3 January 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

DAVID J. JANSSEN,
Senior Airman (E-4), USAF
Appellant.

Crim. App. No. 37681
USCA Dkt. No. 14-0130/AF

BRIEF ON BEHALF OF APPELLANT

JEFFREY A. DAVIS, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34253
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER THE CIVILIAN JUDGE ON APPELLANT'S AIR FORCE COURT OF CRIMINAL APPEALS PANEL WAS UNCONSTITUTIONALLY APPOINTED.

Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence included a bad-conduct discharge and 12 years, 8 months' confinement, which brought his case within the Air Force Court of Criminal Appeals' Article 66 jurisdiction. *See* Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006). This Court has jurisdiction to review the Air Force Court's opinion. Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

On 4 August, 9 September, and 9-13 December 2009, Appellant was tried by a general court-martial composed of officer members

at Malmstrom Air Force Base, Montana. J.A. 42-43. The charges and specifications at arraignment, his pleas, and the findings of the court-martial were as follows (J.A. 56-58):

Chg	UCMJ Art	Spec	Summary of Offenses	Plea	Find-ing
I	91			NG	G
			Did, within the State of Montana, o/d/o btw o/a 17 Feb 09 and o/a 1 May 09, willfully disobey a lawful order from MSgt MK, a noncommissioned officer, then known by the Appellant to be a noncommissioned officer, to not have any intentional, knowing, or voluntary contact with B.A.S., an order which it was his duty to obey.	NG	G
II	120			NG	G
			Did a/n Great Falls, Montana, o/a 15 Feb 09, cause B.A.S. to engage in a sexual act, to wit: the penetration of B.A.S.'s vulva with Appellant's penis, by using strength sufficient that she could not avoid or escape the sexual conduct.	NG	G
III	128			NG	G
		1	Did a/n Great Falls, Montana, o/d/o btw o/a 1 Jan 09 and o/a 15 Feb 09, unlawfully place B.A.S. in a headlock wherein she was unable to breath; pin B.A.S. down and pull her hair back until her head came near her spine; and	NG	G, by excep tion

			shove B.A.S. down when she attempted to leave the bedroom.		
		2	Did a/n Great Falls, Montana, btw o/a 1 Feb 09 and o/a 15 Feb 09, unlawfully punch B.A.S. in the stomach with his fist; grab B.A.S.'s wrists, hold them, and tie her wrists with a belt; tie one of B.A.S.'s wrists with a rope; and grab B.A.S. around the neck with his hands, shove her against the wall, and choke her with his hands.	NG	G, by exception
IV	134			NG	G
		1	Did, within the State of Montana, btw o/a 1 Jan 09 and o/a 15 Feb 09, wrongfully communicate to B.A.S. a threat to kill B.A.S.'s son by cutting her son's throat while she watched if she told the police about the Appellant's previous physical abuse of B.A.S.	NG	NG
		2	Did, within the continental United States, o/d/o, btw o/a 17 Feb 09 and o/a 1 May 09, wrongfully endeavor to impede an investigation in the case U.S. v. Appellant, by telling B.A.S. to delete records of electronic communication between Appellant and B.A.S. and by telling her to "call the Base Legal Office or OSI and tell them that 'I want to take it all back,'" or words to that effect.	NG	NG
		3	Did, within the State of Montana, o/d/o btw o/a 17 Feb 09 and o/a 1	NG	G, by excep

			May 09, wrongfully endeavor to impede an investigation in the case of U.S. v. Appellant, by deleting records of electronic communication between Appellant and B.A.S. and by using B.A.S.'s facebook account to send a fictitious electronic message denying Appellant's involvement in physically abusing B.A.S.		tion
		4	Having been restricted to the limits of Malmstrom Air Force Base, Montana, by a person authorized to do so, did, a/n the State of Montana, o/a 25 April 09, break said restriction.	NG	G

On 13 December 2009, a panel of officers sentenced Appellant to a bad-conduct discharge, 12 years and 8 months of confinement, forfeiture of $1,300 pay per month for 12 years, and a reduction to Airman Basic. *Id*. On 19 June 2010, the convening authority approved only so much of the sentence as provides for a bad-conduct discharge, confinement for 9 years, and reduction to E-1. J.A. 51-55.

On 22 July 2013, the Air Force Court set aside and dismissed Specifications 3 and 4 of Charge IV, affirmed all other findings, and affirmed the sentence. J.A. 21-30. On 11 September 2013, the Air Force Court issued an order denying Appellant's motion to vacate its 22 July 2013 decision. J.A. 40-41. On 19 December 2013, this Honorable Court granted

Appellant's petition for review. *United States v. Janssen*, __ M.J. __, No. 14-0130/AF (C.A.A.F. Dec. 19, 2013).

Statement of Facts

On 25 January 2013, the Judge Advocate General of the United States Air Force appointed Mr. Laurence M. Soybel, a Department of Defense civilian employee, to serve as an appellate judge on the Air Force Court. J.A. 1. On 9 May 2013, an Air Force Court panel that included Mr. Soybel decided this case. J.A. 8-17. On 23 May 2013, presumably realizing the Judge Advocate General lacked authority to appoint Mr. Soybel to the Air Force Court as an appellate judge, the Air Force Court issued an order recalling all cases that had been decided by a panel that included Mr. Soybel, to include Appellant's case. J.A. 18-19.

On 25 June 2013, the Secretary of Defense issued a memorandum appointing Mr. Soybel as an appellate judge to the Air Force Court. J.A. 20. It was under this second appointment that Mr. Soybel sat on appellee's panel that issued the 22 July 2013 decision. J.A. 21-30. The Air Force Court's 22 July 2013 decision vacated its 9 May 2013 decision and was identical to its 9 May 2013 decision. J.A. 21-30.

On 16 August 2013, Appellant filed a motion with the Air Force Court, requesting the 22 July 2013 decision be vacated, on the grounds that Mr. Soybel was not properly appointed to the

Air Force Court. J.A. 31-36. On 11 September 2013, the Air Force Court denied Appellant's motion to vacate. J.A. 40-41.

Summary of the Argument

The Air Force Court panel that decided Appellant's case was not properly constituted because a civilian, Mr. Laurence M. Soybel, was improperly appointed as a judge to the Air Force Court by the Secretary of Defense, who lacked the authority for such an appointment.

Argument

THE AIR FORCE COURT OF CRIMINAL APPEALS PANEL THAT REVIEWED APPELLANT'S CASE WAS NOT PROPERLY CONSTITUTED.

Standard of Review

Whether the Air Force Court panel that reviewed Appellant's case was properly constituted is a question of law this Court reviews *de novo*. *United States v. Ryder*, 44 M.J. 9 (C.A.A.F. 1996).

Law and Analysis

This Court has held appellate military judges are inferior officers whose appointment must comply with Article II, Section 2, clause 2 of the United States Constitution. *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993). The Supreme Court has cited with approval and adopted this court's *Carpenter* analysis.

Ryder v. United States, 515 U.S. 177, 179 (1995). The *Ryder* Court further found that a military appellant is prejudiced if denied their entitlement "to a hearing before a properly appointed panel" of a service court of criminal appeals. *Ryder*, 515 U.S. at 188. The relevant portion of Article II, Section 2, clause 2 of the United States Constitution states: "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."

Congress has directed each Judge Advocate General to "establish a Court of Criminal Appeals" comprised of appellate military judges who "may be commissioned officers or civilians." Article 66(a), UCMJ, 10 U.S.C. § 866(a). The Supreme Court ruled that Article 66 gives Judge Advocates General the duty to establish courts of criminal appeals and the authority to assign officers as appellate military judges. *Edmond v. United States*, 520 U.S. 651 (1997). But it does not empower them to create inferior officers and therefore does not empower them to appoint civilians as appellate military judges. *Carpenter*, 37 M.J. at 294. In *Edmond*, 520 U.S. at 652, the Court opined:

> Conspicuously absent from Article 66(a) is any mention of 'appointment.' Instead, the statute refers only to judges 'who are assigned to a Court of Criminal Appeals.'... This Court [finds] the distinction to be significant [and] suggests that Article 66(a) concerns

> not the appointment of judges, but only their assignment. A contrary interpretation of Article 66(a) would render it unconstitutional, for under the Appointments Clause Congress could not give Judge Advocates General power to 'appoint' even inferior officers of the United States.

The Supreme Court has therefore rejected the proposition that Article 66 governs the appointment of appellate military judges. However, the Supreme Court has not questioned the ability of Congress, pursuant to Article II, Section 2, clause 2 of the Constitution, to use other statutes to delegate such appointment authority to department heads. In *Edmond*, the Court found that Congress vested exactly such authority in the Transportation Secretary in 49 U.S.C. § 323(a). The Court reasoned that although that statute does not specifically mention the power to appoint the particular breed of inferior officer that is a Coast Guard appellate military judge, it did explicitly name the Transportation Secretary as the recipient of authority to "appoint and fix the pay of officers and employees of the Department and may prescribe their duties and powers". *Id*. at 660.

The Secretary of Defense, in appointing Mr. Soybel as an appellate military judge, cited 5 U.S.C. § 3101 as his authority for the appointment. That statute states: "Each Executive agency, military department, and the government of the District of Columbia may employ such number of employees of the

various classes recognized by chapter 51 of this title as Congress may appropriate for from year to year." The statute upon which the Defense Secretary relies is vastly different than that which the Transportation Secretary relied upon, 49 U.S.C. § 323(a).

First, unlike 49 U.S.C. § 323(a), 5 U.S.C. § 3101 does not name any particular department head as being the beneficiary of Congress' vestment. Second, unlike 49 U.S.C. § 323(a), 5 U.S.C. § 3101 does not mention the appointment of officers, but instead authorizes only the employment of employees. As mentioned above, the Supreme Court in *Edmond* found that the absence of the word "appointment" in a statute is to be viewed as "conspicuous" and weighs heavily against concluding that it is a Congressional vestment of appointment clause authority.

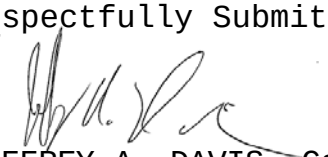
Third, unlike 49 U.S.C. § 323(a), 5 U.S.C. § 3101 is not an unconditional grant of authority but instead limits the "agency, military department, and government of the District of Columbia" to the hiring of employees "as Congress may appropriate for from year to year." Finally, unlike 49 U.S.C. § 323(a), 5 U.S.C. § 3101 does not authorize the beneficiary of that power to define the "duties and powers" of employees or officers. Instead, Congress has vested such authority regarding employees of the Department of Defense in the Office of Personnel Management (OPM). *See* 5 U.S.C. §§ 5103, 5105.

Express Congressional authorization to appoint lesser officers is required in order for the Secretary of Defense to appoint appellate judges to the Courts of Criminal Appeals. Congress has not given such authority to the Secretary of Defense. The Secretary cites 5 U.S.C. § 3101 as authority for his appointment of Mr. Soybel, but that statute merely provides that personnel divisions of the military departments may hire employees to fill whatever positions OPM creates if Congress chooses to fund those positions every year. Such a vague and uncertain provision, completely lacking any reference to "appointment" or even "officers," hardly amounts to Congress vesting its Constitutionally-derived appointment power in a department head.

Conclusion

Mr. Soybel's appointment by the Secretary of Defense was improper and unconstitutional because 5 U.S.C. § 3101 does not grant the Secretary of Defense the authority to appoint civilians as military judges to the military criminal appellate courts. Accordingly, the Air Force Court panel that reviewed and decided Appellant's case was not properly constituted. Therefore, the Air Force Court's decision must be vacated, and the case remanded to the Air Force Court for review by a properly constituted panel.

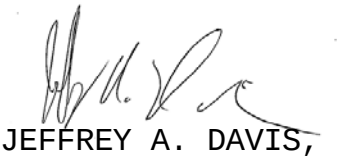
Respectfully Submitted,



JEFFREY A. DAVIS, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34253
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Appellate Government Division on 3 January 2014.



JEFFREY A. DAVIS, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34253
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

Counsel for Appellant