

May 1968

Book Review of Civilians Under Military Justice: The British Practice Since 1689, Especially in North America

Robert E. Quinn

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Repository Citation

Robert E. Quinn, *Book Review of Civilians Under Military Justice: The British Practice Since 1689, Especially in North America*, 9 Wm. & Mary L. Rev. 1203 (1968), <https://scholarship.law.wm.edu/wmlr/vol9/iss4/26>

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not also in fairness be added the questions whether the author and his diligent and effective co-counsel were parties to the opening of a "Pandora's Box" and whether, in their zeal, inordinate emphasis was placed upon the alleged unrestricted "right" to representation by counsel of indigent convicts, to the exclusion of considerations of extraordinary circumstances requiring such representation, of the questions of the guilt of such convicts of the crimes of which they were properly convicted by juries and of the rights of the public whose rights they transgressed in their malevolent acts.

GEORGE D. HORNING, JR.*

CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689, ESPECIALLY IN NORTH AMERICA. BY FREDERICK BERNAYS WIENER.¹ Chicago: The University of Chicago Press, 1967. Pp. 346. \$11.50.

Advance review copies of *Civilians Under Military Justice* were hardly distributed to prospective reviewers when the book was cited in the United States District Court for the District of Columbia in support of an application for writ of habeas corpus by a civilian merchant seaman held for trial for murder of a fellow seaman by a Marine general court-martial in South Vietnam.² The petitioner's counsel, however, relied less upon the textual material than upon the monumental reputation of the author, Frederick Bernays Wiener.

I know Mr. Wiener as a friend and as a practitioner. I have the highest regard for him in both capacities; but I have long disagreed with his opinion that the Supreme Court of the United States properly concluded, at a rehearing in which it reversed its original decision, that civilians accompanying the armed forces in foreign countries in time of peace are not constitutionally subject to courts-martial jurisdiction.³ It has been said that history is interpretation. Mr. Wiener insists in the Introduction that "the ultimate result in the United States reflects with surprising fidelity what had long been the approved practice in the British Service."⁴ Nothing in his materials has altered my conviction

* Professor of Law, The American University, Washington, D. C.

1. Member of the Bar of the District of Columbia.

2. *Latney v. Ignatius*, Habeas Corpus No. 539-67 (D.D.C. Jan. 15, 1968).

3. *Reid v. Covert*, 354 U.S. 1 (1957), *rev'g* 351 U.S. 487 (1956).

4. WIENER, CIVILIANS UNDER MILITARY JUSTICE 4 (1967).

that he and the Supreme Court in its reversal were wrong, especially since neither considered the unique circumstance of an armed force stationed in a foreign country in time of peace. In Chapter III, Mr. Wiener impliedly acknowledges that the British practice never contemplated that circumstance when he observes that British soldiers could not be tried by court-martial on British soil, except where no form of civil judicature was asserted to be in force "and except in foreign parts (where of course such soldiers would not be stationed except in time of war)." ⁵ This, however, is not a review of our differences of opinion, but a review of *Civilians Under Military Justice* as practiced by the British since the first Mutiny Act in 1689.

Civilians Under Military Justice is a slim volume, containing less than two hundred and fifty pages of text, but it reflects a staggering amount of research. The bibliography of materials consulted and cited covers twenty-two pages, literally running from A (Abbott, *New York in the American Revolution*, 1929), to Z (Zouche, *Law Between Nations*, 1650). In between is a mountain of correspondence, including sixteen volumes of the Judge Advocate General's Letter Books, and an exhaustive collection of general orders, unit order books and newspapers, as well as the expected court-martial records. Even more astonishing than the scope and variety of the materials is that all of it is so neatly arranged and so adroitly discussed. The result is no sterile catalogue of courts-martial, but a first-rate kaleidoscope of British life in foreign lands. Here and there the colorful patterns change to a dull gray as Mr. Wiener falls into sarcasms and assumptions that are unworthy of his scholarship and literary skills. For example, commenting on the court-martial of a Canadian former soldier during the *Règne Militaire* of the British in the period from 1760-1764, he observes that the punishment of death by hanging, and then to be "Hung in Irons on a Jibett" at the scene of the crime, "doubtless brought home to the inhabitants of occupied New France, better than any other, a full realization that the common law of England was indeed the perfection of reason." ⁶ At other places, there are puny puns like the reference to the recidivism of Patrick Halfpenny in these terms: "Some time after Evacuation Day, Patrick turned up again, like the bad Halfpenny that he was." ⁷ Neither the

5. *Id.* at 65 (Emphasis supplied).

6. *Id.* at 45.

7. *Id.* at 138.

sarcasms nor the puns detract from the general readability of the text; in fact, some readers might even like them.

As slim as *Civilians Under Military Justice* is, and as skillfully as Mr. Wiener has been in enlivening what is basically a serious subject, the book cannot be read in a single sitting. There is too much thinking to do. First, the reader will often want to return to parts read earlier to compare and evaluate. As indicated at the outset, there is plenty of room to reach a different interpretation from Mr. Wiener, but the important thing is that the material is there. Secondly, the reader is almost compelled to pause and reflect on unanswered questions of principle and politics that lurk in the background of seemingly routine cases. Re-counting the court-martial of John McLearen and William Rogers of the 11th Regiment of Foot, on the Island of Minorca, in 1765, along with Mary Rogers, William's wife, for the robbery and murder of a civilian, Mr. Wiener writes that the reaction of Charles Gould, the Judge Advocate General when the case reached him in England, "was predictable"—he ruled as he had in earlier matters, that the court-martial lacked jurisdiction to try the woman.⁸ Accordingly, Gould wrote to the Secretary of State, the Earl of Halifax, to recommend a royal pardon. Yet, curiously, he proposed that the pardon pass through his hands "as upon a private Solicitation, rather than . . . as the King's Commands . . . officially."⁹ Gould was the first lawyer Judge Advocate General. As such, we would expect him to adhere strictly to the official forms of law. Why then did he have recourse to a private method of executing royal writ? Two years before, in another murder case arising in Canada, he had also concluded that the court-martial had no jurisdiction. On this occasion he wrote privately to the Military Governor, General James Murray, to advise him of the illegality of the proceedings. However, he attributed the private form of his official action to the then Secretary of State, Lord Egremont, who, he said, "preferred its passing in a private manner . . . rather than Signifying the King's Commands from his Office."¹⁰ Why did the Secretary of State's suggestion in the earlier Canadian case become the apparent precedent for Gould's own decision in the Minorca case? A closing passage in the letter to General Murray invites the reader's speculation and a pause for research into English History. "Although there has been no Substantial injustice done in this

8. *Id.* at 75.

9. *Id.* at 76.

10. *Id.* at 56.

case," wrote Gould, "you are so well apprised, how many there are in this Kingdom, who view the Military Arm with a jealous Eye and are ever ready to take advantage of the least mistaken excess of power."¹¹

Mr. Wiener's book is concerned with the British court-martial practice. Spotted throughout, however, are parallel text and footnote comments on the American system. One of the Appendices is a ten-page discussion of the "Rise and Fall" of American military jurisdiction over civilians. The interpositions are not only appropriate, but most welcome. Unfortunately, and strangely because Mr. Wiener is indeed one of the leading scholars of American law, there are some overly broad statements which can be misleading to all but those intimately connected with military law. The two egregious instances merit mention. As to the first, some footnote remarks¹² give the distinct impression that two decisions by the Supreme Court of the United States, *United States v. Cooke*¹³ and *Toth v. Quarles*,¹⁴ establish that a military person properly separated from the service cannot thereafter be tried by court-martial for an offense committed during his period of service, even though he returns to active duty as a regular member of the armed forces. The cases did not stand for this proposition; *Cooke* involved only the effect of a discharge under existing statutes and whether that effect could be changed by a service regulation; *Toth* dealt with a person who had severed all ties with the military. As construed by the United States Court of Military Appeals, Article 3(a), Uniform Code of Military Justice¹⁵ subjects persons who reenter the military service to trial by court-martial for an offense committed during the previous period of service, if the offense is punishable by confinement of five years or more and not otherwise triable in regular federal or state courts.¹⁶ The second oversimplification is the unqualified text statement that under Article 17 of the Uniform Code,¹⁷ "jurisdictional barriers between the several American armed forces were finally eliminated" so that a court-martial of one armed force can try an accused who is a member of another armed force.¹⁸ In fact, other than between the Marine Corps and the Navy, reciprocal jurisdiction is the exception, not the rule. There are

11. *Id.*

12. *Id.* at 33.

13. 336 U.S. 210 (1957).

14. 350 U.S. 11 (1955).

15. 10 U.S.C. § 803.

16. *United States v. Winton*, 15 USCMA 222, 35 CMR 194 (1965).

17. 10 U.S.C. § 817.

18. WIENER at 72.

strict conditions precedent that must be satisfied before a court-martial convened by a commander of one force, such as the Army, can try a member of a different force, such as the Navy.¹⁹

Civilians Under Military Justice is a most worthy addition to the literature on military law. I enjoyed reading it and, except for one thing, would unhesitatingly recommend it as a worthwhile addition to the reader's library. The thing that makes me stop short of the latter is the price. I know the cost of printing is astronomical; and I don't pretend to know how to price a work of art, but \$11.50 impresses me as being just too much. If the excellent color photograph of Thomas Gainsborough's portrait of Sir Charles Gould, which appears as the frontispiece, contributed to the cost, it would, in my view, have been immeasurably better to have left it out. The present price is bound to turn away many potential readers; I urge them to borrow the book from the Library.

ROBERT E. QUINN*

PSYCHOANALYSIS, PSYCHIATRY AND THE LAW. BY JAY KATZ, JOSEPH GOLDSTEIN, AND ALAN M. DERSHOWITZ. New York: Free Press, 1967. Pp. 785.

This book, an imposing work of some eight hundred rather large pages, is broken down into two major sections (referred to by the authors as chapters). Chapter One, entitled *Psychoanalysis and Law—Theories of Man*, attempts to explore the relationships between traditional psychoanalytic theory and certain fundamental legal issues. The second chapter, *Law and Psychiatry*, undertakes a fairly comprehensive survey of laws involving mental disorder, with reference to such crucial issues as involuntary commitment, definitions of insanity and incompetence, and relationships between the courts and psychiatric practitioners. The format of Chapter One consists mainly of selections taken from standard psychoanalytic sources followed by notes of illustrative legal case material and comments by judicial and psychiatric authorities. Chapter Two is built around a number of selected legal cases, each covered rather thoroughly, followed by related court decisions and comments. In most instances, the authors allow their material to speak

19. *United States v. Houston*, 17 USCMA 280, 38 CMR 78 (1967); *United States v. Hooper*, 5 USCMA 391, 18 CMR 15 (1955).

* Chief Judge, United States Court of Military Appeals.