

Judicial Profile

SEAN M. CONNOLLY

“Proud to Be an American” Hon. H.F. “Sparky” Gierke Chief Judge, U.S. Court of Appeals for the Armed Forces

I FIRST MET Chief Judge “Sparky” Gierke about seven years ago, when he asked me to come to the U.S. Court of Appeals for the Armed Forces at Judiciary Square in Washington, D.C., to interview for an internship position in his chambers. After observing the interest that he takes in his students and interns and in their lives and careers and feeling such a strong sense of family in his chambers and the court, I knew there was no place I would rather be.



Ever since that day, I have been constantly amazed by Chief Judge Gierke’s sense of service, his leadership, his energy, and his deep and sincere interest in mentoring interns and helping students — not just while they are working in his chambers or taking his class but throughout their lives. By his example, he has instilled in me and so many others the same sense of service, professionalism, and patriotism that have formed the core of his life.

Soon, Chief Judge Gierke will culminate his full-time service as a member and chief judge of the U.S. Court of Appeals for the Armed Forces and move to Florida full time with his wife, Jeanine. As that time draws near, he has already begun a series of “lasts.” The chief judge has taught his last classes as an adjunct law professor at The Catholic University of America and George Washington University Law School. He has addressed committees and groups for the last time as a sitting judge on the court. And he has heard his final argument. But as Chief Judge Gierke assumes senior status on the court on Oct. 1, 2006, his legacy and reputation — as a patriot and public servant, respected jurist, trusted colleague, teacher, mentor, and friend — will live on in both the military and civilian legal communities in Washington and around the world.

Patriot and Public Servant

Born in Williston, N.D., Chief Judge Gierke grew up on a ranch outside Watford City, where early on he learned from his parents the tremendous work ethic that has inspired him throughout his life. His parents both grew up poor; his mother, Mary Caroline Kelly, married his father, a homesteader from Wisconsin, who was looking for an opportunity to grow and prosper in North Dakota. Chief Judge Gierke remembers life on the ranch very fondly, where his family did a little bit of everything, including raising cattle and horses. In fact, reading Justice Sandra Day O’Connor’s book, *Lazy B*, co-written with her brother, H. Alan Day, in which they describe “growing up on a cattle ranch in the American Southwest,” is like “reading about home,” according to Chief Judge Gierke. He points out, however, that his family’s ranch had much less

acreage. It was also at the ranch where Chief Judge Gierke, an avid golfer, began his lifelong love of the game. His father was able to take him out to play as a boy on the old sand greens golf course not far from the ranch. Still struggling to make the ranch a success, the chief judge's father's paid his dues by mowing the prairie grass in the fairways with a team of horses.

Chief Judge Gierke would certainly have been a success had he simply stayed and worked the ranch after he finished high school. After all, by that time, the Gierke family ranch was a successful enterprise. But his mother, a schoolteacher, was insistent that he receive a good education first. Therefore, in 1960, he enrolled at the University of North Dakota, a land grant college where it was mandatory for all students to participate in the Reserve Officers' Training Corps (ROTC) during their first two years of school.

Required or not, military service was always important in Chief Judge Gierke's family. His mother lost a nephew in Korea and a brother in Italy during World War II, in addition to having three of her other brothers serve during World War II. Chief Judge Gierke also had three uncles on his father's side who served in World War II. Needless to say, it was not difficult for the chief judge to make his decision to continue in ROTC for two additional years and earn a commission in the U.S. Army. And so he began his public service.

Combining his senior year in college with his first year in law school, Chief Judge Gierke earned his B.A. from the University of North Dakota in 1964 and his J.D. degree from the University of North Dakota School of Law in 1966. Already a commissioned officer in the U.S. Army, Chief Judge Gierke successfully applied to the Army Judge Advocate General's (JAG) Corps to fulfill his Army service using his legal training. He then attended the judge advocate basic course at the Judge Advocate General's School (now the Judge Advocate General's Legal Center and School) in Charlottesville, Va. After graduating in May 1967, he headed off to Texas to his first assignment in military justice at Fort Bliss. The chief judge was later reassigned to Schofield Barracks in Hawaii and then volunteered for a one-year tour of duty in Vietnam. He was awarded the Bronze Star Medal and Air Medal for his meritorious service and returned from Vietnam in December 1970. Always anxious to get back home to take over the responsibilities of the family ranch from his father, the chief judge returned to civilian life and the ranch in North Dakota in April 1971.

But Chief Judge Gierke's avocation for ranching did not dissuade him from pursuing his calling in the legal profession. Nor did he give up his penchant for public service when he returned home. Immediately upon his return to North Dakota, the chief judge engaged in the general practice of law in Watford City until his appointment to the North Dakota State Supreme Court in 1983. In addition to his private practice, Chief Judge Gierke was elected the McKenzie County state's attorney, serving in that capacity from 1974 to 1982, and



Captain Gierke served in Vietnam as a military judge from December 1969 to December 1970.

was appointed city attorney for Watford City, serving from 1974 to 1983. These positions required him to cover vast areas of the state of North Dakota, so much so that he trained and tested for his pilot's license and bought an airplane so that he could travel throughout the state.

Prior to his service on the North Dakota State Supreme Court, Chief Judge Gierke was president of several bar associations, including the State Bar Association of North Dakota. He also has dedicated much of his life to veterans' organizations. In fact, soon after returning to Watford City from military service, the local post of the American Legion offered him membership, and just several years later, at the age of 36, Chief Judge Gierke was elected post commander in 1979. He went on to serve as the first Vietnam-era state commander of the North Dakota American Legion from 1983 to 1984 and the first Vietnam-era national commander of the American Legion from 1988 to 1989. His slogan as national commander was "Proud to be an American."

Jurist

A respected lawyer and jurist, Chief Judge Gierke has been a member of the judiciary for almost a quar-

PROFILE *continued on page 46*

ter-century. When Chief Judge Gierke first served on active duty in the Army in 1967, there was no such thing as a military judge. Military commanders could convene general and special courts-martial for service members charged under the Uniform Code of Military Justice without legally trained judges overseeing the courts. Furthermore, special courts-martial could be convened without legally trained counsel representing the defendants. Even under those circumstances, a special court-martial was authorized to sentence a service member with up to six months of confinement, loss of two-thirds of his or her pay for six months, and loss of rank. However, it was only a year after the chief judge joined the JAG Corps that Congress passed the Military Justice Act of 1968, which elevated the standards of military justice.

The improvement in the military justice system, which created the position of military judge, also imposed a new requirement for each service JAG Corps to ensure that qualified judges preside over the courts-martial. Chief Judge Gierke joined the first group of judge advocates to fill a military judge position when he was selected for the judiciary after volunteering for service in Vietnam. After graduating from the military judge course at the Judge Advocate General's School in 1969, the chief judge went off to serve as one of the six full-time special court-martial judges in Vietnam at the age of 26.

Chief Judge Gierke presided over hundreds of courts-martial in Southeast Asia as a captain. Maj. Gen. (Ret.) William K. Suter, clerk of the Supreme Court of the United States, first met Chief Judge Gierke when they were both stationed in Southeast Asia in 1970. Gen. Suter — then Maj. Suter — was serving as the staff judge advocate at the Army's headquarters in Thailand at the time, and Chief Judge Gierke traveled there from Vietnam to preside over courts-martial.



Hon. H.F. "Sparky" Gierke

Gen. Suter recalled that Capt. Gierke was, and still is, "friendly and engaging" and that "he was a fair judge who professionally presided over trials without fanfare." As a prosecutor as well as defense counsel at the time, Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia tried many cases in front of Capt. Gierke. Judge Lamberth, also a former Army judge advocate, served with the First Cavalry Division in Vietnam. He fondly recalls flying to trials in a low-observation helicopter, with only the pilot and two other passengers — Capt. Gierke, who was the military judge, and opposing counsel. They would depart from the division forward early in the morning, fly to a fire support base to try a case all day, and return to the division forward at night, where it would be much safer after dark. Judge Lamberth describes Capt. Gierke as a "very fair-minded" judge.

Chief Judge Gierke hung up his robe when he returned from Vietnam. But, in October 1983, Gov. Allen I. Olson, another former Army judge advocate, appointed Chief Judge Gierke as a justice of the North Dakota Supreme Court. The chief judge was serving as the commander of the North Dakota American Legion at that time, and he remembers that the governor made the announcement of his appointment out on the field of the American Legion National Baseball Championship in Fargo, N.D. A veteran of American Legion baseball himself, Chief Judge Gierke also enjoyed meeting baseball giant and fellow North Dakotan, Roger Maris, out on the field that day. The people of North Dakota voted to keep then Justice Gierke on the state's high court in November 1984 and re-elected him to a 10-year term in 1986.

Eight years after his appointment to the North Dakota Supreme Court and two years after service as the national commander of the American Legion, President George H.W. Bush nominated Justice Gierke to serve as a judge on the U.S. Court of Military Appeals (redesignated the U.S. Court of Appeals for the Armed Forces in 1994). After the U.S. Senate confirmed his nomination, Judge Gierke took his oath of office on Nov. 20, 1991. He assumed the office of chief judge of the court on Oct. 1, 2004. The U.S. Court of Appeals for the Armed Forces has worldwide appellate jurisdiction over members of the armed forces and other persons subject to the Uniform Code of Military Justice. The court is composed of five civilian judges, who are appointed by the President with the advice and consent of the Senate, and it hears cases involving a broad range of legal issues, including constitutional law, criminal law, evidence, criminal procedure, ethics, administrative law, and national security law.

Even though Chief Judge Gierke enjoyed watching the military justice system continue to advance from afar — such as the passage of the Military Justice Act of 1983, which provided for the Supreme Court to directly review decisions reached by the then Court of

Military Appeals — following his appointment to the court, he was honored to be back among the members of the military community. He said, “I love my job” — helping to provide a justice system guided by fairness “for the best people on the planet, the people who wear the uniform.”

In light of his guiding principle of fairness, when asked about the biggest cases he has worked on, Chief Judge Gierke will tell you that the most important case to each appellant is his or her own case, and from my time in chambers that has certainly been his way. The chief judge instinctively treats each case in the careful, respectful, fair, and very thoughtful manner that each of us would expect as an appellant before the court; and he taught me and his other interns and clerks along the way to do the same. His dedication to fostering a fair system of justice for the men and women of the armed forces is just as strong as it was the first day I met him in chambers — perhaps even stronger. As he prepares to leave full-time service on the court, I know that Chief Judge Gierke looks forward to continuing to watch the military justice system advance from off the bench.

Colleague

Having first met Capt. Gierke in Thailand back in 1970, Gen. Suter fondly remembers that he “liked Sparky from the start” and that they “developed a friendship based on mutual respect and professionalism.” Many years later, Gen. Suter finds that “it is an honor to count him as my close personal friend,” and he calls Chief Judge Gierke “an outstanding officer, lawyer, jurist, and educator.” Judge Lamberth believes that Chief Judge Gierke was uniquely qualified for the court because of his military experience and his experience on the North Dakota Supreme Court. According to Judge Lamberth, Chief Judge Gierke has “been an outstanding judge on the Court of Appeals for the Armed Forces” and has done a terrific job as the chief judge.

Those same sentiments ring true throughout all the military, veterans’, judicial, and law school communities that were honored to have the chief judge serve them throughout his distinguished career. From my own observances — whether they were while I was walking through the halls of the court; listening to the students, faculty, and staff at The Catholic University’s Columbus School of Law; or meeting court practitioners at Inns of Court or at FBA Pentagon Chapter lunches — I have found that Gen. Suter and Judge Lamberth are not alone in their respect and admiration for Chief Judge Gierke.

Teacher, Mentor, and Friend

Chief Judge Gierke began his legacy of teaching and mentoring young students and future lawyers when he was appointed a justice on the North Dakota Supreme Court. Not only did he begin working with elbow clerks in chambers, but he also began his teaching career at Bismarck State College while



Chief Judge Gierke and his wife, Jeanine, out for a game of golf.

he was on the bench — a second career that he has loved for more than 20 years. He continued teaching when he arrived in Washington, D.C., after joining the U.S. Court of Appeals for the Armed Forces, and for most of the last 15 years he has taught at both The Catholic University School of Law and George Washington University Law School.

Countless interns and law clerks have passed through Chief Judge Gierke’s chambers, and there is no doubt that he has passed on a piece of himself to each one — whether it is his work ethic, his sense of service, or his heartfelt love for his country. Capt. Griffin Mealhow, who is currently serving on active duty as an Army judge advocate with Special Forces in Japan, was a student in the chief judge’s class at Catholic University and later an intern in the chief judge’s chambers. Capt. Mealhow noted that he has “never worked with another mentor whose knowledge of the laws is as vast, whose teaching techniques have proven more valuable, or whose personality is as endearing and inspiring.” Christopher D’Antonio, another former intern and student of the chief judge and a judge advocate in the Navy Reserve, remembers that “Chief Judge Gierke endeared himself to his students, was genuinely concerned for their individual growth and development into young professionals, and taught them to appreciate not only the subject matter of his lessons, but the fair, civil, and just way in which those lessons were to be applied. He was real to students and professionals alike, putting on no airs, and he never let his positions of political or judicial importance get in the way of his friendly demeanor towards all.”

Chief Judge Gierke has been recognized by the students he has taught and served over the years. In 2002 and 2004, the Student Bar Association of The Catholic University’s Columbus School of Law honored him with a Best Adjunct Professor Award. Also, in 2002, the students at George Washington University’s Law

PROFILE *continued on page 61*

61¹²See *id.* at 100.

61¹³See Kiss, *supra* note 8, at 266.

61¹⁴See Dean, *supra* note 3, at 126.

61¹⁵Private communication to the author from LCDR Lia Reynolds, Trial Attorney, U.S. Navy Trial Services Office, Yokosuka, Japan (Nov. 28, 2005) (on file with author).

¹⁶See Charles Scanlon, *Japan Considers Jury System*, BBC NEWS, Mar. 12, 2003, news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/2844185.stm.

¹⁷See U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Case Processing Statistics*, www.ojp.usdoj.gov/bjs/fed.htm (last visited Nov. 19, 2005).

61¹⁸See Kiss, *supra* note 8, at 263–266.

61¹⁹See Scanlon, *supra* note 16.

61²⁰See Editorial, *Reinstating a Jury System*, JAPAN TIMES, May 29, 2004, available at japantimes.co.jp/cgi-bin/makeprfy.p15?ed20040529a1.htm.

6161²¹See Robert M. Bloom, *Jury Trials in Japan*, BERKELEY ELECTRONIC PRESS at 7 (2005), law.bepress.com/expresso/eps/514.

6161²²Although unanimous verdicts are still required in federal courts, states are permitted to use nonunanimous verdicts; see *Apodaca v. Oregon*, 406

U.S. 404 (1974) (holding that neither the Sixth nor the Fourteenth Amendment imposes on the states the requirement of unanimous verdicts).

6161²³See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921 (2005).

6161²⁴See Bloom, *supra* note 21, at 7–11.

6161²⁵See Kiss, *supra* note 8, at 276.

6161²⁶See Bloom, *supra* note 21, at 24.

6161²⁷Kiss, *supra* note 8, at 273.

6161²⁸See Kiss, *supra* note 8, at 276.

6161²⁹See *id.*, at 279 (discussing cultural factors argued in J.H. Jearey, *Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories*, 4 J. AFR. L. 133, 143 (1960)).

PROFILE *continued from page 47*

School honored him with the Distinguished Adjunct Service Award. The administration of The Catholic University of America has also recognized Chief Judge Gierke's unique impact on students and on legal education in general by honoring him with the President's Medal during the law school commencement exercises in May 2006. The chief judge will continue to make a difference in the lives of new students as he leaves the court. In the fall, he will be living full time in Florida, where he looks forward to enjoying more time with the love of his life, the former Jeanine Christoffersen, who currently serves as the human resources director at Arnold Palmer's Bay Hill Club and Lodge in Orlando. The chief judge will also begin teaching full time as a distinguished jurist-in-residence and coordinator of lawyering skills and values at Barry University's Dwayne O. Andreas School of Law in Orlando; he has been serving as an adjunct law professor at the school for the last few years.

In a speech to the American Legion convention in New York City in 1952, the late Senator Adlai Stevenson spoke about a "sense of national responsibility," describing "a patriotism that puts country above self; a patriotism which is not short, frenzied outbursts of emotion, but the tranquil and steady dedication of a lifetime." In addition to his accomplished service as a lawyer and jurist, Chief Judge Gierke has been a teacher, mentor, and friend. From his early days in the Army, to his intense involvement in veterans' organizations, to his service on the North Dakota Supreme

Court and the U.S. Court of Appeals for the Armed Forces, Chief Judge Gierke has dedicated his life to serving his country and others. He is a true patriot.

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Sean M. Connolly is currently serving as a captain in the U.S. Army Judge Advocate General's Corps. He is a trial attorney at the U.S. Army Legal Services Agency, Contract Appeals Division. He served as a legal intern and later as a law clerk in the chambers of Chief Judge Gierke and is the immediate past president and national delegate of the Pentagon Chapter of the FBA.