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# U.S. v. Arthrex: Exploring Justice Thomas's Call to Reexamine Edmond

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In Part 1 of this two-part post, I summarized Justice Clarence Thomas's recent call to reexamine the "functional prong" of *Edmond v. U.S.* (1997). Though Thomas had joined *Edmond* in full and cited it approvingly as recently as four years ago, Thomas's dissent in *U.S. v. Arthrex* (2021) suggested that *Edmond*'s functional prong may lack historical or textual support.

As I explained in Part 1, it is fair to say that on each of the three points raised by Justice Thomas, neither side has offered a decisive piece of historical or linguistic evidence that clearly settles the debate. This raises two key questions: What explains the lack of strong evidence on this question, and which side should bear the burden of persuasion in the face of historical ambiguity? I address those questions here in Part 2 and conclude with thoughts on why Justice Thomas's views have only now shifted against *Edmond*.

**How to interpret the paucity of historical evidence**

To Justice Thomas, *Edmond*'s "functional prong" bears the burden of persuasion and must be justified by affirmative historical evidence, since it is not explicitly mandated by constitutional text. Without strong evidence that the functional prong was inherent in the understood meaning of "inferior," Thomas urged in his *Arthrex* dissent that "the Court should be hesitant to enforce its view of the Constitution's spirit at the cost of its text."

But Justice Antonin Scalia, the author of *Edmond*, had a plausible argument that the burden of persuasion should go the other way. In his earlier dissent in *Morrison v. Olson* (1988), Scalia noted that the exception from Senate consent for inferior officers was added to the Appointments Clause on "the last day of the Convention before the proposed Constitution was signed, in the midst of a host of minor changes that were being considered." As Scalia recounted, once the exception was proposed "[n]o great debate ensued; the only disagreement was over whether it was necessary at all." From this lack of major conflict or discussion, Scalia inferred that "[n]obody thought that it was a fundamental change, excluding from the President's appointment

power and the Senate's confirmation power a category of officers who might function on their own, outside the supervision of those appointed in the more cumbersome fashion."

Essentially, Scalia's argument was that after the extensive debate at the Constitutional Convention over the default appointment system (which eventually settled on presidential nomination and Senate confirmation), the Framers would not have hidden an elephant in the mousehole of the inferior officer exception. To Scalia, the lack of attention to or discussion of the inferior officer clause led to a presumption that it was a *narrow* and relatively unimportant exception.

In the absence of definitive historical evidence, the debate between Justices Scalia and Thomas might come down to these competing presumptions. The fundamental problem standing in the way of finding such historical evidence is that it appears every example of an officer designated by statute as "inferior" in the Framing era was *both* formally and functionally inferior. (If there are any counterexamples these would be of tremendous historical importance, but I am not aware of any being identified in scholarship during the 24 years since *Edmond* was decided.) Put simply, if formal and functional inferiority were *both* always present in officers exempted from Senate consent during the Framing era, then Congress would never have had an opportunity to decide whether just one or both is essential to inferior status.

But there is one more piece of evidence that, in my view, supports Justice Scalia's intuition that functional subordination was originally inherent in the nature of an inferior officer. As is well known, the First Congress engaged in an extended debate over who had the power to remove officers nominated by the President and confirmed by the Senate. There was no similar debate for inferior officers, but the early understanding appears to have settled on the same rule as for presidential nominees: the power to remove lies by default with the appointer.

In an early Appointments Clause case, *Ex parte Hennen* (1839), the Supreme Court held that a federal judge who had appointed a district court clerk could remove the clerk at will and appoint a successor. The Court held that "all inferior officers appointed [by the president, a department head, or a court], by authority of law, must hold their office at the discretion of the appointing power. Such is the settled usage and practical construction of the Constitution and laws, under which these offices are held." The Court explicitly noted that this rule applied to all executive-branch clerks appointed by their department head, remarking that "although no power to remove is expressly given, yet there can be no doubt, that these clerks hold their office at the will and discretion of the head of the department."

Because *Hennen* described this rule as applying "[i]n the absence of all constitutional provision or statutory regulation," later cases like *U.S. v. Perkins* (1886) and *Morrison* have interpreted *Hennen* to establish only a *default* rule. These later cases have held that the default rule can be overcome by explicit statutory for-cause removal protection. Still, *Hennen* provides valuable context for early congressional practice. If inferior officers were understood to be presumptively removable at will by their appointers, that supports the view that those appointed as inferior officers in the Framing era were understood to be functionally subordinate to their appointers. For example, even if Congress *had* vested appointment of the Comptroller of the Treasury in the Secretary of the Treasury (as Justice Thomas suggested Congress could have done), the

Comptroller would then have been presumptively removable at will by the Secretary, and thus plausibly functionally subordinate.

A theme running throughout Justice Scalia's *Morrison* dissent was that imbuing lower-ranking officers with tenure protection and independence is a departure from early practice. Speaking of the independent counsel specifically, Scalia wrote that "[i]f she were removable at will by the Attorney General, then she would be subordinate to him and thus properly designated as inferior." Scalia thus had a plausible account both for why subordination would have been understood as inherent to "inferior" status at the founding *and* why this fact seemingly went without saying at the founding: The Framers did not anticipate that Congress would attempt to grant inferior appointees removal protection from the very superiors who appointed them, a development that severed formal and functional inferiority for the first time.

**Explaining the impetus for Justice Thomas's shift**

Justice Thomas has drawn attention to some legitimate weaknesses in *Edmond*'s justification for imposing the "directed and supervised" test. But in my view, those justifications are significantly stronger when read in the light of Justice Scalia's *Morrison* dissent, and Thomas fails to completely rebut Scalia by not engaging with the *Morrison* dissent. But whichever side one takes in this debate, we are still left with an intriguing question: What prompted Thomas's sudden skepticism of *Edmond*?

The most likely answer is that the outcome in *Arthrex* simply struck Justice Thomas as implausible: "The fact that [the majority's dividing] line places administrative patent judges on the side of Ambassadors, Supreme Court Justices, and department heads suggests that something is not quite right." In *Edmond* itself, the officer at issue was found inferior under the functional hierarchy view but *also* likely would have been found inferior under a formal hierarchy test. In *NLRB v. SW General* (2017), the NLRB general counsel likely would have *not* been inferior under either approach, since the NLRB is an independent agency and the general counsel is not even nominally below anyone else. *Arthrex,* then, presented the first case to reach the Supreme Court during Thomas's tenure where the outcome likely *differed* under the formal and functional approaches to hierarchy. And in that first conflict between the two, which raised the "intra-*Edmond*" question for the first time, Thomas's instincts sided with the outcome supported by the formal definition.

But even if those instincts were understandable in *Arthrex,* it is once again puzzling that Justice Thomas declined to address *Morrison*, a case predating Thomas's tenure where the formal and functional approaches to hierarchy *also* likely conflicted. Thomas acknowledged near the end of his dissent that one motivation for the functional test is that the Court perhaps "fears that a more formal interpretation might be too easy to subvert. A tricky Congress could allow the Executive to sneak a powerful, Cabinet-level-like officer past the Senate by merely giving him a low rank." Thomas framed this possibility as purely hypothetical, calling *Arthrex* "an odd case to address that concern." But to Justice Scalia, the possibility that the formal interpretation might be subverted was not just a hypothetical; the independent counsel was a real-life example.

The independent counsel was formally below the attorney general within the Department of Justice, despite being appointed by an outside court and not being subject to the attorney general's removal at will or close supervision. The functional prong of *Edmond* was born in *Morrison*, a case where, in Justice Scalia's view, formal rank no longer counted for much. (If Scalia had thought the independent counsel was a principal officer under even a purely formal hierarchical test, it's unlikely he would have focused his dissent on functional hierarchy.) Disagreement with the outcome of *Morrison* shaped Scalia's functional approach just as much as disagreement with the outcome of *Arthrex* has now apparently shaped Thomas's formal approach.

If Justice Thomas's instincts are right and inferior status is solely about formal hierarchy, then *Morrison*'s Appointments Clause holding was likely correct (albeit for the wrong reasons, since the majority focused on multiple factors rather than just formal hierarchy). The question is, would that be an outcome that other originalists are willing to accept?

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