

# HEARING ON PENDING NOMINATIONS

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HEARING  
OF THE  
COMMITTEE ON VETERANS' AFFAIRS  
BEFORE THE  
UNITED STATES SENATE  
ONE HUNDRED SIXTEENTH CONGRESS  
FIRST SESSION

NOVEMBER 6, 2019

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## HEARING ON PENDING NOMINATIONS

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WEDNESDAY, NOVEMBER 6, 2019

UNITED STATES SENATE,  
COMMITTEE ON VETERANS' AFFAIRS,  
*Washington, D.C.*

The Committee met, pursuant to notice, at 9:35 a.m., in Room 418, Russell Senate Office Building, Hon. Jerry Moran presiding. Present: Senators Moran, Boozman, Cassidy, Rounds, Sullivan, Tester, Brown, Blumenthal, Hirono, Manchin, and Sinema.

### OPENING STATEMENT OF SENATOR MORAN

Senator MORAN. Good morning. The hearing will come to order. In the absence of Senator Isakson today I am pleased to chair the Veterans' Committee hearing on these two witnesses. Let me begin with a few opening remarks and then followed by Senator Tester, and we will swear in our witnesses and hear their testimony.

Welcome to our nominees, Grant Jaquith and Scott Laurer. Congratulations on your nominations, and you have been nominated to be judges of the Court of Appeals for Veterans Claims. Thank you for your willingness to serve our nation's veterans on this court and to ensure that all veterans receive the benefits they are due according to the law and according to congressional intent.

The court is relatively new, when compared to other courts, at just over 30 years old. I look forward to hearing from each of you how you will help shape the character and legacy of the court for the future, if you are confirmed.

In 2018, the court received 6,800 appeals. That is 2,000 more claims than during any other year in the last two decades. With the Board of Veterans Appeals increasing its output every year, it is critical the court remain at full capacity, with nine sitting judges, so that we can assure swift and accurate resolution of cases.

I look forward to hearing more from you about your qualities, your experience and what you would bring to the court. I also acknowledge and thank your families for being here today and for supporting you both in your long and continued service to our nation.

So thank you very much, and I recognize the Ranking Member, Senator Tester.

### OPENING STATEMENT OF SENATOR TESTER

Senator TESTER. Well, I want to thank Chairman Moran. I want to also thank both of you for being here today. I want to thank you both for your military experience—military service to this country,

and thank you for your willingness to continue to serve on behalf of our nation's veterans.

Although I have met personally with you both, and you have responded to written questions, your answers today will help many of us make our final decisions about whether you are up for the job to which you have been nominated.

Mr. Laurer, in particular, given your present assignment to the White House, working on the National Security Council, as an ethics counsel, and in records management, and the experience with the European Russian Affairs Directorate, we will want to know more about your role in recent events.

The uniqueness of this court cannot be understated. Formed in 1988, the Court of Appeals hears appeals from a system unlike any other Federal court. If confirmed, you will be charged with the sacred duty, not simply as Federal judges but as the only judges in the country solely tasked with making determinations for those who have served their country.

For many veterans, the court is seen as their last hope after fighting for months, years, and in some cases, decades, to obtain the benefits that they have earned. They look to the court for a fair and equitable resolution of their claims.

Now a few issues to address. Over the last few years, the court has seen a 30 percent increase in decisions appealed to the Federal circuit. I wonder if these appeals are necessary to establish precedent, because so many of the decisions on the Veterans Court are made by a single judge rather than a panel.

Mr. Jaquith, in response to my written questions you mentioned that panel decisions might not take as long if there were more established precedent from this court. I would like both of you to discuss whether you think the court should be using single-judge decisions or more panel decisions to establish precedent.

According to last year's annual report, the court had over 10,000 filings. Now most of these were dismissed, but the court still made more than 8,000 dispositions. The average wait time between filing and disposition went from 301 days to 233 days over the last two years. We are moving in the right direction but eight months is still far too long.

In responses to my pre-hearing question on the length of time it should take to make a decision, both of you said it could only be determined on a case-by-case basis. If confirmed, I want to hear what you would do or suggest to bring down the wait time veterans have to get a decision. We, in Congress, and especially on this Committee, have dedicated a lot of work to modernizing the claims process and improving the quality of care and benefits for veterans. I want to hear how you will ensure our work to serve veterans is carried out.

On that note, the court's recent decision in Wolf, righting a wrong, working to clear the way for many veterans who sought emergency treatment outside the VA to receive the benefits that they were promised. By continuing your life of service, this is an example of what you can do to help your peers receive justice.

Both of you have dedicated your lives to serving this country. I hope you remember your service and appreciate that your fellow

veterans are counting on you when deciding the cases that come before your court.

I look forward to our discussion today and thank you again for your willingness to serve.

Mr. Chairman.

Senator MORAN. Senator Tester, thank you very much. We will swear in the witnesses. If you both will stand. Please stand and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give before the Senate Committee on Veterans' Affairs will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. JAQUITH. I do.

Mr. LAURER. I do.

Senator MORAN. Thank you. Please be seated.

Mr. Jaquith, we will begin with your testimony. You may want to introduce family or friends that are here, if you would like.

#### TESTIMONY OF GRANT C. JAQUITH

Mr. JAQUITH. Chairman Moran, Ranking Member Tester, and distinguished members of this Committee, thank you for the opportunity to speak with you today. I am honored to have been nominated by the President to become a Judge on the United States Court of Appeals for Veterans Claims.

This great privilege is the result of my family's love, support, and example. My wife, Rosemarie, and my six children, Amanda, Larene, Gordon, Olivia, Isabelle, and Colton, mean everything to me.

My inspiring wife is an accomplished lawyer and community leader who spoke only Spanish when she started kindergarten. Her parents came to the United States from Cuba as teenagers to find a better life. She is here today, along with three of the children and some of their family members, including three of my grandchildren. All of my children and grandchildren are with me always. One is in Federal service. My son, Gordon, is the Director of the Naval Forces Division of Cost Assessment and Program Evaluation in the Office of the Secretary of Defense. That is him in a similar hairstyle to his dad's.

The rest is my wife, Rosemarie; son-in-law, Chris; daughter, Amanda; daughter-in-law, Hannah; her father, Dr. Steve Dubansky; my daughter, Larene's husband, Tony Davenport; and grandchildren Allison, Pauly, and Jack.

Senator MORAN. Welcome to all of you, to see your relative testify today before the Committee.

Mr. JAQUITH. My own roots in service run deep. I am descended from a Mayflower passenger, a servant who signed the Mayflower Compact 399 years ago. The first Jaquith born in America died in 1678, of wounds received three years earlier in King Philip's War. Several Jaquiths answered the call to arms in Lexington, Massachusetts in April of 1775. A grandfather six generations back served in the War of 1812.

During the Civil War, my great-great-grandfather was a private in the 12th Vermont volunteers engaged in the defense of Washington. And in the 1950s, my father served in the Navy as a ma-

chinist's mate, contracting pneumonia, returning to work too soon, and developing persistent lung problems that resulted in a permanent disability rating.

My parents taught me to judge people on merit, based upon their character and conduct, and to care about them. They found fulfillment in dedication to family, church, community, and country, and illustrated industry and perseverance. They expected nothing and were grateful for everything.

My mother is watching now on television and cheering my efforts to live up to their example. She instilled my interest in history. From reading biographies of famous people, I concluded that those who shaped our nation most often were lawyers or soldiers, and a dream was born—to become both.

I signed my first contract with the United States of America about a month before my 18th birthday, accepting the ROTC scholarship which enabled the son of postal worker and a homemaker to go to a private liberal arts college. I was commissioned upon graduation, but was granted an educational delay to go to law school, leading to a summer judicial clerkship, work in the public defender's office, and then the Army Judge Advocate Generals Corps.

After six years of active duty, I joined a large law firm in Syracuse. In 1989, I came to the U.S. Attorney's Office. I remained in the Army Reserves, rising to the rank of Colonel, and serving as a trial judge from 2001 to 2010. In the U.S. Attorney's Office, I have been a supervisor since 1998, including serving as Criminal Chief, First Assistant U.S. Attorney, and United States Attorney.

My 32 years of active military service involved a broad range of legal work, including general practice assisting soldiers, veterans, and their families; advising commanders regarding operational, administrative, and disciplinary matters; addressing civil claims; prosecuting criminal cases; and presiding over courts martial throughout the United States and in Germany and Korea, including cases involving soldiers with significant service-connected health issues.

I have spent over 30 years in the U.S. Attorney's Office conducting investigations, trying complex cases of different types, handling appeals, and leading the effort by lawyers and support staff to secure justice in civil and criminal cases throughout a district encompassing 30,000 square miles.

In striving always to fulfill our responsibility to do the right thing in the right way, I have learned from eight excellent United States Attorneys; an outstanding leadership team, including my First Assistant, and many talented colleagues.

My diverse case work included prosecution of a research coordinator at a VA medical center who falsified patient records to enroll them in cancer treatment studies, including those of a patient who died from the resulting infusion of chemotherapeutic drugs, as well as the Chief of Oncology who failed to ensure that accurate case histories were maintained and that treatment was based on actual laboratory results.

As Vice-Chair of the Servicemembers and Veterans Rights Subcommittee of the Attorney General's Advisory Committee, I have initiated greater dialogue with the Department of Veterans Affairs

about the importance of retrievable patient records to the quality of medical care for veterans and later litigation about that care, under both the current VA health records systems and the modernized comprehensive electronic system being designed and fielded.

My family and professional history have imbued me with reverence for the service and sacrifice of veterans and the rule of law for the fair, impartial, and orderly resolution of disputes. These cornerstones of our country are connected in the Court of Appeals for Veterans Claims.

I have learned from exceptional jurists I have appeared before and worked for that excellence depends not only on integrity, judgment, knowledge, and common sense, but also on humility. They showed that good judging comes from listening and learning to understand the facts and the law, and fairly apply the latter to the former. If confirmed, I will follow their example and work tirelessly to resolve cases justly and swiftly.

Thank you for considering my nomination to this crucial court. I would be pleased to answer any questions you have.

Senator MORAN. Mr. Jaquith, thank you.

Mr. Laurer, you are welcome to present your family and friends in the room, and if you would provide your testimony.

#### **TESTIMONY OF SCOTT J. LAURER**

Mr. LAURER. Good morning, Mr. Chairman, Ranking Member Tester, and distinguished members of the Committee. Thank you for the opportunity to testify before you today and for the Committee staff's assistance in connection with my nomination.

I am honored that the President has nominated me to serve as a judge on the United States Court of Appeals for Veterans Claims. I would not be here without the support of many people, and today I would like to particularly acknowledge my family.

My father's parents and mother's grandparents sailed to the United States in search of better lives for themselves and future generations. Most did not even have the equivalent of a high school degree; however, they valued education, embraced hard work, and proudly became American citizens. They labored humbly in a Kansas City slaughterhouse, as a domestic helper in Topeka, and as a custodian, domestic helper, dressmaker, and roofer in Philadelphia.

My parents made extensive sacrifices raising seven children. After two of our grandparents lost their spouses, my parents also welcomed the surviving grandparents into our home. Anything our large family lacked in material wealth was surpassed by mutual affection and happiness. Growing up, our parents taught us to treat everyone with respect, the importance of personal commitment, and the value of hard work and teamwork, lessons that would serve me well throughout my military career.

While a second-year law student, I met my future spouse and best friend. During our 28 years of marriage, 11 permanent change of station moves, and multiple deployments, her support has been unwavering. Our two children have also backed me in countless ways, while being towed around the globe attending a dozen different primary and secondary schools between them. I thank my family members for their love, selflessness, and support to our nation. And I would like to introduce my wife, Kim, in the red dress;

my daughter, Ada, in black; and my son, Ethan. I am very proud of all of them and I am very thankful for them joining me this morning.

I wanted to become a lawyer since high school. As the son of a Korean War-era veteran and nephew of a Vietnam War veteran, I was also drawn towards military service. I did not know it was possible to serve as both an officer and an attorney until I met Judge Advocate General's Corps officers who were recruiting at my law school. The more I learned about the JAG Corps, the more eager I became about serving in the dual professions of arms and the law. The Navy JAG Corps selected me for its Student Program, and I was commissioned in January 1989.

The United States military offered me the privilege of service, unparalleled leadership experience, and a wide range of legal skills. During nearly 30 years of active-duty service, I provided legal services to military service members, veterans and their families, and I advised our country's most senior civilian and military leaders on complex legal issues in combat zones, at sea, overseas, and here in Washington, D.C. Through these diverse experiences, I have demonstrated my ability to faithfully interpret and apply laws and regulations to factual situations and to communicate effectively, in speech and in writing, my reasoning behind legal conclusions.

Veterans and their families deserve judges serving on the United States Court of Appeals for Veterans Claims who are impartial, diligent, skilled, and devoted to the law. If confirmed, I will uphold those solemn obligations and enhance the Court's efforts to decide an individual veteran's appeals fairly and expeditiously.

Thank you again for the opportunity to appear before you today. I would be glad to answer your questions.

Senator MORAN. Mr. Laurer, thank you very much and thank you for your family's presence with you today.

I will defer and recognize the Senator from Arkansas, Senator Boozman.

#### **SENATOR JOHN BOOZMAN**

Senator BOOZMAN. Thank you so much, Mr. Chairman, and also you, Mr. Tester. We appreciate you guys doing this in an expeditious way so we can get these things done. As was just said by Mr. Laurer, fair and expeditious, you know, is so, so very important. This is such a big job. We appreciate you all in the sense of your service to your country in the past and your willingness to serve now.

I had really good meetings with both of you all, and I think you were able to answer my questions, you know, as we talked at length about what the job entails. And so I guess one thing I would like to know is you all have both—were in the military, you know, both veterans yourselves, many years of service. How will that experience affect you as you do your duties regarding the court? What does that bring to the table, in the sense of being a veteran and kind of understanding some of the issues that are out there?

Mr. JAQUITH. Thank you, Senator. As I indicated, I think my over three decades of military service imbued me with great reverence for the service and sacrifice of veterans, but also a personal understanding of the frustrations sometimes experienced when

seeking administrative action, particularly when not on active duty.

My military experience is an important reason why I am here, both as the foundation of my professional success and the impetus for my interest in dedicating the rest of my professional life to this court. The breadth of my military experience has been a real catalyst for professional development.

In nearly 29 years in the Army Judge Advocate General's Corps I performed a wide array of functions, and having to learn and adapt to each one. They included providing legal assistance to soldiers, veterans, and their family members in all areas of civil law, including those involving military and veterans' benefits. I advised a depot commander on matter of command administration, contracts, environmental law, Federal-State relations, and personnel law, and did similar work advising other commanders at all levels, including, as the staff judge advocate advising the New York Army National Guard commander and his staff. I investigated and settled civil claims against the Army arising in a 29-county area. I provided instruction on military justice, operational law, law of war, ethics, mobilization preparedness, and veterans' re-employment rights, and the protections of what is now known as the Servicemembers Civil Relief Act.

As trial counsel, my prosecutors included a wide variety of serious cases. I served as a Special Assistant United States Attorney in both the Western District of Missouri and the Western District of New York, and some of the cases I worked on as a trial counsel and a SAUSA involved significant medical evidence.

As an Army trial judge from 2001 to 2010, I presided over courts martial, including trials on charges of heinous crimes such as solicitation of murder and rape, and some of those cases involved soldiers whose work involved combat injuries that was presented as mitigating evidence.

This broad perspective, I think, if confirmed, will enable me to apply the exercise of the good judgment developed in that career in trying to achieve fair and equitable results, expeditiously, for veterans.

Senator BOOZMAN. Mr. Laurer, quickly, or he is going to gavel me.

Mr. LAURER. Thank you, Senator. I guess you could say that both Mr. Jaquith and myself have walked a mile in veterans' shoes, and that is obviously important for understanding, particularly with respect to veterans' benefits, the frustrations perhaps that they may deal with.

In my case, as a result of my military experience, I have had the privilege of service, first and foremost, some unparalleled leadership experience, to include being in command of a legal organization, and a wide range of legal skills.

Why do I think that is important? Well, first of all, my main role, if confirmed, would be to faithfully interpret and apply laws and regulations to the factual situations. It is not enough just to be able to do that, however, as I am sure we will discuss later. You have to be able to communicate effectively, both in writing as well as orally, in order to help with some of the challenges in the system as they currently exist.

I would also note that both on the Joint Staff and my most recent detail to the National Security Council, I have coordinated extensively using the interagency process. And that is important because, if confirmed, you join a court that is composed of currently nine judges, and you need to be able to collaborate, and based on what I know about the current judges and their diversity of experiences and their incredible knowledge base, that is important to be able to work, whether it is on a single judge alone decision or certainly in panels or en banc, or all together.

And then, finally, I mentioned earlier that I have led organizations in command and in other situations during my career, and one of the important things to remember with judges, again, is that even though you are not in command of something, you are in a leadership and a supervisory role, not only with your chambers, of course, and are responsible for developing the personnel under your charge, but also working across the court with other members, their chambers, and in general. Thank you.

Senator BOOZMAN. Thank you.

Senator MORAN. Senator Boozman, thank you. Senator Tester.

Senator TESTER. Thank you, Mr. Chairman, and I want to thank you both for being here today. I want to also thank your families for being here today. I think it speaks well of both of you.

Before I get into my questions I would just say that I am impressed with the qualifications that both of you bring to the table. I think that it is good to have people with your background on the Court of Appeals for Veterans Claims.

Mr. Laurer, from August of 2017 to August of 2018 you served as Ethics Counsel on the National Security Council at the White House. I believe that is correct, isn't it?

Mr. LAURER. Yes, Senator.

Senator TESTER. And from August of 2018 until recently you served as Deputy Legal Advisor to the European Russian Affairs Directorate. That is correct?

Mr. LAURER. Yes, Senator.

Senator TESTER. Okay. It has been a rather tumultuous time at the NSC, and it would be, I think, helpful for the Committee to know a little bit more about any specific role that you may have played. So did you have any knowledge or involvement regarding the July 2019 call between President Trump and President Zelensky?

Mr. LAURER. Thank you for your question, Mr. Senator. First, if I may explain a little bit about the National Security Council—

Senator TESTER. Sure.

Mr. Laurer.—staff, for those that may not be aware. The staff is composed primarily of detailees.

Senator TESTER. Yep.

Mr. LAURER. In my case, I was detailed from the Department of Defense, and that is true, of course, for the Legal Affairs Directorate as well. So I was one of six detailees. So just to provide a little bit of background.

Senator TESTER. Yep.

Mr. LAURER. As you know, I have been nominated to serve as a judge on the Court of Appeals for Veterans Claims, and I am here in that capacity today, obviously. Because of concerns about pro-



tected information, I am unable to discuss the specifics of any matter that I may or may not have worked on while detailed to the National Security Council.

Senator TESTER. If we were able to, with the Chairman's agreement, be able to go into a closed session, could you tell us about that?

Mr. LAURER. Senator, there would be some of the same concerns with respect to protected information, and if I may briefly explain what those would be—

Senator TESTER. Yes.

Mr. LAURER.—national security interests, of course, first and foremost, to include classified information; client confidences that may exist; as well as protections of the separation of powers between co-equal branches of the government.

Senator TESTER. Okay. So we would not want you to give away anything that would make the country less safe. I do not think that would be there. But if there was any role that you played it would be helpful to know, and that is really where the questions would come from. For example, were you aware or did you have any role in John Eisenberg's decision to move the transcript of the July 25th call to a highly classified server?

Mr. LAURER. Again, Senator, I would express the same concerns.

Senator TESTER. Okay. So it was good. I get it. I just—it would be good to know that. And I do not—I think if you did not have any role in that there is no problem. If you did have a role in it, we would like to know what it was, and I do not think that brings forth national security issues.

I am going to ask him to do it. If you will do it, that will be fine. If not—and that, by the way, does not take away from your qualifications and the fact that you were a detailee, and the fact that you went there because you were assigned that job. It is just if there are any roles there I would just like to know. I think you are a fine man. I think you have got a fine family, and, by the way, your son is a chip off the old block.

The fact of the matter is, is that this is kind of important information moving forward. And so if we could—you seem to be a straight-up guy, an honest guy, somebody who is a no-BS guy. I like that about you. And so if we could get that stuff—it is not real heady, and I have got a notion you probably did not have a hell of a lot to do with it, but I would like to know that. Okay?

Mr. LAURER. Thank you, Senator. I understand.

Senator TESTER. Okay. Let me go with the single judge question that I brought forth in my opening question. With a single judge can decide an appeal more quickly than a panel, are there any downsides to a single panel decision, just as lack of precedence being established? Either one can go first. It does not matter.

Go ahead, Mr. Jaquith.

Mr. JAQUITH. Thank you, Senator. There is not a downside. Single-judge decisions certainly have their place.

Senator TESTER. So would it be helpful to have more panel decisions?

Mr. JAQUITH. Well, I think it is important to maintain the construct of the internal operating procedures that the court has in place. The single-judge resolutions are designed, as I understand

the rules, for relatively simple cases where the outcome seems not readily debatable. And so having a single judge decide those cases can be done more quickly.

Panel decisions are very important, and so it may be that it is screening judges should be sparing resolving questions of doubts about whether a panel is warranted or not in favor of a panel deciding the case, because the additional time it takes to get three judges together and—

Senator TESTER. Gotcha.

Mr. JAQUITH.—work on a case, has the advantage of setting precedent that could speed up cases throughout the system.

Senator TESTER. That is correct. What is your view on it, Scott?

Mr. LAURER. Senator, I would echo what Mr. Jaquith said. I would add that when considering this question obviously there is guidance for the judges, and we would have to follow that. But in addition, the annual reports clearly show that—state the obvious, which is that whenever you have a panel or certainly en banc, it takes longer. And so as I recognize there is a need both in terms of first and foremost getting it right and being fair to the veterans, but also this need to do so in an expeditious manner.

And so there are certainly advantages and disadvantages. I would be comfortable, if confirmed, with following the existing guidance, but also looking for other ways to be more expeditious in resolving cases. And the advantage, obviously, with a panel decision is that it has precedential value. That would be helpful not just for the board but also all the way down the chain to the regional offices and to the veterans themselves.

And so, again, if you meet as a panel and if you provide a decision that is very clear and instructive, it is very difficult because it is hard to capture what those metrics would look like. But common sense tells those of us in the room that if you were to be clear in providing that it could perhaps prevent the need to remand cases to the board, and therefore be more efficient.

Senator TESTER. Thank you. Thank you, Mr. Chairman.

Senator MORAN. Senator Brown.

#### **SENATOR SHERROD BROWN**

Senator BROWN. Thank you, Mr. Chairman. Thank you for that. Thank you both for your willingness to serve. And I reiterate what Senators Tester and Moran said about your qualifications, and good luck through the process, and thank your families for being here.

Following up—Mr. Laurer, following up on Senator Tester's question, in your questionnaire you affirmed you would appear and testify before a duly constituted committee of Congress. If subpoenaed regarding the Ukrainian controversy, are you willing to appear and testify regarding your actions and your position as legal advisor for European Affairs in the NSC?

Mr. LAURER. Thank you, Senator. I stand by my response in the questionnaire, and so for a committee that would call me, my response is yes.

Senator BROWN. Okay. Thank you for your direct answer.

Also following up on Senator Tester's line of questioning, in your role at the NSC, Mr. Laurer, were you aware of, as Ambassador

Taylor's written testimony details, a quote, "irregular policy channel running contrary to the goals of long-stand U.S. policy, vis-à-vis Ukraine"? Were you aware of that written testimony?

Mr. LAURER. Thank you, Senator. Again, I would state that based on concerns about protected information, I am unable to discuss specifics of any matter that I may or may not have advised on while detailed to the National Security Council.

Senator BROWN. But you would be willing, if called back, in a classified setting, to at least appear?

Mr. LAURER. Again, my response to the questionnaire, Senator, is yes, that as a—

Senator BROWN. A lot of us were pretty stunned by the political reaction, or politicized reaction to Mr. Taylor's testimony, and with criticism, sort of an angry criticism of him as a public official and public servant. Did you have a reaction to the criticisms of Mr. Taylor in the ensuing days of his testimony?

Mr. LAURER. Senator Brown, I do not know Mr. Taylor, and I had no reaction to the publicly available information.

Senator BROWN. Okay. As someone with as distinguished a record as you did I just wonder if—as you have had, and as a patriot, and someone who has served his country as admirably as you have, and as admirably as he had, I would just wonder if it sort of hit you in the gut when you see those kinds of criticisms targeted at a public servant like him. But I understand your answer.

Mr. Jaquith, one question for you. If confirmed, when reviewing a case, how would you raise—how would you weigh congressional intent against VA regulation, given the recent Supreme Court ruling in *Kisor v. Wilkie*?

Mr. JAQUITH. Thank you, Senator. I mean, analysis starts and sometimes ends with the text of the statute. If the words are clear and unambiguous they are applied as written, and it making that determination I would construe the words in accordance with their ordinary usage and context, reflecting how they were most likely understood by Congress and the public and most compatible with the surrounding law into which they were integrated.

Legislative history may be helpful in ascertaining the reasonable construction of the statutory language, and, of course, we have the Veteran Canon, that interpretive doubt is to be resolved in the veteran's favor.

This year, as you reference, interplay of the canons of statutory construction and the deference to be accorded reasonable agency interpretation of that ambiguity in statutes, under Chevron, or regulations under Auer, has been the subject of two important cases, *Procopio v. Wilkie*, in which the Federal circuit held that the statute unambiguously applied to veterans who had served in the Blue Water territorial seas of Vietnam, and *Kisor v. Wilkie*, in which the Supreme Court expounded on the proper place for Auer deference. And I would carefully study those recent decisions and apply them to the standards of statutory construction that I had earlier described.

Senator BROWN. Thank you, Mr. Jaquith.

The last point, Mr. Chairman, I would like to enter into the record, and I would ask unanimous consent, an article in the Post today with salaries lagging far behind private sector, VA has

49,000 positions vacant. I know how much you care about this, about the VA, Mr. Chairman, and that Senator Isakson does, and Senator Tester, and Senator Hirono. All of us, we are all concerned about that. It is partly salaries. It is also partly the attacks on Federal employees that we see from the White House, and the undermining of civil service.

Again, I understand it is partly a dollar figure, a dollar issue, and I understand it did not begin with President Trump. There have been shortages before. But this stepping up criticism of Federal employees, and coupled with the threats, again, for a government shutdown, makes it even harder to recruit.

So I would like, Mr. Chairman, to enter this into the record.  
Senator MORAN. Without objection. Senator Hirono?

#### **SENATOR MAZIE K. HIRONO**

Senator HIRONO. Thank you, Mr. Chairman.

I ask all nominees before any of the committees that I sit on the following two questions to start, and I will ask these two questions of both of you, starting with Mr. Jaquith.

Since you became a legal adult, have you ever made unwanted requests for sexual favors or committed any verbal or physical harassment or assault of a sexual nature?

Mr. JAQUITH. No, I have not.

Mr. LAURER. No, Senator.

Senator HIRONO. Have you ever faced discipline or entered into a settlement related to this kind of conduct?

Mr. JAQUITH. No, Senator, I have not.

Mr. LAURER. No, Senator.

Senator HIRONO. For Mr. Laurer, you have had a number of questions relating to your work at the National Security Council. I just want to clarify, was one of your responsibilities to assist the National Security Advisor and the National Security Council staff on interpretations of U.S. and international law relevant to U.S. national security?

Mr. LAURER. Yes, Senator.

Senator HIRONO. So Tim Morrison, the former Senior Director for European Affairs at the White House and NSC testified in detail about his recollections relating to the July 25th telephone call between President Trump and Ukrainian President Zelensky.

Morrison stated, quote, "After the call, I promptly asked the NSC Legal Advisor and his Deputy to review it. I had three concerns about a potential leak of the MemCon. First, how it would play out in Washington's polarized environment. Second, how it would play out in Washington's—second, how a leak would affect the bipartisan support our Ukrainian partners currently experience in Congress. And third, how it would affect the Ukrainian perception of the U.S.-Ukrainian relationship."

Were you the deputy referenced in Mr. Morrison's testimony?

Mr. LAURER. Senator Hirono, I know who Mr. Morrison is. I cannot, in this setting, get into any details about any advice that I may or may not have provided.

Senator HIRONO. Oh, so you are saying that you were the deputy referred to by Mr. Morrison.

Mr. LAURER. No, Senator. That is not what I said. What I said is that I know who Mr. Morrison is, as a Senior Director on the NSC staff, but that in this—

Senator HIRONO. I am not—excuse me, I am not asking you tell us what you said. I am just asking whether you are the deputy that Mr. Morrison referred to. Yes or no?

Mr. LAURER. I do to believe that I am the deputy that he referred to.

Senator HIRONO. So, I figure—you testified that you would be fair and impartial. You would abide by the rule of law. I would expect that for both of you. And I am just wondering, the concerns relating to the telephone call was first raised to the public by basically a valid complaint brought on by a whistleblower. We do have statutes that require a Federal employee, if they see any misconduct, et cetera, to come forward, and we do have statutes that protect a whistleblower.

Do you think that the whistleblower's identity should be disclosed?

Mr. LAURER. Senator, I have no opinion on that. What I can assure you is that throughout my career of public service that I have always acted in accordance with the law and integrity, and I stand on my reputation in that respect, and having done so for almost 30 years on active duty and even longer as a commissioned officer, I have a very clear record in that respect.

Senator HIRONO. So are you aware that we do have laws that protect a whistleblower?

Mr. LAURER. Yes, I am.

Senator HIRONO. And you would abide by those laws. So some of those laws would be that a whistleblower should not be subjected to threats, intimidation, or retaliation, and you would support those.

Mr. LAURER. Yes, Senator, I can assure you that in any context I am familiar with whistleblower laws and that in any context I would respect those laws.

Senator HIRONO. It would be good if others did likewise.

For both of you, as you know there has been a claims backlog at the VA, which ultimately will affect the workload for the court, and many veterans have been waiting, as you are probably aware, for years for their claims to be adjudicated, and we owe them swift justice. What can you do as a judge to decide cases on a timely basis? And since I am running out of time I just need short responses from you, of whether, you know, this would be something that you would pay attention to and try to come up with ways to just effectively move things along.

Mr. JAQUITH. Hard work and quick action.

Senator HIRONO. Long hours.

Mr. JAQUITH. Long hours. I think, you know, a career in litigation and working through the thicket of legal and factual issues under deadlines would help me in that regard, getting from intake to action. There are some other things that are promising—the Appeals Modernization Act, the potential for class action litigation, and as we have already discussed a little bit, the importance of issuing clear, precedential decisions that it is hoped would speed up the entire system.

Senator HIRONO. Mr. Laurer?

Mr. LAURER. Senator, I would add to that obviously Mr. Jaquith and I are not currently sitting on the court, but I recognize, and I am humble enough to know that if confirmed, based on my willingness to make things better and improve things, that I would look around and I would add to that diversity of the experience that currently exists on the court, by bringing to bear ideas that I may have. But it would be very presumptuous at this point to say what those may be, because I am not sitting there. But I would certainly, as part of the learning curve that anyone undergoes with respect to a new position, would be very attuned to that and would be looking for ways to bring hard work to it and innovative ideas.

Senator HIRONO. Thank you. Thank you, Mr. Chair.

Senator MORAN. Thank you, Senator.

Maybe for Mr. Jaquith, but either one of you, you mentioned, I think, Mr. Jaquith, about the presumption of agencies, the deference to their views. What is the current state of that law? What is the court's role in deference to the Department of Veterans Affairs positions?

Mr. JAQUITH. Well, thank you, Senator. There is a statutory standard—it is Section 7261 of Title 38—for reviewing those, and legal questions, de novo, factual findings, clearly erroneous.

In terms of the interpretation of regulations, it has been the subject of a lot of litigation, you know, first—

Senator MORAN. So is the answer, at the current state is it is uncertain?

Mr. JAQUITH. I think the state of the law still is that there is deference to be accorded to agency determinations when those determinations are grounded in the specialized expertise of the agency. That is, I think, the essence of Justice Kagan's opinion in *Kisor*. But first you have to determine if there actually is ambiguity or not. That is not—you do not just immediately to deference—and factor in—and I do not think this was discussed by the court in *Kisor*—the Veterans Canon. So, you know, interpretive doubt is resolved in favor of the veteran.

Senator MORAN. Mr. Laurer, anything I should know beyond what I just learned?

Mr. LAURER. No, Senator. I would concur with Mr. Jaquith.

Senator MORAN. Thank you. Let me ask this. In the interpretation of laws, I assume there are circumstances in which Congress has created uncertainty, one statute saying one thing, one statute saying presumably something different. And I know there would be instances in which regulations, at the Department of Veterans Affairs, might be in conflict with the statutes.

I would ask you, if and when you know of those instances, if you would inform—would this be part of your role, informing this Committee, Congress, of those circumstances? One of the things in regard to the question of backlog, if we can reduce the level of uncertainty as to what the status of the law is, and whether a regulation is complying with the statute, we can reduce the amount of litigation, I think, the amount of uncertainty that veterans face in needing a pending claim.

Do you have suggestions for me of how we can make certain that Congress knows when it might have the opportunity to clear the

air about a law and work to make certain that the Department is operating within the law?

Mr. LAURER. Senator Moran, my commitment would be to work with, if confirmed, other members, of the court and also with the other branches of the government. As I have stated with Committee members and staff that we have had the great fortune to speak to over the course of the last few days, I view this as a collaborative effort between the court, the Executive, and Legislative co-equal branches of the government. And so you have my commitment to work. I do not know the actual mechanics of how we would do that yet, but you have my commitment to do everything within my power to do so.

Senator MORAN. Thank you. Mr. Jaquith, anything?

Mr. JAQUITH. Mr. Chairman, as I understand the role of the court, I think, if confirmed, I would participate in making the determination of whether regulations are consonant with statutes in the context of cases, and it would be through those decisions that that message would get out.

In terms of the interface with this Committee, I do not have an insider's knowledge of that but I presume, perhaps from the reporting requirement that is part of the expansion of the court, that any of that sort of communication would come through the Chief Judge.

Senator MORAN. Thank you. Mr. Tester.

Senator TESTER. Well, I want to thank you for that question, Mr. Chairman, because I think it is really important, and if there are conflicts we have got to figure out a way to resolve them or we have got to make sure that that communication chain is there. And so short of doing it the old-fashioned way of just picking up a phone and saying, "Hey, Jerry Moran, we have got an issue here," or "Jon Tester, we have an issue here," we have got to figure out how to do it, because the truth is it would make your job better and it would just be good government.

Look, you guys have extensive experience. Is there anything—and you are not on the court yet, but is there anything, any certain area that you think that you are going to need to bone up on to be on the court?

Mr. JAQUITH. Thank you, Senator Tester. Thought I believe the nature and breadth and extent of my work over 37 years as a lawyer has been outstanding preparation for service on the court, if I am concerned, there is no question that the focus on the specifics of veterans' law is essential, and I have been doing that, reading the statutes, rules of practice, the internal operating procedures, many precedential cases and the reviews of such cases, and analyses and commentaries on the development of the court, and significant issues that have arisen. I have spoken with some knowledgeable people on the subject, watched oral argument, listened to a podcast or two.

One of the energizing aspects of a career in litigation is the variety of subjects encountered, and I am excited by this one and the possibility of focusing further on veterans' law, if confirmed.

Senator TESTER. Okay. Mr. Laurer?

Mr. LAURER. Senator, the fundamental skills have been demonstrated with respect to interpreting laws and regulations and fairly applying those. I would say that, as has been the case

throughout my career, any time that I have gone to a different assignment there has been some learning to do, and I would expect that I would approach it humbly, and like Mr. Jaquith already started that process without presuming anything, of course, because, as you noted, we have not been confirmed. But certainly reviewing the seminal cases, articles, and doing as much in preparation for today's hearing and this process as possible. So I would continue to do that.

I can tell you that any time I have moved, and I have done so every two years, in the United States Navy, I have had some homework to do before getting there, and then certainly upon arrival, but quickly getting up to speed. Thank you.

Senator MORAN. Senator Blumenthal?

**SENATOR RICHARD BLUMENTHAL**

Senator BLUMENTHAL. Thanks, Mr. Chairman. I want to join in the comments made by Senator Tester about the importance of the Wolf case and the need to provide veterans with reimbursement for the non-VA emergency care that they have paid for. I know you are familiar with the case. I think that the court's decision there was really enormously instrumental and important in vindicating the rights of veterans, and now alerting veterans, making them aware of their rights to that kind of reimbursement. There are literally, as you know, millions of dollars that veterans are due under that decision, and I know that we are going to keep pushing for that kind of fairness in reimbursement.

I hope that you will agree that veterans should not have to wait years, generally, to get medical care from the VA, and that claims and appeals should be resolved as quickly as possible. And I am proud of the fact that we have worked, in the Congress, on a bipartisan basis, to pass the Veterans Appeals Improvement and Modernization Act of 2017.

My understanding is that VA has doubled the number of appeals it has decided from 52,000 in 2017 to 95,000 in fiscal 2019, and I think one of our main goals has to be ensuring that the Court of Appeals of Veterans Claims continues to operate to decide these claims as quickly and fairly as possible, and I hope that both of you agree.

Mr. JAQUITH. Yes, Senator. If confirmed we will certainly do our best to ensure that that occurs.

Senator BLUMENTHAL. Mr. Jaquith, in your responses to the Committee you mentioned that you had a substantial caseload in defending VA malpractice claims, claims against the VA based on malpractice. Why do you think there are so many of those claims?

Mr. JAQUITH. Senator, I think, in the main, it is a result of the volume of care that is provided. I do not mean to suggest that the incidence of medical malpractice claims is any greater in Veterans Affairs medical centers than in other medical facilities, although I have done no study of that so I do not know whether that is true.

In our work with the VA, it has been my observation that there are outstanding professionals there, as there are in civilian hospitals, so I would not draw any negative inference from that experience. And that was my experience in a criminal case that I handled that involved VA medical care. And I am working in my capacity



as Vice Chair of the Servicemembers and Veterans Rights Subcommittee in a very positive way with VA representatives on the issue of complete retrievable electronic patient records.

Senator BLUMENTHAL. In the Northern District of New York, those claims came from which facilities?

Mr. JAQUITH. We have two big VA medical centers in Syracuse and in Albany.

Senator BLUMENTHAL. And so you would defend the VA—

Mr. JAQUITH. Yes.

Senator BLUMENTHAL.—in those claims—

Mr. JAQUITH. Yes, Senator.

Senator Blumenthal.—in Federal court.

Mr. JAQUITH. When lawsuits are filed against the VA or its doctors and caregivers, then it falls on the United States Attorney's offices to provide representation, and it is in that context that we often experience the issues with retrieving and providing discovery of patient records.

Senator BLUMENTHAL. You mentioned that there was a criminal case. Did you—you prosecuted it, I assume?

Mr. JAQUITH. I did, Senator. It involved a research coordinator that was falsifying patient records to enroll and maintain patients in cancer treatment studies, and a patient died because his compromised liver and kidney function, as would have been revealed by accurate laboratory results, made him susceptible—made the infusion of chemotherapeutic drugs fatal.

Senator BLUMENTHAL. Because of your experience in those cases, both civil and criminal, do you think you have any predilection either for or against the VA?

Mr. JAQUITH. No, Senator, I do not. I am certain that I could be, if confirmed, fair and impartial in deciding all the cases that come before the court.

Senator BLUMENTHAL. Thank you. Thanks, Mr. Chairman.

Senator MORAN. Senator Tester.

Senator TESTER. Yeah, thank you, Mr. Chairman. I just wanted a quick statement to put into the record. I want to ensure that I give Chairman Isakson the opportunity to review the discussion. I know Adam is here and he will make sure he gets the discussion. As such, I will confer with Chairman Isakson on whether these matters should be discussed in closed session, and then we will bring the Committee back at a later date to have a broader discussion with all Committee members on whether these issues require the meeting to be closed.

Look, I want to ensure that we are in accordance with the rules of Senate. I also want to give Chairman Isakson the opportunity to review the proceedings today.

I know we are waiting for another member to come. Chairman Moran and I were just sitting here talking. You guys are really incredibly qualified for this job, and I hope I am—I hope that everything works out with the NSC stuff so that both of you can get confirmed, because I think you are going to do a marvelous job. And if you do not, I am going to be really disappointed, because you certainly have the pedigree to do some really good work and the experience to really meet the needs on the appeals court, so thank you both for being here.

Mr. LAURER. Thank you, Senator.

Mr. JAQUITH. Thank you, Senator, for your kind words.

Senator MORAN. Senator Tester, thank you. I too confirmed with Committee staff and here is my suggestion with the issues that have been raised in regard, particularly, to Mr. Laurer and his role at the NSC. What I would suggest is that Committee members submit written questions to the witnesses, and those questions then be answered by the witnesses in writing, to be submitted to the Committee. And if the answer involves an inability to answer the question, if the response involves the inability to answer a question, then explain the legal justification for that inability.

Then Senator Tester, the Ranking Member, and Senator Isakson, the Chairman of the Committee, can then have the conversation about what should be the next step, if any, in regard to a different setting for this Committee. That would put into the record the question, and it would put into the record the legal basis for which the question was not answered. And then you and Chairman Isakson can reach a conclusion to how best to handle that circumstance.

I think this concludes our hearing. I always in hearings that I chair if there is anything that either witness, either of you would like to say, that has not been asked, that you wish to correct something, you wish something was on the record. And I have already taken too much time because Senator Sullivan has now arrived.

But I will give you that opportunity when we conclude the questioning by Senator Sullivan.

#### SENATOR DAN SULLIVAN

Senator SULLIVAN. Thank you, Mr. Chairman, and I apologize. Thank you for keeping the hearing going here. This is an important position. Congratulations to both of you.

You know, my state, the great state of Alaska, we have more vets per capita than any state in the country. And one of the biggest challenges that I have seen is the delay and the backlog with regard to appeals. And so I would just like to get your sense of how you would envision, both of you, addressing doing the appellate work in a fair way, of course, but also in an expeditious way. And are there ways in which you think we, or the VA itself, or even under the current law, can help with regard to addressing what is, I am sure you know, in certain cases, years and years and years of delays with regard to appeals that have built up? And I will just ask that of both of you.

Go ahead, Mr. Laurer.

Mr. LAURER. Thank you, Senator. As you noted in your question, the most important part is getting it right.

Senator SULLIVAN. Yes.

Mr. LAURER. That is the fairness. But I recognize clearly that there is also a need to do so expeditiously.

Senator SULLIVAN. You know the saying, justice delayed is justice denied.

Mr. LAURER. Yes, Senator.

Senator SULLIVAN. So it is a combination.

Mr. LAURER. Yes, Senator. So there have been a number of steps already taken to address that, for example, the temporary expan-

sion of the number of judges that are on the court, that, for four years, increases the size from seven to nine judges. That, of course, will help, but at the same time, as was noted earlier in the hearing, we have seen a significant increase in the number of appeals coming before the court, up from approximately 4,000 in 2017 to almost 7,000 in 2017.

So in addition there have been some other significant developments, for example, with respect to the court's ability to consider class actions and to aggregate similarly situated claimants and appellants, and that is, of course, the Monk case.

And so there are a number of things that are already available. The legislature, of course, has the ability to consider further ways to do this, everything from expanding the court to any other number of measures that are available.

And then also, frankly, if confirmed, my commitment would be to doing everything within my power to, for example, provide clear decisions that are helpful throughout this process, and, of course, if you do so as part of a panel or a banc, that has precedent. And so those opinions and decisions have precedential value. But also even with the single-judge decisions, it is always best to have clarity, and that helps not only the board but all the way down to the regional office and to the individual veterans, because the clearer you can be about the applicable law and regulations, the more efficient the entire process becomes.

Senator SULLIVAN. I do not want to interrupt, Mr. Laurer. Thank you.

Do you have a view on my question and the response?

Mr. JAQUITH. I echo Mr. Laurer's hope that the systemic changes, the Appeals Modernization Act and the potential for aggregate case resolutions help. If confirmed, I would strive to embody my common exhortation to lawyers in the United States Attorney's Office more, better, faster. I will work tirelessly to screen cases quickly, and if they are properly resolved by a single judge, do so expeditiously with a decision that is correct in law and fact. And on cases referred to panels, I will promote celerity and clear articulation of the dispositive rule of law to achieve justice in the case and maximize the likelihood that the precedent will hasten the resolution of other cases.

Senator SULLIVAN. Let me ask, just real quick, I think it is appropriate, and I do not know how the work between the Committee and the court of appeals actually—appeals court works. But I do think that it is appropriate if, if confirmed, and during the course of your time, you are seeing ways in which things that are statutorily based and mandated are either helpful or unhelpful, or ideas to make it more helpful. I think it is certainly appropriate to make sure we get an update—this Committee in particular, gets an update from you when you see this in practice, if you have ideas and thoughts for legislative reform.

So could I get a commitment from both of you to be willing to do that and continue to work with this

Committee on these issues? Mr. Laurer.

Mr. LAURER. Senator Sullivan, you have my personal commitment. As you are aware, there is also the annual reports that are

required under statute. That is one mechanism, but that is not all that can be done.

Senator SULLIVAN. Yeah, sometimes a report can be kind of, you know, bureaucratized to such a degree it doesn't say much. So if you have views, we certainly would love to hear them.

Mr. Jaquith, can I get your commitment on that?

Mr. JAQUITH. Yes, Senator, although I expect—I do not know how the—what the inner working of the court is like in this regard, and it may be that the proper way for those—any input I might have, if confirmed, would be to come through the Chief Judge.

Senator SULLIVAN. Yeah. No, we do not want any ex parte communication or anything like that, but I think a continued—you are going to be the experts. You are going to be on the ground. You are going to see what works and does not work, and I guarantee you it will be things that are good, things that are not so good, and some of which we will need to address, statutorily. I think this Committee has very common approach, bipartisan approach, to see these cases done in an expeditious but fair manner. If you have ideas on that, we would welcome it.

Thank you, Mr. Chairman.

Senator MORAN. Senator from West Virginia, Senator Manchin.

#### SENATOR JOE MANCHIN

Senator MANCHIN. Thank you, Mr. Chairman. First of all, I want to thank our nominees for the service, both of you for your service to our country and for stepping up to continue to serve our veterans as judges of the U.S. Court of Appeals for Veterans Claims. I know both of you are going to do an excellent job, and I plan on voting and supporting you wholeheartedly.

I take these nomination hearings very seriously. I enjoyed meeting with both of you all yesterday in my office. However, I am going to apologize right now for using my time here to address the horrible deaths—the horrible deaths of veterans at the Clarksburg VA, where last year up to 11 veterans were murdered by a VA employee who used unauthorized insulin injections to kill them.

For example, we know from reporting that the person of interest was likely not certified to be treating veterans, that the Clarksburg VA had a history of failing to report sentinel events, that the number of deaths at the hospital during the period in question was higher than normal, and that insulin at the Clarksburg VA was not secured. These are all examples of topics that we could dive into on a policy level that would not harm the investigation and would begin to hold the VA accountable and prevent this from happening at any other VA facility.

The reason I am saying this is because Dr. Richard Stone, the Executive Director, the executive in charge of the Veterans Health Administration, recently wrote an op-ed. Now I had not said a word, because they asked me not to, not to get this an investigation as for veterans, an investigation which I think we need, because they said it would impede their own investigation, from a criminal investigation.

But Dr. Richard Stone, the executive in charge of the Veterans Health Administration, at the VA in Clarksburg, wrote an op-ed in the Clarksburg-area Exponent Telegram, and appeared on a West

Virginia television declaring—mind you, declaring that the VA has already done—has already done what we should do for accountability. I have been quiet, not wanting to impede it. He is ahead of it when all of this happened, and now he is saying everything is hunky-dory and fine, and blamed negative press and headlines for bad perceptions of Clarksburg VA.

Well, I am sorry, Dr. Stone. That is not the case, and it is definitely not the facts in West Virginia. The VA Inspector General and Department of Justice have been leading an investigation into a person of interest for nearly a year and a half, without making any arrest. I have spoken many times to Inspector General Missal and the U.S. Attorney for the Northern District of West Virginia, Bill Powell, and understand that we have to be careful not to interfere with an ongoing criminal investigation.

But I want to know when our family members of victims are going to get answers, and when are we going to have some accountability, other than just an op-ed by the person in charge saying everything is fine.

Something is wrong. My office receives more than 20 calls per week from victims of family members of people who do not even know if their family member's death at Clarksburg was part of this string of homicides. Can you imagine losing a loved one during this period of time, that now that it has been reported that we had homicides and no one has any answers at all?

So we cannot figure out, at the VA, and investigators who refuse to answer for the sake of protecting investigations. Veterans all across West Virginia can contact our office, ask me how is the VA going to be held accountable for many obvious systematic VA issues that caused these murders to continue for at least six months in 2018.

First of all, the insulin was not even secured. The medicine was not even secured, how it was dispensed. Just so many violations.

I have repeatedly called on my colleagues to immediately hold a hearing. If it was in your state, if this happened to any of your constituents, you would feel the same way as I do. On the policies and procedures in place at the VA, it led to 11 veterans being murdered—11 veterans being murdered at the hands of a VA employee. What type of background check did they go through? How do we basically vet these people where they should even be in any hospital setting, let alone a veterans' hospital? But we have been cautioned that we cannot hold the VA accountable until the investigations are completed.

Well, I respectfully disagree, and I will tell you why. I ask my colleagues and the VA—if we cannot hold a hearing until the investigation is completed, how can the VA write op-eds, the head of the VA in Clarksburg write an op-ed declaring that all is well and everyone and everything has been held accountable at the VA?

If you were me, representing the people of West Virginia, we have more veterans per capita than most any state. We rank right at the top with Alaska and everybody else. And our people are willing to go and fight and die for our country, and all we are asking for is a simple answer to families, "Did my dad get killed or murdered, or was it natural causes? What happened?" I have got all this going on now, a year and a half.

So I respectfully—I have been very respectful of this Committee. I think it is a wonderful committee under the leadership of both the Chairman, who is sitting in for our Chairman Isakson right now, and the Ranking Member and my dear friend, Jon. And I just—I feel so strong about this that we can be seeing, have they made any corrections? Are we handling the medication differently? Are we vetting basically people working there? Have we gone back and looked at their background, their experience level, if they had any type of psychotic problems or psychiatry or mental illness that could have caused something like this?

Something has happened. I am reading in the paper, which I am not supposed to say anything or ask questions, but I have to read in the paper every day in West Virginia, the person of interest was a person that was monitoring the insulin levels to make sure that it was working. That means it was making sure that the hypoglycemia was going to work and kill them. Can you believe?

This is what we are dealing with. And I hate to use this time, because I think you two are going to be wonderful. I support both of you. We had a great conversation. I think you understand where I am coming from and my passion for this. But I have compassion for the families and I cannot give them answers. Enough is enough.

Senator MORAN. Senator Manchin, thank you. I do not think there is a question in there for either of the witnesses but I appreciate you highlighting this issue, and I look forward to working with you on a desired outcome. I know that you are dealing with Chairman Isakson and the Ranking Member, Mr. Tester.

If I talk any longer another Senator will arrive, so I think I am going to conclude my remarks.

Again, I would suggest that there is a way to get this issue of whether or not there is a closed or classified hearing through written questions with appropriate response as to why the answers cannot be—the responses cannot be given.

And anything that either one of you want to say before I conclude the hearing?

Mr. JAQUITH. No. Thank you, Senator.

Mr. LAURER. Senator, I would just like to again thank this Committee, as well as the staff, for all of the tremendous work. I know it is a huge effort and I really appreciate, with respect to my nomination, all of the work. Thank you, sir.

Senator MORAN. Surprisingly, Senator Tester did accurately reflect the conversation that he and I had, which was that you are both very impressive individuals and it is a pleasure to hear what you have to say and to know that people of your caliber are interested in serving in these capacities.

The hearing record will remain open for five business days and any question for the record should be submitted to the Chief Clerk no later than the close of business on Friday. That is a little bit different time frame, but we need to see if we are going to do confirmations, that this move expeditiously. We are trying to follow your suggestions about how to get timely results and have our business concluded in an appropriate time frame. So close of business this Friday.

With that the hearing is adjourned.

[Whereupon, at 10:47 a.m., the Committee was adjourned.]

APPENDIX

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**Material Submitted for the Hearing Record**

**Statement of Grant C. Jaquith**  
**Nominee to be Judge, United States Court of Appeals for Veterans Claims**

Chairman Isakson, Ranking Member Tester, and distinguished Members of this Committee, thank you for the opportunity to speak with you today. I am honored to have been nominated by the President to become a Judge on the United States Court of Appeals for Veterans Claims.

This great privilege is the result of my family's love, support, and example. My wife, Rosemarie, and my six children, Amanda, Larene, Gordon, Olivia, Isabelle, and Colton, mean everything to me. My inspiring wife is an accomplished lawyer and community leader who spoke only Spanish when she started kindergarten. Her parents came to the United States from Cuba as teenagers to find a better life. She is here today, along with three of the children and some of their family members, including three of my grandchildren. All of my children and grandchildren are with me always. One is in federal service – my son Gordon is the Director of the Naval Forces Division of Cost Assessment and Program Evaluation in the Office of the Secretary of Defense.

My own roots in service run deep. I am descended from a Mayflower passenger – a servant who signed the Mayflower Compact 399 years ago. The first Jaquith born in America died in 1678 of wounds received 3 years earlier in King Philip's War. Several Jaquiths answered the call to arms in Lexington, Massachusetts in April of 1775. A grandfather six generations back served in the War of 1812. During the Civil War, my great-great-grandfather was a private in the 12<sup>th</sup> Vermont volunteers engaged in the defense of Washington. In the 1950s, my father served in the Navy as a machinist's mate, contracting pneumonia, returning to work too soon, and developing persistent lung problems that resulted in a permanent disability rating.

My parents taught me to judge people on merit, based upon their character and conduct, and to care about them. They found fulfillment in dedication to family, church, community, and country, and illustrated industry and perseverance. They expected nothing and were grateful for everything. My mother is watching now on television and cheering my efforts to live up to their example. She instilled my interest in history. From reading biographies of famous people, I concluded that those who shaped our nation most often were lawyers or soldiers, and a dream was born – to become both.

I signed my first contract with the United States of America about a month before my 18<sup>th</sup> birthday, accepting the ROTC scholarship which enabled the son of postal worker and a homemaker to go to a private liberal arts college. I was commissioned upon graduation, but was granted an educational delay to go to law school, leading to a summer judicial clerkship, work in the public defender's office, and then the Army Judge Advocate General's Corps. After 6 years of active duty, I joined a large law firm in Syracuse. In 1989, I came to the U.S. Attorney's Office. I remained in the Army Reserves, rising to the rank of Colonel and serving as a trial judge from



2001 to 2010. In the U.S. Attorney's Office, I have been a supervisor since 1998, including serving as Criminal Chief, First Assistant U.S. Attorney, and United States Attorney.

My 32 years of active military service involved a broad range of legal work, including: general practice assisting soldiers, veterans, and their families; advising commanders regarding operational, administrative, and disciplinary matters; addressing civil claims; prosecuting criminal cases; and presiding over courts martial throughout the United States and in Germany and Korea, including cases involving soldiers with significant service connected health issues. I have spent over 30 years in the U.S. Attorney's Office conducting investigations, trying complex cases of different types, handling appeals, and leading the effort by lawyers and support staff to secure justice in civil and criminal cases throughout a district encompassing 30,000 square miles. In striving always to fulfill our responsibility to do the right thing in the right way, I have learned from eight excellent United States Attorneys; an outstanding leadership team, including my First Assistant U.S. Attorney; and many talented colleagues. My diverse case work included prosecution of a research coordinator at a VA medical center who falsified patient records to enroll them in cancer treatment studies, including those of a patient who died from the resulting infusion of chemotherapeutic drugs, as well as the Chief of Oncology who failed to ensure that accurate case histories were maintained and that treatment was based on actual laboratory results.

As Vice-Chair of the Servicemembers and Veterans Rights Subcommittee of the Attorney General's Advisory Committee, I have initiated greater dialogue with the Department of Veterans Affairs about the importance of retrievable patient records to the quality of medical care for veterans and later litigation about that care – under both the current VA health records systems and the modernized comprehensive electronic system being designed and fielded.

My family and professional history have imbued me with reverence for the service and sacrifice of veterans and the rule of law for the fair, impartial, and orderly resolution of disputes. These cornerstones of our country are connected in the Court of Appeals for Veterans Claims.

I have learned from exceptional jurists I have appeared before and worked for that excellence depends not only on integrity, judgment, knowledge, and common sense, but also on humility. They showed that good judging comes from listening and learning to understand the facts and the law and fairly apply the latter to the former. If confirmed, I will follow their example and work tirelessly to resolve cases justly and swiftly.

Thank you for considering my nomination to this crucial court. I would be pleased to answer any questions you have.

**Statement of Scott Laurer  
Nominee to be Judge, United States Court of Appeals for Veterans Claims**

Good Morning Chairman Isakson, Ranking Member Tester, and Distinguished Members of the Committee. Thank you for the opportunity to testify before you today and for the Committee staff's assistance in connection with my nomination.

I am honored that the President has nominated me to serve as a judge on the United States Court of Appeals for Veterans Claims. I would not be here without the support of many people, and today I would like to particularly acknowledge my family.

My father's parents and mother's grandparents sailed to the United States in search of better lives for themselves and future generations. Most did not even have the equivalent of a high school degree; however, they valued education, embraced hard work, and proudly became American citizens. They labored humbly in a Kansas City slaughterhouse, as a domestic helper in Topeka, and as a custodian, domestic helper, dressmaker, and roofer in Philadelphia.

My parents made extensive sacrifices raising seven children. After two of our grandparents lost their spouses, my parents also welcomed the surviving grandparents into our home. Anything our large family lacked in material wealth was surpassed by mutual affection and happiness. Growing up our parents taught us to treat everyone with respect, the importance of personal commitment, and the value of teamwork – lessons that would serve me well throughout my military career.

While a second-year law student, I met my future spouse and best friend. During our 28 years of marriage, 11 permanent change of station moves, and multiple deployments, her support has been unwavering. Our two children have also backed me in countless ways, while being towed around the globe attending a dozen different primary and secondary schools between them. I thank my family members for their love, selflessness, and support to our Nation.

I wanted to become a lawyer since high school. As the son of a Korean War-era veteran and nephew of a Vietnam War veteran, I was also drawn toward military service. I did not know it was possible to serve as both an officer and an attorney until I met Judge Advocate General's Corps officers who were recruiting at my law school. The more I learned about the JAG Corps, the more eager I became about serving in the dual professions of arms and the law. The Navy JAG Corps selected me for its Student Program, and I was commissioned in January 1989.

The United States military offered me the privilege of service, unparalleled leadership experience, and a wide range of legal skills. During nearly 30 years of active-duty service, I

provided legal services to military service members, veterans, and their families, and I advised our country's most senior civilian and military leaders on complex legal issues in combat zones, at sea, overseas, and here in Washington, DC. Through these diverse experiences, I have demonstrated my ability to faithfully interpret and apply laws and regulations to factual situations and to communicate effectively, in speech and in writing, my reasoning behind legal conclusions.

Veterans and their families deserve judges serving on the United States Court of Appeals for Veterans Claims who are impartial, diligent, skilled, and devoted to the law. If confirmed, I will uphold those solemn obligations and enhance the Court's efforts to decide an individual veteran's appeals fairly and expeditiously.

Thank you again for the opportunity to appear before you today. I would be glad to answer your questions.

**Pre-Hearing Questions for the Record  
Nomination Hearing of Grant Jaquith to be  
Judge, Court of Appeals for Veterans Claims**

Questions From Ranking Member Jon Tester

*Question 1.* How has your professional experience prepared you to be a judge on the Court of Appeals for Veterans Claims?

**Response:** I believe the nature, breadth, and extent of my work over 37 years as a lawyer has been outstanding preparation for service as a Judge on the Court of Appeals for Veterans Claims. I have served our nation in some capacity throughout that time. More than 32 years have focused on litigation in federal courts, trial and appellate. A typical day in my current job as United States Attorney involves making decisions on how to pursue justice in civil and criminal cases and appeals. The Northern District of New York encompasses 30,000 square miles, well over half of the state, and includes a 310 mile border with Canada, four Haudenosaunee nations (Cayuga, Mohawk, Oneida, and Onondaga), Fort Drum, the Air Force's Rome Laboratory, Watervliet Arsenal, and two Department of Veterans Affairs Medical Centers.

Over my 30 years in the U.S. Attorney's Office, I have tried several complex cases of different types and represented the United States in the appeals to the Second Circuit of those trials and many other cases I've handled. Federal trial and appellate practice involves a lot of research and writing: prosecution memoranda; detailed applications for court authorization of search warrants, eavesdropping warrants, and other investigative measures; motions and motion responses; proposed jury instructions and trial and sentencing memoranda; and appeals briefs. The amount of oral argument is extensive, too.

For over 21 years, I have been supervising litigators, managing programs, and leading the investigation and prosecution of a high volume of challenging cases. I drafted our first formal Criminal Division Operations Manual, addressing new developments, preparing templates for commonly used documents, and establishing standard procedures to ensure compliance with substantive and procedural law. For nearly 10 years, my leadership responsibilities have included civil cases, including a substantial numbers of lawsuits involving Department of Veterans Affairs Medical Centers. I instituted a Civil Division Manual and we made reinvigorating our Civil Division a high priority and emphasized parallel civil and criminal proceedings, affirmative civil enforcement, and more thoughtful, thorough assessment of lawsuits against the United States, to facilitate both vigorous defense and fair settlements. As United States Attorney, I am serving as Vice-Chair of the Servicemembers' and Veterans' Rights Subcommittee of the Attorney General's Advisory Committee, and on the Border and Immigration Subcommittee, Native American Issues Subcommittee, and Health Care Fraud Working Group. I spearheaded establishment of the US-Canada Border Operations Leadership Team (BOLT) to combat transnational crime and have invigorated prosecution and prevention initiatives to curtail violent crime and opioids and other drug offenses.

In nearly 29 years in the Army Judge Advocate General's Corps, I performed a wide array of functions. I provided legal assistance to soldiers, veterans, and their family members in all areas of civil law, including those involving military and veteran's benefits. I advised a depot commander on matters of command administration, contracts, environmental law, federal-state relations, and personnel matters and did similar work advising other commanders at all levels, including as the Staff Judge Advocate advising the New York Army National Guard Commander and his staff. I investigated and settled civil claims against the Army arising in a 29 county area. I provided instruction on military justice, operational law/law of war, ethics, and mobilization preparedness, including veterans' reemployment rights and the protections of what is now known as the Servicemembers Civil Relief Act. As a trial counsel, my prosecutions included cases of forcible sodomy, aggravated assault, child abuse, sexual assault, felony larceny, drug offenses, forgery, burglary, check crimes, and military offenses. I served as a Special Assistant U.S. Attorney (SAUSA) in both the Western District of Missouri and the Western District of New York. Some of the cases I worked on, as a trial counsel and a SAUSA, involved significant medical evidence.

As an Army trial judge from 2001 – 2010, I presided over courts-martial at forts throughout the continental United States and in Alaska, Germany, and Korea, including trials on charges of solicitation to murder, rape, aggravated assault, indecent assault, conspiracy, and internet solicitation of sex with children. In 2006, I was activated and served as the trial judge at Fort Bragg, North Carolina, for three months, where court personnel related that defense counsel and prosecutors regarded me as a patient judge. At all times, I endeavored to treat the lawyers as I wanted to be treated when I tried a case. After trial, I met with the lawyers to discuss their performance and offer suggestions. Formal evaluations of my judicial work included laudatory comments such as:

- "Grant's talent, maturity and experience are simply without par. . . Thoughtful, deliberate, and temperate, his courtroom performance in presiding over 30 trials during this period, including several highly contentious contested cases, was flawless."
- "A gifted jurist, he sets the standard."
- "Grant is the best military judge I've encountered in my tenure as the Chief Judge. . . As one active duty judge put it, 'I go into the courtroom when he is trying a case because he has so much to teach me.'"

I began my legal career trying a few misdemeanor cases as an intern in the public defender's office, and spent a year handling a wide variety of litigation and other client matters, including appearances in both trial and appellate court.

I have learned much from a multitude of exceptional lawyers: judges who supervised my work, trial and appellate judges who presided over my cases, leaders in the JAGC and the U.S. Attorney's Office, the senior leadership teams I have overseen as First Assistant U.S. Attorney and United States Attorney, and other colleagues. These mentors and the broad spectrum and duration of my work have given me perspective and helped develop the good judgment and common sense my parents instilled. In each position, I have always sought to be resolute, fair, and tireless in pursuing justice. I would bring that fairness and work ethic to this position.

Perhaps the most important results of my 37 years in practice are a deep, abiding love of the law; complete commitment to discerning and doing the right thing in the right way in every case; belief that the rule of law is a cornerstone of our country as the way for the fair, impartial, and orderly resolution of disputes; and a sense of humility born of recognizing that fulfilling our public trust requires real attention to others – to listen and learn to understand the facts and the law and faithfully apply the latter to the former. These principles govern my work as United States Attorney and would apply to my work on the Court if I am confirmed.

*Question 2.* How would you evaluate statute? How would you evaluate Congressional intent?

**Response:** I would evaluate statute by carefully considering its text. If the words are clear and unambiguous, they are applied as written. In making that determination, I would construe the words in accordance with their ordinary usage and context, reflecting how they were most likely understood by Congress and the public and most compatible with the surrounding law into which they were integrated. Legislative history may be helpful in ascertaining the reasonable construction of the statutory language.

There is another canon of construction that applies to veterans benefits statutes: “interpretive doubt is to be resolved in the veteran's favor.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

*Question 3.* What are your views of attorney or advocate representation versus pro se representation?

**Response:** Representation is important to advancing the interests of veterans and facilitating the expeditious and just resolution of their claims. In my experience, courts do a good job of ensuring that *pro se* litigants receive fair hearings, both by providing information to help them understand the process and fulfill its requirements and by liberally construing their efforts to do so. But having a representative to advise, assist, and advocate for each litigant nearly always sharpens the identification and presentation of the relevant facts and applicable law, hastens resolution, and increases the likelihood of an appropriate outcome. Cases before the Court often involve assessments of statutes, regulations, policies, military records, and medical evidence, along with all of the proceedings below. Having a representative well versed in veterans’ law helps both the appellant and the Court.

The Court’s annual report for fiscal year 2018 reflects that 26% of claimants were unrepresented when they filed appeals and 11% were still unrepresented when their appeals were resolved. Those percentages are slightly lower than in recent years, and much lower than in fiscal year 2013 and before then. However, the fiscal year 2018 percentage of petitioners who were unrepresented at filing (44%) and at resolution (41%) were significantly higher than in recent years. If confirmed, I will support efforts to reduce the percentages of unrepresented appellants and petitioners.

*Question 4.* What do you believe is a reasonable timeframe for the court to make a decision?

**Response:** I do not believe I can generalize fairly from this vantage point, in light of the many factors that affect the time it takes to make a decision, including the volume of work, the complexity of the issues presented in each appeal, and the nature and extent of the advocacy of the parties. The number of judges involved also affects the length of time to decision. Though decisions by panels of judges generally take longer, but the systemic value of their precedential effect may ultimately decrease the overall amount of time from claim to final action. It is noteworthy that the annual reports of the Court reflect that the median time from filing an appeal to disposition in 2018 was the shortest in the past 20 years, though the numbers of appeals and dispositions were the highest. If confirmed, I hope to help continue that trend.

*Question 5.* Would you reverse a VA position that is consistent with long-standing practice but you believe is an incorrect interpretation of statute?

**Response:** Yes. A long-standing practice that is not lawful should not stand, though its endurance would highlight the importance of careful consideration of statutory construction.

*Question 6.* Would the potential cost of overturning an established rule factor into your decision on how to adjudicate a case?

**Response:** No. A judge should use the canons of statutory construction to determine what the law is. The cost of compliance with the law is a matter for consideration by lawmakers, though it highlights the importance of careful attention in adjudication to what the law permits.

*Question 7.* You noted on page 12 of the supplemental questionnaire that you participate in an ongoing dialogue with Department of Veterans Affairs' representatives about the importance of patient records to the quality of medical care for veterans and later litigation about that care. Generally, what have you communicated to the Department? How will this experience inform your opinion as a judge on the Court of Appeals for Veterans Claims?

**Response:** In my role as Vice-Chair of the Servicemembers and Veterans Rights Subcommittee of the AGAC, I have generally communicated to the Department of Veterans Affairs that: creating and maintaining accurate and retrievable patient records is important to the quality of medical care for veterans and to later litigation about that care handled by United States Attorneys' Offices; we should work together to identify and retrieve the records necessary for such litigation from the many modules of the current VA medical records system; and facilitation of both better access to patient records by caregivers and better retrieval of such records later so the quality of that care can be demonstrated should be part of the VA's electronic health record modernization project. My experience with these matters and the work of the VA – in the context of the efforts of the Servicemembers and Veterans Subcommittee and in civil and criminal cases – aids my

understanding of the issues presented in the cases that come before the Court of Appeals for Veterans Claims.

*Question 8.* The claims process, from an initial claim to an appeal to the Board of Veterans Appeals, is preferential to the claimant. The process is supposed to be non-adversarial and easy for veterans to navigate. That non-adversarial nature changes when a claimant appeals to the Court of Appeals for Veterans Claims. What in your background has prepared you to review cases de novo and when the earlier process purposely gives preferential treatment to the claimant?

**Response:** The standards of review applied by the Court of Appeals for Veterans Claims, outlined in 38 U.S.C. § 7261, are much like those which govern the appellate review of the federal cases I have handled for over three decades. In general, questions of law are reviewed de novo, findings of fact are reviewed for clear error, and discretionary matters are reviewed for abuses of discretion. I believe my extensive experience with cases measured against these standards is excellent preparation for providing proper review in accordance with Section 7261. And my lengthy military career, including nearly nine years as a trial judge, should foretoken facility in applying “the rule that interpretive doubt is to be resolved in the veteran’s favor,” *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

Though there is no perfect parallel, the variety of cases I have handled and roles I have had in those cases provide important grounding in the principles involved. Criminal and civil trials involve a kind of de novo review of the conduct that led to the action. In criminal cases, the accused is cloaked with a presumption of innocence, and both types of cases are governed by procedural and evidentiary rules that sometimes provide parties preferential treatment. Some cases reviewed in federal court arise from prior administrative proceedings, such as those involving social security benefits or complaints of discrimination. The military justice system runs through commanders who serve as convening authorities empowered to disapprove, reduce, commute, or suspend court-martial sentences.

As an Army Judge Advocate, in addition to the work described above, I served in various capacities on administrative separation boards, including president, legal advisor, recorder (presenting the evidence), and respondent’s counsel. I negotiated issues with the union and represented management in adverse personnel actions, complaints of unfair labor practices, and complaints of discrimination, trying an employee disciplinary matter before an administrative law judge of the Merit Systems Protection Board. Army trial judges are expected to engage even more actively and directly with the accused than their state and federal counterparts to ensure that those accused understand their rights, make knowing choices, and, if that choice is to plead guilty, that there is an adequate factual basis satisfying every element of the crime and any hint of a possible defense is explored and the applicable law explained.

As United States Attorney, I am regularly called upon to resolve issues and disputes involving cases, policies, programs, law enforcement and other governmental agencies, and office administration, and have done that kind of supervisory work for over 21 years.



My family and professional history have imbued me with reverence for the service and sacrifice of veterans, so I understand completely the reasons for the preferential treatment described. In addition, my entire professional life has included work in the federal bureaucracy, so I also understand well the frustration sometimes experienced when seeking administrative action.

**Pre-Hearing Questions for the Record  
Nomination Hearing of Scott Laurer to be  
Judge, Court of Appeals for Veterans Claims**

From Ranking Member Jon Tester

*Question 1.* How has your professional experience prepared you to be a judge on the Court of Appeals for Veterans Claims?

**Response.** The United States military offered me the privilege of service, unparalleled leadership experience, and a wide range of legal skills. During my nearly 30 years of active-duty service as a Navy judge advocate, I provided legal services to military service members, veterans, and their families, and I advised our country's most senior civilian and military leaders on complex legal issues. Through these diverse experiences, I have demonstrated my ability to faithfully interpret and apply laws and regulations to factual situations and to communicate effectively, in speech and in writing, my reasoning behind legal conclusions.

As a Deputy Legal Advisor on the National Security Council staff during the last two years of my service, I coordinated extensively with senior attorneys and other personnel across the Federal Government while providing legal advice and counsel in meetings between Cabinet-level officials and their Deputies. If confirmed, this experience would be helpful for collaborating with other judges on the United States Court of Appeals for Veterans Claims (CAVC), particularly when the court is operating in panels or *en banc*.

Finally, I have led and supervised organizations comprised of civilian and military personnel, including legal and non-legal staff members, throughout my career. These experiences have made me both a better leader and a better team member. I am committed to caring for and developing persons under my charge. If confirmed, these experiences would be helpful for supervising my chambers and serving with other judges.

*Question 2.* How would you evaluate statute? How would you evaluate Congressional intent?

**Response.** My first step in evaluating statute would be to carefully review the language to determine whether it is clear and unambiguous. If the language is unambiguous, a judge must apply that statute as written. Alternatively, if the statute is ambiguous and its language has more than one conceivable meaning, a judge must use other tools to determine its meaning. One tool used to determine Congressional intent is legislative history. The broad range of sources for legislative history includes conference reports, committee reports, joint explanatory statements, floor statements, and hearing transcripts. The weight afforded to each source will likely vary based on the specific circumstances, for example whether the language discussed in one of those sources was changed prior to enactment. Further, when evaluating statute, a judge of an inferior court must consider the precedents of higher courts. Finally, there are other statutory construction principles relevant for CAVC judges. For example, the Supreme Court has held that ambiguities in statutes that provide veterans benefits are to be construed in favor of the veteran.

*Question 3.* What are your views of attorney or advocate representation versus pro se representation?

**Response.** Representation by an attorney or non-attorney advocate is likely to provide a better outcome for the veteran, particularly for appeals before the CAVC. My understanding is that proceedings before the Court are frequently complex, both in terms of substance and procedure. For example, a claimant-appellant's case may involve the interpretation of statutes, regulations, United States Department of Veterans Affairs (the VA) policies, judicial opinions, medical evidence, military records, and other sources of information. Accordingly, skilled attorneys and non-attorney advocates are likely better suited to recognize and navigate these complexities, as well as provide better arguments, than *pro se* appellants.

*Question 4.* What do you believe is a reasonable timeframe for the court to make a decision?

**Response.** I believe a reasonable timeframe will vary from case-to-case. Each case before the CAVC will be unique and require the amount of time necessary for full and fair consideration of the issues presented. There are additional factors ranging from the actions of the claimant-appellant and her or his advocates to the staffing of the Court. If confirmed, I am committed to deciding an individual veteran's appeals fairly and expeditiously.

*Question 5.* Would you reverse a VA position that is consistent with long-standing practice but you believe is an incorrect interpretation of statute?

**Response.** Yes, if confirmed, I would reverse a VA position regardless of long-standing practice if appropriate based on relevant facts and law in a particular case.

*Question 6.* Would the potential cost of overturning an established rule factor into your decision on how to adjudicate a case?

**Response.** No, I do not believe the potential cost of overturning an established rule would be a relevant factor for me to consider if confirmed.

*Question 7.* You noted in the supplemental questionnaire that you have assisted veterans in reviewing their medical and personnel files and advised them on issues related to their benefits claims. You also noted that you have advised veterans on the law and procedures related to their benefits claims and how to proceed with appeals. Provide your observations of the claims process. How will your experience in these matters inform your opinion as a judge?

**Response.** Although I have not formally represented veterans benefits claimants or appellants, my observation from assisting and advising them is that the course to receiving benefits can be prolonged and confusing to the claimant-appellant. I have also seen how delays in receiving entitled benefits can create hardships for veterans and their families. My experience assisting and advising veterans and their families with challenges receiving entitled benefits has inspired me to continue my government service

as a judge on the CAVC. If confirmed, I will enhance the CAVC's efforts to decide an individual veteran's appeals fairly and expeditiously.

*Question 8.* The claims process, from an initial claim to an appeal to the Board of Veterans Appeals, is preferential to the claimant. The process is supposed to be non-adversarial and easy for veterans to navigate. That non-adversarial nature changes when a claimant appeals to the Court of Appeals for Veterans Claims. What in your background has prepared you to review cases *de novo* and when the earlier process purposely gives preferential treatment to the claimant?

**Response.** As a staff judge advocate for numerous General Court-Martial convening authorities (the senior flag or general officers who refer cases to courts-martial), I reviewed the results of trial for dozens of courts-martial to assist those leaders in taking post-trial action for the disposition of cases. I also reviewed hundreds of nonjudicial punishment/Article 15, Uniform Code of Military Justice appeals. Within the context of the military justice system, this experience is similar in that the convening authorities had the authority to review an issue of law or a mixed issue of law and fact without giving deference to the decision of the court-martial and to grant a military service member relief from nonjudicial punishment imposed by a subordinate commander.

Furthermore, each Judge Advocate General has established a court of criminal appeals (CCA) under the Uniform Code of Military Justice to review courts-martial. The CCA may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the CCA finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the CCA may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. While I have not represented appellants before a CCA, my familiarity with the CCA's authorities from practicing at the trial court level and experience advising convening authorities as described in the paragraph above have helped prepare me for reviewing cases *de novo*.

*Question 9.* How has your membership in The Federalist Society informed your view of the role of government? The role of the courts?

**Response.** Events sponsored by The Federalist Society offer an opportunity to hear open debate about the role of government and the role of courts. The organization's members are diverse and often hold conflicting views. It is impossible for me to measure how my membership in The Federalist Society has informed my view of the role of government and the courts generally; however, I share its founding principle that "the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."

**Questions for the Record for Grant C. Jaquith  
Nominee to the Court of Appeals for Veterans Claims**

Questions From Ranking Member Jon Tester

*Question 1.* Congress intended the claims process be non-adversarial right up until a veteran appeals the decision on his or her claim to the Court. You noted that you previously helped veterans through the claims process. Is it necessary for veterans to have legal counsel from the start of their claim? In your opinion, would it improve the process if veterans had legal advice when filing their initial claim? If yes, how would it improve the process? In your opinion what is the best way for veterans to gain access to legal representation when filing their claims?

**Response:** A few years before the Court of Appeals for Veterans Claims was created, the U.S. Supreme Court observed that the system for administering veterans benefits was set up to be as informal and nonadversarial as possible so a veteran would not need legal counsel's assistance in making a claim and would get to keep the entirety of any resulting award. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 321-334 (1985). There have been substantial changes since then, but the law still only permits attorneys to charge claimants for representation provided after the agency has issued notice of an initial decision on the claim. 38 U.S.C. § 5904(c); 38 C.F.R. § 14.636(c)(1)(i).

In *Walters*, the Supreme Court set out some concerns with greater involvement by attorneys:

It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.

473 U.S. at 326. More recently, some luminaries in veterans law have expressed a different perspective. Before joining the Court of Appeals for Veterans Claims, Judge Allen suggested that greater involvement by lawyers in the claims process could reduce delays by bringing legal training to bear to ensure that available evidence is assembled and

presented to meet the elements of the claim at the initial adjudication. Michael P. Allen, *Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 U. Miami Nat'l Security & Armed Conflict L. Rev. 1, 23-25 (2015). In a speech on November 8, 2018 at Harvard Law School, Chief Judge Davis suggested that lawyers are needed at the administrative level to help avoid problems with decisions coming out of regional offices. Robert N. Davis, *The United States Court of Appeals for Veterans Claims: The Newest Federal Court Experiment, Past, Present, and Future*, Harvard Law School National Security Journal Online (April 11, 2019), <https://harvardnsj.org/2019/04/the-united-states-court-of-appeals-for-veterans-claims-the-newest-federal-court-experiment-past-present-and-future/>.

The Department publicly notes that veterans may want an accredited attorney or Veterans Service Officer to help them understand and apply for benefits, help them gather supporting documentation, and/or file a claim on their behalf. <https://www.va.gov/disability/get-help-filing-claim/>. In my experience, having the advice, assistance, and advocacy of a lawyer nearly always sharpens the identification and presentation of the relevant facts and applicable law, hastens resolution, and increases the likelihood of an appropriate outcome. I would expect legal representation in the administrative process to advance the interests of veterans and facilitate the expeditious and just resolution of their claims. But there would be costs, to both veterans who retain counsel and the system set up to assist veterans directly, help them develop their claims, and give them the benefit of the doubt. An example of the difference with lawyers is found in the consideration of pleadings: Court of Appeals for the Federal Circuit precedent requires that the Department give a sympathetic reading to all pro se pleadings, but not to pleadings filed by counsel. *Andrews v. Nicholson*, 421 F.3d 1278, 1280-83 (Fed. Cir. 2005).

As constructed, there are opportunities for veterans to secure assistance, from Veterans Service Officers and accredited attorneys who work pro bono (with reasonable expenses reimbursed). It would be imprudent for me to propose profound changes from this vantage point. If confirmed, I would support efforts to promote representation for veterans who seek it.

*Question 2.* During your answers to questions at the hearing, you cited section 7261 of title 38, United States Code, as guidance for regulatory interpretation. This gives the Department deference on interpretation of regulations. Can you further elaborate on what precedents you would cite when determining how regulations should be read? What case law would you rely on when determining ambiguity in Congressional intent or agency regulatory intent before applying deference to a decision?

**Response:** As I understand it, under 38 U.S.C. § 7261, the Court of Appeals for Veterans Claims reviews the Department's interpretation of regulations de novo. See *Lynch v. Wilkie*, 30 Vet.App. 296, 301 (2018) ("The Court reviews VA's interpretation of statutes and regulations de novo."); *Lane v. Principi*, 339 F.3d 1331, 1339 (Fed. Cir. 2003) ("interpretation of a statute or regulation is a question of law" the Court should review de novo, whether the review is conducted under 38 U.S.C § 7261(a)(1) or 7261(a)(3)(A)). Judicial review should begin with careful consideration of the text. If the words are clear and unambiguous, they are applied as written. In making that determination, words are construed in accordance with their ordinary usage and context, as most compatible with the surrounding law into which they were integrated. Legislative history may be helpful in ascertaining the reasonable construction of the statutory language. See *BO v. Wilkie*, 31 Vet.App. 321, 328-29 (August 15, 2019) (statutory interpretation is reviewed de novo, and the basics of statutory interpretation are well established); *Perciavalle v. Wilkie*, — Vet.App. —, 2019 WL 5460693\*3 (October 25, 2019) ("In regulatory interpretation, the Court uses the 'traditional tools of construction,' carefully considering 'the text, structure, history, and purpose of a regulation.' When a regulation's meaning is clear from its text, a Court's analysis need not go any further.") (citations omitted). Application of these rules of construction may end the analysis or just begin it.

In *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court described the judicial role in reviewing agency interpretations of statute:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.* at 842-43.

Later cases reflect that an agency's interpretation of a statute is more likely to warrant deference if it is based on notice-and-comment rulemaking or formal adjudication, rather

than opinion letters, policy statements, agency manuals, or enforcement guidelines. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). “[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001). “Congress has delegated such authority to the Secretary, see 38 U.S.C. § 501(a).” *Cook v. Snyder*, 28 Vet.App. 330, 339 (2017). But *Chevron* deference is not appropriate where the VA regulation does not resolve the ambiguity in the statute. *Id.*

The veteran’s canon of statutory construction provides that “interpretive doubt is to be resolved in the veteran’s favor.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994). See *King v. St. Vincent’s Hospital*, 502 U.S. 215, 220–221, n. 9 (1991) (“provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor”); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (“This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.”). However, the Court of Appeals for the Federal Circuit has held that the veterans’ canon must yield when the VA regulation is entitled to *Chevron* deference:

Though this court has indeed said on several occasions that we must remain conscious of the pro-claimant policy underlying the veterans’ benefits scheme, in *Disabled American Veterans*, we also cautioned that “a veteran ‘cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision.’” [*Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000)] (citations omitted). Even where the meaning of a statutory provision is ambiguous, we must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case. Here, the DVA regulation does not conflict with the spirit of the veterans’ benefits scheme in any substantial way, if at all. . . . even assuming a DVA regulation sometimes operated inconsistently with the pro-claimant policy underlying the statute, the appellant has not cited, nor have we found, a single case in which this court has invalidated a regulation that would otherwise be entitled to *Chevron* deference on this ground. Nor is there any hint in *Chevron* or its progeny that this deference does not apply to DVA regulations.

*Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003)



Even interpretations that do not fall within *Chevron* still may merit some deference. *United States v. Mead Corp.*, 533 U.S. at 235. An agency’s policies and interpretations

made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

The most recent pronouncement of the U.S. Supreme Court on deference to an agency’s interpretation of its regulations is *Kisor v. Wilkie*, 139 S.Ct. 2400 (June 26, 2019), purporting to restate the principles guiding that deference set out in *Auer v. Robbins*, 519

U.S. 452 (1997), and the limits to “*Auer* deference.” In *Kisor*, the Supreme Court vacated the judgment of the Court of Appeals for the Federal Circuit, which had afforded *Auer* deference to the interpretation of a VA regulation by a single judge of the Board of Veterans Appeals, upon finding that the Circuit had not brought all its interpretive tools to bear in determining that the regulation was ambiguous or assessed whether the interpretation deserved deference as the considered judgment of the agency. 139 S.Ct. at 2423-24. Reexamining *Auer* deference, the Supreme Court stressed that it had “cabined *Auer*’s scope in varied and critical ways—and in exactly that measure, [ ] maintained a strong judicial role in interpreting rules,” as follows:

- “[A] court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. . . if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense.”
- “[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the ‘traditional tools’ of construction. . . [A] court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. . . [H]ard interpretive conundrums, even relating to complex rules, can often be solved. To make that effort, a court must ‘carefully consider[ ]’ the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.”

- “If genuine ambiguity remains, . . . the agency’s reading must still be ‘reasonable.’” Tools such as “[t]he text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.”
- The regulatory interpretation must be the agency’s authoritative or official position.
- “[T]he agency’s interpretation must in some way implicate its substantive expertise.”
- “[A]n agency’s reading of a rule must reflect ‘fair and considered judgment,’” not ‘merely a convenient litigating position’ or ‘*post hoc* rationalizatio[n] advanced’ to ‘defend past agency action against attack.’”

139 S.Ct. at 2415-18 (citations omitted).

Justice Kagan delivered the opinion of the Court outlined above, with two other parts of that opinion joined only by Justice Ginsburg, Justice Breyer, and Justice Sotomayor. Chief Justice Roberts wrote an opinion concurring in part. Justice Gorsuch wrote an opinion concurring in the judgment, joined by Justice Thomas and Justice Kavanaugh, and by Justice Alito as to three of its five parts. Justice Kavanaugh wrote concurring in the judgment, joined by Justice Alito. Justice Gorsuch wrote:

It should have been easy for the Court to say goodbye to *Auer v. Robbins*. . . . A legion of academics, lower court judges, and Members of this Court—even *Auer*’s author—has called on us to abandon *Auer*. Yet today a bare majority flinches, and *Auer* lives on.

Still, today’s decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that the Chief Justice claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified.

*Id.* at 2425. With such divergent views on the Supreme Court, it seems likely that the development of the law in this area has not concluded. If confirmed, I will carefully consider and apply applicable law

*Question 3.* In your previous experience you cited combat injuries as mitigating factors when deciding cases as a military judge. Specifically, *United States v. Swick*, involving a soldier with a traumatic brain injury. Can you elaborate on how you weighted those injuries as mitigating factors and what the outcome of sentencing was based on how you incorporated that weighted evidence in making a final decision?

**Response:** In 2008, Lieutenant Swick was sentenced to be confined for 10 months and to be dismissed from the service. He pled guilty to conduct unbecoming an officer by placing hidden cameras in a shower area and videotaping a female Sergeant in his platoon undressing and showering, and to failure to obey a lawful general order by wrongfully possessing pornography he had brought to Iraq (comprised of 55 images of adult sexual activity). The maximum term of confinement for conduct unbecoming an officer was one year and the maximum for failure to obey a general order was confinement for two years. Lieutenant Swick was an Explosive Ordnance Disposal platoon leader and a decorated combat veteran who had received a traumatic brain injury and suffered from depression and posttraumatic stress disorder. Before trial, a medical board conducted a mental examination and concluded that, at the time of the alleged criminal conduct, Lieutenant Swick was able to appreciate the nature and quality or wrongfulness of his conduct and was able to understand the nature of the proceedings against him and cooperate intelligently in his defense. At trial, Lieutenant Swick acknowledged his mental responsibility for his crimes. A forensic psychiatrist from the National Naval Medical Center testified that she agreed with the board's conclusions, too, but opined Lieutenant Swick's traumatic brain injury, depression, and posttraumatic stress disorder led to his poor judgment. A comprehensive neuropsychological report was offered with similar diagnoses and the conclusion that Lieutenant Swick was not then fit for duty. Lieutenant Swick's brigade commander during his service in Afghanistan testified that Swick had been a dedicated professional who performed the work of two people. Lieutenant Swick's supervisor at Fort Bragg following his return from Iraq after these offenses were discovered, a Major responsible for brigade sustainment, testified that Swick had assisted so well that he recommended that Swick succeed him in the position.

The Sergeant who was filmed was the only woman in the platoon. She testified that after viewing the evidence, she was afraid of Lieutenant Swick and had bad nightmares, slept with a loaded weapon, and decided to leave the military because she could no longer trust her male colleagues and could not work in explosive ordnance disposal. Under the Rules for Court Martial, appropriate considerations in determining just punishment include the nature and circumstances of the offense and the history and characteristics of the accused, as well as the impact of the offense on the well-being of the victim and the mission, discipline, and efficiency of the command. There is a deliberative privilege, and military judges are not to disclose information concerning their deliberations or the processes used to resolve issues. On appeal, the findings of guilty and the sentence were affirmed. *United States v. Swick*, ACCA 20080725, July 29, 2009. There is nothing about this case that would affect my ability to be fair and impartial if confirmed to become a judge on the Court.

*Question 4.* In your response to my question about single judge decisions, you responded that there may be a line where cases that are fairly straight-forward should be decided by single judges. What would your determination be for deciding which cases do not merit a panel decision?

**Response:** If confirmed, I would follow the Internal Operating Procedures of the Court, which embrace the standard set out in *Frankel v. Derwinski*, 1 Vet.App. 23 (1990) for deciding which cases do not merit a panel decision. In *Frankel*, the Court declared that a case is suitable for summary disposition by a single judge:

If, after due consideration, the Court determines that the case on appeal is of relative simplicity and

1. does not establish a new rule of law;
2. does not alter, modify, criticize, or clarify an existing rule of law;
3. does not apply an established rule of law to a novel factsituation;
4. does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide;
5. does not involve a legal issue of continuing public interest; and
6. the outcome is not reasonably debatable.

Vet.App. at 25-26. If confirmed, I would apply the *Frankel* standard.

*Question 5.* During your testimony, you said the potential for class actions might help improve the time for decisions. Do you support class actions within the Veterans Court system?

**Response:** Recent cases highlight the potential for enhancing efficiency and effectiveness via the aggregate resolution of claims involving numerous veterans and common questions of law or fact. In *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017), a case arising from a petition for a writ of mandamus, the Court of Appeals for the Federal Circuit held that the Court of Appeals for Veterans Claims has the authority to certify and adjudicate class action cases and remanded for determination of whether such aggregation would be appropriate. The Federal Circuit cited as authority for doing so the general provisions of the All Writs Act and the Veterans Judicial Review Act creating the Court, as well as the absence of any statutory restrictions precluding class certification. *Id.* at 1318-1321. The Circuit noted that the ability to certify a class “can help the Veterans Court exercise [its] authority by promoting efficiency, consistency, and fairness, and improving access to legal and expert assistance by parties with limited resources.” *Id.* at 1320. The Circuit further

said that: “a claim aggregation procedure may help the Veterans Court achieve the goal of reviewing the VA’s delay in adjudicating appeals;” “[c]lass actions may help the Veterans Court consistently adjudicate cases by increasing its prospects for precedential opinions . . . [by helping] prevent the VA from mooting claims scheduled for precedential review;” and “class action suits could be used to compel correction of systemic error and to ensure that like veterans are treated alike.” *Id.* at 1321.

On remand, a divided en banc Court of Appeals for Veterans Claims denied the motion for class certification in *Monk* for failure to meet the commonality standard established by Fed.

R. Civ. Pro. 23(a)(2), concluding that there was no common cause for the delays endured by the petitioners and putative class. *Monk v. Wilkie*, 30 Vet.App.167, 181 (2018). The appeal of that decision to the Federal Circuit is pending.

Since *Monk*, the Court granted modified class certification and partially granted another petition for a writ of mandamus based on unreasonable delay in *Godsey v. Wilkie*, 31 Vet.App. 207 (June 13, 2019) and granted class certification and a petition for extraordinary relief in *Wolfe v. Wilkie*, — Vet.App. —, 2019 WL 4254039 (September 9, 2019). In *Wolfe*, the Court held that “a class action is a more efficient and effective vehicle for resolving this case than a precedential decision focused on an individual veteran’s case,” citing the need for prompt remedial enforcement by any class member, consistent adjudication of similar claims, quicker attention to a systemic issue without the delay associated with individual appeals, and the savings of agency and judicial resources. 2019 WL 4254039\*\*18-19. A case now on limited remand from the Court, *Skaar v. Wilkie*, 31 Vet.App. 16 (February 1, 2019), solicits “a supplemental response from the Board, without vacating the decision on appeal, for the discrete purpose of evaluating a class certification motion arising from that appeal—an issue of first impression at the Court.” *Id.* at 19.

Both the Court of Appeals for the Federal Circuit and the Court of Appeals for Veterans Claims have set out reasons class actions may be more effective and efficient in securing swifter justice for veterans. But issues are said to remain regarding “the jurisdictional and practical challenges that would be inherent in entertaining class actions in an appeals context, given the statutory framework that governs [the Court’s] review of Board decisions.” *Skaar v. Wilkie*, 31 Vet.App. at 32 (Pietsch, Meredith, and Falvey, JJ., dissenting). The foregoing analysis should not be taken as a forecast of how I would resolve any such issues. If confirmed, I will carefully consider the law and facts of each case fairly and impartially, including those involving potential certification and adjudication of class actions, to fulfill the sacred duty of the Court to render justice on veterans’ claims expeditiously.

**Questions for the Record for Scott Laurer  
Nominee to the Court of Appeals for Veterans Claims**

Questions from Ranking Member Tester

*Question 1.* During your testimony you cited national security interests, client confidences, and executive privilege through the separation of powers, as reasons for not being able to respond to certain questions during your confirmation hearing earlier this week. If you cannot provide an answer for the following questions, cite the authority or precedent for withholding your answer. If it is client confidence, citing attorney client privilege as the reason for withholding, please list the pending litigation it was being prepared for.

- a. Can you briefly describe your working relationship with John Eisenberg?
- b. Did John Eisenberg ask you for a legal opinion involving withholding military aid from Ukraine at any point during the summer of 2019?
- c. Did you have any knowledge of, or involvement regarding, the July 25, 2019 phone call between President Trump and President Zelensky?
- d. If yes to question (c):
  - i. Did you listen to the call?
  - ii. Were you concerned about the conversation during the call?
  - iii. Did you inform or consult with others about these concerns?
- e. Were you aware at any point that concerns had been raised by Lt. Col. Alexander Vindman or others regarding the President's comments and requests of President Zelensky during the July 25, 2019 call?
- f. If yes to question (e):
  - i. When did you become aware of such concerns?
  - ii. Did you inform or consult with others about these concerns?
- g. Were you aware of, or did you have any role in, John Eisenberg's decision to move the transcript of the July 25, 2019 call to a more highly classified server?
- h. You stated you did not believe you were the deputy named in Mr. Morrison's testimony and if you were you could not disclose any information regarding Mr. Morrison in the hearing. Could you clarify whether he was referring to you in his testimony?
- i. As Ethics Counsel on the NSC, what did your duties entail?
- j. Did your duties as Ethics Counsel include Hatch Act violations?
- k. If yes to question (j):
  - i. What actions did you take when the Office of Special Counsel made determinations about violations of the Hatch Act by White House officials?

**Response:** From August 2017 to November 2019, I was detailed from the Department of Defense to the National Security Council (NSC). As Deputy Legal Advisor to the NSC, I worked as an attorney with the responsibility of providing legal advice on a variety of national security issues. I was not on the July 25, 2019 call between President Trump and President Zelensky. I was not involved in drafting or preserving the memorandum of conversation for the July 25 call. I was not involved in making the decision to hold or to release the security assistance to Ukraine. I have never spoken with the President or the Vice President. I have never spoken with Rudy Giuliani. During my time at the White House, I have never observed any conduct that I view to be contrary to law. No one at the White House has ever asked me to lie, mischaracterize, or otherwise be untruthful.

*Question 2.* Congress intended the claims process be non-adversarial right up until a veteran appeals the decision on his or her claim to the Court. You noted that you previously helped veterans through the claims process. Is it necessary for veterans to have legal counsel from the start of their claim? In your opinion, would it improve the process if veterans had legal advice when filing their initial claim? If yes, how would it improve the process? In your opinion what is the best way for veterans to gain access to legal representation when filing their claims?

**Response.** There are multiple ways for veterans to apply for disability compensation depending on what time frame the veteran is in (i.e., pre-discharge or post-separation) with respect to her transition from military service. Since filing a claim occurs during the non-adversarial stage of the process and there are trained and certified personnel available to assist veterans in filing claims (e.g., accredited Veterans Service Organization representatives), I do not believe it is necessary or that it would improve the claims process for veterans to have legal counsel at this stage in the disability claims process.

*Question 3.* In response to my question about single judge decisions verses panel decisions, you cited current Court guidance regarding which cases go before a panel. Would you consider changing that guidance or drawing a new line for which cases are heard before a panel?

**Response.** Yes, if confirmed, I would be open to considering proposals to change existing guidance on which cases are heard before a Court panel.

**Questions for the Record for Scott Laurer  
Nominee to the Court of Appeals for Veterans Claims**

Questions from Senator Blumenthal

*Question 1.* Please describe the events that led to you being detailed to the National Security Council (NSC).

*Question 1a.* Was the detail voluntary or non-voluntary?

**Response:** The Department of Defense General Counsel nominated me to serve on the NSC staff. The detail was voluntary.

*Question 2.* Please describe the responsibilities of your various roles on the NSC.

*Question 2a.* Please describe your responsibilities as the President's primary legal advisor to Russian Affairs in particular.

*Question 2b.* Who were your supervisors in all your roles on the NSC?

*Question 2c.* Who were the coworkers on the NSC with whom you interacted on a daily basis?

**Response:** From August 2017 to November 2019, I was detailed from the Department of Defense to the National Security Council (NSC). As Deputy Legal Advisor to the NSC, I worked as an attorney with the responsibility of providing legal advice on a variety of national security issues. I was not on the July 25, 2019 call between President Trump and President Zelensky. I was not involved in drafting or preserving the memorandum of conversation for the July 25 call. I was not involved in making the decision to hold or to release the security assistance to Ukraine. I have never spoken with the President or the Vice President. I have never spoken with Rudy Giuliani. During my time at the White House, I have never observed any conduct that I view to be contrary to law. No one at the White House has ever asked me to lie, mischaracterize, or otherwise be untruthful.

*Question 3.* How much personal interaction did you have with President Trump and Vice President Pence?

*Question 3a.* Did you ever personally brief President Trump or Vice President Pence?

*Question 3b.* Did you ever listen in on President Trump's phone calls?

**Response:** Please see my response to your Question 2.

*Question 4.* Were you involved in advising the President on any interactions with Ukraine?

*Question 4a.* Did you ever personally brief President Trump on any matters related to Ukrainian security?



*Question 4b.* Were you involved in any way with President Trump's call with President Zelensky on July 25, 2019?

**Response:** Please see my response to your Question 2.

*Question 5.* Several NSC members have testified in the House Impeachment hearings. Did you work on any matters currently under investigation by the House?

*Question 5a.* Did you ever personally interact with Gordon Sondland, Kurt Volker, William Taylor, Tim Morrison, or Alexander Vindman on matters relating to Ukraine?

*Question 5b.* If applicable, on what dates did you interact with Gordon Sondland, Kurt Volker, William Taylor, Tim Morrison, or Alexander Vindman on matters relating to Ukraine?

**Response:** Please see my response to your Question 2.

**Questions for the Record for Scott Laurer  
Nominee to the Court of Appeals for Veterans Claims**

Questions from Senator Brown

Mr. Laurer, if you are unable to answer any of the following questions, please cite the reason for nothing being able to respond.

*Question 1.* You were the Deputy Legal Advisor at the National Security Council covering Russia and Europe, until September of this year, yes?

**Response:** From August 2017 to November 2019, I was detailed from the Department of Defense to the National Security Council (NSC). As Deputy Legal Advisor to the NSC, I worked as an attorney with the responsibility of providing legal advice on a variety of national security issues. I was not on the July 25, 2019 call between President Trump and President Zelensky. I was not involved in drafting or preserving the memorandum of conversation for the July 25 call. I was not involved in making the decision to hold or to release the security assistance to Ukraine. I have never spoken with the President or the Vice President. I have never spoken with Rudy Giuliani. During my time at the White House, I have never observed any conduct that I view to be contrary to law. No one at the White House has ever asked me to lie, mischaracterize, or otherwise be untruthful.

*Question 2.* Did you also review and provide legal counsel on Ukraine policy?

**Response:** Please see my response to your Question 1.

*Question 3.* Did you help prepare or review materials for President Trump's call with President-elect Zelensky on April 21?

- Did you listen in on the call with other NSC staff?
  - **If no**—did you review the call summary memo after the call?
    - Did President Trump say anything on that April 21 call to disparage or threaten Ambassador Marie Yovanovitch?
    - Did President Trump ask President-elect Zelenskyy to work with AG Barr or Rudy Giuliani to investigate Burisma or Hunter Biden?
  - **If yes**— Did President Trump say anything on that April 21 call to disparage or threaten Ambassador Marie Yovanovitch?
  - **If yes**—Did President Trump ask President-elect Zelenskyy to work with AG Barr or Rudy Giuliani to investigate Burisma or Hunter Biden?

**Response:** Please see my response to your Question 1.

*Question 4.* Did you help prepare or review materials for President Trump’s call with President Zelenskyy on July 25?

- Did you listen in on the call with other NSC staff?
  - **If no---** How did you become aware of what President Trump said on that call?
    - Given your years of national service, did it concern you that the President would withhold security assistance to an ally for political and personal reasons?
  - **If yes---** Was Burisma specifically mentioned on the call?

**Response:** Please see my response to your Question 1.

*Question 5.* Did you play a role in shifting the call memo to the secure system to limit access?

**Response:** Please see my response to your Question 1.

*Question 6.* As I asked in the hearing earlier this week, in your role at the NSC, were you aware of, as Ambassador Taylor’s written testimony details an “irregular policy channel was running contrary to the goals of longstanding U.S. policy” vis-à-vis Ukraine?

**Response:** Please see my response to your Question 1.

*Question 7.* Were you aware that the irregular policy channel was run by Rudy Giuliani?

- **If yes,** when did you become aware, and what did you do to raise concerns through your chain of command?

**Response:** Please see my response to your Question 1.

*Question 8.* When did you first learn that security assistance to Ukraine was being held up?

- What was your understanding of why it was being held up?

**Response:** Please see my response to your Question 1.

*Question 9.* Did you provide any legal counsel regarding the legality of holding up security assistance that had been authorized and appropriated by Congress to counter Russian aggression?

**Response:** Please see my response to your Question 1.

**Questions for the Record for Scott Laurer  
Nominee to the Court of Appeals for Veterans Claims**

Questions from Senator Hirono

*Role on National Security Council*

If you cannot provide an answer for any question, please provide the legal justification for why that is.

*Question 1.* Please provide a description of your role on the National Security Council, including any involvement in Russian or Ukrainian affairs.

**Response:** From August 2017 to November 2019, I was detailed from the Department of Defense to the National Security Council (NSC). As Deputy Legal Advisor to the NSC, I worked as an attorney with the responsibility of providing legal advice on a variety of national security issues. I was not on the July 25, 2019 call between President Trump and President Zelensky. I was not involved in drafting or preserving the memorandum of conversation for the July 25 call. I was not involved in making the decision to hold or to release the security assistance to Ukraine. I have never spoken with the President or the Vice President. I have never spoken with Rudy Giuliani. During my time at the White House, I have never observed any conduct that I view to be contrary to law. No one at the White House has ever asked me to lie, mischaracterize, or otherwise be untruthful.

*Question 2.* Were you involved in the efforts to coordinate meetings between senior U.S. officials and Ukraine officials, including efforts to arrange a possible meeting between the President of the United States and the President of Ukraine?  
If yes, what was your involvement?

**Response:** Please see my response to your Question 1.

*Question 3.* Did you listen in on the July 25 call between President Trump and President Zelensky?

3a. If yes, was Burisma mentioned on the call?

3b. If yes, what details, if any, did you hear on the call that were not included in the White House memo memorializing the contents of the call?

3c. If yes, did you express any concerns about the content of that call to anyone?

If no, when did you first learn about the July 25 call?

3d. If no, what actions did you take in response to learning about the July 25 call?

**Response:** Please see my response to your Question 1.

*Question 4.* Tim Morrison, the former Senior Director for European Affairs at the White House and NSC, testified about his recollections about the July 25 call between President Trump and President Zelensky. Morrison testified, “After the call, I promptly asked the NSC Legal Advisor and his Deputy to review it.” Did you deliberate with the NSC Legal Advisor about the concerns raised by Mr. Morrison?

4a. If yes, explain your role in these deliberations.

**Response:** Please see my response to your Question 1.

*Question 5.* Were you consulted about or did you have any role in moving the memo summarizing the July 25 call to the NSC Intelligence Collaboration Environment?

**Response:** Please see my response to your Question 1.

*Question 6.* When did you become aware that the July 25 call memo had been stored on the NSC Intelligence Collaboration Environment?

**Response:** Please see my response to your Question 1.

*Question 7.* Ambassador Bill Taylor has described that an “irregular policy channel was running contrary to the goals of longstanding U.S. policy” related to Ukraine.

7a. Were you aware of this channel?

7b. If so, did you express any concerns to colleagues?

7c. If so, what involvement, if any, did you have in this “irregular policy channel”?

**Response:** Please see my response to your Question 1.

*Question 8.* When did you learn that security assistance to Ukraine was being held up?

8a. What explanation for the delay was provided to you and by whom?

8b. Did you provide any legal counsel regarding the delay?

8c. Were you aware of any concerns raised by staff at the Department of Defense, Office of Management and Budget, or any other agency, regarding the withholding of this security assistance? If yes, what were those concerns?

**Response:** Please see my response to your Question 1.

*Question 9.* Are you aware of any other efforts by President Trump to use national security or foreign policy for his political or personal benefit?

**Response:** Please see my response to your Question 1.

*Question 10.* Is there any setting under which you would be willing to discuss these issues with Congress?

**Response.** In my response to the United States Senate Committee on Veterans' Affairs Questionnaire for Presidential Nominees of October 15, 2019, I agreed to appear and testify before any duly constituted committee of the Congress upon the request of such Committee.

**Questions for the Record for Scott Laurer  
Nominee to the Court of Appeals for Veterans Claims**

Questions from Senator Manchin

*Question 1.* Mr. Laurer, In your nomination hearing, you claimed that you could not answer certain questions because of “National Security interests”, “client confidences that may exist” and “protections of the separations of powers”.

- At the hearing, you said that you would return to answer questions about your role on the National Security Council in a closed setting. Are you still willing to do that? Are there any exceptions or caveats you would place on such a meeting?
- Which specific privileges were you asserting when you refused to discuss your role at the NSC? Can you explain your legal basis for using those privileges?

**Response.** In my response to the United States Senate Committee on Veterans’ Affairs Questionnaire for Presidential Nominees of October 15, 2019, I agreed to appear and testify before any duly constituted committee of the Congress upon the request of such Committee. Any testimony I am able to provide is limited by my obligation to not disclose classified information, and to maintain attorney/client confidentiality.

**Questions for the Record for Scott Laurer  
Nominee to the Court of Appeals for Veterans Claims**

Questions from Senator Murray

*Question 1.* Please detail any role you played in advising civilian and military leaders related to Ukraine, including dates of any such conversations, discussions, memoranda or other written materials, and the specific subject matter topics of same.

**Response:** From August 2017 to November 2019, I was detailed from the Department of Defense to the National Security Council (NSC). As Deputy Legal Advisor to the NSC, I worked as an attorney with the responsibility of providing legal advice on a variety of national security issues. I was not on the July 25, 2019 call between President Trump and President Zelensky. I was not involved in drafting or preserving the memorandum of conversation for the July 25 call. I was not involved in making the decision to hold or to release the security assistance to Ukraine. I have never spoken with the President or the Vice President. I have never spoken with Rudy Giuliani. During my time at the White House, I have never observed any conduct that I view to be contrary to law. No one at the White House has ever asked me to lie, mischaracterize, or otherwise be untruthful.

*Question 2.* Were you ever asked, explicitly or implicitly, to lie, mischaracterize, omit, or conceal information related in any way to the issue of U.S. assistance to Ukraine? Please fully describe any such occurrence.

**Response:** Please see my response to your Question 1.

*Question 3.* During your time as Deputy Legal Advisor on the National Security Council staff, were you aware of any efforts that ran counter to long-standing United States government policy?

**Response:** Please see my response to your Question 1.

*Question 4.* Did you listen to the July 2019 call between President Trump and President Zelensky? Did you review the transcript and/or transcript summary of that call?

**Response:** Please see my response to your Question 1.

*Question 5.* Did you ever advise on decisions related to moving records, including but not limited to call transcripts, to more classified systems?

**Response:** Please see my response to your Question 1.

*Question 6.* During your tenure did you observe any behavior or conduct contrary to law, regulations, or ethical standards? Did any person assigned to the National Security Council Staff report to you any such conduct? If so please describe how you responded to each situation, particularly whether you reported such misconduct to appropriate authorities.

**Response:** Please see my response to your Question 1.



UNITED STATES SENATE  
COMMITTEE ON VETERANS' AFFAIRS

SUPPLEMENTAL QUESTIONNAIRE FOR NOMINEES  
TO THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Grant C. Jaquith

PUBLIC

1. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels, or conferences of which you are or have been a member, and provide the titles and dates of any offices which you have held in such groups.

The following Subcommittees and Working Group of the U.S. Attorney General's Advisory Committee, 2017 – present:

- Servicemembers and Veterans Rights Subcommittee, Vice-Chair
- Border and Immigration Subcommittee
- Native American Issues Subcommittee
- Health Care Fraud Working Group

U.S. District Court: Ad hoc court committees to address the safety of cooperating defendants, update the District's collateral forfeiture schedule, update the court's "Plan for the Prompt Disposition of Criminal Cases," and identify defendants eligible to seek reductions of their sentences based upon the application of Sentencing Commission amendments, 2010 – present

Federal Court Bar Association, 2007 – present

Albany County Bar Association, 2014

Chair, Assistant U.S. Attorney Hiring Committee, U.S. Attorney's Office, Northern District of New York, 1998 – 2007

Florida Bar, 1982 – present; Military Law Committee, 1984 – 1989

Adjunct Field Screening Officer, U.S. Army Judge Advocate General's Corps, 1984 – 1985 (interviewing applicants at law schools in Missouri and Illinois)

American Bar Association, 1982 - 1983

2. **Bar and Court Admission:**
- a. Are you currently a member in good standing of the bar of a Federal court or of the highest court of a state?

Yes

- b. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

<u>State</u>	<u>Date of Admission</u>
New York	August 29, 1988
Florida	November 5, 1982

There have been no membership lapses.

- c. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Provide the same information for administrative bodies that require special admission to practice.

<u>Court</u>	<u>Date of Admission</u>
United States Court of Appeals for the Second Circuit	June 27, 1991
<b>United States District Courts:</b>	
Northern District of New York	September 27, 1988
Southern District of New York	February 17, 1989
Eastern District of New York	February 17, 1989
Western District of New York	November 15, 1988
United States Court of Appeals of the Armed Forces (then Court of Military Appeals)	March 7, 1988
United States Army Court of Criminal Appeals (then Army Court of Military Review)	March 25, 1983

To my knowledge, there have been no membership lapses.

3. Memberships:

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Question 12 on the Committee's initial questionnaire, to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, or conferences.

As noted in response to Question 5 on the initial questionnaire: I am a member of St. George's Episcopal Church in Schenectady, New York, and have been since about 2010. I served on the Vestry there from 2012 – 2017.

From 1999 – 2010, I was a member at St. Stephen’s Episcopal Church, where I was on the Vestry or served as a Warden from 2001 – 2005.

In addition: From 1989 – 1999, I was a member at Trinity Episcopal Church in Fayetteville, New York, where I served on the Vestry and then as a Warden from 1991 – 1994. From 1985 – 1989, I was a member at Trinity Episcopal Church in Seneca Falls, New York, where I served on the Vestry from 1987 – 1989. From 1983 – 1985, I was a member of the Episcopal congregation at Fort Leonard Wood, Missouri. In 1982, I was member of Holy Trinity Episcopal Church in Gainesville, Florida.

I have also been a member of or a participant with the following organizations:

As noted in response to Question 5 on the initial questionnaire:

- Vent Fitness, Niskayuna, NY, 2012 – present (as Gold’s Gym, 2012)
- Gray Camp, Inc., Taftsville/Barnard, VT, 2010 – present (not-for-profit corporation for conservation of land encompassing camps)
- Federal Court Bar Association, 2007 – present
- Albany County Bar Association, 2014
- Niskayuna Steering Committee on Drugs, Alcohol, and Social Media, 2011 – 2013
- Boy Scouts of America, 2006 – 2012 (Cub Scout Den Leader 2008 – 2010)

In addition:

- Niskayuna Pop Warner Football – Coach, 2007 – 2011
- Niskayuna Soccer Club – Coach, 2006 – 2010
- Niskayuna Recreation Department Youth Soccer – Coach, 1999 – 2007
- YMCA Syracuse, 1989 – 1999, and Albany, 1998 – 2009
- Lions Club, Fort Leonard Wood, MO, 1983 – 1985 (President, 1985)
- American Bar Association, 1982 - 1983

- b. Indicate whether any of these organizations of which you are a member currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe what efforts, if any, you made to try to change the organization’s discriminatory policies or practices.

None of the organizations of which I am a member discriminates on the basis of race, sex, religion, or national origin.

4. Published Writings and Public Statements:

- a. If you have published any written materials (letters to the editor, articles, reports, memoranda, policy statements, friend of the court briefs, testimony or other official statements or communications) relating in whole or in part to matters of

public policy or legal interpretation related to veterans issues, please supply those materials to the Committee.

**As an Army circuit judge, I was the author of the published article, *A View from the Bench: Apply the Golden Rule, But Don't Argue It*, The ARMY LAWYER, May 2008 (attached at Appendix A), regarding an aspect of the bounds of argument at courts-martial. In addition, as the Post Judge Advocate at Seneca Army Depot (1985-1988), I wrote some articles that were included in the Depot Dispatch (a monthly newspaper) or the periodic Depot Bulletin on topics such as drug testing, driving while intoxicated, and traffic enforcement, but I have not been able to locate copies.**

**As an officer in the Army Judge Advocate General's Corps, 1982-2011, I also wrote and submitted memoranda in representing the United States in specific cases involving soldiers and, from 2001-2010, in conducting trials and related proceedings as a judge.**

**In my third year of law school, I wrote my Commercial Transactions seminar paper on what was then known as the Soldiers and Sailors Civil Relief Act, but I am unable to locate a copy of it now.**

- b. Supply transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions that related in whole or in part to veterans issues. If you do not have a copy of the speech or a transcript or recording of your remarks, provide the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

(Note: As to any materials requested in this question, please omit any confidential materials or materials protected by the attorney-client privilege.)

**I have not given any public speeches on veterans' issues.**

**As Vice-Chair of the Servicemembers and Veterans Rights Subcommittee of the Attorney General's Advisory Committee (AGAC), I have spoken at internal meetings, such as the United States Attorney's Conference, meetings of the Subcommittee, and meetings with Department of Veterans Affairs representatives, about the importance of patient records to the quality of medical care for veterans and later litigation about that care, and participated in discussions about support for veterans treatment courts and the U.S. Department of Justice Servicemembers and Veterans Initiative.**

**As an Army circuit judge, I presented internal "gateway sessions" to trial and defense counsel in at least 2006 (at Fort Bragg, North Carolina) and 2009**

(at Fort Drum, New York), covering my expectations for pre-trial and trial practice at courts-martial.

In April of 2008, I spoke at internal training of the Council of Inspectors General on Integrity and Efficiency Department at West Point, New York regarding the investigation and prosecution of criminal cases concerning the care of veterans in a VA Medical Center.

In various positions in the Army Judge Advocate General's Corps 1982 – 2001, I periodically presented internal instruction to military units on military justice, operational law/law of war, ethics, and mobilization preparedness, including the Uniformed Services Employment and Reemployment Rights Act, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Servicemembers Civil Relief Act.

5. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge and, if so, the name of the judge, the court, and the dates of the period you were a clerk;

I served as a Judicial Clerk for the Seventh Circuit, Volusia County, Florida, in the summer of 1981, working for Circuit Judge John J. Upchurch in Daytona Beach and Circuit Judge Uriel Blount, Jr. in DeLand.

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

- August 1989 – present  
United States Attorney's Office  
Northern District of New York  
445 Broadway, Suite 218  
Albany, NY 12207 (1998 – present)  
100 S. Clinton Street  
Syracuse, NY 13261 (1989 – 1998)

United States Attorney, 2018 – present  
Acting United States Attorney, 2017 – 2018

First Assistant U.S. Attorney, 2010 – 2017  
Chief, Criminal Division, 2006 – 2010  
Narcotics Chief and Chief, Albany Office, 1998 – 2006  
Assistant U.S. Attorney, 1989 – 1998 (Syracuse Office)

- February 2010 – October 2011  
U.S. Army Forces Command  
4700 Knox Street  
Ft. Bragg, NC 28310

Active Reserve, Army Judge Advocate General's Corps  
Chief, Military Law Division (IMA)

- July 2007 – January 2010  
U.S. Army Trial Judiciary  
9275 Gunston Road  
Ft. Belvoir, VA 22060

Active Reserve, Army Judge Advocate General's Corps  
Circuit Judge

- April 2001 – June 2007  
150<sup>th</sup> JAG Detachment (LSO-MJ)  
6901 Telegraph Road  
Alexandria, VA 22310

Active Reserve, Army Judge Advocate General's Corps  
Senior Military Judge, 2004 – 2007  
Military Judge, 2001 – 2004

- March 2006 – June 2006  
Office of the Circuit Judge, Second Judicial Circuit  
2175 Reilly Road, Stop A  
Ft. Bragg, NC 28310

Active Duty, Army Judge Advocate General's Corps  
Circuit Judge

- December 1998 – March 2001  
New York Army National Guard  
330 Old Niskayuna Road  
Latham, NY 12110

Active National Guard, Army Judge Advocate General's Corps  
Staff Judge Advocate, State Area Command

- **January 1995 – December 1998**  
403<sup>rd</sup> Civil Affairs Battalion  
1099 East Molloy Road  
Mattydale, NY 13211  
Active Reserve, Army Judge Advocate General's Corps  
Command Judge Advocate/International Law Officer
- **May 1992 – January 1995**  
98<sup>th</sup> Division Training  
2035 N. Goodman Street  
Rochester, NY  
  
Active Reserve, Army Judge Advocate General's Corps  
Assistant Staff Judge Advocate
- **October 1990 – April 1992**  
98<sup>th</sup> Engineer Group  
1099 East Molloy Road  
Mattydale, NY 13211  
  
Active Reserve, Army Judge Advocate General's Corps  
Assistant Staff Judge Advocate
- **September 1988 – October 1990**  
1209<sup>th</sup> U.S. Army Garrison  
1099 East Molloy Road  
Mattydale, NY 13211  
  
Active Reserve, Army Judge Advocate General's Corps  
Assistant Staff Judge Advocate
- **July 1988 – August 1989**  
Bond, Schoeneck & King  
One Lincoln Center  
100 West Fayette Street  
Syracuse, NY 13202  
  
Litigation Associate
- **July 1985 – September 1988**  
Seneca Army Depot  
Romulus, NY 14541  
(Seneca Army Depot closed in 2000)  
  
Active Duty, Army Judge Advocate General's Corps  
Post Judge Advocate

- December 1982 – July 1985  
Office of the Staff Judge Advocate  
316 Missouri Avenue, Building 315  
Fort Leonard Wood, MO 65473

Active Duty, Army Judge Advocate General's Corps  
Trial Counsel & Special Assistant U.S. Attorney, October 1983 –  
July 1985  
Chief, Legal Assistance, June 1983 – October 1983  
Legal Assistance Attorney, December 1982 & April – May 1983

- Fall 1984  
Drury College (now Drury University)  
268 Constitution Street, # 12  
Fort Leonard Wood, MO 65473

College Instructor (Federal Income Taxation and Juvenile Law)

- January 1983 – April 1983  
The Judge Advocate General's Legal Center and School  
600 Massie Road  
Charlottesville, VA 22903

Active Duty, Army Judge Advocate General's Corps  
Judge Advocate Officer Basic Course Student

- January 1982 – August 1982  
Public Defender's Office  
Eighth Judicial Circuit  
35 N. Main Street (now 151 SW 2<sup>nd</sup> Ave.)  
Gainesville, FL 32601

Certified Legal Intern (course credit, then compensation)

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the ten most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator.



## b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years;

**As United States Attorney for the Northern District of New York since January 5, 2018 and Acting United States Attorney July 1, 2017 – January 4, 2018, I have led the federal effort to secure justice in criminal and civil cases and the management of about 100 lawyers and support staff in four offices to accomplish that mission.**

**As First Assistant U.S. Attorney (2010 – 2017), I was responsible for the daily work of 45 lawyers in four offices who prosecute federal criminal cases and represent the United States in civil and appellate litigation. I worked with the U.S. Attorney and consulted with law enforcement officials to develop and implement strategies to combat crime and enhance border security. I continued to conduct investigations and handle prosecutions in a limited number of criminal cases, including a jury trial for perjury in an arson homicide investigation.**

**As Chief of the Criminal Division (2006 – 2010), I was responsible for federal criminal prosecutions in the 32 counties of New York that comprise the District and for the work of the 34 Assistant U.S. Attorneys then in the Criminal Division. I conducted investigations and handled prosecutions in a limited number of criminal cases.**

**As Chief of the Albany Office and Narcotics Chief for the District (1998 – 2006), I managed the Albany Office, then comprised of 17 Assistant U.S. Attorneys and 20 support staff, supervised drug cases and Assistant U.S. Attorneys engaged in drug prosecutions district-wide, and served as the lead attorney of the Organized Crime Drug Enforcement Task Force (OCDETF). I continued to conduct investigations and handle prosecutions and appeals, principally of drug cases.**

**As a line Assistant U.S. Attorney in Syracuse (1989 – 1998), I conducted investigations and handled prosecutions and appeals in a wide range of criminal cases. My jury trials included convictions for murder of a police officer, engaging in a continuing criminal enterprise, drug conspiracy, drug trafficking, firearms crimes, bank fraud, bank robbery, and labor racketeering. In my first two years in the office, I handled a few civil matters.**

**In the U.S. Army Reserve, Judge Advocate General's Corps, I served as the Chief of Military Law (IMA) for U.S. Army Forces Command**

(2010-2011) providing legal support to the Commanding General and staff across a broad range of administrative, fiscal, and criminal law issues. My work included conducting a sensitive international investigation into allegations of mismanagement by a Staff Judge Advocate and drafting a "One Team Justice Protocol" to enhance efforts to secure justice across active and reserve components by detailing the means of addressing the misconduct of Reserve and National Guard soldiers under the Uniform Code of Military Justice.

I served as an Army circuit judge, senior military judge, and military judge (2001 – 2010) presiding over courts-martial at forts throughout the continental United States and in Alaska, Germany, and Korea, including trials on charges of solicitation to murder, rape, aggravated assault, indecent assault, conspiracy, and internet solicitation of sex with children. I was activated in the spring of 2006 and served as the full-time trial judge at Fort Bragg, North Carolina, for three months.

As Staff Judge Advocate at the state headquarters of the New York Army National Guard, I provided legal advice to commanders and staff on disciplinary actions and command administration, conducted litigation at administrative boards, provided legal assistance to soldiers, and presented instruction on military justice, operational law/law of war, ethics, and mobilization preparedness.

As International Law Officer/Command Judge Advocate for the 403<sup>rd</sup> Civil Affairs Battalion, and as Assistant Staff Judge Advocate for the 98<sup>th</sup> Division (Training), the 98<sup>th</sup> Engineer Group, and the 1209<sup>th</sup> U.S. Army Garrison, I advised the command on all legal matters, including administrative and operational law; provided legal assistance to soldiers; provided instruction on diverse topics; and served as recorder presenting the cases in administrative separation actions.

As a litigation associate at Bond, Schoeneck & King in Syracuse (1988 – 1989), I handled civil and criminal matters and appeared in state, appellate, and federal courts. I also worked on client matters involving property, estate/financial planning, business, labor, and family law.

As Post Judge Advocate at Seneca Army Depot (1985 – 1988), I managed a legal office as sole counsel with a paralegal and three clerical employees. In this position, I provided a full range of legal services: prosecuting criminal cases, representing management in adverse personnel actions, complaints of unfair labor practices, and complaints of discrimination; negotiating with the union; investigating and settling civil claims against the Army arising in a 29 county area (about 350 in one year); providing legal assistance to

hundreds of clients per year in all areas of civil law; and advising the command on all other legal matters, including environmental law, contracts, post administration, and federal-state relations. I also served as a Special Assistant U.S. Attorney, prosecuting minor offenses committed by civilians before a U.S. Magistrate Judge in Rochester, New York.

As a Trial Counsel at Fort Leonard Wood (1983 – 1985), I prosecuted soldiers for crimes such as forcible sodomy, aggravated assault, child sexual abuse, sexual assault, felony larceny, drug offenses, forgery, burglary, check offenses, and military offenses. I also served as a Special Assistant U.S. Attorney, managing a monthly docket and prosecuting cases before a U.S. Magistrate Judge, and I assisted in a federal murder prosecution that involved bringing human remains to the Smithsonian Institution for analysis.

Before becoming a Trial Counsel, I served as a Legal Assistance Attorney and then Chief of Legal Assistance (1983), counseling and assisting about 60 clients per week in matters of domestic relations, wills and estates, debtor-creditor law, landlord-tenant law, taxation, contracts, and adverse administrative decisions. I prepared wills, separation agreements, and other documents, negotiated with clients' adversaries, and managed an office of three assistants and intermittent attorney help.

While at Fort Leonard Wood, I taught courses in federal income taxation and juvenile law at the local campus of Drury College (of Springfield, Missouri) in the fall of 1984.

As a Certified Legal Intern at the Public Defender's Office, Eighth Circuit, Gainesville, Florida (1982), I conducted misdemeanor trial defense. I interviewed clients, deposed witnesses, drafted and argued motions, handled plea negotiations, and did research and writing for trial and appellate issues (including a capital murder) for felony and misdemeanor defense attorneys. I tried two misdemeanor cases to jury verdicts of not guilty and one misdemeanor case to a judgment of acquittal.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

In my work in the United States Attorney's Office (1989 – present), my only client has been the United States, and I have specialized in federal litigation. As an Army Judge Advocate (1982 – 2011), I served in several capacities. When I was a circuit judge, I specialized in presiding over criminal trials and had no clients. When I prosecuted

criminal cases, my only client was the United States. My client also was the United States when I served in positions in which I provided legal support and advice on a wide range of issues to commanders and staff. I also served in positions where I specialized in providing legal advice and assistance to individual clients who were soldiers, retirees, and their family members. As a litigation associate at Bond, Schoeneck & King (1988 – 1989), my clients were both individuals and entities, and I specialized in civil litigation. As a Certified Legal Intern in 1982, my clients were criminal defendants, and I specialized in criminal defense.

- iii. any law practice or legal experience that involved veterans' law.

The work of the United States Attorney's Office sometimes includes enforcement of veterans' rights under the Uniformed Services Employment and Reemployment Rights Act, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, the Servicemembers Civil Relief Act, or other statutes. Our Civil Division has a substantial caseload defending Department of Veterans' Affairs Medical Centers and their employees in medical malpractice lawsuits, and sometimes works with the Department of Veterans' Affairs in affirmative civil enforcement. As Vice-Chair of the Servicemembers and Veterans Rights Subcommittee of the Attorney General's Advisory Committee (AGAC), I have a keen interest in these matters and participate in ongoing dialogue with Department of Veterans Affairs representatives about the importance of patient records to the quality of medical care for veterans and later litigation about that care. Our Subcommittee work also involves support for veterans treatment courts and the U.S. Department of Justice Servicemembers and Veterans Initiative.

I have been personally involved in significant relevant criminal cases, including *United States v. Swick*, ACCA 20080725 Aug. 8, 2008; *United States v. Dr. James A. Holland*, 07-CR-00201 (FJS) and *United States v. Paul H. Kornak*, 03-CR-436 (FJS). I was the presiding judge in *Swick*, involving a First Lieutenant at Fort Bragg, North Carolina who pled guilty to hiding a camera and filming a female sergeant undressing and showering at a base in Iraq, and to stealing the sergeant's underwear. After a medical examination board and additional testimony, Swick was found to be competent and disclaimed any defense of lack of mental responsibility, but presented mitigation evidence that included the diagnoses of major depressive disorder, posttraumatic stress disorder, and traumatic brain injury from exposure to blasts in Iraq. I considered these circumstances in imposing sentence.

I have been responsible for the prosecutions of Holland and Kornak. As is set forth in greater detail below, Kornak was a research coordinator for cancer treatment at the Stratton VA Medical Center in Albany who falsified patient records to secure or maintain their enrollment in treatment studies, including the records of a patient who died from the resulting infusion of chemotherapeutic drugs. As the Chief of Oncology and Director of Research Programs at the VA Medical Center, Dr. Holland was Kornak's supervisor, failed to fulfill his responsibility to ensure that adequate and accurate case histories of patients were maintained, and ordered the infusion in reliance on the patient's enrollment in the study, without checking current laboratory results.

As an Army Judge Advocate, some of my legal assistance clients (on active duty in 1983 and 1985 – 1988, and in reserve components 1988 – 2001) were veterans. Most involved issues commonly encountered by soldiers, retirees, and their family members, but some needed help with reemployment rights or claims for benefits.

In various positions in the Army Judge Advocate General's Corps 1982 – 2001, I periodically presented internal instruction to military units on military justice, operational law/law of war, and mobilization preparedness, including the reemployment, voting, and civil relief statutes.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.
- i. Indicate the percentage of your practice in:
    1. federal courts: 96%
    2. state courts of record: 3%
    3. other courts: 0%
    4. administrative agencies: 1%.
  - ii. Indicate the percentage of your practice in:
    1. civil proceedings: 10%
    2. criminal proceedings: 90%.

In the United States Attorney's Office (1989 – present), 100% of my practice involves litigation, or the management of it, all in federal court. All of my court appearances have been in criminal proceedings (though I have handled a few civil cases and I have managed all of our litigation – civil, criminal, and appellate – since 2010). As United States Attorney and First Assistant U.S. Attorney, I have appeared in court occasionally. As Chief of the Criminal Division, I also occasionally appeared in court. As Narcotics Chief and Chief

of the Albany Office, I appeared in court with some frequency. As a line Assistant U.S. Attorney, I regularly appeared in court.

In the Army, my position with Forces Command did not involve litigation, but my work as a trial judge (2001 – 2010) was 100% criminal litigation at courts martial. As Staff Judge Advocate (1998 – 2001), Command Judge Advocate (1995 – 1998), and Assistant Staff Judge Advocate (1988 – 1995), about 10% of my work involved occasional litigation before federal administrative boards. As a litigation associate at Bond, Schoeneck & King (1988 – 1989), my practice was about 75% litigation – about 90% in state court, 9% in federal court, and 1% before administrative agencies – and nearly all of it (99%) involved civil proceedings. As Post Judge Advocate and Special Assistant U.S. Attorney (1985 – 1988), about 10% of my practice was litigation, about 80% in federal court (courts-martial and U.S. Magistrate's Court) and 20% before administrative agencies or boards, and I appeared before a court or administrative body occasionally. As a Trial Counsel and Special Assistant U.S. Attorney (1983 – 1985), my practice was 100% litigation before federal courts (mostly courts-martial) and I appeared in court frequently. There was no litigation involved in my work as a college instructor in the fall of 1984, or in my work as a Legal Assistance Attorney and then Chief of Legal Assistance in 1983. As a Certified Legal Intern in 1982, 100% of my practice involved criminal litigation in state courts.

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

As a prosecutor, I have tried about 25 cases to verdict in federal courts, about equally divided between U.S. District Court and Army courts-martial. As a defense counsel, I have tried three cases to final decision in state courts. I represented the United States in one case to final decision before a Merit Systems Protection Board administrative law judge. These numbers do not include bench trials I prosecuted before U.S. Magistrate Judges or cases before Army administrative separation boards (in which I have served as the Board President, legal advisor, recorder, and respondent's counsel); those cases would add at least 20 more. Also not included are my trials as an Army circuit judge. I have briefed and argued about 16 appeals before the Court of Appeals for the Second Circuit representing the United States and one appeal before the New York State Appellate Division, Fourth Department representing a business client. About 80% of my trials were as sole counsel and 20% as co-counsel.

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

**I have not practiced before the Supreme Court of the United States.**

6. **Litigation:** Describe the ten most significant litigated matters that you personally handled, whether or not you were the attorney of record. Provide the citations, if the cases were reported, and the docket number and date if unreported. Provide a summary of the substance of each case. Identify the party or parties whom you represented and describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *United States v. Edward A. Leon*, 1:14-CR-00412-GLS; *United States v. Jennica Duell*, 1:14-CR-00413-GLS; *United States v. Richard Ramsey*, 1:16-CR-00314-GLS; *United States v. Bryan Fish*, 1:16-CR-00315-GLS  
Lead counsel, 2013 – present  
Hon. Gary L. Sharpe, Senior United States District Judge, Northern District of New York

An arson homicide in Schenectady, NY, on May 2, 2013, resulted in the deaths of a father and his three young children, ages 3, 2, and 11 months, and seriously maimed a 5 year old girl. The mother of the children gave sworn statements and grand jury testimony identifying her boyfriend as the arsonist, and his close friend did, too. Both testified that they had traveled with the boyfriend from Saratoga Springs in the early morning hours and saw him set the fire. Eight months later, the mother testified that her prior testimony was false. Eleven days after his testimony, the close friend changed some details of his story and later said he was not present when the fire was set.

The mother pled guilty to three counts of perjury by giving irreconcilably contradictory grand jury testimony and was sentenced to imprisonment for 135 months. The close friend pled guilty to two counts of perjury arising from his false testimony regarding the involvement of his brother the night of the fire and was sentenced to imprisonment for 108 months. Another defendant pled guilty to two counts of perjury arising from irreconcilably contradictory grand jury testimony that he loaned the boyfriend a car to drive to Schenectady the night of the fire and was sentenced to imprisonment for 87 months.

Another defendant had obtained a TracFone and used it to make anonymous threats to Terry, including “you’ll never make it to your wedding day;” “die

Dave, die;" and "you're a dead man walking." In the early morning hours of May 2, 2013, this defendant went to the area of the fire, but he falsely testified before the grand jury that he had not obtained and used the phone, and was not there on May 2<sup>nd</sup>. He later admitted otherwise, but maintained that the house was on fire when he arrived, so he left as quickly as he could, without alerting the people inside or calling the fire department, the police department, or 911, because he did not want to get involved. On November 12, 2015, a jury found him guilty of two counts of perjury before the grand jury. On March 17, 2016, he was sentenced to the statutory maximum of imprisonment for 10 years.

**Co-Counsel:**

Wayne Myers  
Assistant U.S. Attorney (AUSA)  
Northern District of New York  
445 Broadway, Suite 2180  
Albany, NY 12207  
518-431-0247

**Defense counsel:**

**Defendant Edward A. Leon:**

Trial:  
David L. Gruenberg  
54 2nd Street  
Troy, NY 12180  
518-274-7252

**Prior:**

James A. Resila, Carter  
Conboy Law Firm  
20 Corporate Woods Boulevard  
Albany, NY 12211  
518-465-3484

Timothy Nugent  
1528 Columbia Turnpike  
Castleton, NY 12033  
518-479-1405

**Defendant Jennica Duell:**

Plea:  
Cheryl F. Coleman,  
90 State Street, Suite 1400  
Albany, NY 12207  
518-436-5790



**Prior:**

Hon. Daniel J. Stewart (current United States Magistrate Judge)  
 U.S. District Court-NDNY  
 James T. Foley U.S. Courthouse  
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 Albany, NY 12201

**Defendant Richard Ramsey:**

Lee Carey Kindlon  
 The Kindlon Law Firm  
 52 James Place – 5<sup>th</sup> Floor  
 Albany, NY 12207  
 518-434-1493

**Defendant Bryan Fish:**

Frederick Rench  
 P.O. Box 3386  
 Saratoga Springs, NY 12866  
 518-373-8400

2. *United States v. Endo Pharmaceuticals, Inc.*, 1:14-CR-66 (MAD), and *United States v. \$10,414,466.50*, 1:14-CV-171 (MAD)

Lead counsel on criminal case and sole counsel for civil forfeiture, 2012 – 2017

Hon. Mac A. D'Agostino, United States District Judge, Northern District of New York

A pharmaceutical company paid \$192.7 million to resolve criminal and civil liability arising from its marketing of the prescription drug Lidoderm for uses not approved as safe and effective by the Food and Drug Administration (FDA). The resolution included a deferred prosecution agreement with significant corporate compliance provisions and a monetary penalty and forfeiture totaling \$20.8 million (in the Northern District of New York) and civil false claims settlements with the federal government and the states totaling \$171.9 million (in the Eastern District of Pennsylvania, where three qui tam lawsuits were filed). Lidoderm was approved by the FDA only for the relief of pain associated with post-herpetic neuralgia (PHN), a complication of shingles, but was distributed nationwide for use in the treatment of non-PHN related pain, including low back pain, diabetic neuropathy, and carpal tunnel syndrome. Lidoderm was misbranded because its labeling lacked adequate directions for these intended but unapproved uses. The case was complicated by *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012), holding that a conviction for promoting an FDA-approved drug for off-label use violated the right of free speech under the First Amendment, but assuming that off-label promotion may be used as

evidence that the unapproved use is an intended one – which can cause a drug to be misbranded.

**Co-counsel:**

**Jill Furman**

**Deputy Director, Consumer Protection Branch, U.S. Department of Justice  
450 5th Street NW  
Washington, DC 20530  
202-307-0090**

**Shannon L. Pedersen**

**Trial Attorney, Consumer Protection Branch, U.S. Department of Justice  
450 5th Street NW  
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**Jamie Yavelberg**

**Deputy Director, Fraud Section, Commercial Litigation Branch, U.S.  
Department of Justice  
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**Brian McCabe**

**Fraud Section, Commercial Litigation Branch, U.S. Department of Justice  
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**Margaret Hutchinson**

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215-861-8282**

**Marilyn May (former AUSA)**

**Associate General Counsel  
Rand Corporation  
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**Gerald Sullivan**

**AUSA, Eastern District of Pennsylvania  
615 Chestnut Street, Suite 1250  
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215-861-8786

Defense counsel:  
Jonathan L. Stern, Esq.  
Arnold & Porter Kaye Scholer LLP  
601 Massachusetts Avenue NW  
Washington, DC 20001  
202-942-5018

3. *United States v. Dr. James A. Holland*, 07-CR-00201 (FJS) and  
*United States v. Paul H. Kornak*, 03-CR-436 (FJS)  
*United States v. Holland*, 394 Fed. Appx. 766, 2010 WL 3769225 (2d Cir.  
2010)  
Sole counsel, 2002 – present  
Hon. Frederick J. Scullin, Jr., Senior United States District Judge, Northern  
District of New York

Defendant Kornak was a research coordinator for cancer treatment at the Stratton VA Medical Center in Albany. He concealed a prior mail fraud conviction for falsifying college and medical school transcripts to obtain a medical license and then altered or falsified medical records pertaining to 65 patients to facilitate their participation in the studies or make it appear that study requirements were fulfilled. He falsified a report of the results of blood tests of a patient which showed compromised kidney and liver function; the patient was enrolled in a gastric cancer treatment study, infused with chemotherapeutic drugs, and died eleven days later. He pled guilty to making false statements in his employment application, mail fraud, and criminally negligent homicide and was sentenced to be imprisoned for 71 months.

Defendant Dr. Holland was the Chief of Oncology and Director of Research Programs at the VA Medical Center. Holland pled guilty to failing to fulfill his responsibility to ensure that adequate and accurate case histories of patients were maintained. Holland failed to review patient records, including the reports of laboratory analysis he was provided before ordering the infusion of the patient who died. At Holland's sentencing hearing, I presented the testimony of the hospital chief of staff, the medical director for the regional cancer center at the University of Texas, and a nationally famous forensic doctor and medical examiner. Holland was sentenced to probation and ordered to pay restitution of \$502,905, which was affirmed on appeal. Holland has continued to file collateral attacks on his conviction and sentence.

Defense Counsel:

Defendant Paul H. Kornak

E. Stewart Jones, Esq.  
 28 Second Street  
 Troy, NY 12180  
 518-274-5820

Defendant James A. Holland  
 Gaspar M. Castillo, Jr.  
 817 Madison Avenue  
 Albany, NY 12208  
 518-496-5677  
 Registration Status: Suspended

4. *United States v. Luis A. Murgas, a/k/a Big Louie, a/k/a Barosa; Luis E. Cordoba-Murgas, a/k/a Negro, a/k/a Carlos; Luis Antonio Todd-Murgas, a/k/a Little Louie; Cesar A. Todd-Murgas, a/k/a Tony, a/k/a Pepita; Raul Antonio Cordoba-Murgas, a/k/a Strawberry; Jose C. Dominguez, a/k/a Pachito; Ruben A. Todd-Murgas; Vincente Rogers, a/k/a Santos; Gilberto Arce, a/k/a Luigi Santiago; Jayson Jones; Dennis J. Calandra, Jr.; Tiffany Gaudinot; and Tricia Irving, 95-CR-384*  
*United States v. Murgas*, 967 F. Supp. 695 (N.D.N.Y. 1997); *United States v. Murgas*, 31 F. Supp. 2d 245 (N.D.N.Y. 1998); *United States v. Murgas*, 177 F.R.D. 97 (N.D.N.Y. 1998); *United States v. Cordoba-Murgas*, 233 F.3d 704 (2d Cir. 2000); *United States v. Murgas*, 321 F. Supp. 2d 451 (N.D.N.Y. 2004); and *United States v. Cordoba-Murgas*, 422 F.3d 65 (2d Cir. 2005).  
 Sole counsel, 1994 – 2008  
 Hon. Howard G. Munson, Senior United States District Judge, Northern District of New York, 1995 – 2007 (deceased); Hon. Norman A. Mordue, Senior United States District Judge, Northern District of New York, 2008

Thirteen defendants were charged with conspiring to distribute and distributing cocaine in the Utica area from 1991 to 1996. Seven defendants pled guilty, one is a fugitive, and five went to trial May 15 to June 26, 1997, culminating in their conviction as charged. Trial evidence included about 200 conversations in Spanish intercepted pursuant to a state wiretap, drug seizures and controlled purchases, and the testimony of a multitude of participants in and customers of the organization. The drug ring supplied customers as much as a kilogram of cocaine at a time for redistribution. At sentencing, evidentiary hearings were held on the United States' motion to hold three of the defendants accountable for the murders of a customer of the ring and his girlfriend. The district court initially denied the motion, finding that the defendants' participation in the murders had not been proven by clear and convincing evidence. The United States' appeal on that issue was granted and the convictions and sentences otherwise were affirmed. On remand, the district court granted the United States' motion and increased the sentences of two of the three defendants to 207 and 170 months. After *Apprendi* and a successful defense appeal, the sentence of the third

defendant was reduced to 228 months in 2008. Sentences for the other 9 defendants ranged from 12 months to 210 months.

**Defense counsel:**

**Defendant Luis A. Murgas:**  
Frank Policelli  
Office of Frank Policelli  
10 Steuben Park  
Utica, NY 13501  
315-793-0020

**Defendant Luis E. Cordoba-Murgas:**  
Principal counsel:  
Calvin J. Domenico, Jr.  
P.O. Box 19828  
Sarasota, FL 34276-2828  
941-929-1390

**Salvatore J. Piemonte**  
Office of Salvatore J. Piemonte  
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315-423-4444  
Registration Status: Suspended

**Barry D. Leiwant and Edward S. Zas**  
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**Lisa A. Peebles**  
Office of the Federal Public Defender  
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Syracuse, NY 13202  
315-701-0080

**Defendant Luis A. Todd-Murgas:**  
William M. Borrill  
Office of William M. Borrill  
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New Hartford, NY 13413  
315-223-3084

**Defendant Cesar A. Todd-Murgas:**  
William R. Bartholomae  
Marris, Bartholomae Law Firm  
317 Montgomery Street  
Syracuse, NY 13202  
315-472-6417

**Trial:**  
Hon. William D. Walsh  
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315-476-2113; 315-476-2114

**Alexander Bunin**  
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315-701-0080

**Defendant Raul A. Cordoba-Murgas:**  
Robert G. Wells  
Office of Robert G. Wells  
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825 University Building  
Syracuse, NY 13202  
315-472-4489

**Defendant Ruben A. Todd-Murgas:**  
Angelo A. Rinaldi  
Registration Status: Resigned from Bar

**Defendant Vincente Rogers:**  
Stephen Lance Cimino  
Office of Stephen Lance Cimino  
247 W. Fayette Street - Suite 315  
Syracuse, NY 13202-2200  
315-428-1000

**Defendant Gilberto Arce:**

Richard P. Ferris  
P.O. Box 368  
Barneveld, NY 13304-0368  
315-794-4458

Defendant Jayson Jones:  
Norman P. Deep  
P.O. Box 300  
Clinton, NY 13323-0300  
315-725-2008

Defendant Dennis J. Calandra, Jr.:  
Neal P. Rose  
Office of Neal P. Rose  
60 East State Street, Route 5  
Sherrill, NY 13461  
315-361-5200

David G. Secular  
Brooklyn Defender Services  
177 Livingston Street, 7th Floor  
Brooklyn, NY 11201-5875  
718-254-0700

Defendant Tiffany Gaudinot:  
Raymond J. Dague  
4874 Onondaga Road  
Syracuse, NY 13215-2241  
315-422-2052

Defendant Tricia Irving:  
Lisa A. Peebles  
Office of the Federal Public Defender  
The Clinton Exchange, 3rd Floor  
4 Clinton Square  
Syracuse, NY 13202  
315-701-0080

5. *United States v. Victor A. Blythe, Horace N. Parks, a/k/a "Bibby", Errol Peart, and Junior Peart*, 93-CR-126  
*United States v. Blythe*, No. 94-1357, slip. op. (2d Cir. May 30, 1995), 57 F.3d 1064 (Table) (2d Cir.), *cert. denied*, 116 S.Ct. 395 (1995)  
Sole counsel, 1992 – 1995  
Hon. Howard G. Munson, Senior United States District Judge (deceased)

Four defendants who participated in a conspiracy to import at least 100 kilograms of cocaine and 2,000 pounds of marijuana into the United States from Jamaica were convicted as charged at the conclusion of a three-week jury trial. The defendants planned to import the drugs concealed in shipments of legitimate goods, but never succeeded in doing so (though one defendant had been separately convicted for a prior importation of 243 pounds of marijuana concealed in fish and a co-defendant sold 4 ounces of cocaine to an undercover agent). Defendants' sentences ranged from 97 to 262 months.

**Defense counsel:**

**Defendant Victor A. Blythe:**  
 George P. Alessio  
 214 N State Street  
 Syracuse, NY 13203-1917  
 315-424-0300

**Defendant Horace Parks:**

Richard P. Plochocki  
 100 Madison Street, Suite 1640  
 Syracuse, NY 13202-2724  
 315-427-1353

**Defendant Errol Peart:**

Craig P. Schlanger  
 Hiscock Legal Aid Society  
 351 S Warren Street  
 Syracuse, NY 13202-2057  
 315-422-8191

**Defendant Junior Peart:**

Richard N. Bach (deceased)

6. *United States v. Carnell Donaldson, a/k/a Cornell Dotson, a/k/a C, Jarvis C. Guins, a/k/a J, Leroy Terry, a/k/a Preacher, John Mosley, a/k/a Haney, Jerry L. Burwell, a/k/a Bird, Joel C. Grant, Milton E. Spaight, Diane Robinson, a/k/a Diane Sams, Shellia Milledge, Michele R. McDowell, Georgetta Kearse, a/k/a Georgetta Scott, Sylvester Fair, Brigethia Guins, Carmen Tyrone Williams, and Frank C. Rivers, 92-CR-51*  
*United States v. Donaldson, 93-1043, 93-1052, 999 F.2d 537 (2nd Cir. Jun. 28, 1993)*  
 Lead counsel, 1991 – 2015  
 Hon. Neal P. McCurn, Senior United States District Judge (deceased)

Donaldson and Guins led a continuing criminal enterprise that distributed about 4 kilograms of cocaine in Syracuse every 6 weeks. Guins and 11



defendants pled guilty. Donaldson, Terry, and Williams were convicted at the end of a jury trial from September 9 to October 1, 1992, upon evidence that included 52 cocaine sales to informants and an undercover officer and many intercepted telephone conversations. Donaldson was sentenced to imprisonment for 400 months and forfeiture of his residence and \$875,000. Terry was sentenced to imprisonment for 270 months, and Williams was sentenced to imprisonment for 97 months.

**Co-counsel:**

Michael C. Olmsted (former AUSA)  
Now Criminal Division, U.S. Department of Justice  
1400 New York Avenue NW  
Washington, DC 2005  
202-514-9843

**Defense counsel:**

**Defendant Carnell Donaldson:**

Stephen Lance Cimino  
Office of Stephen Lance Cimino  
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Syracuse, NY 13202-2200  
315-428-1000

**Defendant Jarvis C. Guins:**

Richard D. Priest  
Office of Richard D. Priest  
333 East Onondaga Street  
Syracuse, NY 13202  
315-474-7401

**Defendant Leroy Terry:**

Gary J. Valerino  
Meggesto, Crossett Law Firm  
313 East Willow Street, Suite 201  
Syracuse, NY 13203  
315-471-1664

**Defendant John Mosley:**

Robert G. Wells  
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120 East Washington Street  
825 University Building  
Syracuse, NY 13202  
315-472-4489

**Defendant Jerry L. Burwell:**  
James P. McGinty  
333 E. Onondaga Street – Second Floor  
Syracuse, NY 13202-2011  
315-657-1608

**Defendant Joel C. Grant:**  
Hon. William D. Walsh  
103 E. Water Street  
Syracuse, NY 13202-1146  
315-476-2113; 315-476-2114

**Defendant Milton E. Spaight:**  
Salvatore J. Piemonte  
Office of Salvatore J. Piemonte  
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Syracuse, NY 13031  
315-423-4444  
Registration Status: Suspended

**Defendant Diane Robinson:**  
Andre Sobolevsky  
Sobolevsky & Associates  
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New York, NY 10282-1198  
212-566-8866  
Registration Status: Suspended

**Defendant Sheilia Milledge:**  
Bruce R. Bryan  
Office of Bruce R. Bryan  
333 East Onondaga Street, Suite 600  
Syracuse, NY 13202  
315-476-1800

**Defendant Michele R. McDowell:**  
Robert Capriles  
Korea National University of Education Department of English Education,  
San 7  
Darak-Ri, Gangnaem-Yeon Cheongwon-Kun  
Chungcheongbuk DO 363-791, Korea  
082-043-230-3552

**Defendant Georgetta Kearse:**  
Hon. Kate Rosenthal  
Syracuse City Court

John C. Dillon Public Safety Building  
 505 South State Street  
 Syracuse, NY 13202-2179  
 315-671-4662

Defendant Sylvester Fair:  
 Edward Z. Menkin  
 440 S. Warren Street – Suite 400  
 Syracuse, NY 13202-2601  
 315-425-1212

Defendant Brigethia Guins:  
 Paul G. Carey  
 Carey Law Offices, P.C.  
 333 East Onondaga Street  
 Syracuse, NY 13202  
 315-474-0077

Defendant Carmen Tyrone Williams:  
 Mark Romano (deceased)

Defendant Frank C. Rivers:  
 John D. Kinsella  
 Office of John D. Kinsella  
 6834 Buckley Road  
 North Syracuse, NY 13212  
 315-451-7955

7. *United States v. Jaime A. Davidson, a/k/a "Stringer," a/k/a "Andrew Brown," a/k/a "Jamie Davidson," Lenworth Parke, a/k/a "Lenwood Parker," a/k/a "Glen," a/k/a "Paul Scott", Robert Lawrence, a/k/a "Robert Julien," a/k/a "Bam-Bam," Juan A. Morales, a/k/a "Pedro," a/k/a "Antonio", Gary Anthony Stewart, a/k/a "Poppy," and Dean Thomas, a/k/a "Dino,"* 92-CR-35. *United States v. Thomas*, 34 F.3d 44 (2d Cir. 1994) 1990 – 2014  
 Hon. Neal P. McCurn, Senior United States District Judge (now deceased);  
 Hon. David N. Hurd, United States District Judge, Northern District of New York

Five defendants were convicted of the murder of an undercover drug task force officer at mid-day in a grocery store parking lot in downtown Syracuse as he attempted to purchase two kilograms of cocaine. The defendants were also convicted of various drug crimes. All five defendants were sentenced to be imprisoned for life plus 5 years. Two of the defendants were not present for the murder, but led the drug trafficking enterprise distributing between 5 and 15 kilograms of cocaine and sent the other three to rob the officer of the

\$40,000 to be paid for the 2 kilograms to be purchased that day. In January of 2014, following the Supreme Court decision in *Miller v. Alabama*, the sentence of one defendant was reduced to 31 years imprisonment. The defendant was not quite 17 years old when he pulled the trigger of his .357 revolver and murdered the police officer by shooting him in the back of the head. I led the investigation, examined exactly half of the 72 trial witnesses, cross-examined the shooter (the only defendant to testify), and made the closing argument. I was the principal author of the appellate brief and delivered half of the appellate argument.

**Co-counsel:**

John G. Duncan, AUSA, 1990 – 2014 (retired)  
206 Landsdowne Road  
DeWitt, NY 13214  
315-374-3562

**Defense counsel:**

Defendant Jaime A. Davidson:  
John Laidlaw (retired)  
171 Manor Drive  
DeWitt, NY 13214

**Defendant Lenworth Parke:**

Hon. William D. Walsh  
103 E. Water Street  
Syracuse, NY 13202-1146  
315-476-2113

**Defendant Robert Lawrence:**

James P. McGinty  
333 E. Onondaga Street – Second Floor  
Syracuse, NY 13202-2011  
315-657-1608

**Defendant Juan Morales:**

Frederick O'Rourke  
250 Harrison Street  
Syracuse, NY 13202  
315-471-4629

**Defendant Gary Anthony Stewart:**

Hon. Kate Rosenthal  
Syracuse City Court  
John C. Dillon Public Safety Building  
505 South State Street  
Syracuse, NY 13202-2179

315-671-4662

**Defendant Dean Thomas:**  
James F. Greenwald  
124 Dorset Road  
Syracuse, NY 13210-3048  
315-427-4120

8. *United States v. John Aukema*, 89-CR-256; *United States v. William W. Daniels, James R. Silliman, and David T. Vance*, 90-CR-38; *United States v. David T. Vance*, 91-CR-3  
*United States v. Daniels*, 91-1354, 962 F.2d 1 (2d Cir. Feb. 20, 1992) (table)  
Sole counsel, 1989 – 1992  
Hon. Howard G. Munson, Senior United States District Judge (deceased)

Silliman had borrowed almost the bank's individual limit of \$300,000 when he attempted to borrow another \$225,000 to buy stock in Solid Waste Industries (SWI). To circumvent the limit, Silliman recruited Vance to serve as a nominee borrower. Daniels, who worked for SWI, had Vance sign the necessary documents, inflated Vance's assets on his financial statement, and sent the loan application to Aukema, the president of the bank. The money was loaned to Vance and passed to Silliman, but not repaid. Aukema was given some SWI stock in the name of his son and pled guilty to receiving a gift for procuring a loan. Daniels pled guilty to bribery of a bank officer and conspiracy to make a false loan application and commit bank fraud. Vance pled guilty to being an accessory to a false loan application. Silliman went to trial; after the United States rested and his motion for a judgment of acquittal was denied, he pled guilty to aiding and abetting making a false loan application.

**Defense counsel:**

**Defendant John Aukema:**  
C. Scott Bowen,  
Now adjunct faculty at Binghamton University  
P.O. Box 6000  
Binghamton, NY 13902  
607-777-2000

**Defendant William W. Daniels:**  
Harold J. Boreanz (deceased)

**Defendant James R. Silliman:**  
Peter M. Hartnett  
Hartnett Law Office, P.C.  
3216 W. Lake Road

Casenvia, NY 13035-9830  
315-256-1797

Defendant David T. Vance:  
John W. Condon (deceased)

9. *United States v. Walter J. Butler*, 89-CR-244  
*United States v. Butler*, 954 F.2d 114 (2d Cir.1992)  
1989 – 1996

Butler was the president of Service Employees International Union (SEIU) 200, covering all of New York, treasurer of an SEIU local in Florida, and vice-president of the International Union. The jury trial from September 12 to October 15, 1990, culminated in guilty verdicts of racketeering, causing false entries to be made in ERISA documents, embezzlement of union funds, and mail fraud. Butler's racketeering acts included: embezzlement of multiple payments from union benefit funds for the same travel expenses; embezzlement of Christmas bonuses and vacation pay for his son, who was a law student; embezzlement of payments for separately reimbursed expenses; and Butler's scheme to divide the compensation of employees of Local 200 into two checks, called "salary" and "expenses" though all actual expenses were separately reimbursed, as an artifice to avoid making pension contribution on the full amount of compensation paid. After his conviction was affirmed, a successful appeal by the United States of his original sentence resulted in Butler being re-sentenced to be imprisoned for 27 months. Though the junior lawyer, I prepared the prosecution memorandum, introduced most of the documentary evidence, examined half the witnesses, including the defendant's son, and gave the closing argument, then became sole counsel for the appeal and post-conviction challenges to Butler's debarment.

Co-counsel:  
William H. Pease, AUSA, 1989 – 1996 (now retired)  
623 First Street  
Liverpool, NY 13088  
315-374-4248

Hon. Howard G. Munson, Senior United States District Judge (now deceased)

Defense counsel:  
Trial:  
Emil M. Rossi  
Office of Emil M. Rossi  
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315-471-0126

Joseph Fahey  
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315-671-1050

Appeal:  
John A. Cirando  
Onondaga Savings Bank Building  
101 South Salina Street, Suite 1010  
Syracuse, NY 13202  
315-474-1285

10. *United States v. Staff Sergeant Robert Davis*, CM 445751, Ft. Leonard Wood, MO  
Sole counsel, 1983 – 1984  
Colonel Gustave F. Jacob, Military Judge

The defendant was a drill sergeant who took advantage of six male soldiers in his charge for training. Following trial from February 26 to 29, 1984, the defendant was convicted by a jury, as charged, of two specifications of forcible sodomy, consensual sodomy, three specifications of indecent assault, and 17 violations of a regulation. He was sentenced to the maximum punishment, including a dishonorable discharge and confinement for 34 years. The discharge and confinement for 29 years were affirmed on appeal.

Defense counsel:  
Then Captain Bruce E. Stephens  
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York, NE 68467  
402-362-3603;  
233 S. 13<sup>th</sup> Street  
Lincoln, NE 68501  
402-260-7859

7. Judicial Opinions/Offices:

- a. If you are or have ever been a judge, attach a statement providing (1) citations for the ten most significant opinions you have written, (2) a short summary of and citations for all appellate opinions either reversing your decision or confirming it with significant criticism of your substantive or procedural rulings, and (3) citations for significant opinions on federal or state constitutional issues, together with citations for any appellate court rulings on your decisions in those cases. (If any of the opinions were not officially reported, please provide a copy of the opinions.)

- (1) Findings, decisions, and orders in courts-martial are not published; those in writing are maintained in the “record of trial” for each case and those announced in open court are reflected in trial transcripts. An example of two written decisions and orders from *United States v. Lis* are attached as Appendix B.

The ten most significant cases over which I presided as an Army circuit judge were:

• *United States v. Joyner*, ACCA 20090938, Oct. 7, 2009

At Yongsan, South Korea, Specialist Markelle Joyner and his brother, Sergeant Markease Joyner, were charged with assaulting two other soldiers with a means or force likely to produce grievously bodily harm. Sergeant Joyner pled guilty, but Specialist Joyner moved to suppress statements and evidence. The motions were denied, and Specialist Joyner proceeded to trial by a jury. After two days of testimony, the government rested. After three defense witnesses had testified, six sworn statements taken by law enforcement on the day of the incident were disclosed by the government. One of the sworn statements was taken from the accused, and two were taken from witnesses who testified at the trial. The new statements brought additional inconsistencies to a case involving conflicting evidence on the reliability of the observations of witnesses and the identification of the accused as a participant. Holding that fairness required that the defense be afforded a reasonable opportunity and time to consider and investigate the newly provided information and to factor that into trial strategy, things that could not be accomplished at that stage of the trial, I granted the defense motion for a mistrial.

• *United States v. Morales*, ACCA 20090294, Apr. 3, 2009

At Yongsan, South Korea, a jury trial resulted in the conviction of a Master Sergeant of engaging in prohibited relationships with three subordinates, and acquittal of wrongfully using a government credit card, a government vehicle, and adultery.

• *United States v. Lis*, ACCA 20080718, July 22, 2008

At Fort Knox, Kentucky, a Second Lieutenant was charged with desertion to shirk mobilization to Iraq, and moved to dismiss for lack of jurisdiction. After extensive hearings, I granted the motion, finding that while Lis expressly accepted his appointment to the office of Second Lieutenant in the Army National Guard of the State of Ohio, he did not accept appointment as a Reserve commissioned officer in the Army National Guard of the United States, so there was no federal jurisdiction.

• *United States v. Knowland*, ACCA 20071405, Dec. 11, 2007



At Fort Wainwright, Alaska, a jury convicted Knowland of rape and sentenced him to a dishonorable discharge and confinement for 44 months.

• *United States v. Johnson*, ACCA 20060575, June 13, 2006

At Fort Bragg, North Carolina, the bench trial of a Sergeant First Class led to conviction on charges of submission of false documents to secure promotion.

• *United States v. Welch*, ACCA 20060516, May 25, 2006

At Fort Bragg, North Carolina, a bench trial resulted in findings of guilty of false official statements, but not guilty of larceny and dereliction charges, all in connection with a Warrant Officer's service as summary court officer for the estate of a soldier/friend who had committed suicide. The sentence included a dishonorable discharge, but the convening authority approved a bad conduct discharge instead. On appeal, the court held that the only permissible punitive discharge for a warrant officer who is not commissioned is a dishonorable discharge. *United States v. Welch*, 2008 WL 8104048 (Army Ct. Crim. App. Aug. 4, 2008).

• *United States v. Campbell*, ACCA 20060426, May 11, 2006

At Fort Bragg, North Carolina, a bench trial led to conviction of a Special Forces Staff Sergeant for solicitation of the murder of his wife.

• *United States v. Bryant*, ACCA 20060375, Apr. 29, 2006

At Fort Bragg, North Carolina, after a reopening of the Article 32 investigation, a bench trial led to the conviction of the accused for using the internet to make arrangements to have sex with a 10 year old girl.

• *United States v. Brady*, ACCA 20030216, Mar. 3, 2003

At Fort Drum, New York, a jury convicted the accused *in absentia* for desertion after the he had fled while pending trial.

• *United States v. Travis*, ACCA 20010995, Nov. 2, 2001

At Fort Sill, Oklahoma, a jury acquitted a Sergeant of having carnal knowledge of a 14 year old girl.

(2) The following appellate opinions either reversed decisions or affirmed with some criticism:

• In *United States v. Peck*, \_\_\_ M.J. \_\_\_, 2010 WL 3547956 (Army Ct. Crim.

App. May 7, 2010), a bench trial led to the conviction of the accused of indecent assault. On appeal, the court incorrectly considered the trial as a "general court-martial composed of enlisted and officer members." The conviction was reversed upon the finding that the lineup which led to the identification of the accused was unduly suggestive and the subsequent in-

court identification was unreliable. I denied the pretrial motion to suppress identification evidence, concluding, *inter alia*, that the disparities between the participants in the lineup did not draw undue attention to the accused but would be considered in assessing the weight and reliability to be accorded the lineup identification; and that the shortcomings did not render the lineup so suggestive as to create a substantial likelihood of misidentification in light of the alleged victim's testimony that when she discovered the accused in her bed touching her, she left the bed to use the latrine and turned the lights on to look at her assailant, paid particular attention to what he was doing, and observed him for some period of time as she gave very definitive instructions as to what was to happen next.

• In *United States v. Guillette*, \_\_\_ M.J. \_\_\_, 2008 WL 8085003 (Army Ct. Crim. App. Apr. 24, 2008), the accused pled guilty to a total of eleven specifications of unauthorized absence, insubordination, making a false official statement, malingering, disorderly conduct, breaking restriction, and forgery, and was convicted at a bench trial of resisting arrest, reckless endangerment, and two additional specifications of insubordination. On appeal, the court affirmed the convictions of thirteen specifications and the sentence but dismissed the two forgery specifications when the defense claimed and the government conceded, both for the first time in the case, that the accused's forgery of sick slips did not constitute forgery under Article 123 of the UCMJ.

• In *United States v. Maisonet*, \_\_\_ M.J. \_\_\_, 2006 WL 6625041 (Army Ct. Crim. App. Dec. 7, 2006), the accused pled guilty to missing movement and two specifications of absence without leave, one of which was from April 4, 2005 until January 25, 2006, when he returned from Massachusetts to his unit at Fort Bragg. On appeal, the court found that the AWOL terminated four days earlier, when the accused met a recruiter in Massachusetts who arranged for the accused's flight back to his unit. The court amended the specification, affirmed the accused's conviction of that specification and the other two, and affirmed the sentence.

• In *United States v. Dunbar*, 60 M.J. 748 (Army Ct. Crim. App. 2004), the accused pled guilty to making false claims and larceny. After he was sentenced to be reduced in rank, to be confined for two months and to receive a bad conduct discharge, it was revealed that the plea agreement included unusual terms regarding whether the discharge could be approved by the convening authority. On appeal, the court found that I mistakenly interpreted the language concerning the potential discharge by asking only trial and defense counsel their understandings of the effect of the terms, and not the defendant personally.

(3) I am not aware of any citations for significant opinions on federal or state constitutional issues or citations for any appellate court rulings on my decisions in such cases.

b. State (chronologically) any judicial office you have held and whether you were elected or appointed. Please provide a description of the jurisdiction of each such court.

I was appointed to serve as an Army trial judge (called a Circuit Judge, Senior Military Judge, and/or a Military Judge), and did so from April 1, 2001 - January 31, 2010, conducting a total of 93 bench and jury trials of criminal cases at general and special courts-martial at Army installations across the continental United States, Alaska, Germany, and Korea.

8. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities.

(Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Since 1989, I have served in the United States Attorney's Office for the Northern District of New York, and my most significant legal activities (in addition to the cases described above) have included the following:

I have worked to curtail violent crime, and the gangs, guns, and drugs that beget it. To address our most serious violent crime problems, I have supervised the initiation and refinement of major anti-gang initiatives in Syracuse, Albany, Schenectady, Binghamton, and Kingston which dismantled or crippled many gangs and resulted in the convictions of well over 200 gang members and associates. I personally prosecuted several continuing criminal enterprises distributing kilograms of crack and cocaine in our cities, including those led by Tyrone Hines (14 defendants) and Vyron Hargrett (15 defendants). We are engaged with community leaders in other gun violence reduction efforts in these metropolitan areas through both Project Safe Neighborhoods and our LEADership Project, teaching 5<sup>th</sup> graders about the law, decision-making, personal responsibility and accountability, and focusing on their good qualities, what they want to be when they grow up, and what they need to do to accomplish that, in four classroom sessions using interactive skits, to help them avoid gangs, drugs, and violence and lead productive, law abiding lives.

I have worked to enhance border security and improve law enforcement collaboration with Canada, including spearheading (with my predecessor) the establishment of the US – Canada Border Operations Leadership Team (BOLT), bringing together the national operational leaders of law enforcement and prosecution agencies of both countries, and playing a pivotal role in organizing and conducting the annual BOLT meetings in 2015 and 2018 in Washington, DC, and in

2016 and 2019 in Canada. I have served on other bi-national committees aimed at improving cross-border law enforcement operations and implementing the pre-clearance agreement.

I have emphasized the use of the Organized Crime Drug Enforcement Task Force and the Border Enforcement Security Task Force to promote collaboration among federal, state, Canadian, and tribal police to investigate and prosecute the biggest transnational drug trafficking organizations, including those which exploit the St. Regis Mohawk territory (which straddles the border with parts in Quebec, Ontario, and New York). The Northern District includes the Mohawk, Oneida, Onondaga, and Cayuga Nations, so I have provided leadership in addressing public safety in these Iroquois tribal communities.

I have implemented prosecution initiatives to address the opioids epidemic, methamphetamine resurgence, and synthetic drug problem. I helped organize an inter-disciplinary summit to address the prescription drug abuse crisis in 2011, and helped develop and field a plan to conduct town hall meetings and community forums with community coalitions featuring the film *Chasing the Dragon*, an expert presentation on opioid addiction and the brain, and/or panels of treatment providers, first responders, addicts, and family members.

I have continued to emphasize Project Safe Childhood and accountability for public corruption and fraud.

I facilitated continuation of the Office's impressive record of environmental protection after the reversal of a trial conviction and the later retirement of our program leader by personally resolving the Certified Environmental Services, Inc., case with plea of guilty to negligently releasing asbestos into the ambient air, thereby placing other persons in imminent danger of death or serious bodily injury, and a sentence to that included restitution of \$409,829.

I play an active role in ensuring that our Civil Division is a dynamic force for securing justice, focusing on aggressive affirmative civil enforcement to address false claims involving health care and government procurement, as well as environmental harms and civil rights violations; thoughtful, thorough assessment of lawsuits against the United States, to facilitate both vigorous defense and fair settlements; and outreach regarding the importance of compliance programs, self-disclosure of false claims and overpayments, and qui tam actions brought by whistleblowers.

I meet with the Albany Law Enforcement Resolution Team, which aims to build a multi-racial and multi-ethnic bridge between the community and law enforcement, speaking about the importance of that relationship to community safety, the effectiveness of policing, and the integrity of our criminal justice system, and the ongoing commitment of DOJ and the NDNY to upholding the civil and

constitutional rights of all.

Within the U.S. Attorney's Office, I drafted the first operations manuals for our Criminal and Civil Divisions, and instituted our first formal employee engagement initiative – including conducting twelve sessions with various groups regarding how we can improve.

My service as an Army Judge Advocate on active and reserve duty involved a wide range of roles in criminal, administrative, and civil law, including the general practice of law, the resolution of monetary claims, and command advice in specialized areas, giving me a broad perspective.

I presided over 93 cases as an Army trial judge from 2001 to 2010, including jury trials involving charges of rape, carnal knowledge of a minor, aggravated assault, desertion, and prohibited relationships with subordinates; bench trials involving charges of solicitation to murder, internet solicitation of sex with a child, assault of a superior, and larceny; guilty plea and sentencing proceedings involving obstruction of justice by a Major, three soldiers who engaged in sex acts on film for pay and depiction on a website with a military theme, and serial absences by a soldier whose mental capacity was put in issue; and pretrial motions regarding desertion with intent to shirk mobilization and unlawful command influence.

I also prosecuted criminal cases – courts-martial such as the Davis jury trial for sexual assaults, a jury trial resulting in the conviction of a Major of conduct unbecoming an officer for sexual harassment of female civilian employees who worked for him, and a bench trial that resulted in the conviction of a soldier of three counts of aggravated assault of his baby daughter based upon the testimony of medical experts, including a pediatric radiologist, a pediatric neurologist, and a forensic pathologist. I prosecuted minor federal offenses before U.S. Magistrate Judges, as well as assisting in a significant federal murder prosecution and bringing the victim's remains to the Smithsonian Institution for analysis.

9. **Lobbying Activities:** List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s).

(Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

**I have never performed any lobbying activities.**

10. **Teaching:** What, if any, courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide copies to the committee.

**In the fall of 1984, I taught college courses in Federal Income Taxation and Juvenile Law at the Fort Leonard Wood Campus of Drury College (of Springfield, Missouri, now Drury University). I do not have a syllabus of either course.**

11. **Outside Commitments During Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service? If so, explain.

**I do not have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during my service.**

12. **Principal Office of the U.S. Court of Appeals:** By statute, the principal office of the U.S. Court of Appeals for Veterans Claims is in the Washington, D.C., metropolitan area. If confirmed, would you maintain your permanent residence within commuting distance of the Court while in active service?

**Yes.**

13. **Charitable or Volunteer Work:** Please describe any charitable or volunteer work, including pro bono work, you have performed, particularly any work involving military personnel, veterans, or their families.

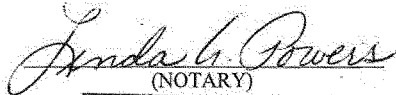
**I have been actively engaged in federal public service for all of my legal career. While in private practice, I did some pro bono litigation on behalf of a client unable to pay a debt carrying a very high rate of interest. For several years, I have made financial contributions to a not-for-profit organization dedicated to providing legal services to the poor. I have been active in serving the community through my church, as a volunteer in youth activities, serving meals to the homeless at Christmas time, and supporting the St. Baldrick's Foundation's fight against childhood cancer. I have held lay leadership positions in churches near my residences periodically throughout my professional life, and currently serve as a Lector and Counter. Through the church, I have served the disadvantaged by delivering donated furniture and by providing coats, socks, underwear, food, school supplies, Christmas gifts, and monetary donations to those in need. I coached youth sports teams for twelve years, and served as a Cub Scout co-Den Leader for two years. At Fort Leonard Wood, Missouri, I helped keep our congregation of military families together by leading worship services when there was no Episcopal priest. As a member of the Lions Club at Fort Leonard Wood, I participated in service projects to benefit the local community of military personnel, veterans, and their families.**

AFFIDAVIT

I, Grant C. Jaquith, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

October 15, 2019  
(DATE)

  
(NAME)

  
(NOTARY)

LINDA A. POWERS  
NOTARY PUBLIC, STATE OF NEW YORK  
Registration No. 01PO6211260  
Qualified in Saratoga County  
Commission Expires September 14, 2021

UNITED STATES SENATE  
COMMITTEE ON VETERANS' AFFAIRS  
SUPPLEMENTAL QUESTIONNAIRE FOR NOMINEES  
TO THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Grant C. Jaquith

Appendix A

*A View from the Bench: Apply the Golden Rule, But Don't Argue It*, The ARMY LAWYER,  
May 2008



## A View from the Bench:

## Apply the Golden Rule, But Don't Argue It

Colonel Grant C. Jaquith  
Military Judge, U.S. Army Trial Judiciary

## The Golden Rule Argument

Most of us were taught the Golden Rule as children: "Do to others as you would have them do to you."<sup>1</sup> As a precept promoting civility and professionalism in trial practice, the Golden Rule should be embraced by court-martial advocates.<sup>2</sup> In closing argument, however, the Golden Rule generally must rest unsaid.

The "Golden Rule argument" asks court-martial members to reach a verdict by imagining themselves as either the accused or the victim.<sup>3</sup> The argument is based on the notion that members will be more lenient if they think of the result they would want if they were in the accused's place, but would convict more readily or impose a greater sentence if they stood in the shoes of the victim. Such arguments are "improper and impermissible in the military justice system,"<sup>4</sup> and cannot be made to members or military judges.<sup>5</sup>

## Rule for Court-Martial 919

Rule for Courts-Martial (RCM) 919 sets the bounds for closing argument on findings on the merits.<sup>6</sup> Counsel may make "reasonable comment on the evidence in the case, including inferences to be drawn therefrom."<sup>7</sup> Counsel may address the "testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence," and "may treat the testimony of witnesses as conclusively establishing the facts related by the witnesses."<sup>8</sup> Expressions of personal opinion,<sup>9</sup>

<sup>1</sup> Luke 6:31 (New Revised Standard 1989); see also Matthew 7:12 ("In everything do to others as you would have them do to you; for this is the law and the prophets."). Some variation of the Golden Rule is part of most religions. See HUSTON SMITH, THE RELIGIONS OF MAN 351 (Perennial Library 1965) (1958); Susan Ryder, *Bound Together by the Golden Rule* (2005), <http://ezinearticles.com/?Bound-Together-by-the-Golden-Rule&id=116042>.

<sup>2</sup> "Refraining from abusive or obdeterous conduct is a corollary of the advocate's right to speak on behalf of litigants." U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 3.5 cmt. (1 May 1992) [hereinafter AR 27-26]. Our system of justice depends on fair competition in the parties' efforts to marshal the evidence for fact-finders. *Id.* R. 3.4 cmt. Reciprocal obligations sometimes are imposed, as in discovery. *Id.*; see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701 (2008) [hereinafter MCM].

<sup>3</sup> See BLACK'S LAW DICTIONARY 700 (7th ed. 1999).

<sup>4</sup> *United States v. Baer*, 53 M.J. 235, 238 (2000). Golden Rule arguments are "universally condemned." *United States v. Palma*, 473 F.3d 899, 902 (8th Cir. 2007) (quoting *Lowell ex rel. Lovett v. Union Pac. R.R. Co.*, 201 F.3d 1074, 1083 (8th Cir. 2000)). See generally Kevin W. Brown, Annotation, *Propriety and Prejudicial Effect of Attorney's "Golden Rule" Argument to Jury in Federal Civil Case*, 68 A.L.R. 2d 333 (1984). Golden rule arguments have been characterized as errors of intermediate seriousness, sometimes warranting reversal. J. Alexander Tanford, *Closing Argument Procedure*, 10 AM. J. TRIAL ADVOC. 47, 93-94 (1986).

<sup>5</sup> See *United States v. Nellums*, 21 M.J. 700, 701 (A.C.M.R. 1985) (sentencing argument asking the military judge whether he would like the accused to walk the streets in his community or neighborhood held improper). Counsel addressing arguments to a military judge are not relieved of the obligation to conduct themselves "with the same high standards as [they] would before court members, notwithstanding the presumption that a military judge exercises discretion in distinguishing between proper and improper argument." *Id.*

<sup>6</sup> MCM, *supra* note 2, R.C.M. 919.

<sup>7</sup> *Id.* R.C.M. 919(b).

<sup>8</sup> *Id.* R.C.M. 919(b) discussion.

<sup>9</sup> *United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980); *United States v. Knickerbocker*, 2 M.J. 128, 129-30 (C.M.A. 1977); *United States v. Tanksley*, 7 M.J. 573, 577 (A.C.M.R. 1979), *aff'd*, 10 M.J. 180 (C.M.A. 1980); see *United States v. Zehrbach*, 47 F.3d 1252, 1265-66, 1265 n.11 (3rd Cir. 1995) ("Although counsel may state his views of what the evidence shows and the inferences and conclusions that the evidence supports, it is clearly improper to introduce information based upon personal belief or knowledge."). Prefacing assertions with "the Government contends" or "the Government submits" is preferable to "I think" or other uses of the personal pronoun "I." *Tanksley*, 7 M.J. at 579; cf. *United States v. Freisinger*, 937 F.2d 383, 385-87 (8th Cir. 1991) (noting that the use of the personal pronoun "I" is not necessarily improper, but conveying a personal belief as to a witness's credibility is, and no less so when the preface is "I suggest that" or "I submit that."). It is acceptable to argue "you are free to conclude," "you may perceive that," "it is submitted that," or "a conclusion on your part may be drawn." *United States v. Fletcher*, 62 M.J. 175, 180 (2005) (quoting *United States v. Washington*, 263 F. Supp.

vouching for the credibility of witnesses,<sup>10</sup> comments calculated to inflame passions or prejudices,<sup>11</sup> and statements not supported by evidence<sup>12</sup> are among the arguments not permitted.<sup>13</sup> These rules for closing argument apply equally to defense and trial counsel.<sup>14</sup> Though RCM 1001(g),<sup>15</sup> which governs sentencing arguments, does not repeat or refer to the standards spelled out in the discussion of RCM 919(b), that discussion sets forth general principles that may be applied to sentencing arguments.<sup>16</sup>

#### Pursuit of a Perspective of Personal Interest

Golden Rule arguments are impermissible because urging court members to put themselves in the place of a victim, a near relative of a victim, or a potential victim, invites the members "to cast aside the objective impartiality demanded of [members] and judge the issue from the perspective of personal interest."<sup>17</sup> If a court member had such an interest in the case, the member would be disqualified.<sup>18</sup> Asking members to picture themselves or their families as crime victims, and thus to feel personal interest in the case, is also foreclosed as "calculated to inflame the passions or prejudices" of the members.<sup>19</sup>

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2d 413, 431 (D. Conn. 2003)). The most appropriate and persuasive preface is "the evidence shows," without characterizing the contention as a personal opinion or belief. Cf. *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 269 (5th Cir. 1994) ("remarks of counsel should more appropriately have been phrased 'the evidence shows' rather than 'I believe'"); *United States v. Thiederman*, Nos. 91-30308, 30324, and 30327, 972 F.2d 1347, tbl. (9th Cir. 1992) (prosecutor should have prefaced argument with "as the evidence shows").

<sup>10</sup> E.g., *Fletcher*, 62 M.J. at 179-80.

<sup>11</sup> E.g., *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983) ("[I]t is improper for counsel to seek unduly to inflame the passions or prejudices of court members."):

<sup>12</sup> *Id.* at 29-30. There is an exception to this general prohibition that permits comment on matters of common knowledge. *Fletcher*, 62 M.J. at 183.

<sup>13</sup> MCM, *supra* note 2, R.C.M. 919(b) discussion. There are additional limitations on arguments by trial counsel, who may not comment on the accused's exercise of the right against self-incrimination or the right to counsel, the failure of the defense to call witnesses, or the probable effect of findings on relations between the military and civilian communities. *Id.*

<sup>14</sup> See *United States v. Young*, 470 U.S. 1, 8-9 (1985) ("It is clear that counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds."). The American Bar Association Standards for Criminal Justice prescribe the same standards for arguments to the jury by prosecutors and defense counsel. For prosecutors, Standard 3-5.8 provides:

(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw. (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury. (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-5.8, 106 (3d ed. 1993), available at [http://www.abanet.org/crimjust/standards/pfunc\\_blk.html#5.8](http://www.abanet.org/crimjust/standards/pfunc_blk.html#5.8). The standard for jury argument by the defense, 4-7.7, substitutes "defense counsel" for "the prosecutor," but otherwise uses exactly the same language. *Id.* Standard 4-7.7. As Judge Learned Hand declared in *United States v. Wexler*, "Courts . . . recognize . . . that the truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction." 79 F.2d 526, 530 (2d Cir. 1935). There are few reported cases addressing improper defense arguments, because an acquittal is not subject to review and a conviction will not be reversed for an improper comment by defense counsel not amounting to constitutionally ineffective assistance. See *Young*, 470 U.S. at 9 n.6; *United States v. Fisher*, 17 M.J. 768, 772 (A.F.C.M.R. 1983), *rev'd on other grounds*, 24 M.J. 358 (C.M.A. 1987); Rosemary Nidry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1315 (1996).

<sup>15</sup> MCM, *supra* note 2, R.C.M. 1001(g).

<sup>16</sup> See *United States v. Fergert*, No. 97 00301, 1997 WL 766471, at \*1 n.2 (N-M. Ct. Crim. App. Oct. 30, 1997).

<sup>17</sup> *United States v. Wood*, 40 C.M.R. 3, 8 (C.M.A. 1969).

<sup>18</sup> *Id.*; see MCM, *supra* note 2, R.C.M. 912(f)(1) discussion.

<sup>19</sup> See *United States v. Shamberger*, 1 M.J. 377, 379 (C.M.A. 1977) (quoting the *American Bar Association's Standards for Criminal Justice, The Prosecution Function* §§ 5-8(c), (d) (1971)); *United States v. Moore*, 6 M.J. 661, 664 (A.F.C.M.R. 1978) (asking members to picture their families as crime victims was inflammatory). Inflammatory arguments are prohibited by RCM 919(b). MCM, *supra* note 2, R.C.M. 919(b) discussion.

Examples of Golden Rule sentencing arguments concerning victims declared improper by military courts include asking the members:

- How they would feel if their father or brother had been slain as the victim was (by weapons fire in response to a false alarm);<sup>20</sup>
- If they would want the accused, a scoutmaster convicted of taking indecent liberties with three boys in his Boy Scout troop, to have access to other young boys, the members' sons, or their friends' sons;<sup>21</sup>
- To put themselves in the position of a Soldier who was pinned to the ground and helpless as the accused and two other men took turns raping his wife;<sup>22</sup>
- How many of them go home at night hoping that none of their subordinates or family members meet with someone like the accused who has drugs ready for sale;<sup>23</sup>
- If the victim was their son, would they let him say he did not want to go to the doctor or force him to get medical care;<sup>24</sup> and
- To imagine being the murder victim, who was lured into the home of another Marine, beaten to unconsciousness by three Marines who used fists, shod feet, a baseball bat, and a stun gun, then bound, taken to a remote area, and executed with a single pistol shot to the head.<sup>25</sup>

Asking members to put themselves in the place of the accused also improperly seeks judgment colored by personal interest.<sup>26</sup> In *United States v. Roman*, the district court granted a government motion *in limine* to preclude the defendant from making a golden rule appeal to the jury.<sup>27</sup> The defendant was a police officer charged with filing fraudulent tax returns that excluded additional money he earned working part-time providing security at a "gentlemen's club."<sup>28</sup> He wanted to ask the jury to put themselves in his shoes and think, "There but for the grace of God go I."<sup>29</sup> The court of appeals affirmed and held the argument to have been correctly foreclosed.<sup>30</sup>

<sup>20</sup> *United States v. Bogley*, 38 C.M.R. 488, 495 (A.B.R. 1967).

<sup>21</sup> *Wood*, 40 C.M.R. at 8; see also *United States v. Cabrera-Frattini*, 65 M.J. 950, 955 (N-M. Ct. Crim. App. 2008) (holding trial counsel's sentencing argument in a case involving carnal knowledge and indecent acts with a child—that the members' children were not safe on base with the accused around—to be improper, but not plain error).

<sup>22</sup> *Shamberger*, 1 M.J. at 379.

<sup>23</sup> *Moore*, 6 M.J. at 663-64.

<sup>24</sup> *United States v. Robertson*, 37 M.J. 432, 439 (C.M.A. 1993) (Gierke, J., concurring).

<sup>25</sup> *United States v. Baer*, 53 M.J. 235, 236-37 (2000). Unpublished military cases illustrating this type of improper argument include *United States v. Lane*, No. 96 01460, 1998 WL 35491, at \*1 (N-M. Ct. Crim. App. Jan. 13, 1998) (finding no plain error in admittedly improper argument of trial counsel who asked members in case of indecent acts involving children: "What if these were your children?"); *United States v. Harris*, No. 94 01947, 1996 WL 927867, at \*1-2 (N-M. Ct. Crim. App. Jan. 23, 1996) (sentence set aside because trial counsel asked members to put themselves in the place of sodomy and indecent assault victims); *United States v. Aiple*, No. 28642, 1990 WL 149843, at \*1 (A.F.C.M.R. Sept. 7, 1990) (sentence reassessed based on sentencing argument upon conviction of a fire fighter of using drugs; assistant trial counsel asked members, "Would you want [the accused] on duty if you had to report a fire at your house?").

<sup>26</sup> See *United States v. Roman*, 492 F.3d 803, 805-06 (7th Cir. 2007); *United States v. Teslim*, 869 F.2d 316, 327-28 (7th Cir. 1989) (in commenting on the evidence that police officers told the defendant that he could stay with his luggage while a drug detection dog was brought to check it, the prosecutor improperly began to ask jurors, "If it happened to you and you had nothing to hide—"); *Jackson v. Roper*, No. 4:05CV1090 JCH, 2006 WL 3694635, at \*3 (E.D. Mo. Dec. 14, 2006) ("At least three times, [defense] counsel improperly asked the jury to place themselves at the crime scene and consider what they would do in [defendant's] place.")

<sup>27</sup> *Roman*, 492 F.3d at 805.

<sup>28</sup> *Id.* at 803-04.

<sup>29</sup> *Id.* at 805.

<sup>30</sup> *Id.* at 806.

An appeal to the pecuniary interests of members is another inappropriate invocation of personal interest.<sup>31</sup> A trial counsel could not properly argue that a larceny from the post exchange, commissary, or any military community organization or fund was a theft from the members themselves, *i.e.*, “when the accused stole that money, he stole it from you,” for that would constitute an appeal to the members’ personal financial interests.<sup>32</sup>

This issue may arise via victim impact testimony, too. When the father of a rape victim was asked to relate his reaction when his daughter called to advise him that she had been raped, he said, “I pray right now that all of you that sit here don’t ever have to get a call like that.”<sup>33</sup> The court concluded the statement was a spontaneous emotional response that did not constitute an attempt by counsel to ask the court members to put themselves in the position of the victim’s father.<sup>34</sup> In contrast, the following direct appeal by the mother of another victim was considered asking the members to put themselves in the place of the parents and held impermissibly inflammatory:

I don’t know how many of you are parents. I’m sure some of you are. I hope that you put that person away for as long as possible so that you or others don’t have to live through the nightmare we have because . . . he will do it again, and I hope it’s not your family or someone you love or care about. Please, for your own families and for others.<sup>35</sup>

#### Keeping the Trial Golden

Opposing counsel must be vigilant during closing arguments, for any objections to improper argument not made before the military judge begins to instruct the members are waived.<sup>36</sup> Without a timely objection during trial, appellate review is only for plain error—obvious error resulting “in material prejudice to a substantial right of the accused.”<sup>37</sup> In assessing prejudice, the court balances: “(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.”<sup>38</sup> A defense counsel’s failure to object to improper argument may constitute ineffective assistance.<sup>39</sup>

Improper argument thus does not always constitute reversible error, but may have other consequences. An objection by opposing counsel disrupts a closing argument and, if sustained, may adversely affect how the entire argument is received by the members. If the aborted argument was a discomforting effort to get the members to put themselves in the place of the

<sup>31</sup> See *United States v. Ortega*, No. 30776, 1995 WL 132055, at \*1 (A.F. Ct. Crim. App. Mar. 17, 1995) (finding it improper to argue that accused, “in effect, stole from the court members when he shoplifted from the base exchange”); *United States v. Palma*, 473 F.3d 899, 902 (8th Cir. 2007) (improper to invoke jurors’ status as taxpayers in case of Social Security fraud by arguing that the defendant lied and got money from the jurors) (collecting cases); see also Judy E. Zelin, Annotation, *Prosecutor’s Appeal in Criminal Case to Self-Interest or Prejudice of Jurors as Taxpayers as Ground for Reversal, New Trial, or Mistrial*, 60 A.L.R. 4TH 1063 (1988).

<sup>32</sup> See *Ortega*, No. 30776, 1995 WL 132055, at \*1.

<sup>33</sup> *United States v. Moses*, No. 32039, 1996 WL 685835, at \*3 (A.F. Ct. Crim. App. Nov. 27, 1996).

<sup>34</sup> *Id.*

<sup>35</sup> *United States v. Martinez*, No. 96 01990, 1998 WL 351513, at \* 1–2 (N-M. Ct. Crim. App. June 23, 1998).

<sup>36</sup> MCM, *supra* note 2, R.C.M. 919(c), R.C.M. 1001(g). Military judges likewise “should be alert to improper argument and take corrective action when necessary.” *Id.* R.C.M. 919(c) discussion. See *United States v. Erickson*, 65 M.J. 221, 223–25 (2007). In a judge alone trial, the military judge is presumed to know and follow the law distinguishing between proper and improper arguments absent clear evidence to the contrary. *Id.*

<sup>37</sup> *United States v. Fletcher*, 62 M.J. 175, 179 (2005).

<sup>38</sup> *Id.* at 184.

<sup>39</sup> See, e.g., *Girts v. Yanai*, 501 F.3d 743, 756–58 (6th Cir. 2007) (failure to object to comment on defendant’s failure to testify); *Burns v. Gammon*, 260 F.3d 892, 896–98 (8th Cir. 2001) (failure to object to argument that jury should consider defendant’s exercise of his right to trial); *Newlon v. Armentrout*, 693 F. Supp. 799, 810–11 (W.D. Mo. 1988) (failure to object to prosecutor’s argument that expressed personal belief, compared defendant to mass-murderers, and questioned whether jury would kill the defendant if he was going to harm their children), *aff’d*, 885 F.2d 1328 (8th Cir. 1989).

accused or the victim, members may ask themselves, "What was this lawyer trying to pull?" The argument may open the door to an otherwise impermissible response by opposing counsel.<sup>40</sup> Improper argument may also violate ethical rules.<sup>41</sup>

An improper argument is not redeemed or saved by counsel's good intentions.<sup>42</sup> As the Court of Appeals for the Armed Forces admonished in *United States v. Baer*:

What the trial counsel may or may not have calculated in making an improper argument is not as important as the actual direction, tone, theme, and presentation of the argument as it is delivered. Trial counsel must therefore actively take responsibility upon themselves to avoid all improper argument, rather than to rely on their own noble intentions as a defense against the potential consequences of such arguments. The best and safest advocacy will stay well clear of the "gray zone."<sup>43</sup>

#### Permissible Personalizing

Not every effort to personalize a case in closing argument has been prohibited. Courts have allowed counsel to ask jury members to put themselves in the place of a witness.<sup>44</sup> In *United States v. Kirvan*, the court concluded that "golden rule" cases were inapplicable to a prosecution request that the jury put itself in the place of an eyewitness and held that "the invitation [was] not an improper appeal to the jury to base its decision on sympathy for the victim but rather a means of asking the jury to reconstruct the situation in order to decide whether a witness' testimony is plausible."<sup>45</sup>

Prosecutors also have been allowed to ask the jury to put themselves in the place of the victim or the defendant if the purpose is not to inflame the passions of the jury or to urge a decision based on sympathy, but is merely to facilitate the evaluation of the evidence. In *Brown v. State*, asking the jury to put themselves in the victim's place in judging the believability of her testimony concerning the defendant's attack was considered proper.<sup>46</sup> In *State v. Bell*, the prosecutor sought to discredit the defendant, who had offered an innocent explanation of his actions on the night he was accused of shooting a police officer.<sup>47</sup> In rebuttal argument, the prosecutor asked the jurors to put themselves in the defendant's position that night and consider what they would have done and said if they were innocent.<sup>48</sup> The court held that the prosecutor was asking the jurors to draw inferences from the evidence based upon their judgment of how a reasonable person would act under the circumstances, including inferring consciousness of guilt from the defendant's deception, and thus was within bounds.<sup>49</sup> In *United States v. Moreno*, asking the jurors to put themselves in the place of the defendant was deemed an

<sup>40</sup> *United States v. Doctor*, 21 C.M.R. 252, 260 (C.M.A. 1956) ("There are numerous authorities to the effect that a prosecutor's reply to arguments of defense may become proper, even though, had the argument not been made, the subject of the reply would have been objectionable."); *United States v. Haney*, 64 M.J. 101, 113-16 (2006) (Crawford, J., concurring in part); see *United States v. Robinson*, 485 U.S. 25 (1988) (defense argument that government had unfairly denied defendant the opportunity to explain his actions invited prosecution response that defendant could have taken the stand); *United States v. Young*, 470 U.S. 1, 4-14 (1985) (though invited response may not be prejudicial error, this doctrine should not encourage inappropriate responses in kind; the better remedy is for the judge "to deal with the improper argument by the defense counsel promptly and thus blunt the need for the prosecutor to respond").

<sup>41</sup> See AR 27-26, *supra* note 2, R. 3A(6) ("A lawyer shall not: (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused."); see also *Young*, 470 U.S. at 14 (closing arguments by both prosecutor and defense counsel that included personal opinions and inflammatory attacks on opposing counsel "crossed the line of permissible conduct established by the ethical rules of the legal profession").

<sup>42</sup> *United States v. Baer*, 53 M.J. 235, 239 (2000).

<sup>43</sup> *Id.*

<sup>44</sup> See *United States v. Kirvan*, 997 F.2d 963, 964 (1st Cir. 1993); *State v. Bell*, 931 A.2d 198, 212-15 (Conn. 2007); *Commonwealth v. Stafford*, 749 A.2d 489, 498-99 (Pa. Super. Ct. 2000).

<sup>45</sup> *Kirvan*, 997 F.2d at 964.

<sup>46</sup> 839 So.2d 597, 601 (Miss. App. 2003).

<sup>47</sup> *Bell*, 931 A. 2d at 212-13.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 214-15.

acceptable attempt to get them to focus on the evidence in deciding whether the defendant was unaware of her co-defendant boyfriend's drug trafficking, as she claimed, notwithstanding the evidence that she repeatedly "gift-wrapped" cocaine for delivery to his customers.<sup>50</sup> In *United States v. Abreu*, the prosecutor addressed whether a defendant made substantial income from cocaine distribution by asking jurors: "When you left your house this morning, did you leave \$23,000 on the bed? Did you leave \$2,500 in the headboard of your bed? Did you leave \$500 in the kitchen drawer? Did you leave \$26,000 in your apartment when you left this morning?"<sup>51</sup> The court declared this argument merely a call for the jury to employ common sense in evaluating and drawing reasonable inferences from the evidence.<sup>52</sup>

Personalized arguments aimed at relevant sentencing factors have also been allowed. A sentencing "argument asking the members to imagine the victim's fear, pain, terror, and anguish is permissible, since it is simply asking the members to consider victim impact evidence."<sup>53</sup> Asking the members to imagine the victim's circumstances "is conceptually different from asking them to put themselves in the victim's place."<sup>54</sup> Asking whether the members would want an accused found guilty of wrongful appropriation of money from a patients' trust fund to be the bookkeeper of a fund over which they were responsible – and urging a punitive discharge if the answer was "no"—was held a fair comment on the risk of recidivism in *United States v. Berry*.<sup>55</sup> In *United States v. Williams*, the following words were deemed an acceptable rhetorical question regarding the specific deterrence theory of sentencing and the appropriate duration of confinement for the accused: "you must determine how long it will be until you all, representing society, want this rapist walking among your daughters. . . . How many days do you want to go by before you let this man out among your daughters—our daughters."<sup>56</sup> Asking the jury to "imagine [being] in your own living room not bothering a soul on a Saturday afternoon . . . [when] a total stranger, because you got in his way, destroys you," was upheld, in *Kennedy v. Dugger*, as permissible comment on future dangerousness.<sup>57</sup>

Personalizing the victim or the accused is perilous, however. Counsel not adequately mindful of the distinction between what is permitted and what is not may slide across the line in the heat of the argument.<sup>58</sup> That line may be hard to pinpoint. Courts consider arguments in their entirety, viewed in the context of the whole court-martial.<sup>59</sup> An argument deemed on the permissible side of the line in the context of one case may be declared out of bounds when the circumstances are slightly different.<sup>60</sup>

<sup>50</sup> 947 F.2d 7, 8 (1st Cir. 1991).

<sup>51</sup> 952 F.2d 1458, 1470 (1st Cir. 1992).

<sup>52</sup> *Id.* at 1471 (conducting plain error review in the absence of a contemporaneous objection).

<sup>53</sup> *United States v. Baer*, 53 M.J. 235, 238 (2000); *see United States v. Edmonds*, 36 M.J. 791, 792–93 (A.C.M.R. 1993) (asking members to imagine the fear of a robbery victim is permissible); *Basile v. Bowersox*, 125 F. Supp. 2d 930, 951 (E.D. Mo. 1999) (prosecutor asking jury to imagine the terror when the victim was aware of the defendant behind her, grabbing her and then shooting her twice in the back of the head constituted reasonable inferences from the evidence, not improper personalization); *State v. Jones*, 595 S.E.2d 124, 141 (N.C. 2004) (proper to ask the jury to imagine what the victims were thinking); *see also Grossman v. McDonough*, 466 F.3d 1325, 1348 (11th Cir. 2006) (permissible for prosecutor to tell jury that victim endured terrorizing blows to the head and there was "terror and pain" in the victim's voice). *Compare Merck v. State*, 975 So. 2d 1054, 1062–65 (Fla. 2007) (finding prosecutors sentencing comment that "[o]ne has to wonder . . . how kind [the victim] felt when the Defendant jabbed this [knife] into his throat and twisted it" and question regarding how many thoughts went through jurors' heads in a line equivalent to the victim's last moments constituted permissible descriptions of the victim's injuries and suffering based on facts in evidence and common sense inferences from those facts), with *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985) ("inviting the jury to imagine the victim's final pain, terror, and defenselessness" has long been prohibited in Florida).

<sup>54</sup> *Baer*, 53 M.J. at 238; *accord United States v. Melbourne*, 58 M.J. 682, 690 (N-M. Ct. Crim. App. 2003); *Edmonds*, 36 M.J. at 793.

<sup>55</sup> 37 C.M.R. 638, 640 (A.B.R. 1967) (also finding waiver for failure to object).

<sup>56</sup> 23 M.J. 776, 779, 786–87 (A.C.M.R. 1987); *see also United States v. Sipp*, No. 94 01475, 1995 WL 934969, at \*1 (N-M. Ct. Crim. App. Sept. 15, 1995).

<sup>57</sup> 933 F.2d 905, 913 (11th Cir. 1991).

<sup>58</sup> *Baer*, 53 M.J. at 238.

<sup>59</sup> *Id.*; *see United States v. Robinson*, 485 U.S. 25, 33 (1988) (holding that "prosecutorial comment must be examined in context").

<sup>60</sup> The difficulty in predicting whether a particular argument will be deemed an improper request for the members to put themselves in the place of the victim is illustrated by comparing the argument held impermissible in *Baer*, 53 M.J. at 237–38, with the argument allowed in *Dugger*, 933 F.2d at 913.

### The Orator Is Well Prepared

A closing argument is as good as the evidence and preparation on which it is based, for which theatrics are no substitute.<sup>61</sup> The cornerstones of effective trial preparation include a thorough investigation of the facts, comprehension of the elements of the offense, analysis of how each element can be proven by admissible evidence, and consideration of how the case will be presented to the fact-finder in closing argument.<sup>62</sup> In crafting a case presentation, counsel must consider how the members or the judge will view the accused and any victim of the charged crime. Trial counsel may want the members to identify with a victim, a witness, or the command, while defense counsel seeks an understanding of the accused's perspective that will yield a not guilty verdict or minimize the sentence. The prohibition of Golden Rule arguments should pose little problem in this quest for empathy. Counsel remain free "to comment earnestly and forcefully on the evidence" and reasonable inferences that may be drawn from it,<sup>63</sup> using "blunt and emphatic language."<sup>64</sup> Arguments that evoke strong emotions or tend to be inflammatory may be appropriate if grounded in evidence in the record and legitimate merits or sentencing concerns.<sup>65</sup>

The difference between what is permitted and what is not is more than pedantic. The lawyer's tools are words carefully chosen based on knowledge of the facts and applicable law. Ignorance of the rules or clumsy word choices may result in an improper argument, but a little thought and recasting can convert an idea for an impermissible argument into an effective one. Would a description of the circumstances of the gang rape charged in *United States v. Shamberger*,<sup>66</sup> including the proximity and restraint of the victim's husband, be less powerful without asking the members to put themselves in the husband's position? Not in the hands of an effective advocate who told the story with every detail found in, or reasonably inferred from, the evidence.

### Conclusion

You can move the members to walk a mile in the shoes<sup>67</sup> of the accused or feel the pain of a crime victim without an express invitation (that might derail your effort, immediately or on appeal), by focusing on the details from the outset, gathering and presenting the evidence upon which your arguments will be based, and then telling the members what the evidence shows in vivid language appropriate to the circumstances. The Golden Rule for advocates is: prepare—and treat others the way you want to be treated.

<sup>61</sup> See Joseph F. Anderson, Jr., *The Lost Art: An Advocate's Guide to Effective Closing Argument*, 48 U.S. ATTY'S BULL. 3, 19 (Sept. 2006).

<sup>62</sup> "Whether prosecutor or defender, the advocate should be thinking about the closing argument from the time that involvement in the case begins." *Planning Closing Argument*, 2 CRIM. PRAC. MANUAL § 57-2 (West 2007).

<sup>63</sup> *United States v. Doctor*, 21 C.M.R. 252, 259 (C.M.A. 1956).

<sup>64</sup> *United States v. Edmonds*, 36 M.J. 791, 792 (A.C.M.R. 1993); *United States v. Williams*, 23 M.J. 776, 779 (A.C.M.R. 1987).

<sup>65</sup> See *Doctor*, 21 C.M.R. at 259; *Edmonds*, 36 M.J. at 792; *Williams*, 23 M.J. at 779.

<sup>66</sup> 1 M.J. 377, 379 (C.M.A. 1976).

<sup>67</sup> JOE SOUTH, *Walk a Mile in My Shoes*, on THE GAMES PEOPLE PLAY (Lowery Music Co. 1969).

UNITED STATES SENATE  
COMMITTEE ON VETERANS' AFFAIRS  
SUPPLEMENTAL QUESTIONNAIRE FOR NOMINEES  
TO THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Grant C. Jaquith

Appendix B

*United States v. Lis*, ACCA 20080718, July 22, 2008

**Decision and Order: Defense Motion to Dismiss for Lack of Jurisdiction, June 21, 2008**

**Decision and Order: Government Request for Reconsideration of Dismissal for Lack of Personal Jurisdiction, July 29, 2008**



IN THE FIRST JUDICIAL CIRCUIT  
FORT KNOX, KENTUCKY

United States of America	)	
	)	
v.	)	Decision and Order:
	)	Defense Motion to Dismiss for
2LT Matthew R. Ljs	)	Lack of Jurisdiction
U. S. Army Armor Center	)	
Headquarters and Headquarters Company	)	
Fort Knox, Kentucky 40121	)	

PROCEDURAL HISTORY

The accused is charged with desertion with intent to shirk important service, in violation of Article 85 of the Uniform Code of Military Justice, in a single specification alleging that he quit his unit, the 211<sup>th</sup> Maintenance Company, Camp Atterbury, Indiana, on or about 30 October 2004, to shirk mobilization for deployment in support of Operation Iraqi Freedom, and remained absent until he was apprehended on or about 5 July 2007. The accused has moved to dismiss for lack of jurisdiction upon his claim that he is not a member of the Army of the United States and thus not subject to the Uniform Code of Military Justice.

BURDEN AND STANDARD OF PROOF

Once the accused presents evidence raising a question regarding personal jurisdiction, the prosecution bears the burden of proving jurisdiction (as an interlocutory issue) by a preponderance of the evidence. Rule for Courts-Martial (RCM) 905(c)(2)(B); RCM 905(c)(1). See *United States v. Oliver*, 57 M.J. 170, 172 (2002), cert. denied, 537 U.S. 112 (2003); *Woodrick v. Divich*, 24 M.J. 147, 151 (C.M.A. 1987).

ESSENTIAL FINDINGS OF FACT

Having read the motion by the defense, the response by the government, and the defense reply, taken testimony and received evidence on 5 June 2008, and resolved issues of credibility, and having given due consideration to all of the foregoing and the arguments made by the parties, the court finds as follows:

1. The accused enlisted in the Ohio Army National Guard. He went to and completed Officer Candidate School at Fort McClellan, Alabama, and then was commissioned a Second Lieutenant. By the time he was commissioned, the accused was a Specialist in the Ohio Army National Guard and the reserve of the Army. Appellate Exhibit XV.
2. On 1 March 2004, the accused completed NGB Form 62-E, his "Application for Federal Recognition as an Army National Guard Officer . . . and Appointment as a Reserve Commissioned Officer . . . of the Army in the Army National Guard of the United States."

Appellate Exhibit XIV. The application reflected a favorable endorsement on behalf of the Ohio Army National Guard Deputy Chief of Staff for Personnel. *Id.*

3. On 4 April 2004, the accused executed an oath of office as a National Guard officer, swearing to “support and defend the Constitution of the United States and the Constitution of the State . . . of Ohio,” to “obey the orders of the President of the United States and of the Governor of the State . . . of Ohio,” and to “well and faithfully discharge the duties of the Office of 2LT in the Army/Air National Guard of the State . . . of Ohio.” Appellate Exhibit XII. The accused acknowledged having been granted temporary Federal recognition and swore “that during such temporary Federal recognition [he would] perform all Federal duties as if [he] had been appointed as a Reserve Officer of the Army.” *Id.*

4. By order 066-056, dated 5 April 2004, the accused was “discharged from the Army National Guard and as a reserve of the Army,” effective 3 April 2004, and appointed a Second Lieutenant (2LT) in the Army National Guard (assigned to the 372d Maintenance Company, Cleveland, Ohio, as a platoon leader). Appellate Exhibit XV.

5. Army National Guard Bureau special order number 95 AR, dated 14 April 2004, announced “the extension of Federal recognition in the Army National Guard” for the initial appointment of the accused and nine other officers who “qualified under sections 305 and 307 or 308 of Title 32, United States Code.” Appellate Exhibit XIII.

6. By memorandum dated 26 April 2004 signed by the Chief of Appointments of the U. S. Army Human Resources Command, the accused was notified that he was “appointed a Reserve commissioned officer of the Army,” an appointment “considered to have been accepted and effective from [4 April 2004].” Appellate Exhibit XI. Paragraph 3 of the memorandum instructed the accused to:

Execute the enclosed form for oath of office and forward it promptly to the Army National Guard Readiness Center . . . This action constitutes an acceptance of appointment. Cancellation of this appointment is required if acceptance is not received within 90 days. If you do not desire to accept appointment, return this letter and commission to this office.

*Id.* The form enclosed with the memorandum was the DA Form 71, “Oath of Office - Military Personnel.” The memorandum concluded by telling the accused that his “appointment in the Army National Guard of the United States [would] terminate on withdrawal of Federal recognition of [his] Army National Guard appointment,” and he would “then become a member of the Army Reserve” unless discharged from his appointment as a Reserve commissioned officer.

7. The enclosed DA Form 71 was made out in the name of the accused, spelled out that its purpose was to create a record of the date of the accused’s acceptance of appointment as a reserve commissioned officer, and specified:

This form will be executed upon acceptance of appointment as an officer in the Army of the United States. Immediately upon receipt of notice of appointment, the appointee will, in case of acceptance

of the appointment, return to the agency from which received, the oath of office (*on this form*) properly filled in, subscribed and attested. In case of non-acceptance, the notice of appointment will be returned to the agency from which received, (*by letter*) indicating the fact of non-acceptance.

The form stated that failure to complete it would "cause the appointment to be invalid."

8. As Mr. Mark Galantowicz, the present Chief of the Reserve Appointments Branch at the Human Resources Command (HRC), testified, his office did not expect to receive and did not receive anything back from National Guard officers in response to such memoranda – neither executed oaths nor returns of appointments not accepted. As to the oath of office, that expectation and result accords with the express instruction of the 26 April 2004 memorandum to the accused that the enclosed DA Form 71 was to be executed and returned to the Army National Guard Readiness Center, rather than HRC. Though the memorandum apparently contemplated that returns of appointments not accepted would be to HRC – "this office" – the Appointments Branch considered their participation in the appointment of National Guard officers to be concluded by the issuance of the memorandum (whether that meant "this office" actually referred to the Army National Guard Readiness Center or just that the experience of the Appointments Branch was that Reserve appointments that were not accepted generally were not returned, merely not executed). The 90-day time limit was intended as an exhortation of prompt action, but was not enforced by the Appointments Branch as a fixed deadline for Reserve appointments.

9. In 2004, Second Lieutenant (2LT) Lis went to the orderly room of the 211<sup>th</sup> Maintenance Company, in Newark, Ohio, during pre-deployment soldier readiness processing on a drill (or battle assembly) date, to see the company commander, Captain (CPT) John R. Frye, Jr. CPT Frye was not present, but had left a DA Form 71, "oath of office," for Master Sergeant (MSG) (then First Sergeant) Terry D. Mullins to have 2LT Lis sign. MSG Mullins presented 2LT Lis with the form and asked him to sign the oath, but 2LT Lis refused, saying he would never do so, or words to that effect. MSG Mullins later briefed CPT Frye regarding what had happened. Appellate Exhibit VI.

10. By memorandum dated 18 June 2004 through his chain of command to The Adjutant General of Ohio, the accused tendered his resignation "as an officer of the Ohio Army National Guard and as a Reserve of the Army under the provisions of Paragraph 5a(3)a, NGR 635-100, effective 26 June 2004." Appellate Exhibit XVI. The accused related having changed his mind about going back into the military (15 years after having completed a 3 year enlistment in the active Army) and concluded that, "For me to start a military career now at this time of my life would be selfish under any circumstances, my priorities are my wife and kids." *Id.*

11. Both the testimony of Mr. Rick Stoner, then a civilian personnel technician, Officer Personnel Branch, at Ohio Army National Guard headquarters, and the stipulation of expected testimony of Staff Sergeant (SSG) Abbey Marofsky, the acting Senior Human Resources Sergeant for Headquarters, 371<sup>st</sup> Special Troops Battalion, Ohio Army National Guard, Newark, Ohio, reflect that the Officer Personnel Branch used a computer database known as an Officer Action Log to track administrative actions such as the processing of the HRC notice of

appointment and the return by officers of a completed DA Form 71. The records pertaining to the accused reflect that a memorandum dated 13 May 2004 was sent to the accused forwarding his appointment as a Reserve Commissioned Officer of the Army and instructing him to have the oath administered and sign and return the enclosed DA Form 71 (Oath of Office) by 13 July 2004. An executed oath of office was not returned, so a follow-up memorandum, dated 4 April 2005, was sent through command channels to advise that the DA Form 71 for 2LT Lis had not been returned and “[f]ailure to receive the completed DA Form 71 by the suspence [sic] date indicated above [27 June 2006] may result in the officer losing his/her National Guard Appointment.”

12. The accused never completed the DA Form 71 and returned it to the Army National Guard.

13. Orders dated 2 November 2004 confirmed verbal orders of the Adjutant General of Ohio ordering 2LT Lis to active duty in support of contingency Operation Iraqi Freedom. Appellate Exhibit III.

#### CONCLUSIONS OF LAW

“Whether court-martial jurisdiction will exist in a given case will depend upon whether the basic requirements for the method of entry have been met, or, if not met, whether the individual has by his or her own conduct waived such defects or otherwise voluntarily assumed the [appropriate] status.” Francis A. Gilligan and Frederic I. Lederer, *Court-Martial Procedure* § 2-22.10(a) (3<sup>rd</sup> ed. 2006). For an officer, court-martial jurisdiction “commences with the acceptance of his appointment or commission, or, where originally appointed by State authority, with his muster, (or re-appointment,) into the service of the United States.” *United States v. Clardy*, 13 M.J. 308, 309 (C.M.A. 1982) (quoting W. Winthrop, *Military Law and Precedents* (2d ed. 1920 reprint)). See also *Wickham v. Hall*, 706 F.2d 713 n.1 (5<sup>th</sup> Cir. 1983) (also quoting Winthrop).

The modern National Guard consists of “two overlapping but distinct organizations:” the National Guard of each state, or state militia, and the National Guard of the United States. *Perpich v. Department of Defense*, 496 U.S. 334, 345, 110 S.Ct. 2418, 2425, 110 L.Ed.2d 312 (1990). See 10 U.S.C. § 101(c)(2) and (3). Soldiers in the National Guard enroll in both the state and federal organizations. *Perpich*, 496 U.S. at 347, 110 S.Ct. at 2426. See 10 U.S.C. §§ 12107(b), 12201(a)(1). The Uniform Code of Military Justice and military justice regulation recognize the jurisdictional implications of this dual status. Article 2 of the Uniform Code of Military Justice specifies that those subject to the Code include:

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States . . . only when in Federal service.

Army Regulation 27-10, para. 21-2, provides that:

b. ARNG Soldiers will be subject to the UCMJ when in Federal service as Army National Guard of the United States (ARNGUS) under title 10, USC, and when otherwise called into Federal service. ARNG Soldiers are not subject to the UCMJ while in State service under title 32, USC.

“For purposes of federal court-martial jurisdiction, a member of the Guard must be in federal service at both the time of the offense and at the time of trial.” *United States v. Wilson*, 53 M.J. 327, 329 (2000).

The accused accepted his appointment to the office of Second Lieutenant in the Army National Guard of the State of Ohio when he executed the oath of office on 4 April 2004. Appellate Exhibit XII. He applied for federal recognition as an Army National Guard officer and appointment as a Reserve commissioned officer in the Army National Guard of the United States. Appellate Exhibit XIV. Federal recognition was granted, Appellate Exhibit XIII, and the accused was appointed a Reserve commissioned officer in the Army National Guard of the United States under Title 10. Appellate Exhibit XI. But the accused did not expressly accept that appointment or take the oath for that office. The question presented is whether the federal aspect of the appointment of the accused was nonetheless effectively consummated by operation of law or by the oath taken on 4 April 2004.

The Government asserts that the accused is a federal officer pursuant to Title 10, United States Code, Section 12211, which provides, in pertinent part:

(a) Upon being federally recognized, an officer of the Army National Guard shall be appointed as a Reserve for service as a member of the Army National Guard of the United States in the grade that he holds in the Army National Guard. . . . The acceptance of an appointment as a Reserve for service as a member of the Army National Guard of the United States by an officer of the Army National Guard does not vacate his office in the Army National Guard.

(b) When an officer of the Army National Guard to whom temporary Federal recognition has been extended is appointed as a Reserve for service as a member of the Army National Guard of the United States, his appointment shall bear the date of the temporary recognition and **shall be considered to have been accepted** and effective on that date.

(emphasis added). Army Regulation 135-100, para. 3-26, mirrors section 12211. Whether the highlighted language is meant to obviate the need for actual acceptance of the federal appointment or to mark the date *nunc pro tunc* for measuring time in service (for promotion, pay, and retirement, for example) is not clear. Read in context of the statutory, regulatory, and factual situation, “considered to have been accepted” is too slender a reed to support personal jurisdiction.<sup>1</sup>

The Appointments Clause of the United States Constitution, Article II, Section 2, Clause 2, requires Presidential appointment of officers of the United States. The Appointments Clause applies to military officers. *Weiss v. United States*, 510 U.S. 163, 170, 114 S.Ct. 752, 757, 127 L.Ed.2d 1 (1994). Because the power to appoint military officers rests with the President,

<sup>1</sup>The issue here “is complicated by the murky and mystical duality of the National Guard system.” *Bowen v. United States*, 49 Fed. Cl. 673, 676 (2001).

automatic appointment pursuant to statute would be unconstitutional. *Dysart v. United States*, 369 F.3d 1303, 1315 (Fed. Cir. 2004).

The process followed here tracked the applicable regulations. National Guard Regulation (NGR) 600-100, para. 2-1, provides:

Officers who are federally recognized in a particular grade and branch shall be tendered an appointment in the same grade as Reserve commissioned officers of the Army with assignment to the Army National Guard of the United States (ARNGUS) as provided in Title 10, USC sections 3351(a)<sup>2</sup> and 3359, if they have not already accepted such appointment.

NGR 600-100, para. 10-2, likewise provides that, "A commissioned officer who is federally recognized is tendered an appointment as a Reserve commissioned officer of the Army with assignment to the ARNGUS (Title 10, USC, section 3351)."

"Tender" means "offer" or "present for acceptance." WEBSTER'S NEW WORLD DICTIONARY, COLLEGE EDITION 1501 (1968). See BLACK'S LAW DICTIONARY 1479-80 (7<sup>th</sup> ed.1999). The offered appointment may be accepted or rejected. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 161 (1803)("The appointment is the sole act of the President; the acceptance is the sole act of the officer . . . [who] may refuse to accept").

The opportunity to accept or decline appointment is afforded by the appointing authority, pursuant to statute and regulation, in connection with the oath of office mandate. "The Army is held to strict compliance with its own regulations before jurisdiction may be asserted at a court-martial." *United States v. Arthur*, 2 M.J. 481, 484 (A.C.M.R. 1975). Regarding appointment of officers, AR 135-100, para. 2-7, provides:

- On approval of an application, the appointing authority will—
- b. Issue and send to each appointee a memorandum of appointment (fig 2-2) and DA Form 71 (Oath of Office – Military Personnel) to be completed per instructions thereon.
    - (1) A signed oath of office is required for appointment in any component of the Army.
    - (2) The execution and return of the oath of office constitutes acceptance of appointment. No other evidence is required. However, acceptance of an appointment may be "expressed" as by formal acceptance in writing or "implied" as by entering on the performance of the duties of the office.

The DA Form 71 is designed to reflect fulfillment of the requirement specified by 5 U.S.C. § 3331 that an individual appointed to an office in the uniformed services execute an oath. The oath the accused executed (Appellate Exhibit XII) is the one required by 32 U.S.C. § 312 for appointment as an officer in the National Guard. Though the language of the oaths is substantially the same, there is a pivotal difference: the oaths are to "well and faithfully discharge the duties of" different offices in distinct organizations.

<sup>2</sup>This section has been renumbered 10 U.S.C. § 12211.

The accused's oath "that during [his] temporary Federal recognition [he would] perform all Federal duties as if [he] had been appointed a Reserve Officer of the Army," block II of NGB Form 337 (Appellate Exhibit XII), makes plain that the oath covers that specific status and does not silently serve as an oath **upon** appointment as a Reserve commissioned officer of the United States to well and faithfully discharge the duties of that office.

The need for a state officer to execute an oath of office to accept appointment in a federal component distinguishes this situation from acceptance of promotion and detailing as a military judge. Promotions are considered to have been accepted on the date of appointment to the higher grade absent an express declination, and no new oath is required for promoted officers who have served continuously since subscribing a prior oath (under 5 U.S.C. § 3331). 10 U.S.C. § 626. An appointment separate from that which commissioned the officer in the military is not required to detail an officer to serve as a military judge. *Weiss v. United States*, 510 U.S. at 170-76, 114 S.Ct. at 757-60.

The instructions on the DA Form 71 sent to the accused and those set forth in the memorandum informing him of his federal appointment advised the accused that he had two options: 1) to execute and return the form to accept appointment as a Reserve commissioned officer in the Army National Guard of the United States, or 2) to return the appointment if he did not accept it. Appellate Exhibit XI. Though the course apparently chosen by the accused – neither to execute nor return the oath – was not a listed option, such inaction was not construed as acceptance of appointment. The applicable National Guard Regulation, NGR 635-100, para. 5a.(17), contemplates and describes the intended sanction for not accepting federal appointment: "the appointment of an Army National Guard officer should be terminated for . . . [f]ailure to accept appointment as a Reserve officer of the Army."

Though the accused did not expressly accept federal appointment, acceptance may be implied from "entering on the performance of the duties of the office." AR 135-100, para. 2-7(b)(2). Article 2(c) of the Uniform Code of Military Justice provides, in pertinent part, that:

- (c) Notwithstanding any other provision of law, a person serving with an armed force who –
  - (1) submitted voluntarily to military authority;
  - (2) met the mental competence and minimum age qualifications . . . at the time of voluntary submission to military authority;
  - (3) received military pay or allowances; and
  - (4) performed military duties;
 is subject to this chapter until such person's active service has been terminated in accordance with law or regulations.


Voluntary entry into Army service may waive the formality of the oath. *Sanford v. Callan*, 148 F.2d 376, 377 (5<sup>th</sup> Cir. 1945).

The evidence presented to date includes some circumstances indicating implied acceptance by the accused of his appointment as a Reserve for service as a member of the Army National Guard of the United States, but not enough to satisfy the prosecution's burden of proof. When the accused tendered his resignation, he did so "as an officer of the Ohio Army National Guard and as a **Reserve of the Army**" (emphasis added), implicitly acknowledging having the

latter status. The accused specified that his resignation would become effective 26 June 2004, thereby suggesting that he had held federal status and would voluntarily continue to do so for 8 more days. The stipulation of expected testimony of MSG Mullins reflects that the accused came to one drill, apparently before August of 2004, but states only that the accused came to see the commander, CPT Frye, and refused to sign his DA Form 71. No evidence was presented regarding whether the accused was in uniform, was paid, performed military duties, or did anything that day beyond speaking with MSG Mullins, and there was no evidence of any Title 10 service by the accused.

## RULING

The defense motion to dismiss for lack of personal jurisdiction is granted.

 21 June 2008  
Grant C. Jaquith  
COL, IA  
Circuit Judge



IN THE FIRST JUDICIAL CIRCUIT  
FORT KNOX, KENTUCKY

United States of America	)	
	)	
v.	)	Decision and Order:
	)	Government Request for Reconsideration of
2LT Matthew R. Lis	)	Dismissal for Lack of Personal Jurisdiction
U. S. Army Armor Center	)	
Headquarters and Headquarters Company	)	
Fort Knox, Kentucky 40121	)	

PROCEDURAL HISTORY

The defense motion to dismiss for lack of personal jurisdiction was granted. The Government requested reconsideration to present testimony in support of its contention that the accused's actions amounted to implied acceptance of his appointment as a Reserve commissioned officer of the Army. That request was granted (pursuant to Rule for Courts-Martial 905(f)), and an evidentiary hearing was conducted on 22 July 2008. Reconsideration of other aspects of the court's findings of fact and conclusions of law was not specifically requested, but review of the findings of fact and conclusions of law made in connection with the ruling in light of the evidence presented on and prior to 22 July 2008 results in reaffirmation of those findings of fact and conclusions of law (which will not now be restated).

ADDITIONAL ESSENTIAL FINDINGS OF FACT

Having read the request by the government, the response by the defense, and the government and defense papers on whether there was implied acceptance, taken testimony and received evidence on 22 July 2008, and resolved issues of credibility, and having given due consideration to all of the foregoing and the arguments made by the parties, the court finds as follows:

1. After he was commissioned a second lieutenant (2LT) in the Ohio Army National Guard in April of 2004, the accused was paid for performance of duty in that grade in a Title 32 status. The accused's pay records, Appellate Exhibit XXI, reflect that he was paid for inactive duty training (IDT) on 4 April 2004, 1 - 2 May 2004, and 4 - 6 June 2004, and for active duty 11 - 13 June 2004. The payments were made by the Defense Finance and Accounting Service (DFAS), a federal agency, which does not pay Army National Guard soldiers for performing purely state functions. From the time of his commissioning through late 2004, the accused never served in a Title 10 status.
2. In May of 2004, the accused reported to the 372<sup>nd</sup> Maintenance Company for "drill" (multiple unit training assemblies). The accused wore a battle dress uniform (BDU) bearing his name, rank, and the U.S. Army tape. The company commander, Major (MAJ) Mark Hatfield, does not recall any particular performance of duties by the accused. The accused was going to

become a platoon leader. However, MAJ Hatfield advised the accused that he was being considered for "cross-leveling" to fill a vacancy in the 211<sup>th</sup> Maintenance Company, which would be deploying.

3. MAJ Hatfield also spoke with the accused about attending his Officer Basic Course (OBC), but the accused said he was resigning. MAJ Hatfield told the accused he had an obligation to complete the process unless and until he was discharged. MAJ Hatfield left a message advising the accused of dates for his OBC. The accused responded, via e-mail, that he was not going to attend (OBC).

4. In June of 2004, the accused went to drill with the 211<sup>th</sup> Maintenance Company. The accused wore his BDU bearing his rank as a 2LT. Lieutenant Colonel (LTC) Thomas W. Arendt, the Commander of the 737<sup>th</sup> Maintenance Battalion, which was comprised of the 372<sup>nd</sup> Maintenance Company and the 211<sup>th</sup> Maintenance Company, was also there. The accused asked to speak with LTC Arendt regarding his reservations about deploying. The accused addressed LTC Arendt as "Sir." The accused became emotional while describing issues concerning his children and his mother-in-law, so LTC Arendt asked the accused to go collect himself. LTC Arendt told the accused that he had just returned from deployment, and that everything would be okay – the family members of the accused would make it.

5. The accused also went to drill with the 211<sup>th</sup> Maintenance Company on or about 12 June 2004, during pre-deployment soldier readiness processing (SRP). Captain (CPT) John R. Frye, Jr., the 211<sup>th</sup> Maintenance Company Commander, met the accused at the morning accountability formation and observed him at SRP stations. The accused was wearing his BDU. During the SRP, MAJ Mark J. Cappone, the Executive Officer of the 737<sup>th</sup> Maintenance Battalion, called MAJ Hatfield to advise him that the accused was not cooperating in pre-deployment processing in that he did not want to get an anthrax inoculation. MAJ Hatfield came in the next day to speak with the accused. The accused told MAJ Hatfield that he did not want to be there, did not want to deploy, had some family issues, and was resigning. MAJ Hatfield replied that the accused had an obligation to complete the SRP unless and until his resignation was accepted. Sergeant First Class (SFC) Charissa Binckley also saw the accused at the SRP; the accused was sitting in a folding chair on the drill floor looking like he did not want to be there.

6. During the SRP for the 211<sup>th</sup> Maintenance Company, Master Sergeant (MSG) (then First Sergeant) Terry D. Mullins presented the accused with a DA Form 71, "oath of office," to sign. MSG Mullins presented the form to the accused on behalf of CPT Frye, who was not present. The accused refused to sign the oath of office, saying "I'm never going to sign that," or words to that effect. MSG Mullins later advised CPT Frye that the accused had refused to sign the oath, and left the follow-up to CPT Frye.

7. After June of 2004, the accused did not return to drill or otherwise perform military duties. The accused failed to report to the second OBC he was scheduled to attend.

8. By memorandum dated 18 June 2004 through his chain of command to The Adjutant General of Ohio, the accused tendered his resignation "as an officer of the Ohio Army National Guard and as a Reserve of the Army under the provisions of Paragraph 5a(3)a, NGR 635-100,

effective 26 June 2004." Appellate Exhibit XVI. In the memorandum, the accused said he had changed his mind about going back into the military (15 years after having completed a 3 year enlistment in the active Army) and concluded that, "For me to start a military career now at this time of my life would be selfish under any circumstances, my priorities are my wife and kids." *Id.* The unit did not act on the accused's resignation, but began counting the accused as absent without leave (AWOL) when he did not show up for drill. An effort was made to contact the accused by telephone regarding his unexcused absences from drills, and he was notified by mail that he was being counted as AWOL. Appellate Exhibits XXX, XXXI.

9. In October of 2004, LTC Arendt called the accused to try to get the accused to come back to the unit and work through his family issues. LTC Arendt told the accused that going AWOL was not a good way to address his issues with deployment. The accused said the suggested date for meeting would not be a good time, but never called back with another date. The accused had tendered his resignation, did not want to be in the Army National Guard, and believed he was not obligated to serve.

10. On 26 October 2004, a memorandum sent on behalf of the Supply Sergeant of the 211<sup>th</sup> Maintenance Company notified the accused that, since he was pending discharge, he was required to turn in all clothing and equipment he had been issued. A memorandum dated 1 November 2004 by the Supply Sergeant for Headquarters Company, 112 the Engineer Battalion (Hvy)(Div), certified that the accused had cleared unit supply at the battalion.

11. CPT Frye spoke with the accused on or about 29 October 2004. After a memorandum was sent informing the accused that he would be mobilized, the accused called and questioned why he was receiving mail from the unit, asserting that he already was out of the service. CPT Frye indicated that the accused was expected to report to the unit on 30 October 2004 pursuant to his mobilization order. *See* Appellate Exhibit III. A charge sheet reflecting preferal on 29 November 2004 alleged that the accused violated Article 86 of the Uniform Code of Military Justice by failing to go at the time prescribed to his appointed place of duty from 30 October 2004 - 28 November 2004. Appellate Exhibit XXXII.

#### ADDITIONAL CONCLUSIONS OF LAW

The accused expressly accepted his appointment to the office of Second Lieutenant in the Army National Guard of the State of Ohio when he executed the oath of office on 4 April 2004. Appellate Exhibit XII. He applied for federal recognition as an Army National Guard officer and appointment as a Reserve commissioned officer in the Army National Guard of the United States. Appellate Exhibit XIV. Federal recognition was granted, Appellate Exhibit XIII, and the accused was appointed a Reserve commissioned officer in the Army National Guard of the United States under Title 10. Appellate Exhibit XI. The accused did not expressly accept that appointment or take the oath for that office, and the evidence is insufficient to imply acceptance from the accused "entering on the performance of the duties of the office." AR 135-100, para. 2-7(b)(2).


There is no evidence that the accused was notified that he had been appointed a Reserve commissioned officer in the Army National Guard of the United States before MSG Mullins

presented the DA Form 71 to the accused for the accused to execute the oath of office in June of 2004. The accused expressly refused to sign the oath and said he never would, thus declining the federal appointment. Within a week, the accused submitted a written resignation. No evidence was presented that the accused performed any military duties, in either Title 32 or Title 10 status, after he refused to take the oath of office, so it has not been shown that the accused entered on the performance of the duties of the office of Reserve commissioned officer in the Army National Guard of the United States after appointment to that office was tendered to him. *See generally Corrigan v. Secretary of Army*, 211 F.2d 293, 296-97 (9<sup>th</sup> Cir. 1954) (“The evidence reveal[ed] no act after the induction ceremonies from which it could be found that the petitioner had in fact acquiesced in induction;” in the absence of proof of actual induction, the soldier was released from Army custody on a writ of *habeas corpus*); *Maybarn v. Heflebower*, 145 F.2d 864, 866 (5<sup>th</sup> Cir. 1944) (the subsequent conduct of the parties supported the finding that “irregularities [in the induction of the soldier] were cured or the right to invoke them was waived”).

The accused’s conduct before his demonstrated knowledge and receipt of his federal appointment was not shown to be so inconsistent with his declination of the appointment in June of 2004 to support a conclusion that he accepted the appointment before it was offered him. The accused’s participation in unit training assemblies always was in a Title 32 status. He wore the uniform and rank of a 2LT, extended and received appropriate military courtesy, and was paid for his service. But these circumstances are indistinct from those of any Army National Guard officer who has been commissioned by the state but has not yet accepted appointment as a Reserve commissioned officer in the Army National Guard of the United States. Though federal recognition and appointment generally are required for continued commissioned service in the Ohio Army National Guard, the process contemplates an initial state appointment and oath of office, accompanied by temporary federal recognition but no temporary federal appointment, affording the United States time to determine whether to extend federal recognition and appointment and the officer a concomitant opportunity to accept or decline it. In the meantime, the officer is required to perform duties as a member of the Ohio Army National Guard. The accused did no more than that, and his protest of activation for federal service began in May of 2004, almost immediately following his commissioning. Under these circumstances, the accused’s initial compliance with directives by attending two multiple unit training assemblies before refusing to sign the federal oath does not constitute implied acceptance of his appointment as a Reserve commissioned officer in the Army National Guard of the United States. *See United States v. Arthur*, 2 M.J. 481, 484 (A.C.M.R. 1975).

RULING

The defense motion to dismiss for lack of personal jurisdiction is granted.

 29 July 2008  
Grant C. Jaquith  
COL, JLC  
Circuit Judge

**UNITED STATES SENATE  
COMMITTEE ON VETERANS' AFFAIRS**

**SUPPLEMENTAL QUESTIONNAIRE FOR NOMINEES  
TO THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS**

**PUBLIC**

1. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels, or conferences of which you are or have been a member, and provide the titles and dates of any offices which you have held in such groups.

**I have been a member of the following bar or legal associations without holding any offices:**

- American Bar Association
- Judge Advocates Association

2. **Bar and Court Admission:**

- a. Are you currently a member in good standing of the bar of a Federal court or of the highest court of a state? **Yes.**
- b. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

**I have been admitted to the bar in the following states without any lapses in membership:**

- Pennsylvania Bar; admitted on December 13, 1990
- New Jersey Bar; admitted on December 20, 1990

**However, my admission to both bars has been on an inactive status while serving on active duty in the U.S. military.**

- c. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Provide the same information for administrative bodies that require special admission to practice.

**I have been admitted to the following courts without any lapses in membership:**

- Pennsylvania Supreme Court; admitted on December 13, 1990
- New Jersey Supreme Court; admitted on December 20, 1990
- U.S. Navy-Marine Corps Trial Judiciary; admitted on March 8, 1991
- U.S. Navy-Marine Corps Court of Military Appeals; admitted on October 9, 2019

**3. Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Question 12 on the Committee's initial questionnaire, to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, or conferences. **There are no additional organizations to report.**
- b. Indicate whether any of these organizations of which you are a member currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe what efforts, if any, you made to try to change the organization's discriminatory policies or practices. **The Knights of Columbus (listed on the Committee's initial questionnaire) is a Roman Catholic service organization that limits its membership to men. There is an equivalent service organization for women. I have not made any efforts to change the organization's admission policy.**

**4. Published Writings and Public Statements:**

- a. If you have published any written materials (letters to the editor, articles, reports, memoranda, policy statements, friend of the court briefs, testimony or other official statements or communications) relating in whole or in part to matters of public policy or legal interpretation related to veterans issues, please supply those materials to the Committee. **I have not published any written materials related to veterans issues.**
- b. Supply transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions that related in whole or in part to veterans issues. If you do not have a copy of the speech or a transcript or recording of your remarks, provide the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke. **I have not given any speeches or talks related to veterans issues.**

(Note: As to any materials requested in this question, please omit any confidential materials or materials protected by the attorney-client privilege.)

5. **Legal Career:** Answer each part separately.

- a. Describe chronologically your law practice and legal experience after graduation from law school including:
- i. whether you served as clerk to a judge and, if so, the name of the judge, the court, and the dates of the period you were a clerk; **I have not served as a clerk to a judge since graduation from law school; however, as noted in the Committee's initial questionnaire, I clerked for Pennsylvania Superior Court Judge Frank J. Montemuro, Jr. from June to August 1988.**
  - ii. whether you practiced alone and, if so, the addresses and dates; **I have never practiced alone.**
  - iii. the dates, names, and addresses of law firms or offices, companies, or governmental agencies with which you have been affiliated, and the nature of your affiliation with each;

**National Security Council, Executive Office of the President**  
 1650 Pennsylvania Avenue NW  
 Washington, DC 20509

**From August 2017 to the present, I have been detailed from the Department of Defense to the National Security Council (NSC) Legal Affairs directorate serving as Deputy Legal Advisor. Before starting retirement leave, I was a member of a small group of lawyers who advised the President, Assistant to the President for National Security Affairs, and the NSC and Homeland Security Council staffs.**

**United States Navy, Office of the Judge Advocate General**  
 1322 Patterson Avenue, Suite 3000  
 Washington Navy Yard, DC 20374-5066

**In January 1989 I was commissioned through the U.S. Navy Judge Advocate General's (JAG) Corps Student Program during my second year of law school. Since reporting to the Naval Justice School in January 1991, I have served on continuous active duty as a judge advocate. The Navy JAG Corps is a global law firm with more than 2,300 lawyers, paralegals, and legal assistants whose 3 core practice areas are military justice, command advice and national security law, and legal assistance. I have practiced in each of these core areas.**

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the ten most significant

matters with which you were involved in that capacity. **I have not served as a mediator or arbitrator.**

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years;

**I have served on continuous active duty as a U.S. Navy judge advocate for nearly 30 years and held successive positions of increasing complexity and responsibility. While serving in diverse assignments, the general character of my law practice has included:**

- **Military Justice (prosecution, defense, and investigation)**
- **Legal Assistance (personal legal services and advice to military service members, veterans, and their families)**
- **Administrative Law (government ethics, legislation, and regulations)**
- **Admiralty and Maritime Law (admiralty tort and salvage claims, and international and domestic maritime issues)**
- **Civil Litigation (cases incident to the operation of the Navy, usually in conjunction with the Department of Justice)**
- **Environmental Law (laws protecting human health, the environment, and historic and cultural resources)**
- **International Law (law of the sea, law of armed conflict, international agreements, and foreign criminal jurisdiction)**
- **Operational Law (rules of engagement/rules for the use of force)**
- **Information Operations and Intelligence Law (national security and cyberspace matters)**

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized;

**During my Navy JAG Corps career, typical clients have included senior civilian and military leaders, military service members, veterans, and their families. After completing Naval Justice School, I began my legal career as a Trial Counsel (prosecutor), Command Services Attorney, Claims Officer, and Legal Assistance Attorney at Naval Legal Service Office San Francisco. My other ashore and headquarters assignments included tours as an Administrative Law Attorney in the Office of the Judge Advocate General, Deputy Executive Assistant to the Judge Advocate General of the Navy, Executive Officer (second in command) of Naval Legal Service Office Central, Executive Assistant to the Deputy Judge Advocate General of the Navy/Commander, Naval Legal Service Command, and Commanding Officer, U.S. Region Legal Service Office Europe,**



**Africa, Southwest Asia. Prior to my detail to the National Security Council, I served as Special Counsel to the Chief of Naval Operations.**

**My afloat, combat zone, and staff tours have included serving as Staff Judge Advocate (general counsel) for Naval Special Warfare Group One, Deputy Fleet Judge Advocate for U.S. Seventh Fleet, Staff Judge Advocate for the Abraham Lincoln Carrier Strike Group/Cruiser-Destroyer Group Three, Chief of Operational Law and Exercises for U.S. European Command, Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff, Staff Judge Advocate for North American Aerospace Defense Command and U.S. Northern Command, Director of Legal Operations for Combined Joint Interagency Task Force-435, and Special Legal Advisor to Commander, International Security Assistance Force and Commander, U.S. Forces Afghanistan.**

- iii. any law practice or legal experience that involved veterans' law.

**During my nearly 30 years as an active duty judge advocate, I have advised our Nation's most senior civilian and military policy-makers on veterans' law issues. I have also supervised other attorneys responsible for providing veterans' law advice as well as legal assistance to veterans and their families. Additionally, I have assisted veterans in reviewing their medical and personnel files to advise them about issues related to their benefits claims. Finally, I have advised veterans on the law and procedures related to their benefits claims and on how to proceed with their appeals following adverse rulings from U.S. Department of Veterans Affairs regional offices.**

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

**I gained litigation experience in the Navy JAG Corps while serving in military justice assignments, primarily while serving as a trial counsel (prosecutor) from 1992-1993 when I frequently appeared in court. After promotion to higher paygrades, I mentored and supervised defense counsel while serving as Executive Officer (second in command) of a command with a criminal defense mission from 2003-2005 and prosecutors while serving as the Commanding Officer of a command with a prosecution mission from 2013-2015, when I supervised all of the prosecutors for Navy Region Europe, Africa, Southwest Asia. Finally, as a staff judge advocate for numerous General Court-Martial convening authorities (the senior flag or general officers who refer cases to courts-martial), I reviewed the results of trial for dozens of cases to assist those leaders in taking post-trial action for the**

**disposition of cases, and I reviewed hundreds of nonjudicial punishment/Article 15, Uniform Code of Military Justice appeals.**

- i. Indicate the percentage of your practice in:
  1. federal courts; **100 percent (military courts-martial)**
  2. state courts of record; **0 percent**
  3. other courts; **0 percent**
  4. administrative agencies. **0 percent**
- ii. Indicate the percentage of your practice in:
  1. civil proceedings; **0 percent**
  2. criminal proceedings. **100 percent (military courts-martial)**
- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

**From 1992 to 1993, I was the sole or chief trial counsel (prosecutor) for 7 General Courts-Martial and 37 Special Courts-Martial before the U.S. Navy-Marine Corps Trial Judiciary. These courts-martial were decided either by judge alone (bench trials) or by members (jury trials). The cases I tried ranged in complexity from complicated child sexual assault and multiple accused drug distribution cases to relatively simple unauthorized absence cases. To the best of my knowledge, they were not reported cases. I also served as the investigating officer for 11 Article 32, Uniform Code of Military Justice preliminary hearings. Finally, I represented the Government in two officer Boards of Inquiry and dozens of Administrative Separation Boards.**

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice. **I have not practiced before the Supreme Court of the United States.**
6. **Litigation:** Describe the ten most significant litigated matters that you personally handled, whether or not you were the attorney of record. Provide the citations, if the cases were reported, and the docket number and date if unreported. Provide a summary of the substance of each case. Identify the party or parties whom you represented and describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
  - a. the date of representation;
  - b. the name of the court and the name of the judge or judges before whom the case was litigated; and

- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

**Aside from the courts-martial noted in paragraph 5.d above, I have not personally litigated additional matters.**

**7. Judicial Opinions/Offices:**

- a. If you are or have ever been a judge, attach a statement providing (1) citations for the ten most significant opinions you have written, (2) a short summary of and citations for all appellate opinions either reversing your decision or confirming it with significant criticism of your substantive or procedural rulings, and (3) citations for significant opinions on federal or state constitutional issues, together with citations for any appellate court rulings on your decisions in those cases. (If any of the opinions were not officially reported, please provide a copy of the opinions.) **Not applicable.**
- b. State (chronologically) any judicial office you have held and whether you were elected or appointed. Please provide a description of the jurisdiction of each such court. **None.**

8. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities.

(Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

**Deputy Legal Advisor, National Security Council**

I advised the President, Assistant to the President for National Security Affairs, and the National Security Council (NSC) and Homeland Security Council (HSC) staffs. I served as the primary legal advisor to the Defense Policy and Strategy, European and Russian Affairs, South and Central Asian Affairs, and Weapons of Mass Destruction and Biodefense Strategy directorates. During the first year of my detail, I served as the NSC Ethics Counsel and supported the African Affairs, International Organizations, Records Access and Information Security Management, and Resource Management directorates.

**Special Counsel to the Chief of Naval Operations (CNO)**

I supported the U.S. Navy's senior military leader and member of the Joint Chiefs of Staff, who is responsible for organizing, training, equipping, preparing, and maintaining the readiness of operating forces and assigned shore activities of the U.S. Navy and who provides military advice to the President, Secretary of Defense (SECDEF), NSC, and HSC. I synchronized with high-level legal advisors and policy makers throughout the Navy, Department of Defense (DOD), and other agencies to fuse law and policy into solutions to meet national security objectives. I also served as the Ethics Counselor to the CNO and his personal staff.

**Commanding Officer, Region Legal Service Office Europe, Africa, Southwest Asia**

I led over 75 attorneys, paralegals, and support personnel in providing criminal prosecution, command services, international law, and claims support to commands within the Navy Region Europe, Africa, Southwest Asia area of responsibility and legal assistance to eligible persons on 3 continents. I commanded a diverse, geographically-dispersed organization composed of U.S. military and civilian personnel, as well as foreign local nationals, with a command headquarters in Naples, Italy and five detachments located in Bahrain, Greece, Sicily, Spain, and the United Kingdom.

**Special Legal Advisor to Commander, ISAF and USFOR-A**

I was "by-name requested" to serve as Legal Advisor for Strategic International Agreements for Commander, International Security Assistance Force (ISAF) and U.S. Forces Afghanistan (USFOR-A), the four-star U.S. general responsible for conducting operations in support of the Afghan Government to defeat the insurgency and strengthen the capacity of Afghan Security Forces. I organized and primed the USFOR-A Staff for successful U.S.-Afghanistan (AFG) Bilateral Security Agreement (BSA) negotiations, drafted the original BSA text as foundation for defense cooperation and to provide status protections for DOD personnel in AFG post-2014, and acted as the USFOR-A Headquarters delegate for U.S.-AFG Acquisition Agreement negotiations.

**Director of Legal Operations, Combined Joint Interagency Task Force-435**

I supervised over 100 officer, enlisted, and civilian personnel conducting detention operations in support of Operation Enduring Freedom, and I directed the completion of 1,148 Detainee Review Boards (DRB) in accordance with law of war standards. I led the development of the process for and oversaw assembly of DRB files transferred to AFG along with detainees pursuant to the U.S.-AFG Detentions Memorandum of Agreement, and I advanced Security Force Assistance by devising and executing the transfer of the Justice Center in Parwan (JCIP) Evidence Building and its contents, the first JCIP building conveyed to AFG.

**Staff Judge Advocate, North American Aerospace Defense Command and U.S. Northern Command**

I served as chief legal counsel for the U.S. and Canadian defense and security organization comprised of over 2,500 personnel. I delivered executive, decision-making support to the four-star commander responsible for Aerospace Warning and Control in the U.S. and Canada, and for homeland defense, civil support and security cooperation to defend and secure the United States and its interests. I directed DOD's largest Unified Combatant Command (COCOM) legal office, consisting of 22 U.S. and Canadian attorneys and paralegals, and charted the legal courses to counter criminal organizations in Mexico, including the development and execution of a training plan for comprehensive Mexican military justice reform.

**Deputy Legal Counsel to the Chairman, Joint Chiefs of Staff**

In coordination with NSC and DOD staff members, I guided the principal military advisor to the President, NSC, and SECDEF on complex, multifaceted issues, including global force posture alignment, weapons of mass destruction interdiction, environmental law, foreign criminal jurisdiction, and law of the sea. I spearheaded U.S. working group teams during meetings with Colombian, Omani, and Polish counterparts, and I served as the senior Joint Staff representative for critical negotiations with Colombia, Czech Republic, Iraq, Kazakhstan, Kyrgyzstan, Oman, and Poland for base access, missile defense, and status protection agreements.

**Executive Assistant to the Deputy Judge Advocate General of the Navy and Commander, Naval Legal Service Command**

I reviewed, coordinated, and tracked all decisions considered by a two-star admiral, ranging from detainees to sonar litigation to officer personnel matters, as well as management issues inherent in leading a global law firm of over 2,200 military and civilian attorneys, paralegals, and legal assistants. As the senior aide, I collaborated with high-ranking Office of the Judge Advocate General Staff and 18 Naval Legal Service Command commanding officers to increase overall Navy Judge Advocate General's Corps efficiency and effectiveness.

**Chief of Operations Law and Exercises, U.S. European Command**

I supported contingency operations and exercises for the Unified COCOM responsible for meeting North American Treaty Organization and U.S. national commitments in contingency operations as well as security cooperation with joint U.S. forces operating in 93 countries in Europe, Africa, Asia, and most of the Atlantic Ocean. I served as the senior legal advisor to the team that delivered humanitarian aid to Levant combat zone and safely evacuated hundreds of U.S. citizens; oversaw lawful expenditure of over \$100 million of Operation Enduring Freedom-Trans Sahara Title 10 funds. As the Information

Operations (IO) law sub-specialist, I provided advice for a prototype IO program and handled the Special Access Program/Special Technical Operations portfolio.

**Staff Judge Advocate, Abraham Lincoln Carrier Strike Group/Cruiser-Destroyer Group Three**

Pre-deployment, I was responsible for legally preparing and training over 7,000 personnel to support Operations Enduring Freedom and Southern Watch as well as maritime interdiction operations in the Northern Arabian Gulf. During the 290-day deployment, I served as the senior judge advocate for 5 Carrier Strike Groups during Operation Iraqi Freedom and was responsible for coordinating with joint and coalition judge advocates, guiding junior Navy judge advocates, and providing international and operational law support during combat operations. Contemporaneously, I managed a heavy administrative and military justice caseload by processing/reviewing 30 administrative separation packages, 20 investigations, 13 courts-martial, 10 nonjudicial punishment appeals, 9 officer/senior enlisted misconduct and detachment for cause cases, and served as General Court-Martial Convening Authority legal counsel for 2 major aircraft mishaps and a surface warship collision with an Iranian merchant vessel.

9. **Lobbying Activities:** List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). **None.**

(Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

10. **Teaching:** What, if any, courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide copies to the committee. **None.**
11. **Outside Commitments During Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service? If so, explain. **No.**
12. **Principal Office of the U.S. Court of Appeals:** By statute, the principal office of the U.S. Court of Appeals for Veterans Claims is in the Washington, D.C., metropolitan area. If confirmed, would you maintain your permanent residence within commuting distance of the Court while in active service? **Yes.**
13. **Charitable or Volunteer Work:** Please describe any charitable or volunteer work, including pro bono work, you have performed, particularly any work involving military personnel, veterans, or their families.

Throughout my military career, I have performed charitable and volunteer work to help military service members, veterans, and their families (as well as others).

Examples include:

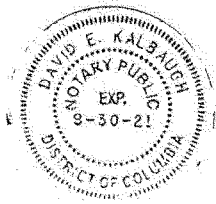
- Supporting American Legion Post 180 fundraising events to sponsor local youth sports teams and provide scholarships to the children of local veterans.
- Volunteering to serve on the Board of Directors for the White House Athletic Center, a non-profit organization that promotes and supports physical fitness and overall health for federal employees of the Executive Office of the President and White House military personnel.
- Fundraising for KOVAR, a Virginia Knights of Columbus charity that provides financial assistance to tax exempt organizations that provide training and assistance to citizens with intellectual disabilities.
- Serving as equipment assistant and timekeeper for Colorado Springs, CO and Vienna, VA youth lacrosse teams.
- Providing facilities maintenance assistance to the Benedictine sisters at the San Vincenzo al Volturno Abbey in Molise, Italy during my most recent overseas assignment.
- Leading a group of volunteers from my command who mentored at-risk students from an elementary school in one of the poorest neighborhoods in Naples, Italy; the group also assisted with facilities improvement projects at the school.
- Volunteering as a lector for masses aboard the USS Abraham Lincoln (CVN 72) during the aircraft carrier's 290-day deployment and other underway periods; I also volunteered to support community relations projects during port visits conducted by the Lincoln and the USS Blue Ridge (LCC 19) during my U.S. Seventh Fleet tour.
- Serving as the Office of the Judge Advocate General (OJAG) Administrative Law Division Social Chair and OJAG Social Committee Representative.
- Coordinating the U.S. Seventh Fleet Volunteer Income Tax Assistance (VITA) Program, which provided free tax-preparation services to military service members, veterans and their families.
- Organizing and aiding "SEAL Pups," a Naval Special Warfare Group One youth development program for children of active duty and veteran Navy SEALs and support staff; served as adult counselor for weekend long campouts and assisted with the organization's Olympics and the command's support of the San Diego Children's Hospital Fun Run.

AFFIDAVIT

I, Scott J. Laurer, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

15 October 2019  
(DATE)

Scott J. Laurer  
(NAME)



David E. Kalbauch  
(NOTARY)



## VA struggles to fill hospital jobs. It has 49,000 openings across the country.

Staffing shortages are “a root cause for many of the problems in veterans’ care,” said VA Inspector General Michael J. Missal. (Mandel Ngan/AFP/Getty Images)



By  
**Joe Davidson**  
Columnist

November 5, 2019 at 6:00 a.m. EST

Three numbers indicate just how bad staffing shortages are at the Department of Veterans Affairs — even as the problem in some ways is getting better.

The number of vacant positions across the department: 49,000.

“That is an astounding number,” said Rep. Mark Takano (D-Calif.), chairman of the House Veterans’ Affairs Committee.

The percentage of VA facilities that reported at least one “severe occupational shortage,” [according to a report](#) by the department’s Office of Inspector General: 96.

The decline in severe staffing shortages from 2018 to 2019: 12 percent. That’s good news from the inspector general’s survey of all 140 facilities, but it highlights just how bad staffing is at VA.

Staffing shortages amid the 386,000 VA employees are “a root cause for many of the problems in veterans’ care,” said Inspector General Michael J. Missal.

There are two main reasons for the shortages — low salaries and a lack of qualified applicants, with the former leading to the latter.

Consider this item from the report: VA “medical center directors make approximately 25 percent of a private sector hospital chief executive officer salary yet have a greater scope of responsibility.” Top pay for a VA medical center director is \$201,900.

And this from Daniel R. Sitterly, a VA assistant secretary: Highly specialized surgeons in San Francisco earn about \$800,000, while VA can only pay about half that, tops.

Because the law caps how much federal employees can be paid, “this leaves federal agencies at a disadvantage when competing for talented employees,” he said in a statement.

Highly skilled individuals work for the federal government when they could make more elsewhere because of their public service drive and the sense of purpose their agencies provide. VA attracts many employees, including a high percentage of veterans, who appreciate that role and the sacrifice those in uniform have displayed for the nation.

But let's be real, that only goes so far.

"While VA has employees and applicants who are willing to accept a lower salary to be part of an organization with such an important mission," Sitterly said, VA "faces increasing challenges in its ability to attract or retain quality health care professionals when the salary gap continues to increase."

Money isn't the only problem. Punitive, political policies also play a role.

After the 2014 scandal over the coverup of long patient wait times for veterans' medical care, Congress weakened civil service protections for VA senior executives.

Then in 2017, "the VA Accountability and Whistleblower Protection Act made medical center director positions unappealing, leaving current directors feeling vulnerable and disincentivizing applicants," the report said. "... Medical center directors recognized the potential of being removed without appeal."

The congressional action "undoubtedly had a negative effect" on VA recruitment and retention, said Jason Briefel, executive director of the Senior Executives Association. Who would want to work at a place where "you had a target on your back from day one," he asked.

That fuels turnover at the top of VA hospitals. About one-third of VA facilities, the inspectors reported, "annually experienced at least one change in medical center directors."

This led one director to tell inspectors that long-term vacancies in the top slot can result in "a workforce that feels abandoned and that nobody cares enough for them to get stable leadership."

Among other indications of VA staffing shortages, the inspector general found:

- Thirty-nine percent of the 140 facilities had severe shortages in at least 20 occupations.
- Psychiatry was identified by 85 facilities, more than any other, as a specialty with severe shortages.
- Human resource management was second, cited by 72 facilities.
- Medical officers and nursing shortages were commonly cited across the system.
- Twenty-seven occupations have severe shortages in at least 20 percent of the facilities.

Despite these difficulties, Sitterly said VA's overall workforce has grown by 2 to 5 percent annually over the last five years.

That's not good enough for Chairman Takano.

"We need to know what actions VA is taking to address long-standing staffing challenges and the extent to which VA has made full use of numerous new [hiring] authorities Congress has authorized in recent years," he said. "... We need to understand why VA is struggling to use this and other tools Congress has provided."

Sitterly said his department is now developing a comprehensive legislative package to help recruit and retain the talent it requires to serve veterans.

VA “needs the ability to offer competitive salaries to recruit and retain employees in various occupations that have much higher rates of pay in the private sector,” he said, “particularly in larger cities and rural areas.”