Essay

Morrison, *Edmond*, and the Power of Appointments

Andrew Croner*

> *The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing "Officers of the United States," but the drafters had a less frivolous purpose in mind . . . . We think that the term "Officers of the United States" as used in Art. II . . . is a term intended to have substantive meaning.*[1]

Introduction

The power of appointments under the Constitution is governed by the Appointments Clause. On its face, the Appointments Clause appears to be a model of clarity among the many more vague commands of the Constitution;[2] the procedures used for the appointment of federal officers are clearly spelled out and readily understandable. The Appointments Clause requires that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not

---

* J.D., 2009, The George Washington University Law School; B.A., 2006, Johns Hopkins University.

1 Buckley v. Valeo, 424 U.S. 1, 125–26 (1976) (per curiam).

2 Nick Bravin, Note, *Is* Morrison v. Olson *Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1111 (1998) ("Article II, section 2 stands out as a specific textual provision among many more vague commands in the Constitution.").

> herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[3]

Notwithstanding the specific appointment procedures outlined in the Clause, there are questions the Clause leaves unanswered. Principally, the Clause provides for two distinct modes of appointment based on whether an officer is classified as a "principal officer"[4] or an "inferior officer," but fails to provide any guidance for how this delineation should be made.[5] It has largely been left up to the Supreme Court to provide substance to the distinction between principal and inferior officers due to the Constitution's silence.[6]

The distinction between principal and inferior officers is not a trivial one either. As this Essay explains,[7] the classification of officers as principal or inferior can have drastic effects on the ease with which they are appointed. An analysis of the principal/inferior distinction is particularly appropriate in the aftermath of the drama surrounding the unsuccessful confirmations of Obama appointees Tom Daschle and Nancy Killefer.[8]

With that in mind, this Essay attempts to shed light on the different approaches the Supreme Court has taken to distinguishing between principal and inferior officers, while also highlighting the importance of this distinction in the area of administrative law.[9] Fur-

---

3 U.S. CONST. art. II, § 2, cl. 2.

4 Although the Clause itself does not use the term "principal officer," that term has been used to denote "Officers of the United States" who are selected by the President by and with the advice and consent of the Senate. *See, e.g.*, *Buckley*, 424 U.S. at 132 (noting in its discussion of the Clause that "[p]rincipal officers are selected by the President with the advice and consent of the Senate").

5 As Justice Story said: "In the practical course of the government, there does not seem to have been any exact line drawn, who are, and who are not, to be deemed *inferior* officers in the sense of the constitution, whose appointment does not necessarily require the concurrence of the senate." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 566 (Carolina Academic Press 1987) (1833).

6 *See, e.g.*, Edmond v. United States, 520 U.S. 651, 658–66 (1997); Morrison v. Olson, 487 U.S. 654, 670–77 (1988).

7 *See infra* Part II.

8 *See, e.g.*, Toby Harnden, *Barack Obama Nominees Forced to Quit over Taxes*, TELEGRAPH.CO.UK, Feb. 4, 2009, http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/4450211/Barack-Obama-appointments-forced-to-quit-over-taxes.html.

9 It is important to note what this Essay will not address. In addition to the distinction between principal and inferior officers, another Appointments Clause issue is the distinction between federal "officers" generally and federal "employees." The distinction between "officers" and "employees" will not be addressed here, but for a thorough discussion of this issue,

ther, this Essay provides its own view on the best way to determine which officers should be classified as principal and those that should be deemed inferior. Part I briefly recounts the history of the Appointments Clause, focusing specifically on the motivations behind the structure of the Clause. Part II then discusses the importance of the distinction between principal and inferior officers within the realm of administrative law. Part III examines *Morrison v. Olson*[10] and *Edmond v. United States*,[11] the two most recent cases in which the Court has grappled with the distinction between principal and inferior officers, highlighting the widely divergent approaches taken by the Court in each case. Finally, Part IV argues that the proper approach the Court should take when addressing this issue is the approach adopted in *Edmond*, considering heavily its effect in the area of administrative law.

I. A Brief History of the Appointments Clause

The Appointments Clause was born out of the Founders' skepticism and fear of public officers. As early as the First Continental Congress, the Founders wrote of "oppressive officers" who needed, by means of freedom of the press, to be "shamed or intimidated into more honorable and just modes of conducting affairs."[12] The Declaration of Independence similarly expressed this skepticism and fear, charging that King George III had "erected a Multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance."[13] So critical to the Founders' thinking was this skepticism and fear of public offices that "'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism.'"[14]

It is not surprising, then, that debates over the Appointments Clause at the Constitutional Convention centered on devising a structure that would maintain both accountability for appointments and a

---

see generally Memorandum from Steven G. Bradbury, Acting Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to the General Counsels of the Executive Branch, Regarding Officers of the United States Within the Meaning of the Appointments Clause (Apr. 16, 2007), *available at* http://www.usdoj.gov/olc/2007/appointmentsclausev10.pdf.

10 Morrison v. Olson, 487 U.S. 654 (1988).

11 Edmond v. United States, 520 U.S. 651 (1997).

12 *Id.* at 8 (quoting *Appeal to the Inhabitants of Quebec*, 1 JOURNALS OF THE CONTINENTAL CONGRESS 105, 108 (1774)).

13 THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

14 Freytag v. Comm'r, 501 U.S. 868, 883 (1991) (quoting GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 143 (1969)).

check on concentrated power.[15] With respect to principal officers, the Framers addressed these two concerns by adopting a proposal modeled after the judicial appointments clause of the Massachusetts Constitution, in which officers were appointed by the executive with the advice and consent of the Senate.[16] The Framers promoted accountability by vesting the power of nomination singularly in the President, explicitly rejecting the idea of giving nomination power to the Senate because that body was "too numerous, and too little personally responsible, to ensure a good choice."[17] At the same time, the Framers prevented excessive concentration of power by subjecting the President's nominees to Senate approval.

Concerning the inferior officer provision, sometimes referred to as the "Excepting Clause,"[18] there was little discussion over its addition to the Appointments Clause.[19] Though the provision, which was added to the Constitution on the last day of the Convention, needed two separate votes to pass, that was not due to controversy over the provision as much as debate over its necessity.[20] Gouverneur Morris,[21] who opposed the provision, felt that blank commissions for officers could be issued as an alternative to adding the Excepting Clause, while James Madison felt that the Excepting Clause did not go far enough in providing other means for the appointment of officers.[22] Either way, what is clear from the modest debate on this provision is the Framers viewed the Excepting Clause as enhancing the efficiency of the appointment process.[23]

Looking at the historical motivations behind the Appointments Clause, two principles seem to emerge. First, the Founders wanted to

---

15 Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1917 (2007).

16 *Id.*

17 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 274–75 (Gaillard Hunt & James Brown Scott eds., 1920).

18 Edmond v. United States, 520 U.S. 651, 660 (1997).

19 *See* 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627–28 (1911 ed.), *available at* http://lcweb2.loc.gov/ammem/amlaw/lwfr.html.

20 *See id.*

21 Gouverneur Morris was a delegate to the Philadelphia Convention representing Pennsylvania, and later a U.S. Senator from New York. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 1620 (2005), *available at* http://www.gpoaccess.gov/serialset/cdocuments/hd108-222/index.html.

22 *See id.*

23 *See Edmond*, 520 U.S. at 660 ("As one of our early opinions suggests, [the Excepting Clause's] obvious purpose is administrative convenience . . . ." (citing United States v. Germaine, 99 U.S. 508, 510 (1879))).

prevent the tyranny associated with public offices at the time by establishing accountability and a decentralization of power in the appointments process. Second, the Founders recognized that although these concerns are extremely important, they should not operate so as to render the appointments process entirely inefficient.

II. The Principal/Inferior Distinction in Administrative Law

The practical effect the principal/inferior distinction has on administrative law is chiefly tied to the second principle that emerges from the history of the Appointments Clause. The procedures used to appoint principal officers are often cumbersome and time consuming, requiring a number of steps before confirmation takes place. After the President chooses an individual for a position, the nomination is referred to the Senate committee with jurisdiction over the agency or office which the nominee would fill.[24] At that point, the Senate committee may or may not act on the nomination, often holding public hearings on the nomination if they do choose to act.[25] If the committee approves the nomination, it goes before the full Senate, which may or may not take up the nomination on the floor.[26] If the Senate does proceed to consider the nomination, it may or may not proceed to a final vote.[27] An affirmative majority vote of the full Senate is required for a nomination to be confirmed.[28]

This process would not necessarily be cumbersome if the Senate acquiesces to a nomination, but often this is not the case.[29] One scholar has found an emerging trend in which the Senate has increasingly interfered with presidential nominations.[30] Senate interference has not arisen solely in the area of judicial nominations (traditionally where the most visible nomination battles have been staged), but also with respect to nominations in the areas of national security, the environment, economics, and civil rights.[31] It is suggested that this phenomenon is primarily the result of the aggrandizement of powerful

---

24 Lorraine H. Tong, Cong. Research Serv., Senate Confirmation Process: A Brief Overview 1–2 (2008), *available at* http://assets.opencrs.com/rpts/RS20986_20081201.pdf.

25 *Id.* at 2.

26 *Id.*

27 *Id.*

28 *Id.*

29 *See* Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 Harv. J.L. & Pub. Pol'y 467, 482–95 (1998).

30 *Id.* at 487.

31 *Id.*

Senate committees, the advent of powerful interest groups, and the media's expansion into the appointments process.[32]

Even worse, the sheer number of significant offices within each agency only exacerbates the possible consequences of the cumbersome principal-officer confirmation process. Every four years—just after the Presidential election—the Senate Committee on Governmental Affairs and the House Committee on Government Reform publish what is commonly known as the *Plum Book*, a "publication [that] contains data . . . on over 7,000 Federal civil service leadership and support positions . . . that may be subject to noncompetitive appointment . . . ."[33] In the 2004 edition of the *Plum Book*, the Environmental Protection Agency ("EPA") alone had 174 positions that met these qualifications.[34] For the Social Security Administration, the number was 162.[35] Clearly, it would be a significant waste of agency time and resources to go through the Senate confirmation process each time one of these positions needs to be filled.

Although it is safe to assume that many of the positions in the *Plum Book* would not qualify as principal officers under any formulation of that term by the Court, the fact that our national government has expanded to include so many positions places particular importance on the distinction between principal and inferior officers. Nowhere is this more evident than with administrative agencies, whose proliferation in the twentieth century caused some to coin them the "Fourth Branch" of our governmental structure.[36] Having accepted that the principal/inferior distinction would affect significantly the efficient operation of agencies, it is now time to look at the Court's recent attempts to provide substance to this distinction.

III. The Morrison *and* Edmond *Decisions*

A. Morrison v. Olson

The Court's first modern assessment of the distinction between principal and inferior officers arose out of the independent counsel investigation of Ted Olson, then the Assistant Attorney General for

---

32 *Id.* at 491–95.

33 H. Comm. on Gov't Reform, 108th Cong., United States Government Policy and Supporting Positions, at iii (Comm. Print 2004), *available at* http://www.gpoaccess.gov/plumbook/2004/2004_plum_book.pdf. The *Plum Book* includes listings for positions such as agency heads and their immediate subordinates, policy executives and advisors, and aides who report to these officials. *Id.*

34 *Id.* at 160–64.

35 *Id.* at 197–202

36 FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

the Office of Legal Counsel, for allegedly providing false and misleading testimony to a House subcommittee.[37] Olson had provided testimony to the subcommittee as part of a House Judiciary Committee investigation into the Justice Department's role in an acrimonious dispute between Congress and the Executive over access to documents of the EPA.[38] That dispute stemmed from the EPA's invocation of executive privilege in response to House subpoenas directing the EPA to produce certain documents relating to efforts to enforce the "Superfund Law."[39]

Once appointed, the independent counsel, Alexia Morrison, caused a grand jury to issue and serve subpoenas on Olson and other Justice Department officials.[40] Olson moved to quash the subpoenas, arguing, among other things, that the statute providing for the appointment of independent counsel violated the Appointments Clause and thus Morrison lacked authority to proceed with her investigation.[41] That statute, Title VI of the Ethics in Government Act (the "Act"),[42] provided that if the Attorney General felt there were "reasonable grounds" for an investigation by an independent counsel, he would notify a three-member "Special Division" of judges of the various U.S. Courts of Appeals chosen by the Chief Justice of the United States.[43] The "Special Division" would then appoint an appropriate independent counsel and define that independent counsel's prosecutorial jurisdiction.[44]

Because the Act did not provide for appointment by nomination of the President with the advice and consent of the Senate, it would only survive constitutional scrutiny if the independent counsel were deemed an inferior officer.[45] The Court found that Morrison was in-

---

37 *See* Morrison v. Olson, 487 U.S. 654, 665–68 (1988).

38 *Id.* at 665–66.

39 *Id.* at 665 (citing Comprehensive Environmental Response, Compensation, and Libaility Act of 1980, 42 U.S.C. §§ 9601–9675 (2000)). It was later found that the documents contained evidence of political manipulation of "Superfund" enforcement, which led to the resignation of the Administrator of the EPA. Earl C. Dudley, Jr., Morrison v. Olson*: A Modest Assessment*, 38 AM. U. L. REV. 255, 257 (1989).

40 *See Morrison*, 487 U.S. at 668.

41 *See id.* at 668–69.

42 28 U.S.C. §§ 591–599 (2006).

43 *See Morrison*, 487 U.S. at 660–61.

44 *Id.*

45 Pursuant to the Excepting Clause, Congress can vest the power of appointment of an "inferior" officer "in the Courts of Law." U.S. CONST. art. II, § 2, cl. 2.

deed an inferior officer, and upheld the Act's method of appointment as constitutional.[46]

In support of its conclusion, the Court laid out four factors: (1) the officer's removability by a superior executive branch official; (2) the scope of the officer's duties; (3) the scope of the officer's jurisdiction; and (4) the tenure of the office at issue.[47] As to the first inquiry, the Court found that although Morrison "may not be 'subordinate' to the Attorney General (and the President)" due to the great discretion and latitude the Act affords her, "the fact that she can be removed by the Attorney General indicates that she is to some degree 'inferior' in rank and authority."[48] Looking then at the scope of Morrison's duties, the Court found the duties of an independent counsel to be "limited" despite the fact that an independent counsel was free to exercise all the powers of the Justice Department and the Attorney General.[49] Assessing the third inquiry, the Court found that an independent counsel is limited in jurisdiction because they can only act within the scope of the jurisdiction granted to them by the Special Division.[50] Finally, discussing the fourth factor the court concluded that, though there is no time limit on the appointment of a particular independent counsel, the office is still "temporary" because it terminates once the independent counsel has accomplished the assigned task.[51]

In his dissent, Justice Scalia began his Appointments Clause analysis by criticizing the majority's application of its own factors.[52] But his dissent is most significant for its promulgation of a different test for delineating between principal and inferior officers. In contrast to the majority's multifactor test, Scalia looked to the literal definition of inferior and determined that here the Court should have asked simply whether the independent counsel was subordinate to a principal officer to determine if they were inferior under the Appointments Clause.[53] In doing so, though, Justice Scalia did note that although such a relationship was "not a *sufficient* condition for 'inferior' officer status," at the very least it was "a *necessary* condition."[54] In the end,

---

46 *See Morrison*, 487 U.S. at 671.

47 *See id.* at 671–72; *see also* Bravin, *supra* note 2, at 1116 (discussing the Court's use of these four factors).

48 *Morrison*, 487 U.S. at 671.

49 *Id.*

50 *Id.* at 672.

51 *Id.*

52 *See id.* at 715–19.

53 *See id.* at 719–22.

54 *Id.* at 722.

Justice Scalia concluded that the independent counsel was not an inferior officer because she was not subordinate to the Attorney General, who could remove the independent counsel only *for cause* under the Act.[55]

B. Edmond v. United States

The importance of Justice Scalia's dissent in *Morrison* did not become readily apparent until the Court's decision in *Edmond*. In *Edmond*, the issue presented was whether, under the Appointments Clause, Congress could authorize the Secretary of Transportation to appoint civilian Administrative Law Judges to the Coast Guard Court of Criminal Appeals ("CGCCA").[56] The petitioners in the case were all convicted by court-martial and had their convictions affirmed by the CGCCA.[57] The petitioners argued that these appointments violated the Appointments Clause because judges of military Courts of Criminal Appeals are principal officers that must be appointed by the President with the advice and consent of the Senate.[58]

Justice Scalia wrote the majority opinion for the Court and concluded that the civilian CGCCA judges were inferior officers within the meaning of the Appointments Clause.[59] In doing so, Scalia noted that "*Morrison* did not purport to set forth a definitive test for whether an office is 'inferior' under the Appointments Clause," thereby giving himself the freedom to adopt the test he set forth in his dissent in that case.[60] Writing on behalf of seven other members of the Court, Justice Scalia held:

> [I]n the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.[61]

Scalia then applied this test to the civilian judges of the CGCCA, finding that the Judge Advocate General of the Coast Guard and the Court of Appeals for the Armed Forces together exercised enough

---

55 *Id.* at 722–23.

56 Edmond v. United States, 520 U.S. 651, 653 (1997).

57 *Id.* at 655.

58 *Id.* at 655–56.

59 *Id.* at 666.

60 *Id.* at 661.

61 *Id.* at 663.

supervision over the judges to make them inferior officers.[62] Justice Scalia emphasized that the Judge Advocate General, for his part, prescribed uniform rules of procedure for the court, was required to meet periodically with other Judge Advocates General to formulate policies and procedures in regard to review of court-martial cases, and could remove a CGCCA judge from his post without cause.[63] In particular, Justice Scalia emphasized this last factor, explaining that "[t]he power to remove officers, we have recognized, is a powerful tool for control."[64] With regard to the Court of Appeals for the Armed Forces, Justice Scalia observed that they had the power to review any and all decisions by the CGCCA, so the CGCCA judges had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."[65]

IV. Morrison *versus* Edmond*: Which is Better?*

As a result of the *Morrison* and *Edmond* decisions, the Court has left us with two conflicting methods of determining whether an officer is principal or inferior, both of which are still technically good law. The purpose of this Part is to determine which of the two tests the Court should adopt as its exclusive means of delineating between principal and inferior officers, considering both the historical motivations behind the Appointments Clause and the practical effects each method would have on the administrative state. Looking at these factors, it is clear that the method prescribed by Justice Scalia in *Edmond* is preferable.

As discussed earlier,[66] the chief motivations behind the structure of the Appointments Clause were to ensure accountability and prevent a concentration of power in the realm of appointments, while at the same making certain those concerns did not render the appointments process entirely inefficient. Looking at accountability, the *Morrison* test seems less preferable because it "invites an ad hoc and standardless classification by the judiciary of various federal officials."[67] In a very real sense it would be the judiciary that decided who required the more cumbersome appointments process used for principal officers based on the outcome of the *Morrison* test. Obvi-

62 *See id.* at 664–65.

63 *Id.* at 664.

64 *Id.*

65 *Id.* at 665.

66 *See supra* Part I.

67 Andrew Owen, Note, *Toward a New Functional Methodology in Appointments Clause Analysis*, 60 GEO. WASH. L. REV. 536, 537 (1992).

ously the problem with this is the judiciary is the only branch of our government that is not politically accountable to the people.

On the other hand, the test used by Justice Scalia in *Edmond* would seem to enhance accountability in the appointments process. Though Scalia's test has been criticized for being overinclusive,[68] with respect to accountability this is not necessarily a bad thing. By classifying more officers as inferior, the Court would be placing the decision as to who required the more cumbersome appointments process used for principal officers back in Congress's hands. It must be remembered that while the Excepting Clause *allows* inferior officers to be selected by means other than Presidential nomination with the advice and consent of the Senate, it does not *require* that other means be used.[69] Thus, by erring on the inferior side of the distinction, the *Edmond* test will more often result in scenarios where Congress has the full range of appointment methods at its disposal, vesting the power of choosing which method is most appropriate in Congress rather than the courts.

With respect to concentration of power, it would seem there would be no risk of this under either the *Morrison* or the *Edmond* test. One could argue that under the *Edmond* test more power is given to Congress because they have discretion as to which appointment process to use with respect to more officers, due to the test's overinclusiveness.[70] But the ultimate decision as to who to appoint to a particular office must still be made by one of the other branches, as even under the Excepting Clause Congress may not give itself sole power over an appointment.[71] In this way the Appointments Clause ensures that no matter how an appointment is made, two branches will play a role in the appointment process.[72] Consequently, in this

---

68 This criticism stems from the fact that some believe any federal officer can be said to have a "superior" in some sense. *See id.* at 553. It is important to note, however, that in *Edmond* Scalia specifically said that a "superior" did not merely connote someone with a higher rank, but instead required a certain amount of supervision over the inferior officer. *See Edmond*, 520 U.S. at 662–63. At the same time, it still stands to reason that Justice Scalia's single-factor test would result in more officers being classified as inferior compared to the multifactor test used in *Morrison*.

69 U.S. CONST. art. II, § 2, cl. 2.

70 *See supra* note 68 and accompanying text.

71 U.S. CONST. art. II, § 2, cl. 2. Obviously, Congress does not have sole power over appointment under the process used for principal officers because it is the President who has sole discretion with respect to whom to nominate for a particular office. *See id.*

72 To clarify, under the procedures used for principal officers, there is the President's decision to nominate and the Senate's advice and consent. U.S. CONST. art. II, § 2, cl. 2. With respect to inferior officers (assuming Congress chooses to take full advantage of the Excepting Clause), there is the decision by Congress of which body to vest the decision of appointment

area it would seem to make little difference whether one uses the *Morrison* or the *Edmond* test.

Moving to the effects these two tests would have on the administrative state (as it goes to the final motivation behind the Appointments Clause), clearly the *Edmond* test would be preferable. As Part II shows, within a federal agency there are many times an inordinate number of "leadership and support" offices.[73] As such, there is a better chance that officers appointed to these positions will be classified as principal under the multifactor *Morrison* test, which takes into consideration scope of duties, scope of jurisdiction, and tenure. At the very least, the classification of those types of offices will be less clear, perhaps encouraging Congress to provide for appointment by Presidential nomination with the advice and consent of the Senate just in case.

In contrast, use of the *Edmond* test would result in more offices being classified as inferior, and more predictability as to whether the office will be considered principal or inferior by a court. As mentioned earlier, the *Edmond* test is overinclusive because an officer is found to be inferior once it is shown that he is supervised and directed by an officer nominated by the President with the advice and consent of the Senate.[74] Further, by substituting a single inquiry for the multifactor balancing test used in *Morrison*, the application of the *Edmond* test is far more predictable. Such predictability would likely cause Congress to embrace the Excepting Clause more often, knowing that it does not need to use the more burdensome procedures provided in the Appointments Clause just to be safe.

By classifying more officers as inferior and providing more predictability with respect to how appointments will be classified in the courts, the *Edmond* test would allow agencies to invest fewer resources in the appointment of its officers than if the *Morrison* test were adopted. This would ensure that the appointments process remained reasonably efficient—a concern the Framers seemed to have at the time of adoption.[75] Considering the above discussion, then, the test employed by the Court in *Edmond* seems more consistent with the historical motivations behind the Appointments Clause, while at the same time being what is best for the administrative state. As such,

---

(e.g., the President, the courts, or the heads of departments) and then the ultimate appointment decision by the body chosen.

73 *See supra* notes 33–35 and accompanying text.

74 *See supra* note 68 and accompanying text.

75 *See supra* notes 19–23 and accompanying text.

it would be incumbent on the Court the next time it addresses this issue to adopt the *Edmond* test as the exclusive means by which it delineates between principal and inferior officers.

Conclusion

In the wake of President Obama's recent struggles with appointments, the importance of the appointments power is as evident as it has been for some time. And just as Obama has had to confront the tumultuous appointments process in his first few months of office, so too will every future incoming President who seeks to fill executive positions with his or her own people. It would be nice if the next time this happened there was a sense of predictability with respect to how appointment decisions would be viewed by the courts in the event they were challenged. The Supreme Court, however, has failed to provide such predictability in its recent decisions interpreting the Appointments Clause, opting for different tests to distinguish between principal and inferior officers seemingly on a whim.

It would be prudent for the Court to provide such predictability the next chance it gets, by choosing the test provided by Justice Scalia in *Edmond* to differentiate principal and inferior officers. By doing so, the Court would make it relatively simple to predict how an officer will be classified, using a single-factor test in lieu of the confusing and ambiguous multifactor test announced in *Morrison*. Further, by classifying more officers as inferior, the Court would leave any battle over the method used to appoint an officer in the hands of the politically accountable legislature, which would fulfill the Founders' general intent of accountability with respect to the appointments process as a whole. With respect to administrative agencies, the Court's tilt to the inferior side of the distinction would make it more likely such agencies would not have to expend significant resources fighting nomination battles in the Senate, as Congress would have more confidence in using the Excepting Clause to provide for the majority of administrative appointments.