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PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: JON E. EDMOND, Petitioner v. UNITED STATES

CASE NO: 96-262

PLACE: Washington, D.C.

DATE: Monday, February 24, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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JON E. EDMOND, :

Petitioner :

v. : No. 96-262

UNITED STATES :

- - - - -X

Washington, D.C.

Monday, February 24, 1997

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

ALAN B. MORRISON, ESQ., Washington, D.C.; on behalf of  
the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant to the 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

(10:02 a.m.)

1  
2  
3 CHIEF JUSTICE REHNQUIST: We'll hear argument now in  
4 Number 96-262, Jon Edmond v. United States.

5 Mr. Morrison.

6 ORAL ARGUMENT OF ALAN B. MORRISON

7 ON BEHALF OF THE PETITIONER

8 MR. MORRISON: Mr. Chief Justice, and may it please the  
9 Court:

10 The question presented by this case is whether the  
11 civilian judges of the Courts of Criminal Appeal of the Coast  
12 Guard were properly appointed. In actuality, there are two  
13 questions: 1) did the Secretary of Transportation have the  
14 statutory authority to make the appointment, and 2) if he did,  
15 is it constitutional for him to have done so because the  
16 officers are principal offices rather than inferior officers.

17 Congress first provided for civilian appellate judges in  
18 the armed services in 1950, with the passage of the Uniform  
19 Code of Military Justice, in particular, Article 66(a). It  
20 was available to all of the armed services, but the  
21 legislative history is clear that it was intended principally  
22 for the use of the Coast Guard.

23 Until 1993, the Coast Guard used civilian judges and,  
24 like all of the other military judges who were appointed to  
25 the military appellate panels, they were appointed, as they

1 were for the other armed services, by the person known as the  
2 Judge Advocate General of the armed services, which in the  
3 case of the Coast Guard is the general counsel of the  
4 Transportation Department, and before that the general counsel  
5 of the Treasury Department.

6 QUESTION: There's a Judge Advocate General for each  
7 branch, is there not?

8 MR. MORRISON: That is correct. In the Transportation  
9 Department -- there is no one in the Coast Guard. That  
10 position by statute is the --

11 QUESTION: General --

12 MR. MORRISON: -- general counsel of the Department of  
13 Transportation.

14 In 1993, the Court of Military Review for the Coast  
15 Guard, as it was then known, recognized that there were  
16 serious Appointments Clause problems with respect to the  
17 civilian members of the Coast Guard Court of Military Review.  
18 The problem arose because the Judge Advocate General is  
19 clearly not one of those listed persons in the Appointments  
20 Clause and therefore cannot constitutionally be designated as  
21 an appointing officer even for inferior officers.

22 As part of its opinion in a case called Senior, the  
23 Coast Guard Court of Military Review asked the Secretary of  
24 Transportation to "reappoint" all of the civilian judges, and  
25 he did that.

1           In fact, he did that for all of the judges of the Coast  
2 Guard Court of Military Review, and although he did not cite  
3 49 U.S.C. section 323(a), or, in fact, any other provision,  
4 that is the statute on which the Government relies, and the  
5 first question presented is, is that reliance justified?

6           The Government recognizes that, despite the broad  
7 language of section 323(a), it cannot be used if there is  
8 another statute that provides for another method of  
9 appointment for this particular office or any other.

10           The question in this case arises because Article 66(a)  
11 does not use the word, appointment. It uses -- it used  
12 initially establish, and then constitute, but the history is  
13 clear that from 1950 until 1993, it was the Judge Advocate  
14 General who actually did the appointing for the civilians.  
15 The Government says because the word appointment wasn't used  
16 we should not --

17           QUESTION: Well, Article 66 speaks in terms of  
18 assigning, doesn't it, not appointing?

19           MR. MORRISON: Yes. Well, it first talks about  
20 constitute and establish, and then it uses the word  
21 assignment. That is correct, Your Honor.

22           The Government argues from that that it should not be  
23 treated as an alternative method of appointment. The first  
24 answer we have to that is that it has been construed by the  
25 agencies all across the military from 1950 to 1993 as

1 providing the appointment power.

2 Indeed, there is no other provision of law that would  
3 allow the appointment of civilian judges in the Coast Guard.  
4 There certainly was nothing from 1950 to 1968 -- '66, when the  
5 Coast Guard was transferred from the Treasury Department --

6 QUESTION: But there weren't any civilian judges in the  
7 other branches, were there?

8 MR. MORRISON: Yes, there were, Your Honor. There were  
9 also in the Navy. The Navy had a number of them.

10 QUESTION: For how long?

11 MR. MORRISON: It's in note 2 of my brief, Your Honor.  
12 I'll --

13 QUESTION: Well, I'll pick it up.

14 MR. MORRISON: Yes. And it's also recognized in the  
15 Weiss opinion as well.

16 QUESTION: Well, the Coast Guard is the only place where  
17 civilian judges are now used --

18 MR. MORRISON: That is correct.

19 QUESTION: -- at the present time, and I guess -- I  
20 mean, even if 866(a) were invalid, you still -- as long as  
21 they are inferior officers you could look to 49 U.S. Code  
22 323(a), I suppose, for the Coast Guard, for appointment by the  
23 Secretary of Transportation.

24 MR. MORRISON: Well, that gets to our -- that is the  
25 question, Your Honor, whether you can, and the Coast Guard --



1 QUESTION: Well, I just thought there was a fall-back  
2 statute, so until you get to whether they're principal or  
3 inferior officers, I'm not sure you can address your first  
4 question.

5 MR. MORRISON: No, Your Honor, I think not. I think  
6 that the question of whether 323(a) is a fall-back statute or  
7 not is very much of an open question, and we first suggest  
8 that 66(a) has been treated as though it were an Appointment  
9 Clause in all of the armed -- in all of the armed service  
10 appointment statutes, in all of the armed services, including  
11 the Coast Guard, and the history is absolutely clear that it  
12 has been construed that way, for there is no other source of  
13 appointment. But --

14 QUESTION: Well, let me ask you this, which gets further  
15 into this principal or inferior business. How many military  
16 officers are there at present, more than 250,000 and some?

17 MR. MORRISON: That's correct, Your Honor. I -- that is  
18 about correct. I don't know for sure, but it's in that order  
19 of --

20 QUESTION: And are all of those people principal  
21 officers?

22 MR. MORRISON: No, Your Honor.

23 QUESTION: No.

24 MR. MORRISON: I don't believe so. It's never --

25 QUESTION: So as far as you're --

1 MR. MORRISON: -- been tested.

2 QUESTION: -- concerned, if one of those military  
3 officers is reassigned to a principal office, then it would  
4 require a new appointment and confirmation?

5 MR. MORRISON: No, Your Honor. The Appointment Clause  
6 requires a method of appointment. In -- under our  
7 constitutional scheme, every inferior officer of the United  
8 States could be appointed by the President with the advice and  
9 consent of the Senate.

10 The Congress is given the option to make a law that  
11 provides for one of three alternative methods of appointment,  
12 but the fact that somebody is appointed by the President with  
13 the advice and consent of the Senate does not make them, by  
14 that alone, a principal officer, but --

15 QUESTION: But you do -- you accept Weiss, in other  
16 words.

17 MR. MORRISON: I have no choice, Your Honor.

18 QUESTION: You aren't suggesting any invalidity there?

19 MR. MORRISON: Yes -- yes, Your Honor.

20 Now, the Government seems to say that under the scheme  
21 that they have devised using 323(a) to rescue them -- and by  
22 the way, Justice O'Connor, there was a very simple solution in  
23 1993 when this problem was recognized.

24 All the Government had to do at that point was to ask  
25 the President of the United States to appoint the civilian

1 judges with the advice and consent of the Senate, and the  
2 problem would have been cured prospectively at that point,  
3 so --

4 QUESTION: Mr. Morrison, isn't that a bit much, when you  
5 think of all of the ALJ's, all of the people who perform  
6 comparable functions, the trial people at the tax court, and  
7 to take this officer, as important as his job is, and to say  
8 that this intermediate appellate judge is a principal  
9 officer --

10 MR. MORRISON: Well, I'll be glad to turn to that  
11 question, Your Honor.

12 First, let me -- our principal focus on the principal  
13 officer point is twofold. One is that these judges have very,  
14 very broad powers of review, and second that they have  
15 practical finality.

16 That latter characteristic distinguishes them from the  
17 trial judges that Your Honor was talking about, the ALJ's, all  
18 of whose decisions are reviewable as of right.

19 Judges' decisions by the Coast Guard Court of Military  
20 Review and of the other armed services are reviewable on a  
21 discretionary basis only, certiorari, in essence, to the Court  
22 of Appeals for the Armed Forces, and less than 4 percent of  
23 those cases get taken.

24 QUESTION: Excuse me. You say ALJ's are reviewable  
25 as --

1 MR. MORRISON: Of right. The decisions --

2 QUESTION: Are routinely and automatically reviewed?

3 I'm not --

4 MR. MORRISON: As of right, Your Honor. Yes, that is  
5 correct. Certainly in all of the examples that the Government  
6 cites on pages 26 and 27 of its brief, and obviously there may  
7 be some ALJ some place whose decisions are not, but my  
8 understanding of the basic structure of the APA is that every  
9 person who is dissatisfied with the decision by the ALJ can at  
10 least go to an agency head and in most cases to a court of law  
11 as of right, in contradistinction to this case, in which the  
12 reviews are entirely discretionary.

13 QUESTION: But these people you say are principal  
14 officers are assigned by the general counsel of the Coast  
15 Guard, who is not a principal officer. Isn't that a strange  
16 world?

17 MR. MORRISON: It certainly is, Your Honor. Sorry, you  
18 mean the military officers, or the civilians, because --

19 QUESTION: Both.

20 MR. MORRISON: As far as the military officers are  
21 concerned, they may be assigned by the general counsel, but  
22 under Weiss, under this Court's decision in Weiss, the Court  
23 held that there was no separate appointment required for them.

24 QUESTION: But on your theory they jump from being, some  
25 of them at least, inferior officers to superior officers based



1 on the general counsel's appointment, or assignment, rather.

2 QUESTION: All of them do. All of them do, unless --

3 MR. MORRISON: All of the appellate judges, yes. We're  
4 not talking about trial judges here.

5 QUESTION: Well, but --

6 MR. MORRISON: They may well be -- it is entirely  
7 possible for various officers in the military to reach certain  
8 points in which they may be principal officers.

9 That is, for instance, somebody could be a high-ranking  
10 person that could be a principal officer in the military.  
11 Without knowing what the duties are, I couldn't tell for sure.  
12 I would say the likelihood is not great, but there are  
13 probably not very many in the Coast Guard, other than the  
14 Commandant of the Coast Guard.

15 QUESTION: As I understand your theory, what you do have  
16 to say on your theory is that those who are not at the  
17 superior level by virtue of their military appointments as  
18 such suddenly become superior officers by virtue of this  
19 assignment to sit on a court.

20 MR. MORRISON: That is correct, Your Honor, and that  
21 is -- but that is constitutionally acceptable, as this Court  
22 held in Weiss, because they were appointed as principal  
23 officers along the way.

24 QUESTION: We didn't hold that in Weiss. We left open  
25 the -- as I recall, Justice Souter wrote that that question

1 was involved, but as I recall the opinion for the Court never  
2 addressed it.

3 MR. MORRISON: It said as I -- we're talking about  
4 civilian --

5 QUESTION: I'm talking about the problem of having a  
6 requirement for the appointment of superior -- of principal  
7 officers which can be evaded by simply having an inferior  
8 officer reassigned to a task that is the task of a principal  
9 officer, never appointing that inferior officer by the method  
10 set forth in the Constitution. That's a real problem, isn't  
11 it? I mean, I think it's a real problem.

12 MR. MORRISON: Well, I think it is, but my burden today  
13 is a more limited burden, which is for the civilians who were  
14 never appointed by the President with the advice and consent  
15 of the Senate to positions in the Coast Guard, that they  
16 cannot be reassigned or anything by the Judge Advocate General  
17 to these positions.

18 QUESTION: Well, of course --

19 QUESTION: But --

20 QUESTION: It goes to the heart of your whole  
21 contention, because it goes to the question of whether it is  
22 reasonable to interpret 66 as you ask us to interpret it, as  
23 being an authorization to appoint these people.

24 MR. MORRISON: No, Your Honor, I -- well, we know for a  
25 fact that -- and I don't believe the Government disputes this.

1 From 1950 until 1993, Article 66 was the only provision relied  
2 upon for the appointment of civilians to the Courts of  
3 Military Review for the Coast Guard and for the Navy, which is  
4 the only two services that had them, and so insofar as that  
5 fact is concerned, it's not disputed.

6 I would say, however, if the Court agrees with me on my  
7 first issue -- that is, on the first, the statutory  
8 construction issue, the Court need not reach this  
9 constitutional question.

10 It simply says, the Secretary of Transportation,  
11 construing the statutes together, does not have the authority  
12 in part because it produces a series of results with regard to  
13 the courts of military review that don't make any sense.

14 QUESTION: Mr. Morrison, but we do know that Congress  
15 wanted to have these tribunals, and -- including civilians.  
16 If we take your interpretation of the statute, then we are  
17 demolishing what Congress wanted. If we take the Government's  
18 view that 323 -- is that what it is? -- can supplement 66,  
19 then we save what Congress plainly wanted to do, so why  
20 doesn't the statutory argument turn against you?

21 MR. MORRISON: Well, we have two rules of construction  
22 in conflict. One is to try to save the statute, as Your Honor  
23 has just suggested. The other is to try to avoid the  
24 constitutional question, which I have suggested also comes  
25 into effect here.

1 But there is another way, of course, to have saved this  
2 statute, which is to have had the President of the United  
3 States make these appointments in January 1993, instead of  
4 going through the short-cut of having the Secretary of  
5 Transportation do it, because under the Constitution the  
6 President has the power to appoint all officers of the United  
7 States with the advice and consent of the Senate.

8 The only time he does not have that power is when  
9 Congress expressly by law takes it away from him and gives it  
10 in a valid law to somebody else. Since the law as applied to  
11 civilians in the Coast Guard -- appointments by the Judge  
12 Advocate General -- was not a valid law, the President's  
13 residual power would come forward.

14 QUESTION: But the President's resid -- you make it  
15 sound as though this was totally within the control of the  
16 executive, but it wasn't, because the President's power is the  
17 power to appoint by and with the advice and consent of the  
18 Senate, not alone.

19 MR. MORRISON: That is correct, Your Honor.

20 QUESTION: So --

21 MR. MORRISON: I agree with that.

22 QUESTION: It's a little harder than you make it.

23 QUESTION: It would be --

24 MR. MORRISON: Well, not -- I think probably not, Your  
25 Honor, as a practical matter. There are two judges at this



1 point in the Coast Guard. The President says, these people  
2 have been serving. He reappoints them. There are problems  
3 with appointment, but I don't think this would come within --

4 QUESTION: It would be a fairly unusual provision,  
5 though, for the office to be filled by presidential  
6 appointment with advice and consent of the Senate for  
7 officials of -- this far down the ladder.

8 MR. MORRISON: Well, I don't know that that's -- I view  
9 them as comparable to people in the -- as tax court judges,  
10 Your Honor, and tax court judges are appointed by the  
11 President with the advice and consent of the Senate.

12 There are various administrative boards whose members  
13 are appointed by the President with the advice and consent of  
14 the Senate.

15 There would, of course, be one anomaly, which is that  
16 you would have some people who are chosen by the President and  
17 other people who are chosen either by JAG or the Secretary of  
18 Transportation. That's what we're concerned about here.

19 If the Government's view is upheld, we have a situation  
20 in which some of the members of the Coast Guard Court of  
21 Criminal Appeals will be appointed by the President -- by the  
22 JAG, selected, assigned, chosen by the JAG, if I may use  
23 neutral terms -- others will be appointed by the Secretary of  
24 Transportation.

25 Article 66(a) specifically says that the chief judge of

1 each of these courts of military appeals are to be appointed  
2 by the JAG.

3 QUESTION: Does Article 66 use the word appointed there?

4 MR. MORRISON: It says chosen I believe, Your Honor.

5 QUESTION: Well, that's quite different from appointed.

6 MR. MORRISON: Well, in this --

7 QUESTION: It can mean -- chosen can mean selecting from  
8 someone who already holds the office.

9 QUESTION: Designated.

10 MR. MORRISON: Designated. I beg your pardon. I beg  
11 your pardon.

12 QUESTION: Well, that's even further from appointed.

13 MR. MORRISON: Yes, except that in this case if you look  
14 at the appointing memorandum here it appoints and as far as I  
15 can tell designates Chief Judge Baum as the -- this is in our  
16 appendix at A7 -- I'm sorry, at A6.

17 He has -- the Secretary of Transportation has designated  
18 Chief Judge Baum, the only civilian, as the chief judge of the  
19 court. That is contrary to what the statute says.

20 Similarly, the statute -- we have a situation, supposing  
21 a vacancy now occurs on the Coast Guard court. It's one of  
22 the military officers who are regularly and routinely  
23 reassigned.

24 The question then becomes, who gets to fill this  
25 vacancy? Does the JAG get to fill it by assignment, or does

1 the Secretary get to fill it by appointment? The next thing  
2 we would know, we would have a larger number of civilian  
3 judges.

4 I say this not because it's an insuperable problem, but  
5 it creates a situation which seems to be very different from  
6 what's created by the statute here.

7 QUESTION: Well, it's not insuperable at all, given that  
8 the JAG has to do what the Secretary tells him.

9 MR. MORRISON: Well, Your Honor, that's not entirely  
10 true.

11 QUESTION: Any power given to the JAG, unless it's  
12 expressly or implicitly limited to him alone, is certainly  
13 exercisable by the Secretary, is it not?

14 MR. MORRISON: Well, the JAG is independently -- general  
15 counsel is appointed by the President with the advice and  
16 consent of the Senate, and I don't think that the general  
17 counsel of the Transportation Department could be removed by  
18 the Secretary of Transportation if the President wanted to  
19 keep him.

20 QUESTION: It's not a question of removing him. It's a  
21 question of the Secretary saying, I know that this function is  
22 assigned to you, but you are my subordinate, and I am going to  
23 exercise this function directly myself. Can't that be done?

24 MR. MORRISON: Well, I think that's the question, but  
25 it's by no means clear that that's correct, and the reason I

1 say that is because there are other things about this statute  
2 which suggest that although Congress didn't use the word  
3 exclusively here, that it did intend for the JAG's to be in  
4 charge of the process. As this Court recognized --

5 QUESTION: Sure, and it intends, for example, in the  
6 Justice Department for the subordinate heads of the divisions  
7 to do what they want, but doesn't the Attorney General have  
8 the power to direct them to do it the way he wants?

9 MR. MORRISON: Your Honor --

10 QUESTION: Even though it sets forth their duties?

11 QUESTION: That's Andrew Jackson and the Bank of the  
12 United States.

13 MR. MORRISON: Yes. Yes, sir. Well, that's right,  
14 except that as I suggested -- he said he would fire his  
15 Secretary till he finds one that agrees with him. Here, I  
16 suggest to you that the general counsel cannot necessarily be  
17 fired by the Secretary of Transportation because the general  
18 counsel is a presidential appointee.

19 But there's an important set of reasons why I would say  
20 that the Justice Department analogy doesn't apply, other than  
21 the fact that there are no specific duties listed for most  
22 high-ranking officials in the Justice Department. It simply  
23 says there shall be 11 Assistant Attorneys Generals who shall  
24 carry out the duties.

25 Here, in Article 66, I believe the fair reading is that



1 Congress has constructed a system in which they are taking the  
2 control over the workings of the courts of military review, or  
3 now courts of criminal appeal, out of the line authority.  
4 That is, from the Secretary of Defense, Secretary of  
5 Transportation, and put the control in the lawyers.

6 That is to prevent what this Court recognized in Weiss  
7 was the possibility of improper command influence, and this  
8 shows up in the selection of the chief judge, in the fact that  
9 the -- by the JAG, by the fact that the JAG designates who  
10 shall sit on what panels, by the fact that the rules for the  
11 courts of military review are decided by the JAG's, and that  
12 the JAG's are regularly scheduled to meet on practices and  
13 procedures.

14 This is more than simply interstitial law-making. This  
15 is, in our view, a deliberate decision by the congress to say,  
16 for whatever reason -- and I suggest that there are many good  
17 ones relating to command influence -- we want the JAG's rather  
18 than the departmental heads to be involved in this process.

19 QUESTION: Well, suppose they wanted the JAG's --  
20 Congress passed a statute and said, we want the JAG's to do  
21 all the appointing. We want them to. That's their job.

22 And one day somebody walked into Congress and said, you  
23 know, you've made a little mistake here, because unfortunately  
24 under the Constitution the civilian person doesn't have a  
25 presidential appointment, and you've got to give the power to



1 the Secretary to appoint him.

2 So Congress says, ah, great idea. We'll say he can be  
3 appointed by the Secretary of the Treasury. That cures it,  
4 right?

5 MR. MORRISON: That is correct, Your Honor.

6 QUESTION: All right, and they say, you know, it could  
7 come up again, so why don't we pass our statute in general  
8 form and just say the Secretary of the Treasury can appoint  
9 officers, and that would cure it, I guess. He's an officer.

10 MR. MORRISON: Well --

11 QUESTION: And then somebody says, you know, you don't  
12 have to. You already did.

13 MR. MORRISON: Well --

14 QUESTION: I mean, that's the difficulty I'm having,  
15 because I don't see -- the statute there certainly would be  
16 okay as a curative statute.

17 MR. MORRISON: Well, that --

18 QUESTION: It would certainly be okay as a specific  
19 curative statute.

20 MR. MORRISON: There's no question about that.

21 QUESTION: You could put the specific word in general  
22 form, and if somebody points out you already have the statute  
23 you don't need to pass it.

24 MR. MORRISON: My submission is that this general  
25 statute should not be applied here because it doesn't make any

1 sense.

2 It's not -- in the words that this Court used just  
3 recently in the Robinson v. Shell Oil case in part 2A of its  
4 opinion, even were the plain language to apply, the result  
5 must also be consistent and coherent and workable, and I  
6 suggest to you that implying the authorization for the  
7 Secretary of Transportation to make the appointment here runs  
8 up against that problem, and therefore you should construe  
9 this not to do so.

10 QUESTION: But why?

11 QUESTION: Well, how much implying are you doing when  
12 the statute says the Secretary of Transportation may appoint  
13 and fix the pay of officers and employees of the Department of  
14 Transportation?

15 MR. MORRISON: Well, I misspoke, Your Honor. Let me  
16 suggest this. I said at the beginning, and the Government  
17 doesn't dispute it, that if there is another specific  
18 statutory scheme for appointment of other officers, as there  
19 is -- for instance, there's a general counsel in the  
20 Department of Transportation -- that the Secretary of  
21 Transportation could not use this residual power of  
22 appointment whether the person is an inferior officer or not,  
23 and I --

24 QUESTION: And what is your authority for that, the -- a  
25 specific statute governs --

1 MR. MORRISON: Yes.

2 QUESTION: -- in preference --

3 MR. MORRISON: Yes.

4 QUESTION: But certainly there can be situations in  
5 which more than one statute apply, can't there?

6 MR. MORRISON: Yes, and the question is, did Congress  
7 intend to allow this to apply, given the lengths to which they  
8 went in Article 66(a)?

9 Now, there are two advantages in accepting this  
10 approach. Number 1 is, it sends the matter back to Congress  
11 so that Congress can look at this and say, now, which makes  
12 sense? Which system do we want to have?

13 Because the legislative history is clear that Congress  
14 has never focused on the Appointments Clause --

15 QUESTION: Well, Congress can do that if you lose the  
16 case.

17 MR. MORRISON: Yes, Your Honor.

18 QUESTION: Congress can say, gee, we passed a fall-back  
19 statute that covers this, and maybe we don't want to cover it  
20 again, and the advantage is that you do not for reasons of  
21 appointment formality disrupt a great many things that have  
22 been done, so why not let Congress have its crack at it on a  
23 different contingency?

24 MR. MORRISON: That gets me to my second submission,  
25 Your Honor, and that is that it avoids the constitutional

1 question, to which I'd now like to return.

2 As I said before, my two principal arguments on the  
3 constitutional issue are that the broad range of review that  
4 the judges of the courts of criminal appeal have, they have an  
5 enormous power. They review every single conviction of  
6 every -- any significance in the military. Every bad conduct  
7 discharge, every confinement for a year or more appeal as of  
8 right to these courts.

9 As the court of military appeals said in 1990 in the  
10 Cole case, this is an awesome plenary power of de novo review  
11 of facts and law. There is an unusually broad power of review  
12 of facts.

13 As Article 66, quoted on page 3 of our brief, says,  
14 judges may weigh evidence, judge the credibility of witnesses,  
15 and determine controverted issues, questions of fact,  
16 recognizing the trial court had the opportunity to see and  
17 hear the witnesses.

18 That's an extraordinary power of review, far broader  
19 than the judges of the court of appeals have in our Federal  
20 criminal system.

21 QUESTION: Well, but it's no broader than the authority  
22 of a district court to review the findings of a special  
23 master, is it?

24 MR. MORRISON: Well, I would say that that is correct.  
25 District judges, of course, I believe are principal officers,

1 Your Honor. The Government has never suggested otherwise.

2 But the second -- and the second reason is the question  
3 of finality, and that gets me to my Freytag point, which is  
4 that in Freytag this Court ruled that the chief judge of the  
5 tax court had the authority to appoint inferior officers, and  
6 in my view, implicit in that decision was a recognition that  
7 the judges of the tax court had to be principal officers, for  
8 otherwise you would have a system in which inferior officers  
9 were appointing other inferior officers, precisely the  
10 diffusion of power and accountability the Appointment  
11 Clause --

12 QUESTION: There are some differences --

13 MR. MORRISON: There are, Your Honor.

14 QUESTION: -- and for example there's a fixed tenure for  
15 tax court judges that doesn't exist here.

16 MR. MORRISON: Yes, Your Honor. The Government makes a  
17 point of that. My view on that is that the tenure question is  
18 most important with respect to the office rather than the  
19 office-holder.

20 Surely, for example, if the Secretary of Transportation  
21 for the last 40 years had had terms -- the Secretary of  
22 Transportation serves at the will of the President. If we  
23 could show that he was only there for a year or two each time  
24 before there was a turnover, nobody would say they aren't  
25 principal officers.



1           QUESTION: Well, but the trouble, Mr. Morrison is, if  
2 you're going to make the accountability point, on your theory  
3 the inferior military officer becomes a superior officer  
4 merely on the designation of the Judge Advocate General, and  
5 there is no accountability at all for that. Congress never  
6 gets a look at it.

7           MR. MORRISON: Your Honor, I lost that issue in Weiss,  
8 and I'm not here to reargue it again today.

9           I'll reserve the remainder of my time if I may. If  
10 you ask a question, Your Honor, I'll be --

11          QUESTION: Very well, Mr. Morrison.

12          Mr. Stewart, we'll hear from you.

13                           ORAL ARGUMENT OF MALCOLM L. STEWART

14                                   ON BEHALF OF THE RESPONDENT

15          MR. STEWART: Mr. Chief Justice, and may it please the  
16 Court:

17           The appointment at issue in this case satisfied the  
18 requirements of the Constitution and was consistent with the  
19 pertinent statutes.

20           Judges on the Coast Guard Court of Criminal Appeals are  
21 inferior officers whose appointment may properly be vested in  
22 the head of a Department. The judges are removable by an  
23 executive branch official subordinate to the President, their  
24 decisions are subject to review by the Court of Appeals for  
25 the Armed Forces, and their jurisdiction is confined to a

1 narrow class of cases.

2 Second, the appointment was consistent with the relevant  
3 statutes. The Department of Transportation Act, 49 U.S.C.  
4 323(a), authorizes the Secretary to appoint officers within  
5 the Department. Nothing in Article 66 of the UCMJ divests the  
6 Secretary of that authority for the courts to give --

7 QUESTION: Are --

8 MR. STEWART: For the courts to give the Judge Advocate  
9 General exclusive power to select members of the courts of  
10 criminal appeals.

11 QUESTION: Are Coast Guard officers appointed in the  
12 same manner as the officers of other services?

13 MR. STEWART: Yes, they are. They're appointed by the  
14 President and confirmed by the Senate, and as with officers in  
15 the other branches a separate appointment is required for a  
16 promotion to a higher rank.

17 QUESTION: So the -- 323 does not apply to Coast Guard  
18 officers.

19 MR. STEWART: That's correct, 323(a) does not give the  
20 Secretary of Transportation authority to appoint commissioned  
21 officers in the Coast Guard.

22 QUESTION: Mr. --

23 QUESTION: Even though -- and is that because there's  
24 another specific statute that supervenes it?

25 MR. STEWART: That's correct. There's a specific

1 statute that not only is addressed particularly to the office  
2 in question, but that provides an inconsistent method of  
3 appointment.

4 QUESTION: Mr. Stewart, you were giving several reasons  
5 why you say these officers are inferior, and yet in one sense  
6 they do have more power than even a normal court of appeals  
7 judge in the Federal system would have, insofar as they make  
8 de novo fact-finding and so forth.

9 MR. STEWART: It's correct that with respect to the  
10 scope of review in cases falling within their jurisdiction a  
11 court of criminal appeals may engage in de novo fact-finding  
12 as opposed to the clearly erroneous standard that would apply  
13 in the civilian courts.

14 In other respects, however, the powers of the courts of  
15 criminal appeals are more limited. First, and perhaps most  
16 obviously, the courts of criminal appeals hear cases falling  
17 within a narrow class of jurisdiction, in contrast to Article  
18 III courts of appeals, who can hear the full range of civil  
19 and criminal cases.

20 QUESTION: That makes the difference whether you're  
21 inferior or not, whether what you're given control of is  
22 insignificant or not? I find that -- I don't know.

23 MR. STEWART: We certainly don't claim that that's  
24 dispositive, but in Morrison --

25 QUESTION: I don't see why it has any relevance. I

1 mean, if I'm made an ambassador to a really tiny, itsy-bitsy  
2 country, am I not a principal officer?

3 MR. STEWART: Well, with respect to ambassadors,  
4 obviously the Constitution specifically identifies that as an  
5 office that must be appointed by the President and confirmed  
6 by the Senate, but we take your point that there may be  
7 officers who exercise power in a limited area.

8 QUESTION: If I'm appointed as an independent counsel  
9 for a little tiny offense, am I not a principal officer, as --  
10

11 MR. STEWART: No. The Court held in Morrison that it's  
12 an inferior officer rather than a principal officer.

13 QUESTION: One thing, in the court in question here, the  
14 Coast Guard court does sit in review on officers who were  
15 themselves appointed by the President and confirmed by the  
16 Senate. That seems to me a very substantial function. This  
17 court can review the court martial of an officer, can it not?

18 MR. STEWART: That's correct, but again in terms of the  
19 limited nature of the jurisdiction of the Coast Guard Court of  
20 Criminal Appeals, it's limited not simply in the sense that it  
21 hears only a small category of cases, but in the sense that  
22 the only people potentially subject to its jurisdiction are  
23 individuals who have chosen to join a specialized society  
24 knowing that they are to be governed by different rules.

25 We would also say that while the Coast Guard Court of

1 Criminal Appeals may engage in de novo fact-finding, in other  
2 respects its review of court martial decisions is more limited  
3 than that which would prevail in the Article III system.

4 QUESTION: I'm less concerned about what it can do to  
5 those below it than I am concerned with what those above it  
6 can do to it. What is the finality of the determinations made  
7 by this court?

8 MR. STEWART: Well, there are --

9 QUESTION: To what extent is it subject, in other words,  
10 to control by some superior officer?

11 MR. STEWART: Well, all of its decisions are subject to  
12 review by the Court of Appeals for the Armed Forces.

13 There are two categories of cases as to which the Court  
14 of Appeals for the Armed Forces exercises mandatory review.  
15 Those are cases in which the Coast Guard Court of Criminal  
16 Appeals has affirmed sentence of death, and cases in which the  
17 Judge Advocate General of the service certifies the case for  
18 review by the Court of Appeals for the Armed Forces. The  
19 Government as a practical matter may insist upon further  
20 review by the Court of Appeals for the Armed Forces.

21 QUESTION: So in any case, any case can be mandatorily  
22 reviewable so long as the JAG wants it reviewed, isn't that  
23 right?

24 MR. STEWART: That's correct.

25 With respect to other cases, cases not involving a



1 sentence of death and cases in which the JAG does not certify,  
2 the defendant may petition for review. It is essentially like  
3 a cert process where the Court of Appeals for the Armed  
4 Forces --

5 QUESTION: If review is had, is it de novo review of  
6 facts --

7 MR. STEWART: It is not de novo --

8 QUESTION: -- and law?

9 MR. STEWART: It is not de novo review of facts. In  
10 that limited sense the court of criminal appeals may issue a  
11 decision which is not effectively subject to reversal by --

12 QUESTION: Should that enter the balance on whether we  
13 think it's an inferior officer?

14 MR. STEWART: I think it enters the balance, but I think  
15 the more important point is that in ensuring the practical  
16 subordinacy of the court of criminal appeals within the  
17 military justice system, the important point is that the Court  
18 of Appeals for the Armed Forces may review all questions of  
19 law, and the court of criminal appeals is subordinate not  
20 simply in the sense that it is subject to reversal in an  
21 individual case, but in the sense that it is obligated to  
22 follow the precedents laid down by the Court of Appeals for  
23 the Armed Forces in prior cases.

24 QUESTION: Now, the Navy used to also have civilian  
25 judges.

1 MR. STEWART: Up to, I believe the early seventies.

2 QUESTION: And under what statutory authority were they  
3 properly employed --

4 MR. STEWART: I think --

5 QUESTION: -- under your theory?

6 MR. STEWART: I think under our theory they were not  
7 properly employed, and under our theory the civilian judges  
8 who served on the Coast Guard Court of Criminal Appeals prior  
9 to the Secretary's January '93 memorandum were not properly  
10 employed. Indeed, we conceded as much in Ryder.

11 QUESTION: And do you take the position that the  
12 Secretary of Transportation here could designate his authority  
13 to some lower officer or employee?

14 MR. STEWART: The question of delegation of Appointments  
15 Clause authority is a complicated one. My understanding is  
16 that that is currently being considered by others within the  
17 Department of Justice, so I would hesitate --

18 QUESTION: Well, you cite United States v. Hartwell,  
19 which might deal with that very question. Do you rely on it  
20 for that authority?

21 MR. STEWART: Well, Hartwell dealt with something  
22 different from delegation. That is, by delegation we would  
23 envision a system in which a Secretary said to a subordinate  
24 official, you may exercise my authority to appoint a  
25 particular official without further review from me.

1           What happened in Hartwell was different. The individual  
2 officer appointed in Hartwell was appointed by the Assistant  
3 Secretary with the express approval of the Secretary, so --

4           QUESTION: Well, isn't it a little difficult to see how  
5 delegation could survive under the Appointments Clause?

6           MR. STEWART: I think there would certainly be concerns  
7 about whether the accountability was preserved. On the other  
8 hand, it's also true that most powers that are conferred upon  
9 Department heads may be delegated to subordinates. In any  
10 event, the Secretary has not purported to delegate his 323(a)  
11 authority in this case. Instead, he issued a memorandum  
12 stating that he was adopting the JAG's assignments as  
13 appointments of his own.

14           And to return to the point I was making earlier, in some  
15 respects the court of criminal appeals' review of court  
16 martial decisions is more limited than that which would occur  
17 in an Article III court in the criminal context. That is,  
18 under the Sentencing Reform Act, a court of appeals within the  
19 Federal system may hear a Government appeal from a district  
20 court sentencing determination and may determine that the  
21 sentence was not harsh enough.

22           In the military justice system, by contrast, Article 66  
23 makes it clear that the review of the court of criminal  
24 appeals is limited to the sentence as entered by the court  
25 martial and approved by the convening authority.

1 QUESTION: Now, are you essentially adopting the  
2 position that Justice Souter did in his separate concurring  
3 opinion in Weiss?

4 MR. STEWART: Well, we conceded in -- the Government  
5 conceded in Weiss at oral argument and we would concede here  
6 that if judges on the Coast Guard Court of Criminal Appeals  
7 were principal officers, there would be a substantial  
8 constitutional question as to the status not only of the  
9 civilian judges but as -- but of the military judges as well.

10 QUESTION: Well, couldn't you give me an easier, shorter  
11 answer? Do you agree with Justice Souter's concurrence in  
12 Weiss, yes or no?

13 MR. STEWART: We are not prepared to concede that the  
14 appointment would necessarily be invalid. That is, if this  
15 Court were to hold that judges on the Coast Guard Court of  
16 Criminal Appeals --

17 QUESTION: Excuse me. I thought Justice Souter took the  
18 position they were inferior officers.

19 MR. STEWART: Oh, yes, we definitely agree with that.

20 QUESTION: And you agree with that?

21 MR. STEWART: Yes, that's correct.

22 Now, with respect to the statutory question --

23 QUESTION: What you don't agree with is that it would be  
24 unconstitutional to allow the assignment of an inferior  
25 officer to the position -- to do a function performed by

1 principal officers?

2 MR. STEWART: We're not prepared to concede at this  
3 point that an inferior officer who was appointed by the  
4 President with Senate confirmation -- we're not going to  
5 concede as a categorical matter that that person could not be  
6 shifted to a principal office.

7 If we lose this case on the Appointments Clause question  
8 we would --

9 QUESTION: I see.

10 MR. STEWART: -- look at the opinion and see what it  
11 said.

12 QUESTION: One who happened to have been appointed that  
13 way.

14 MR. STEWART: That's correct.

15 QUESTION: Yes, I see.

16 MR. STEWART: With respect to the statutory question, we  
17 want to make clear the Government is not arguing that  
18 Congress, in passing the Department of Transportation Act,  
19 specifically contemplated that the Secretary's authority would  
20 be used with respect to civilian judges on the Coast Guard  
21 Court of Criminal Appeals. In our view, that's simply not the  
22 correct question.

23 The question first is whether section 323(a) by its  
24 terms authorizes the Secretary to act, and we think it's clear  
25 that it does. Section 323(a) says specifically that the



1 Secretary of Transportation may appoint officers and  
2 employees within the Department.

3 There's no question that a judge on the Coast Guard  
4 Court of Criminal Appeals is an officer within the Department  
5 of Transportation, and so the real question is, does Article  
6 66 of the UCMJ divest the Secretary of the authority that he  
7 would otherwise possess with respect to these civilian judges,  
8 and we think for two reasons that it shouldn't be read that  
9 way.

10 First, Article 66 doesn't use the word appoint. It says  
11 the Judge Advocate General can establish a court of criminal  
12 appeals, refers to judges assigned to that court, but there's  
13 no plain language that would suggest that the Judge Advocate  
14 General makes appointments at all, let alone that he is the  
15 sole appointing authority.

16 With respect to one point made by the petitioners, in  
17 our view the legislative history makes clear and this Court's  
18 opinion in Weiss makes clear that the point of vesting this  
19 authority in the Judge Advocate General was to remove the  
20 matter from the influence of the commanding officer who  
21 convened the court martial, not to remove the decision from  
22 the control of the Secretary of Transportation and, indeed, if  
23 Congress' purpose were to make it impossible for the Secretary  
24 of Transportation to influence the assignment process, it  
25 would have been bizarre to give assignment authority to --

1           QUESTION: But is it true -- but I take it that nobody  
2 ever thought about this problem at all in Congress, so we're  
3 not -- it's just totally imaginary to think what they were  
4 thinking. They weren't thinking anything, and the -- on this  
5 point, and so I think the argument is that just as you  
6 responded to Justice Kennedy you said, well, look, the  
7 Secretary under this clause doesn't appoint officers of the  
8 Coast Guard, does he?

9           MR. STEWART: No, that's --

10          QUESTION: No, because there's another provision for  
11 that. He says, well, read this provision. What this  
12 provision fairly read says is that the JAG was going to do the  
13 appointing, and just as the officer of the Coast Guard  
14 provision is -- everybody understood that, and they know that  
15 this general catch-all doesn't apply to that, so everybody  
16 here understood that the JAG would do the appointing, and so  
17 the catch-all doesn't apply to that, either. Why do one and  
18 not the other, and it can't just be a technicality of the  
19 definiteness of the language. He says, look really to the  
20 reality of how the thing was working.

21          MR. STEWART: Well, the --

22          QUESTION: What's your response to that?

23          MR. STEWART: The definiteness of the language is one  
24 point, but I think what we would say is even more important is  
25 that the JAG is a subordinate official within the Department

1 of Transportation who is subject by statute to the Secretary's  
2 control and who could be directed by the Secretary to assign a  
3 particular individual to the court of criminal appeals.

4 And therefore while it would -- it would obviously  
5 disrupt the statutory scheme for the Secretary of  
6 Transportation to purport to appoint commissioned officers  
7 within the Coast Guard, because that would subvert in a very  
8 practical way the process that Congress had established for  
9 making people a part of the Coast Guard, since the Secretary  
10 could, in any event, direct the JAG to assign a particular  
11 individual to the court of criminal appeals, there's no  
12 practical disruption --

13 QUESTION: Well --

14 MR. STEWART: -- by saying that the Secretary can  
15 exercise that authority himself.

16 QUESTION: Doesn't the statute pertain to commissioning  
17 of Coast Guard officers read the same way? Aren't they  
18 appointed by the President and confirmed by the Senate the  
19 same way other officers are?

20 MR. STEWART: That's correct.

21 QUESTION: Mr. Stewart, isn't it, beyond that, your  
22 position that to read the language here, which does not say  
23 appoint, to mean appoint the civilian officers -- the civilian  
24 judges would be unconstitutional? Is that not -- unless you  
25 think the JAG is the head of a Department. You don't think

1 he's the head of a Department, do you?

2 MR. STEWART: That's correct. But the JAG certainly  
3 could not assign civilian judges to the court without an  
4 appointment from someone else, so --

5 QUESTION: So essentially petitioner is asking that  
6 66(a) be interpreted, although it doesn't say it explicitly,  
7 in a fashion that is unconstitutional.

8 MR. STEWART: I think that's correct, in a fashion  
9 that's unconstitutional and also in a fashion that would  
10 subvert Congress' intention that the services, and  
11 particularly the Coast Guard, should be able to use civilian  
12 judges. That is I think -- one important point is that to the  
13 --

14 QUESTION: I think his point was that you -- how far do  
15 you go in stretching 323 in order to rescue a scheme that  
16 would be unconstitutional if you didn't stretch 323?

17 MR. STEWART: I mean, with respect, we agree with the  
18 Chief Justice that it's not a stretch. Article 323(a) says  
19 categorically that the Secretary of Transportation may appoint  
20 officers and employees within the Department.

21 The only remotely difficult question is not whether  
22 323(a) applies by its terms, but whether Article 66 takes away  
23 the authority that was otherwise conferred, and we think it's  
24 important to point out that to the extent that we can hazard  
25 an educated guess as to what Congress anticipated, neither



1 side in this case is arguing that the system should work in  
2 precisely the manner that Congress expected.

3 That is, probably Congress expected that the JAG's would  
4 be solely responsible for placing individuals on the courts of  
5 criminal appeals, but it surely expected that the pool of  
6 potential judges would include all civilians who were members  
7 of the bar of a Federal court, or the highest court of the  
8 State, and we know that it can't work that way. We can't have  
9 both sole authority in the JAG and that pool of judges, and  
10 therefore it can't be a dispositive objection to our theory  
11 that Congress didn't anticipate that it would work that way.

12 To the extent that Congress' expectations are relevant  
13 at all, the more accurate question is, which approach  
14 preserves more of what Congress wanted than the other one, and  
15 we think it would clearly have been more important to Congress  
16 that the potential pool of judges remain the same, rather than  
17 that the authority be lodged in the Judge Advocate General  
18 rather than the Secretary, because the Secretary in any event  
19 could direct the JAG to appoint -- to assign whatever  
20 individuals he wanted.

21 If there are no further questions --

22 QUESTION: Thank you, Mr. Stewart.

23 Mr. Morrison, you have 3 minutes remaining.

24 REBUTTAL ARGUMENT OF ALAN B. MORRISON

25 ON BEHALF OF THE PETITIONER

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1 MR. MORRISON: I'd just like to add to Mr. Stewart's  
2 response to Justice O'Connor's question about the de novo  
3 review. In addition, the Court of Appeals for the Armed  
4 Forces cannot review sentences in the same way that the courts  
5 of criminal appeals can do, and so that's an additional power  
6 that extends beyond it.

7 For better or for worse, the Constitution creates only  
8 two categories of officers of the United States. They must  
9 either be principal officers or inferior officers and, thus,  
10 if the Court reads 323(a) the way that Mr. Stewart suggests,  
11 the Court must then face the constitutional question of  
12 whether on balance these officers are more like principal  
13 officers or more like inferior officers.

14 We believe that the comparisons with the courts are the  
15 most relevant comparisons, and that compared with the judges  
16 of the tax court and other similar judges, these judges, who  
17 deal not simply with money but with liberty and life in some  
18 cases, are sufficiently important -- they're sufficient --

19 QUESTION: On that subject, Mr. Morrison, do I  
20 understand your argument to be that prospectively, if you're  
21 right -- I know that you have a client concern -- because  
22 there is the important liberty interest that you describe, all  
23 of the judges of this tribunal would be military and none  
24 would be civilian?

25 MR. MORRISON: I -- if I understand your -- until

1 Congress could correct it, that is correct, Your Honor. They  
2 would have to be civilian.

3 QUESTION: So --

4 MR. MORRISON: Unless the President -- as I said before,  
5 the President --

6 QUESTION: If you prevail then, of course, there's one  
7 result for your clients, but the result for the system is that  
8 unless and until Congress does something further, all of the  
9 judges must be military people.

10 MR. MORRISON: No, Your Honor, that is not correct. As  
11 I said before, the President could step in tomorrow and send  
12 these nominations to the Senate, and as soon as they were  
13 confirmed, that would be constitutionally sufficient, because  
14 under the Appointments Clause the President has the ultimate  
15 fall-back authority to make these appointments and to cure the  
16 constitutional defect.

17 So the question then is, under this choice that the  
18 Court must make if it agrees with the Government's submission  
19 on 323(a), are they more like principal officers or are they  
20 more like inferior officers and we believe that, given their  
21 wide-ranging powers and the practical finality of their  
22 decisions, the balance favors principal rather than inferior  
23 officers.

24 If the Court has no further questions --

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Morrison. The

1 case is submitted.

2 (Whereupon, at 10:48 a.m., the case in the above-  
3 entitled matter was submitted.)

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JON E. EDMOND, Petitioner v. UNITED STATES  
CASE NO. 95-262

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BY Don Mari Fedigo-----

(REPORTER)