

**107<sup>th</sup> CONGRESS, 2001 – 2002  
UNITED STATES SENATE  
COMMITTEE ON ARMED SERVICES**

**ROOM SR-228  
WASHINGTON, D.C. 20510-6050  
(202) 224-3871**

**Advance Questions for Charles E. Erdmann  
Nominee for the Position of Judge,  
United States Court of Appeals for the Armed Forces**

- 1. What is your view of the primary responsibility of the Court of Appeals for the Armed Forces?**

The primary responsibility of the Court of Appeals for the Armed Forces is to provide an independent civilian appellate review of those areas specified in Article 67, UCMJ. The purpose of that review is to protect the rights of the accused while ensuring that the military is able to maintain good order and discipline and also to ensure uniformity in enforcement of the UCMJ in the different services.

- 2. In your view, has the Court of Appeals for the Armed Forces fulfilled the expectations of Congress which the Court was established in 1951?**

Yes

**Are there any legislative changes needed in statutes concerning the Court of Appeals for the Armed Forces?**

Based on my present knowledge of the Court, I do not believe that any legislative changes are necessary at this time.

**Are there any changes needed in the jurisdiction of the Court of Appeals for the Armed Forces?**

Based on my present knowledge of the jurisdiction of the Court, I do not believe that any changes are necessary at this time.

- 3. Are the current compensation and retirement provisions for the Court sufficient to ensure that, if confirmed, you will be able to exercise your responsibilities in an impartial and independent manner?**

Yes

- 4. Please describe the three decisions of the Court of Appeals for the Armed Forces which you believe to have been the most significant.**

United States v. Jacoby, 29 C.M.R. 244 (C.M.A. 1960) - stating that “the protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces”.

United State v. Thomas, 22 M.J. 388 (C.M.A. 1986) - definitively stating that unlawful command influence is “the mortal enemy of military justice”.

Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (1988) - protecting the independence of military judges.

**5. In your view, what are the major strengths and weaknesses of the military justice system?**

Major Strengths:

- Oversight by independent civilian court.
- Greater protections against self-incrimination are provided under Article 31 than in civilian criminal proceedings.
- Every military accused is entitled to free military defense counsel.
- The investigating officer in an Article 32 investigation is independent from the prosecutor and the accused’s right to participate in that proceeding provide greater protections than in the civilian criminal proceeding.

Major Weaknesses:

- Real and perceived instances of unlawful command influence.
- Lack of understanding of the procedures and protections afforded under the UCMJ that contribute to a misconception in the eyes of the public and civilian bar that the military justice system is flawed.
- The perception that the commander has too great a role in pre and post trial procedures.

**6. What is your view of the relationship between the rights of service members and the disciplinary role of commanders?**

The balance between the rights of service members and the necessity for commanders to maintain good order and discipline lies at the heart of the UCMJ. The two interests need not be in conflict and are so interrelated that they cannot be analyzed separately. A military commander needs the ability to enforce behavior standards in a wide variety of situations not found in civilian society. An efficient military force requires high morale that is fostered by a military justice system that ensures that the rights of military members are vigorously protected.

**7. What is your view of the role of the doctrine of *stare decisis* in terms of prior decisions of the Court of Appeals for the Armed Forces?**

The doctrine of *stare decisis* is important in that it provides stability, consistency and predictability for both military commanders and service members. The doctrine, however, does not mean that precedence should be cast in iron. The law is an evolving process that must be flexible enough to address the changing

conditions and circumstances that our military justice system encounters. Judicial change should be evolutionary and done only with careful consideration.

**8. In view of Article 36 of the UCMJ, what is your view as to the hierarchy of sources of law that must be applied by the Court in determining appropriate rules of evidence and procedure in courts-martial?**

The hierarchy as to the sources of law in the military justice system is similar to the hierarchy found in state and federal courts. The U.S. Constitution is the highest source followed by federal statutes (UCMJ), Executive Orders (Manual of Courts-Martial), and administrative directives (DoD and service regulations). All lower sources of authority must be consistent with higher authority, although they may provide greater protections for service members.

**9. In your view, what is the standard for determining when the court should apply a rule that is different from the rule generally applied in the trial of criminal cases in the federal district courts?**

Where the Manual for Courts-Martial provides guidance on a particular matter and that guidance is not contrary to or inconsistent with the UCMJ or the Constitution, it should be applied. Where the Manual is silent, the rules generally used in the trial of criminal cases in federal courts can be utilized if not inconsistent with the UCMJ.

**10. The problem of command influence, including instances involving judge advocates as well as commanders, is a constant threat to the military justice system. What is your view as to the role of the Court of Appeals for the Armed Forces in addressing this problem?**

The Court of Appeals for the Armed Forces has adopted a strong position that unlawful command influence cannot be tolerated in the U.S. military justice system. The Court must continue to be vigilant in this area and protect service members from unlawful command influence.

**11. What is your view of the role of legislative history in judicial interpretation of the law?**

Under the standard rules for statutory interpretation, a court first looks to the plain language of the statute. If that language is unclear or ambiguous, the court can look to relevant legislative history. In those situations, legislative history is extremely helpful to courts in determining the intent of Congress.