OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JAMES D. RYDER, Petitioner v. UNITED STATES

CASE NO: No. 94-431

PLACE: Washington, D.C.

DATE: Tuesday, April 18, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES D. RYDER, :

Petitioner, :

v. : No. 94-431

UNITED STATES. :

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Washington, D.C.

Tuesday, April 18, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:15 a.m.

APPEARANCES:

ALLEN LOTZ, ESQ., Washington, D.C.; on behalf of the Petitioner.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:15 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 94-431, James Ryder v. United States.

Mr. Lotz.

ORAL ARGUMENT OF ALLEN LOTZ

ON BEHALF OF THE PETITIONER

MR. LOTZ: Mr. Chief Justice and may it please the Court:

Petitioner, James D. Ryder, was convicted at a general court martial of several offenses pursuant to Article 66 of the Uniform Code of Military Justice. His case was then automatically appealed to the Coast Guard Court of Military Review. His case was heard there by three-judge panel consisting of two civilian military appellate judges and one active duty commissioned officer.

During the course of that appeal, he raised as a contention that the judges of that court had not been appointed in accordance with the requirements of the Appointments Clause of the Constitution. The Court of Military Review rejected that contention.

The case was then reviewed further on discretionary appeal to the United States Court of Military Appeals, and the appointments issue was raised

again by that court.

The Court of Military Appeals rejected that contention on the grounds, or on the basis of its recent decision in the Carpenter case. In Carpenter, the Court of Military Appeals found that the civilian judges of the Coast Guard Court of Military Review had been improperly or unconstitutionally appointed, but affirmed their decision there anyway, saying only that just as the acts of the Federal Election Commissioners were accorded de facto validity in Buckley v. Valeo, we hold that the judicial acts of the civilian judges are entitled to de facto validity.

The case is now here to address the question of what the effect of the unconstitutional appointments of these military appellate judges is on the decision in the case. Everyone is in agreement, the Government has conceded, that the civilian judges of the Coast Guard court were unconstitutionally appointed, yet the Government then goes on to say nevertheless there should be no relief in this case under the de facto officer doctrine.

QUESTION: May I --

QUESTION: Mr. Lotz --

QUESTION: Go ahead.

QUESTION: Go ahead.

QUESTION: I was just going to ask you, what is your view as to the validity of the appointment made in 1993 in January?

MR. LOTZ: Your Honor, our view is that that appointment is not valid, but that question is not before the Court in this case because the decision at issue here was made before the Secretary's memorandum.

QUESTION: I understand that, but is it not correct that it was made -- was that appointment made before the judgment in this case became final in the sense that all direct review was over?

MR. LOTZ: Well, Justice Stevens, direct review continues, but it was made before the case was decided by the Court of Military Appeals.

QUESTION: It's your view, I gather, then, that even if the valid appointment were made 20 minutes after the case was over it would be too late?

MR. LOTZ: Yes, Your Honor, that would be my view.

QUESTION: I'd like to ask you how, under these circumstances, the petitioner was harmed. The subsequent appointment by the Secretary of Transportation put the very same people back on the court who made the decision, and it's hard to construct any kind of harm to the petitioner here.

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MR. LOTZ: Justice O'Connor, the -- this Court's cases in separation of powers cases have never indicated that a showing of direct harm is necessary. If you look at Buckley, Northern Pipeline, Morrison v. Olson, Freitag --

QUESTION: But you have a very different situation, for example, if it's an Article III court, and a non-Article III judge is participating. I can imagine some sort of harm.

Here, with an Article I situation, where the very same people are reappointed, it's very hard to understand what the harm might be.

MR. LOTZ: The Freitag decision, also while this Court found the appointments there to be proper, there was a -- as it was put there, the decisions of the special trial judges of the tax court would have been invalid had they not been properly appointed. That was also an Article I court.

The -- this Court's decision in Mistretta defined the -- or referred to the separation of powers as necessary to the preservation of liberty. A violation of the separation of powers is really an invitation to mischief, to prejudice arising, and furthermore, while this appeal to the Court of Military Review was automatic, it was by no means a pro forma appeal. There were

significant issues raised dealing with the fairness of the underlying court martial.

QUESTION: Well now, at common law, an appointment-related challenge of the kind you're trying to make here as defense to a prosecution would not have been considered justiciable, would it? It would have been limited to the bringing of quo warranto, or something of that kind, never allowed as a defense to a prosecution.

MR. LOTZ: Currently, under the very old common law, which viewed the holding of an office as akin to a property right, that's correct. That has not been the view recently in the decisions of this Court, and the decision of the D.C. Circuit Court in the Federal Election Commission v. NRA Political Victory Fund --

QUESTION: But that may be, in fact, what's behind the de facto officer doctrine as such, the notion that when raised as the petitioner did here, it just isn't going to produce an overturning of the conviction.

MR. LOTZ: Well, Your Honor, I think that's the question we're deciding here, whether it will, and we're not talking about an overturning of the conviction, basically an overturning of the appeal where the unconstitutionally appointed judges sat. The de facto officer doctrine is really a rule of practicality designed to avoid chaos and mass disruption when a defect in an

appointment is discovered long after the fact.

QUESTION: Mr. Lotz, if we're concerned with practicality, then isn't this business about de facto at the middle tier kind of an academic exercise? After all, you have no complaint about the court of first instance, and then there was a review at the third tier, a fully competent court, and the conviction was affirmed, so even if there's an infirmity at the second tier, why should it matter?

MR. LOTZ: Well, Justice Ginsburg, the review at the Court of Military Appeals by no means corrected this. The Court of Military Appeals is limited to reviewing matters of law. The Court of Military Review, on the other hand, has much broader powers to review --

QUESTION: Well, can you tie it into this case and tell me what it was that was reviewed as the second tier that was not reviewed on final review?

MR. LOTZ: The -- I can't tell you specifically anything that was not reviewed. The --

QUESTION: It's conceivable that the issues were the same, and if they were, then this is kind of a moot case, isn't it?

MR. LOTZ: Well, we don't -- our position is that it's not moot. The Court of Military Review, by statute, may only affirm those findings that it finds

correct in law and fact.

The Court of Military Appeals takes the facts as they're found. The petitioner also -- the case is not moot. He has a punitive discharge that's not been executed.

QUESTION: Were facts challenged at the intermediate stage? In other words, did the intermediate court have any fact-finding to do which would not have been reconsidered by the Court of Military Appeals?

MR. LOTZ: There was no fact-finding that was critical to the decisions of the issues.

QUESTION: So then what Justice Ginsburg says would seem to be correct, that if there are only issues of law, you've simply skipped the middle stage.

MR. LOTZ: Well, Your Honor, the statute provides the petitioner with the right to an appeal at the Court of Military Review. The Constitution requires that that appeal be heard by judges appointed in a manner designed to enhance their quality and their stature, and that wasn't done here, and --

QUESTION: Let's put it in a context of Article III courts. If someone had, let's say, lost in the district court, and raised issues of law on appeal to the court of appeals, and the court of appeals affirmed, then he applied here for certiorari and we also affirmed,

surely it would make no difference whether the court of appeals was properly constituted or not, because he got a full review of the same things that the court of appeals reviewed by us, so how could it possibly affect his status?

MR. LOTZ: Justice Scalia, the -- my understanding of the decisions in Glidden and in Freitag indicate that it's -- you don't have to show direct harm.

QUESTION: In Freitag it was in the first instance there was an infirmity.

MR. LOTZ: That's correct.

QUESTION: In Glidden it was a question of an Article III judge at the second tier.

MR. LOTZ: Glidden involved two cases. One was at the trial level, one was at the court of appeals.

QUESTION: But think of a case, let's say cases in the circuit, and a question is certified, so it comes right here. We have no middle tier. Or, in the old days, when we had three-judge courts more often than we do now -- take a voting rights case nowadays, three-judge court, go right to the Supreme Court -- the middle tier seems to be an unnecessary extra in this picture.

MR. LOTZ: Well, Justice Ginsburg, Congress didn't think it was an unnecessary extra and provided for it. The Court of Military Review traditionally is the

petitioners or the appellant's best hope for relief.

In addition, review of the court --

QUESTION: Well, there is no constitutional right to two reviews, no less than one, right?

MR. LOTZ: That's correct, but it's a statutory right. But furthermore, the Court of Military Appeals is not an appeal as of right. That's done on petition only.

QUESTION: Well, Mr. Lotz, did you petition for review by the Court of Military Appeals in this case?

MR. LOTZ: We did.

QUESTION: And was it granted?

MR. LOTZ: It was.

QUESTION: And what -- do they grant on specific issues, or do they review the same things that you argued to the intermediate court?

MR. LOTZ: Normally they grant on specific issues. Occasionally, the court will specify.

QUESTION: And what did they do in this case?

MR. LOTZ: They reviewed the issues specified by the petitioner, which in essence were the same issues reviewed by the court --

QUESTION: So you really did get a review by a correctly constituted court of the same issues that you raised in the first tier appellate court.

MR. LOTZ: After denial of appropriate review in

the Court of Military Review.

QUESTION: I suppose you would argue, though, that as is true with us, that the court of last resort is sometimes affected by the caliber of the judging in the intermediate court. It always has an impact. I know it does for me when we review cases. I think a lot about what the intermediate court said, even if I end up agreeing with them.

MR. LOTZ: I would absolutely agree with that, Justice Stevens.

QUESTION: But your remedy would be going back perhaps to the same panel, or what would you remedy be?

MR. LOTZ: Remedy would be a review anew in the Court of Military Review by constitutionally appointed judges.

QUESTION: How about these very same judges who are now constitutionally appointed?

MR. LOTZ: My position is that they should not review the same case again as they have already given an opinion on the merits of the case.

QUESTION: Would it be unlawful for the -- after all, they are already familiar with this, and it would be least expensive to have the same judges review what they did now that they have the proper appointment.

MR. LOTZ: It's our opinion that that would be

unlawful, yes.

QUESTION: Why would it be unlawful? There's no charge of bias or anything like that. It was just a defect in their appointment.

MR. LOTZ: Well, Chief Justice Rehnquist, the -- in essence, at the earlier appeal they were not constitutionally appointed judges, and in that capacity they issued a decision expressing their opinion on the merits of the case. I'm sure this Court understands that that's normally inappropriate to then sit as a judge on that same case.

QUESTION: Well, I certainly don't understand that. On what are you basing your contention?

MR. LOTZ: On a prejudgment of the merits of the case, Your Honor.

QUESTION: Well, what if three, say, professors sat on a moot court and the question was presented to them and they decided it for the moot court and then later the exact -- they were all appointed to a court of appeals, and later the exact same question comes up in the court of appeals, are they disqualified because they participated in the same thing in a moot court?

MR. LOTZ: No, I don't believe so, Your Honor, but a moot court is by definition an academic exercise, not a real dispute between live parties, so I think that

would be a different situation.

QUESTION: What about when this Court reverses an appellate panel and it has to go back to that same panel, and maybe there was an alternate ground to end up for the same party?

MR. LOTZ: I believe that there -- that may be different in that the -- I'm assuming that the appellate panel that's reversed was consti -- or composed entirely of constitutionally appointed judges, and their opinion then is expressed only in their judicial capacity.

QUESTION: Mr. Lotz, I want to go back to whether there's any harm done in light of the fact that there was a later review anyway which would have been the same review. What if the -- what if a Court of Military Review had found for the defendant in the case? What would have happened? Does the United States always appeal?

MR. LOTZ: The United States does not always appeal. The -- and of course it depends on the grounds.

QUESTION: So you can't really tell. It might have come out differently with a different panel.

MR. LOTZ: It might have.

QUESTION: And the United States might not have appealed.

MR. LOTZ: That's correct, Your Honor.

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QUESTION: They might also have -- or might they. Was there any factual -- I think you said before there was no factual issue even before them, was there?

MR. LOTZ: It was basically a legal issue regarding evidentiary issues.

QUESTION: Still and all, at least there's a chance they would have come out for the defendant and the United States would not have appealed.

MR. LOTZ: That's correct. There could have been a new trial.

QUESTION: I'm sorry, I'm just missing something. I may have just missed this, but in the -- I'm just reading the appendix to the Government's brief, and in the appendix they said in the United States Coast Guard Court of Military Review -- that's the one that was not properly constituted, right?

MR. LOTZ: That's correct.

QUESTION: There was an assignment of error that the appellant received a disproportionate sentence because the military judge unduly emphasized the deterrent function of sentencing, and then I didn't find the -- I didn't find that referred to. I may have just missed it in the U.S. Court of Military Appeals.

MR. LOTZ: I appreciate your asking that, Justice Breyer. The -- that issue was raised to the Court

of Military Appeals and review was not granted on that issue, but that also is the kind of issue that the Court of Military Review has more leeway on approving only that portion of the sentence that they --

QUESTION: Then it seemed to me there was an issue that they decided below in the improperly constituted court that the properly constituted court didn't decide.

MR. LOTZ: That's correct.

QUESTION: So then we probably would have to reach the issue.

MR. LOTZ: That's correct, and I apologize for that misstatement.

The Government is arguing here that this application of the de facto officer doctrine here is akin to pure prospectivity which it claims has never been expressly renounced by this Court, but whatever its application in a civil case seeking injunctive relief like Buckley, it's fairly clear from a reading of Justice Souter's plurality opinion in Beam that that implies or assumes that you can't have juris prospectivity in a criminal case. Griffith makes it clear that there's no selective prospectivity in a criminal case. Beam and Harper, there's no selective prospectivity in civil cases.

QUESTION: May I ask this: when you're getting

into this distinction between direct review and collateral attack, this, I understand, is on direct review, but is it your position that your client, if he had not raised it during the proceeding but had waited until after the appellate process had run its course and then brought a habeas corpus petition, that relief would have been appropriate?

MR. LOTZ: Justice Stevens, I'm -- that's not my client. I don't represent anyone who's here on habeas corpus. I think a habeas corpus petitioner with the same grounds would have an uphill struggle based on Teague v. Lane, the limits on relief in habeas cases.

QUESTION: Well, but I think Teague would no longer be a problem if we decided, and perhaps we'd -- it may be in the first case, but somewhere along the line I would assume that the question could be raised. If it were not Teague-barred you would think -- I understand you don't have to go that far, but do you think there might be a distinction between the two?

MR. LOTZ: I think that there may well be a distinction between a case on direct review and collateral review.

QUESTION: Mr. Lotz, before you waste more ammunition on prospectivity, why do we have to worry about prospectivity? This prospective decision did not come

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from an Article III tribunal anyway, and we don't have any case law that says that non-Article III tribunals can't even achieve selective prospectivity if they want to. Is there any restriction on --

MR. LOTZ: Well, Justice Scalia, my reading of Griffith and Beam and Harper, all of those went back to State courts, which by definition are not Article III courts, plus, it would be ironic to say that it's okay for the Court of Military Appeals to issue a purely prospective decision that this Court could not do even when that case comes up here.

QUESTION: Which we would have to do if we went the other way from yours in this case.

MR. LOTZ: That's correct.

QUESTION: Yes.

MR. LOTZ: The --

QUESTION: I don't understand that. Say it again.

MR. LOTZ: The --

QUESTION: What would we be tied to?

MR. LOTZ: In this case, if Petty Officer Ryder had not persuaded the Court of Military Appeals that the appointments of the Court of Military Review judges were unconstitutional, basically that he lost on the legal issue at the Court of Military Appeals but won on that

issue at this Court -- this is an Article III court that should not issue purely prospective decisions. It would be ironic if he could lose below and do better here than he does by winning below.,

QUESTION: I don't know why it -- it might be ironic, but I don't know why it would pose any problem from the standpoint of prospectivity juris.

MR. LOTZ: Well, and as I said earlier, Griffith and Beam and Harper all dealt with State courts, and forbidding them from applying prospective adjudication. The --

QUESTION: Could you clarify the issue that was raised before this tribunal that you say was improperly composed and therefore has to be redone, precisely what that issue was, and whether it would be appropriate then to say only as to the unreviewed issue does this have to go back to have what would be a first appeal?

MR. LOTZ: The issue that was not granted review at the Court of Military Appeals dealt with a contention that the panel, which is the equivalent of the jury, imposed an unduly severe sentence because of the way the military judge, the military trial judge answered a question and that he may have overemphasized the general deterrent effect of a harsh sentence and led, then -- which led the panel to impose that unduly harsh sentence.

The Court of Military Review, their statutory authority indicates that they should approve only that part of the approved sentence that they find correct in law and fact. They have statutory authority simply to say, we find this sentence too severe, and reduce it.

QUESTION: You petitioned the Court of Military Appeals to review that and they declined to?

MR. LOTZ: That's correct, Your Honor.

QUESTION: So would it be appropriate to have just that issue --

MR. LOTZ: I --

QUESTION: -- since the other issues were reviewed?

MR. LOTZ: I don't believe it would. It would still permit the review in the first instance of all the issues by unconstitutionally appointed judges, and the Appointments Clause requires the proper appointments.

This whole prospectivity issue is contrary to the nature of the judicial process. By necessity, it looks backwards and tries to resolve disputes between real litigants.

The value in purely prospective decisionmaking when it's been applied in civil cases has really been to protect the settled expectations, particularly large economic interests that have been arranged based on an

erroneous but reasonable interpretation of what the law is. You really don't have those considerations in this case. There's not a large reliance interest.

Petty Officer Ryder certainly didn't rely on the validity of these appointments. He challenged the appointments when he was before that court.

QUESTION: Yes, but how about the prosecuting arm of the Coast Guard?

MR. LOTZ: Well, Mr. Chief Justice, the Government was on notice of the allegation of this appointments defect. It was raised in the briefs. The Government took no steps to correct it before the decision. The Government created the flawed process in the first place by --

QUESTION: But isn't that generally true in a lot of cases where you're talking about reliance interest? You simply rely on the existing state of the law, and you may have set up part of the existing, or lobbied for or drafted statutes that created the existing law that's later found to be flawed, but I don't think that dispenses with the concept of a reliance interest.

MR. LOTZ: When there is reasonable reliance that may be a factor, but that's only really been applied in civil cases anyway. This is a criminal case. The Government created the problem in the first place, was on

notice of it, and could have corrected it in a couple of fashions and did not do that.

QUESTION: But you could have cases, it seems to me -- you say the Government was on notice, and in a perfect world we all know what the law is, but there are, potentially at least, some very close questions under the Appointments Clause in which the Government might reasonably think that there had been a proper appointment but later on, after years go by, somebody realizes there was a flaw in the procedure, and in the meantime hundreds of cases have been decided. Can't there -- there is a legitimate reliance interest at some point.

MR. LOTZ: There is in some cases, Your Honor. The -- this is not that close case, is our contention, plus reliance interests normally speak in terms of many, many people. There are only, by my count, ten appellants situated similarly to Petty Officer Ryder. We're not talking about the Republic collapsing under the weight of many, many reappeals.

This case has often, and it's the nature of judicial review in itself, that if a decision below is reversed, it causes a certain amount of disruption. That's simply the nature of the process.

Another problem with applying a purely prospective decision here is it reduces the incentive to

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litigate an issue like this. If an appellant sees that he's likely to get a decision in his favor on the law but no relief, there's really no incentive to litigate it, and it would permit these sorts of problems to continue uncorrected.

If there aren't any other questions, I'd just like to conclude by asking that the Court remand the case for a new appeal by a properly appointed Court of Military Review judges and I'd like to reserve the remainder of my time.

QUESTION: Very well, Mr. Lott.

Mr. Wallace, we'll hear from you.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE RESPONDENT

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

This Court's 1993 decision in Harper v. The Virginia Department of Taxation recognized a distinction between retroactive application of a legal rule as a choice of law matter and remedial issues, a distinction previously discussed in opinions in the American Trucking and Jim Beam cases that were not subscribed to by a majority of the Court.

In those cases, the distinction was important because they involved invalid schemes of State taxation,

and the remedial issues implicated questions of State law.

Here, the distinction is important because the remedial issues implicate questions of remedial discretion of a Federal appellate court.

QUESTION: But in effect you're -- I think what you're saying is that there is remedial discretion to give no remedy whatsoever, and therefore I don't see how you draw the distinction between prospectivity of remedy and prospectivity of vindication of right.

MR. WALLACE: There -- in particular circumstances there can be occasions when a remedy is not appropriate. I mean, the breadth of the remedial discretion of Federal appellate courts is actually something codified and recognized in a familiar provision of title 28 of the code, which was not cited heretofore in the case, but I would like to remind the Court of it, and I notified counsel of it yesterday when in preparation for this argument its relevance became apparent, and because it's not quoted in the papers I'll just read it briefly to the Court, title 21 -- section 2106 of title 28, and it's the ending that seems to us in context to have particular relevance.

It says: "The Supreme Court or any other court of appellate jurisdiction" -- and that, presumably the Court of Military Appeals is any other court of appellate

jurisdiction, but it codifies a principle whether that's true or not -- "may affirm, modify, vacate, set aside, or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

And it seems to us that the rather clear implication is when there are reasons to conclude in the circumstances of a particular case that further proceedings would not be just under the circumstances, further proceedings need not as a remedial matter be ordered in that case.

QUESTION: Well, the Court of Military Appeals isn't established under title 28, is it?

MR. WALLACE: Well, I understand that. I'm looking to this provision as a codification of remedial principles that are inherent in the exercise of appellate authority in any event, and as a guide, rather than as something that necessarily has to apply to the Court of Military Appeals.

QUESTION: Are you saying that this, even as applied to Article III courts this allows selective prospectivity? That is to say, in a particular case we think selectively we should -- this renders Harper wrong,

is that it?

MR. WALLACE: I would not say it renders Harper wrong at all. I would say that the circumstances to be looked to are not necessarily selective circumstances, but the circumstances that would warrant pure prospectivity such as the Court has ordered in some of its cases, including Northern Pipeline v. Marathon and Buckley v. Valeo.

QUESTION: I don't see how you get that out of that language. I mean, it seems to me if the language means what you say it means, it validates selective prospectivity as well as --

MR. WALLACE: One could make that argument.

QUESTION: One would have to make that argument. It's the only argument the language allows.

MR. WALLACE: Well, what is just under the circumstances can be looked at in a more generalized way than the selective prospectivity way of looking at it. The circumstances are not self-defining, that they necessarily mean selective.

QUESTION: One way to do that, for example, would be to recognize a harmless error doctrine as we do.

MR. WALLACE: That is correct.

QUESTION: But it's a very far step from that to say that to sort of deny the old slogan and say yes,

indeed, there can be rights absolutely without remedy, and that seems to me the consequence of your argument.

MR. WALLACE: Well, there may be rights without remedy in a particular circumstance, although there would be remedies in other circumstances, and what I would like to suggest here is that there were six factors, six considerations that were before the Court of Military Appeals and that apply to all nine or ten of the pending cases -- this is not a selective matter -- that warranted their conclusion that when there was no other defect in the proceedings there was no need to order relief in this case, and I would like --

QUESTION: Well, one of the consequences of accepting that argument is that no one, I suppose, no party in interest, will ever have an incentive to challenge a valid appointment in these circumstances.

MR. WALLACE: Well, that is in our view, Justice Souter, not the consequence, because anyone who raises an additional issue, as the petitioner here did, would have the incentive to also raise the Appointments Clause issue, because if there were another error or defect in the proceedings that required retrial or remand to the Court of Military Review, certainly then the Court of Military Appeals should say any further hearing should be conducted by a tribunal constituted in a --

QUESTION: Why should it say that, on your theory?

MR. WALLACE: Because --

QUESTION: If they were good enough the first time, why aren't they good enough the second time?

MR. WALLACE: Because there now has been a definitive ruling by the Court of Military Appeals that this defect had occurred. That happened to be a question of first impression in the Carpenter --

QUESTION: But it's a remediless one --

QUESTION: Yes.

QUESTION: -- so why -- Mr. Wallace, your distinction between choice of law and remedy has a familiar ring. We heard it in a case called Reynoldsville Casket not too long ago. Are you familiar with that case? I know that the Government wasn't a party.

MR. WALLACE: We weren't a party. I have some familiarity with it. It's a case pending --

QUESTION: The identical argument was made -- well, the statute of limitations, the service of process question there, that was a question of choice of law, and choice of law, that was fully retroactive, but remedy, applying it to this plaintiff, you didn't have to do that, because that was a question of remedy.

MR. WALLACE: Well, that's a case in which the

Government is not taking a position which is pending before the Court. I did not hear the argument, and I'm reluctant to comment about the case itself.

I do think that we should look at the particular circumstances with which the Court of Military Appeals was faced when it determined under Buckley v. Valeo to accord the judicial acts of these two judges with de facto validity for purposes of the cases that were then before it, and there are six considerations that we think justified that in the situation that they were presented with, and it's a rather narrow situation that they were presented with.

If I can just recount what these -- the first is that they had already, by the time they rendered the decision, there was already a cure that had been effectuated. There can be debate about the validity of that cure, but the Secretary of Transportation had reappointed the same two judges. The second --

QUESTION: It seems to me if you rely on that, you're really asking us to decide whether that was a valid cure or not.

MR. WALLACE: Well, it was an effort to correct the defect that had been found, and to that extent the public interest consideration required --

QUESTION: Supposing we were -- we thought it

was a perfectly obvious ineffective effort to correct it, would it still be satisfactory to you? I'm not saying that's the case, but it seems to me rather strange to rely on the fact that they tried to cure it if they didn't, in fact, do so.

MR. WALLACE: Well, it's a cure for the future. The question is one of statutory authority.

QUESTION: Well, you say --

QUESTION: It's arguably a cure for the future.

MR. WALLACE: Yes, but there's a very substantial argument that these statutes should be interpreted in conformity with the Appointments Clause rather than in a manner that would not enable the responsible officials to comply with the Appointments Clause while still conducting the proceedings that Congress has authorized. I think our argument is quite strong on that. In any event, to that extent the public interest had been addressed.

Now, there -- I've already mentioned the second factor, that there was no other error or defect. They found no error in the trial that occurred in the case, for example, or any error in the appellate proceedings to the extent they had been reviewed and they decided certain contentions were not worthy of their review.

QUESTION: But again, that seems to me if there

were another error you'd reverse for that reason. You wouldn't worry about that.

MR. WALLACE: We'd reverse for that reason, and any further proceedings would be -- they could order it would have to be before a tribunal constituted in accordance with the Appointments Clause.

QUESTION: Once again, the consequence of taking that as relevant is in effect to say that as long as the improperly appointed people are competent, there's nothing to worry about. There's no other value to be concerned with. As long as they get it right, who cares?

MR. WALLACE: Well, but -- but the competence is quite important when you're talking about whether in the absence of other defect there's reason to upset the result of the particular proceeding and redo it.

QUESTION: Yes, but the -- in effect you're saying there just is not an independent value in policing the Appointments Clause by providing the normal incentive for a party like this to raise the issue prospectively, and you're saying that, and implicitly it seems to me you're saying there just is not a value that outweighs the importance of getting a particular issue right on the merits.

MR. WALLACE: In light --

QUESTION: As long as they get it right, who

cares?

MR. WALLACE: In light of the adequate incentive to raise the issue along with other issues which the defendant will have if for no other reason than because if he persuades an appellate court that there was more than one error, the appellate court is less likely to say that it's satisfied that the cumulative effect of the errors was harmless.

QUESTION: No, but I would suppose he has even the disincentive on your theory, because if he raises it, as I suppose he ought to do, at the trial level, he has to worry about making all those judges mad, and I suppose that if he knows that he gets nothing independently by raising the Appointments Clause issue, there is in fact an incentive not to raise it.

MR. WALLACE: I think we generally have to operate on the assumption that judges will rise above personal reactions to contentions and rule on their legal merits.

QUESTION: At least properly appointed judges.

(Laughter.)

MR. WALLACE: Yes. Well, this gets me to another one of the considerations that is relevant. What the Court of Military Appeals was faced with here was a situation involving only two individual judges in the

entire military court system.

Military trial judges all have to be active duty commissioned officers. It's only -- and they don't need a second appointment from the President under this Court's decision in Weiss. It's only on the Courts of Military Review that civilians can be appointed, and it's only these two judges on the Coast Guard Court of Military Review who were appointed as --

QUESTION: This argument sounds to me like you'd say you got tried before a judge who happened not to be a lawyer, not to be appointed or anything else. We have 100 other Federal judges who are great judges, but the one you got tried before just didn't happen to be one of those, and we'll rely on the other 100. I think the one that tries the litigant's case is the important one to him.

MR. WALLACE: With respect, Justice Stevens, I have not yet made my point.

QUESTION: I'm sorry.

(Laughter.)

MR. WALLACE: Which is --

QUESTION: I'm interested --

MR. WALLACE: -- that these two individuals happened both to be persons who had served while on active duty as commissioned officers as judges of Courts of Military Review, so while the analogy is not a perfect

one, they are in many respects and important respects similar to judges on senior status.

QUESTION: But the Appointments Clause does not assure quality. I mean, it is neither -- it is neither not complied with when a person of no quality is appointed, nor is it complied with when a person of quality is appointed --

MR. WALLACE: We are not contesting whether the Appointments Clause was violated.

QUESTION: Well, then I don't see what the relevance is.

MR. WALLACE: We're talking about an exercise of remedial discretion in the circumstances.

QUESTION: Well, I don't see why your argument doesn't cut against you on that, because it seems to me what you've shown us is that this would be a defect which it would be very easy to remedy. There are only these two judges, and according to your brother there are only ten cases. As he said, no sky is going to fall to correct this defect.

MR. WALLACE: The defect has been remedied for future cases, in our view, and we do think that we are going to be able to resist collateral attack on habeas corpus efforts which may be made. There will be more than ten cases litigated, Mr. Justice, even though we think

that it could be cured by rehearing ten cases.

QUESTION: Wouldn't that be easier than have to face habeas later on?

MR. WALLACE: Well, we'll be facing the habeas anyway, unless we prevail in this case, and then the habeas cases would follow a fortiori from it. My point in comparing these two judges to judges on senior status is that there is no reason to question their qualifications that they could fully and fairly hear such cases. They've heard many such cases sitting pursuant to valid appointments prior to this particular problem.

And when you combine that with the fact that ordinarily when a case is remanded to a court it's remanded to the same panel, and these judges have now been reappointed -- two of the three judges on the panel were these same judges. No other error was committed by them -- to send it back to the same panel would be a rather useless gesture under the circumstances.

QUESTION: Mr. Wallace, what do you think of the argument about the issues that were reviewed by the court of final instance? I'd like your frank answer to the question that I raised.

MR. WALLACE: There were issues that the Court of Military Appeals denied review of. My point is that there is no reason to think that the judges who heard and

passed on those issues were not fully qualified to do so. They had been doing so in the past pursuant to appointments that were proper under the Appointments Clause.

QUESTION: Other judges might have come out other ways.

MR. WALLACE: That is correct, but --

QUESTION: Judges sometimes come out different ways --

MR. WALLACE: But --

QUESTION: -- and on the same question --

MR. WALLACE: But --

QUESTION: -- so you cannot assure us that this would have come out the same way.

MR. WALLACE: Of course, but there's a question here, if you don't follow the normal practice of remanding it to the same panel, if you specify that there have to be different judges, which can occur here because the military judges have been rotated, although the same two civilian judges out of the five judges still sit there, you're really giving this particular criminal defendant something that most of the defendants don't have, which is two reviews, and these reviews are more extensive reviews in the military system factually than the --

QUESTION: Would they have to be --

MR. WALLACE: -- ordinary court of appeal reviews.

QUESTION: Since this is a unique situation, would they have to be? Why couldn't the review simply be on the written record, with no oral argument? Just have three judges who hold proper appointments.

MR. WALLACE: Whatever it is, it's something that other defendants don't get, two de novo reevaluations of the evidence. Whether there's briefing and argument or not, we're still dealing with the record from a court martial.

QUESTION: Mr. Wallace --

QUESTION: How is the first round appellate panel of the Coast Guard constituted? Do they sit -- does the court sit in panels of three?

MR. WALLACE: It sits in panels of three, which is --

QUESTION: What's the total membership?

MR. WALLACE: Five.

QUESTION: So it would be possible, if you decided that the two who had sat previously should not review it, still to get a fully constituted panel.

MR. WALLACE: It would, because the military judge who was on this case has been rotated out of this service, and there are three new military judges on the

court, and they -- active duty judges, that is, and they could hear the case. It would be possible.

QUESTION: Now, is it -- in the ordinary course of business, would you ordinarily have the three military judges constituting a panel, or would there always be a civilian on the panel?

MR. WALLACE: It can -- the panels rotate, and it can be the three military judges. In the Navy, Marine, or the Army or Air Force Court of Military Reviews there are no civilian judges, so you always have panels consisting entirely of active duty officers. That would --

QUESTION: Is that true of the Coast Guard? I thought they always worked it out so they had at least one civilian judge.

MR. WALLACE: I don't really know. I guess that is the answer, I'm told from a nod of the head, but I do know that their practice would ordinarily be to go back to the same panel, and in order for the Court of Military Appeals to order anything other than that the same judges reconsider the same matters without suggesting any error occurred --

QUESTION: Mr. Wallace, can I ask you sort of a broader question? Your argument has been entirely sort of an appeal to discretion. You've got six factors. You've

only -- I only know what three of them are. I know you're going to give us three more when you get through, and that you rely on section 2106.

You're not relying at all on anything, any legal doctrine, a de facto doctrine that would apply regardless of these particular equities of the case?

MR. WALLACE: Well, we think that the de facto officer doctrine is the backdrop here against which this was a proper exercise of remedial discretion. That doctrine has been recognized over and over.

Strictly speaking, we don't think that that was precisely what was applied in the de facto officer cases. The courts never reached the merits of whether there had been a defect in the appointment. Here, the reasoning was, as it was in Buckley v. Valeo, that there had been a defect in the appointment but that nonetheless the official acts that have been taken should be accorded de facto validity, which is more a question of remedial discretion than --

QUESTION: Well --

QUESTION: It seems to --

QUESTION: -- can we ignore the de facto officer doctrine, then, in our consideration --

QUESTION: That's what I --

QUESTION: -- of this case? Because frankly,

you know, I used it -- as you know, I was in the Justice Department for several years, and used it often, but I never recall its being used except collaterally, as to something that's already happened and someone challenges it after it's happened, not in the case where someone is before -- immediately before an officer whom he claims is improperly appointed. He says, you have no right to rule in my case.

Has the Government ever asserted the de facto officer doctrine in that case, in that kind of situation --

MR. WALLACE: I can't say that --

QUESTION: -- where it is raised immediately before the officer, before he rules.

MR. WALLACE: I can't say whether we've ever asserted it. We're not --

QUESTION: Do you know of any case where we've asserted it?

MR. WALLACE: I don't know of a case where we have, and we're using it only as a backdrop to the exercise, what we believe is the proper exercise of remedial discretion in this case, that --

QUESTION: It seems to me it's critical to your position, then, that the subsequent attempt to cure the defect was valid. It seems to me your position would be

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totally unpersuasive if there was just a mere attempt later on to cure it, and nobody seems to want to argue whether the later appointment did, in fact, cure it.

MR. WALLACE: Well, I would go so far as to say there has to be a substantial basis for believing that the cure was valid. I don't think that that question need be resolved in advance before it's been litigated in the lower courts or briefed and argued in this Court on the basis of that, and I think we certainly have a substantial basis for arguing that the cure was effective. Let --

QUESTION: Mr. Wallace, before we -- it seems to me there's a real risk for this Court in adopting this kind of an approach that you're urging on us, that we look upon the individual case, and before we apply the doctrine that the officer who rules on a case has to be one properly appointed, at least where the challenge is raised immediately.

The problem with your approach is that in some situations it would lead us into confrontations with the executive, where the executive appoints someone who is a close friend, let's say, or one of the reasons for which you have an Appointments Clause, that there is indeed some problem, but you cannot say the individual appointed was incompetent. All you can say is that the individual was, perhaps, one more favorable to the appointing officer than

the Appointments Clause would have provided.

In order to protect the person in a case like that, we would have to make an affirmative finding that this person was an unsatisfactory individual, that he had judged the case improperly, was not as good as another judge. I don't want to have to do that.

MR. WALLACE: Well, I don't say that this case should turn on an assessment by this Court of that kind of question.

The question before the Court is whether the Court of Military Appeals, when it resolved a question of first impression that was before that court, namely, that the principle of Weiss that a second commission was not needed cannot be extended to retired military officers, that the question is whether the circumstances that they were dealing with justified their remedial decision that these particular cases need not be reheard because of the circumstances in which they had been heard.

QUESTION: The difficulty that I wanted to ask you about is in -- I haven't read the whole Carpenter opinion, but in the part of it in your brief, the reason that they give for not extending it backwards, it says just as the acts of the FEC Commissioners were accorded de facto validity in Buckley v. Valeo, we hold that judicial acts of the chief judge are entitled to de facto validity.

Now, if that's the reason that they gave, then how can we know whether they would have given some other reason if they'd adopted your theory that you're arguing now?

MR. WALLACE: I think that it is properly looked at as an exercise of remedial discretion in that use of the Buckley case.

In 1984, in a case that petitioner cites in the D.C. Circuit, an opinion that was joined by then Judge Ginsburg, called Andrade v. Lauer, the court of appeals there described Buckley the following way: the court's discussion of remedies in Buckley did advert to the need on prudential grounds to avoid interfering with past actions of the commission. The court's discussion, however, gives no indication that this was a matter of anything other than ordinary remedial discretion in a case involving reform of an entire institution.

The prospectivity that the Court adopted in Buckley for its relief, as it did in Cipriano v. City of Houma and in Northern Pipeline v. Marathon, was basically a remedial question rather similar in kind to other aspects of the Court's jurisprudence, where it has held that remedies are not rigid and mechanical, but are adaptable to the circumstances presented.

That's true in harmless error jurisprudence in

the criminal area. It's true with respect to the good faith exception to the exclusionary rule which otherwise applies --

QUESTION: Mr. Wallace, at least with respect to Buckley v. Valeo, wasn't that just a challenge head-on to the statute with no individual's case on the line?

MR. WALLACE: Well, it arose in that context, that is correct, although there had been actions taken of an administrative nature that were not being undone. I mean --

QUESTION: But you didn't have somebody in the position of Ryder.

MR. WALLACE: That is correct, but even in injunction jurisprudence the Court has said it's error to interfere with action in the future, that it doesn't comply with the statute until the statute has been complied with in cases like Weinberg v. Romero Barcello.

QUESTION: Thank you, Mr. Wallace.

Mr. Lotz, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF ALLEN LOTZ

ON BEHALF OF THE PETITIONER

MR. LOTZ: Just very briefly, at the risk of repeating what Justice Breyer and Justice Ginsburg said, this six-factor analysis that Mr. Wallace referred to is not apparent in the Court of Military Appeals decision in

Carpenter. They took one sentence, took one case, Buckley, which was a case seeking only injunctive and declaratory relief.

With respect to the argument about --

QUESTION: We could remand to have them apply the six-factor test, I --

MR. LOTZ: Well, that -- Justice Scalia, I believe that would generate much more litigation than sending Ryder back to the Court of Military Review, and the Court of Military Appeals specifically considered and rejected the Government's contention in Carpenter that the fact that these individuals were retired military officers somehow improved their position under the Appointments Clause.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lotz.

The case is submitted.

(Whereupon, at 11:14 a.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)