SUPREME COURT OF THE UNITED STATES

No. 92–1482

ERIC J. WEISS, PETITIONER *v.* UNITED STATES

ERNESTO HERNANDEZ, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

[January 19, 1994]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

I think the Appointments Clause issue requires somewhat more analysis than the Court provides, and the Due Process Clause issue somewhat less.

As to the former: The Court states that this case differs from *Shoemaker* v. *United States*, 147 U. S. 282 (1893), because, after the passage of the Military Justice Act in 1968, military judges could be selected from "hundreds or perhaps thousands of qualified commissioned officers," *ante*, at 11, so that there is no concern (as there was in *Shoemaker*, where a single incumbent held the office whose duties were enlarged) that "Congress was trying to both create an office and also select a particular individual to fill the office." *Ibid*. That certainly distinguishes *Shoemaker*, but I do not see why it leads to the Court's conclusion that *therefore* "germaneness" analysis need not be conducted here as it was in *Shoemaker* (though the Court proceeds to conduct it anyway, *ante*, at 11–12).

Germaneness analysis must be conducted, it seems to me, whenever that is necessary to assure that the conferring of new duties does not violate the Appointments Clause. Violation of the Appointments Clause occurs not only when (as in *Shoemaker*) Congress may be aggrandizing *itself* (by effectively

appropriating the appointment power over the officer exercising the new duties), but also when Congress, *without* aggrandizing itself, effectively lodges appointment power in any person other than those whom the Constitution specifies. Thus, "germaneness" is relevant whenever Congress gives power to confer new duties to anyone other than the few potential recipients of the appointment power specified in the Appointments Clause—*i.e.*, the President, the Courts of Law, and Heads of Departments.

The Judges Advocate General are none of these. Therefore, if acting as a military judge under the Military Justice Act is nongermane to serving as a military officer, giving Judges Advocate General the power to appoint military officers to serve as military judges would violate the Appointments Clause, even if there were "hundreds or perhaps thousands" of individuals from whom the selections could be made. For taking on the nongermane duties of military judge would amount to assuming a new "Offic[e]" within the meaning of Article II, and the appointment to that office would have to comply with the strictures of Article II. I find the Appointments Clause not to have been violated in the present case, only because I agree with the Court's dictum that the new duties are germane.[1]

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[1]The further issues perceptively discussed in JUSTICE SOUTER'S concurrence—namely, whether the Appointments Clause permits conferring principal-officer responsibilities upon an inferior officer in a manner other than that required for the appointment of a principal officer (and, if not, whether the responsibilities of a military judge are those of a principal officer)—were in my view wisely avoided by the Court, since they were inadequately presented and not at all argued. The Petition for Certiorari said only: "There is considerable force to the argument that military appellate judges are `superior' or `principal' officers, in which case the President must appoint them with the advice and consent of the Senate. But in any event, ..." Pet. for Cert. 12. The only reference in petitioner's Brief was the statement that "if military judges are principal officers, it is an even more serious transgression of the purposes of the Appointments Clause to have their original commissions substitute for an appointment to a principal office." Brief for Petitioner 15. As JUSTICE SOUTER'S opinion demonstrates, the issues are complex; they should be resolved only after full briefing and argument.

With respect to the Due Process Clause challenge, I think it neither necessary nor appropriate for this Court to pronounce whether "Congress has achieved an acceptable balance between independence and accountability," *ante*, at 16. As today's opinion explains, a fixed term of office for a military judge "never has been a part of the military justice tradition," *id.*, at 15. "Courts-martial . . . have been conducted in this country for over 200 years without the presence of a tenured judge," *ibid.* Thus, in the Military Justice Act of 1968 the people's elected representatives achieved a "balance between independence and accountability" which, whether or not "acceptable" to five Justices of this Court, gave members of the military at least as much procedural protection, in the respects at issue here, as they enjoyed when the Fifth Amendment was adopted and have enjoyed ever since. That is enough, and to suggest otherwise arrogates to this Court a power it does not possess.

> "[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country . . . . [That which], in substance, has been immemorially the actual law of the land . . . is due process of law." *Hurtado* v. *California*, 110 U. S. 516, 528 (1884).

As sometimes ironically happens when judges seek to deny the power of historical practice to restrain their decrees, see, *e. g.*, *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604, 637–639 (1990) (Brennan, J., concurring in judgment), the present judgment makes no sense except as a consequence of historical practice. Today's opinion finds "an acceptable balance between independence and accountability" because the Uniform Code of Military Justice "protects against command influence by

precluding a convening officer or any commanding officer from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge relating to his judicial duties"; because it "prohibits convening officers from censuring, reprimanding, or admonishing a military judge `. . . with respect to any . . . exercise of . . . his functions in the conduct of the proceeding'"; and because a Judge Advocate General cannot decertify or transfer a military judge "based on the General's opinion of the appropriateness of the judge's findings and sentences." *Ante*, at 17–18. But no one can suppose that similar protections against improper influence would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive. I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the *structural* protection of tenure in office, which has been provided in England since 1700, see J. H. Baker, An Introduction to English Legal History 145–146 (2d ed. 1979), was provided in almost all the former English colonies from the time of the Revolution, see Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 S. Ct. Rev. 135, 138–147 (1969), and is provided in all the States today, see National Center for State Courts, Conference of State Court Administrators, State Court Organization 1987, pp. 271–302 (1988). (It is noteworthy that one of the grievances recited against King George III in the Declaration of Independence was that "[h]e has made Judges dependent on his Will alone, for the tenure of their offices.")

Thus, while the Court's opinion says that historical practice is merely "a factor that must be weighed in [the] calculation," *ante*, at 16, it seems to me that the Court's judgment today makes the fact of a differing military tradition utterly conclusive. That is as it

should be: "[N]o procedure firmly rooted in the practices of our people can be so `fundamentally unfair' as to deny due process of law." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 38 (1991) (Scalia, J., concurring).

For these reasons, I concur in Parts I and II–a and concur in the judgment.