IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

WILLIAM R. JONES,
Second Lieutenant (O-1), USAF
Appellant.

Crim. App. No. 38028
USCA Dkt. No. 14-0057/AF

BRIEF ON BEHALF OF APPELLANT

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

Issue Presented

WHETHER THE *DE FACTO* OFFICER DOCTRINE CONFERRED VALIDITY UPON JUDGE SOYBEL'S PARTICIPATION IN THE AIR FORCE COURT OF CRIMINAL APPEALS' DECISION IN APPELLANT'S CASE.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c). This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On 26-29 July 2011, Second Lieutenant (2d Lt) William Jones was tried by officer members sitting as a general court-martial at Laughlin Air Force Base, Texas. He was convicted, contrary to his pleas, of one charge and specification of drunk driving in violation of Article 111 of the UCMJ, one charge and

specification of assault consummated by battery in violation of Article 128, UCMJ, and one charge and specification of conduct unbecoming an officer in violation of Article 133, UCMJ. J.A. 56-57.

Appellant was sentenced to total forfeiture of pay and allowances, six months of confinement, and a dismissal. *Id*. On 30 September 2011, the convening authority approved the sentence as adjudged. J.A. 52-55.

Summary of Proceedings

On 23 July 2013, the Air Force Court of Criminal Appeals (AFCCA) affirmed the approved findings and sentence. J.A. 30-31. On 27 June 2014, this Honorable Court granted Appellant's petition for review. *United States v. Jones*, __ M.J. __, No. 14-0057/AF (C.A.A.F. Jun. 27, 2014).

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 15 April 2013, an Air Force Court panel that included Mr. Soybel decided this case. J.A. 24-25. 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. 26-27.

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. 28. On 23 July 2013, a panel on the Air Force Court that included Mr. Soybel issued its opinion on reconsideration and reaffirmed the findings and sentence. J.A. 30-31.

Appellant filed his original assignment of error (AOE) on 21 August 2012. J.A. 8-19. On 2 April 2013, Appellant filed a motion for leave to file additional assignments of error, which the Air Force Court granted on 10 April 2013. J.A. 20-23. Appellant did not, however, raise any issue related to Mr. Soybel's appointment in his supplemental filing.

On 20 September 2013, Appellant filed an out of time motion for reconsideration with the Air Force Court, but again, did not raise anything related to Mr. Soybel's appointment. J.A. 32-35 On 2 October 2013, the Air Force Court denied the motion. J.A. 36-37. On 20 September 2013, Appellant filed a petition and motion with this Court requesting until 10 October 2013 to file his supplement, which the Court granted on 23 September 2013. On 10 October 2013, Appellant filed his supplement with this Court, raising the issue of Mr. Soybel's appointment as one of

his assignments of error with this Court. This was the first time Appellant raised the issue of Mr. Soybel's appointment.

On 15 April 2014, this Court held that the Secretary of Defense did not have the authority to appoint Mr. Soybel as a judge on the Air Force Court of Criminal Appeals. *United States v. Janssen*, 73 M.J. 221 (C.A.A.F. 2014). The Court remanded the case to the Air Force Court to be reviewed by a properly constituted panel.

Summary of the Argument

This Court should not apply the *de facto* officer doctrine because Mr. Soybel's appointment to the Air Force Court did not involve merely a technical defect in the appointment. Rather, his appointment was defective because it involved the Secretary of Defense usurping the appointment power of Congress and the President of the United States, in violation of the Appointments Clause of the United States Constitution. Constitutional violations of this magnitude create jurisdictional error that the Supreme Court will not cure with the *de facto* officer doctrine.

Argument

THE *DE FACTO* OFFICER DOCTRINE DID NOT CONFER VALIDITY UPON JUDGE SOYBEL'S PARTICIPATION IN THE AIR FORCE COURT OF CRIMINAL APPEALS' DECISION IN APPELLANT'S CASE.

Standard of Review

Whether the *de facto* officer doctrine applies is a question of law this Court reviews *de novo*. *Ryder v. United States*, 515 U.S. 177, 180-88 (1995).

Law and Analysis

The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient. *Ryder*, 515 U.S. at 180 (1995) (citing *Norton v. Shelby County,* 118 U.S. 425, 440 (1886)). However, the Supreme Court seems rather skeptical of the doctrine itself, often referring to it as the "so called" *de facto* doctrine and applying it only when there is a "merely technical" defect in an otherwise valid exercise of statutory or constitutional appointment power. *Nguyen v. United States*, 539 U.S. 69, 77 (2003). In fact, the Supreme Court has consistently refused to apply the *de facto* officer doctrine to cases that concern the 'proper administration of judicial business,' in particular, issued related to "basic constitutional protections," like the Appointments Clause. *Id*. at 77-83 (citing, among other cases, *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)).

The Appointments Clause of the United States Constitution does not deal with mere etiquette or protocol but rather is a fundamental safeguard in the separation of powers that is the very core of our system of government. *Buckley v. Valeo*, 424 U.S. 1, 125 (1976). The Appointments Clause is not merely a political concept, but rather, a fundamental element of the structure of the Constitution and our form of government. *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991). The Appointments Clause is structural because it preserves the integrity of the constitutional balance of power by "preventing the diffusion of the appointment power." *Id*.

The Supreme Court has on numerous occasions made it clear that they are willing to consider 'untimely' challenges related to the appointment of judicial officers, particularly when they deal with Appointments Clause issues related to judicial officers. *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991) (citing *Glidden Co.*, 370 U.S. at 535-536)). The reason the Court refuses to apply the *de facto* doctrine to these types of cases is because they are fundamental to the proper administration of justice and are essentially jurisdictional errors that cannot be waived or tolerated. *Glidden Co.*, 370 U.S. at 535-536.

The Supreme Court made it clear in *Freytag* just how far they were willing to go before finding waiver or forfeiture (and

applying the *de facto* officer doctrine) of an Appointments Clause issue related to judicial officers. In *Freytag*, the Appellant did not object at trial to the authority of the special trial judge to hear the case, and in fact, even consented to having their case assigned to the special trial judge. *Freytag*, 501 U.S. at 878. Then on appeal appellant raised the issue of the validity of the special trial judge's appointment, and although the government urged the Court to find waiver and apply the *de facto* doctine, the Court refused:

> It is true that, as a general matter, a litigant must raise all issues and objections at trial. But the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Ibid.* We conclude that this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge.

Freytag, 501 U.S. at 879.

A modern example of the Court's continued approach in refusing to find waiver pursuant to the *de facto* doctrine when the issue presented involves constitutional implications can be found in *Nguyen v. United States*, 539 U.S. 69 (2003). This case offers almost a carbon copy factual scenario to Appellant's case, and thus, merits a more detailed discussion.

In *Nguyen*, appellant was tried and convicted before a federal district court in Guam, and as authorized by statue,

appealed the conviction to the Ninth Circuit Court of Appeals. *Nguyen*, 538 U.S. at 72. The panel that heard Nguyen's appeal included two Article III judges that had been properly appointed for life by the President of the United States to the Ninth Circuit, and the third judge was the Chief Judge of the District Court for the Northern Mariana Island, an Article IV court, making him an Article IV judge. *Id*. at 72-73.

Normally, an Article IV judge would not sit as an appellate judge on a circuit court of appeals, but the chief judge for the Ninth Circuit would invite the district court judges of Guam and the Northern Mariana Island to sit as appellate judges on the Ninth Circuit whenever the court traveled to hear cases in the respective regions. *Id*. at 73. This three judge panel affirmed Nguyen's conviction without dissent. *Id*. Nguyen never challenged the composition of the Ninth Circuit Court that was hearing his case, and even after the fact, did not ask for a rehearing. *Id*. Instead, he raised the issue of the Article IV judge's appointment for the first time on appeal to the Supreme Court, which the Court agreed to hear. *Id*. at 73-74.

The government urged the Supreme Court to find waiver and apply what the Supreme Court called the "so called" *de facto* doctrine, and the government also urged that even if there was error, Nguyen suffered no harm under the plain error doctrine. *Nguyen*, 538 U.S. at 77. The Supreme Court refused to find

waiver, refused to apply the *de facto* doctrine, and suggested that doing either under these circumstances would be improper. *Id*. at 81. The Court said, "[w]hatever the force of the *de facto* officer doctrine in other circumstances, an examination of our precedents concerning alleged irregularities in the assignment of judges does not compel us to apply it in these cases." *Id*. at 77.

The Court explained that application of the *de facto* officer doctrine was inappropriate because it would "incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld." *Id*. at 80-81. The Court drove home the point by saying "[e]ven if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel." *Id*. This rationale is very similar to early Supreme Court precedent from 1886, rejecting application of the *de facto* doctrine, where the Court said:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

Norton v. Shelby County, 118 U.S. 425, 441-42 (1886).

This is why the Supreme Court pointed out in *Nguyen* that they have only applied the *de facto* doctrine when there is a "merely technical" defect. *Nguyen*, 539 U.S. at 77.

Finally, the Court also refused to apply or even consider a plain error analysis because the issue has nothing to do with the validity of Nguyen's conviction, but rather a jurisdictional defect regarding the composition of the Court of Appeals. *Nguyen*, 539 U.S. at 81. Thus, prejudice is irrelevant. *Id*.

Nguyen is indistinguishable from Appellant's case. Just like Nguyen, Appellant was convicted at trial and exercised his statutory right of appeal. Just like in Nguyen's case, there was an issue related to one of the three judges appointed to review Appellant's case on appeal, but Appellant, like Nguyen, did not raise an issue with the appointment before the court reviewing his appeal. Instead, Nguyen raised the issue for the first time on appeal to the Supreme Court, just like Appellant raised the issue for the first time on appeal to this Court. Accordingly, the result in *Nguyen* should obtain: this Court should refuse to apply the *de facto* officer doctrine, consider the issue on its merits, which will result in the application of this Court's ruling in *United States v. Janssen*, 73 M.J. 221 (C.A.A.F. 2014).

The result in *Nguyen* should not be surprising because forty years prior to *Nguyen* the Supreme Court laid the foundation for

such a ruling. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). In *Glidden Co.*, the Supreme Court refused to apply the *de facto* officer doctrine, even when the government specifically urged the Court to do so.[1] Responding to the government's urging to apply the *de facto* officer doctrine, the Supreme Court said, "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional' and agreed to consider it on direct review even though not raised at the earliest practicable opportunity," particularly when it involves "nonfrivolous constitutional grounds." *Id*. at 535-36.

In fact, the principles underlying the decision in *Nguyen* run much further than just forty years ago. The Supreme Court has rigorously and consistently refused to apply the *de facto* officer doctrine to cases involving constitutional significance, as opposed to cases involving merely technical defects, starting as early as 1886 with *Norton*, 1962 with *Glidden Co*., 1991 with *Freytag*, 1995 with *Ryder*, and most recently *Nguyen* in 2003. Appellant cannot find a single case in which the Supreme Court

[1] "No challenge to the authority of the judges was filed in the course of the proceedings before them in either case. The Solicitor General, who submitted briefs and arguments for the United States, has seized upon this circumstance to suggest that the petitioners should be precluded by the so-called de facto doctrine from questioning the validity of these designations for the first time on appeal." *Glidden Co*., 370 U.S. at 535.

has applied the *de facto* officer doctrine to a case involving constitutional significance, particularly a case involving the Appointments Clause, arguably the most important and fundamental mechanism to preserve the balance of power in our constitutional scheme and form of government.

Conclusion

Mr. Soybel was one of three judges that decided Appellant's case before the Air Force Court. At the time, Mr. Soybel was performing duties with the Air Force Court pursuant to an appointment by the Secretary of Defense. This Court has held that the Secretary of Defense had no authority to appoint Mr. Soybel to the Air Force Court, and, in so doing, the Secretary of Defense usurped the power of appointment of the President of the United States, in violation of the Appointments Clause of the United States Constitution. Consequently, Appellant did not receive his statutorily guaranteed Article 66(a) review before the Air Force. Article 66(a), Uniform Code of Military Justice, 10 U.S.C. § 866(a); *see also United States v. Elliott*, 15 M.J. 347, 348-49 (C.M.A. 1983), *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685 (1960), and *Ayshire Collieries Corp. v. United States*, 331 U.S. 132 (1947).

This Court should not apply the *de facto* officer doctrine because Mr. Soybel's appointment to the Air Force Court was not invalid merely because of a technical defect in his appointment.

Rather, Mr. Soybel's appointment was invalid because the Secretary of Defense usurped the appointment power of the President of the United States, in violation of the Appointments Clause of the United States Constitution. Violations of the Appointments Clause cannot be tolerated because the Appointments Clause is a fundamental safeguard of the separations of powers doctrine that is the very core of our constitutional system of government. As the Supreme Court stated over 120 years ago:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

Norton v. Shelby County, 118 U.S. 425, 441-42 (1886).

Respectfully Submitted,

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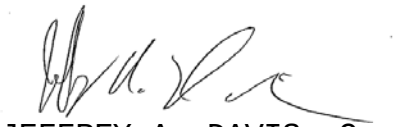
CERTIFICATE OF FILING AND SERVICE

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 28 July 2014.



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