, it became imperative to raise massive forces by compulsion, the impact of a sterner military code on the countless citizens suddenly subject to its provisions had grave potential for war-time difficulties and for post-war and anti-military reaction.

Trouble was averted for the United States Army in the Civil War and for the United States Navy in both World Wars because service in those forces did not involve social inversion. Civil War volunteers could be tried only by courts-martial composed of volunteer officers, normally drawn from the same community as the culprit,⁶ while the Navy in both World Wars commissioned its nonregular officers on the basis of educational qualifications, from those who had the ability or (more generally) the means to acquire a college degree. But the mass armies of both World Wars were officered by those selected by competition, through the rigorous proving ground of the Officer Candidate School. In consequence, as in Barrie's *Admirable Crichton*, the butler frequently wound up as the commander, and the resultant social inversion created much unhappiness, sentiment that was translated into thorough revisions of the military code. World War I was followed by the 1920 amendment to the Articles of War,⁷ World War II by further amendments in the Elston Act⁸ and, a little later, by the Uniform Code of Military Justice.⁹

Dr. Generous starts his study of the development of the Uniform Code of Military Justice with a discussion of some of the difficulties that surfaced when the 1916 Articles of War, which had deliberately rejected the Civil War safety-valve just mentioned,¹⁰ was applied to an army four million strong led by a hurriedly trained officer corps, of whom probably less than ten percent had had any prior military experience. After dealing rather sketchily

⁶ By Article of War 97 of 1806 (carried into R.S. § 1342 as Article of War 77), regular officers were "not . . . competent to sit on courts-martial to try the officers or soldiers of other forces." See W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 92-93 (2d ed. 1896). The same provision governed during the Spanish-American War. See *United States v. Brown*, 206 U.S. 240 (1907); *McClaghry v. Deming*, 186 U.S. 49 (1902).

⁷ Act of June 4, 1920, ch. 227, 41 Stat. 759, 787.

⁸ Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 604, 627.

⁹ Act of May 5, 1950, ch. 169, 64 Stat. 108 (now 10 U.S.C. §§ 801-940 (1970)).

¹⁰ The 1908 amendments to the Dick Act provided that courts-martial for the trial of militia while in federal service required only a majority militia membership. Act of May 27, 1908, ch. 204, § 6, 35 Stat. 399, 401. The short-lived and soon forgotten Volunteer Act of 1914 abolished all distinctions between officers of the several components in respect of, *inter alia*, service on courts-martial. Act of April 25, 1914, ch. 71, § 4, 38 Stat. 347, 347-48. And Article of War 4 of the 1916 Articles (Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 619, 650) made all officers in the military service of the United States competent to serve on all courts-martial. This has been the law ever since. See 10 U.S.C. § 825 (1970).

with World War II, the author covers the passage of the Elston Act, the genesis and ultimate adoption of the Uniform Code, the framing of the 1951 "Manual for Courts-Martial," and the selection of the initial members of the Court of Military Appeals. Then follow chapters analyzing that tribunal's decisions, the deflections in doctrine that accompanied personnel changes, service reactions to the court's rulings, the problem of administrative discharges, and further legislation through the Military Justice Act of 1968.¹¹

Much of the material used is still in manuscript form, many letters were obtained from participants in the matters discussed, and over twenty personal interviews are listed. The author is not without insight, as opening and closing passages in his book make clear:

All too many observers have seen the struggle as one which pitted enlightened civilian reformers, bent on bringing the blessings of civilian judicial practices to the military, against arch-reactionaries in the service, fabricated from the Prussian mold and determined to preserve the autocratic power of commanders.¹²

. . . The history related in these pages suggests that the Uniform Code had been a failure in a number of important ways. . . . Within the services, the code has created large legal bureaucracies, connected to the defense effort only tangentially.¹³

Unfortunately, Dr. Generous does not comment on the let-down in discipline that paralleled the "criminal law revolution" loosed on the country by the Supreme Court of the 1960's. There is no mention of the many, many "fragging" incidents in Viet Nam, nor of the lax discipline that has almost destroyed the combat effectiveness of our forces in Europe today.¹⁴

Moreover, the book suffers from a built-in schizophrenia. On one hand, the author recognizes the factors just quoted from his book; on the other, he marches in warm sympathy with "the bar association reformers," primarily a group of articulate New York doctrinaires who, while acquiescing in the power of a field commander to order an invasion such as the cross-Channel attack on Normandy in 1944, with its inevitable concomitant of a myriad of inescapable casualties, are nevertheless unwilling to trust that same

¹¹ Act of Oct. 24, 1968, Pub. L. No. 90-632, 82 Stat. 1335.

¹² P. 3.

¹³ P. 205.

¹⁴ Moskos, *Coping in Europe*, 23 ARMY 12 (No. 11, Nov. 1973).

individual with the appointment of a court-martial to try any officer or soldier for any military offense.¹⁵

Similarly, while denigrating the pages of Colonel William Winthrop's classic and still authoritative treatise as "militaristic,"¹⁶ Generous fails to realize that in many significant respects the gallant and learned colonel was actually expressing the views of the Founders. It was Winthrop's opinion that the assistance of counsel at military law was a privilege rather than a right,¹⁷ a pronouncement guaranteed to raise the hackles, not to say the blood pressures, of both absolutist libertarians as well as post-prandial bar association pontificators of almost any epoch. But on this point, Winthrop was simply restating the interpretation that President Madison, the father of the Bill of Rights, placed on the first ten amendments to the Constitution. Madison, who read court-martial records carefully, approved the conviction of General William Hull for surrendering Detroit in 1812, although that aged incompetent had clearly been denied the kind of assistance of counsel that he would have received in a civil court.¹⁸ Further, the principle fundamental to military law, that an army is "a collection of armed men, obliged to obey one man,"¹⁹ is stigmatized by Generous as "the popular conception of a Prussian officer."²⁰

This lack of a consistent outlook, combined with an undue emphasis on personalities, results in episodic "gee whiz!" treatment of a long simmering controversy. Consequently, the fifty-year history covered by this book sometimes reads like a TV melodrama, with the colors of the contestants' hats clearly seen. Most regrettable of all, the author's insufficient background and lack of legal training have led him into a host of demonstrable mistakes. Here are a few of the most glaring:

I. Chapter I6, "The Federal Courts and Military Justice," is a hotchpot of decisions on varied topics, cited interchangeably; suits for back pay, trials for violations of the laws of war, and cases delimiting the scope of collateral review of court-martial proceedings are all lumped together under the rubric, "To Intervene or

¹⁵ See *Constitutional Rights of Military Personnel, Hearings Before the Senate Comm. on the Judiciary Pursuant to S. Res. 260, 87th Cong., 2d Sess. 777* (1962).

¹⁶ Pp. 7, 72.

¹⁷ W. WINTHROP, *supra* note 6, at 241-43.

¹⁸ Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 29-31, 45-46 (1958).

¹⁹ This principle was first formulated by General W. T. Sherman in *Proceedings of the United Services Institution for 1879*. It derives ultimately from a John Locke apothegm (via Dr. Johnson's dictionary).

²⁰ P. 49.

Not." The result is so confused as to suggest a discussion of antibiotics, open-heart surgery, and kidney dialysis by a physician trained only in the ancients' four humors.

2. The account of the Fort Sam Houston riot and mutiny late in 1917 that disclosed the opportunities for abuse possible under the 1916 Articles of War is badly tangled, less than candid, and incomplete.

Dr. Generous starts his account of the incident by stating: "Negro troops, angered by their treatment at the hands of the Army and the local Texas community, protested violently, were subdued, and court-martialled."²¹ Even in today's climate of opinion, this is hardly enough to apprise the reader that the charges included not only willful disobedience and mutiny but also murder and assault with intent to murder.²² The trial, which lasted over three weeks, produced a 2,200-page record that was reviewed daily by the convening authority's staff judge advocate, and that resulted in thirteen of the sixty-three accused being sentenced to death by hanging.²³ Those sentences were approved by the convening authority on one day and executed the next morning, the first mass military execution since Winfield Scott caused the recaptured deserters of the San Patricio Battalion to be hanged after the taking of Chapultepec.²⁴

News of the executions reached a War Department that had not even known of the trial, and there it landed, in the words of a contemporary, with a dull thud. The immediate result was a general order prohibiting the execution of any death sentences in the United States without prior notice to the War Department.²⁵ A few days later, another general order provided general review procedures.²⁶ Later examination found the Houston record of trial legally sufficient. Under the 1916 Articles of War, a department commander in time of war could confirm death sentences for mutiny and murder; where, as in this instance, he was also the convening authority, no additional confirming action was neces-

²¹ P. 5.

²² General Court-Martial Order No. 1299, Hq. Southern Dep't, Fort Sam Houston, Texas, Dec. 10, 1917.

²³ See *Trials by Courts-Martial, Hearings Before the Senate Comm. on Military Affairs on S. 5320*, 65th Cong., 2d Sess. 39-42, 193-209 (1918); *Establishment of Military Justice, Hearings Before the Senate Comm. on Military Affairs on S. 64*, 66th Cong., 1st Sess. 94-97, 1124-26, 1357-58 (1919).

²⁴ S. E. CHAMBERLAIN, *MY CONFESSION* 226-28 (1956); C. W. ELLIOTT, *WINFIELD SCOTT, THE SOLDIER AND THE MAN* 517, 546 n.27, 555-56 (1937).

²⁵ General Order No. 169, War Dep't, Dec. 29, 1917.

²⁶ General Order No. 7, War Dep't, Jan. 17, 1918.

sary. The law required no legal review whatever, not even that of the staff judge advocate.²⁷ What had happened was that the department commander, Major General John W. Ruckman, had exercised his undoubted legal powers with utter lack of judgment. For this he was shortly afterwards relieved of his command, and reduced to his permanent grade of brigadier general.²⁸

Dr. Generous's account does not cite the first general order, nor the congressional hearing dealing primarily with the Houston trial, nor the commander's subsequent fate.

3. Any reader unacquainted with the position of the Army's lawyers would surely conclude from this book that, until the enactment in 1947 of the Elston bill, lawyers did not constitute a separate corps within the Army.²⁹ Unhappily, the author has completely confused the separate corps status of Army JA's with the wholly different question of a separate JA promotion list. Unlike the Navy's lawyers, who were originally line officers, then designated as legal specialists but still wearing line insignia, and not fashioned into a JAG Corps on a par with the Navy's other staff corps—Medical, Dental, Supply, Civil Engineer, and Chaplains—until 1967,³⁰ the Army's lawyers had always been distinct from the line, first as the Bureau of Military Justice and then as the JAGD in successive acts from 1862.³¹ These Army lawyers had separate promotion within their own branch until after the end of the First World War.

In 1920, doctors, dentists, veterinarians, and chaplains were granted promotion by length of service, whereas judge advocates were placed on the single list where promotion was by seniority: an officer went up only as those ahead of him grew old or cold. Promotion was slow between the wars, and the JA's clamored for

²⁷ Legal review was first required by Article of War 46 of 1920. See S. REP. NO. 130, 64th Cong., 1st Sess. 66-68 (1916) (Testimony of General E.H. Crowder in support of proposal to permit partial approval of court-martial findings, in which decision to approve in part is couched throughout in terms of commander's determination, without any mention of his judge advocate).

²⁸ ORDER OF BATTLE OF U.S. LAND FORCES IN THE WORLD WAR, ZONE OF THE INTERIOR 602 (1949); ARMY REGISTER 1920, at 8.

²⁹ Pp. 26-27, 191.

³⁰ Act of Dec. 8, 1967, Pub. L. No. 90-179, 81 Stat. 545.

³¹ Act of July 17, 1862, ch. 201, §§ 5-6, 12 Stat. 597, 598; Act of July 28, 1866, ch. 299, § 14, 14 Stat. 332, 334; Act of June 23, 1874, ch. 458, § 2, 18 Stat. 201, 212; Act of Feb. 2, 1901, ch. 192, § 15, 31 Stat. 748, 751; Act of June 3, 1916, ch. 134, § 8, 39 Stat. 166, 169-70; Act of June 4, 1920, ch. 227, § 8, 41 Stat. 759, 765-66.

In general, line branches were the combatant arms, staff branches the supporting troops. For example, infantry, cavalry, and artillery were line; quartermasters, medical personnel, and judge advocates were staff.

new legislation granting them similar advances by length of service. Such a bill passed the Senate in 1939.³² Then, when the Elston bill became law in 1948, its provisions gave JA's a promotion list all their own.³³

By then such separate treatment was not only unnecessary, it was actually detrimental. Earlier, in 1940, all Army promotions had been put on the basis of length of service.³⁴ Even more significantly, between the time that the Elston bill was reported to the House and the time that it became law, the Officer Personnel Act of 1947 scrapped the old system entirely and substituted promotion by selection.³⁵ In the expanded post-World War II Army, where half of all officers were not college graduates, this would have given JA's, most of whom had seven years of education after high school, a great competitive advantage, except when they were competing with certified (*i.e.*, decorated) heroes. But by being placed on the separate list for which they were still clamoring, they were competing with—and eliminating—themselves. Consequently, the much-touted separate list placed Army lawyers at such a substantial disadvantage that before long they had to be rescued from their long-cherished heart's desire by special legislation which put them back on the single list.³⁶

None of the foregoing can be learned from the book under review.

4. One item verging on the fantastic is the assertion in the book that the harmless error doctrine was invented for courts-martial of the pre-Uniform Code era, when they were staffed by laymen. The author states:

The essence, if not the precise doctrine, of harmless error is deeply rooted in the traditional view of courts-martial; a military court was recognized as a function of amateur lawyers and was governed by rules written especially for them. If the result of such an affair was punishment of the guilty and release of the innocent, why should there be concern about whether some arcane rules of procedure were followed exactly? Given this attitude and the general lack of professional expertise by these amateurs, however well-trained the services tried to make them, errors were likely to be frequent, and a harmless error rule was a necessity.³⁷

³² S. 1993, 76th Cong., 1st Sess. (1939), which passed the Senate on April 20, 1939. See 84 CONG. REC. 4538-39 (1939).

³³ Act of June 24, 1948, ch. 625, § 247, 62 Stat. 604, 643.

³⁴ Act of June 13, 1940, ch. 344, 54 Stat. 379.

³⁵ Act of Aug. 7, 1947, ch. 512, 61 Stat. 795 (codified in scattered sections of 10 U.S.C.).

³⁶ Act of Aug. 21, 1954, ch. 783, 68 Stat. 758.

³⁷ P. 79.

Although the author does refer to the federal criminal harmless error statute, which was indeed anticipated by the 1916 Articles of War³⁸—not followed by the 1920 amendments, as he mistakenly declares³⁹—he completely fails to realize that the statutory concept, civilian as well as military, embraced what the Supreme Court called a “salutary policy . . . adopted . . . after long agitation under distinguished professional sponsorship.”⁴⁰ Thus, in actual fact, harmless error was a doctrine that the legal profession forced upon civilian appellate courts that were acting as “impregnable citadels of technicality,” rather than an invention of Prussian-minded militarists bent on sustaining the convictions of citizen soldiers.

But the author compounds his error when he fails to recognize that the Powell Committee,⁴¹ to whose report he devotes his entire Chapter 13, actually proposed a definition of harmless error under which even a mob-dominated trial such as was struck down in *Moore v. Dempsey*,⁴² would still have been sustained if only examination could show that a conviction would equally have followed a perfectly fair trial. Here are the terms of that Committee’s proposed Article 59:

An error of law . . . will not be considered to materially prejudice the substantial rights of an accused unless after consideration of the entire record it is affirmatively determined that a rehearing would probably produce a materially more favorable result for the accused.⁴³

Yet that proposal, which goes far beyond anything ever tolerated in American criminal law, civilian or military, is not even commented on by Dr. Generous—though in all fairness it must be acknowledged that, when proposed, it drew far too little indignation from any source.

Turning from the demonstrably wrong to the inadequately treated or entirely omitted, there are still significant blotches to be noticed.

5. The author mentions⁴⁴ another infamous Powell Committee proposal, its revised Article 67(a)(1), which would have enlarged the three-judge Court of Military Appeals to five by adding

³⁸ Article of War 37 (Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 619, 656); cf. Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181.

³⁹ P. 79.

⁴⁰ *Kotteakos v. United States*, 328 U.S. 750, 758-59 (1946).

⁴¹ The Powell Committee was a board of general officers appointed by the Secretary of the Army to examine the operation of the Uniform Code of Military Justice.

⁴² 261 U.S. 86 (1923).

⁴³ *Hearings, supra* note 15, at 781.

⁴⁴ P. 143.

two former judge advocates general.⁴⁵ But not until his next chapter does he characterize this for what it was, "the Army's court-packing scheme."⁴⁶ Here again, outside indignation was strangely absent, although in this instance perhaps no one was prepared to take seriously what was, most charitably viewed, a manifestation of paranoia.

6. The author's treatment of *O'Callahan v. Parker*,⁴⁷ which held that courts-martial trying undoubted soldiers lacked constitutional power to do so if their offenses were not "service-connected" is similarly diffused and incomplete.⁴⁸ The rationale underlying this newly invented doctrine was that military persons should not lose their fifth and sixth amendment rights to indictment by grand jury and trial by petit jury in cases not involving service-related charges. Dr. Generous does, a little later,⁴⁹ point out that this reasoning brushes aside the military exception expressly written into the fifth amendment. He attributes⁵⁰ to the *Toth* and *Covert* cases⁵¹ the principle that military jurisdiction rests on military status, whereas actually the status test was not formulated until later, in the *Singleton* and *Guagliardo* cases in 1960.⁵² And he quite fails to note that the author of the *O'Callahan* opinion had squarely asserted in *Whelchel v. McDonald*,⁵³ less than twenty years earlier, that those in the military service did not have, and never had, any right whatsoever to a jury trial.

A lawyer knowledgeable in the field would not have been guilty of those omissions. But probably only the most realistic observers would be prepared to assert what is in all likelihood the true if unpalatable explanation of *O'Callahan*—that it was simply another willful and result-oriented pronouncement by the Warren Court. Last year, however, a fractionalized Court, in *Gosa v. Mayden*,⁵⁴ refused to apply *O'Callahan* retroactively. Nevertheless, the *O'Callahan* decision still needs to be overruled as the aberration

⁴⁵ *Hearings*, *supra* note 15, at 781.

⁴⁶ P. 155.

⁴⁷ 395 U.S. 258 (1969).

⁴⁸ P. 183-85.

⁴⁹ P. 200.

⁵⁰ P. 185.

⁵¹ *Reid v. Covert*, 354 U.S. 1 (1957), *withdrawing* *Kinsella v. Krueger*, 351 U.S. 470 (1956), and *Reid v. Covert*, 351 U.S. 487 (1956); *Toth v. Quarles*, 350 U.S. 11 (1955).

⁵² *McElroy v. Guagliardo*, 361 U.S. 281, 287 (1960); *Kinsella v. Singleton*, 361 U.S. 234, 240-41, 243 (1960).

⁵³ 340 U.S. 122, 126-27 (1950).

⁵⁴ 413 U.S. 665 (1973).

that it was and is. A case in which review was recently granted provides a vehicle for that greatly needed result.⁵⁵

7. Dr. Generous's treatment of administrative discharges is also deficient, even though all of his Chapter 12 is devoted to that subject. He never mentions the problem of administrative discharges for officer misconduct, a subject extensively aired by Senator Ervin in hearings on two occasions.⁵⁶ And he is unaware that the present provisions governing administrative separations for such misconduct were actually enacted in 1960 during the pendency of a lawsuit that established the lack of any earlier statutory basis for such proceedings.⁵⁷

The foregoing represent the primary deficiencies in the Generous work; the list of errors could be substantially extended. Some of these derive not simply from lack of background, but from faulty techniques. Thus, the author too frequently relies on secondary rather than primary authorities. This fault mars his treatment of the court-martial controversy that followed the First World War—the text cites a law review article and the essentially inadequate biography of General Crowder, reflecting the author's failure to study adequately the lengthy 1919 hearings on the Ansell articles.⁵⁸ Similarly, for the trial of Henry Wirz, commandant of the notorious Confederate prison at Andersonville, he cites only two modern rehashes⁵⁹ rather than the verbatim record of trial contained in a congressional document.⁶⁰

The book thus relies on second-hand versions of vital source materials. The author's interview with this reviewer is garbled with respect to two matters,⁶¹ creating a reasonable doubt whether at least some of his discussions with others have been accurately rendered in all respects.

⁵⁵ *Schlesinger v. Councilman*, 481 F.2d 613 (10th Cir.), *cert. granted*, — U.S. — (1973) (No. 73-662, Dec. 17, 1973).

⁵⁶ *Military Justice, Joint Hearings Before the Senate Comms. on the Judiciary and on Armed Services on S. 745 and Sundry Other Bills*, 89th Cong., 2d Sess. (1966); *Hearings*, *supra* note 15.

⁵⁷ See Act of July 12, 1960, Pub. L. No. 86-616, 74 Stat. 386, *as amended*, 10 U.S.C. §§ 3791-97, 8791-97 (1970). The case of *Ledford v. Brucker* had been filed on Dec. 18, 1959. For the pleadings and appeal papers therein (also *sub nom.* *Ledford v. Curran*, 366 U.S. 948 (1961)), see *Hearings*, *supra* note 15, at 635-735. See also *Beard v. Stahr*, 370 U.S. 41 (1962), *vacating* 200 F. Supp. 766 (D.D.C. 1961). Both officers concerned were ultimately given clean retirements.

⁵⁸ *Hearings on Establishment of Military Justice*, *supra* note 23.

⁵⁹ P. 226 n.2.

⁶⁰ H.R. EXEC. Doc. No. 23, 40th Cong., 2d Sess. (1867).

⁶¹ Pp. 178, 225 n.45.

The bibliography fails to show examination of the service journals, such as the United States Naval Institute *Proceedings* and *Army* magazine and its predecessors; these all contained valuable treatments and significant points of view on military discipline and justice. Instead, the authorities listed include what doubtless is required of doctoral candidates, the enumeration of statutes and law reports, indispensable sources to be sure, but hardly appropriate for continued inclusion after the thesis is published. Furthermore, reference is made more difficult for the reader by the absence of any table of cases, and by the manifestation of that current disease of publishers, the substitution of backnotes for footnotes. Inconvenience to the user of the book is compounded in this instance since the backnotes do not use short titles but refer only to the numbers assigned to the several items in the bibliography. Thus, the reader seeking the author's documentation for a given statement is sent off on a species of paper-chase.

It would be unfair to criticize Dr. Generous unduly for the faults detailed above, since so many of them reflect not his own very agreeable and outgoing personality and obvious industry, but primarily the pitfalls that await the layman who ventures to treat a particularly complex field and system of law. In addition, the author's credentials are not impressive on any footing; even the publisher's dust-jacket, a medium not normally prone to understatement, can only venture this: "A professional historian who as a commissioned naval officer sat on several courts-martial, Dr. Generous now teaches at the Choate School in Wallingford, Connecticut."

No, the blame for the present badly flawed work rests with the cognizant graduate faculty, who conferred upon it the accolade of the highest earned academic degree. Whether they were unaware of its manifold inaccuracies and shortcomings because of unfamiliarity with the subject-matter, whether they were willing to accept it because some at least of its conclusions accorded with the anti-militarism that now infects so many universities, it is unnecessary to inquire. The brutal fact is that when a thesis as deficient as this one is shown to be still passes muster, its stigma rests on the teachers who approved the work, not on the earnest student who simply tendered it.

*Frederick Bernays Wiener**

* AUTHOR OF BRIEFING AND ARGUING FEDERAL APPEALS (1961); CIVILIANS UNDER MILITARY JUSTICE (1967). Colonel, Army of the United States, Retired. Late of the District of Columbia Bar.