IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. Craig X. Jorell Master Sergeant (E-7) United States Air Force Appellant	MOTION TO VACATE & RECONSIDER, AND TO ATTACH Before Panel No. 1 ACM 38061 Tried at Jt. Base Andrews, MD, on 4-6 October 2011, before a general court-martial, convened by A. F. District Washington

TO THE HONORABLE, THE JUDGES OF THE AIR FORCE COURT OF CRIMINAL APPEALS:

In accordance with Rule 19, 23, of this court's rules of practice and procedure, Appellant moves to vacate the decision issued by this court on 29 July 2013, and for reconsideration, and to attach a copy of Judge Soybel's "appointment" letter.

Issues Presented

> Appellate Military Judge Lawrence M. Soybel, authored the opinion of this panel and court at a time when he was not a lawfully appointed appellate military judge. Because he was not properly appointed, the decision and opinion must be vacated and reconsidered by a properly appointed panel.

Statement of Facts

On 25 June 2013, the Secretary of Defense purported to "appoint" Judge Soybel as an appellate military judge; citing 5 U. S. Code §3101, as his authority.

> 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.

On 29 July 2013, Judge Soybel authored a published opinion for Panel No. 1, in which Appellant's conviction and sentence were affirmed.

Argument

Appellate military judge Soybel is not appointed to this court in accordance with the Appointment's Clause, Art. II, Sec. 2, Cl. 2, U. S. Constitution.

Appellant is "entitled to a hearing before a properly appointed panel of th[is] court." *Ryder v. United States*, 515 U.S. 177, 188 (1995). (The court also rejected application of the de facto appointment doctrine.) A proper panel requires "officers" properly appointed in accordance with the Appointment's Clause. *Weiss v. United States*, 510 U.S. 163, 169 (1994). In *Edmond v. United States*, Justice Scalia properly noted the distinction between active duty officers and civilians regardless of their professional antecedents. *Edmond v. United States*, 520 U.S. 651, 654 (1997).

Appellate military judges assigned to a Court of Criminal Appeals may be commissioned officers or civilians. Article 66(a), UCMJ, 10 U. S. Code § 866(a); and they must be appointed pursuant to the Appointment's Clause, even if a civilian. *Weiss*

v. United States, 510 U.S. 510 (1994); *Ryder*. It is appellant's understanding that although a retired commissioned officer, Judge Soybel is serving as a civilian employee and assigned to be an appellate military judge and he is not recalled to active duty for that purpose. Were he recalled to active duty at his current retired rank, then he could be detailed to this court in the same manner as any other active duty judge advocate, and the Supreme Court's holdings in *Weiss* would support that appointment.

> Examining the difference in function and authority between the Coast Guard Court of Military Review, and the Court of Military Appeals, it is quite clear that the former had broader discretion to review claims of error, revise factual determinations, and revise sentences than did the latter. It simply cannot be said, therefore, that review by the properly constituted Court of Military Appeals gave petitioner all the possibility for relief that review by a properly constituted Coast Guard Court of Military Appeals would have given him. We therefore hold that the Court of Military Appeals erred in according de facto validity to the actions of the civilian judges of the Coast Guard Court of Military Review.

Ryder, 515 at 188.

In *Ryder*, the Supreme Court found that the Coast Guard judges were not properly appointed because of an Appointment's Clause deficiency. In that case the then chief judge, was a retired naval officer, serving as a civilian and not as a recalled retiree. Since the holding in *Ryder*, civilian military

appellate judges continue to serve on the Coast Guard Court of Criminal Appeals. However, they are now properly appointed under statutory authority specific to the Department of Transportation. *See Edmond v. United States*, 520 U.S. 651 (1997); 49 U. S. Code §323 (The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation[.]). That provision does not apply to the Secretary of Defense, or the Secretary of the Air Force. 10 U. S. Code §113, does not allow or provide for the Secretary to appoint "officers" as appears in 49 U. S. Code §323. Thus the Coast Guard appointments fall within the "Congress may by law vest the appointment of such inferior officers . . . in the" head of the Department of Transportation. Art. II, Sec. 2., Cl. 2, U. S. Constitution. There is nothing in 5 U. S. Code §3101, that purports to give the Secretary of Defense this special appointment power – the authority is limited to employing personnel, and not officers. What statute does require is that,

> When a vacancy occurs in an office within the Department of Defense and the office is to be filled by a person appointed from civilian life by the President, by and with the advice and consent of the Senate, the Secretary of Defense shall inform the President of the qualifications needed by a person serving in that office to carry out effectively the duties and responsibilities of that office; at which point the President may follow the nomination procedures.

The Secretary is not given the power to appoint, but merely the power to recommend. *Id.* at (f).

Secretary Hagel states he's using his employment authority. Yet the plain language in the letter contradicts that function. Judge Soybel has been a civilian employee of the Department of the Air Force since 2009, according to an available biography.

Secretary Hagel's use of 5 U. S. Code §3101 is not the type of appointment contemplated by the Appointment's Clause of the constitution. The statutory provision is a "general" authority to employ members of the Department of Defense.

> 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.

Chapter 51 does not appear to contemplate the constitutional "officers," as within the meaning of an employee. 5 U. S. Code §5102(a)(2)(3). The act of employment and of appointment contemplate two qualitatively distinct actions and powers. The Supreme Court impliedly recognized that distinction in *Edmond*, "The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation[.]" 520 U.S. at 656. No such dual language appears in the authority of the Secretary of Defense.

The language of the "appointment" letter itself refutes an employment by the Department of Defense and clearly establishes and effort to appoint a civilian employee of the Department of the Air Force. If the intent was to use the department head authority to appoint, then the Secretary of the Air Force should qualify.

In addition to the Appointment's Clause issue, Judge Soybel's manner of appointment and lack of a fixed term is starkly different to that of administrative law judges, judges of the Court of Appeals for the Armed Forces, and even the active duty military judges on this panel and court. On its face, Judge Soybel's "appointment" is effectively "at-will," by the language in Secretary Hagel's letter of "appointment."

> This appointment will terminate upon my direction or when Mr. Soybel is no longer employed by the Department of the Air Force.

Mr. Soybel is beholden to the Secretary of Defense for his appointment directly. Mr. Soybel's appointment lacks reasonable indicia of independence. With the current issues surrounding sexual assault offenses and the implication of command influence as it relates to Secretary Hagel's words and behavior, the concept of an appellate military judge serving at the whim of the Secretary of Defense is disturbing. Appellant notes that Secretary Hagel has attempted to claw-back on the UCI issue with

a memorandum issued on 6 August 2013, issued after the decision in appellant's case.

Respectfully submitted,

//Philip D. Cave//
Philip D. Cave
Law Office
1318 Princess St.
Alexandria, VA 22314
703-298-9562
mljucmj@court-martial.com

TAS, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division (AFLOA/JAJA)
240-612-4782
Thomas.Smith@pentagon.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the forgoing have been delivered to the Court and Chief, Appellate Government Division, by email on 19 August 2013.

Philip D. Cave