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Reassessing the Ahistorical Judicial Use of William Winthrop and Frederick Bernays Wiener

Joshua Kastenber*

Federal and state appellate courts have cited to William Winthrop (1831-1899) and Frederick Bernays Wiener (1906-1996) on questions of military law including the executive branch's power to court-martial retired service-members and the jurisdictional authority of Article III courts to review courts-martial convictions. *See* 10 U.S.C. § 802; *Larabee v. Braithaite*, 502 F. Supp. 322 (DC DC, 2020); *Ortiz v. United States*, 138 S.Ct 2165 (2018); *see also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004)(Scalia J., dissenting); *Hamdan v. Rumsfeld*, 548 U.S. 557 , 679 (2006) (Thomas, J., concurring). Given the judiciary's use of both scholars, they can fairly be classified as two of the most utilized military law sources. Winthrop, a Yale Law School graduate and Civil War veteran, has been titled by the Supreme Court as "the Blackstone of Military Law." *See* *Burns v. Wilson*, 346 U.S. 844, 849 f.n. 1 (1953) (Frankfurter, J., dissenting); *Reid v. Covert*, 320 U.S. 1, 20 f.n. 38 (1957). Wiener does not enjoy a similar moniker, but nonetheless has been considered as a legal-scholar who is "owed a debt by all serious military legal historians." Captain Michael J. Kelleher and Daniel Trimble, [An Oral History of Frederick Bernays Wiener](#), January 28-30, 1987. Ironically, Wiener opposed the creation of a court of military appeals in his testimony to the United States Senate in 1949, and yet the military courts of appeals consider him a viable source of law. Hearings on S. 857 and H.R. 4080, Before a Subcommittee of the Senate Committee on Armed Servivces, 81 Cong. 1st Sess. (1949), 128-140 (statements of Wiener). This brief article is written with the belief that judges who invoke the writings of historic persons as well as historic events, as a matter of scholarly, if not intellectual, integrity should treat their subjects candidly and "take them as a whole." *See, e.g.*, David McGowan, *Ethos in Law and History: Alexander Hamilton, the Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 758 (2000).

In spite of Winthrop's and Wiener's subject-matter prominence, one can search in vain to ascertain whether the nation's judges have actually articulated any historic context for their scholarly work, or questioned their motivations in producing their influential works. In 1955 Homer Carey Hockett a once-prominent historian, noted that "negative criticism" is an important tool which requires a proponent of a source to discover every possible reason for doubting the

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source's statement. HOMER CAREY HOCKETT, [THE CRITICAL METHOD IN HISTORICAL RESEARCH AND WRITING](#), 43-44(1955). The judiciary has long since abandoned even employing a scintilla of this tool to Winthrop or Wiener. Perhaps the judicial tendency toward an ahistorical presentation of either scholar might be understandable if citations to them were to have only the most limited effect on the law, but this is not the case. Questions of presidential power over the nation's citizenry, even when limited to service-members subject to the Uniform Code of Military Justice (UCMJ) are of a constitutional nature involving, *inter alia*, the separation of powers and, who is entitled to the full protections of the Bill of Rights. Enacted into law in 1950, the Uniform Code of Military Justice is found in 10 U.S. Chap. 47§ 801 to § 946a. Art. 146a. As a result of the intentional brevity of this paper, the author basis his analysis of the separation of powers that from the Nation's founding the Framers split between authorities between the branches of the government as well as enabled legislative investigatory powers to prevent tyranny. *See, e.g.*, The Federalist No. 51 (James Madison); *see also* Buckley v. Valeo, 424 U.S. 1, 120 (1976); McGrain v. Daugherty, 273 U.S. 135 (1927)(upholding that the power to investigate is a part of the congressional authority to legislate). On the military courts use of Wiener for defining the application of the Bill of Rights to service-members, *see e.g.*, United States v. Clardy, 13 M.J. 308, 312 (CMA 1982). Wiener was not alone in convincing Congress that the extension of military jurisdiction was not limited by breaks in service as Edmund Morgan, a former judge advocate and significant influence in the formation of the had a similar view. *Id.*

Both men had impressive credentials and given their profound contributions to the development of military law, it is unsurprising that they continue to be cited to the present day. Yet, United States military law is more than a study of court-martial procedure, the law of armed conflict, or the ability of the government to field an armed force. It is also a study of the relationship between the commander in chief and the nation's citizenry regardless of whether or not citizens are directly subject to the UCMJ. In this regard, both Wiener and Winthrop, in addition to providing commentary and analysis on the law, advocated for a powerful executive in a manner that can be considered deleterious to other constitutional principles.

The apex of Winthrop's military law scholarship is found in *Military Law and Precedents*, a two-volume book, first published in 1896. WILLIAM WINTHROP, [MILITARY LAW AND](#)

[PRECEDENTS](#) (1896). However, this work was a continuation of both his *Military Law*, first published in 1886, and his authorship of the first *Digest of Opinions of the Judge Advocate General of the Army*, first published in 1865. WILLIAM WINTHROP, *MILITARY LAW* (1886); and WILLIAM WINTHROP, [DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY](#) (1865). As in the case of *Military Law and Precedents*, federal courts have cited to his other two works. For a sampling of judicial citations to *Military Law*, see *Smith v. Whitney*, 116 U.S. 167 (1886); *In re Grimley*, 137 U.S. 147 (1890); *De Arnaud v. United States*, 26 Cl. Ct. 370 (Ct. Cl. 1891). For a sampling of judicial citation to the *Digest of Opinions*, see *U.S. v. Landers*, 92 U.S. 77 (1875); *Grimley v. U.S.*, 32 Ct. Cl. 285 (Ct. Cl. 1897); *Vanderslice v. U.S.*, 19 Ct. Cl. 480 (Cl. Ct. 1884). Although Wiener authored well over a dozen law reviews and books, his most cited work in regard to military law is his two-part law review article, *Courts-Martial and the Bill of Rights: The Original Practice*. See e.g., Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice, Vol I*, 72 HARV. L. REV. 1-49 (1958); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice, Vol II*, 72 HARV. L. REV. 266-308 (1958). For a sampling of judicial citations to this article, see, *Loving v. United States*, 517 U.S. 748 (1996); *Middendorf v. Henry*, 425 U.S. (1976); *Allen v. Van Cantfort*, 436 F.2d 625 (10th Cir. 1971). However prominent the two scholars are, it should at least be noted that Winthrop minimized both the importance of the separation of powers and the constitutional principle of containing the military's jurisdiction over the smallest number of citizens and with a limited subject matter jurisdiction until he was personally confronted with his own position. And, equally, if not more importantly, Wiener unapologetically defended one of the more heinous racist governmental programs in United States history, the internment of United States citizens of Japanese descent. Both of these matters are discussed below.

After September 11, 2001, a renewed interest in executive branch authority occurred following President George W. Bush [proclamation](#) that the United States was in a war against "terror" and then [ordered](#) the military to conduct operations against al-Qaeda and the Taliban across the globe. As challenges to the federal government's anti-terrorism programs arose in the courts, federal judges reached to both Winthrop and Wiener to buttress the efficacy of their rulings. See e.g., *Ali Hamza Ahmad Suliman Al Bahlul v. United States*, 840 F.3d 757, 761-62 (Ct. App. D.C. 2016) (citing Winthrop for the proposition "that the (military) commission is

simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war. *Id.*, citing to Winthrop, [Military Law and Precedents](#), 831). But just as one can search in vain for contextual statements from the judiciary on either scholar, it appears that the nation's judges accepted their writings as accurate to the point that their scholarship becomes a matter of faith. Whether Winthrop or Wiener remains viable for the purpose of clarifying a commander in chief's authority over the military, particularly in regard to military justice is a reasonable question to ask in an age where racial disparities in military justice have been found to exist; where jurisdiction over retirees poses a significant yet unanswered question on the constitutional extent of commander in chief authority over citizens; or where a president seeks to influence a court-martial and appeals to an end result. *See, e.g.*, *United States v. Bergdahl*, 80 M.J. 230 (C.A.A.F. 2020)(presidential authority to influence courts-martial); For military jurisdiction over retired service-members, *see* *Larrabee v. Braithwaite*, 502 F.Supp. 3d 322 (DC DC 2020); *United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021). On the continuation of racial disparities in the military, *see* General Accountability Office, [Military Justice: DoD and Coast Guard Need to Improve Their Servicemembers Were More Likely to Be Subjects of Recorded Investigations and Tried in General and Special Courts-Martial](#); *see also* Air Force Inspector General, [Report of Racial Inquiry, Independent Racial Disparity Review](#), December 2020 (finding that enlisted black service members were 72% more likely than enlisted white service members to receive UCMJ, Article 15, commanding officer's non-judicial punishment (NJP), and 57% more likely than white service members to face courts-martial.)

I. William Winthrop: Unbridled Executive Power and the Defeat of Insurrection

Winthrop, did not set out to be a professional military officer. A descendant of John Winthrop and a nephew of Speaker of the House Robert Charles Winthrop as well as a nephew of Yale's president Timothy Dwight Woolsey, Winthrop came from privilege. After graduating from Yale and a further year of legal study at Harvard's law school, Winthrop represented "fugitive slaves" in Boston, and then moved to the Minnesota Territory where he assisted in writing that state's constitution. JOSHUA E. KASTENBERG, [THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP](#), 39-68 (2009). When South Carolina seceded from the Union in 1861, he joined the Seventh New York Volunteers, and then was commissioned into the First

United States Sharpshooters. *Id.* Winthrop saw the horrors of war in battles on the Peninsula Campaign of 1862, and then at Second Bull Run, Antietam, and Fredericksburg. George S. Prugh, *Colonel William Winthrop: The Tradition of the Military Lawyer*, 42 A.B.A. J, 126-129 (1956). After being shot in the lung at this last battle he became a judge advocate commissioned at the rank of major and he remained in the Army until his retirement in 1895. He had a role in the military prosecutions of civilians including a member of Congress and nominally of Mary Surratt and the other conspirators.

There is much to commend to Winthrop's life and scholarship, both in his contributions to professionalizing the army, as well as in his non-military work which included his pre-Civil War efforts to abolish slavery. And, he worked to create equal treatment under the military law for persons regardless of race. *Id.* But he also was an advocate for the extension of executive branch authority in several areas. For instance, he referred to the Posse Comitatus Act an "embarrassment" to the presidency and advised his War Department contemporaries as well as future generations of military officers that the act was unconstitutional. WINTHROP, MILITARY LAW AND PRECEDENTS, at 866-867.

The Posse Comitatus Act was intended to curb the use of the army as a domestic police force as a response to the extension of military power in the Civil War and Reconstruction, but it also reflected the Framers' standing army fears. One might speculate that Winthrop sided with President Grover Cleveland's use of the army to end the Pullman Railroad Strike in 1894 because he believed that the strikers – largely composed of immigrants and "second-generation Americans" - represented political and economic ideologies that he, like many elites, insisted were both antithetical and dangerous to the Republic. *See* 20 Stat. 152 (1878). On Cleveland's basis for ordering federal military forces, *see*, Steven I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE. L. J., 149, 185 (2004); Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 90-91 (2003). But neither the Pullman Strike nor the previous Haymarket Riot were insurrections against the government. *See, e.g.*, Troy Rondinone, *Guarding the Switch: Cultivating Nationalism during the Pullman Strike*, 8 J. OF THE GILDED AGE AND PROGRESSIVE ERA, 83-109 (2009).

Another aspect of Winthrop's view of presidential power had to do with the authority of a president to order – or convene – a court-martial against a person subject to military jurisdiction. Under the current UCMJ, a president may convene a court-martial. 10 U.S. Code § 822(a)(1). For the history of presidential authority in the UCMJ, *see* Act Aug. 10, 1956, ch 1041, § 1, 70A Stat. 44. This was not true under the original Articles of War, and it was not until 1830 that Congress passed legislation enabling a president to convene a general court-martial, but only in instances when a commanding general or colonel accused another general officer of violating the Articles of War, and the commanding general or colonel would have also served as the convening authority. *See* CHAP. CLXXIX – An Act to amend the sixty-fifth article of the first section of an act, entitled “An act for establishing rules and articles for the government of the armies of the United States,” passed the Tenth of April, 1806. In its plain language, this law hardly enabled a president to serve as a universal convening authority. Winthrop, however, argued that the broadest of presidential authority to convene courts-martial was “properly incident to chief command.” WINTHROP, MILITARY LAW AND PRECEDENTS, at 59. To be sure, he cited to several examples where presidents had ordered courts-martial to convene, but he dismissed the 1830 law as merely giving credence to a part of executive authority that already existed. *Id.*; *see also* Swaim v. U.S., 165 U.S. 553 (1897). It was not until 1897, one year after Winthrop published *Military Law and Precedents*, that the Court noted such a presidential authority existed even though the law was silent on the subject. Swaim v. U.S., 165 U.S. 553 (1897).

Winthrop pushed for the idea that “retired officers are a part of the army and so triable by court-martial – a fact never admitting of question – as adjudged in ... *Tyler v. United States*.” WINTHROP, MILITARY LAW AND PRECEDENTS at 87. The Court, in *Tyler* noted that retired officers were subject to military law, yet the issue raised in that opinion was whether retired officers were entitled to pay increases. 105 U.S. 244 (1881). The Court's statement Winthrop relied on was nothing more than *dicta*. *See* Pierre N. Leval, in JUDGING UNDER THE CONSTITUTION: DICTA ABOUT DICTA, 81 N.Y.U. L. REV. 1249, 1267 (2006)(arguing “If these superfluous pronouncements were indeed always correct, there would be no problem. Unfortunately, however, law is endlessly complex and subtle.”)

Indeed, prior to 2020, no Article III court had actually determined that the military's jurisdiction over retirees was not violative of the Constitution, and only the military's appellate courts have done so. While the military's appellate system should not be devalued, it also should not be forgotten that the very judges on these courts serve without the protections of Article III judges and may be removed by a president.

Shortly after the publication of *Military Law and Precedents* and well into his brief retirement, Winthrop did, in fact, cast doubt on the efficacy of the military's jurisdiction over retirees. *See e.g.*, *In re Winthrop*, 31 Ct. Cl. 35 (Ct Cl 1895); JOSHUA KASTENBERG, *BLACKSTONE OF MILITARY LAW*, at 306-307. Winthrop took liberties in regard to the military's jurisdiction over enlisted retirees. In 1885, Congress enacted the first pension plan for enlisted soldiers but it was silent on whether military jurisdiction continued into retirement. Act of Feb. 14, 1885 titled "An Act to Authorize a Retired List for Privates and Non-Commissioned Officers of the United States Army who have Served for a Period of Thirty Years or Upward." For the effect of the act on the Army, *see* DON RICKEY JR., *FORTY MILES A DAY ON BEANS AND HAY*, 341-42 (1963); *see also*, J.W. Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, U. PENN. L. REV. 317, 332-333 (1964). In 1889 in General Orders No. 55, the Army's Adjutant General in noting that retired soldiers would not be given formal discharges, used the operative statement "the retired soldier will regarded as continuing in service on the retired list, but will be dropped from the rolls of his former command." *See* Headquarters of the Army, General Orders 43, May 2, 1889, superseding General Orders No 55. This statement cannot have had the force of law to extend court-martial jurisdiction since Congress did not provide for it, and it was only tied to the ability of the War Department's continuation of pay and provisions such as rations and firewood for retirees. *Id.* In his 1895 *Military Law and Precedents*, Winthrop insisted that the military's jurisdiction over enlisted soldiers continued into their retirement, but in doing so, he expressed an army policy, rather than the law. William Winthrop, *MILITARY LAW AND PRECEDENTS* at 87, f.n. 27. It was not until 1901 that Congress specified court-martial jurisdiction over enlisted service-members in retirement status. H.R. 23628, Hearing Before the Committee on Military Affairs, House of Representatives, 62d Congress, 2d Sess., April 19, 1912, pg. 4. Judge Advocate General Enoch Crowder, in his testimony, advocated for an expansion of court-martial jurisdiction, noting that

there were several cases in which retired enlisted soldiers abandoned their families and creditors had sought his office's assistance, but the army could not assert jurisdiction, because the crimes were not connected to the military. *Id.*, at 84.

On a contextually important note, Winthrop took exception to the Court's majority opinion in *Ex Parte Milligan*. Winthrop, *Military Law and Precedents*, at 817. Winthrop stated: It is the opinion of the author that the view of the minority of the Court is a sounder and more reasonable one and that the dictum of the majority was influenced by the confusing of martial law proper with that of military government which exists only at a time and at a theatre of war, and which was clearly distinguished from martial law by the Chief Justice in his dissenting opinion – the first complete judicial definition on the subject. *Id.* In essence, he argued that the military remains an arm of the executive branch to enforce the law in times of war, including the use of military commissions trials, or where Congress has authorized it to do so, including establishing military trials that could sentence citizens to death. On several occasions, Winthrop highlighted his role in the military trial of Benjamin Gwinn Harris, a sitting member of Congress. *See, e.g., Id.*, at 206. Perhaps unthinkable today, in 1865 Winthrop served as a judge advocate in the military commission trial of a sitting member of the House of Representatives which found him guilty and sentenced him to a term in jail as well as a permanent prohibition from further government service. *See*, JOSHUA E KASTENBERG, *BLACKSTONE OF MILITARY LAW*, at 155-159; and JOSHUA E. KASTENBERG, [A CONFEDERATE IN CONGRESS: THE CIVIL WAR TREASON TRIAL OF BENJAMIN GWINN HARRIS](#), 125-146 (2016). In doing so, Winthrop saw no constitutional incompatibility with the military preventing the legislative branch from determining its own membership. *Id.* Indeed, Winthrop conceded that no statute authorized removal from legislative office and he urged that “the authority therefore for disqualification as a military punishment by sentence must depend upon usage.” WINTHROP, *MILITARY LAW AND PRECEDENTS*, at 409.

It should strike a serious scholar of military law that aspects of Winthrop's view of military power would have been dangerous to a Republic during the time he wrote *Military Law and Precedents* as well as today. And it would be surprising for Winthrop not to have understood the possibility of the military being used for nefarious purposes. His use of the term “usage” denotes a military power exercised in an absence of constitutional authority. Winthrop

had travelled widely in researching his work, including spending time in France, Germany, and Britain. JOSHUA E KASTENBERG, *BLACKSTONE OF MILITARY LAW*, at 155-159.

Given that Winthrop thoroughly researched the court-martial of François Achille Bazaine, he would have certainly known that Louis Napoleon, the democratically elected president of France's Second Republic had the assistance of the French Army in 1851 to launch a *coup d'état*, arrest legislators, and be crowned emperor in the process destroying the republic. On Louis Napoleon and the army's role in the 1851 coup e'tat, see ROGER PRICE, [THE FRENCH SECOND EMPIRE: AN ANATOMY OF POLITICAL POWER](#), 27-40 (2001). One can be confident in making this statement since Bazaine was Napoleon III's—formerly known as Louis Napoleon—most “celebrated” military commander who was placed in charge of the French “Army of the Rhine,” led it in a disastrous war against Prussia and its German states allies in 1870-71. WINTHROP, *MILITARY LAW AND PRECEDENTS*, at 92, 243, 282, 533. On Bazaine, see GEOFFREY WAWRO, [THE FRANCO-PRUSSIAN WAR: THE GERMAN CONQUEST OF FRANCE IN 1870-1871](#), 68-71, 141-148 (2003). As a sample of United States news reporting on Bazaine's court-martial in 1873, see *The Political Situation in France Becoming Interesting: Court-Martial of Bazaine for his Surrender at Metz*, CHICAGO DAILY TRIBUNE, October 7, 1873; *Bazaine's Trial: A View of the Proceedings After Verdict—After Incidents*, N.Y. TIMES, December 27, 1873. Likewise Winthrop would have known of the Boulanger Affair in France in which a retired general had unsuccessfully attempted to break the Third Republic and set up military rule. On Georges Boulanger, see Patrick Hutton, *Popular Boulangism and Advent of Mass Politics in France, 1886-90*, 11 J. CONTEMP. HIST. 85-106 (1976). For a sample of the reporting of the Boulanger Affair in the United States, see *Boulanger is a Dictator*, WASH. POST, May 24, 1887; *Boulanger's Electoral Address: He Again Denounces his Opponents and Says France Wants Justice*, N.Y. TIMES, January 4, 1889. Winthrop lived through part of France's “Dreyfus Affair” in which the democratically elected government existed in fear of some of its generals and at a minimum, the conduct of several senior military officers in France opened a question as to whether they supported the Third Republic or would turn on it. PHILIP CHARLES BANKWITZ, [MAXIME WEYGAND AND CIVIL MILITARY RELATIONS IN MODERN FRANCE](#), 31 (1967).

Perhaps most tellingly, Winthrop was certainly aware of the Framers' fears of standing armies which originated in seventeenth century Britain and resulted in significant parliamentary

curbs on military jurisdiction. RICHARD KOHN, [EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA](#), 2, 1783-1802 (1975); BERNARD BAILYN, [THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION](#), 112 (1967). He references the evolution of military law in Britain after the New Model Army prevented Parliament from voting on profound questions of law including whether England's deposed king should be spared and whether to disband the army itself. *See, e.g.*, WINTHROP, *MILITARY LAW AND PRECEDENTS*, at 11. Yet his scholarship does not recognize the importance of the standing army fears. Although *Military Law and Precedents* is a significant scholarly work, Winthrop's position that "usage," or executive branch determinations, can infringe on the Legislative Branch or sweep persons into military jurisdiction that Congress had not expressly permitted, should give jurists pause in citing to him on any matter of presidential authority, including the recall of retirees for court-martial.

II. Frederick Bernays Wiener: Race and Executive Power

If the use of Winthrop on jurisdictional questions or presidential "commander in chief" authority over courts-martial should be carefully reconsidered, future judicial use of Wiener's scholarship is outright problematic. Wiener's [biography](#) includes being a relation of Sigmund Freud and Edward Bernays. There is a newly published book-length biography on him and his own writings continue to be cited by contemporary legal scholars. *See* PAUL BAIER, [WRITTEN IN WATER](#) (2018). In 2014, Justice Michael B. Hyman on the Illinois Court of Appeals cited Wiener for the proposition that in appellate practice if a lawyer omits or mischaracterizes pertinent facts, the lawyer's ability to persuade the court may be lost because of the court's lack of faith in the lawyer's overall position. *PNC Bank., N.A. v. Mathin*, 2014 IL App (1st) 133061-U (unpub) (Ill. Ct. App. 2014)(Hyman J. concurring). One might conclude, based on Justice Hyman's incorporation of Wiener into a concurrence that Wiener's influence in the law is important to preserve. Perhaps this conclusion is tenable, if, for no other reason than the United States Supreme Court has repeatedly cited to his scholarship. Most recently, Justice Alito relied on both Winthrop and Wiener in his dissent in *Ortiz v. United States* to argue that the Court could not grant review of appeals from courts-martial as it currently does and instead had to employ the more restrictive traditional habeas test. 138 S.Ct., at 2189 (Alito J., dissenting).

There can be little doubt that Frederick Bernays Wiener has made a significant impact not only in the field of military law, but in a broader sense as well. *See, e.g.*, Estate of Burris v. State, 360 M.D. 721, 729 (MD, 2000)(use of Wiener to identify the historic role of the Maryland state militia in the modern National Guard context), citing to Frederick Bernays Wiener, The Militia Clause of the Constitution, 54 HARV. L. REV. 181, 183 (1940); State v. Aronson, 82 Wn. App. 762 f.n. 3 (WA. App. 1996), citing to Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958)(determining that a court-martial conviction was usable for Washington’s habitual offender laws). Wiener began his legal career as a “New Deal Democrat” having joined the Public Works Administration before becoming a judge advocate on the eve of World War II. Jed Rakoff, *Frederick Bernays Wiener, Master of Advocacy*, 81 LOUISIANA L. REV. 943, 944 (2021). Wiener, like Winthrop, served in the Army, albeit in World War II, and had a government lawyer career in the Justice Department before embarking on a lengthy tenure in private practice. *See, e.g.*, Jed S. Rakoff, Book Review: *Frederick Bernays Wiener: Master of Advocacy*, 81 LOUISIANA L. REV. 943-948 (2021). He graduated from Brown in 1927 and then Harvard Law School in 1934. As a student, he was a “favorite” of future Justice Felix Frankfurter and went on to represent the government in a variety of lawsuits during the New Deal. *See, e.g.*, Bell v. Hood, 327 U.S. 678 (1946) (As ASG, Wiener argued against the federal courts having jurisdiction to determine an award for damages arising from the false imprisonment by FBI agents); United States v. Summerlin, 310 U.S. 414 (1940)(successfully argued that the Federal Housing Administrator may enforce a claim on behalf of the United States and is not bound by state statutes of limitations); United States v. Dickinson, 331 U.S. 735 (1947)(statutes of limitation for government-caused damages under the Tucker Act). In 1935 he was commissioned as a reserve officer in the Army Judge Advocate General’s Corps. Captain Michael J. Kelleher and Daniel Trimble, *An Oral History of Frederick Bernays Wiener*, January 28-30, 1987. When he authored *Courts-Martial and the Bill of Rights*, Frankfurter lobbied the Harvard Law School to publish it. FF to Goodwin, cc to Weiner, April 10, 1958 (Frankfurter Papers/R-67). Both Wiener and Frankfurter wanted to counter a previous article in the Harvard Law Review written by Professor Gordon Henderson who urged that the Bill of Rights, with the exception of the Fifth

Amendment's Grand Jury Clause, applied to courts-martial. *Id.* Henderson's article is *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV 293 (1957). In 1975 in *Middendorf v. Henry*, an opinion which denied the right to counsel in summary courts-martial, Justice William Rehnquist in authoring the majority opinion noted that Wiener's works and Henderson were at odds in regard to the Bill of Rights application to courts-martial. 425 U.S. 24, f.n. 12 (1976). Perhaps, unsurprisingly Justices Thurgood Marshall and William Brennan considered Henderson's view more reasonable. 425 U.S. 41 f.n. 1 (1976)(Marshall J., dissenting). However, the majority opinion employed Wiener's position.

In World War II, Wiener served in Guadalcanal, New Caledonia, and Okinawa as well as in the war crimes division. *Id.* After the war, he was employed in the Solicitor General's Office and shaped the government's arguments in *In re Yamashita*. *Id.*; *see also* *In re Yamashita*, 327 U.S. 1 (1946). He also served as a reporter for the Court's Rules Committee from 1953-1954. And he argued dozens of cases before the Court both in government service and in private practice including convincing the Court to uphold a private corporation's right to refuse service to a person of color. *Moose Lodge v. Irvis*, 407 U.S. 163 (1972). While it is true that the Model Rules of Professional responsibility are clear that a lawyer cannot be tarred by a cause or client, it later appeared to be the case that Wiener, in an oral interview, agreed with the private corporation's alleged right to discriminate on the basis of race. Rule 1.2(b) of the Model Rules of Professional Responsibility state "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Thus, while Wiener may not have agreed with the "right" of Moose Lodge, in his oral history, he seemed to support this "right" and noted the Court's decision was short lived and "received bad press." His other actions, described in this section's conclusion, give support to this view.

Wiener authored several influential articles including an examination of the Constitution's militia clause, and commentary on the constitutionality of the UCMJs "general articles. *See* Frederick Bernays Weiner, *The Militia Clause and the Constitution*, 54 HARV. L. REV. 181 (1940). This article has been cited in the following federal court decisions: *Dukakis v. Department of Defense*, 686 F. Supp. 30 (DC MA, 1988)(providing background history on the militia's inefficiency prior to the National Guard Act of 1903); *Zister v. Walsh*, 352 F. Supp. 438

(DC CT 1972)(describing the modern National Guard as the lineal descendant of the militia); *see also*, Frederick Wiener, *American Mutiny Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1 (1989); Wiener, *Are the General Military Articles Unconstitutionally Vague*, 57 A.B.A. L. J. 354 (1968). He vigorously defended the preservation of the military law's *lex non-scripta* in the realm of speech regulation during the Vietnam Conflict. In 1974 Solicitor General Robert Bork sought Wiener's help in writing the government's briefs for *Parker v. Levy* and *Avrech v. Secretary of the Navy* – two companion cases involving the limits of free speech in the military. *See* Wiener to Bork, April 2, 1974 (Robert Bork Papers/LOC). Wiener later wrote to Benjamin V. Cohen, another former New Dealer, that he was instrumental in the Court arriving at their decisions in both cases. Wiener to Cohen, September 17, 1974 (Benjamin V Cohen Papers/LOC).

As both an assistant solicitor general and as a private counsel he argued dozens of diverse causes before the nation's appellate courts. *See, e.g.*, *Bell v. Hood*, 327 U.S. 678 (1946) (As ASG, Wiener argued against the federal courts having jurisdiction to determine an award for damages arising from the false imprisonment by FBI agents); *United States v. Summerlin*, 310 U.S. 414 (1940) (successfully argued that the Federal Housing Administrator may enforce a claim on behalf of the United States and is not bound by state statutes of limitations); *United States v. Dickinson*, 331 U.S. 735 (1947) (statutes of limitation for government-caused damages under the Tucker Act). Most notably, he twice represented Clarice Covert and Dorothy Krueger Smith - known as "the murdering wives cases" – before the Supreme Court. *Reid*, 351 U.S., at 1. For Wiener's later commentary on his role, *see* Frederick Bernays Wiener, *Persuading the Supreme Court to Reverse Itself*, 14 *Litigation*, 6-10 (1988). Three years after the Court determined that the federal government could not constitutionally prosecute military dependents in a military trial, Wiener successfully represented a civilian employee of the Army who had been prosecuted by the military in Germany for a capital offense. *Grisham v. Hagan*, 361 U.S. 278 (1969). Once more the Court determined that civilian employees were entitled to the same grand jury rights as well as the right to a trial by a jury as all other civilians in the United States. *Id.* at 280. One of the issues at stake in both the "murdering wives" and civilian employee cases was how far the constitution permitted citizens not ordinarily subject to the UCMJ to fall under a system governed by military powers of a president. Perhaps because the Court agreed that the

military could not constitutionally conduct trials over United States citizens who happened to reside on overseas bases, Wiener may be assumed to have been against the expansion of commander in chief authority over civilians. But, such an assumption would be misplaced. Indeed, Wiener conceded during an oral interview in 1987 that after prevailing in *Reid*, he advised the Department of Defense that civilians who accompanied the army in Vietnam should have been subject to court-martial jurisdiction. Captain Michael J. Kelleher and Daniel Trimble, *An Oral History of Frederick Bernays Wiener*, January 28-30, 1987.

During the Court's deliberations in *Ex Parte Quirin*, Frankfurter reached out to Wiener to obtain his sense of the Court's denial of habeas. 317 U.S. 1(1942). Although Wiener believed that the Court was right to deny the great writ's protections, he also argued that President Roosevelt should have permitted a general officer, such as the commanding general in New York or Florida to order the military trial of the German and United States citizen saboteurs, rather than use a proclamation to create the trial. *See* G. Edward White, Felix Frankfurter's Soliloquy in *Ex Parte Quirin*, 5 Green B. 436. Yet, he also insisted that in the absence of congressional legislation, a presidentially ordered military commission was free to depart from the rules for courts-martial as embedded in the Articles of War. Wiener to Frankfurter, January 13, 1943 (FF-Harv, SIII/R-43). Perhaps the most telling aspect of Wiener's view of the Bill of Rights limitations against presidential excess was in his second letter where he criticized *Milligan* as being replete with "extravagant dicta." Wiener to Frankfurter, November 5, 1942 (FF-Harv, SIII/R-43). Wiener, in fact, informed Frankfurter that the *Quirin* opinion "narrows *Milligan* and presumably foreshadows repudiation of the oft-quoted dictum that martial law can never arise from a threatened invasion." *Id.* In a third letter to Frankfurter, Wiener argued once more that *Milligan* was a narrow opinion that only addressed whether a military commission could prosecute a citizen who was not already subject to the law of war and not whether Congress could have made citizens such as *Milligan* subject to the law of war. Wiener to Frankfurter, August 1, 1943 (FF-Harv, SIII/R-43). Thus, like Winthrop, Wiener was willing to tolerate an expanded military jurisdiction beyond what the Court determined in 1866. But Wiener was able, as a product of the times in which he wrote, to celebrate something Winthrop could not do: a Court opinion that was "the first judicial step towards whittling away the authority of the majority opinion in the *Milligan* case." *Id.*

There is a darker side to Wiener. In 1945, Yale Law professor, Eugene V. Rostow, authored a law review article excoriating the unconstitutional internment of United States citizens of Japanese descent during World War II. Eugene V. Rostow, *The Japanese American Cases— A Disaster*, 54 Yale L. J. 489 (1945). Rostow argued that in the wartime cases to come before the Court, the justices – with the exception of Owen Roberts and Frank Murphy – “weakened society’s control over military authority” and gave the prestige of its support to dangerous racial myths about a minority group, in arguments that could be made applied easily to any other minority group in society.” *Id.* Another excellent early criticism of the Court’s willingness to permit racism to be coupled to military deference is Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUMBIA L REV. 157, 239 (1945). Echoing Rostow, there is a consensus that the federal government’s treatment of United States citizens of Japanese descent during World War II was both unconstitutional and based on racism. See Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L. 165, 166-74 (2003). But, Wiener never joined this consensus and he vehemently supported the government’s actions until his death in 1996. Committee on Governmental Affairs of the United States Senate, 98th Congress, 2nd Session, S. Hrg. 98-1304 (16 August 1984). On September 14, 1983, Wiener penned a letter to John J. McCloy expressing his disgust with a governmental investigation’s conclusion that the wartime imprisonment of Japanese Americans was in gross error by attacking the investigation’s composition. “Of the 33 staff members listed, eleven had Japanese names and a twelfth was married to one of the eleven,” he penned. Frederick Bernays Wiener to John J. McCloy, September 14, 1983 (John J. McCloy Papers). In other words, he concluded that United States citizens who happened to be of Japanese descent acted in a supposed concert with their ethnicity and were incapable of achieving an objective position. This was not a singular instance of racism on his part. There is more than a hint of racism in his letters to Frankfurter as well as in one law review article in which he defended MacArthur’s justification for prosecuting General Yamashita in a war crimes trial in 1946. As an example of Wiener’s racist language see, Wiener to Frankfurter, February 8, 1935 (Frankfurter/R-67). The author has omitted the actual language used but Wiener disparaged persons of African ancestry. See Frederick Wiener, *Comment: Two*

Years of MacArthur, Vol III, MacArthur Unjustifiably Accused of Meting Out Victor's Justice, 113 MIL L. REV 203-220 (1986)(arguing Yamashita's guilt was partly established as "the sack of Manila was a direct consequence of ingrained Japanese attitudes"). Western military history is replete with massacres of a similar nature from the siege of Magdeburg in 1631 to the Me Lai Massacre in 1968.

Weiner's views on race was not limited to United States citizens of Japanese descent. In 1969 he argued that while the Kerner Commission – an investigation established by President Lyndon Baines Johnson to uncover the causes of urban unrest in the aftermath of the 1967 Detroit Riots – concluded that "white racism" was the primary factor, the sometimes destructive demonstrations that followed the assassination of Martin Luther King were rooted in "black racism." Frederick Bernays Wiener, *Martial Law Today*, 55 AMERICAN BAR ASSOCIATION J. 723, 729 (1969). Wiener, perhaps in a prelude to his criticisms of the investigation into the interment of United States citizens of Japanese descent, argued that the Kerner Commission's conclusion of "white racism" was based on the ideology of the commission's participants rather than the data it uncovered. *Id.* at 730. It should not be missed that the investigation included African-Americans Senator Edward Brooke (R-MA) and Roy Wilkins, the former NAACP President. *See THE KERNER REPORT: THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS*, xviii (Princeton ed. 2016). This lead an active duty judge advocate to respond that Wiener, in rejecting the commission's conclusions on white racism while blaming black racism was "symbolic of the ostrich-like posture of too many men of influence in his generation." Richard W. Hillsberg, *Views of our Readers*, 55 AMERICAN BAR ASSOCIATION J., 1006, 1006 (1969). On the "Kerner Commission," *see* ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES*, 515-517 (1998); John Charles Bodger, *The Urban Crisis: The Kerner Commission Report Revisited: Race and the American City: The Kerner Commission in Retrospect*, 71 N.C. L. REV. 1289, 1292-97 (1993). In short, when Wiener argued for decisive presidential action to use the military (and for governors to do the same with their National Guard) to assure "domestic tranquility" it could be to do so for the purpose of containing the civil rights of people who had long-been denied them.

Wiener complained that in Arizona – where he moved in his retirement – the Navajo Indians were immune from state taxation yet still had the right to vote. Wiener to Cohen, August

11, 1975 (Benjamin V Cohen/16). He added that this feature of the law “is par for the course in today’s climate of discrimination in reverse” without pausing to consider that the Navajo peoples, along with other Native Americans, had suffered through more than a century of state and federal governmental sanctioned abuse including the taking of children on the slightest pretense. *Id.* On the treatment of the Navajo Nation, see Margaret D. Jacobs, *A Battle for the Children: American Indian Removal in Arizona in the Era of Assimilation*, 45 J. ARIZ. HIST. 31, 31-62 (2004). In 1975 he refused to lecture on appellate practice at the Arizona State University College of Law because it had admitted “less qualified black, Chicano, and women,” applicants over white males. Wiener to Dean Willard H. Pedrick, December 8, 1975 (Benjamin V. Cohen/16). Wiener penned: “The unhappy analogy that comes inescapably to mind concerns the worker in the fertilizer factory who, having been there so long that he no longer notices the stench, is then greatly shunned by his neighbors.” *Id.*

Wiener’s views on race were not contained to the United States. He opposed the return of the Panama Canal to Panama. Wiener to Cohen, August 24, 1977 (Benjamin V. Cohen/16). He [excoriated](#) the United Nations for removing the Republic of South Africa from the General Assembly. In a letter to Cohen, he penned:

After watching the UN performances on the PLO murder gang – and in expelling South Africa – I am about prepared to join the isolationist Neanderthals who want the US out of the outfit. Just a bunch of miserable cannibals who ought to be back in the jungle. The best thing that ever happened to them was the all-too-short dose of civilizing colonialism to which they were exposed. Wiener to Cohen, November 15, 1974 (Benjamin V Cohen/16).

It would be a mistake to conclude that a racist cannot, under any circumstance, provide a usable interpretation of constitutional law. Although Wiener was a racist, his vast body of scholarly work might still possess value in a general sense, in particular because his letters evidence a state of mind for such ideas as the Warren Court’s civil rights and criminal procedure decisions being responsible for a spike in lawlessness. See, e.g., Frederick B. Wiener, *Courts v. Constitution: The Memoirs of Earl Warren*, MODERN AGE, 98-100 (1978). Put another way, maintaining Wiener’s scholarship enables the ideas of law influencers to become a part of a historic corpus for future scholarship. But, Wiener’s views on executive power are another matter. It is clear, that he shaped his views of military authority around the ability of the federal

or state governments to deny whole populations of minorities of their right to equal treatment under the law and the fullest protections that citizenship confers.

III. Conclusion

Government lawyers, like the courts continue to cite to Winthrop. Most recently, in the pending appeal titled *Larabee v. Harker*, the government 's counsel [quoted Winthrop](#) for the proposition that “retired officers are a part of the army and so triable by court-martial—a fact indeed never admitting of question.” It is unlikely that the government’s counsel considered the matters presented in this brief article, or that Winthrop rested his statement on dicta rather than any constitutional statement on jurisdiction. Likewise, whatever criticism may be given to Justice Alito’s *Ortiz* dissent, I am not suggesting that either he, or Justice Neil Gorsuch who joined with him, knew of either Winthrop’s or Wiener’s views of expanded military powers or Wiener’s insistence that *Korematsu* was rightly decided as a matter of military necessity. Yet the dissent placed considerable reliance on both Winthrop and Wiener in a matter directly related to their military jurisdictional views.

As challenges to military jurisdiction over retirees continue through both the federal and military appellate courts, review of this type of jurisdiction should not be solely focused on the important question of whether a citizen forfeits the full protections of the Bill of Rights merely because they are in receipt of retired – or “retainer” – income. This type of jurisdiction denotes a unique lifetime subservience to the powers of the commander in chief and given the Framers’ standing army fears it is reasonable to assume that there is an open question as to whether such a military power, which could, in theory be used for nefarious political ends, is tolerable. That is, can the courts follow Winthrop’s scholarship in ignorance of the dangers of his overall view of military jurisdiction. Likewise, while it is true that Robert Bowe Bergdahl’s appeal has exhausted in the military appellate courts, there is the possibility that the federal courts will accept an appeal and rule on presidential authority over courts-martial. Given the excusal of former President Trump’s conduct in the Bergdahl trial by the majority of judges on the Court of Appeals for the Armed Forces it is possible that a future president will imitate Trump instead of evidencing regard for the importance of due process in military trials. For my own criticism of Trump and the judicial process in *United States v. Bergdahl*, see Joshua E. Kastenberg, *Fears of*

Tyranny: The Fine Line Between Presidential Authority over Military Discipline and Unlawful Command Influence Through the Lens of Military Legal History in the Era of Bergdahl, 49 HOEFLER L. REV 11 (2020).

Winthrop, who believed that “usage” was enough of a legal theory to use a military trial against a sitting member of Congress that sentenced the member to a lifetime bar from further government service and believed that *Milligan* was wrongly decided, should, at most, be cautiously approached by the nation’s judges. As for Wiener, despite his profound impact on military law and on military legal history, his coupling of racism with executive power is problematic for the continued judicial use of his work on presidential military power as well. If one considers Justice Sonia Sotomayor’s dissent in *Trump v. Hawaii* that governmental policies originating from racially or religiously biased ideologies undermine constitutional guarantees for all, the continuation of Wiener’s scholarship as it relates to military power should trouble any judge who cites to him. *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018)(Sotomayor, J. dissenting).