

27 January 2014

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

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UNITED STATES,  
Appellee,

v.

SENIOR AIRMAN (E-4)  
David J. Janssen,  
UNITED STATES AIR FORCE,  
Appellant.

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Crim. App. No. ACM 37681

USCA Dkt. No. 14-0130/AF

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Appellant's Reply Brief

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FOR THE ARMED FORCES

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UNITED STATES,	)	APPELLANT'S REPLY BRIEF
Appellee	)	
	)	
v.	)	Crim. App. No. ACM 37681
	)	
	)	
	)	USCA Dkt. No. 14-0130/AF
David J. Janssen	)	
SENIOR AIRMAN (E-4)	)	
United States Air Force,	)	
Appellant.	)	

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

COMES NOW Appellant, pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, and replies to the Government's brief, dated 23 January 2014.

**Argument**

I.

5 U.S.C. § 3101 does not grant the Secretary of Defense the authority to appoint inferior officers, and therefore, it did not grant him the authority to appoint Mr. Soybel as an appellate judge on the Air Force Court of Criminal appeals.

5 U.S.C. § 3101, in its entirety, provides:

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 government's position is that Congress intended the word "employ" in 5 U.S.C. § 3101 to mean appoint, such that 5

U.S.C. 3101 was designed to grant appointment authority to everyone it applies to, so that they could appoint Inferior Officers in accordance with the Excepting Clause of the United States Constitution. Gov. Br. at 10-13. This position is not supported by the plain language of the statute, by the definitions of the statute, the structure of the statute, and the case law.

Appellant agrees that 5 U.S.C. § 3101 applies to the Secretary of Defense. 5 U.S.C. § 105 defines an Executive agency as "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 101 further defines Executive department as all of the 15 cabinet level departments, to include the Department of Defense. Appellant also agrees that the term "employee" includes "officers". 5 U.S.C. § 2105 defines an employee as an officer and 5 U.S.C. § 2104 defines an officer, in part, as

a justice or judge of the United States and an individual who is-

(1) required by law to be appointed in the civil service by one of the following acting in an official capacity--

- (A) the President;
- (B) a court of the United States;
- (C) the head of an Executive agency; or
- (D) the Secretary of a military department....

The best evidence that Congress did not intend to grant constitutional appointment authority via 5 U.S.C. 3101 by using the term "employ" is that in the definition section, in defining what an "officer" is, they specifically use the term appointment, and the definition almost strictly follows language of the Constitution. When Congress used the term "employ" they meant it to have its common, everyday understanding, which is "to make use of; to use advantageously; to use or engage in service." See Merriam-Webster Online Dictionary, at <http://www.merriam-webster.com/dictionary/employ>, last accessed on 27 January 2014.

Thus, "employ" in 5 U.S.C. § 3101 means that all the individuals and organizations listed may "make use of" the employees that Congress has made available to them. And this includes Officers, but only Officers who have been properly appointed in accordance with 5 U.S.C. § 2104, which itself is just a restatement of the Excepting Clause of the Constitution. It does not, however, grant appointment authority. It would not make sense for Congress to define an Officer exactly as the law and the Constitution requires, and then in the very same statute attempt to grant appointment authority by using the term "employ."

Additionally, 5 U.S.C. § 3101 does not define the powers of or apply to any specific Secretary, Department, Agency, or

Department Head. Instead, it is a blanket statement that on its faces applies nearly to the entire federal government. Given that Congress fully understood what an Inferior Officer is and how one is appointed, it only makes sense that if Congress intended to grant such authority, they would have done so by granting the authority specifically, and to a specific Secretary, Department, Agency, or Department Head.

And Congress provided this specific grant of authority in 49 U.S.C. § 323, where they granted the Secretary of Transportation the authority to "appoint and fix the pay of officers and employees of the Department of Transportation." First off, in granting the Secretary of Transportation this authority, they did not bury it in some generic employment statute that applied to the entire federal government and all its employees. Instead, they put this authority in the very place one would expect to find it, under the Department of Transportation (Title 49), General Duties and Powers (Chapter 3), Administrative Duties (sub-chapter II), § 323, Personnel, which falls directly under § 322, Powers. If Congress intended the Secretary of Defense to have the same appointment power as the Secretary of Transportation, they clearly knew how to do it, but they chose not to. The Secretary of Defense's duties and powers are defined at 10 U.S.C. § 113 and nowhere in that

statute does congress grant the Secretary of Defense appointment power.

Finally, the Court should consider the magnitude of the position the government is advocating. The government is asking this Court to interpret 5 U.S.C. § 3101 as granting the Secretary of Defense the power to appoint Inferior Officers in accordance with the Excepting Clause of the Constitution. If that is true, then it is also true for everyone else that 5 U.S.C. § 3101 applies to. As noted above, the statute applies to all Executive departments, Government corporations, and an independent establishments (5 U.S.C. § 105), which applies to all 15 executive cabinet level departments (5 U.S.C. § 101), all 3 military departments (5 U.S.C. § 102), and the Government of the District of Columbia. The website USA.gov lists close to 100 independent agencies and government corporations that would fall under Section 3101. See [www.usa.gov/Agencies/Federal/Independent.shtml](http://www.usa.gov/Agencies/Federal/Independent.shtml), last accessed on xxx January 2014.

If 5 U.S.C. § 3101 grants appointment power to the Secretary of Defense, then it grants the same authority to everyone else listed above. This would be constitutionally overbroad and it would exceed the limits of *Freytag v. C.I.R.*, 501 U.S. 868 (1991), which limited appointment authority to Department Heads of executive divisions like Cabinet-level departments.

The plain meaning and ordinary language of 5 U.S.C. § 3101 does not grant the Secretary of Defense, or anyone else, the power to appoint Inferior Officers, in accordance with the Excepting Clause of the Constitution. Instead, it simply allows the agencies of the federal government to "make use of" the number of employees that Congress appropriates, from year to year. To be sure, that includes Officers, but they must be first properly appointed and available to be employed, just as 5 U.S.C. § 2104 requires. The Secretary of Defense exceeded his grant of authority when he appointed Mr. Soybel in accordance with 5 U.S.C. § 3101 because Mr. Soybel had not yet been properly appointed, and thus, he was not available to the Secretary of Defense to employ.

## II.

5 U.S.C. § 301 does not grant the Secretary of Defense the authority to appoint inferior officers, and therefore, it did not grant him the authority to appoint Mr. Soybel as an appellate judge on the Air Force Court of Criminal appeals

The government argues that 5 U.S.C. § 301 grants the Secretary of Defense the Power to appoint Inferior Officers in accordance with the Excepting Clause of the Constitution. Gov. Br. at 10-13. That statute provides:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its

business, and the custody, use, and preservation of its records, papers, and property.

First, this statute merely grants the authority to prescribe regulations, nothing more, nothing less. Just because the regulations they prescribe concern the conduct of its employees does not transform the statute into an appointment power.

The best evidence for understanding the plain meaning of this statute is to look at 49 U.S.C § 322(a), which states the following:

**(a)** The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.

This statute is essentially a mirror image of 5 U.S.C. § 301. Thus, if Congress intended this type of language and statute to grant constitutional appointment power, then it would make no sense for Congress to have a separate statute giving the Secretary of Transportation appointment power, as the statutes would be duplicative. Yet, with 10 U.S.C. § 323(a) Congress did just that:

**(a)** The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers.

Not only did Congress create both statutes, but moreover, Congress placed the two statutes right next to each other, clearly indicating that the language from 10 U.S.C. § 322 (the



mirror image of 5 U.S.C. § 301) does not grant appointment authority, thereby making 10 U.S.C. § 323 necessary.

And again, 5 U.S.C. § 301 is an overly broad statute that applies to a vast amount of people, agencies, departments, etc. If it were to grant appointment authority to the Secretary of Defense, then just as argued above, it would grant appointment power to everyone else, thereby making the statute overly broad and unconstitutional.

### III.

10 U.S.C. § 113 (a-b) does not grant the Secretary of Defense the authority to appoint inferior officers, and therefore, it did not grant him the authority to appoint Mr. Soybel as an appellate judge on the Air Force Court of Criminal appeals.

10 U.S.C. § 110 (a-b) states, in part, the following:

(a) There is a Secretary of Defense, who is the head of the Department of Defense, appointed from civilian life by the President, by and with the advice and consent of the Senate.

(b) The Secretary is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President and to this title and section 2 of the National Security Act of 1947 (50 U.S.C. 401), he has authority, direction, and control over the Department of Defense.

As is clear from the plain language of sections a-b, it does not grant the Secretary of Defense appointment power. Neither does any other subsection of § 110 grant appointment authority to the Secretary of Defense. In fact, Congress essentially replicated

the same language for the Secretary of the Department of Homeland Security at 6 U.S.C. § 112, which states:

**(a) Secretary (1) In general**

There is a Secretary of Homeland Security, appointed by the President, by and with the advice and consent of the Senate.

**(2) Head of Department**

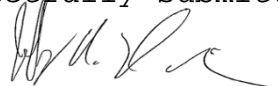
The Secretary is the head of the Department and shall have direction, authority, and control over it.

This is very generic language that essentially applies to every Department Head of a cabinet-level executive agency. It does not grant appointment authority.

**Conclusion**

This Honorable Court should find that Mr. Soybel was not properly appointed to the Air Force Court of Criminal Appeals, and accordingly, Appellant did not have his case reviewed by a properly appointment panel of the Air Force Court of Criminal Appeals. Therefore, this Honorable Court should set aside the Air Force Court of Criminal Appeals decision and remand the case to the Air Force Court to be reviewed by a properly appointed panel.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 27 January 2014.



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