23 January 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 14-0130/AF
Senior Airman (E-4) DAVID J. JANSSEN, USAF *Appellant.*	)	Crim. App. No. 37681

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUE SPECIFIED

WHETHER THE CIVILIAN JUDGE ON APPELLANT'S AIR FORCE COURT OF CRIMINAL APPEALS PANEL WAS PROPERLY APPOINTED. See U.S. Const. Article II, Section 2, Clause 2; 10 U.S.C. § 113 (2012); 5 U.S.C. § 3101 (2012).

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ). This Court has discretionary jurisdiction to review this case under Article 67(a)(3) "upon petition of the accused and on good cause shown."

STATEMENT OF THE CASE

The government generally accepts Appellant's Statement of the Case.

STATEMENT OF FACTS

Facts necessary to the disposition of this case are contained in Argument below.

SUMMARY OF ARGUMENT

The Appointments Clause of the United States Constitution requires the appointment of "inferior officers" in a manner permitted by Congress. Civilian appellate judges assigned to a service Court of Criminal Appeals, established under Article 66, UCMJ, are "inferior officers" who must be appointed in accordance with the Appointments Clause. As head of the Department of Defense, the Secretary of Defense, Chuck Hagel, was permitted to appoint these judges based on the authority granted by Congress under Title 5 and Title 10 of the United States Code. Therefore, Secretary Hagel's appointment of Judge Laurence M. Soybel to the Air Force Court of Criminal Appeals was made in a constitutionally permitted manner and Appellant's panel was properly constituted.

ARGUMENT

THE CIVILIAN JUDGE ON APPELLANT'S AIR FORCE COURT OF CRIMINAL APPEALS PANEL WAS PROPERLY APPOINTED BY THE SECRETARY OF DEFENSE.

Standard of Review

Whether a service court of criminal appeals panel is properly constituted is a question of law reviewed de novo. *See* United States v. Lane, 64 M.J. 1 (C.A.A.F. 2006).

Law and Analysis

A. BACKGROUND

The Appointments Clause of Article II of the Constitution

reads:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the 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.

U.S. Const., Art. II, § 2, cl. 2. An employee "exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States, and must, therefore, be appointed in the manner prescribed by" the Appointments Clause. Buckley v. Valeo, 424 U.S. 1, 126 (1976); Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 881 (1991). Although there is no bright line distinction between inferior officers and other officers (often referenced as "principal officers"), the key distinction rests between whether the individual is subordinate (inferior) to another officer (principal). *See generally* Morrison v. Olson, 487 U.S. 654 (1988); Edmond v. United States, 520 U.S. 651, 662 (1997)("the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President" and "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential

nomination with the advice and consent of the Senate.").[1] Therefore, certain governmental positions based upon degrees of authority and supervision will require appointment consistent with the Appointments Clause.

Upon enactment of the Uniform Code of Military Justice in Title 10, Congress mandated that:

> Each Judge Advocate General shall establish a Court of Criminal Appeals[2] which shall be composed of not less than three appellate military judges. For the purposes of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with the rule prescribed under subsection (f).
>
> * * *
>
> Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court, or the highest court of a State.

Article 66(a), UCMJ, 10 U.S.C. § 866(a) (emphasis added). Therefore, each service was directed by Congress to create an intermediate appellate court of military review that could be staffed by civilian judges.

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[1] The typical importance of establishing whether someone is a principal or inferior officer rests with the manner of appointment (the President with the advice and consent of the Senate for principal officers and the President alone, Courts of Law or Department Heads for inferior officers). However, in this case, the distinction between principal and inferior officers is not an issue. *See also* Weiss v. United States, 510 U.S. 163 (1994)(detailed along with Edmond below in Part B).

[2] The original UCMJ referred to these courts as "Courts of Military Review." However, the name "Courts of Criminal Appeals" replaced this original provision. *See* Pub.L. 103-337, § 924(b)(1).

On 25 June 2013, pursuant to this authority, the Secretary of Defense, Chuck Hagel, "appointed" Judge Laurence M. Soybel, a civilian employee, to "serve as an appellate military judge on the Air Force Court of Criminal Appeals." (J.A. at 36.) Secretary Hagel further established the term of this appointment would "terminate upon [his] direction or when Mr. Soybel is no longer employed by the Department of the Air Force." (Id.) In this instance, Secretary Hagel, as a Department Head, appointed Judge Soybel to the Air Force Court of Criminal Appeals as an inferior officer. Despite this appointment, Appellant maintains that his panel was not properly constituted[3] because Congress did not provide Secretary Hagel with the explicit power to "appoint" officers.[4] (App. Br. at 8-9.)

B. SUPREME COURT ANALYSIS OF MILITARY APPELLATE JUDGE APPOINTMENTS

Although issues regarding the employment of trial judges or staffing of the Courts of Criminal Appeals have not been the subject of a substantial amount of litigation, the Supreme Court has addressed these issues in three important cases: Weiss v. United States, 510 U.S. 163 (1994); Ryder v. United States, 515 U.S. 177 (1995); and Edmond.

[3] This issue should not be confused with previous issues in which Judge Soybel was appointed by The Judge Advocate General of the Air Force (J.A. at 1), which was impermissible. *See* Ryder v. United States, 515 U.S. 177 (1995). This issue solely involves Judge Soybel's appointment by the Secretary of Defense.

[4] *Citing* 49 U.S.C. § 323(a) and Edmond v. United States,520 U.S. 651 (1997).

In Weiss, the petitioner challenged his conviction because he felt "the judges in his case had no authority to convict him because their appointments violated the Appointments Clause."[5] Id. at 165. The petitioner argued that the military judges "needed another appointment[6] pursuant to the Appointments Clause before assuming their judicial duties." Id. at 170. The Supreme Court accepted the contention that military judges were "officers" "because of the authority and responsibility they possess." Id. *Citing* Freytag v. Commissioner, 501 U.S. 868 (1991); Buckley v. Valeo, 424 U.S. 1, 126. However, the Supreme Court rejected any requirement that military judges receive a second special appointment before assuming judicial duties. Id. at 169, 171-76. In the end, these military members are "assigned" or "detailed" as military judges "germane" to their military duty. Id.

The Supreme Court next addressed appointment issues in Ryder. Here, the petitioner's case was reviewed by two civilian appellate judges who the Coast Guard Court of Criminal Appeals determined where "inferior officers" but were not appointed in

[5] The petitioner also argued that the appellate court judge's appointments violated the Due Process clause because the judges did not have a "fixed term of office." Weiss, 510 U.S. at 165-66. This argument was rejected by the Court and is not a subject of this appeal. Id., 176-81.

[6] As detailed in Weiss, military judges are first appointed as "officers" by the President with the advice and consent of the Senate consistent with their rank and commissioning. Id. at 170, n. 5.

accordance with the Appointments Clause.[7] Id. at 179-80. However, the Coast Guard argued that review was still proper under the "*de facto* officer doctrine" because the civilian judges were acting "under the color of official title." Id. at 180. The Supreme Court rejected this argument and held the Coast Guard panel was not properly appointed in violation of the Appointments Clause. Id. at 187-88.

Last and most recently, in Edmond, the Supreme Court revisited the appointment issue for the Coast Guard in regard to civilian judges who were appointed by the Secretary of Transportation and not the General Counsel.[8] In Edmond, the petitioner attacked the Secretary's appointments because he lacked Congressional authority to make the appointments.[9] The Supreme Court disagreed.

Under 49 U.S.C. § 323(a), Congress gave the Secretary of Transportation the authority to "appoint and fix the pay of

[7] While Ryder was still progressing on appeal, the Court of Military Appeals reviewed United States v. Carpenter, 37 M.J. 291 (C.M.A. 1993). In Carpenter, the Court determined that the General Counsel for the Department of Transportation (who also acts as The Judge Advocate General) was not a department head and not authorized to appoint inferior officers. Id. at 294. Since Ryder had an appellate head start over Carpenter by the time Ryder reached the Supreme Court, the Coast Guard had conceded the holding in Carpenter.

[8] The Secretary of Transportation appointed these judges through the issuance of "a memorandum 'adopting' the General Counsel's assignments to the Coast Guard Court of Military Review "as judicial appointments of [his] own." Edmond, 520 U.S. at 654.

[9] The petitioner also argued that civilian appellate judges are principal officers who require appointment by the President with the advice and consent of the Senate. Id. at 655-56. The distinction between inferior and principal officers is analyzed in Part A above.

officers and employees of the Department of Transportation and may prescribe their duties and powers." The Supreme Court found that, despite the fact that 49 U.S.C. § 323(a) did not specifically mention "Coast Guard Judges," the statute:

> . . . authorizes the Secretary of Transportation to appoint judges of the Coast Guard Court of Criminal Appeals; and that such appointment is in conformity with the Appointments Clause of the Constitution, since those judges are "inferior Officers" within the meaning of the provision, by reason of the supervision over their work exercised by the General Counsel of the Department of Transportation in his capacity as Judge Advocate General and the Court of Appeals for the Armed Forces.

Edmond, 510 U.S. at 656, 666.

C. ROADMAP OF AUTHORITY FOR JUDGE SOYBEL'S APPOINTMENT

In harmonizing these three cases, the Constitution and appropriate statutes, the Supreme Court has left us with a strong background to analyze subsequent appointments to any Court of Criminal Appeals. It has conclusively been determined that these judges (1) are "inferior officers," (2) that they must be appointed to their positions, (3) they may be appointed by a "Head of Department" and (4) the "Head of Department" must be authorized by Congress to make the appointment.

(1) "Inferior Officers"

The decisions of Weiss, Ryder, and Edmond conclusively establish that civilian judges serving on service Courts of

Criminal Appeals under Title 10, due to their functions, are "inferior officers." It is impossible to conceive of a situation where this position will not involve the "exercising significant authority pursuant to the laws of the United States." Buckley v. Valeo, 424 U.S. at 126.

(2) Must Be Appointed

On 25 June 2013, by Memorandum and in accordance with Title 5, the Secretary of Defense, Chuck Hagel, "appointed" Judge Laurence M. Soybel, a civilian employee, to "serve as an appellate military judge on the Air Force Court of Criminal Appeals." (J.A. at 36.) In this appointment, Secretary Hagel established Judge Soybel's duties ("perform the judicial duties and exercise the judicial powers prescribed in the [UCMJ] for military appellate judges") and the tenure for his appointment ("appointment will terminate upon my direction or when Mr. Soybel is no longer employed by the Department of the Air Force"). (Id.)

(3) "Head of Department"

5 U.S.C. § 101 details the Executive Departments of the United States. Listed among these "departments" is the Department of Defense. Id. Further, under 10 U.S.C. § 113(a-b), the Secretary of Defense is "the head of the Department of Defense" and, "[s]ubject to the direction of the President, . . . he has authority, direction, and control over the Department

of Defense." Therefore, Secretary Hagel is a "Head of Department" within the meaning of the Appointments Clause and has been granted "authority, direction, and control over the Department of Defense" by Congress.

(4) Congressional Authority to Appoint

As detailed above, Article 66(a), UCMJ, mandates the establishment of Courts of Criminal Appeals and the authority for civilian judges to serve on these courts. At the very least, by Article 66(a), Congress has authorized the potential employment of inferior officers in these positions. The only real question involves whether the Secretary of Defense has the ability to fill these positions.

Title 5 of the United States Code provides a comprehensive framework establishing the Secretary of Defense's authority to employ or "appoint" inferior officers, such as judges:

> (1) 5 U.S.C. § 301, empowers "[t]he head of an Executive Department or military department may prescribe regulation for the governance of his department, the conduct of its employees, ..."
>
> (2) 5 U.S.C. § 3101, provides that "[e]ach 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."
>
> (3) 5 U.S.C. § 2104, defines an "officer" for the purposes of Title 5 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 – . . . (C) the head of an Executive agency. . . .”
>
> (4) 5 U.S.C. § 2105, defines “employee” as an officer (among others).

In terms of the plain language of Title 5, the head of an Executive Department may employ and prescribe the conduct of its employees who, by definition, include “officers.”

In his brief, Appellant contends that 5 U.S.C. § 3101 “authorizes only the employment of employees.” (App. Br. at 9.) He further complains that 5 U.S.C. § 3101 does not specifically vest authority in one specific “department head” and applies merely to the Office of Personnel Management. (Id.) These arguments lack merit.

First, Title 5 clearly defines “officers” as being “employees.” 5 U.S.C. § 2105. Therefore, by Appellant’s own logic, the authority to employ employees would include officers.[10] Second, as indicated by Edmond, Congressional authority is not required to be so explicit. Id. at 656 (statute not specifically mentioning Coast Guard Judges still grants authority to appoint them). In all, Appellant’s arguments attempt to place a burden on Congress to reach a level of

[10] It is also important to note that the word “appointment” can be viewed as superfluous to the word “employment.” A review of 10 U.S.C.A. § 1584, a statute applicable to the Department of Defense over which the Secretary of Defense is in “control,” the “HISTORICAL AND STATUTORY NOTES” reads: “The words ‘appointment or’ are omitted as surplusage.”

specificity in its legislation that is not required by the Appointments Clause.

Perhaps the best example of the broad authority Congress provides for appointments is detailed in Willy v. Administrative Review Board, 423 F.3d 483 (5th Cir. 2005). In Willy, the Fifth Circuit analyzed Edmond and found that "nothing in Edmond requires such explicit language" to appoint the Coast Guard Judges. In fact, the Secretary of Labor was authorized to create the Administrative Review Board (ARB), appoint its members (as inferior officers), and "delegate final decision-making authority to them" in accordance with the "broad language employed by Congress in the Reorganization Plan No. 6[,§ 2] of 1950, 15 Fed.Reg. 3174 (1950)[11] and in 5 U.S.C. § 301." Id. at 491-92.[12] Here, unlike Article 66, UCMJ, Congress had not even created the very "court" that the Secretary of Labor created through the ARB.

It appears quite absurd that the broad language of 5 U.S.C.

[11] The Reorganization Plan No. 6, § 2 of 1950 reads: "The Secretary of Labor may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Labor of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan."

[12] The Petitioner in Willy attacked the Secretary of Labor's appointments because there was no provision within the United States Code expressly creating administrative review boards, specifying its authority or authorizing the appointment of inferior officers for the purpose of hearing employee protection claims. This same analysis finding the ARB appointments to be valid has been applied in the Sixth Circuit as well. *See* Varnadore v. Secretary of Labor, 141 F.3d 625, 631 (6th Cir. 1998).

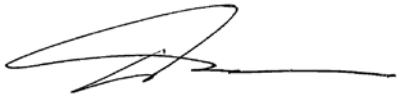
§ 301 would enable with Secretary of Labor to create his very own administrative justice system, appoint its "judges," and set its rules but would not allow the Secretary of Defense to appoint judges to service Courts of Criminal Appeals who have already received Congress' blessing (let alone the fact that these Courts are mandated). This would ultimately lead to the untenable question of if not the Secretary of Defense, then whom?

Through the creation of the Uniform Code of Military Justice, Congress specifically created the Courts of Criminal Appeals and authorized the employment of civilian judges. Article 66, UCMJ, 10 U.S.C. § 866. Further, pursuant to the broad authority granted by Congress under Title 5, specifically 5 U.S.C. § 3101,[13] the Secretary of Defense appointed a specific person, Judge Soybel, to sit as a judge on the Air Force Court of Criminal Appeals. Therefore, Judge Soybel was appointed in a constitutionally permissible manner, Appellant's panel was properly constituted, and Appellant's allegation has no merit.

[13] Appellant further attacks 5 U.S.C. § 3101 by arguing that 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." (App. Br. at 9.) It must be noted that Edmond at 657-58, attacked the argument that a Judge Advocate General's authority to "assign" military judges was Congressional authority for appointment because a Judge Advocate General is not a "department head" like the Secretary of Defense. Last, Edmond never mentions a standard in which the lack of the specific word "appoint" has any weight whatsoever, let alone "heavily against." It is important to note that the Article 2, Section 2, Clause 3 of the Constitution does not use the word "appoint" but rather the phrase "fill up all Vacancies" by granting "Commissions" in regard to recess appointments.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court hold that Judge Soybel was properly appointed by the Secretary of Defense and affirm Appellant's conviction and sentence.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 January 2014.

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