United States Court of Appeals
for the Armed Forces

Commemoration of the 100th Anniversary of the Completion of the Courthouse

Washington, D.C.
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Proceedings

(The Court convened in special session at 10:00 a.m.)

CHIEF JUDGE EFFRON: Good morning. Today the Court meets in special session to commemorate the centennial of this historic courthouse. Since 1910, the courthouse has served as the home for the U.S. Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Armed Forces, and the predecessors to both courts.

The people of the United States, through their elected representatives, established these courts to provide for the fair and efficient administration of justice. Today we honor all who have come here in pursuit of equal justice under law: counsel, litigants, judges, and staff. We express our appreciation to each person who has entered this courtroom just to observe a case, a simple but meaningful act that underscores the commitment of our democracy to open and public judicial proceedings.

On behalf of my colleagues, Judges Baker, Erdmann, Stucky, and Ryan, and Senior Judges Darden, Cox, Sullivan, Crawford, and Gierke, welcome to the Court and this special session. We are honored by the presence of so many members of the judiciary from our neighboring courts, and from the military trial and appellate bench. We are joined by military and civilian attorneys from a wide variety of courts, agencies, departments, law firms, and bar associations, including many who have practiced before the D.C. Circuit and our Court.

We welcome members of the academic community, whose scholarship enhances our historical perspective and our contemporary practice. We also welcome officials from the General Services Administration and the Department of Defense, who provide outstanding administrative support for the Court and this beautiful courthouse.

We are deeply honored by the presence of The Honorable John Roberts, Chief Justice of the United States, whose career as an advocate, judge, justice, and leader of the federal judiciary exemplifies an enduring commitment to excellence in the legal profession. Among his many current duties, Chief Justice Roberts serves as the Circuit Justice for the D.C. Circuit, a

court on which he previously served. He also serves in a similar capacity with respect to filings from our Court. Thank you, Chief Justice Roberts, for being with us today.

We now have the special privilege of hearing from The Honorable David Sentelle, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit. Chief Judge Sentelle not only serves on the court that previously occupied this courthouse, but he has also sat with our Court by designation. Scholar, friend, neighbor, and colleague, we welcome you back to the Court and to the podium. Chief Judge Sentelle.

CHIEF JUDGE SENTELLE: I'm honored to be here today to honor this place. I do have the personal connection to which Chief Judge Effron referred, that I have sat here myself -- not during the time before 1952. I did become a judge at an earlier age, but not quite that early.

I'm honored personally, I think of the judges that I've known here, when I first came up and was first designated. One of my most favorite people in the world, Robinson Everett, who was Chief Judge at the time, personified the Court for me and I see heads nodding around the room for memory of Robbie Everett and his distinguished career, first with Duke Law School and the military, and then as the Chief Judge of this Court.

I think for a moment, can you honor a place? If you do, why you should honor a place? Isn't that just a physical entity? And I think, no, it's a lot more than that.

If you think, first, of what Lincoln said of the place at Gettysburg. That was not just a piece of ground in Pennsylvania; that represented the turning point of the war to establish that a land where government is of the people, by the people, and for the people, where equality is known, would not vanish from the face of the earth.

We think about a place like Iwo Jima, that has become not an island in the Pacific, but the very embodiment of the valor of the United States Marines.

You hear of a building like the White House, say you hear, "the White House today announced," you know that a limestone mansion didn't suddenly start talking; you know that that represents the Chief Executive of the United States.

When you hear, “the Pentagon today reported that Americans were killed in Afghanistan,” it’s not an oddly shaped office building in Virginia; the Pentagon is the embodiment of the military history and honor of the United States.

And so, this building is something more than an attractive courtroom. This building represents, first, equal justice before the law in the District of Columbia. Today, it represents the extension and guarantee of justice under law for members of the armed forces. We know it had not always been as smooth and true a guarantee as it became in the Uniform Code of Military Justice, and we know that it had not always been reviewed by civilians in the way that it has in this Court.

So think about what this building represents, not how pretty it is or what fine architecture it has, but what this is, what happens here, what has happened here in the past. We should all feel honored that we have a chance to honor it. Thank you, Chief Judge.

CHIEF JUDGE EFFRON: Thank you, Chief Judge Sentelle, for those very special remarks. Chief Justice Roberts has graciously agreed to participate, along with Chief Judge Sentelle, in dedicating a plaque honoring the courts that have sat in this courthouse over the past one hundred years. After the dedication, Chief Justice Roberts must depart to meet his schedule for a very important session at the Supreme Court, and we thank him again for being with us.

I now invite Chief Justice Roberts and Chief Judge Sentelle to participate in the dedication, and I would also ask my colleague, Judge Scott Stucky, who planned today’s event and who designed the plaque, to join us in the well.

We now present this plaque in honor of all who have participated in the work of the courts that have occupied this courthouse for the past hundred years, and with special recognition of the men and women of the armed forces for their dedicated service to our Nation.

(The plaque was presented.)

This will hang proudly in our foyer.

Judge Stucky will now present remarks on the history of this courthouse.

JUDGE STUCKY: Thank you Chief Judge Effron.

John Ruskin, in The Stones of Venice, one of the most influential artistic works of the nineteenth century, wrote:

> We require from buildings, as from men, two kinds of goodness: first, the doing their practical duty well: then, that they be graceful and pleasing at doing it, which last is itself another form of duty.

For a century, the elegant little building at 450 E Street, Northwest, has been fulfilling these requirements: serving first the D.C. Circuit's and then our Court's practical needs, and performing that function in a "graceful and pleasing" manner which, I dare say, elevates the thoughts and feelings of those who enter it. Justice, like men, does not live by bread alone; the dispensing of justice cannot but be advanced by its being done in surroundings that emphasize the importance of what takes place there. It is the great good fortune of our Court that it has been able since 1952 to dispense justice in such surroundings.

Today marks the hundredth anniversary of the opening of the courthouse. When built, it was the first federal courthouse in the District of Columbia to be built as such. Remember that the Supreme Court was located in the Capitol until 1935. The lower federal courts at the beginning of the 20th century were located in the D.C. City Hall, the oldest part of which dates to 1820. The City Hall is next door to our courthouse and, after a magnificent renovation, houses our friends at the D.C. Court of Appeals.

There was definitely something in the air in the early twentieth century. In 2007, our Court heard cases under our Project Outreach in New Orleans and Indianapolis. In New Orleans, we were privileged to hear one case in the ceremonial en banc courtroom of the Fifth Circuit, which will hold at least twenty judges. In Indianapolis, the Chief Judge of the Southern District of Indiana showed us around the equally ornate, if smaller, courtroom that he uses on a daily basis. Both courthouses are stunning examples of the beaux arts classical style in favor for official buildings until the 1930's. Both have marble, mosaics, frescoes, and the like, which produce an overwhelming effect of grandeur.

Our courthouse is, of course, very different in tone from those in New Orleans and Indianapolis. It is smaller, less

ornate, and was dedicated exclusively to judicial business. Many of these courthouses doubled and still double, as post offices.

The architect of our building was Elliott Woods (1865-1923), who served from 1902 until his death as Architect of the Capitol. His tenure in that position saw the building of the first House and Senate office buildings, now the Cannon and Russell buildings. Consulting architect on the courthouse project was Paul Pelz, who was primarily responsible for the Library of Congress, now the Jefferson Building, probably the most lavish example of beaux arts architecture in America.

From the beginning, the courthouse was seen as a part of a formal, balanced, ensemble of classical buildings, centered on the old City Hall, which would adorn Judiciary Square. Indeed, the first plans for the courthouse had it as an extension to the City Hall, with a somewhat more Georgian look than its present form. When the decision was made to erect a separate building, little had to be changed in Woods's interior design; the building was detached, turned ninety degrees to the north, and given a somewhat more ornate exterior. The plans for an ensemble of buildings had to wait for the New Deal. The Juvenile Court building at 4th and E Streets, built in 1937, is a near copy of Woods's design, but differs in detail and lacks the grace and elegance of the original building. Corresponding buildings, which have recently had exterior renovations, were built across E Street somewhat later.

The courthouse, when occupied in 1910, had two functioning floors plus a basement that was used for building systems and storage. The first floor, as today, housed the Clerk's Office and related functions; the second floor contained three judges' chambers, a ceremonial lobby, the courtroom, and the judges' conference room. The third floor, which today houses two judges' chambers and the library, was left unfinished at that time. It was finished in 1937. While the ceilings are lower and the windows shorter than on the second floor, the construction was done with remarkable sensitivity to the original interior finish. From the occupation of the building by the Court of Military Appeals in 1952 to the expansion of that court to five judges in 1991, the two third floor chambers and the chamber on the east side of the second floor were occupied by judges, while the two chambers on the west side were carved up into office space. The dropped ceilings and partitions in these chambers were removed in 1991, when they were restored to their original appearance and function. In the 1990's, the

basement was redone to provide needed office and library space. The most recent change is the addition of an underground parking garage, opened in 2006, which is shared with the District of Columbia courts and connects directly with the courthouse. Here I would be remiss if I did not mention the fact that, in connection with the garage project and other areas of common interest, our Court has developed an excellent relationship with the District of Columbia Court of Appeals under its present Chief Judge, Eric Washington, and his predecessor, Annice Wagner.

The exterior is of granite at the basement level and Indiana limestone above, 100 by 125 feet in dimensions. The north facade on E Street has an Ionic portico, with an entrance loggia at street level and a balcony on the second-floor level. One very nice touch in these days of security mania is that the second-floor windows retain their original function as French doors to the balcony; on pleasant days, courthouse workers eat lunch on the tables provided for the purpose on the balcony. The east and west long elevations differ only in minor detail, both having five large central windows illuminating judges' chambers. The south elevation, which faces a small park and the Moultrie courthouse, has pilasters framing three large windows, which illuminate the judges' conference room.

The main public areas of the courthouse are on the second floor. The lobby is 61 by 25 feet, floored with black and white marble squares. The walls are decorated with Ionic pilasters, and the whole is illuminated by the three tall windows/French doors, which give access to the balcony. The ceiling has a fretwork band with acanthus quatrefoils. The courtroom is, of course, the center of the building. It is 66 by 41 feet with a ceiling height of 35 feet. It was originally lit by a large skylight, which was roofed over in 1956 -- because it leaked -- and is now lit artificially from above. The decoration in the courtroom is significantly more ornate than that of the lobby. The paired pilasters are Corinthian and are fluted. The ceiling rises from an elaborate cornice with ogee, egg and dart, and dentil moldings. The skylight is surrounded by a fretwork band.

One of the most remarkable features of the courtroom is the survival, in daily use, of all or virtually all of the original furnishings. The mahogany judges' bench as originally built would accommodate five judges; thus, no subsequent reconstruction was necessary. Three of the massive judges' chairs are also original. The bench is decorated with frets, dentils, and pilasters; the podium, counsel's tables, and

clerk's and bailiff's tables all are decorated with uniform fretwork. A 1939 photo of the six D.C. Circuit judges shows the bench and the curtain screen behind it just as they are today. The present courthouse has three magnificent judges' desks, with fret and acanthus designs that replicate the ceiling work in the lobby. Judge Erdmann and I each have one, and the third is elsewhere in the building.

Also of note on the second floor, though not a public area, is the judges' conference room behind the courtroom. The ceiling has three groined vaults, unique in the building except for the barrel vault in the library, which has been covered over. As mentioned before, there are three large windows facing south, which illuminate the room. Massive pilasters frame the windows, with coffered arches springing from them and dividing the vaults. There are two identical fireplaces on the ends of the room, each bearing a decorative tablet carrying the national eagle and shield.

How did a court less than two years old enter into this inheritance? As Senator Everett Dirksen said in a different context, "It was an absolute, unadulterated, unmitigated, unrefined, unconfined, deal." When the D.C. Circuit prepared to leave the courthouse for its new building on Constitution Avenue, the new Court of Military Appeals was temporarily using the courtroom of the Court of Customs and Patent Appeals -- the C.C.P.A., which was later incorporated into the Federal Circuit -- in the Internal Revenue Service building in the Federal Triangle. That courtroom was only in use a few days a month.

According to the court's historian, Jonathan Lurie, Chief Judge Quinn first attempted to get the old Supreme Court chamber in the Capitol, but was rebuffed by the Chairman of the Senate Rules Committee. The Chief Judge of the D.C. Circuit had made an informal agreement with the Chief Judge of the C.C.P.A. that that court could move into the courthouse when the D.C. Circuit vacated it. The C.C.P.A. was thus happy to have the Court of Military Appeals share its courtroom, since they expected to move shortly. Chief Judge Quinn, drawing on contacts from his days as Governor of Rhode Island, simply went around this arrangement and got an appointment with President Truman, whom he persuaded to direct the Public Buildings Commissioner to allocate the building to the Court of Military Appeals. The Chief Judge of the D.C. Circuit, in ignorance of this, informed Quinn that there would be no room for the Court of Military Appeals in the new Constitution Avenue courthouse, and that the old courthouse would be declared surplus. Presidential

intervention thus cleared the way for us to move into the building, which we did in October 1952. The reaction of the C.C.P.A. judges is not recorded in Lurie's book.

So here we are, a century into the life of this extraordinary building and nearly sixty years into our occupation of it. Its survival in such fine condition is due to many factors. For one thing, it has always been used for its original purpose, an appellate courthouse, so there has been no need to do major surgery on it and the very fine fittings have remained in the building. Also, such construction and renovation as has taken place -- such as the finishing of the third floor in 1937 -- have been done with sensitivity to the integrity of the building. Finally, the Court has benefited from its status as a federal institution, receiving outstanding support from the Congress, the Department of Defense, and the General Services Administration. Ultimately, those who have occupied and cared for the building for the last century have clearly felt a sense of stewardship for this national treasure and have done what is necessary to keep it in first-rate condition.

Here, I must pay tribute to former Chief Judge Gene Sullivan, who was largely responsible for the restoration of the courtroom to its original glory, former Chief Judge Walter Cox, under whom the renovation of the basement took place, and former Chief Judges Sparky Gierke and Susan Crawford, under whom the garage project came to fruition. I also want to mention Ben Hruska, a doctoral candidate in history at Arizona State University, who as my intern in the summer of 2009 made enormous research contributions to these centennial proceedings. Finally, I must pay a special tribute to our present Building Manager, Joe Lusk, an outstanding civil servant to whom all of us who work in the building owe a great deal. Joe is ever-vigilant in the difficult task of maintaining a century-old structure.

In 1984, a contractor working for the General Services Administration wrote a summary of the significance of the courthouse for its nomination to the National Register of Historic Places. It concisely sets out the remarkable character of this national treasure:

> The [courthouse] is a particularly fine and remarkably early example of revived (20th century) Greek Revival architecture. . . . The . . . building is exceptionally well-executed. The

> materials are fine without being lavish, and the refined restraint displayed throughout the structure exemplifies the best architectural thought of the conservative school during the first decade of this century. This singularly harmonious building is extravagant by modern standards in its use of space, fully a third of which is devoted to stairs, passages, and stately lobbies. The dignity of the law and esteem in which it should properly be held are well expressed by the setting provided by this building. There is in Woods' building no false note of pomposity or meretricious display. A judicious restraint and fine sense of balance mark this judicial structure, one of the handsomest of its period among Government buildings.

I welcome you to these festivities. In my time on the Court, I have come to a new appreciation of the repose, elegance, balance, and order of this great structure, and hope that many others will do so as well. Thank you.

CHIEF JUDGE EFFRON: Thank you, Judge Stucky; and for the opportunity to be in the building, thank you, Chief Judge Quinn.

Our final speaker is Professor Steven Goldblatt, who will highlight a number of cases that illustrate the proceedings in this courthouse over the last one hundred years.

At the Georgetown University Law Center, Professor Goldblatt serves as Director of the Appellate Litigation Program, and Director of the Supreme Court Institute. In addition, he serves our Court with great skill and expertise as the Chair of the Court's Rules Advisory Committee.

Like many appellate courts, our Court benefits from the voluntary services of the legal profession who serve in an advisory capacity. Professor Goldblatt's dedication to improving the practice of law reflects the best in our profession. Professor Goldblatt.

PROFESSOR GOLDBLATT: Thank you, Chief Judge Effron. Thank you to the Judges of the United States Court of Appeals for the Armed Forces, Chief Judge Sentelle, Judge Brown, Judges of the District of Columbia Court of Appeals, other distinguished, jurists, distinguished guests.

This is both an honor -- a particular honor to me,

obviously -- but it's also something I really look forward to, because I've litigated many cases before both of these courts. As Chief Judge Sentelle pointed out, he was not on the D.C. Circuit when it was here or when it moved to its new building, and I wasn't around early enough to appear here when the Court of Appeals for the Armed Forces moved in. But in thirty years, I've appeared many times before those courts as well as the D.C.C.A. and the U.S. Supreme Court, and that's the perspective I bring to this.

The problem I ran into in reading the histories of the Court -- which are great -- and speaking to people like the Clerk, Bill DeCicco, and Chris Sterritt, I quickly realized there was no way on earth I was going to do the significant decisions of both of these courts over one hundred years in twenty minutes or less.

So, I'll use my advocate's right to change the focus of the argument and come up with a different theme. I also wanted to change it because I think that approach understates what happened to these courts while in this building. It's the genius of our system that there are courts all across the country that do a great job, that's what they're supposed to do, and these courts certainly do that as well.

But something more happened here, something that doesn't happen in other courts across the country and is, in fact, very rare. Both of these courts, while they were here, transformed themselves into courts of greater national importance than anybody thought they had when they came into the building. It wasn't simply Congressional mandate that created that; it was the work that these courts did that produced that result. The only instance I can think of where that has occurred would be the Supreme Court of the United States when Chief Justice Marshall was the Chief Justice, and that would bring you into Marbury v. Madison,[1] but if I start talking about that, the red light's going to go on very fast.

So I would go back and start in the beginning. First of all, the D.C. Circuit came into this building around 1910. It's not the D.C. Circuit. It's the Court of Appeals for the District of Columbia, and like the D.C.C.A. today, it was a leading court, but it was considered a state court, essentially the equivalent of the highest state court in the District of Columbia, and not really a federal court. That was true,

[1] 5 U.S. (1 Cranch) 137 (1803).

notwithstanding that in that capacity in the 1920's it decided cases like Frye v. United States,[2] which was the leading case in the country on the admissibility of polygraph evidence under the Federal Rules of Evidence, and remained in place by the Supreme Court -- it was not touched, it was the standard for the country -- until the 1990's, when the Court granted certiorari in Daubert.[3]

But Congress still didn't see it as being a federal court, and the best example I can give you of that is that in the early 1930's, when we were in the height of the Depression, they actually tried to cut their salaries. You can imagine what kind of a reaction that produced. They actually had to go to the Court of Claims, and up to the Supreme Court. In 1933, the Supreme Court declared that they were indeed a constitutional court; their salaries couldn't be cut.[4] But it was a six-to-three vote.

What intrigues me is that seventeen years later, President Truman, in dedicating a new building -- the new courthouse that this Court would go into -- declared that "in this building, more issues of national importance will be decided than anywhere else other than the Supreme Court." Now, that is not a bad run for seventeen years, to go from having a salary cut to what the Court is today, which is the second most important Court in the country.

Now, how did that happen? Well, a lot of factors, but mostly it was the emergence of administrative law; the agencies were built. That didn't exist -- the Court had jurisdiction over the Commissioner of Patents when it first came into the building -- but administrative law as we know it today only started in the late 1920's through the 1930's. Through the New Deal we have the emergence of what was then called the Federal Radio Commission, which became the FCC, over which the D.C. Circuit has exclusive jurisdiction by a petition for review. All of the other agencies emerged, and this Court -- not simply through Congressional mandate -- became the most important court with regard not only to administrative law, but any cases involving litigation in which the U.S. Government was involved. That's the specialty court that it is today, although obviously now it is also a regional circuit, but that occurred in the 1940's.

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[2] 293 F. 1013 (D.C. Cir. 1923).
[3] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).
[4] O'Donoghue v. United States, 289 U.S. 516 (1933).

It was a hard battle, but that's where it is today. And although in those years there were decisions like Eisentrager,[5] Tokyo Rose, Axis Sally,[6] those cases and others that I could go through, where the Court set out very, very important things. Much of that jurisdiction is now ably handled by the D.C.C.A. It is now one of the lead courts in the country doing that.

But for me, what was truly the remarkable thing that the D.C. Circuit did in those early years when administrative law was just developed around it, was -- and any appellate lawyer knows this as well -- the critical decisions were the standard of review for agency action, standing, all the technical stuff that puts everybody else to sleep, but we get all excited about. Because what it does is it sets the balance between letting agencies do their job and protecting the rights of the regulated.

This Court emerged not only because of Congress giving it jurisdiction, but because of its expertise; it is the expert court in the country on administrative law and government litigation. It's reflected in its docket, and as the Chief Justice said in 2005 when he was on the D.C. Circuit, "it's not simply because Congress has mandated that this be the case. Lawyers prefer coming to this Court, and the district courts as well, to litigate these cases because these courts have the best-developed body of law on that subject." So, in that sense, that transformation -- from the Court of Appeals of the District of Columbia to the second most important court in the country -- all occurred here, in this building. It's that transformative change to a court of national significance that, I think, is really what we would want to dedicate here.

Now, how am I going to segue into the Court of Appeals for the Armed Forces? After all, you guys have the same jurisdiction that you had. Nothing could be further from the truth. The Court that came into this building in 1952 is at best a distant relative to the Court that exists today. The military justice system today, largely through the effort of this Court, is in much better shape than it was in 1952. You have to remember, this Court was created because of a situation that existed, which was that we were asking people to join the armed forces -- or conscript them in, back in those years -- and risk their lives or lose their lives to defend a system of justice that we did not provide to them in the military.

[5] Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949).
[6] Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950).

Command influence and the lack of any uniform system plagued military justice and had since its inception.

This Court became the first civilian court to sit atop the military justice system, and it was done almost out of a sense of desperation because something had to be done to provide for justice in the military system.

But there was a question mark attached to the Court. It was called, originally, the "Judicial Council" in the legislation. And in a city where you are your acronym, calling it the Court of Military Appeals was also not a great idea, as it then became C.O.M.A. It was challenged in the early years. There were battles over the Court's authority, there were threats to transfer its jurisdiction, there were fights fought all along the way.

The issue that really was put in the hands of the Court was, "how do you make this system just?" You can see it in the decisions, in Jacoby,[7] in the 1960's, the concept of "military due process," which was always modified by the needs of the military, was a convenient way to water down due process. The Court served notice that that was stopping; it reversed prior decisions and said, "The Sixth Amendment right to confrontation applies in military trials," and the Court served notice that if the military wanted to relax constitutional protections in the name of security or in the needs of defense, they would have to justify it.

For me, however, the 1980's are significant years and there a couple of things I want to mention from that era. First of all, for those of you who might not be familiar with what "command influence" means, let me give you a caption of a case that was decided here, and that ought to tell you. The caption is: United States Navy-Marine Corps Court of Military Review, Petitioners, v. The Honorable Frank C. Carlucci III, Secretary of Defense, June Gibbs Brown, Inspector General of the Department of Defense, and Rear Admiral Hugh D. Campbell, U.S. Navy, The Judge Advocate General of the Navy, Respondents.[8] That is command influence. A panel of the CMR had decided a case that reversed the conviction that had been entered by the court-martial. The next thing they know, they received orders from the Judge Advocate General -- and of course they're military, so those orders had to be obeyed -- to make their commissioners and

[7] United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244 (1960).
[8] 26 M.J. 328 (C.M.A. 1988).

their files related to the decision in the Billig[9] case available for inspection by the Inspector General, and that they would undergo interrogation by the Inspector General as well. That is also command influence.

The court, in desperation, filed a petition for extraordinary relief with this Court. In a remarkable decision invoking the All Writs Act and the power of the Court to intervene and prevent corruption of the decisional process within the military -- which would affect other cases that were pending -- the Court enjoined the orders of the Judge Advocate General of the Navy. Had the Court ruled any other way, any sense that this Court could control against command influence would have been destroyed, because what more command influence can you have than dragging your decisional body -- your military court -- and exposing their files and decisional process to inspection by a DoD investigator? So that, to me, is one of the most significant decisions.

The other thing that's significant about it is that one of the bases upon which the Court grounded its power to intervene was based on what I considered the turning point for this Court. There was a statute that was passed that changed the nature of this Court in a way that no one can dispute, and that's when Congress gave the Supreme Court of the United States certiorari jurisdiction over this Court. What that said was, "this Court is deciding important issues. This Court is the highest court over the military and it is worthy of review by the Supreme Court of the United States." That was part of the reasons why the Court exercised its jurisdiction in the Carlucci case and, to me, validates the importance of the Court in a way that nothing else can.

Since certiorari jurisdiction has been conferred on the Court, nine cases have been granted review. The Court has been affirmed seven of the nine times. Some of those decisions, like Solorio,[10] reversing prior decisions and giving the military jurisdiction over all crimes committed by a servicemember while in the service, are groundbreaking decisions. Just last year, in United States v. Denedo,[11] a three-to-two decision by this Court, and then a five-to-four decision by the Supreme Court of the United States in a very close case with arguments on both sides that was decided just on the basis of numbers. Where it left the Court was -- it left the entire military system with

[9] United States v. Billig, 26 M.J. 744 (N.M.C.M.R. 1988).
[10] Solorio v. United States, 483 U.S. 435 (1987).
[11] 66 M.J. 114 (C.A.A.F. 2008), aff'd, 129 S. Ct. 2213 (2009).

coram nobis jurisdiction, one of the most infrequently used powers that courts have but one of the most important powers that courts have over their own judgments.

With all that, you have today -- in all the decisions that I can't go into -- this Court, unlike the court that came into the building, no one disputes that it is the highest court within the military. What we have today is a military system of justice that bears no resemblance to what it was when the Court came in, in 1952. Statutes are now pending to expand certiorari jurisdiction to all decisions of the Court. There is even an argument that the commissions that we're using -- that have so much criticism -- would be better off in the military system as a solution to how to provide fair and just dispositions of those cases. So, the military justice system is not what it was in 1952. It is a model at this point, and it is because of this Court that it has gotten there: its integrity and its ability to withstand command influence at every level of the way, and to provide a just system. I should add that this is not simply a matter of power because the Court could not achieve what it has achieved without ultimately winning over the military to accept the authority and legitimacy of a strong court. Every component of the military justice system can rightfully take pride and a measure of credit for the transformation of the military justice system that we have today.

I want to end -- and I use this term very advisedly here – with so many military personnel here -- with what lawyers call a "war story," sort of a geek war story. Let me define it two ways. One, it's a retelling of a case that I litigated before this Court and I was on the winning side. I don't do war stories if I didn't win the case. And two, in the retelling, any resemblance to the actual decision and what happened in the case is purely coincidental.

With that in mind, let me wrap up what I think about this Court with Cooke v. Orser,[12] a case decided in the 1980's. Lieutenant Christopher Cooke was the Deputy Commander of a Titan missile. This may be dating me -- that goes back a ways -- but Titan missiles had nuclear warheads and were aimed at the Soviet Union at the height of the Cold War. This was a significant position that he held, especially when he was seen entering the Soviet Embassy in Washington, D.C.

[12] 12 M.J. 335 (C.M.A. 1982).

The military responded by doing a damage control assessment, arrested him, brought him in to find out what he was doing in the Soviet Embassy, no warnings, no lawyer. He gives them a statement that is benign, basically indicates that he's a bit odd but not a security threat. The facts are disputed after that. The military judge found that when he refused to take the polygraph, they switched gears, they appointed counsel and the Staff Judge Advocate, which was the lawyer, general-level grade to the commander-in-chief of the Strategic Air Command who was the convening authority in the case, made an offer of complete immunity and an honorable discharge if Lieutenant Cooke would give a full statement to the investigators and pass a polygraph exam. His counsel got verification; that was the deal; that was understood. So they sat him down and they took his statement, and he gave them one of the largest security breaches in the history of the SAC.

They kept questioning, doing damage assessment; and they had already decided that the immunity agreement was going to be withdrawn, but they didn't tell him. They just kept questioning him, and they did their damage assessment, and then he actually took the polygraph. He passed the polygraph. That's when they told him that he was not going to get immunity, and the case came up to this Court after the trial judge denied the motion to dismiss the charges.

By a two-to-one vote, the Court held that the offer of immunity by the Staff Judge Advocate was binding regardless of whether or not he had the authority of the convening authority, and in doing so, essentially accepting an argument that apparent authority is enough in the military to enforce the immunity agreement. What made that case interesting, and why to me it's sort of a watershed case as well -- I appeared as amicus, F. Lee Bailey represented Lieutenant Cooke. So there was quite a bit of theater in the courtroom that day, from F. Lee Bailey, not from me.

What it stood for, which as I say is watershed decision, in the civilian side, if I was arguing this case before Chief Judge Sentelle and Judge Brown, I'd be in trouble because the case law basically holds that this type of immunity agreement, if it's not legitimate, it's probably not going to be enforceable and the charges would not be dismissed. This represented a situation where the military outcome actually showed that in the military, in this instance, due process meant something more than it would in the civilian system. It wasn't simply a question of creating approximately the same, but the due process

in the military in certain instances would provide greater protection than was provided in the civilian system.

There wasn't certiorari jurisdiction at that point, and who knows how the case would come out today, who knows how the case would come out in any court? The point is, military due process was real and it was there. In The New York Times, an editorial appeared after Cooke v. Orser came down, part of which said:

> By thus making good on the commanding officer's word, the military's highest court upheld military honor. The decision turned an embarrassment into one of the finest hours for justice, especially the oft-criticized military brand.

Now, this is The New York Times, they're not going to give them a bold compliment, it's a little bit backhanded. But putting that aside, there's no question that the case was a critical decision, that the country was looking at, and what it said back in the 1980's, was that this Court was going to decide it as it came up and military due process was going to be what the Court felt military process should be. Command wasn't going to make a difference. That's what it stands for today and that, to me, is as much a transformation as what happened to the D.C. Circuit. It has turned this Court into a powerhouse that no one anticipated that it could be. All we can say for both courts, for the next hundred years, it's going to be a tough act to follow. Thank you.

CHIEF JUDGE EFFRON: Thank you, Professor Goldblatt. Before we conclude, I have a few brief announcements. First, a word of special thanks to Judge Scott Stucky, the Chair of our Centennial Program; to our Court Executive, Keith Roberts; our Projects Officer, Barbara Burley; and our Operations Officer, Mike Pinette; and to all members of the Court's staff for your care and thoughtfulness in planning today's program. The record of today's proceedings will be published in the Military Justice Reporter, and we welcome everyone to a reception in the foyer immediately following this session.

The Court will stand in recess until Monday morning, October 4th, at 9:30 a.m., when we shall convene in regular session for oral argument.

(The Court adjourned at 11:15 a.m.)

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