Louisiana Law Review

Volume 81
Number 3 *Spring 2021*

Article 10

4-29-2021

# Frederick Bernays Wiener: Master of Advocacy

Jed S. Rakoff

# Frederick Bernays Wiener: Master of Advocacy

*Jed S. Rakoff*[*]

*Review of Paul R. Baier,* Written in Water: An Experiment in Legal Biography

*Editor's Note: Judge Jed Rakoff of the Southern District of New York contributes to the LSU Paul M. Hebert Law Center's heralding of Professor Baier's biography of Frederick Bernays Wiener with this perceptive review of Professor Baier's magnum opus*—Written in Water: An Experiment in Legal Biography *(Twelve Tables Press 2020). Judge Rakoff and Professor Baier were classmates in the Harvard Law School class of 1969. Professor Baier moderated the 50th anniversary symposium, featuring Judge Rakoff. Countless LSU Law Center students, professors, and members of the Louisiana Law Review have indulged Professor Baier's tireless reference to Colonel Wiener. The Board of Editors of Volume 81 of the Louisiana Law Review is proud to publish Judge Rakoff's review of Professor Baier's captivating experiment in legal biography.*

Courtroom dramas dominate much of television and internet programming, yet the great trial and appellate lawyers of real life are very soon forgotten. Please name a great trial lawyer of the past whose name is not Clarence Darrow. Please identify a great but deceased appellate advocate whose name is not Daniel Webster. If we lawyers come up empty-handed at these challenges, we can hardly blame the general public for asking: "Clarence and Daniel who?"

Professor Paul R. Baier of the Louisiana State University Paul M. Hebert Law Center (helped and inspired in this respect by the late Jacob A. Stein of the D.C. Bar) is intent on rescuing from such obscurity a brilliant and immensely talented appellate advocate named Frederick Bernays Wiener. To this end, Baier has written an absorbing, original, and altogether delightful biography entitled *Written in Water* (Twelve Tables Press 2020). "Colonel" Wiener (among other things, he served as a military lawyer) himself suggested this title when he started composing his never-completed autobiography. But Wiener in turn borrowed it from a remark, by Harvard Law Professor Henry Hart, that the names of legal

---


* U.S. District Judge, Southern District of New York

practitioners are, in effect, "written in water," as they soon evaporate without a trace. (This is all too true, even though many practitioners might agree with me that the life of the law, to extrapolate on Holmes' famous remark, is neither logic nor experience, but the labor and ingenuity of the lawyers who make it work.[1])

Born in New York in 1906 to parents of distinguished lineage (his mother's granduncle was Sigmund Freud) but modest means, "Fritz" Wiener made it, first, to Brown University, and then to Harvard Law School, where, like many others, he fell under the spell of Felix Frankfurter. Thereafter, Wiener carried on a lifelong correspondence with Frankfurter, telling examples of which are found in Baier's book. What the two shared, as the letters make plain, was a devotion to hard work and accuracy—but also an increasingly narrow view of the proper role of the judiciary, culminating in a disdain for the Warren Court.

Yet when he graduated from law school, Wiener (like Frankfurter) was at first a "New Deal Democrat." After a brief sojourn in private practice, Wiener joined the Public Works Administration in 1933. Just two years later, however, Wiener, foreseeing that war was brewing, joined the Army's Judge Advocate General Corps. There, he not only handled with distinction the cases to which he was assigned, but also so thoroughly immersed himself in military law that Justice William Douglas (with whom Wiener shared very little in common) later praised him as "our foremost military law authority."

After the war, Wiener joined the Office of the Solicitor General, where his great talents in both written and oral advocacy were quickly recognized, leading to his being frequently chosen to argue the government's case before the Supreme Court. Overall, if one includes his later work in private practice, Wiener argued no fewer than 38 cases before the Supreme Court. And in most cases, he won.

It was Wiener's unusual combination of Supreme Court experience and military law expertise that led to perhaps his greatest victory, in the case of *Reid v. Covert II*, 354 U.S. 1 (1957). Not one, but two wives had in short order murdered their army husbands while resident in army bases in, respectively, the U.K. and Japan. Pursuant to agreements with those nations that granted U.S. military jurisdiction over crimes committed by U.S. citizens on such bases, the two wives were tried before military tribunals and duly convicted by the presiding judges. Wiener got involved in their representation after they each petitioned in U.S. federal courts for habeas relief on the ground that the jury trial guarantees and other protections of the Fifth and Sixth Amendments applied to all U.S. citizens,

1. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

even if residing on a foreign base, unless they were themselves part of the military.

The case finally reached the Supreme Court in 1955. It was argued by Wiener for the petitioners, and, for the government, by Marvin Frankel (later a Columbia Law Professor and thereafter a very distinguished judge of my court). The government prevailed, in an opinion handed down in 1956: *Reid v. Covert I*, 351 U.S. 470. The vote was 5-3, with the ninth Justice, Frankfurter (with whom Wiener was still in regular contact) issuing neither a concurrence nor a dissent, but rather a "reservation" inviting reconsideration. Doubtless encouraged by this unusual maneuver, Wiener promptly moved for re-argument, and his motion was granted.

Wiener's peroration on re-argument, reprinted in full in Baier's book, can only be called masterful. The government, now represented by the solicitor general himself, Lee Rankin, not only argued, as before, that the case was simply about enforcing valid agreements entered into with foreign sovereigns, but also argued more broadly that the historic freedom from judicial intervention accorded to the U.S. military and the obvious need for the army to maintain order and discipline on a foreign base reasonably included giving the army the power to try U.S. citizens for crimes committed on such bases. With precision and learning, Wiener dissected and refuted each of these arguments; but then, in his final words, he sought to persuade the Justices both to feel sympathy for the defendants (murderers though they might be!) and to appreciate the importance of broader issues involved. It was not just that the two wives did not remotely receive the kind of fair trial that they would have gotten in any regular U.S. court. It was also that they did not enjoy the rights the Constitution guarantees every civilian in every federal criminal case, and it was this failing that was worst of all. For, Wiener argued, the Constitution protects American citizens not only against oppression but also against "the expediency of the passing hour," and to deny that protection in the name of the expediency of maintaining order on a foreign military base would ultimately open the door to oppression itself. Addressing the Justices politely, but almost as equals, Wiener urged them to "keep the faith" by recognizing the role the Constitution thus plays in guaranteeing fundamental rights against the practical conveniences of the moment.

Wiener won: *Reid v. Covert II,* 354 U.S. 1 (1957). The vote was 6-2 (with a new Justice, Charles Whittaker, recusing himself). In effect, Wiener had persuaded several Justices to change their minds from the positions they had adopted only a few months earlier (although Justices Frankfurter and Harlan somewhat hedged their bets by limiting their concurrence to capital cases). Wiener thus became the first and only

lawyer ever to convince the Supreme Court to reverse on re-argument a decision it had already handed down in the very same case.

Wiener was also a prolific writer, authoring dozens of articles and several books. The two of his books that most remain of current value are the two that reflect the same linkage of talent and expertise that enabled him to prevail in *Reid v. Covert II*. The first, *Civilians Under Military Justice* (1968), was immediately recognized as the definitive treatise on the thorny relation between military law and civilian status. But it was also, as typical of Wiener's writing, witty and delightful. The eminent Oxford Professor of Jurisprudence Arthur L. Goodhart wrote at the time of its publication: "This must be one of the most enjoyable books ever written on legal history."

Of more general interest, however, is Wiener's *Effective Appellate Advocacy*, for even though it was first published in 1950, most of its prescriptions and admonitions remain as true and valuable today as when Wiener first voiced them, in his own inimitable style. For example: "An advocate must be fair and accurate: but he has no business being impartial. An impartial advocate not only fails in his duty, he fails his function as well."[2] Or again: "The four outstanding don'ts for brief-writers, in my judgment, are (a) inexcusable inaccuracy; (b) unsupported hyperbole; (c) unwarranted screaming; and (d) personalities and scandalous matter."[3] Or still further: "Once you are up on your feet, you are on your own, and there just isn't anyone who can help you if you aren't prepared."[4] And finally, my favorite: "[In responding to a judge's questions, maintain an] attitude of respectful intellectual equality."[5]

Wiener's last victory in the Supreme Court is also worthy of mention (and not only because of this reviewer's indirect connection to the case). The case is *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Mr. Irvis was the majority leader of the Pennsylvania House of Representatives. He was also an African-American. One day, a colleague invited Irvis to join him for lunch and a drink at the colleague's favorite club, Moose Lodge No. 107 in Harrisburg. But the staff refused to serve him because the Loyal Order of Moose, as a matter of national policy, forbade African-Americans not only from being members but also from using (even as guests of members) the Moose lodges' facilities, including their restaurants and bars. However, pursuant to the Twenty-First Amendment repealing Prohibition, Pennsylvania had not only made the sale of liquor a state-run

2. FREDERICK BERNAYS WIENER, EFFECTIVE APPELLATE ADVOCACY 10 (Christopher T. Lutz & William Pannill eds., 2004).

3. *Id.* at 149.

4. *Id.* at 195.

5. *Id.* at 182.

monopoly but also had regulated in huge detail the terms on which a restaurant or bar could receive a liquor license. Accordingly, Irvis filed a complaint in the federal court for the Middle District of Pennsylvania, seeking to require Pennsylvania to revoke the lodge's liquor license on the ground, inter alia, that the issuance of the license in the context of Pennsylvania's pervasive regulation of this area constituted state action in violation of the Fourteenth Amendment's prohibitions against racial discrimination.

In accordance with then-existing federal judicial procedures regarding constitutional challenges, the case was assigned to a three-judge federal court comprised of two district judges and a circuit judge. The Circuit Judge was the Honorable Abraham L. Freedman, and I was his law clerk assigned to the case. Writing for the unanimous panel, Judge Freedman wrote that, even though the Moose Lodge might limit its membership however it chose, when, as here, it sought to operate as in effect a restaurant and bar, it could not qualify for a liquor license from a state-run monopoly if it discriminated in violation of the Fourteenth Amendment.[6]

From there, the case went directly to the Supreme Court, and the Moose hired Wiener as their appellate attorney. True to his successful method of framing the issues in terms of their broader implications, Wiener argued that the real issue in this case was "whether anything in the Constitution of the United States requires the virtual destruction of private clubs in this country," virtually all of which serve liquor. The answer, he said, was an emphatic "no," not only because the Fourteenth Amendment was limited to far more direct state action than any here involved, but also because the First Amendment right of association would mean nothing if it did not allow groups of private citizens to choose with whom they wished to congregate over drinks or meals.

The Supreme Court agreed, 6-3. Biographer Baier, a huge fan of Wiener's, nonetheless voices here his respectful disagreement with the outcome. And so do I. But still, one cannot help but be impressed by the skill and forcefulness of Wiener's advocacy in this case, much of it set forth verbatim in Baier's book.

In short, Wiener is a worthy subject of a biography. But author Baier goes well beyond what might expect from a conventional biographer. Instead, he takes the reader through the very process by which he discovered and evaluated the frequently obscure materials on which he based the biography, while ingeniously weaving these accounts of how the biographer did his job into the fabric of Wiener's life from whence these

6. *See* Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970).

materials derived. All of this is done, moreover, with great wit and panache.

Now already forgotten by most, Wiener was both a forceful advocate and influential author whose life and works are worthy of a biography. Professor Baier, however, has more than done him justice, for this is a delightful and insightful book that should be of interest, and entertainment, to any lawyer who wishes both to discover the past and to learn from it.