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## Military Judges, One Appointment or Two: Weiss v. United States

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# NOTES AND COMMENTS

## MILITARY JUDGES, ONE APPOINTMENT OR TWO: *WEISS v. UNITED STATES*

### I. INTRODUCTION

The system of checks and balances created by the framers of the United States Constitution symbolizes a recognition of the inherent power struggles that plague any form of government. The Appointments Clause of the Constitution is one device the framers designed to thwart the usurpation of power by one branch of government from another.<sup>1</sup> From a mechanical standpoint, the Appointments Clause provides the sole method for appointing "Officers of the United States."<sup>2</sup> It gives the President power to appoint principal officers with the advice and consent of the Senate and vests appointment power over inferior officers in the President, Courts of Law, or in the Heads of Departments without Senate approval.<sup>3</sup> In its broadest sense, the Appointments Clause addresses the separation of powers

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1. Justice Souter in his concurring opinion wrote:

While it is true that 'the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches,' (cite omitted) the Framers also expressed concern over the threat of expanding presidential power, including specifically in the context of appointments. (cite omitted) Indeed, the Framers added language to both halves of the Appointments Clause specifically to address the concern that the President might attempt unilaterally to create and fill federal offices. (cite omitted) No doubt, Article I's assignment to Congress of the power to make laws makes the Legislative Branch the most likely candidate for encroaching on the power of the others. But Article II gives the President means of his own to encroach, and indeed we have been forced to invalidate presidential attempts to usurp legislative authority, as the *Buckley* Court recognized: 'The Court has held that the President may not execute and exercise legislative authority belonging to Congress.' (cite omitted).

*Weiss v. United States*, 114 S. Ct. 752, 766 n.2 (1994).

2. The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2.

3. *Id.*

permeating our system of government. It does so by limiting the universe of eligible recipients of the power to appoint from which Congress can choose. By so doing, Congress is prevented from dispensing appointment power too freely or keeping it for itself.<sup>4</sup> By thwarting the danger of Congress aggrandizing its power at the expense of the Executive Branch, the Appointments Clause limitations help preserve the structural integrity of our government as envisioned in the Constitution.<sup>5</sup>

This seemingly simplistic clause leaves much to be interpreted. For instance, courts have struggled with the task of classifying officers as either principal officers or inferior officers.<sup>6</sup> There is also controversy over those circumstances that produce the need for appointment, such as when Congress vests an existing office with new responsibilities.<sup>7</sup> In such a case, it is sometimes debatable whether the incumbent officeholder's new responsibilities require him or her to be duly appointed a second time as if being appointed to a new office. This is the debate concerning certain military judges.

All military trial judges and most military appellate judges are also commissioned military officers.<sup>8</sup> Commissioned military officers are considered "inferior" officers of the United States and are duly appointed in accordance with the Appointments Clause.<sup>9</sup> Those military judges who are also commissioned military officers are not appointed to their positions; instead, they are "detailed" to their positions by their commanding officer.<sup>10</sup> Because the position of military judge has evolved into one with responsibilities much like those of civilian judges, critics of the modern military justice system contend that appointment of these positions should be made in accordance

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4. *See Freytag v. Commissioner*, 501 U.S. 868, 879 (1991).

5. *See id.* at 878.

6. This debate is outside the scope of this paper because it has no bearing on the outcome of the *Weiss* decision, however Justice Souter believed that the case would raise a more difficult constitutional question if it involved the appointment of principal officers. *Weiss v. United States*, 114 S. Ct. 752, 766 (1994).

7. *See, e.g., Shoemaker v. United States*, 147 U.S. 282 (1893).

8. Appellate judges may be commissioned officers or civilians. Uniform Code of Military Justice, 10 U.S.C. § 866 (1988) [hereinafter U.C.M.J.]. The Court of Military Appeals consists of five civilian judges who are duly appointed by the President with the advice and consent of the Senate. Arts. 67, 142 U.C.M.J., 10 U.S.C. §§ 867, 942 (1988 & Supp. IV 1992). The appointment of these judges are not at issue in the *Weiss* case.

9. *United States v. Weiss*, 36 M.J. 224, 227 (C.M.A. 1992).

10. *Weiss*, 114 S. Ct. at 760.

with the Appointments Clause.<sup>11</sup> Others argue that the initial appointment of a military judge as a commissioned military officer is enough to comply with the requirements of the Appointments Clause.<sup>12</sup> The Supreme Court of the United States recently settled this issue in *Weiss v. United States*.<sup>13</sup> This note examines whether the current method of appointing military judges violates the Appointments Clause of the Constitution.

## II. STATEMENT OF THE CASE

### A. Facts

Two marines, Eric Weiss and Ernesto Hernandez, pled guilty before courts-martial<sup>14</sup> in separate proceedings to separate crimes. A special<sup>15</sup> court-martial convicted Weiss of one count of larceny for violating Article 121 of the Uniform Code of Military Justice (U.C.M.J.).<sup>16</sup> Weiss was sentenced to three months of confinement, partial forfeiture of pay, and a bad-conduct discharge.<sup>17</sup> Hernandez was convicted by a general<sup>18</sup> court-martial of possession, importation, and distribution of cocaine. Hernandez was sentenced to 25 years of confinement, forfeiture of all pay, a reduction in rank, and a dishonorable discharge.<sup>19</sup>

In separate appeals, the Court of Military Review affirmed the petitioners' convictions. The Court of Military Appeals agreed to consider Weiss's contention that the judge in his case lacked the authority to convict him because the judge was not duly appointed in accordance with the Appointments Clause.<sup>20</sup> In a plurality opinion,

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11. Brief of Petitioners on Writ of Certiorari to the United States Court of Military Appeals (October Term 1992)(on file with author).

12. See *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992) (majority opinion).

13. *Weiss v. United States*, 114 S. Ct. 752 (1994).

14. A court-martial is a temporary court, called into existence by a military order and dissolved when its purpose is accomplished. See Arts. 22-24 U.C.M.J., 10 U.S.C. §§ 822-24 (1988).

15. A special court-martial usually consists of a military judge and three court-martial members. Art. 16(2) U.C.M.J., 10 U.S.C. § 816(2) (1988). A special court-martial has jurisdiction over most offenses under the U.C.M.J., but it may impose punishment no greater than six months of confinement, three months of hard labor without confinement, a bad conduct discharge, partial and temporary forfeiture of pay, and a reduction in rank. 10 U.S.C. § 819.

16. 10 U.S.C. § 921 (1988).

17. *Weiss v. United States*, 114 S. Ct. 752, 755 (1994).

18. A general court-martial consists of either a military judge and at least five members, or the judge alone if the defendant so requests. Art. 16(1), U.C.M.J., 10 U.S.C. § 816(1) (1988). A general court-martial has jurisdiction over all offenses under the U.C.M.J. and may impose any lawful sentence. 10 U.S.C. § 818.

19. Hernandez's sentence was reduced to 20 years of confinement by the convening officer. *Weiss*, 114 S. Ct. at 755.

20. *United States v. Weiss*, 36 M.J. 224, 225 (C.M.A. 1992).

three of the five judges on the Court of Military Appeals concluded that the present system of appointing military judges was adequate. The three concurring judges relied on two largely inconsistent rationales to garner a majority. Two of the judges agreed that military judges are officers who must be appointed in accordance with the Appointments Clause, but believed their initial appointment as commissioned officers adequately satisfied the Appointments Clause.<sup>21</sup> The third judge concurred in the result only, concluding that the Appointments Clause does not apply to the military.<sup>22</sup> Two judges dissented, opining that the duties of military judges are sufficiently distinct from the other duties performed by military officers to require a second appointment.<sup>23</sup>

The Court of Military Appeals affirmed the conviction of petitioner Weiss.<sup>24</sup> Based on that decision, the Court of Military Appeals also affirmed the conviction of petitioner Hernandez.<sup>25</sup> Weiss and Hernandez jointly petitioned for Supreme Court review, and the Court granted certiorari.<sup>26</sup>

#### B. *Issue*

Weiss and Hernandez were primarily concerned with the ability of the military judges who heard their cases to issue autonomous decisions, without influence from the judges' superiors. Judge Advocate Generals (J.A.G.) are the senior uniformed lawyers in each branch of the service except the Coast Guard.<sup>27</sup> They command all military legal officers, including those serving as military judges, and are responsible for the supervision of all military justice matters.<sup>28</sup> The J.A.G. has virtually unreviewable discretion to remove or transfer military judges. All military judges, excluding judges on the Military Court of Appeals, are selected and appointed by their service's

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21. *See id.* at 225-34.

22. *See id.* at 234-40.

23. *See id.* at 240-63.

24. *See id.* at 224.

25. *Weiss v. United States*, 114 S. Ct. 752, 755 (1994).

26. The focus of this note is on the Appointments Clause issue. In *Weiss*, the Court also had to decide whether the lack of a fixed term for military trial judges and for judges sitting on the Court of Military Review violates the Fifth Amendment's Due Process Clause. The Court decided that it did not. *Weiss*, 114 S. Ct. at 760-63.

27. In the Coast Guard the position is held by the General Counsel of the Department of Transportation.

28. Art. 6(a) U.C.M.J., 10 U.S.C. § 806(a) (1988).

J.A.G.<sup>29</sup> Trial judges and judges serving on the Court of Military Review serve at the discretion of the J.A.G. and have no fixed terms of office.<sup>30</sup> Moreover, the J.A.G. prepares annual fitness reports regarding these judges, which are used to decide promotions, duty assignments, and susceptibility to involuntary early retirement.<sup>31</sup> The petitioners argued that decisions of military judges lack adequate assurances of sovereignty; thus, any decision could be tainted by the preferences of the J.A.G.<sup>32</sup>

Weiss and Hernandez believed the system of appointing military judges provided inadequate assurances of protection from impartial decision makers. One of the ways they addressed this concern was by attacking the current method of detailing duly appointed military officers to the position of military judges without requiring a separate appointment. That procedure, they contended, violated the Appointments Clause of the Constitution. In *Weiss v. United States*, the United States Supreme Court settled the issue.<sup>33</sup> This note is concerned with the appropriateness of the Court's conclusion and the analysis used in reaching the conclusion.

### III. DECISION OF THE CASE

The Supreme Court<sup>34</sup> affirmed the convictions of Weiss and Hernandez, holding that the current method of appointing military judges does not violate the Appointments Clause.<sup>35</sup> The majority agreed that since military judges are appointed, pursuant to the Appointments

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29. The Court of Military Appeals has five judges appointed from civilian life by the President with the advice and consent of the Senate for fixed terms of fifteen years. Art. 142 U.C.M.J., 10 U.S.C. § 942 (Supp. IV 1988). Petitioners do not contest the validity of appointment regarding these judges.

30. The fact that these judges have no fixed term of office was a second issue presented by the petitioners and reviewed by the Supreme Court. Petitioners argued that the Due Process Clause requires that military judges must have a fixed term of office. The Supreme Court found that neither history nor current practice supported petitioner's claim that a military judge who does not have a fixed term lacks the independence necessary to ensure impartiality, thus, the lack of a fixed term of office for military judges does not violate the Due Process Clause of the 5th Amendment. *Weiss*, 114 S. Ct. at 760-63.

31. See Art. 6, U.C.M.J., 10 U.S.C. § 806 (1988).

32. Brief of Petitioners on Writ of Certiorari to the United States Court of Military Appeals (October term 1992)(on file with author).

33. *Weiss v. United States*, 114 S. Ct. 752 (1994).

34. Justice Rehnquist delivered the opinion of the Court, in which Justices Blackmun, Stevens, O'Connor, Kennedy, Souter, and Ginsburg joined, and in which Justices Scalia and Thomas joined in part. Justices Souter and Ginsburg filed separate concurring opinions, and Justice Scalia filed an opinion concurring in part and in the judgment, in which Justice Thomas joined. *Weiss*, 114 S. Ct. at 754.

35. *Id.* at 760.

Clause, as officers, there is no need for a second appointment when they are assigned to serve as judges.<sup>36</sup> The rationalization for this conclusion focused on the duties of military judges as compared to the duties of other military officers. The Court found the position of military judge was not so dissimilar to other positions to which a military officer might be detailed, that a second appointment was needed. The Court went on to contend that neither Congress, by implication, nor the Appointments Clause, by its own force, required a second appointment before an officer could discharge judicial duties.<sup>37</sup>

Though concurring in the conclusion, the Justices disagreed on the analysis used to reach it. *Shoemaker v. United States*,<sup>38</sup> a landmark case, recognized that when a duly appointed officer undertakes new duties, the officer can do so without the necessity of a new appointment if the new duties are “germane” to the existing duties of that officer.<sup>39</sup> Despite the Court’s recognition of *Shoemaker*, the majority chose to distinguish *Weiss* from *Shoemaker*, holding a “germaneness” analysis was unnecessary to their conclusion.<sup>40</sup>

However, in dictum, the court did say that even if the “germaneness” analysis were applied, no second appointment would be required because the role of the military judge is “germane” to that of the military officer.<sup>41</sup> Concurring in the conclusion, Justice Scalia and Justice Thomas questioned the majority’s decision not to apply a “germaneness” analysis.<sup>42</sup> The Justices argued that a “germaneness” analysis must be conducted whenever it is necessary to assure that the conferring of new duties does not violate the Appointments Clause.<sup>43</sup>

#### IV. DOES THE APPOINTMENTS CLAUSE REQUIRE A SEPARATE APPOINTMENT FOR MILITARY JUDGES?

Virtually all “officers”<sup>44</sup> of the United States are to be appointed in accordance with the Appointments Clause, and no type is excluded

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36. *See id.* at 757.

37. *Id.* at 760.

38. 147 U.S. 282 (1893).

39. *Id.*; *see, e.g.,* *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992).

40. *Weiss v. United States*, 114 S. Ct. 752, 759 (1994).

41. *Id.*

42. *Id.* at 770.

43. *Id.*

44. The determination of whether a party is an officer also involves a second step of determining whether they are “principal” or “inferior” officers. The majority in *Weiss v. United States* decided that like ordinary commissioned military officers, military judges are inferior officers within the meaning of the Appointments Clause. Though such a distinction would not seem to have any bearing on the outcome of the case, Justice Souter believed that to classify military

because of its special function.<sup>45</sup> It is almost beyond controversy that military judges are “officers” as contemplated by the Appointments Clause. In *Buckley v. Valeo*,<sup>46</sup> the Supreme Court defined the term “officer” as “any appointee exercising significant authority pursuant to the laws of the United States.”<sup>47</sup>

Military Judges exercise significant authority and, therefore, qualify as officers. A court-martial can try any offense committed by a member of the armed services regardless of when or where it took place or who the victim was; the sole requirement is that the accused was on active military duty at the time of the offense.<sup>48</sup> The military trial judge rules on all legal questions and instructs court-martial members regarding the law and procedures to be followed.<sup>49</sup> Military trial judges can decide guilt or innocence and impose sentences.<sup>50</sup> Most significantly, since 1968,<sup>51</sup> with the consent of the accused, military trial judges can sit without a court-martial panel<sup>52</sup> and try a case as would a district judge. Military judges on the Court of Military Review review all cases in which the sentence imposed exceeds one year of confinement, involves dismissal of a commissioned officer, or involves the punitive discharge of an enlisted service member.<sup>53</sup> This appellate court can review de novo both factual and legal findings,<sup>54</sup> and it may overturn convictions and sentences.<sup>55</sup> As officers of the United States, military judges must be appointed in accordance with the Appointments Clause.

A. *No Additional Judicial Appointment of Military Judges is Necessary Because Their Original Appointment as Military Officers Satisfies the Appointments Clause*

The relevant controversy does not center on whether a military judge must be appointed in accordance with the Appointments

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judges as principal officers would raise a “far more difficult constitutional question” because of the greater potential for aggrandizement and abdication. *Weiss*, 114 S. Ct. at 763-69 (Souter, J., concurring).

45. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

46. *Id.* at 126.

47. *Id.*

48. *Solorio v. United States*, 483 U.S. 435, 450-51 (1987).

49. Art. 51, U.C.M.J., 10 U.S.C. § 851 (1988).

50. *Id.*

51. In 1968 Congress revised the Uniform Code of Military Justice. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (codified as amended in scattered sections of 10 U.S.C.).

52. See Art. 16(1)(B), U.C.M.J., 10 U.S.C. § 816(1)(B) (1988).

53. Art. 66(B), U.C.M.J., 10 U.S.C. § 866(B) (1988).

54. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

55. Art. 66(c)-(d), U.C.M.J., 10 U.S.C. § 866(c)-(d) (1988).



Clause. Few would disagree that since military judges exercise significant authority they must be properly appointed.<sup>56</sup> The problem is that military judges are not specifically appointed as such. Rather, military officers with legal expertise are "detailed" to specific courts-martial by their J.A.G.<sup>57</sup> Nevertheless, all military trial judges and most appellate military judges are commissioned officers of their respective service.<sup>58</sup> Commissioned officers of the armed forces are officers of the United States,<sup>59</sup> and are duly appointed in accordance with the Appointments Clause. Therefore, the issue becomes whether the initial appointment as a military officer suffices when that officer is assigned "judicial" duties or whether a new judicial appointment is necessary for military officers to constitutionally carry out judicial duties.

The Supreme Court correctly concluded that Congress did not specifically or by implication require a separate appointment.<sup>60</sup> Where Congress has seen fit to require separate appointments for certain military officers in the past, it has done so expressly. The Supreme Court recognized that Congress expressly requires separate appointment by the President and confirmation by the Senate for a number of top level positions in the military hierarchy.<sup>61</sup> Congress has distinguished

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56. In her concurring opinion, Judge Crawford argued that the Appointments Clause did not apply to the selection of military judges. She argued that at the time of the Constitutional Convention there was no thought given to how the Appointments Clause should be applied to the military trial and appellate judges. Further, she contended that subjecting appointment of military judges to the Appointments Clause did not serve the interest to be protected by the Appointments Clause. Finally, she argued that the unique nature of the military and its officers render the Appointments Clause inapplicable. *United States v. Weiss*, 36 M.J. 224, 234-40 (C.M.A. 1992).

57. Art. 26(a), U.C.M.J., 10 U.S.C. § 826(a) (1988).

58. Appellate judges may be commissioned officers or civilians. Art. 66(a), U.C.M.J., 10 U.S.C. § 866(a) (1988).

59. *See Wood v. United States*, 107 U.S. 414, 417 (1883).

60. *Weiss v. United States*, 114 S. Ct. 752, 752 (1994). The intentions of Congress are of importance because "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). The Supreme Court has long recognized Congress' extraordinary powers to regulate the military. *See United States v. Prive*, 35 M.J. 569, 573 (C.G.C.M.R. 1992) (citing and discussing Supreme Court cases which recognize extraordinary judicial deference granted to Congress' decisions concerning regulation of the military). This deference is premised on the fact that the military is unique in nature. It is a specialized society separate from civilian society whose mission requires that individual rights must yield to overriding military necessity. *Id.* at 574-75.

61. Additional appointment and Senate confirmation is required for the Chairman and Vice Chairman of the Joint Chiefs of Staff, 10 U.S.C. §§ 152, 154 (1988); the Chief and Vice Chief of Naval Operations, 10 U.S.C. §§ 5033, 5035; the Commandant and Assistant Commandant of the Marine Corps, 10 U.S.C. §§ 5043, 5044; the Surgeons General of the Army, Navy, and Air Force, 10 U.S.C. §§ 3036, 5137, 8036; the Chief of Naval Personnel, 10 U.S.C. § 5141; the Chief of Chaplains, 10 U.S.C. § 5142; and the Judge Advocates General of the Army, Navy, and Air Force, 10 U.S.C. §§ 3037, 5148, 8037.

between an office requiring a separate appointment, and a position or duty to which one can be assigned or detailed by a superior officer. For instance, the Deputy and Assistant Chiefs of Staff for the Army are considered “general officers *detailed* to those positions.”<sup>62</sup> Moreover, the sections of the U.C.M.J. concerning military judges expressly provide for “detailing” and “assignment” of military judges with no mention of a separate appointment.<sup>63</sup>

#### B. “Germaneness” Test

Even though Congress may not require a special appointment, the Appointments Clause may demand a separate appointment by its own force. The Constitution dictates that when Congress creates an office, the officer must be appointed according to the demands of the Appointments Clause.<sup>64</sup> The same is not true where Congress merely increases the power and duties of an existing office, provided the new powers and duties are “germane” to the existing powers and duties.<sup>65</sup>

The landmark case creating the “germaneness” exception to the Appointments Clause is *Shoemaker v. United States*.<sup>66</sup> Whether the duties of a military judge are germane to the duties of a military officer is a factual issue. The *Shoemaker* test examines whether the duty in question can fairly be said to be dissimilar to or outside the sphere of official duties.<sup>67</sup> If so, then the duties are not germane to the official duties. In relevant part, *Shoemaker* concerned the enactment of a federal statute establishing a commission to supervise the development of Rock Creek Park in the District of Columbia. Three of the commissioners were appointed by the President with the advice and consent of the Senate, but two others were not similarly appointed. These two men were the Chief of Engineers of the Army and the Engineer Commissioner of the District of Columbia, both of

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62. 10 U.S.C. § 3035 (1988)(emphasis added). Other examples include: the Chief of Staff of the Marine Corps and his assistants who are “detailed” to those positions by the Secretary of the Navy. 10 U.S.C. § 5045. Commissioned officers may be detailed for duty with the American Red Cross by the appropriate military Secretary. 10 U.S.C. § 711a; Secretaries of military departments may assign or detail members of the armed forces to be inspectors of buildings owned or occupied abroad by the United States. 10 U.S.C. § 713; the Secretary of the Navy may assign enlisted members of the Navy to serve as custodians of foreign embassies and consulates. 10 U.S.C. § 5983; and the President may detail officers of the Navy to serve as superintendents or instructors at Nautical Schools. 10 U.S.C. § 5985.

63. See, e.g., 10 U.S.C. § 826(a) (1988)(providing that a military judge shall be detailed to each general court martial, and may be detailed to any special court martial).

64. U.S. CONST. art. II, § 2, cl. 2.

65. See *Shoemaker v. United States*, 147 U.S. 282 (1893).

66. *Id.*

67. *Id.* at 301.

which were already appointed as commissioned military officers.<sup>68</sup> Respondents contended that the Appointments Clause required reappointment of the two officers to their new positions since Congress had created a new office.<sup>69</sup>

The Supreme Court rejected this argument, holding that because these two men were duly appointed officers of the United States when the Rock Creek Park Act was passed, and because the additional duties were not dissimilar to or outside the sphere of the official duties already held by the officers, it was not necessary that they be appointed again by the President and confirmed by the Senate.<sup>70</sup> This ruling confirmed that Congress could increase the power and duties of an existing office without thereby rendering it necessary that the incumbent be nominated and appointed a second time.

In *Weiss*, the majority mistakenly declined to apply a “germaneness” analysis.<sup>71</sup> Instead, the court distinguished the present case from *Shoemaker*.<sup>72</sup> The court held that the cases differ based on the passage of the 1968 Military Justice Act (M.J.A.).<sup>73</sup> Pursuant to the M.J.A., military judges could be selected from “hundreds or perhaps thousands of qualified commissioned officers.”<sup>74</sup> The *Weiss* court found that the present case lacked the concern which was the basis of the *Shoemaker* decision—that Congress was trying to both create an office and also select a particular individual to fill the office in violation of the Appointments Clause.<sup>75</sup>

As Justice Scalia and Justice Thomas pointed out in their concurring opinion, although the cases are distinguishable, the justification for the *Shoemaker* decision does not warrant abandonment of the “germaneness” analysis.<sup>76</sup> The majority failed to consider the full impact of a germaneness analysis. Though germaneness as an exception provides for a more loose interpretation of the Appointments Clause, it also provides limitations. When Congress increases the powers and duties of an existing office, such action does not make it necessary that

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68. *Id.* at 284.

69. *Id.* at 300.

70. *Id.* at 300-01.

71. *Weiss v. United States*, 114 S. Ct. 752, 770 (1994) (Scalia, J., and Thomas, J., concurring in part and concurring in the judgment).

72. *Id.*

73. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (codified as amended in scattered sections of 10 U.S.C.).

74. *Weiss*, 114 S. Ct. at 759.

75. *Id.*

76. *Id.* at 770 (Scalia, J., and Thomas, J., concurring in part and concurring in the judgment).

the incumbent be again nominated and appointed.<sup>77</sup> The germaneness analysis helps assure that Congress does not circumvent the Appointments Clause by simply professing to increase the powers and duties of an existing office when in fact creating an office with an entirely new function. The concern in *Shoemaker* was that Congress was effectively appropriating to itself the appointment power over the two previously appointed commissioners.<sup>78</sup> The germaneness analysis was essential in determining whether such was the case.

Violation of the Appointments Clause may also occur when Congress, without aggrandizing itself, effectively lodges appointment power in someone other than the President, heads of departments, or courts of law.<sup>79</sup> This was the concern in *Weiss*. Pursuant to the M.J.A., J.A.G.s appoint military judges.<sup>80</sup> However, J.A.G.s do not fit into any of the three categories allowed by the Appointments Clause. Thus, if military judges, acting pursuant to the M.J.A., exercise duties non-germane to serving as a military officer, the appointment power vested in J.A.G.s violates the Appointments Clause.

### C. *Did Congress Create a New Office?*

In the past, a position was considered an "office" only when Congress required that the position be filled by the President, heads of departments, or a court of law.<sup>81</sup> Such an approach does not conform with the accepted notion that Congress cannot legislate in violation of the Appointments Clause.<sup>82</sup> Today, the Supreme Court looks at the functions and duties of a purported office to determine whether an office of the United States has been created.<sup>83</sup> This is important in determining whether an existing office has had its powers and duties increased, or whether an entirely new office has been created. Petitioners and respondents in *Weiss* sharply disagreed over the characterization of the functions and duties of military judges.<sup>84</sup>

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77. *Shoemaker v. United States*, 147 U.S. 282, 300-01 (1893).

78. *Id.*

79. *Weiss*, 114 S. Ct. at 765-66 (Souter, J., concurring).

80. 10 U.S.C. § 826(c) (1988).

81. *United States v. Weiss*, 36 M.J. 224, 259 n.5 (C.M.A. 1992).

82. *Id.* (citing *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991)).

83. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

84. The petitioners seem to argue that the functions and duties of military judges are new and separate from their functions as commissioned military officers, even legally trained military officers. Respondents argue that the duties of a military judge are similar to those of a military officer because of the role all military officers play in military justice, and because the military justice functions were performed by military officers until 1968. Respondents apparently view

A historical examination shows that as the position of military judge evolved, the military judge acquired the functions and duties previously performed by other military officers. In 1920, the Articles of War (A.W.) were amended to require that a "law member" be detailed to general courts-martial in the Army.<sup>85</sup> The U.C.M.J. was amended in 1950 to require a detail of a "law officer" to every general court-martial.<sup>86</sup> In 1968, the U.C.M.J. was again amended, redesignating the law officer as military judge.<sup>87</sup> With each amendment, the emphasis remained on placing legal matters in the hands of legally trained officers.<sup>88</sup> The 1968 Amendment changed the title of the law officer to military judge, not to create a new office but to increase the stature of, and to transfer more legal duties to the military judge.<sup>89</sup> It seems clear that Congress transferred legal authority and duties from one military officer to another and renamed the law officer in an effort to put legal matters under the purview of legally trained officers. There appears to have been no intent to create an entirely new office. Duties that were historically those of military officers remained the duties of military officers.

A different analysis is warranted when considering whether officers sitting on the Courts of Military Review need a second appointment. When Congress created Boards of Review, the predecessor to the Courts of Military Review,<sup>90</sup> they created a new office. The Court of Military Appeals has ruled that Courts of Military Review are unmistakably Courts created by Congress.<sup>91</sup> Before amended in 1968, the U.C.M.J. mandated that the J.A.G. of each of the armed forces constitute in his office one or more Boards of Review.<sup>92</sup> Effective in 1968, the U.C.M.J. was revised to read:

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the position of military judge as only a name change and not a significant change in responsibility. *See generally* Weiss v. United States, 114 S. Ct. 752 (1994).

85. 41 Stat. 787, 788 (1920).

86. Art. 26, U.C.M.J., 50 U.S.C. § 590 (repealed 1956).

87. Art. 26, U.C.M.J., 10 U.S.C. § 826 (1988).

88. For instance, prior to the 1920 amendments to the Articles of War, the president of a court martial, who usually was not a lawyer, presided over the trial. *See* para. 89, Manual for Courts-Martial, U.S. Army, 1917. More recently, the Military Justice Act of 1968 for example, required military judges to preside over special courts martial, and authorized an accused to request trial by a court martial composed of only a military judge. Pub. L. No. 90-632, § 2(9), 82 Stat. 1335, 1336.

89. *See* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

90. In 1968, the U.C.M.J. was amended to change the name of the boards of review to Courts of Military Review. Art. 66(a), U.C.M.J., 10 U.S.C. § 866 (1988). The redesignation was only a name change, designed to enhance the stature of the board of review by calling it a court and calling its members judges. *See* S. REP. No. 1601, 90th Cong., 2d Sess. 3, 14 (1968).

91. *Dettinger v. United States*, 7 M.J. 216, 219 (C.M.A. 1979).

92. Art. 66(a), U.C.M.J., 10 U.S.C. § 866 (1958)(amended 1968).

Each Judge Advocate General shall *establish* a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges . . . . Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State . . . .<sup>93</sup>

For the first time, the military had a level of formal appellate review by a legally trained officer. Furthermore, this was a permanent tribunal as opposed to the temporary courts-martial.<sup>94</sup>

Nevertheless, the mandate issued to each J.A.G. to establish Boards of Review was consistent with the traditional practice of vesting authority and responsibility for establishing military tribunals in military officers and giving them the authority to appoint the members.<sup>95</sup> Thus, the redesignation of Boards of Review as Courts of Military Review should be viewed as only a name change. Only organizational changes were made in the 1968 amendment to improve efficiency and protect the independence of appellate military judges.<sup>96</sup> The name change was accompanied by no new authority, duties, or appointment procedures for appellate military judges.<sup>97</sup>

#### V. CONCLUSION

An examination of military judges leads to the conclusion that their duties and functions are germane to those of military officers generally. Military judges have no inherent judicial authority. They gain their judicial authority from the court-martial to which they are detailed. Until detailed to a specific court-martial by their J.A.G., military judges have no more authority than any other military officer of the same grade or rank.<sup>98</sup>

Once detailed, military judges exercise unique and important functions within the military judicial system. Such functions are not so distinct from the duties of other military officers to be considered outside the sphere of a military officer's official duties. It has been held that the military remains a specialized society separate from civilian society.<sup>99</sup> This also holds true in the area of military justice. In the

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93. *United States v. Weiss*, 36 M.J. 224, 231 (C.M.A. 1992)(emphasis added).

94. *Id.*

95. *Id.* at 231-32.

96. *Id.* at 232-33.

97. *Id.*

98. *Id.* at 228.

99. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

military justice system it is not only the military judges that participate; all military officers play a role. The Supreme Court majority in *Weiss* highlighted a number of powers and duties within the military justice system that are exercised by non-judicial military officers.<sup>100</sup>

Furthermore, the duties now performed by a military judge were historically performed by non-legal military officers. As the position of military judge has evolved, the military judge has acquired virtually all the duties once performed by the President and members of a court-martial.<sup>101</sup> Since judicial duties have always been performed by military officers, regardless of legal training, and such duties continue to be shared by all military officers, even if disproportionately, such duties are germane to the duties of military officers.

Military officers, including military judges, are "officers of the United States" as contemplated by the Appointments Clause. As such, they must be appointed in accordance with the Appointments Clause. In *Weiss*, the Supreme Court properly reached the conclusion that military judges had been sufficiently appointed in accordance with the Appointments Clause when they were appointed as military officers and did not require a second nomination and appointment when they were assigned positions as military judges.<sup>102</sup> However, the majority improperly concluded the *Shoemaker* "germaneness" exception did not apply in the present case. In fact, "germaneness" should be considered whenever it is necessary to assure the conferring of new duties by Congress does not violate the Appointments Clause.<sup>103</sup> The Court did correctly state in dictum that the duties of military judges are not so dissimilar or outside the sphere of the duties of military officers as to require a separate appointment. To hold military judges to a separate appointment would do little to further the policies of the Appointments Clause.

*P. Dean Brinkley*

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100. Commissioned officers, for example, have the power and duty to quell quarrels, frays, and disorders among persons subject to the U.C.M.J. and to apprehend persons subject to the U.C.M.J. who take part therein. Art. 7(c), U.C.M.J., 10 U.S.C. § 807(c) (1988). Commanding officers are authorized to impose non judicial punishment which includes restricting a service member's movement for up to 30 days, suspending the member from duty, forfeiting a week's pay, and imposing extra duties for up to two consecutive weeks. 10 U.S.C. § 815. *Weiss v. United States*, 114 S. Ct. 752, 759 (1994).

101. *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992).

102. *Weiss*, 114 S. Ct. at 760.

103. *Id.* at 759.