

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ERIC J. WEISS, Petitioner v. UNITED STATES

CASE NO: 92-1482

PLACE: Washington, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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ERIC J. WEISS, :
Petitioner :
v. : No. 92-1482
UNITED STATES :
- - - - -X

Washington, D.C.
Wednesday, November 3, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:
ALAN B. MORRISON, ESQ., Washington, D.C.; on behalf of the
Petitioner.
DREW S. DAYS, III, ESQ., Solicitor General, Department of
Justice, Washington, D.C.; on behalf of the
Respondent.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 92-1482, Eric Weiss v. the
5 United States.

6 Mr. Morrison.

7 ORAL ARGUMENT OF ALAN B. MORRISON

8 ON BEHALF OF THE PETITIONER

9 MR. MORRISON: Mr. Chief Justice, and may it
10 please the Court:

11 The first question before the Court today is
12 whether the method by which military trial and appeals
13 judges are appointed is consistent with the Appointments
14 Clause of the Constitution. All of the judges in
15 petitioners' --

16 QUESTION: Mr. Morrison, how does it happen to
17 come up so late, rather than back in 1970, for instance?

18 MR. MORRISON: Your Honor, I think that the
19 answer is that this Court's decision in Freytag in 1991
20 caused a recognition that the Appointments Clause had
21 ramifications beyond what people had considered it before.
22 That is my understanding, Your Honor. I was not there
23 when the issue was first raised, but that is my
24 understanding.

25 All of the judges in petitioners' cases were

1 commissioned officers. All of them were appointed by the
2 President with the advice and consent of the Senate. But
3 the commissions that they received were commissions as
4 military officers and not as judicial officers, and the
5 question presented is whether that appointment satisfies
6 the Appointments Clause for their judicial positions.

7 QUESTION: Well, are you distinguishing between
8 commissions as military officers and commissions as
9 Article III judicial officers?

10 MR. MORRISON: No, Your Honor. I'm
11 distinguishing -- the question is whether, in order to
12 fill the judicial offices which they hold as trial --
13 military trial judges or military appeals judges, whether
14 they have to receive a separate appointment under the
15 Appointments Clause. That is the question.

16 I recognize they do not have to be Article III
17 judges. There's no question about that here.

18 QUESTION: Well, so, then why do you use the
19 term judicial -- a commission as a judicial officer? Is
20 that a word of art?

21 MR. MORRISON: No. I simply indicated, Your
22 Honor, to fill the fill judicial office which -- I thought
23 I said judicial office, not officer, Your Honor, but the
24 office which they hold. And as Your Honor will note, in
25 the addendum to our brief there are separate certificates

1 appointing each of these persons to a judicial office, and
2 that is why I use that particular term, Your Honor.

3 QUESTION: But I had thought, Mr. Morrison, that
4 when a JAG officer in the Army and the Navy, as opposed to
5 the Marine Corps, is confirmed and appointed, he is
6 appointed as a legal officer.

7 MR. MORRISON: That is correct. It does not
8 apply to the Marine Corps; it does apply to the Army and
9 the Navy and the Air Force.

10 That narrows the group of people from all of the
11 officers in the military down to about 1,650 officers who
12 are law officers. Of that, only 3 percent are either
13 military trial judges or military appellate judges: 91
14 trial judges, and about 31 appeals judges.

15 QUESTION: If your theory were to prevail, would
16 those legal officers be assignable to nonlegal duties?

17 MR. MORRISON: I believe they now are in any
18 event, Your Honor.

19 QUESTION: Well, but under your theory you have
20 to be appointed to a specific office. Why isn't a legal
21 officer a specific office so that a legal officer could
22 not, say, take a command position or an officer position
23 in the combat unit?

24 MR. MORRISON: The principal reason, Your Honor,
25 and this is the heart of our argument, is that under the

1 Uniform Code of Military Justice only certain people,
2 those who are appointed as judges, can perform the major
3 functions that judges perform in the military: presiding
4 over general and, in most cases, special court-martials;
5 deciding on whether evidence will be admitted; ruling on
6 challenges for cause; instructing the jury; ruling on
7 matters of -- other matters that come before such as
8 preliminary motions.

9 And most important of all, only a military judge
10 can decide in a special or general court-martial the guilt
11 or innocence of the accused and can pass sentence.

12 QUESTION: Well, I suppose only a military legal
13 officer can advise with reference to a will or a divorce?

14 MR. MORRISON: I don't know that, Your Honor.

15 QUESTION: So under your theory, it seems to me,
16 that a legal officer must be confined just to legal
17 duties. Under your theory.

18 MR. MORRISON: Your Honor, I don't believe
19 there's any statute governing the military that restricts
20 what legal officers can do. In fact, Your Honor, I am
21 advised that persons who have the legal officer
22 designation do perform other legal duties, and no one,
23 except the judges, performs judging duties. No one other
24 than the 31 members of the Courts of Military Review sit
25 and decide the appeals that come to them with the quite

1 extraordinary powers of appellate jurisdiction in the
2 military.

3 QUESTION: Mr. Morrison, with respect to trial
4 judges, however, would you go back and just help me out on
5 a matter of fact? You said a second ago -- I think you
6 said a second ago, in passing, that a military judge was
7 indispensable to a finding of guilt or innocence. Is that
8 correct?

9 MR. MORRISON: No. I said, Your Honor, that
10 only a military trial judge sitting alone could find guilt
11 or innocence.

12 QUESTION: I see.

13 MR. MORRISON: In special and general
14 court-martials. The Government points to the fact that in
15 summary court-martials a nonjudge could sit, but this
16 Court has held in Middendorf against Henry that those
17 summary court-martials are not criminal proceedings. In
18 any event, are very different in terms of the punishment
19 that --

20 QUESTION: Now, is it correct that with respect
21 to the two higher grades of court-martial, a judge may not
22 sit alone without the consent of the accused? Is that
23 right?

24 MR. MORRISON: That is correct.

25 QUESTION: So that unless the --

1 MR. MORRISON: But not the consent of the
2 Government.

3 QUESTION: I'm sorry?

4 MR. MORRISON: But not the consent of the
5 Government. That's not required.

6 QUESTION: But unless, though -- unless the
7 accused consents of the finding of guilt or innocence.
8 And I assume the determination of punishment would be made
9 by a panel, only one of whom presumably would be a
10 military judge.

11 MR. MORRISON: Except the last -- I agree with
12 it except the last part. The military judge does not sit
13 on that panel. The judge is as a judge in the civilian
14 court system, acting as a judge instructing the panel
15 members.

16 In the -- in the old days when we had law --
17 when there were law officers in the military, the law
18 officer would, in some cases, sit as an advisor. But now
19 the president of the court-martial is not the chief -- is
20 not the judge, and the judge does not vote on guilt or
21 innocence unless the case is referred to the judge. Which
22 approximately -- I don't have the exact figures, but a
23 very high percentage of cases are tried before military
24 judges alone.

25 QUESTION: So the members of the court, other

1 than the law officer, who decide guilt or innocence would
2 not, under your theory, have to be appointed specially
3 under the Appointments Clause.

4 MR. MORRISON: That is correct, Your Honor. In
5 fact, in the military not only do officers serve on
6 court-martials, but in limited circumstances enlisted
7 personnel can serve on court martials. There are a series
8 of rules about that, but they are eligible. And we
9 would -- we would contend that that is germane, in the
10 Government's phraseology, to other military duties,
11 principally because there is no special qualifications.

12 QUESTION: Mr. Morrison, am I correct that your
13 germaneness argument is not based on the notion that there
14 is some inherent requirement that you cannot give a single
15 person duties that are so -- that are too diverse, but is
16 rather based upon the notion that Congress has not chosen
17 to give this person these sorts of duties?

18 In other words, it would be all right in your
19 mind if Congress -- if Congress said all military officers
20 shall do the following duties, and then listed everything
21 including the judicial officers.

22 MR. MORRISON: I would say that's -- that is
23 substantially correct, Your Honor.

24 QUESTION: All right. Now, is that --

25 MR. MORRISON: With two caveats -- may I? Two.

1 The first is that it isn't simply that Congress hasn't
2 said they may do it. The Congress has said the opposite.
3 It has said only those persons who are designated judges
4 may perform the following functions.

5 QUESTION: That's correct.

6 MR. MORRISON: So it's a little stronger than
7 Your Honor hypothesized.

8 QUESTION: But Congress has also, has it not,
9 made clear since 1968 that any person who is commissioned
10 as an officer in the military forces runs a risk of
11 becoming a judicial officer, may be designated a judicial
12 officer. So, certainly, once the '68 statute was passed,
13 anyone who received an officer's commission knew that one
14 of the duties of being an officer could be to be a
15 judicial officer. Isn't that so?

16 MR. MORRISON: No, Your Honor. No, Your Honor.

17 QUESTION: Why --

18 MR. MORRISON: Under Article 26, only persons
19 who are members of the bar can become a judicial officer,
20 and they must also be certified by the Judge Advocate
21 General of their service in order to become a judicial
22 officer.

23 QUESTION: But that's fine. But Congress
24 certainly envisioned that any military -- or you could
25 also say there are certain requirements for other

1 particular. To be a medical officer, for example, of
2 course you have to be a doctor.

3 MR. MORRISON: Yes.

4 QUESTION: But the fact is that Congress
5 anticipated that the military commission would be enough
6 to authorize that person to be a judicial officer, once
7 the '68 act was in effect. Now, with respect to judicial
8 officers before '68, I can understand your relevance
9 argument. But surely there -- are there any judicial
10 officers functioning today who were commissioned prior to
11 1968? I would doubt that.

12 MR. MORRISON: I do not know. I do not believe
13 so, Your Honor. But there are probably officers who were
14 commissioned prior to 1968 who are still serving as
15 judicial officers, some of the most senior grades.

16 But, Your Honor, I think I'm not understanding your
17 question, because it seemed to me to be rather the
18 opposite. That is, it seemed to me that until 1968 anyone
19 might have served as a law officer because there were no
20 special qualifications embodied in the Uniform Code of
21 Military Justice, as there are now. After 1968 a very
22 narrow group of people is now even eligible in Congress'
23 view, that is those who are admitted to a bar. And then
24 they must, in addition, be certified by the Judge Advocate
25 General before they can be law officers -- because they

1 can be judicial officers.

2 QUESTION: Mr. Morrison, you say the only way
3 this could be fixed is to have a fresh appointment in
4 addition to the appointment that the officer already
5 holds. Is that so? Or suppose Congress, having set this
6 scheme up thinking it was an improvement over what existed
7 before, wants to run it in the most efficient manner? Is
8 there any cure for the alleged defect that you are urging
9 under the Appointments Clause, other than to have a fresh
10 appointment for anyone who is going to serve as a legal
11 officer?

12 MR. MORRISON: As a judicial officer, Your
13 Honor?

14 QUESTION: As a judicial officer.

15 MR. MORRISON: Yes, I would say -- it's almost
16 in response to Justice Blackmun's remark earlier about why
17 this didn't happen right after 1968. I would say that if
18 they went back to the 19 -- pre-1968 system, that there
19 would be no Appointments Clause problem because people
20 would not be serving in judicial offices because the
21 functions were very different. That is, the person who
22 was a law officer was simply an advisor. The court could
23 disregard his or her --

24 QUESTION: But apart from going back to the way
25 it was, evidently Congress thought this was an

1 improvement.

2 MR. MORRISON: Yes, Your Honor. I can't think
3 of any, but I wouldn't want to exclude --

4 QUESTION: So the only way that Congress could
5 make it better is to have this double appointment, is that
6 it?

7 MR. MORRISON: Yes. And I would say, Your
8 Honor, it's not a large matter because there are only 31
9 appeals judges and 91 trial judges who serve for periods
10 of time, and the burden would be very minimal in order to
11 comply with the Appointments Clause.

12 QUESTION: Mr. Morrison, I thought you gave me
13 the opposite answer. I thought you told me that there is
14 no inherent disability for Congress defining an office so
15 broadly that it could include becoming a judicial officer.
16 So certainly --

17 MR. MORRISON: Yes, I think --

18 QUESTION: -- At least one other solution is for
19 Congress to say, whenever a military officer is
20 commissioned, that officer will be competent to become a
21 judge under -- under this 96 -- 1968 law. So long as he
22 has the other legal qualifications, you would acknowledge
23 that that's good enough.

24 MR. MORRISON: So long as he has the other legal
25 qualifications.

1 QUESTION: That's right.

2 MR. MORRISON: And is a member of the bar.

3 QUESTION: Right.

4 QUESTION: Do you also assume --

5 QUESTION: Couldn't Congress --

6 MR. MORRISON: I think -- I think that would be
7 correct, Justice Scalia.

8 QUESTION: Okay. And my point is it seems to me
9 Congress has done that. It seems to me that once the 1968
10 act was passed, in effect that's what Congress has said.
11 It's right there on the statute books. It's clear that
12 anybody who's appointed as an officer can become a
13 judicial officer so long as he has the legal
14 qualifications. It seems to me you're -- you're really
15 relying upon the technical fact that Congress did not
16 write it all into one statute.

17 MR. MORRISON: I don't think that that is the
18 scheme that Congress has envisioned, and I perhaps
19 answered your question too hastily. It does seem to me
20 that Congress has made it quite clear that it views the
21 persons serving as judges as different from other military
22 officers, both because they must all be members of the bar
23 and because they all must be certified as qualified by the
24 Judge Advocate General.

25 QUESTION: But they can do that.

1 QUESTION: Of course, in the case of the Army
2 and the Navy they are. I --

3 MR. MORRISON: No, Your Honor, they're not
4 certified by the Judge Advocate General.

5 QUESTION: Not the latter.

6 MR. MORRISON: That's a special procedure.

7 QUESTION: Not the latter. Not the latter.

8 MR. MORRISON: And, Your Honor, it's very
9 important. There are several instructions and regular
10 procedures under which very few people, group of people, 3
11 percent of all persons in the military -- military Judge
12 Advocate General's Corps become judges. And part of the
13 reason is because most lawyers in the military do not
14 participate in the criminal justice system.

15 QUESTION: I don't understand your point. Is
16 your point that Congress cannot regard two functions as
17 being very different and nonetheless by one commission
18 authorize the same person to perform those two very
19 different functions?

20 MR. MORRISON: I think I agree with Your Honor's
21 question.

22 QUESTION: Congress can't do that?

23 MR. MORRISON: The breadth of it takes -- makes
24 me taken aback a little, but I think that that is correct.

25 QUESTION: Congress -- what is correct?

1 Congress can do that. It can say by this commission you
2 will be a -- authorized to be a Government physician and
3 also to dig ditches for the Government, right? Congress
4 could do that if it wanted to.

5 MR. MORRISON: I think it could if it did so
6 clearly, yes, Your Honor.

7 QUESTION: Well, so the only question is whether
8 the 1968 legislation doesn't do that -- doesn't do that
9 clearly enough.

10 MR. MORRISON: But I don't think that that's the
11 scheme -- I don't think that's the scheme that Congress
12 set up. The whole purpose, if you read the legislative
13 history -- the goal behind it, and it's reflected in the
14 statute, was to create a judiciary in the military that
15 was much more like the civilian judiciary than had ever
16 been true in the past. The judges were given new
17 responsibilities. They were given for the first time the
18 opportunity to try cases.

19 QUESTION: Maybe so. But that only demonstrates
20 the jobs are very different. The point is Congress by its
21 1968 legislation nonetheless expect military -- expected
22 military officers to do both of those jobs. And you've
23 told me that's okay.

24 MR. MORRISON: Well --

25 QUESTION: You can expect people to dig ditches

1 and be physicians.

2 MR. MORRISON: There is a further difficulty
3 with that theory, Your Honor, and there is nothing to
4 support the theory that that's what Congress was doing,
5 and the Government has not contended otherwise. One of
6 the difficulties the Government has in defending this
7 statute on its germaneness argument is that for Courts of
8 Military Review, that is the appeals judges, a person need
9 not be a member of the military. And there are
10 presently --

11 QUESTION: Well, doesn't that simply go to the
12 constitutionality of those particular appointments?

13 MR. MORRISON: No, Your Honor, and let me say
14 why I don't believe that's the case.

15 QUESTION: You don't think that would be
16 severable?

17 MR. MORRISON: It would be -- it might be
18 severable, but I think it goes -- it goes to the question
19 about whether -- as Justice Scalia has suggested, that
20 what Congress did in 1968 was to say that everyone who is
21 a military officer can be a judge, and we equate the two.
22 That cannot explain how civilians can become judges.
23 There has to be a separate method of appointment and a
24 separate theory.

25 QUESTION: Well, that's -- that's right, it does

1 not explain that and he was not purporting to explain
2 that. He's simply explaining the relationship between
3 those who are officers and those who function as judges,
4 and the appointment of civilians may be an entirely
5 separate problem.

6 MR. MORRISON: No, but I suggest rather like the
7 13th stroke of the clock, it undermines the theory that
8 this is simply what Congress did in 1968.

9 QUESTION: But isn't -- wouldn't you -- isn't it
10 our obligation to construe this law in the way that would
11 save its constitutionality so that if there is a discrete
12 problem, that that would be put aside and not have that
13 tail of some of these officers possibly being civilians
14 wag the whole dog.

15 MR. MORRISON: I don't disagree with that, Your
16 Honor. I think, though, that in trying to understand what
17 Congress was doing and whether what Congress was doing was
18 what I believe they were doing, which was to establish a
19 separate judicial office in the military for which only a
20 very few people would become eligible and would be chosen
21 to serve by a process that would take place in the
22 military, that Congress was recognizing that there was a
23 difference and they wanted them treated differently, and
24 what Congress failed to do was to provide for their
25 separate appointment.

1 QUESTION: And you interpret that -- you
2 attribute that interpretation to Congress, although it
3 needn't -- it need not. I mean, the other interpretation
4 is that Congress said one commission will enable you to be
5 both, you know, a line officer and a judge. That's the
6 other interpretation.

7 MR. MORRISON: Well, one --

8 QUESTION: And you want us to take your
9 interpretation in order to declare the statute
10 unconstitutional? I mean we normally --

11 MR. MORRISON: Because I think it's the --

12 QUESTION: We normally do the opposite. We --

13 MR. MORRISON: It's the most obvious
14 interpretation. But the Government argument -- under the
15 Government's argument, and there's no -- there's -- the
16 Government contends that under its theory anyone who's a
17 military officer, an infantry officer, a pilot, a dentist,
18 a chaplain, a supply officer, all of those could be judges
19 without a separate appointment because they're all
20 military officers.

21 It seems to me that Congress did not have that
22 in mind at all remotely, and that its requirement that
23 there be a separate selection in Article 26 made it clear
24 that what Congress wanted was a separate judiciary.

25 QUESTION: But it's equally clear that Congress

1 did not want a second appointment.

2 MR. MORRISON: No, Your Honor, it's not clear
3 that Congress didn't. There's no --

4 QUESTION: Or they would have provided for it.

5 MR. MORRISON: Well, only -- there's no evidence
6 that they --

7 QUESTION: To say that this is just what
8 Congress wanted but they just didn't get around to
9 providing for a separate appointment really doesn't do
10 justice to any theory of enforcing legislation that I know
11 of.

12 MR. MORRISON: Well, Your Honor, in fairness to
13 the Congress and in recognition of what has happened, the
14 Appointments Clause was largely, not entirely, dormant
15 until this Court's decision in Buckley in 1976. And just
16 as Congress did not focus on many things, there's no
17 evidence that they focused at all on the Appointments
18 Clause question at any time.

19 QUESTION: Well, other -- other than that they
20 certainly didn't provide for an appointment by the
21 President.

22 MR. MORRISON: Right. It was not a conscious
23 choice to not provide for it; they just simply never
24 considered it. They never considered the constitutional
25 ramifications of creating --

1 QUESTION: Well, how do you know that? How do
2 you know that they never considered it?

3 MR. MORRISON: Well, I've been through the
4 legislative history, Your Honor, and I've never -- I've
5 seen no mention of any consideration of the Appointments
6 Clause. Now, it's true I can't go into the mind of every
7 member of all the Armed Services Committee.

8 QUESTION: I would think not.

9 (Laughter.)

10 MR. MORRISON: Yes.

11 QUESTION: Well, you say they never considered
12 the constitutional ramifications. There are no
13 constitutional ramifications if Congress chooses to create
14 one office by one appointment that is so broad that it
15 includes both being a line officer and being a judge. It
16 can do that. There are no constitutional ramifications,
17 so why would they have to consider the constitutional
18 ramifications?

19 The only question is whether they chose to
20 create such an office, and as far as I can tell from
21 reading the 1968 statute, they did. Now, there's a
22 problem with respect to officers commissioned before '68,
23 I acknowledge. Do you know whether any of the officers
24 involved in these particular cases were commissioned
25 before '68?

1 MR. MORRISON: It's my understanding that they
2 were not, Your Honor.

3 QUESTION: Were not.

4 MR. MORRISON: And in any event, I would have to
5 say that all of them had been promoted, which required a
6 separate confirmation, since that time. I mean, so I
7 wouldn't --

8 QUESTION: Mr. Morrison --

9 QUESTION: And these particular cases don't
10 involve situations of use of one of these civilian judges.

11 MR. MORRISON: They do not. Those are only the
12 Coast Guard. They do involve persons in the -- who were
13 not appointed to the Judge Advocate General Corps. That
14 is that the -- both of these trials were before Marine
15 officers who do not have, as Justice Kennedy noted
16 earlier, separate appointments under -- under the -- under
17 the Constitution. Under the appointments, that is. They
18 are appointed as line officers in the Marine -- Marine
19 Corps, and they're not law designated.

20 But under Justice Scalia's approach, that would
21 not -- not matter. And, in addition, two of the judges on
22 the Courts of Military Review who sat on these panels were
23 also Marine officers.

24 QUESTION: You're assuming, I take it,
25 throughout, Mr. Morrison, that both the -- both the

1 judges, as well as the commissioned officers as such, are
2 all inferior officers. There's no suggestion in your
3 argument that a military judge is a superior officer
4 within the meaning of the Appointments Clause.

5 MR. MORRISON: No, Your Honor, I do not
6 acknowledge that. And the reason I --

7 QUESTION: Well, if you don't acknowledge that,
8 do you -- is your answer different to that -- your
9 germaneness argument, depending on whether we're talking
10 about assigning duties assumed to be germane of a superior
11 office to an inferior officer?

12 MR. MORRISON: Well, since all of the judges
13 here were appointed by the President with the advice and
14 consent -- that is, inferior officers can be appointed
15 that way also.

16 QUESTION: Well, I realize that. But you're --
17 you're also assuming that there is no further particular
18 value to be served in enforcing the particular appointment
19 of superior officers to that office as such. You're
20 saying you're assuming that the only value to be served is
21 to get Congress involved or Congress and the President
22 involved, and you're assuming that there is no further
23 value to be served by the Appointments Clause.

24 MR. MORRISON: No. And I thank you, Justice
25 Souter. I actually would say that that is an additional

1 value when we're talking about separate superior officers.
2 Certainly, the judges on the Courts of Military Review
3 whose decisions are reviewable by the Court of Military
4 Appeals, a civilian court as opposed to a military court,
5 are superior officers. Only 3 percent of their cases ever
6 get to the Court of Military Appeals.

7 And I would say that the trial judges are
8 superior officers, not inferior officers, as well. I
9 analogize them to the judges of the tax court.

10 QUESTION: Was this argument pressed below?

11 MR. MORRISON: It wasn't relevant. It is not
12 dispositive in this case, Your Honor. I don't believe it
13 was pressed below. It is in my brief. I made this
14 specific argument, and the Government challenged on this.

15 QUESTION: What difference --

16 QUESTION: But it was not -- it was not pressed
17 below.

18 MR. MORRISON: I don't believe so, Your Honor.
19 I'm not -- I'm not sure. I did not -- I did not reread
20 the briefs with that in mind.

21 QUESTION: If we are in doubt on the point of
22 classification, do we owe deference to Congress in the
23 implicit classification that Congress seems to have made?

24 MR. MORRISON: Well, I think that in Morrison
25 against Olson that argument was made, and the Court did

1 not accept it. I believe the Court decided that it was up
2 to the Court to decide, under the constitutional scheme,
3 whether an office was an inferior or superior office.
4 Obviously, Congress has a role in defining the terms of
5 the office. But --

6 QUESTION: Does the military context have any
7 bearing on the answer to that question?

8 MR. MORRISON: I do not believe so, Your Honor,
9 except insofar as the Congress has an important role in
10 defining the military and establishing offices. But I
11 believe --

12 QUESTION: Of course, you -- excuse me. You
13 don't -- you take the position that the military context
14 really has no bearing on the due process analysis.

15 MR. MORRISON: No, I don't say it has no bearing
16 at all, Your Honor. In fact, if there had been an
17 argument made of military necessity here, we would have to
18 take that argument very seriously. The Government has
19 never made such an argument in the trial court, never made
20 it before Congress. Congress surely didn't make a
21 considered judgment as it made -- as the State legislature
22 made in Medina or as Congress made in Middendorf against
23 Henry.

24 Congress, on the -- as far as the term of office
25 argument is concerned, has never expressed any reason, and

1 today, even in this Court, the only reason on the term of
2 office issue raised by the Government is that excessively
3 long terms of office would interfere with career paths.
4 We have never suggested that there need to be excessively
5 long terms of office.

6 QUESTION: This is your due process argument.

7 MR. MORRISON: Yes, it is, Your Honor. Yes.
8 Justice Souter asked me about it, so I thought it would be
9 appropriate at this time to move over to that.

10 QUESTION: May I ask you just one further
11 question on the first appointments part?

12 MR. MORRISON: Sure, Your Honor.

13 QUESTION: You are not urging, as far as I can
14 tell, any separation of powers concern of the type of the
15 legislature encroaching on executive turf. This is just,
16 as you see it, a technical violation of the Appointments
17 Clause. Is there any larger purpose?

18 I think you -- you have conceded that this was
19 an effort by Congress to improve the system, and it could
20 go back to the old ways and it wouldn't have any problem.

21 MR. MORRISON: I don't view it as a technical
22 violation. I view it as a violation of the Appointments
23 Clause and I view it as important because what's happened
24 is that we have transferred the appointing power for very
25 important people, trial and appellate judges, from persons

1 under the Constitution who are supposed to do the
2 appointing -- from them to the Judge Advocate General, who
3 is a mid-level officer in the Navy and Marine Corps.

4 And I do not view that as a technical violation.
5 I believe it's an improper diffusion of power of the kind
6 that this Court has been concerned about in Appointments
7 Clause cases before.

8 QUESTION: But the loser is the President, I
9 guess.

10 MR. MORRISON: Not necessarily. The Department
11 head could be the loser. The Secretary of Defense would
12 be --

13 QUESTION: Either the Secretary of Defense or
14 the President is the victim of this scheme, in effect.

15 MR. MORRISON: Yes, but we've never -- that's
16 never been a question before. That the Appointments
17 Clause was intended to protect the people, as this Court
18 said in Freytag, and not simply the President. That it
19 was intended to assure accountability and prevent the
20 diffusion of power.

21 QUESTION: But one thing that could be done is
22 to have less protection by going back to the old system
23 where we didn't have judicial officers.

24 MR. MORRISON: That is less protection for
25 Appointments Clause purposes, yes, yes.

1 I'd like to reserve the remainder of my time.

2 QUESTION: Very well, Mr. Morrison.

3 General Days, we'll hear from you.

4 ORAL ARGUMENT OF DREW S. DAYS, III

5 ON BEHALF OF THE RESPONDENT

6 GENERAL DAYS: Mr. Chief Justice, and may it
7 please the Court:

8 These cases present the question of whether the
9 military is required by the Constitution to alter
10 procedures and practices bearing on the operation of its
11 system of courts-martial that have been in place for over
12 200 years. It is a system designed for a multitude of
13 circumstances in peacetime, at war, on battleships, in
14 submarines, and on land. These several practices have
15 been established and maintained by the Congress and the
16 President in faithful discharge of powers granted by the
17 Constitution.

18 With respect to the Appointments Clause argument
19 that petitioners make, it's our view that Congress did
20 expect that qualified military officers would serve as
21 military judges at some point during their careers.

22 QUESTION: Well, General Days, what about these
23 civilian judges that can be appointed? Do you defend
24 those appointments as somehow meeting the requirements of
25 the Constitution?

1 GENERAL DAYS: No, Justice O'Connor. That
2 particular provision was included in the act at the
3 request of the Coast Guard.

4 QUESTION: Well --

5 GENERAL DAYS: Because of resource limitations.

6 QUESTION: -- That's fine, but I'm asking
7 whether you can defend it or whether you concede that it
8 fails to meet the Appointments Clause requirements?

9 GENERAL DAYS: Your Honor, that issue was raised
10 in the Carpenter case, as to whether there could be an
11 appointment of a civilian without going through the
12 requirements imposed by the Appointments Clause.

13 QUESTION: Yes. And what is your answer?

14 GENERAL DAYS: And the answer is that those
15 judges have to be appointed by a head of department; in
16 that case, the head of the Transportation Department, the
17 Secretary of Transportation.

18 QUESTION: Is the provision severable?

19 GENERAL DAYS: I believe it is, yes.

20 Oddly enough --

21 QUESTION: Excuse me. Before --

22 GENERAL DAYS: Yes.

23 QUESTION: You're not asserting that the
24 executive branch could, on its own, simply have the head
25 of the department appoint them? I mean, that would cure

1 it, but you'd need statutory authorization for that,
2 wouldn't you? I mean so the consequence would be that you
3 simply cannot appoint any of these civilian judges until
4 the statute's amended. Is that what you think the
5 consequence is? Or do you think the consequence is
6 without amending the statute, the Secretary of
7 Transportation can make the appointment?

8 GENERAL DAYS: That's correct.

9 QUESTION: You think?

10 GENERAL DAYS: The latter.

11 QUESTION: The latter.

12 QUESTION: And, unlike Mr. Morrison, you don't
13 believe that they are appointments to a superior office
14 within the meaning of the clause?

15 GENERAL DAYS: I do not. No, our position is
16 that they're inferior officers. They are responsible to
17 higher executive officials.

18 QUESTION: So that your -- once again, your
19 germaneness argument does not assume that there could be
20 assignment of an inferior office to perform the duties of
21 a superior office?

22 GENERAL DAYS: No, Justice Souter, I don't
23 believe that that's appropriate. I think that as --

24 QUESTION: That would -- under your view, would
25 that be unconstitutional?

1 GENERAL DAYS: That would create Appointments
2 Clause problems, yes.

3 The fact is that in the military a second
4 appointment is not required by the Constitution, because
5 military officers are expected during their careers to
6 undertake the function of a military judge at some point.
7 Usually the service term is between 2 and 4 years, but
8 it's also true that people who are commissioned as Judge
9 Advocate General officers serve as trial counsel, as
10 defense counsel, as legal advisors, as staff Judge
11 Advocates. They perform a variety of functions as law
12 officers within the military.

13 It's also important to point out that the
14 military regulatory structure anticipates that any
15 commissioned officer, even an officer lacking
16 qualifications to become a military judge, may at some
17 point be called on to perform quasi-judicial functions.
18 Take, for example, the role of the convening authority.
19 That's not a job that requires the person to be a military
20 officer, and yet the convening authority in this system
21 has the responsibility for reviewing decisions that are
22 made at the court.

23 QUESTION: Well, who could be a convening
24 authority besides an officer?

25 GENERAL DAYS: An officer, certainly, would have

1 to be a convening officer.

2 QUESTION: Oh, you said it didn't require the
3 person to be an officer. You mean be a judicial officer.

4 GENERAL DAYS: That's right, be a lawyer, for
5 example. We have the summary court-martial situation that
6 was pointed out by Mr. Morrison.

7 QUESTION: You -- General Days, you were going
8 to explain the role of the convening authority who need
9 not be a lawyer, and perhaps you can enlarge on that.

10 GENERAL DAYS: That's right. It's really a
11 commanding officer, and that person is responsible under
12 the Uniform Code of Military Justice for, under proper
13 circumstances, convening a court-martial to inquire into
14 charges against a person in the military.

15 QUESTION: A function kind of like a grand jury.
16 Is that --

17 GENERAL DAYS: In effect, although there is a
18 procedure, an Article 32 procedure that's more akin to the
19 grand jury. But in any event, what the convening
20 authority does is conclude that there are proper
21 circumstances presented to request the setting up of a
22 court-martial, either a special court-martial or a general
23 court-martial. But I think it's --

24 QUESTION: Well, it's basically a decision
25 whether you have a court-martial or company punishment or

1 captain's mast, which doesn't require the --

2 GENERAL DAYS: That's right, in Article 15. But
3 after the trial is completed, the convening authority has
4 the ability to review the sentence that has been handed
5 down in the court-martial and exercise clemency, so that
6 there is a role for the convening authority that is a
7 judicial role in some respects, even though he's not or
8 she is not a military officer.

9 And it's also true in a special court-martial
10 situation that there can be proceedings without a military
11 judge present, such that military officers -- and in some
12 cases there can be one-third representation of enlisted
13 personnel on a special court-martial to hear the charges
14 and decide on guilt or innocence and allocate sentence.

15 QUESTION: Well, one could say -- one could say
16 that that's closer to being a juror than being a judge,
17 and one of the footnotes in Mr. Morrison's brief does
18 bring up Justice Jackson's wonderful quotation regarding
19 the word "quasi" and you do have to use that throughout
20 your brief, that these are quasi-judicial functions.

21 I think you have to concede that prior to 1968
22 there was no purely judicial function that a military
23 officer performed. Is that not accurate?

24 GENERAL DAYS: That's correct, but I think that
25 the petitioners make the point that there is tremendous

1 authority reposed in a military judge. That is certainly
2 true, but it's also true that prior to 1968 that same
3 power was reposed in people who did not have military
4 training.

5 And one of the ironies of this case is that
6 efforts by the military system to upgrade the quality of
7 its justice, if you will, is being used a basis for
8 claiming that there's an Appointments Clause problem.
9 Certainly, there are many jobs --

10 QUESTION: No. It's a question whether or not
11 the Constitution will afford the dignity to the office
12 that the Congress intended.

13 GENERAL DAYS: I understand that, Justice
14 Kennedy, and I certainly agree with that. I'm not
15 suggesting otherwise. But I do want to make clear that
16 for 200 years decisions have been made by military
17 officers in very serious cases, including death.

18 Prior to 1968, those decisions were made by
19 people without legal training necessarily, although in
20 1948 there was a requirement that law officers be legally
21 trained and certified by the Judge Advocate General's
22 Corps. But these very important decisions were made by
23 people who did not have legal training and were not
24 military judges.

25 It's also important to point out that in the

1 military, military officers are responsible, literally,
2 for life and death decisions outside of the judicial
3 process. We are all lawyers and judges, in the case of
4 the Court Justices, but I don't think we should overlook
5 the fact that a military commander leading a ground
6 squadron or in charge of a bomber that has nuclear
7 weaponry, or the head of a submarine military group has
8 any less responsibility for life and death determinations.

9 QUESTION: Are there special statutory
10 qualifications for any of those positions you've just
11 mentioned?

12 GENERAL DAYS: They are not. But I would
13 assume --

14 QUESTION: Isn't that different than this case
15 where there is a special statutory qualification? You
16 have to be a member of the bar of the State and a
17 certified legal officer.

18 GENERAL DAYS: Your Honor, I think that if
19 Congress -- if one follows the petitioner's argument, if
20 Congress decided that it was going to set up special
21 qualifications for pilots on nuclear bombers, presumably
22 that would require a new appointment, given the
23 petitioner's theory.

24 Our position is that military officers have this
25 wide-ranging responsibility. One of those

1 responsibilities is serving as a judicial officer.

2 QUESTION: I certainly think it's easy to say
3 that after 1968, because it was clear on the face of the
4 United States Code that if you were a military officer you
5 might have to do that. Prior to '68, it wasn't clear that
6 you ever had to be a judge.

7 GENERAL DAYS: That's correct.

8 QUESTION: I was -- I was exploring with Mr.
9 Morrison the possibility of deciding this case on
10 that -- on that narrower ground, but I guess that poses a
11 problem. There are probably some court-martial
12 convictions that were handed down by panels or by judges
13 that were appointed before commissioned -- before 1968.
14 And I guess those things would be left in jeopardy,
15 wouldn't they, if we decided --

16 GENERAL DAYS: That may well be the case. I
17 simply don't know, Justice Scalia. But if -- if one
18 takes, for example, the judge who sat in the Hernandez
19 case, the general court-martial case, he came into the
20 military in 1957 or '58 but decided, after becoming a
21 military officer, to go back to law school, and became a
22 military judge and began serving in 1975. So this is some
23 indication of patterns that have been followed in the
24 military with respect to peopling and providing military
25 officers to serve in the judiciary.

1 QUESTION: If there is an infirmity with respect
2 to a pre-1968 appointment, for one thing if it wasn't
3 raised and the case is closed, that's -- for another it
4 would be a problem, if not moot, on its way to becoming
5 moot, given the distance we've come since 1968.

6 GENERAL DAYS: Indeed, that is -- that is
7 correct, Justice Ginsburg.

8 I wanted to turn to the --

9 QUESTION: Well, can you say with any confidence
10 that a conviction rendered by a defective court-martial,
11 if it were determined that the court-martial were
12 defective under the Appointments Clause, would not be
13 subject to attack on habeas corpus, even though it had
14 been -- you know, concluded on direct appeal many years
15 ago?

16 GENERAL DAYS: Your Honor, I think that we would
17 have to look to the de facto officer doctrine and operate
18 on the assumption that those decisions were rendered --
19 those judgments were rendered in the context of a
20 legitimate process, and therefore public policy would
21 justify making those de jure offices occupied by,
22 arguably, de facto officers, final.

23 I wanted to turn, if I may, to the due process
24 arguments that have been raised by the petitioners. The
25 petitioners have invited this Court to engage in a

1 balancing process with respect to practices that have
2 been, as I've said earlier, in effect for centuries.

3 We disagree with their proposition, namely that
4 balancing is appropriate. We think that given this
5 Court's many decisions recognizing the deference that is
6 properly afforded to decisions made by Congress and the
7 President as Commander in Chief, with respect to the
8 governance of the military, it suggests that this is not a
9 situation where the military has the responsibility to
10 come forward and justify practices that are time honored.
11 But rather it's the responsibility of petitioners to show
12 why their concerns, why their claims are so
13 extraordinarily weighty as to overcome the balance already
14 struck by Congress.

15 QUESTION: In other words, we don't have to
16 resolve Medina or Mathews, we just go to Middendorf.

17 GENERAL DAYS: Your Honor, we certainly would
18 find that appropriate. Although there are arguments, and
19 I've certainly observed the views of members of this Court
20 with respect to the Medina-Mathews dichotomy. But I think
21 it is instructive that after Mathews was decided, this
22 Court decided Middendorf a year afterward, and there was
23 no mention of a Mathews line of analysis in Middendorf.

24 We would suggest, although obviously the Court
25 is the ultimate determiner of this, that what those

1 decisions reflect is the fact that this court saw a
2 different line, a different mode of analysis as being
3 appropriate when dealing with practices in the military
4 that are the result of determinations made by the
5 President and Congress. And we would urge this Court to
6 follow that line of cases in the dispute that's before
7 this Court today.

8 QUESTION: Well, of course, you would
9 acknowledge, I'm sure, that there are concerns when the
10 judge is subject to disciplinary action by superiors, if
11 the judge isn't tough enough or something like that. And
12 that's been a concern that's been expressed from time to
13 time around the country and I'm sure in the halls of
14 Congress, and these are serious concerns in the military
15 context.

16 GENERAL DAYS: Yes, Justice O'Connor, they
17 certainly are serious, and I think they have been taken
18 seriously by the Congress and by the military. The
19 petitioners talk about the lack of independence insofar as
20 military judges are concerned or courts-martial, but, in
21 fact, they seem to be making an implied bias argument.
22 And we think that the implied bias line of cases is
23 inappropriate in the context of the military system.

24 They rely upon Tumey and Ward and Connally, and
25 it is our position that military judges do not have a

1 direct personal substantial and pecuniary interest in the
2 cases that they sit on. Certainly not as a systematic
3 matter. After all, in Tumey and Ward and many of the
4 other cases, it was established that the bias was a result
5 of the normal operation of the schemes that were
6 challenged there.

7 QUESTION: Would it be unrealistic to say that
8 in a substantial number of cases there is a likelihood
9 that there will be a desire to please the higher command?

10 GENERAL DAYS: No, Your Honor, Justice Kennedy,
11 I don't believe that is appropriate. What we've seen over
12 the years since 1968 is an effort by Congress and the
13 military to isolate and insulate military judges from
14 command influence. In fact, if there is any central
15 purpose --

16 QUESTION: But isn't -- isn't that simply a
17 recognition that there -- that there is a significant risk
18 of this kind of influence?

19 GENERAL DAYS: There -- I'm not certain about
20 the qualification, but certainly there is some risk, and
21 there have been concerns expressed in Congress and the
22 military about this. And Congress has legislated to
23 insulate military judges by, for example, making certain
24 that the fitness reports and the review of the activities
25 of military judges is done by the Judge Advocate General

1 and not by the commander. It does not go through the
2 regular chain of command.

3 But, Justice Kennedy, I would concede that there
4 are some concerns here, but they are concerns that have to
5 be evaluated in the military context. We're not talking
6 about a civilian circumstance. We're talking about other
7 demonstrable and powerful needs of the military that have
8 to be met. One, then, can look at the concerns that you
9 pointed out.

10 And my response is that Congress and the
11 military have attempted to deal with those problems, and I
12 think has dealt with them in a largely effective way.
13 There's the --

14 QUESTION: General, even if you take it outside
15 the military context, I think what you're describing is a
16 closer approach to insulation than would be true, for
17 example, between the decisions of elected State court
18 judges and the electorate.

19 GENERAL DAYS: I think that's right, Justice
20 Souter, and it's important to -- also, to recognize that
21 when we talk about tenure provided to civilian judges,
22 we're talking about protecting them from the pressures of
23 the political process. The pressures come not only from
24 the people who pay their salaries, the Governments that
25 pay their salaries, but the various pressures outside of

1 the courtroom that might, if there were not proper
2 protection, influence their judgment.

3 We have a concern, as Justice Kennedy has
4 pointed out, with command influence from that side of the
5 equation, and there have been efforts to deal with this.
6 It is not appropriate under the system that's been
7 established for a superior officer, and certainly for a
8 commander to make any comments whatsoever about a military
9 judge based upon that military judge's decisions. It is
10 not appropriate. Indeed, it is a violation of the law for
11 anyone to try to interfere, to coerce or influence a
12 determination made by a judge.

13 QUESTION: There is a certain irony, isn't
14 there, in that after all Congress and the military have
15 done to make the system of military justice more fair and
16 more equitable, say, since the time of the Second World
17 War, this is really the first time it's been challenged?
18 And it's much more favorable to a criminal defendant now
19 than it certainly was 40 years ago.

20 GENERAL DAYS: That's correct. In fact, Chief
21 Justice Rehnquist, if one looks at the system, although
22 there are points one can identify that differ from the
23 civilian justice process arguably unfavorably, there are
24 procedures within the military justice system that, in my
25 estimation, are superior to ones we encounter on the

1 civilian side.

2 I mentioned the Article 32 proceeding where,
3 unlike our grand juries, the accused is allowed to go
4 before the convening authority, or that particular
5 proceeding, with a lawyer and hear the entire process.

6 There are also procedures having to do with plea
7 bargaining that are much more rigorous than anything I've
8 seen in the civilian context in which, for example, the
9 military judge determines, going line by line in a plea
10 agreement, whether the -- or a plea of guilty, whether the
11 accused really does understand the nature of the charges
12 and, in fact, agrees with the guilty plea, in fact to the
13 point of requiring the accused to go through a narrative
14 description of exactly what he or she did. And then the
15 judge can determine --

16 QUESTION: But you don't really want to rest
17 your case on that, do you?

18 GENERAL DAYS: No, I do not want to.

19 QUESTION: That, in all respect, the military
20 system is -- I mean, for example we don't have a right to
21 a jury trial of citizens at large in the military, do we?

22 GENERAL DAYS: That's correct, or --

23 QUESTION: And that's certainly a less
24 significant procedural protection. But it's always been
25 that way in the military, right?

1 GENERAL DAYS: It has --

2 QUESTION: And therefore it conforms with due
3 process because it's always been like that.

4 GENERAL DAYS: That's correct.

5 QUESTION: And I suppose you have -- you have
6 less rights of privacy. What might be considered an
7 unreasonable search and seizure in some other context is
8 not in the military. You just don't have the same rights
9 of privacy. And I gather much of your argument is simply
10 that's the way it's been for 200 years and it's not been
11 considered a violation of due process.

12 GENERAL DAYS: That's right, Your Honor. And
13 it's been a practice over 200 years by common consent.
14 We're not talking about something that has missed the eye
15 of the American people or, indeed, the Congress or the
16 President. And we think that that history is a powerful
17 testament to its constitutional validity. I wanted to
18 say --

19 QUESTION: You also -- you made the analogy to
20 the elected judge. The elected judge is out if he's not
21 reelected or she's not reelected, but the consequence for
22 the judicial officer is not that, right?

23 GENERAL DAYS: That is correct, Justice
24 Ginsburg. I don't want to minimize the impact of a
25 removal of a military judge, but we are not talking about

1 military judges being out on the street. There's no loss
2 of salary, there's no loss of benefits. The military
3 judge gets another assignment, and --

4 QUESTION: And I know how we tend to look at it
5 from this angle, but I'm not so sure that for a military
6 officer the highest and best calling is that of a judge.

7 (Laughter.)

8 GENERAL DAYS: Well, Your Honor, I'm not going
9 to respond directly to that except to say that military
10 officers and JAG officers are interested in having a
11 well-rounded career. And, indeed, the flexibility that
12 the military provides affords them the opportunity to gain
13 experience in a number of different contexts so that, to
14 the extent that they become military judges, they will
15 bring that -- that wisdom and that experience to bear.

16 We're not talking about first lieutenants, by
17 the way, being military judges. We talking about, in most
18 instances, lieutenant colonels or colonels. These are
19 people with extensive experience within the military
20 system bringing that experience to bear as military
21 judges.

22 One other point I wanted to make about the
23 protections under the military judicial system is that at
24 the top of the entire system is the Court of Military
25 Appeals. That is, as the Court is aware, a civilian

1 court, and it's designed to police the military justice
2 system against incursions on the independence and impartiality
3 impartiality of military judges. Judges on the Court of
4 Military Appeals serve for 15 years, and the chief judge
5 has a 5-year term. That court has shown a willingness, since its
6 creation, to address cases of bias in the military justice
7 system in a very effective way. There has been some
8 dispute in the briefs about Article 6(a) of the Uniform
9 Code of Military Justice, which is a provision that allows
10 for inquiring into the fitness of military judges and
11 whether it came after the 1983 Military Justice Act
12 legislation or at some other time. But I think it's important -- and let us concede
13 that it did come later on than 1983 -- that that provision
14 was a response to what seemed to many a very courageous
15 decision on the part of the Court of Military Appeals to
16 resist an effort by the Secretary of Defense and the
17 Inspector General of the Department of Defense to inquire
18 into the accuracy and propriety of decisions that had been
19 made by military judges in a specific case. What the
20 Court of Military Appeals said was there cannot be that
21 type of investigation. It has to be done pursuant to a
22 commission. In sum, Your Honors, neither the Appointments

1 Clause nor the Due Process Clause is violated by the way
2 in which the military staffs and operates its judicial
3 system. It is a system created, directed, and monitored
4 by Congress and the Commander in Chief of the United
5 States. We think that the decisions below should be
6 affirmed.

7 Thank you very much.

8 QUESTION: Thank you, General Days.

9 Mr. Morrison, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF ALAN B. MORRISON

11 ON BEHALF OF PETITIONER

12 MR. MORRISON: The Government's basic submission
13 on the Appointments Clause issue is that military judges
14 are no different from military officers. We think that
15 that is not what Congress meant. That's not what Congress
16 wrote in Article 26 and it's not what Congress enacted in
17 specifying who can perform the function of military trial
18 and appellate judges.

19 Second, in addition to the Coast Guard, the Navy
20 has had civilians on the Courts of Military Review. None
21 recently: I believe the last one was in the early 1970's.

22 Third, while we dispute vigorously with the
23 Justice Department the applicability of the de facto
24 officer doctrine as it applies to direct appeals, we
25 recognize that it may have considerable force in the

1 context of habeas corpus or collateral attack, assuming
2 that there was -- that Teague itself did not prevent the
3 overturning of military court-martials of many years.

4 QUESTION: Because it's basically a
5 prospectivity doctrine, and not a doctrine that goes to
6 the merits.

7 MR. MORRISON: Excuse me, Your Honor?

8 QUESTION: Because it's basically a
9 prospectivity doctrine.

10 MR. MORRISON: De facto.

11 QUESTION: Is there -- yeah.

12 MR. MORRISON: The de facto officer, yes.

13 QUESTION: Yeah.

14 MR. MORRISON: Yes.

15 And last, the Government talks on the due
16 process issue about this time-honored practice, 200 years.
17 Well, we haven't had military judges for 200 years, so the
18 time to start counting is 1968, and since that time that's
19 the first time we've had anybody that has terms of office.
20 What they forget, of course, is that the time-honored
21 practice every place except in the military is for those
22 persons who are performing judicial functions to have some
23 term of office, to have some kind of protection about the
24 very concerns that Justice Kennedy and others have spoken
25 about here.

1 The Government says deference, deference,
2 deference. But it doesn't say deferent to what, other
3 than the fact that they haven't done anything. There's
4 not a single reason advanced, a single military policy or
5 military necessity that can form the basis of reliance on
6 this deference, and for that reason we believe that due
7 process, as well as the Appointments Clause, has been
8 violated.

9 We ask the Court to reverse the convictions.
10 Thank you, Your Honor.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
12 Morrison.

13 The case is submitted.

14 (Whereupon, at 10:56 a.m., the case in the
15 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

ERIC J. WEISS V. UNITED STATES

CASE 92-1482

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BY Ann Marie Federico

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