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

Thomas Berry

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Four years ago in *NLRB v. SW General* (2017), Justice Clarence Thomas argued in a concurring opinion that the general counsel of the NLRB "is likely a principal officer" and that appointing an *acting* general counsel without Senate consent "raises grave constitutional concerns." In that concurrence, Justice Thomas applied the test for distinguishing "principal" and "inferior" officers originally set out in *Edmond v. U.S.* (1997). Thomas wrote that "*Edmond* is . . . consistent with the Constitution's original meaning and therefore should guide our view of the principal-inferior distinction." Thomas's endorsement of *Edmond* was not particularly surprising, given that Thomas had joined Justice Antonin Scalia's majority opinion in *Edmond* 20 years earlier.

That concurrence was Justice Thomas's last word on *Edmond* until this past term, when Thomas authored a dissenting opinion in *U.S. v. Arthrex* (2021) to explain his view that administrative patent judges (APJs) are inferior officers. In his dissent, Thomas primarily argued that APJs are inferior under the test set out in *Edmond*. But in an unexpected conclusion, he strongly suggested that a core element of the *Edmond* test may not "align[] with the Appointments Clause's original meaning."

Exactly how have Justice Thomas's views changed in the four years since *SW General*? Just how strong are the arguments that Thomas has now mustered against *Edmond*? And why is Thomas only now calling into question an opinion that he joined in full 24 years ago? Those questions are the subject of this two-part post.

How much have Justice Thomas's views shifted since *SW General*?

To understand how Justice Thomas's views have shifted and how they have *not* shifted, it is crucial to place *Edmond* in context. *Edmond* itself is in significant tension with a case from nine years earlier, *Morrison v. Olson* (1988), which had held that an independent counsel was an

inferior officer. The author of *Edmond*, Justice Scalia, was the sole dissenter in *Morrison*. Much of *Edmond*'s language was closely adapted from Scalia's *Morrison* dissent.[1]

Edmond seemingly overruled *Morrison* on one fundamental question: is "inferior" status defined by a multi-factor test that includes an office's duties, scope, and tenure (as *Morrison* had held), or is "inferior" status defined entirely by an office's hierarchical position within the executive branch? On this fundamental question, Justice Thomas's views still align with *Edmond*: inferior status is about hierarchy. In his *Arthrex* dissent, Thomas proposed three possible interpretations of "inferior," and all three are defined by hierarchy. Though the three interpretations vary in just *how* low-ranking an officer must be to qualify as "inferior," all three definitions are about rank, and none resembles the multi-factor approach of *Morrison*.

But Justice Thomas's views *have* shifted, or at the very least become less certain, on what might be called an "intra-*Edmond*" question: how do we determine an officer's place in the hierarchy? If "inferior" status is indeed about hierarchy, is it solely about being inferior to another officer in *formal* rank, or is it also about being inferior to another officer in *functional* supervision? The thrust of Thomas's *Arthrex* dissent is that *Edmond* may have jumped too quickly from defining inferior status by hierarchy to defining it by *functional* hierarchy.

Specifically, *Edmond* held that to be inferior "[i]t is not enough that other officers may be identified who formally maintain a higher rank . . . [rather,] 'inferior officers' are officers whose work is directed and supervised at some level by others" appointed by the President and confirmed by the Senate. This "directed and supervised" test is what Justice Thomas calls *Edmond*'s "functional prong." And the functional prong is the object of Thomas's criticism. Thomas now believes that *Edmond*'s "decision to require more than just a lower rank and a superior officer" may not have been based on sound reasons.

Rather than a call to return to the multi-factor approach of *Morrison*, Thomas's *Arthrex* dissent is a call to potentially move to an even more formalized version of *Edmond*. It is a suggestion, as far as I am aware, that no member of the Court or scholar has made before. How convincing is it?

Evaluating Justice Thomas's critique of *Edmond*

Justice Scalia's *Edmond* opinion offered three reasons for why inferior status must require being "directed and supervised" by another officer, not just being formally lower in rank. Justice Thomas's *Arthrex* dissent scrutinized each of these reasons in turn.

First, *Edmond* contrasted the Framers' choice of the word "inferior" with another potential option that they did not choose: the word "lesser." *Edmond* suggested that if the Framers had intended to refer broadly to any officer of a formally lower rank, they would have used the word "lesser" rather than "inferior."

But as Justice Thomas pointed out, none other than James Madison apparently used the word "lesser" rather than "inferior" when the Framers were debating the Appointments Clause. "If

Madison understood the two terms to be interchangeable," Thomas reasoned, then "perhaps this Court should too."

Edmond admittedly put a lot of weight on quite a fine distinction between two words that might strike the average reader as nearly synonymous. But *Edmond* did not represent Justice Scalia's full textualist argument on this point. As noted above, Scalia's majority opinion in *Edmond* was closely adapted from his dissenting opinion in *Morrison*. But that does not mean the two opinions are identical. Some arguments were more fleshed out in the *Morrison* dissent (presumably because Scalia was then writing only for himself), and the textualist "inferior vs. lesser" argument is one of them.

In his *Morrison* dissent, Justice Scalia explained that the choice of the word "inferior" was significant because the word "inferior" appears elsewhere in the Constitution, which allows interpreters to use comparative textualism. "At the only other point in the Constitution at which the word 'inferior' appears, it plainly connotes a relationship of subordination. Article III vests the judicial power of the United States in 'one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'" If an "inferior court" must be functionally subordinate to the Supreme Court rather than merely formally lower in rank (a view, Scalia noted, that finds support in Federalist 81), then an "inferior officer" plausibly carries the same connotation for the executive branch.

This fuller version of Scalia's textualist argument is stronger than the *Edmond* version. Scalia probably conceded too much by suggesting that the word "lesser" would have *rejected* functional subordination. Rather, the word "inferior" carries strong connotations of functional subordination that other words (including "lesser") don't because "inferior" evokes the role of the "inferior courts." Thomas's *Arthrex* dissent does not address this comparative textualism argument from *Morrison*.

Next, *Edmond* maintained that the functional prong is necessary to "preserve political accountability" by ensuring that a Senate-confirmed superior is responsible for an inferior officer's actions. Justice Thomas countered that the mere *appointment* of an inferior officer is sufficient to place accountability for the inferior's actions in the appointer; direct supervision of particular decisions is not also necessary. For support, Thomas cited Federalist 77 by Alexander Hamilton, which spoke of the President's accountability for "a bad nomination."

But in Federalist 77, Hamilton's topic of discussion was limited to the default Appointments Clause system of presidential nomination and Senate confirmation. Hamilton argued that under this system, "[t]he blame of a bad nomination would fall upon the President singly and absolutely." Neither Federalist 77 nor any of the other Federalist Papers ever discussed the alternative method of appointment available solely for inferior officers, in which the President, a department head, or a court can appoint the officer without Senate consent. Is blame on the appointer for a bad nomination sufficient to preserve political accountability when the appointer is the head of a department or a court, neither of which has a direct claim to a democratic mandate like the President? The Federalist Papers don't shed light on what the Framers' views might have been on that question.

Finally, *Edmond* held that the functional subordination requirement is consistent with Framing-era practice. When the First Congress established the Department of Foreign Affairs and Department of War, it gave both departments a "chief clerk, who would be 'employed' within the Department as the Secretary 'shall deem proper,' as an 'inferior officer.'" In both cases, the chief clerk was to be appointed by the Secretary, so there is no doubt Congress viewed these clerks as "inferior" in the Appointments Clause sense. *Edmond* suggested that serving the Secretary "as he shall deem proper"—*i.e.* functional subordination—was central to why these chief clerks indeed qualified as inferior officers.

But Justice Thomas contended that this historical evidence is not so clear. One early position with an unusual amount of independence was the Comptroller of the Treasury, a "quasi-judicial figure" (in Justice Thomas's words) charged with settling monetary disputes between the United States and U.S. citizens.[2] While Congress did *not* in fact exempt the Comptroller from presidential nomination and Senate consent, Thomas noted that "at least one early legislator (with no recorded objections) thought 'the Comptroller was an inferior officer.'" If an official with that level of independence did not obviously strike the First Congress as a principal officer, Thomas reasoned, then perhaps supervision and control were not viewed as the *sine qua non* for all inferior officers.

It's hard to say either side of the Scalia-Thomas debate definitively wins on this point, due to the scarcity of historical evidence. On the one hand, the statement of a single legislator should carry far less weight than the actual decision of the First Congress, which was *not* to exempt the Comptroller from the Senate consent requirement. On the other hand, any decision not to exempt a particular officer is inherently ambiguous, since Congress is free to require Senate consent even for inferior officers. Thus, while a decision to exempt an officer from Senate consent is affirmative evidence that Congress viewed that officer as inferior, a decision *not* to exempt cannot be taken as expressing a view one way or the other.

Overall, it is fair to say that on each of these three points neither side has offered a decisive piece of historical or linguistic evidence that clearly settles the debate. If that is so, which side should carry the burden of persuasion on this constitutional question? What explains the lack of on-point historical evidence? And why have Justice Thomas's views only now shifted against Justice Scalia's? I will propose answers to these questions in Part 2 of this post.

Thomas Berry is a research fellow in the Cato Institute's Robert A. Levy Center for Constitutional Studies and managing editor of the Cato Supreme Court Review.