The Next Judge

Eugene R. Fidell*

INTRODUCTION

The filling of a judicial vacancy provides a unique opportunity to examine not only the appointment or election process, but also the court itself and its work. For obvious reasons, this has been recognized in connection with the Supreme Court of the United States,[1] where vacancies are often the subject of much conjecture but, because of life tenure, remain essentially unpredictable. On a less lofty plane, the opportunity to take stock also occurs in other courts, and the timing, at least, is less a matter of speculation in non-Article III courts, where judges serve for fixed terms.

A case in point is the expiration of Chief Judge Andrew S. Effron's term on the United States Court of Appeals for the Armed Forces (referred to here as the Court of Appeals) on September 30, 2011. It is appropriate to consider the process for filling his seat; the standards that, based on the law and past experience, must, could, or should not be taken into account in choosing a successor; and the possible impact on the court and its jurisprudence.

While national security law covers a broad swath, military justice is a key component, since good order and discipline are integral to a credible military capacity, and notwithstanding the remarkable trend towards the use of high technology in national defense, uniformed personnel – human beings – and their conduct (both actual and desired) remain the heart of the matter. Hence, the filling of Chief Judge Effron's seat is properly viewed as affecting national security.

* Senior Research Scholar in Law and Florence Rogatz Lecturer in Law, Yale Law School, and President, National Institute of Military Justice. This article is adapted from remarks presented at a January 8, 2011, panel sponsored by the Section on National Security Law at the 2011 Annual Meeting of the Association of American Law Schools in San Francisco. I greatly appreciate the comments of Elizabeth L. Hillman, Diane H. Mazur, Michelle Lindo McCluer, and Dwight H. Sullivan on a draft of this article.

1. *See, e.g.*, CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS (2007).

I. THE COURT AND NOMINATIONS TO IT

The Court of Appeals is the top appellate court of the military justice system. Now composed of five civilian judges appointed by the President and confirmed by the Senate, it came into being in 1951 when the Uniform Code of Military Justice (UCMJ) took effect, and was long known as the United States Court of Military Appeals. The court's jurisdiction is limited to review of courts-martial; it has no role with respect to military commissions[2] or other military courts such as provost courts. The core of its jurisdiction is discretionary review of cases in which the accused has been sentenced to a year or more of confinement or a punitive discharge (*i.e.*, a bad-conduct or dishonorable discharge, for enlisted personnel, or a dismissal, for officers).[3] Some of its decisions are subject to direct review by the Supreme Court.[4] Its decisions are also subject to collateral review in the district courts[5] and the United States Court of Federal Claims.[6]

Nominations to the Court of Appeals differ from nominations to the Article III courts in a variety of ways. Perhaps the most significant is that they are reviewed by the Senate Armed Services Committee rather than the Senate Judiciary Committee. Related to this is the fact that conventional "senatorial courtesy" does not function, as the court is nationwide and geography plays no formal role. Article III candidates are vetted by the Department of Justice; candidates for the Court of Appeals are vetted by the Office of General Counsel of the Department of Defense.

Little is known about the involvement of the Judge Advocates General in the screening process, although it is hard to imagine that they would remain entirely silent.[7] If nothing else, they might speak up for a veteran of their branch. Given their recent elevation to three-star rank in recognition, at least in part, of their resistance to the George W. Bush administration's policy on "enhanced interrogation techniques," they are arguably in a better position than before to make their views heard, although the principle of civilian control over the military and Congress's direction that the Court of Appeals be a court of persons drawn from civilian life counsel against affording them anything approaching a decisive voice.

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2. *See* 10 U.S.C. §950g(a)(1)(A) (2006) (conferring exclusive jurisdiction on the United States Court of Appeals for the District of Columbia Circuit).

3. 10 U.S.C. §867(a) (2006).

4. 28 U.S.C. §1259 (2006); *see also* 10 U.S.C. §867(a).

5. 28 U.S.C. §1331 (2006) (federal question jurisdiction).

6. Tucker Act, 28 U.S.C. §1491(a)(1) (2006).

7. *See* 2 JONATHAN LURIE, PURSUING MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980, at 6, 8 (1998) (noting Air Force Judge Advocate General's support for one of the original three judges); WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 61 (1973).

Finally, nominations to the Court of Appeals are not screened by the American Bar Association's Standing Committee on the Federal Judiciary, although other ABA entities have been consulted on vacancies.[8] I doubt that anything approaching the kind of in-depth scrutiny for which the Standing Committee on the Federal Judiciary is well known has ever been applied to potential nominees for the Court of Appeals, or will be applied in filling the 2011 vacancy.

II. SHOULD THE VACANCY BE FILLED?

The Court of Appeals has been deciding fewer than one case per judge per month on full opinion for the last several years, although admittedly it also must sift through many petitions for grant of review. Whether or not the court should (as I believe) be granting far more petitions for review,[9] this is clearly not a heavy load. Moreover, trial caseloads in the armed forces have declined markedly,[10] meaning the Court of Appeals is unlikely to experience a surge of cases in the foreseeable future. Is a five-judge court needed, or could any slack be taken up by exercising the power to designate a senior judge (that is, a judge whose statutory term has expired) or, failing that, an Article III judge to sit?[11] The latter, at least, may be "robbing Peter to pay Paul," although there do seem to be excess judicial resources on the United States Court of Appeals for the District of Columbia Circuit, at least. There has not been any sentiment in Congress to abolish the seat held by Chief Judge Effron, but in an era of increasing austerity, with many new faces in the House of Representatives, the court's low numbers could raise the question of shrinking if not abolishing the court or making other dramatic changes in the appellate structure of the military justice system.

III. THE REAPPOINTMENT OPTION

It must be the case that Chief Judge Effron, a scrupulous jurist and gifted writer who has served with distinction and probity, would be reappointed if he wished, although if he were, he would revert to Associate

8. LURIE, *supra* note 7, at 10-11.

9. The court's parsimony in granting discretionary review is particularly dismaying because the denial of review disqualifies a case for review by the Supreme Court. *See* 10 U.S.C. §867a(a); 28 U.S.C. §1259(3).

10. *See* Dwight H. Sullivan, *Top 10 Military Justice Stories of 2010–#5: The Decline of Court-Martial Dockets,* CAAFLOG (Dec. 29, 2010), http://www.caaflog.com/2010/12/29/top-10-military-justice-stories-of-2010%E2%80%935-the-decline-of-court-martial-dockets/.

11. 10 U.S.C. §942(e), (f) (2006).

Judge,[12] as, under the statute, Judge James E. Baker automatically becomes Chief unless he declines (something that has not happened in the court's history).[13] Chief Judge Effron would certainly have smooth sailing in the confirmation process. Having been born in 1948, he is still a relatively young man, and would only be in his seventies if he served an additional full term. But given the steps the Department of Defense has taken to find a successor, one can only assume that he has not sought reappointment.

The court's judges are appointed to fifteen-year terms,[14] and there is no known current sentiment on Capitol Hill to shift to life tenure, although that has been proposed at various times in the past. Fifteen years (coupled with reasonable pay and a generous retirement package) is sufficient to ensure judicial independence,[15] but it is still odd that the court has such a limited history of reappointments, especially given the prevailing norm of service in the Article III courts. The average length of service on the Supreme Court, for example, has exceeded 26 years since the middle of the last century. Moreover, administrations of both parties have shown a willingness to appoint younger and younger judges to all courts.

I will speculate that Judge Eugene R. Sullivan III would have liked to be reappointed. He was not, and has not been called in to fill out the bench in recusal cases. Judge Robinson O. Everett was appointed three times, but that was in the days when judges filled out unexpired terms;[16] all told, he only served for a decade, although he did sit regularly as a senior judge until his death.[17] Before him, Judge Robert E. Quinn was reappointed, although it is unclear whether Judge Paul W. Brosman – who died five months before his short-straw five-year appointment by President Truman would have expired – would have been reappointed by President Eisenhower. Judge George W. Latimer wanted to be reappointed, but President Kennedy appointed Paul J. Kilday instead.[18]

12. 10 U.S.C. §943(a)(1), (3) (2006).

13. Technically, Judge Baker would become chief and then have to decline. §943(a)(4)(A)(ii). He would presumably be chief for a *scintilla juris*.

14. 10 U.S.C. §942(b)(2).

15. The same cannot be said of military trial and intermediate court judges, who have no statutory fixed term of office, although the Supreme Court found no constitutional flaw in that omission. *See* Weiss v. United States, 510 U.S. 163, 176-181 (1994). Army and Coast Guard judges now enjoy three-year terms by service regulation, but even those may be cut short if, among other reasons, the needs of the service so require in time of war or national emergency. Navy, Marine Corps, and Air Force judges continue to serve at will. The inter-service disparity was upheld against a Fifth Amendment equal protection challenge in Oppermann v. United States, 2007 U.S. Dist. LEXIS 43270 (D.D.C.), *aff'd mem*., 2007 U.S. App. LEXIS 26169 (D.C. Cir. 2007).

16. Uniform Code of Military Justice, art. 67(a)(1), 64 Stat. 129 (1950) (current version at 10 U.S.C. §867(a)(2) (2006)).

17. *See, e.g.,* Goldsmith v. Clinton, 48 M.J. 84 (C.A.A.F. 1998), *rev'd*, 526 U.S. 529 (1999).

18. LURIE, *supra* note 7, at 157-158.

IV. THE PROCESS AND THE STATUTORY FACTORS

Reappointment and allowing the vacancy to remain unfilled are merely thought experiments. Given the fact that a new judge will be appointed, how is the process shaping up? As in the past, the search is being conducted by the Office of General Counsel of the Defense Department. That office solicited suggestions from, among other organizations, the Judge Advocates Association, the ABA's Standing Committee on Armed Forces Law, and the Military Courts Committee of the National Association of Women Judges. In due course, the White House will be involved, as will the Senate Armed Services Committee. It is unclear whether the Justice Department, which functions on other judicial appointments, will play a role. But two other things are clear. First, the Obama administration is not employing a judicial nominating commission, as did the Carter administration when Judge Everett was selected.[19] Second, although nothing can be ruled out in the current political climate, one would hope there is little danger that a nomination will be tied up politically or held hostage as has happened, appallingly, with Obama administration appointments to the Article III courts and other critical positions such as Assistant Attorney General in charge of the Office of Legal Counsel. This seems not to have happened with respect to vacancies on either the Court of Appeals or its predecessor, the Court of Military Appeals.[20]

The Administration's choices are not wide open. There are three qualifications that a nominee for the Court of Appeals must meet. First, he or she must be a member of the bar.[21] No problem there (assuming no résumé-fudging).[22] Second, the nominee must be drawn from civilian life.[23]

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19. *Id*. at 266-269.

20. I refer here to nominations actually submitted to the Senate. In 1971, Albert Watson, a former Member of Congress who was seemingly under very serious consideration for Judge Ferguson's seat, was blocked by congressional opposition after his name was floated in a "trial balloon." *Id*. at 214-216 (noting public denunciation by Senator George McGovern (D-S.D.)). Another potential nomination that was killed in the cradle following informal consultations with legislators is referred to in the following paragraph. Presumably there are yet others.

21. 10 U.S.C. §942(b)(3).

22. *But see* Bruce Rolfsen, *Troubled Colonel Busted to O-2 When Booted*, AIR FORCE TIMES, Mar. 13, 2010, *available at* http://www.airforcetimes.com/news/2010/03/airforce_murphy_031310w/ (noting court-martial of senior judge advocate who failed to disclose disbarment by two jurisdictions); Gary D. Solis, *First George S. Prugh Lecture in Military Legal History: Judge Advocates, Courts-Martial, and Operational Law Advisors*, 190-191 MIL. L. REV. 153, 162-166 (2006-07); United States v. Zander, 46 M.J. 558 (N-M. Ct. Crim. App. 1997), *pet. denied*, 48 M.J. 18 (C.A.A.F. 1997) (affirming court-martial conviction of unadmitted law school graduate for, among other offenses, falsely claiming to be qualified to serve as defense counsel at 20 courts-martial); United States v. Harness, 44 M.J. 593 (N-M. Ct. Crim. App. 1996) (affirming general court-martial conviction even though defense counsel was same unadmitted officer because civilian co-counsel was qualified and overall

Originally that meant simply that the nominee could not come from active duty, although as it happens that rule was violated in the very first round of nominations to the Court of Military Appeals: Judge Brosman was on active duty in the Air Force until immediately before he was named to the court.[24] More recently, Congress put teeth in the second qualification by passing the so-called Joe Baum Act, which bars anyone who (whether or not receiving retired pay) has served on active duty for 20 years.[25] The provision is named for a respected judge of the Navy-Marine and Coast Guard courts who garnered some support when he sought appointment to the Court of Appeals some years ago – until objections were raised on the Hill. I'll leave to others whether the Baum Act is fair or makes sense. It assuredly excludes many qualified candidates for a specialized court, but does so in the interest of ensuring civilian judicial oversight of military justice. For the moment, it is the law (indeed, there is no reason to believe Congress's view on the matter has shifted) and, if nothing else, it limits the field and therefore simplifies the selection process.

The third qualification for appointment to the Court of Appeals springs from the political balance requirement.[26] This indefensible provision, which has been in the UCMJ from the beginning, permits no more than a bare majority of the court to be members of the same political party. It is easily circumvented. For example, a candidate may be (or become) a registered Independent, or may be a merely nominal member of one party but enjoy strong political support from legislators of the other party. This provision should be repealed, but as long as it is on the books it must be complied with. Given the presumed political affiliations of Chief Judge Effron's colleagues before they were named to the court, it means that the Administration would have to nominate either a Democrat or an Independent.

defense team's assistance was not ineffective).

23. 10 U.S.C. §942(b)(1).

24. LURIE, *supra* note 7, at 9. Another author argues that "Brosman should never have been appointed. The law required that the court be appointed 'from civilian life,' a qualification Brosman, who was still in the Air Force for the Korean emergency, could not meet. Nevertheless, after a madcap affair, involving a request for the owner of a men's store to open late at night so the new judge could exchange his uniform for a suit, and a 'special processing' of his request for relief from active duty, Brosman was duly nominated more or less legally." GENEROUS, *supra* note 7, at 62. Generous adds that the press releases referred to him as Dean of Tulane Law School. "[N]o mention of his more recent Air Force service was made." *Id*. & n.9.

25. 10 U.S.C. §942(b)(4).

26. 10 U.S.C. §942(b)(3).

V. WHAT OTHER FACTORS SHOULD BE CONSIDERED?

Who, then, should be appointed? I'll address that on two levels: diversity and judicial viewpoint. I take as a given that whoever is chosen will be highly intelligent, have a distinguished record of one kind or another, as well as appropriate judicial temperament. It's the other characteristics that can profitably be addressed here.

What does diversity mean in this day and age, and how important is it? Once upon a time, it meant race and gender; now it's much more complicated. I'll take things one at a time, but let me at the outset register my own discomfort with selecting judges according to demographics rather than those habits of mind and personal qualities, such as work ethic, that ought to be among the decisive factors.

Age: The current judges were appointed from a bit under age 40 to their 50s. Judge Homer Ferguson was 68 when he was appointed.[27] Judge Kilday was 61 when he was appointed.[28] Given the one-term tradition, the age bracket should be very broad; there is no reason a person in his or her 60s could not be a plausible candidate. At the younger end, roughly age 40 is probably as young as a person could be and still have a plausible résumé.

Gender: The court has had two female judges, but never more than one at a time. At present, Judge Margaret A. Ryan is the only woman on the court. It would be perfectly fine to add a second, but to the extent balance or diversity is a factor, one would expect race or ethnicity to be afforded higher priority in filling the 2011 vacancy.

Sexual orientation: There is no reason a gay or lesbian nominee should not be confirmable, especially given the repeal of Don't Ask, Don't Tell.[29]

Ethnicity: All five current judges are white. The court has had two black members, but not recently. Both of them – Judges Robert M. Duncan and Matthew J. Perry – left to become federal district judges. Judge Duncan later left the district court bench in Ohio to go into private law practice. There has never been a Hispanic or Asian-Pacific Islander or, so far as I know, Native American judge. It must be acknowledged that the Obama administration – indeed, any administration faced with the current monochromatic composition of the court – would be highly likely to give serious consideration to naming a member of a racial or ethnic minority to the 2011 vacancy.

Religion: There have been Protestants and Catholics, at least one Mormon,[30] a Jew,[31] but no Muslim on the court. Happily, there has been no

27. Judge Ferguson was nearly eight months older than President Eisenhower.

28. GENEROUS, *supra* note 7, at 156.

29. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

30. LURIE, *supra* note 7, at 22; GENEROUS, *supra* note 7, at 61.

public controversy over its religious makeup, unlike the occasional discussion of the Catholics-and-Jews composition of the post-Justice-Stevens Supreme Court. Issues before the Court of Appeals have not *yet* been connected, even remotely, to questions of religious belief, unlike the questions of abortion, Christmas displays, and public prayer with which the Supreme Court has repeatedly wrestled. It is to be hoped that religious affiliation will play no role in filling Chief Judge Effron's place.

Geography: At times it has seemed that coming from the South (Judges Brosman, Kilday, William H. Darden, Everett and Walter T. Cox III) or the Great Plains (Judges H.F. "Sparky" Gierke and Charles E. "Chip" Erdmann) was a major advantage for those seeking appointment. Judges from the Northeast were relatively rare (Judges Quinn (a former governor of Rhode Island), Effron, Baker). Where is the best place to be from is probably a function of who the chairs and ranking members of the House and, more importantly, Senate Armed Services Committees happen to be. Wherever a new judge is *from*, it now seems to be expected – contrary to early practice – that upon taking office he or she will live in the Washington, D.C. metropolitan area.[32]

Military service: All five current judges have served in the military; one (Judge Erdmann) has served in two branches (Air National Guard and Marine Corps). Three have served in the Marine Corps (Judges Erdmann, Baker, Ryan). No judge of the court has ever served in the Coast Guard, and none of the judges who will remain after Chief Judge Effron leaves served in either the Army or the Navy. A veteran of one (or both?) of those branches would almost certainly enjoy a leg up in the competition (assuming this factor is even taken into account), all other things being equal (which they never are).[33] Judges Ferguson, Kilday[34] and Susan J. Crawford never served in the military, although Judge Kilday had been on the House Armed Services Committee and Judge Crawford had held high appointive office in the Pentagon before (as well as after) her service on the court. Given the court's specialized nature and the politics of confirmation hearings by the Senate Armed Services Committee, a non-veteran would

31. Prof. Lurie notes that in 1956 Sen. Everett McKinley Dirksen (R-Ill.) urged that "serious thought" be given to "Colonel [Edward] Chayes as a member of the Jewish faith," but nothing came of it. LURIE, *supra* note 7, at 116 n.39. Col. Chayes served in World War II and was the father of Professor Abram Chayes, long a member of the Harvard Law School faculty. Obituary*, Edward Chayes, 88*, WASH. POST, Apr. 30, 1983, at B5.

32. LURIE, *supra* note 7, at 22-23, 44-45, 225 & nn.85-87. Chief Judge Everett regularly commuted from North Carolina, but shared an apartment in the Washington area.

33. At the beginning and later on there seems to have been an effort to have a "balanced ticket" – New Yorkers of a certain age will recall such exquisitely-balanced statewide slates as "Lefkowitz, Fino and Gilhooley" or "Wagner, Beame and Screvane" – on the court. *See id*. at 22 (original appointees had served in Army, Navy and Air Force); GENEROUS, *supra* note 7, at 61, 156. How potent a factor this is today is unknown, and may shift from administration to administration.

34. *Id*. at 156.

likely be a "hard sell."[35] If "empathy" is a proper factor, as was disputed when Justice Sonia Sotomayor was nominated to the Supreme Court,[36] perhaps combat experience could prove to be a plus, although given the actual demands of the job, service as a judge advocate would have as much or more to recommend it.

Educational credentials: The court has not been a private preserve for graduates of the Ivy League law schools, although there have been judges who graduated from Harvard (Judges Quinn, Everett, Effron, Scott W. Stucky) and Yale (Judge Baker). Only one incumbent – Judge Ryan – has served as a Supreme Court law clerk (for Justice Clarence Thomas). She and Judge Sullivan also clerked for U.S. circuit judges. Except for Judge Everett, there is no tradition of judges of the court having previously worked at the court in any other capacity. Several have been law professors (*e.g.*, Judges Ferguson, Brosman, Everett) before being named to the bench.

Judicial experience: Several current and former judges had prior civilian judicial experience (Judges Quinn, Latimer, Ferguson, Duncan, Albert B. Fletcher, Jr., Cox, Gierke, Erdmann). Plainly, this is desirable, but equally plainly, it is not essential. I believe that only Judges Cox and Gierke served as military judges while on active duty; Judge Stucky served as a reservist on the Air Force Court of Criminal Appeals. In addition to his state judicial service, Judge Erdmann served on the Bosnian Election Court in 2000-01.

Other employment experience: Judges of the court have held high elected (Judge Quinn was governor of Rhode Island, Judge Ferguson was a United States Senator, and Judge Kilday served in the House of Representatives) or appointed office (Judge Ferguson was also an ambassador (to the Philippines)), or worked as civilians in the Pentagon (Judges Sullivan, Crawford, Effron), at the Department of State and on the National Security Council (Judge Baker), or on Capitol Hill (Judges Darden, William H. Cook, Everett, Effron, Baker, Stucky). A few have had sustained pre-judicial experience in either private practice (Judges Perry, Everett, Robert E. Wiss, Gierke, Erdmann, Ryan) or academia (Judges Brosman, Ferguson, Everett). Judge Everett appeared before the court both as an Air Force captain[37] and as a civilian[38] before joining it.[39]

35. Opinions will differ as to how truly specialized the court is. Court-martial rules of evidence, for example, closely track the Federal Rules of Evidence. As for those issues the court confronts that are truly "inside baseball," it is hard to imagine that capable appellate counsel could not fully inform the judges. After all, Article III judges sit on the Court of Appeals from time to time by designation, and they may have no familiarity with military justice.

36. Peter Baker, *White House Memo: In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES, Apr. 26, 2010, at A12.

37. United States v. Holt, 7 U.S.C.M.A. 617, 23 C.M.R. 81 (C.M.A. 1957).

38. United States v. Guy, 17 U.S.C.M.A. 609, 38 C.M.R. 407 (C.M.A. 1968). He was

You can slice and dice this information any way you like; it may not tell much about who the next nominee will be since, even what might, apart from intellectual horsepower, writing skill, and judicial temperament, seem the highest priority (ending the current all-white court) could easily be trumped by other considerations. All I can say is "stay tuned."

VI. IMPLICATIONS FOR THE COURT'S JURISPRUDENCE

No two judges are alike. Overall, Chief Judge Effron's jurisprudence is highly restrained, eschewing sweeping pronouncements in favor of narrow rulings based on a painstaking examination of the pertinent authorities.[40] His successor may share that approach, but perhaps not. And if not, it is difficult to discern where the court's path may lead. Still, what difference *could* the choice of a successor make for the court and its jurisprudence? The most likely place to look for change in the court's overall direction is the cases decided by 3-2 votes. Three thematic areas come to mind: jurisdiction, paternalism, and military exceptionalism, by which I mean the view that factors peculiar to the military may justify a departure from civilian jurisprudence.

Chief Judge Effron has typically been in the majority on the most hotly contested jurisdictional cases, such as *Denedo v. United States*[41] and *United States v. Lopez de Victoria*.[42] His successor could well turn the 3-2 pattern into a 2-3 pattern. This is not the place to debate whether the court has exhibited a pattern of exceeding its jurisdiction, although I don't think it has, except for *Clinton v. Goldsmith*,[43] where the Supreme Court firmly reversed. One case does not constitute a pattern.

Chief Judge Effron, like a number of the court's judges over the years (and currently including Judge Baker), has been willing to engage in

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also civilian appellate defense counsel in United States v. Austin, 20 C.M.R. 939 (A.F.B.R. 1955), *pet. denied*, 21 C.M.R. 340 (C.M.A. 1956).

39. Judge Latimer appeared before the court several times after completing his term. *E.g.,* United States v. Calley, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (C.M.A. 1973); United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (C.M.A. 1969). He got mixed reviews. LURIE, *supra* note 7, at 218 & n.55. Senior judges are now forbidden from serving as counsel in cases arising under the UCMJ, including on appeal to the Court of Appeals. C.A.A.F. R. 3A(e).

40. *E.g.,* Willenbring v. Neurauter, 48 M.J. 152 (C.A.A.F. 1998) (jurisdiction over offenses committed by reservists during prior period of active duty).

41. 66 M.J. 114 (C.A.A.F. 2008) (3-2 decision), *aff'd*, United States v. Denedo, 129 S. Ct. 2213 (2009) (5-4 decision) (availability of writ of *error coram nobis* following completion of appellate review).

42. 66 M.J. 67 (C.A.A.F. 2008) (3-2 decision) (jurisdiction to review decisions of service courts of criminal appeals on government appeals).

43. 48 M.J. 84 (C.A.A.F. 1998) (3-2 decision), *rev'd*, 526 U.S. 529 (1999) (9-0 decision) (overruling Court of Appeals' use of All Writs Act to review order dropping officer from the rolls).

paternalism, affording GIs a bit of slack where none might be expected in other federal courts. Recent examples include his votes to disregard or find ways to hold appellants harmless from appellate defense counsels' failures to comply with deadlines.[44] He has also been more willing than some (*e.g.*, Judges Crawford and Ryan) to embrace military exceptionalism.[45] His successor may not share that philosophical orientation.

Finally, Chief Judge Effron has shown himself to be both well prepared and unfailingly courteous on the bench. These are essential traits, and it can only be hoped that his successor will share them.

VII. MEMO TO THE JUDGE-PICKERS

How will the judge-pickers approach their task? One must assume they will not impose any litmus tests; after all, the issues facing the system do not lend themselves to that kind of decisionmaking. I don't believe either the administration or the Senate ought to look for explicit or implicit doctrinal commitments of any kind. Nor should any litmus tests be applied. Still, if I were interviewing candidates, here are some things I'd be interested in knowing:

1. What does the individual think about the court's low caseload, low grant rate, and unique ability to preclude Supreme Court review?
2. What does the individual think about the surprising frequency of petitions for grant of review that cite no issues?
3. What does the individual think about Project Outreach, under which the court hears arguments at law schools, civilian venues, and military installations?[46]
4. What does the individual think about the utility of the Code Committee?[47]

44. *E.g.,* United States v. Denedo, 69 M.J. 262 (C.A.A.F. 2010) (mem.) (3-2 decision) (Effron, C.J., dissenting) (denying leave to file untimely writ-appeal); United States v. Rodriguez, 67 M.J. 110, 116 (C.A.A.F. 2009) (3-2 decision) (Effron, J., dissenting) (denial of untimely petition for grant of review).

45. *E.g.,* United States v. Tulloch, 47 M.J. 283 (C.A.A.F. 1997) (Effron, J.) (applicability of Supreme Court precedent on race-neutral explanations for peremptory challenges).

46. *See generally* EUGENE R. FIDELL, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 259-263 (13th ed. 2010) (collecting Project Outreach cases).

47. *See* 10 U.S.C. §946 (2006).

5. What approach would the individual take to achieving cost reductions and providing electronic public access to the court's dockets?

CONCLUSION

We are fortunate to have a new generation of aspirants for the Court of Appeals. Chief Judge Effron will be a tough act to follow, and the stakes are high because the court's work is important. Friends of military justice will therefore watch the unfolding selection process with interest and hope.