

# Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge

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## Abstract:

*Bankruptcy judges of the United States of America are currently appointed by the Courts of Appeals, under the power given by Congress, and they are therefore excepted from the Appointment Clause. However, district judges and Court of Appeal judges are appointed under the classic appointing procedure. Accordingly, the constitutionality of bankruptcy judges depends on the interpretation of the notion of "inferior officer".*

*The interpretation has been given by the sole judicial interpreter of the Constitution, the United States Supreme Court, which, in two landmark decisions has established competing interpretations of the inferior officer notion. In its first interpretation, given in Morrison v. Olson it has been laid down that the notion inferior would refer to petty or unimportant. Following that decision, and without formally reversing its previous case-law, the Supreme Court held in Edmond v. United States that inferior would describe the relation between a superior and a subordinate.*

*With respect to these two Supreme Court rulings, the author launches into a debate regarding the constitutionality of the bankruptcy judge. The powers of the bankruptcy judge are extensive, ranging from core bankruptcy cases but also non-core proceedings, conduct jury trials, reach parties nationwide. Thus, the debate is far from being purely theoretical and reaches into one of the most powerful judges in the U.S. federal judiciary.*

## Rezumat:

*Judecătorii sindici ai Statelor Unite ale Americii sunt în prezent numiți de către Curțile de Apel, potrivit puterii conferite acestora de către Congres, nefiind incluși în procedura clasică impusă de Clauza de numire, deși judecătorii districtuali, ca și cei ai Curților de Apel, sunt numiți după această procedură.*

*Constituționalitatea judecătorilor-sindici depinde de interpretarea care este acceptată pentru noțiunea de ofițer inferior, iar rolul de interpretare a acestei noțiuni a revenit autorității de contencios constituțional, respectiv Curtea Supremă a Statelor Unite, care în două decizii, a stabilit interpretări diferite a noțiunii de ofițer inferior.*

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Printr-o primă hotărâre, *Morrison v. Olson* s-a stabilit că termenul de inferior s-ar referi la o funcție minoră, neimportantă, în timp ce, ulterior, fără a se schimba în mod formal jurisprudența, s-a statuat în *Edmond v. United States* că inferior descrie relația dintre superior și subordonat.

Reportat la aceste două decizii fundamentale ale Curții Supreme, autorul lansează o dezbateră cu privire la constituționalitatea judecătorului-sindic. Prerogativele judecătorului-sindic sunt extinse, el fiind investit cu puterea de a judeca dosare de insolvență, dar și alte cauze care au legătură cu un dosar de insolvență, poate prezida o ședință de judecată cu jurați și poate să își exercite jurisdicția la nivel național, nefiind limitat de granițele statale. Așadar, discuția, departe de a fi una teoretică, atinge una dintre cele mai puternice funcții din organizarea judiciară federală a Statelor Unite ale Americii.

**Keywords:** bankruptcy judges, constitutionality, the Appointment Clause, appointing procedure, the notion of “inferior officer”, United States Supreme Court, case-law

## Introduction

Bankruptcy judges are powerful judicial officers. They exercise jurisdiction over some of the largest commercial matters heard in the federal courts, including public company bankruptcies that reach into the multibillions in total assets prepetition<sup>314</sup>. They decide not only commercial disputes, but also significant constitutional questions<sup>315</sup>. Notwithstanding a state’s sovereign immunity, they entertain claims brought

against state entities<sup>316</sup>. They exercise broad equitable powers;<sup>317</sup> reach parties nationwide<sup>318</sup>; may hold parties and counsel in contempt<sup>319</sup>; conduct jury trials with the parties’ consent<sup>320</sup>, and—without any consent—resolve “core proceedings.”<sup>321</sup> They serve renewable fourteen-year terms.<sup>322</sup> Short of impeachment, they are subject to removal during their term of office only for limited grounds for cause<sup>323</sup>. They are also invaluable to the federal judiciary for their case capacity and service<sup>324</sup>.

<sup>314</sup> For example, consider these multibillion dollar bankruptcies in prepetition assets filed during the last ten years (in billions of U.S. dollars): Lehman Brothers Holdings (\$684.1), Washington Mutual (\$324.6), Worldcom (\$124.9), Enron (\$80.3), Consec (\$73.5), Refco Finance (\$53), IndyMac Bancorp (\$32.2), Calpine (\$29.9), New Century Financial (\$27.4), Pacific Gas and Electric (\$26.9), and Global Crossing (\$5.1). See Bankruptcy Research Database, Company Profile, <http://lopucki.law.ucla.edu/corporations.asp> (last visited Dec. 15, 2008) (follow company profiles to obtain pre-filing assets in millions of current dollars).

<sup>315</sup> See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 36 (1989) (reversing a bankruptcy judge who had denied Seventh Amendment jury trial rights to defendants who had not submitted claims against a bankruptcy estate).

<sup>316</sup> *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 359 (2006).

<sup>317</sup> 11 U.S.C. § 105(a) (2006); see also

*Marrama v. Citizens Bank of Mass.*, 127 S. Ct. 1105, 1111–12 (2007) (noting broad equitable authority granted to bankruptcy judges by § 105(a) as well as noting a court’s inherent power).

<sup>318</sup> See Fed. R. Bankr. P. 7004.

<sup>319</sup> See *infra* notes 343–45 and accompanying text.

<sup>320</sup> 28 U.S.C. § 157(e) (2006).

<sup>321</sup> See *infra* notes 354–57 and accompanying text.

<sup>322</sup> 28 U.S.C. § 152(b).

<sup>323</sup> *Id.* § 152(e).

<sup>324</sup> During the twelve-month period ending September 30, 2007, bankruptcy judges terminated almost 865,000 cases. Admin. Office of the U.S. Courts, 2007 Annual Report of the Director: Judicial Business of the United States Courts 295 tbl. F (2008). During that same period, approximately 1.3 million cases remained pending and over 800,000 cases were commenced. *Id.*

Bankruptcy judges are not mere judicial pawns, but the knights of the federal judicial hierarchy.

Yet as powerful and as useful as these bankruptcy judges may be their method of selection arguably violates the Appointments Clause. No President appointed any of the 339 presently serving judges<sup>325</sup>. Instead, the courts of appeals appointed them pursuant to statutory authority<sup>326</sup>. Although it is the President's prerogative to nominate and, upon the Senate's confirmation, appoint the principal officers of the United States, Congress may by law vest the appointment of "inferior officers" in the courts under the excepting provision of the Appointments Clause, occasionally referred to as the "Excepting Clause."<sup>327</sup> In exercising this option, Congress impliedly characterized bankruptcy judges as "inferior officers." This Article argues that this congressional assumption may not be well placed, at least under the balancing approach of *Morrison v. Olson*<sup>328</sup>. Bankruptcy judges have accrued tenure, safeguards against removal<sup>329</sup>, expansive jurisdiction<sup>330</sup>, and duties that are incompatible (at least under *Morrison*) with inferior officer status<sup>331</sup>. If they are principal officers, they are not amenable to judicial appointment. The President must appoint them pursuant to the usual Article II

procedure. Thus, their appointments are constitutionally suspect, and their judgments and orders are of doubtful validity.

Whether bankruptcy judges are inferior officers remains an open question. The Supreme Court has never addressed itself to the precise question of bankruptcy judges, and its applicable precedents—*Morrison v. Olson*<sup>332</sup> and *Edmond v. United States*<sup>333</sup>—suggest different and conflicting answers. No academic commentator<sup>334</sup> has addressed the question of whether modern bankruptcy judges constitute inferior officers. Criticism of the bankruptcy system has focused almost universally on whether the judges, who wield the judicial power of the United States, ought to be shielded by Article III tenure and salary protection<sup>335</sup>. This oversight is understandable. Commentators remained fixated on winning the last war—the striking down of the 1978 Act in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>336</sup>—and therefore focused on the Article III issue. They spent little attention on the Article II issue of appointment by the circuit courts. Although this Article is about a problem of similar scale to *Marathon*, it is about the bankruptcy court's *other* separation of powers problem.

<sup>325</sup> See *id.* at 45 tbl.12.

<sup>326</sup> 28 U.S.C. § 152(a).

<sup>327</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>328</sup> 487 U.S. 654, 671–73 (1988).

<sup>329</sup> See *supra* note 10 and accompanying text.

<sup>330</sup> See *supra* note 5 and accompanying text.

<sup>331</sup> See *infra* Part.IV.B.

<sup>332</sup> 487 U.S. 654.

<sup>333</sup> 520 U.S. 651, 662–63 (1997).

<sup>334</sup> A legal scholar did recently call (in passing) bankruptcy judges "inferior officers." John Harrison, *Addition by Subtraction*, 92 Va. L. Rev. 1853, 1855 n.9 (2006). Several academic commentators testified before Congress in 1975 concerning a proposal to vest the appointments of bankruptcy judges in

the Courts of Law. The majority view was that such an arrangement would violate the Appointments Clause. See *infra* notes 291–95 and accompanying text.

<sup>335</sup> See, e.g., Jeffrey T. Ferriell, *Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 Am. Bankr. L.J. 109, 121–22 (1989); Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 Vand. L. Rev. 675 (1985); Thomas G. Krattenmaker, *Commentary, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 Geo. L.J. 297 (1981).

<sup>336</sup> 458 U.S. 50, 87 (1982).

**Whether “bankruptcy judges are unconstitutional” may depend on the question asked: the normative one (“ought they be unconstitutional under existing law?”) or the predictive one (“would the courts actually hold the bankruptcy courts unconstitutional?”).**

The Article develops its argument in five parts. Part I sets up the present problem by explaining how a colorable Appointments Clause challenge became possible. Since the earliest adjudicators—commissioners, registers, and referees—the method of appointment by the Courts of Law has remained largely unchanged. The adjudicators, however, steadily accumulated accoutrements of principal officer status such that the modern office no longer resembles its modest inferior officer forbearers. Although the appointment method remained constant, the office may have outgrown it.

Part II introduces the interpretive fork in the road of the operation of the Excepting Clause. It examines the original public meaning of “inferior officer” and develops the Supreme Court’s two competing interpretations. *Morrison* defined an inferior office as a “lesser” one and balanced in the abstract the characteristics and powers of office to make its determination<sup>337</sup>. *Edmond*, which did not purport to overrule *Morrison* (and has not been treated as having done so by lower courts or commentators), interpreted “inferior officer” as a “subordinate” officer<sup>338</sup>. Neither case, however, addressed directly the status of bankruptcy judges.

In Part III, the Article explains why a challenge is possible by exploring three

narratives about the relationship between *Morrison* and *Edmond* and their competing interpretations. Drawing upon archival and other sources, the Article argues that attempts at reconciling the two cases are implausible, as too are claims that they govern in different domains. Part III concludes that the best account of their relationship is that *Edmond*’s approach to the Appointments Clause has overruled *Morrison*. Nonetheless, given the uncertainty about the relationship between the two cases, it is plausible for litigants to claim that bankruptcy judges are principal officers.

Part IV details what an Article II challenge might look like and responds to potential objections. It suggests that two such challenges are possible—both under *Morrison*’s interpretation of “inferior” as well as under *Edmond*, depending on the construction given to the subordinate interpretation. Thus, even if *Edmond* represents the Court’s view of the Appointments Clause, bankruptcy judges are not entirely immune from colorable challenge. There are constructions of the “subordinate” interpretation that favor principal officer status.

Finally, Part V discusses the policy implications of a potential Article II challenge. It proposes a legislative means of saving bankruptcy judges prospectively from an appointments challenge. Barring a fix, a challenge may force the Court to clarify its Appointments Clause jurisprudence. One possible resolution—acknowledging *Morrison* as overruled *sub silentio* by *Edmond*—could open the door to a policy innovation under certain constructions: bankruptcy judges could be granted Article III tenure while retaining the present method of appointment. In such a world, Congress could vest the appointment of *all* inferior Article III judges in the Courts of Law.

<sup>337</sup> 487 U.S. 654, 671–73 (1988)

<sup>338</sup> 520 U.S. 651, 662–63 (1997).

## I. The Evolving Office of Bankruptcy Judge

Although the Article III judiciary has appointed bankruptcy adjudicators throughout most of the bench's history, the appointed officers have steadily accumulated tenure, safeguards against removal, enlarged jurisdiction, and increasingly significant duties over time. This brief history of the evolution of bankruptcy judge selection emphasizes two themes: the continuity in the appointment model, and the dramatic growth in the appointed officers' significance. These themes provide the backdrop for this Article's discussion of how a colorable Appointments Clause challenge to bankruptcy judges as "inferior officers" has become possible.

### A. The Origins of Appointment by the Courts of Law

The present method of judicial appointment by the courts of appeals finds its roots in the earliest federal bankruptcy laws. The predecessors of the modern bankruptcy judge were the commissioners, registers, and referees. Congress would later adopt their method of selection—appointment by the Courts of Law—for the appointment of bankruptcy judges. The Bankruptcy Act of 1800 authorized a federal trial judge to appoint commissioners to assist in hearing involuntary bankruptcy petitions filed against merchants and other

traders<sup>339</sup>. The judge, in appointing up to three "good and substantial" individuals, "commissioned" them to work on a particular bankruptcy, placing them under oath in a commission extending to a particular named debtor<sup>340</sup>. These case-by-case commissioners were compensated with an allowance from the bankruptcy estate<sup>341</sup>. In the event of a vacancy or a commissioner's refusal to act, the judge could appoint a replacement<sup>342</sup>. Commissioners were not judges, or necessarily trained in the law, but many were "politically connected lawyers and merchants."<sup>343</sup> Although there were no permanent commissions, the courts often appointed a small number of the same people to "most or all of the commissions in each jurisdiction," thereby creating a de facto core of commissioners.<sup>344</sup> In 1802, Congress stripped the district judges of their authority to appoint these commissioners<sup>345</sup>, and required the judges to direct any future commission to presidentially appointed "general commissioners of bankruptcy" for each judicial district.<sup>346</sup> Although the Act was to sunset in 1805<sup>347</sup>, the Democratic-Republican-dominated Congress repealed it in 1803.<sup>348</sup>

During the Act's brief span, commissioners performed principally administrative functions. They exercised the power to, among other things, have a bankrupt arrested;<sup>349</sup> take possession of and appraise a bankrupt's property and inventory;<sup>350</sup> notify the public of the

<sup>339</sup> Act of Apr. 4, 1800, ch. 19, §§ 2–3, 2 Stat. 19, 21–22 (repealed 1803).

<sup>340</sup> *Id.* In case of disagreement among the commissioners, majority rule governed. *Id.* § 55, 2 Stat. at 35.

<sup>341</sup> *See id.* § 47, 2 Stat. at 33.

<sup>342</sup> *Id.* § 2, 2 Stat. at 21–22.

<sup>343</sup> Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* 225 (2002).

<sup>344</sup> *Id.*

<sup>345</sup> Act of Apr. 29, 1802, ch. 31, § 14, 2 Stat. 156, 164 (repealed 1803).

<sup>346</sup> *Id.* The Democratic-Republican Congress, on almost entirely partisan lines, stripped the Federalist judiciary of its power to appoint commissioners. 11 *Annals of Cong.* 981–82 (1802).

<sup>347</sup> Act of Apr. 4, 1800, ch. 19, § 64, 2 Stat. 19, 36 (repealed 1803).

<sup>348</sup> Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

<sup>349</sup> Act of Apr. 4, 1800 § 4, 2 Stat. at 22–23

<sup>350</sup> *Id.* § 5, 2 Stat. at 23.

bankruptcy, schedule a meeting of creditors, take evidence of the validity of debts;<sup>351</sup> and summon and examine witnesses under oath.<sup>352</sup> That commissioners handled these important tasks rather than the courts has led more than one scholar to conclude that Congress recognized “that the administrative work of commissioners did not fit comfortably within the definition of the judicial power of the United States.”<sup>353</sup> Indeed, bankruptcy trustees, and not bankruptcy judges, now handle these administrative tasks.<sup>354</sup>

Congress did permit commissioners to perform limited adjudicative functions, but only with substantial judicial oversight. Commissioners “made the all-important initial determination of whether the debtor was in fact a bankrupt,”<sup>355</sup> but the debtor could demand a jury trial before a district judge on the issue.<sup>356</sup> Similarly, commissioners could take evidence of the validity of creditors’ claims<sup>357</sup>, but creditors (or assignees) could refuse to submit their claims to the commissioners and require a jury trial in the circuit court for the district<sup>358</sup>. Elsewhere, key adjudication was determined exclusively or predominantly by the court. The estate’s claims against third parties were settled by resort to litigation before a judge, not before commissioners<sup>359</sup>.

Further, a judge, and not a commissioner, could award the debtor a discharge.<sup>360</sup>

### 1. Commissioners and the 1841 Act

The Bankruptcy Act of 1841 continued the model of judges appointing adjuncts for bankruptcies, but did not authorize special-purpose bankruptcy officers<sup>361</sup>. It relied on the court’s general statutory authority to appoint commissioners to take affidavits<sup>362</sup> and authorized additional evidentiary functions in the bankruptcy context<sup>363</sup>. Like their predecessors, the 1841 commissioners handled largely nonadjudicative tasks of the sort now managed by bankruptcy trustees<sup>364</sup>. These included examining the bankrupt<sup>365</sup>, receiving proof of creditors’ claims<sup>366</sup>, and taking evidence from other witnesses<sup>367</sup>. The Act specified neither term of service nor safeguard against removal. Commissioners continued to be compensated from the bankrupt’s estate, but at a statutorily specified rate.<sup>368</sup>

### 2. Registers and the 1867 Act

The 1867 Act returned to the 1801 model of bankruptcy-specific adjuncts. It authorized judges to appoint one or more “registers in bankruptcy” upon the Chief Justice’s nomination and recommendation.<sup>369</sup>

Unlike the 1800 Act’s commissioners, these officers were appointed on a standing, and not a case-by-case basis<sup>370</sup>. They enjoyed no safeguard against removal<sup>371</sup>.

<sup>351</sup> *Id.* § 6.

<sup>352</sup> *Id.* § 15, 2 Stat. at 25–26.

<sup>353</sup> See, e.g., James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 Harv. L. Rev. 643, 720 & n.343 (2004).

<sup>354</sup> 11 U.S.C. §§ 341–351 (2006).

<sup>355</sup> Mann, *supra* note 30.

<sup>356</sup> Act of Apr. 4, 1800 § 3, 2 Stat. at 22.

<sup>357</sup> *Id.* § 6, 2 Stat. at 23.

<sup>358</sup> *Id.* § 58, 2 Stat. at 35.

<sup>359</sup> *Id.* § 13, 2 Stat. at 25.

<sup>360</sup> *Id.* § 36, 2 Stat. at 31.

<sup>361</sup> Act of Aug. 19, 1841, ch. 9, 5 Stat. 440

(repealed 1843).

<sup>362</sup> Act of Feb. 20, 1812, ch. 25, 2 Stat. 679, 679–81.

<sup>363</sup> Act of Aug. 19, 1841 § 7, 5 Stat. at 446.

<sup>364</sup> See 11 U.S.C. §§ 341–351 (2006).

<sup>365</sup> Act of Aug. 19, 1841 § 4, 5 Stat. at 443–44.

<sup>366</sup> *Id.* § 5, 5 Stat. at 444–45.

<sup>367</sup> *Id.* § 7, 5 Stat. at 446.

<sup>368</sup> *Id.* § 13, 5 Stat. at 448.

<sup>369</sup> Act of Mar. 2, 1867, ch. 176, § 3, 14 Stat. 517, 518 (repealed 1878).

<sup>370</sup> *Id.* § 3, 14 Stat. at 518.

<sup>371</sup> *Id.* § 5, 14 Stat. at 519.

Registers' duties consisted mostly of the same type of administrative matters previously handled by commissioners and today handled by bankruptcy trustees.<sup>372</sup> They received the bankrupt's property, administered oaths, presided at meetings with creditors, took proof of debts, and generally handled uncontested matters and the administrative business of bankruptcy.<sup>373</sup>

In addition, the Act denied registers several important powers. They could not sanction for contempt, or decide any legally or factually disputed issue, including those questions relating to the allowance or suspension of a discharge<sup>374</sup>. When those matters were raised, the register's role was simply to have the parties prepare their positions and then direct them to the court for resolution.<sup>375</sup>

## **B. Dramatic Growth in the Power of the Office**

### *1. Referees and the 1898 Act*

Congress continued to vest the appointment of bankruptcy adjuncts in the

federal trial courts under the 1898 Act<sup>376</sup>. These adjunct officers, now named "referees," grew more powerful over time. They accrued lengthier terms, safeguards against removal, new duties and jurisdiction<sup>377</sup>. At first, referees served for only two years; were removable at a district court's discretion either "because their services [were] not needed or for other cause"<sup>378</sup>; and performed duties that were principally ministerial, supervisory, and administrative.<sup>379</sup> When referees adjudicated, they were subject to a district judge's review at all times<sup>380</sup>.

Later, however, Congress transformed the office of referee into a judicial office requiring legal training<sup>381</sup>. It lengthened their terms to six years<sup>382</sup>, limited the grounds for removal to "incompetency, misconduct, or neglect of duty,"<sup>383</sup> replaced some of the administrative duties with more substantive ones<sup>384</sup>, and authorized jurisdictional referral of matters to them<sup>385</sup>. These duties assumed still greater significance when the 1973 Bankruptcy Rules conferred finality on the referees' findings unless "clearly erroneous."<sup>386</sup>

<sup>372</sup> See 11 U.S.C. §§ 341–351 (2006).

<sup>373</sup> Act of Mar. 2, 1867 § 4, 14 Stat. at 519.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* The 1874 amendments to the Act did not authorize registers with any additional power, but reduced their fees, obligated courts to consolidate and simplify registers' duties "to the benefit of creditors," and imposed an annual reporting requirement. Act of June 22, 1874, ch. 390, §§ 18–19, 18 Stat. 178, 184–85. In 1878, Congress repealed the 1867 Act and its supplementary amendments. Act of June 7, 1878, ch. 160, 20 Stat. 99.

<sup>376</sup> Act of July 1, 1898, ch. 541, § 34, 30 Stat. 544, 555.

<sup>377</sup> *Id.* Although referees were given the title of "judge" by judicial rule from 1973 until they received the statutory title "judge" under the Bankruptcy Act of 1978, this Article will refer to the judicial officers under the 1898 Act as "referees." See Fed. R. Bankr. P. 901(7) (repealed Aug. 1, 1983). For an interesting discussion of the title change, see

Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978, Part Two: The Third Branch Reacts*, 81 Am. Bankr. L.J. 165, 169–71 (2007) [hereinafter Mund, *Part Two*].

<sup>378</sup> Act of July 1, 1898 § 34, 30 Stat. at 555.

<sup>379</sup> H.R. Rep. No. 95-595, at 8 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5969. In fact, referees were not required to be lawyers until 1946. Act of June 28, 1946, ch. 512, § 3, 60 Stat. 323, 324–25.

<sup>380</sup> H.R. Rep. No. 95-595, at 8.

<sup>381</sup> See Act of June 22, 1938, ch. 575, 52 Stat. 840, 857.

<sup>382</sup> Act of June 28, 1946 sec. 2, § 34(a), 60 Stat. at 324.

<sup>383</sup> *Id.* § 34(b). A part-time referee could also be removed if "his services [were] not needed." *Id.*

<sup>384</sup> *Id.* sec. 39, 52 Stat. at 858–59.

<sup>385</sup> *Id.* sec. 22(a), 52 Stat. at 854; *id.* sec. 38, 52 Stat. at 857.

<sup>386</sup> Fed. R. Bankr. P. 810 (repealed 1978).

## 2. Bankruptcy Judges and the 1978 Act

The Bankruptcy Reform Act of 1978 represented a major attempt to reform an ailing bankruptcy court system. Two principal defects with the prior court system drove the reform: “the lack of simplicity in determining jurisdiction of the bankruptcy court and the low status and lack of power of the bankruptcy judges which resulted in disrespect for their position and inability to attract the best caliber judges.”<sup>387</sup>

The office of bankruptcy judge became much more powerful under the 1978 Act. The Act granted bankruptcy judges fourteen-year terms, subject to removal only for enumerated grounds for cause<sup>388</sup>. It also expanded their jurisdiction to grant bankruptcy judges the powers of a court in law, equity, and admiralty, including the power to grant habeas corpus petitions<sup>389</sup>. This expanded subject-matter jurisdiction became even more significant because their orders were self-executing, subject only to ordinary appellate review.<sup>390</sup>

As to their duties, bankruptcy judges were authorized to conduct jury trials.<sup>391</sup>

Congress withheld only the power to enjoin another court and hold a party in criminal contempt.

Following the recommendation of the Commission on the Bankruptcy Laws of the United States, the Bankruptcy Reform Act of 1978 departed from appointments by the Judiciary in favor of appointments

by the President upon Senate confirmation. First, Congress had reason to doubt the constitutional permissibility of vesting the appointments of the new proposed bankruptcy judges in the Courts of Law. Representative Peter Rodino had asked several prominent federal courts scholars for their views on the two principal competing bankruptcy proposals, the Commission’s Bill (H.R. 31) and so-called Judges’ Bill (H.R. 32).<sup>392</sup>

Several scholars doubted that the appointments arrangement proposed in the Judges’ Bill, providing for appointment by the Courts of Law, would be permissible.<sup>393</sup> Congress settled the matter by rejecting judicial appointment in favor of presidential appointment.<sup>394</sup>

Second, appointment by the district judges was perceived as tainted by political patronage and a lack of independence. District judges tended to appoint their friends and former associates to the bankruptcy bench.<sup>395</sup> In contrast, presidential appointment would promote judicial independence by avoiding the situation where an “entity that reviewed the bankruptcy decisions on appeal would have a hand in the selection of judges.”<sup>396</sup>

Incumbent bankruptcy referees did not favor this move to a presidential appointment process. They lacked those political ties that would permit them to win presidential nomination to the new bankruptcy judgeships, and they feared replacement by politically well-connected

<sup>387</sup> 130 Cong. Rec. 20,225 (1984) (statement of Rep. Edwards).

<sup>388</sup> 28 U.S.C. § 153(b) (1976).

<sup>389</sup> 28 U.S.C. §§ 1481, 2256 (1976).

<sup>390</sup> 11 U.S.C. § 67(c) (1976 & Supp. IV 1980).

<sup>391</sup> 28 U.S.C. § 1480 (1976).

<sup>392</sup> Letter from Peter Rodino, Chairman, House Judiciary Comm., Subcomm. on Civil and Constitutional Rights 63 (Apr. 30, 1976), reprinted in *Hearings on H.R. 31 and H.R. 32*, 94th Cong., 1st & 2d Sess., pt. 4, at 2682–2706 (1975–76) [hereinafter *Hearings*].

<sup>393</sup> See *infra* notes 291–95 and accompanying text.

<sup>394</sup> 28 U.S.C. §§ 152, 153(a) (1976).

<sup>395</sup> Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978, Part Three: On the Hill*, 81 Am. Bankr. L.J. 341, 358–59 (2007) [hereinafter *Mund, Part Three*]. Patronage may influence presidential appointments too, but the check of Senate confirmation mitigates the risk.

<sup>396</sup> *Id.* at 369.



lawyers.<sup>397</sup> For this reason, the National Conference of Bankruptcy Judges, which had assumed that Article III tenure would necessitate presidential appointment and confirmation, was initially reluctant about the House's insistence on Article III status.<sup>398</sup>

Perhaps as a concession to the incumbent bankruptcy referees as well as a recognition of the practical difficulties involved in appointing an entire new slate of bankruptcy judges all at once, the 1978 Act provided for a period of transition from the system of referees appointed by the district courts to the system of bankruptcy judges appointed by the President with advice and consent.<sup>399</sup>

Rather than create the new courts immediately, the Act, which provided for bankruptcy judges to replace the referees, contemplated a transition period spanning almost five-and-a-half years, during which time they would exercise the newly authorized jurisdiction and duties. Each referee (bankruptcy judge) continued to serve for the remainder of the appointed term unless found not qualified by the Chief Judge of the circuit.<sup>400</sup> Bankruptcy referees serving on November 6, 1978, were extended until March 31, 1984 as bankruptcy judges<sup>401</sup>. The bankruptcy courts created by section 152 were not to come into existence until the expiration of the transition period, on April 1,

1984.<sup>402</sup> The President would eventually appoint replacements or reappoint the incumbent bankruptcy judges.

In 1982, during this transition, the Supreme Court struck down the broad, new jurisdictional statute that was the centerpiece of congressional reform efforts.<sup>403</sup> In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court held that Congress had violated Article III by vesting the essential power of the judicial branch in judges who lacked Article III tenure and salary protection.<sup>404</sup> The bankruptcy court neither fell into any exception for Article I courts nor qualified as an adjunct to an Article III court.<sup>405</sup> Because the jurisdictional statute was not severable from the rest of the Act, the Court struck down the whole arrangement.<sup>406</sup> The Court had no occasion to address any Article II challenge to the appointment of transition judges. Moreover, the bankruptcy judges to be appointed after the transition period would have presented no Appointments Clause difficulty. They were to be appointed by the President with Senate confirmation.

Congress failed to act promptly to create a new bankruptcy court structure. Initially, the Court stayed its judgment until October 4, 1982, and then extended its stay until December 25, 1982, to give Congress the necessary time to react.<sup>407</sup> When Congress failed to legislate, the

<sup>397</sup> Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978, Part One: Outside Looking In*, 81 Am. Bankr. L.J. 1, 17, 20–21, 24–25 (2007) [hereinafter Mund, *Part One*]; Mund, *Part Two*, *supra* note 64, at 166. The National Conference of Bankruptcy Judges, which supported appointment by the circuit courts, argued that courts would favor merit over political connections because presidents from both major political parties had appointed them. Mund, *Part One*, *supra*, at 25 n.78. Of course, the district courts, too, were composed of judges appointed by various presidents. The difference may be that a U.S. district court is much more likely than a circuit court to represent the handiwork and input of a senator or senators who spanned several presidential administrations.

<sup>398</sup> Mund, *Part One*, *supra* note 84, at 29; Mund, *Part Three*, *supra* note 82, at 356.

<sup>399</sup> Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 401–411, 92 Stat. 2549, 2682–88 (codified in scattered sections of 11 U.S.C.).

<sup>400</sup> *Id.* § 402(b), 92 Stat. at 2682.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>404</sup> *Id.* at 87.

<sup>405</sup> *Id.* at 73–76.

<sup>406</sup> *Id.* at 87 n.40; see also *id.* at 91–92 (Rehnquist, J., concurring).

<sup>407</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 459 U.S. 813 (1982) (staying judgment until December 24, 1982).

Court refused to stay its judgment any further.<sup>408</sup> Instead, district courts adopted emergency rules to address the exigencies of running a workable (and constitutional) bankruptcy system.<sup>409</sup> The former bankruptcy referees, who were to exercise the powers of the new bankruptcy court judges, were to remain in place only through the expiration of the transition period on March 31, 1984, unless reappointed.<sup>410</sup>

Congress, however, had still failed to restructure the bankruptcy courts by the transition period's end. As a patch, it extended successively the terms of the then-serving officers, until June 27, 1984<sup>411</sup>. Congress finally passed a new court structure with the Bankruptcy Amendments and Federal Judgeship Act<sup>412</sup> ("BAFJA"), which President Reagan signed into law on July 10, 1984, shortly after the expiration of the last stopgap extension.

### 3. Bankruptcy Judges and BAFJA to the Present

Under the 1984 Bankruptcy Amendments and Federal Judgeship Act, Congress abandoned the 1978 Act's use of the default appointments process. It returned to appointment by the Courts of

Law,<sup>413</sup> as had been done with commissioners, registers, and referees.<sup>414</sup> On June 27 to 28, 1984, the staff attorneys for the conferees for the House and Senate worked out a tardy compromise to vest the courts of appeals with the authority to appoint the bankruptcy judges.<sup>415</sup>

The delay in reaching this new consensus resulted in immediate court challenges to BAFJA. The thirteen-day hiatus between the expiry of the last extension statute and the President's signing of BAFJA (June 27, 1984 to July 10, 1984) precipitated Appointments Clause challenges nationwide.<sup>416</sup> BAFJA had provided for a further transition period with judges' terms to expire on October 1, 1986, or four years after the date of their last appointment to that office, whichever was later.<sup>417</sup> In one of these cases, *In re Benny*, an involuntary bankrupt, joined by the U.S. Justice Department and the Administrative Office of the U.S. Courts<sup>418</sup> argued that the thirteen-day lapse in the office and then BAFJA's retroactive extension of the bankruptcy judges then-serving effected unconstitutional congressional reappointments of the judges in violation of the Appointments Clause.<sup>419</sup> Congress

<sup>408</sup> N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 459 U.S. 1094 (1982) (declining to stay judgment any longer).

<sup>409</sup> See, e.g., *In re Benny*, 812 F.2d 1133, 1138 (9th Cir. 1987) (citing N.D. Cal. Gen. Order 24 (Dec. 27, 1982, effective Dec. 25, 1982)).

<sup>410</sup> Bankruptcy Reform Act of 1978, No. 95-598, § 404(b), 92 Stat. 2549, 2683.

<sup>411</sup> Act of Mar. 31, 1984, Pub. L. No. 98-249, 98 Stat. 116 (extended to Apr. 30, 1984); Act of Apr. 30, 1984, Pub. L. No. 98-271, 98 Stat. 163 (extended to May 25, 1984); Act of June 20, 1984, Pub. L. No. 98-325, 98 Stat. 268 (extended to June 27, 1984).

<sup>412</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (amending scattered sections of 11 U.S.C. and 28 U.S.C.).

<sup>413</sup> 28 U.S.C. § 152(a)(1) (2006).

<sup>414</sup> See *supra* notes 26, 48, 56, 63 and accompanying text.

<sup>415</sup> 28 U.S.C. § 152(a)(1).

<sup>416</sup> See, e.g., *Koerner v. Colonial Bank (In re*

*Koerner)*, 800 F.2d 1358, 1367 (5th Cir. 1986) (upholding the retroactive extension of bankruptcy judges' terms of office).

<sup>417</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984 § 106(a), 98 Stat. at 342; *id.* § 121, 98 Stat. at 345-46.

<sup>418</sup> For its part, the Administrative Office, which believed the legislative extension of terms without a new appointment to be unconstitutional, refused to pay those judges sitting with extended terms. *In re Benny*, 812 F.2d 1133, 1139 (9th Cir. 1987). Eventually, it relented. *Id.*

<sup>419</sup> *Id.* The Office of Legal Counsel viewed these retroactive extensions as congressional reappointments. A presidential signing statement noted this reservation with the term extension. *Bankruptcy Amendments and Federal Judgeship Act of 1984*, 20 Weekly Comp. Pres. Doc. 1010, 1011 (July 10, 1984). The statement said nothing, however, about BAFJA's classification of bankruptcy judges as "inferior officers" or the permissibility of vesting their appointments in the courts of appeals.

was effectively appointing judges by retroactively extending their terms in a lapsed office and granting the office new powers. Significantly, these *In re Benny*-type challenges did not question—as this Article now does—whether bankruptcy judges constituted “inferior officers” such that their initial appointments by the courts of appeals would offend the Appointments Clause.

BAFJA greatly enhanced the office of bankruptcy judge from the day of bankruptcy referees, retreating only minimally from the apex of power proposed by the 1978 Act. Bankruptcy judges hold their offices for fourteen years<sup>420</sup> and may be removed only for limited grounds<sup>421</sup>. They exercise considerable power and independence to resolve “core” proceedings, entering final orders that are subject only to appellate review by the district court.<sup>422</sup>

With respect to non-core proceedings, bankruptcy judges exercise authority akin to magistrate judges. In core and non-core proceedings alike, they may exercise power over any party located within the country or who may have minimum contacts with it.<sup>423</sup> They were given broad equitable powers in exercising their jurisdiction.<sup>424</sup>

Notwithstanding the great power of these new officers, several concerns animated BAFJA’s return to the earlier model of appointment by the Courts of Law, specifically the courts of appeals. First, partisan politics and the prospect of court packing favored the decision to

vest the appointment power in the Article III courts. Post-*Marathon*, Congress was confronted with a need to appoint a large number of bankruptcy judges.<sup>425</sup> That meant that in 1984 President Ronald Reagan and a Republican-controlled Senate would dominate the appointments process. But the authorization for new bankruptcy judgeships could become law only with House cooperation. Democrats, who controlled the House, were concerned that a Republican President and Senate would cut them out of the default confirmation process and pack the bankruptcy bench with party loyalists. They question[ed] whether the appointment of more than 200 new article 3 judges, with all of the attendant privileges, including lifetime tenure, by the President would result in anything other than a new permanently irreducible court system dominated by conservative white male appointees insensitive to civil rights and labor issues and to the needs of poor and minority citizens.<sup>426</sup>

Thus, “Presidential appointment would decrease the pool of applicants realistically eligible to be chosen. . . . [O]nly those applicants active in the President’s party are likely to be chosen.”<sup>427</sup>

Second, the bankruptcy judges had disfavored presidential appointment for self-serving, nonpartisan political reasons. Unlike district judges and other judicial officers appointed by the President, bankruptcy judges were not well connected politically.<sup>428</sup> They had

<sup>420</sup> 28 U.S.C. § 152(a)(1) (2006).

<sup>421</sup> *Id.* § 152(e).

<sup>422</sup> *Id.* § 157(b)(1).

<sup>423</sup> Fed. R. Bankr. P. 7004.

<sup>424</sup> 11 U.S.C. § 105(a) (2006); *Marrama v. Citizens Bank of Mass.*, 127 S. Ct. 1105, 1111–12 (2007). For some illustrations of the expansive exercise of equity, see Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power Under*

*Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 *Ariz. St. L.J.* 793, 794 (2003).

<sup>425</sup> See *infra* notes 122–27 and accompanying text.

<sup>426</sup> 130 Cong. Rec. 6246 (1984) (statement of Rep. Crockett, Jr.).

<sup>427</sup> *Id.* at 6046 (statement of Rep. Kastenmeier).

<sup>428</sup> *Mund*, Part One, *supra* note 84, at 20–21.

avored merit selection by the circuit courts in the past over presidential selection because they estimated their chance of reappointment to be superior when not in a footrace with well-connected friends of U.S. senators and the President.<sup>429</sup>

Why were the appointments given to the courts of appeals rather than the district courts? Some district judges may have been nursing lingering hard feelings toward incumbent bankruptcy judges seeking reappointment. The earlier 1977 Conference Report to H.R. 8200 disclosed the pettiness of some district court judges toward bankruptcy judges' efforts to secure greater tenure and independence. "Feeling among the district benches is running high against bankruptcy judges for their role in the formulation of this legislation. There has been some fear that retaliation may take the form of unrenewed appointments of sitting bankruptcy judges."<sup>430</sup> Section 404(b) of H.R. 8200 addressed this concern by providing "that the terms of all bankruptcy judges sitting on the date of enactment of the legislation are extended to the end of the transition period."<sup>431</sup> These same considerations may have informed the congressional choice to give the circuit courts, and not the district courts, the power to appoint new judges.

Cast in public-regarding terms, the need to reach a broader pool of bankruptcy judicial applicants also favored vesting the circuit courts with the appointment power. Prior to the 1978 Act, district courts appointed the bankruptcy judges/referees.<sup>432</sup> That arrangement would tend to favor appointees familiar to

the district judges, namely, those attorneys drawn from the talent pool of the judicial district's bankruptcy bar. Circuit-wide selection, however, permitted the casting of a wider geographic net for qualified applicants. This arrangement would partially make up for a lost, even if largely theoretical, advantage of presidential appointment, namely that the appointed judges would be drawn from a national talent pool. As Representative Robert Kastenmeier explained, the political logic of bankruptcy judicial appointments differs from the context of other judicial appointments:

Presidential appointment works well for district and circuit judges, because many qualified lawyers are willing to serve, the range and importance of issues to be handled makes it appropriate to consider a potential judge's political philosophy, and the large impact and high visibility that an individual judge can have induces the President to choose a well-qualified candidate. The same conditions do not exist with respect to bankruptcy judgeships. There is not a huge pool of obviously qualified candidates, and the President does not have as strong an incentive to choose the best qualified of those candidates.<sup>433</sup>

Kastenmeier held the view that the courts of appeals would principally consider merit for the specialist position and "choose the best qualified candidate regardless of political affiliation."<sup>434</sup>

Finally, *Marathon* may have given Congress some cause to rethink presidential appointment.<sup>435</sup> *Marathon* had struck down the broad grant of jurisdiction to non-Article III judges by holding that the 1978 Act had thereby granted the "essential attributes" of the

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<sup>429</sup> See *supra* notes 84–85 and accompanying text.

<sup>430</sup> H.R. Rep. No. 95-595, at 460 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6415.

<sup>431</sup> *Id.* at 459–60.

<sup>432</sup> 28 U.S.C. § 152(a) (1976).

<sup>433</sup> 130 Cong. Rec. 6046 (1984) (statement of Rep. Kastenmeier).

<sup>434</sup> *Id.*

<sup>435</sup> See 458 U.S. 50, 87 (1982).

Article III judicial power to bankruptcy judges.<sup>436</sup> These bankruptcy judges were not subject to sufficient control by the Article III judiciary to be considered adjuncts.<sup>437</sup> *Marathon* suggested that better Article III control of the bankruptcy judges could save their constitutionality by strengthening the claim that they were merely adjuncts to the district courts.<sup>438</sup> Although presidential appointment with Senate confirmation was constitutionally permissible, the vesting of appointments in the Courts of Law would make the bankruptcy judges more subject to supervision and avoid a repeat performance of *Marathon*.<sup>439</sup> District judges had appointed commissioners, registers, and referees previously. That selection method had provided a means to control the non-life tenured officers and had helped assure that the bankruptcy judges were true adjuncts to the Article III judiciary.<sup>440</sup> Of course, the power to remove and the threat of its exercise have always been more significant as tools of control than the power to appoint. Congress could have granted the circuit courts the power to remove these judicial officers while leaving the appointment power with the President and the Senate. This concern may have been only secondary to the immediate partisan and constituent politics.

Since BAFJA, Congress has continued to enhance the office of bankruptcy judge by adding to its powers. Among others, it clarified a judge's power to raise issues sua sponte;<sup>441</sup> authorized jury trials before bankruptcy judges upon the parties' consent, and when designated by the district court;<sup>442</sup> and authorized the abrogation of state sovereign immunity in some instances.<sup>443</sup>

The circuit courts have continued to appoint bankruptcy judges post-BAFJA. By statute, they must select judges according to a merit-selection plan: "a person whose character, experience, ability, and impartiality qualify such person to serve in the Federal judiciary."<sup>444</sup> Applicants must "possess, and have a reputation for, integrity and good character"; a demonstrated "commitment to equal justice under the law"; and a good judicial temperament, as reflected by their "demeanor, character, and personality."<sup>445</sup> In addition, the court disqualifies applicants whose appointments would violate nepotism/familial conflict of interest rules and who are not "of sound physical and mental health" sufficient to perform the essential duties of the office.<sup>446</sup>

How does the appointments process actually function?<sup>447</sup> Most searches result

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 85–86.

<sup>438</sup> *See id.* at 79, 85–86

<sup>439</sup> G. Ray Warner, *Rotten to the "Core": An Essay on Juries, Jurisdiction and Granfinanciera*, 59 UMKC L. Rev. 991, 996 (1991).

<sup>440</sup> Thomas A. Wiseman, Jr., *The Case Against Bankruptcy Appellate Panels*, 4 Geo. Mason L. Rev. 1, 14 (1995).

<sup>441</sup> Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, sec. 203, § 105(a), 100 Stat. 3088, 3097.

<sup>442</sup> 28 U.S.C. § 157(e) (2006).

<sup>443</sup> Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104, 108 Stat. 4106, 4108; *id.* § 112, 108 Stat. at 4117; *id.* § 113, 108 Stat. at 4117.

<sup>444</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 120(a)(1), 98 Stat. 333 (codified as amended at 28 U.S.C. § 152 nt. (2006)). For a discussion of the permissibility of using statutory qualifications in vested appointments, see Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. Pa. J. Const. L. 745 (2008).

<sup>445</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984 § 120(c), 98 Stat. at 333 (codified as amended at 28 U.S.C. § 152 nt.).

<sup>446</sup> *Id.*

<sup>447</sup> The informal process behind the selection of bankruptcy judges, including the differences in process among circuits and the campaigns run by applicants seeking appointment, is a topic fit for another article.

in the appointment of an attorney drawn from the pool of the local bankruptcy bar.<sup>448</sup> Once appointed, odds for reappointment at the end of the fixed fourteen-year term are good. During 1998 to 2002, circuit courts reappointed over 90% of those bankruptcy judges applying for reappointment.<sup>449</sup>

## II. Opting Out of Nomination and Advice and Consent

The requirements of the Appointments Clause and its excepting provision provide the basis for a possible challenge to the present method of appointing bankruptcy judges. Part II briefly discusses the Clause's operation.

### A. The Appointments Clause

Article II, section 2, clause 2, provides 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 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.<sup>450</sup>

The first half of the clause describes the obligatory method for appointing "Ambassadors, other public Ministers and

Consuls, Judges of the Supreme Court," and other "principal" officers of the United States.<sup>451</sup> The President nominates, the Senate confirms, and then the President may appoint. This arrangement was a political bargain between those who favored the vesting of the appointment power in the President alone and those who preferred senatorial appointment.<sup>452</sup>

The Appointments Clause, however, serves a purpose beyond the expediency of a founding-era political compromise. The Court has repeatedly claimed that the Clause is not a "frivolous" matter of "etiquette or protocol," but represents an important separation of powers safeguard.<sup>453</sup> "This power of distributing appointments, as circumstances may require, into several hands, in a well formed disinterested legislature, might be of essential service, not only in promoting beneficial appointments, but, also, in preserving the balance in government . . ."<sup>454</sup> Nomination by a sole President with Senate advice and consent makes credit and blame for nominations politically clear, and promotes excellent and politically acceptable appointees because of the "silent operation" of the Senate's advice and consent.<sup>455</sup> Moreover, presidential nomination and appointment, together with the Incompatibility and Ineligibility Clauses,<sup>456</sup> prevent Congress from creating offices and then appointing themselves or friends to them.<sup>457</sup> Thus, the Clause serves the separation of powers.

<sup>448</sup> Lynn M. LoPucki, *Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts* 20 (2006).

<sup>449</sup> *Id.* at 21 (citation omitted).

<sup>450</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>451</sup> The Clause itself does not use the "principal" nomenclature. James Madison employed this term in a discussion of the Clause during the Virginia ratifying convention. See *infra* notes 162–64 and accompanying text.

<sup>452</sup> Michael Comiskey, *Seeking Justices* 21–22 (2004).

<sup>453</sup> *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (per curiam).

<sup>454</sup> Letter from the Federal Farmer to the Republican No. 14 (Jan. 17, 1788), reprinted in 4 *The Founders' Constitution* 98 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>455</sup> *The Federalist* No. 76, at 394 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

<sup>456</sup> U.S. Const. art. I, § 6

<sup>457</sup> *Freytag v. Comm'r*, 501 U.S. 868, 904 n.4 (1991) (Scalia, J., concurring).

### **B. The Excepting Clause**

The excepting provision of the Appointments Clause, occasionally referred to as the “Excepting Clause,” authorizes Congress to opt out of the default constitutional arrangement for appointment.<sup>458</sup> “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.”<sup>459</sup>

Congress may elect, either by statutory enactment with presidential concurrence or by legislative supermajority without it,<sup>460</sup> to vest the appointing power in the enumerated recipients.<sup>461</sup> When Congress exercises this power, it excludes itself from the default appointments process by stripping the Senate of its confirmation authority. In addition, the choice to use this power may, depending on its exercise, divest the President of the appointment power. Congressional discretion to permit intrabranch appointments is broad.<sup>462</sup>

Language parallel to “as they think proper” in other parts of the Constitution

illustrates this discretion. The grants of discretion in the Presidential Adjournment Clause<sup>463</sup> and the Slave Trade Clause<sup>464</sup> “expressly make a political actor’s judgment, rather than objective necessity, propriety, or expediency, the test of constitutionality.”<sup>465</sup>

Not all officers are discretionarily eligible to be so appointed. The Excepting Clause extends only to “inferior officers,” that subclass of officers of the United States who are not listed in the Clause and who are “inferior.” If Congress attempts to exempt a principal officer—i.e., a noninferior officer—from the default process, litigants may challenge the appointment’s constitutionality. Thus, defining who is an “inferior” officer is important to avoid constitutional difficulties.

As a threshold matter, to be an “inferior” officer, one must be an officer, judicially defined as “any appointee exercising significant authority pursuant to the laws of the United States.”<sup>466</sup> There are two principal competing interpre-

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<sup>458</sup> U.S. Const. art. II, § 2, cl. 2. The provision was a constitutional innovation in its time. No state constitution at the time of the Philadelphia Convention provided any model for the Excepting Clause.

<sup>459</sup> U.S. Const. art. II, § 2, cl. 2 (emphasis added).

<sup>460</sup> *Cain v. United States*, 73 F. Supp. 1019, 1021 (N.D. Ill. 1947) (noting Congress exercises this option by means of “specific legislation”).

<sup>461</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>462</sup> The scope of discretion to authorize interbranch appointments is disputable. There are two competing interpretations of the discretion encompassed by the phrase “as they think proper.” First, the phrase could mean Congress enjoys not only the discretion to choose whether or not to vest the appointing power, but also the unfettered discretion in selecting who receives that appointing authority. On this account, “as they think proper” introduces a menu of available appointing authorities. Such an interpretation would permit interbranch as well as intrabranch appointments, such as the Courts of Law appointing executive officers. See, e.g., *Ex parte Siebold*, 100 U.S. 371, 397–98 (1879) (“[T]he selection of the appointing power, as between the functionaries named, is a

matter resting in the discretion of Congress.”). Second, the phrase could be construed to permit only the more limited congressional discretion over the choice whether and when to opt out of the default method for appointment. Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *Duke L.J.* 267, 278 n.36 (1993). Such an interpretation would not allow Congress to give appointing authorities the appointment power over an “inferior officer outside their own respective departments.” *Id.* Congress would enjoy the discretion to vest an executive branch appointment, for example, in either the President alone, or the Heads of Departments, but would not be permitted to give the President alone the authority to appoint judges.

<sup>463</sup> U.S. Const. art. II, § 3.

<sup>464</sup> U.S. Const. art. I, § 9, cl. 1.

<sup>465</sup> Lawson & Granger, *supra* note 149, at 278.

<sup>466</sup> *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976) (*per curiam*). This definition does not draw “the line between principal and inferior officer for Appointments Clause purposes, but . . . the line between officer and non officer.” *Edmond v. United States*, 520 U.S. 651, 662 (1997).

tations of the ambiguous term “inferior” in the Excepting Clause.<sup>467</sup>

First, “inferior” may describe the relationship of a subordinate to a superior.<sup>468</sup>

The original meaning, which was followed in *Edmond v. United States*, favors this interpretation.<sup>469</sup> Second, “inferior” may carry “the sense of petty or unimportant.”<sup>470</sup> *Morrison v. Olson*, discussed below, embodies this approach.<sup>471</sup>

### ***The Original Meaning of “Inferior Officer”***

An originalist interpretation of the Excepting Clause favors the subordinate interpretation. The text, structure, purpose, and historical practice reflect an understanding that the word “inferior” denoted a hierarchical relationship with a “superior.”

#### ***a. Constitutional Text***

The text of the Constitution favors the interpretation that “inferior” describes a hierarchical relationship between a subordinate and a superior. Other occurrences of the word in the Constitution include the enumerated

power to constitute “Tribunals inferior to the supreme Court”;<sup>472</sup> the vesting of the judicial power in the “Supreme Court” and “in such inferior Courts” as Congress may authorize;<sup>473</sup> and the description of the terms of office for “[t]he Judges, both of the supreme and inferior Courts.”<sup>474</sup> Similarly interpreted, “inferior officers” in the Excepting Clause would permit appointment of those officers who are subordinate to a hierarchical superior.

The records of the Virginia ratification convention support the subordinate interpretation. James Madison explained the Excepting Clause’s operation.<sup>475</sup>

“With respect to the appointment of [inferior] officers, a law may be made to grant it to the President alone.”<sup>476</sup> He referred to these inferior officers as “subordinate officers,” in contradistinction to the “principal offices,” which the President would fill temporarily with his recess appointments power.<sup>477</sup> His views provide evidence of how a reasonable person in the ratification era might have understood the word “inferior.”

Contextually analogous usage in *The Federalist* confirms that “inferior” should be interpreted as “subordinate.” *The Federalist Nos. 81 and 82* provide an exegesis of the only other constitutional

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<sup>467</sup> In addition, the use of “inferior” may carry a “merely ceremonial meaning”—one that does not necessarily describe a hierarchical relationship and does not signify unimportance. *In re Sealed Case*, 838 F.2d 476, 484 (D.C. Cir. 1988). This meaning has often been conflated with the “lesser” definition of “inferior.” *See id.*

<sup>468</sup> *See, e.g., Edmond*, 520 U.S. at 662.

<sup>469</sup> *Id.* at 663.

<sup>470</sup> *Collins v. United States*, 14 Ct. Cl. 568, 574 (1879).

<sup>471</sup> *See* 487 U.S. 654, 671–72 (1988).

<sup>472</sup> U.S. Const. art. I, § 8, cl. 9.

<sup>473</sup> U.S. Const. art. III, § 1.

<sup>474</sup> *Id.*

<sup>475</sup> The Debates in the Several State Conventions on the Adoption of the Federal Constitution 409–10 (Jonathan Elliot ed., 2d ed., 1876) hereinafter *The Debates*]. Madison’s

statements came in the context of his explanation why appointment matters would not likely detain the Senate. An interlocutor had voiced concern about the provision for adjournment of the Congress. Madison explained that the Senate would not abuse the requirement that “[n]either House . . . shall, without the Consent of the other, adjourn for more than three days,” U.S. Const. art. I, § 5, cl. 4, because the Senate discharges only two duties not shared with the House: providing advice and consent for treaties and appointments. The debates, *supra*.

<sup>476</sup> The Debates, *supra* note 162, at 409. The bracketed word “inferior” is properly implied because the officer would have to be “inferior” in order for Congress to vest the appointment in the President alone. U.S. Const. art. II, § 2, cl. 2.

<sup>477</sup> The Debates, *supra* note 162 (emphasis added).



occurrences of the word “inferior.” Hamilton responded in *Federalist No. 81* to an attack on the scope of congressional power to create “inferior” courts.<sup>478</sup> A ratification opponent had claimed that the power to establish national “inferior courts” was “intended to abolish all the county courts in the several states, which are commonly called inferior courts.”<sup>479</sup> Hamilton rebuffed the suggestion by emphasizing the subordinate usage of “inferior.”

*[T]he expressions of the constitution are to constitute ‘tribunals inferior to the supreme court,’ and the evident design of the provision is to enable the institution of local courts subordinate to the supreme, either in states or larger districts. It is ridiculous to imagine that county courts were in contemplation.*<sup>480</sup>

This explanation, which distinguishes between the U.S. courts that are hierarchically inferior to the Supreme Court and state courts that happened to be styled “inferior,” underscores that the use of “inferior” elsewhere in the Constitution was used to describe a relationship between a subordinate and a superior. Similarly, Hamilton equated inferior with subordinate in *The Federalist No. 82*.<sup>481</sup> “[T]he supreme and subordinate courts of the union should alone have the power of deciding those causes, to which their authority is to extend ....”<sup>482</sup> To be sure, “inferior” carried also the sense of “[l]ower in place[,] . . . station or rank of life[,] . . . value or excellency.”<sup>483</sup> *The Federalist* includes several occurrences of this usage of “inferior,”<sup>484</sup>

but the contextually parallel usages invoke the meaning “subordinate.”

### **b. Structure and Purpose**

The structure and purpose of the Excepting Clause lend support to the subordinate interpretation of “inferior.” The Excepting Clause does not stand apart structurally from the Appointments Clause, but is an exception to it. The default rule attempts to preserve accountability for appointments by vesting the nomination in a single President. It limits presidential appointment power by granting the Senate a role in the selection process. These related objectives permit several inferences about the scope of the Excepting Clause.

The Excepting Clause, as an exception to the Appointments Clause, should not be interpreted to undermine the default appointment arrangement or otherwise work a dramatic departure from it. Its principal purpose was to promote administrative efficiency by facilitating the appointment of numerous subordinates.

[F]orseeing that when offices became numerous, and sudden removals necessary, [Senate advice and consent] might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments.<sup>485</sup>

That little debate followed the last-minute amendment to the Appointments Clause compromise suggests it did not attempt a dramatic departure from the

<sup>478</sup> *The Federalist No. 81* (Alexander Hamilton), *supra* note 142, at 420.

<sup>479</sup> *Id.*

<sup>480</sup> *Id.* n.\* (second emphasis added).

<sup>481</sup> *The Federalist No. 82* (Alexander Hamilton), *supra* note 142, at 427.

<sup>482</sup> *Id.*

<sup>483</sup> 1 Samuel Johnson, *Dictionary of the English Language* (6th ed. 1785).

<sup>484</sup> See, e.g., *The Federalist No. 69* (Alexander Hamilton), *supra* note 142, at 357 (“In this article, therefore, the power of the president would be inferior to that of either the monarch, or the governor.”)

<sup>485</sup> *United States v. Germaine*, 99 U.S. 508, 510 (1878).

default rule. During the last day of the Federal Convention, Governor Morris, seconded by Roger Sherman, proposed amending the Appointments Clause in the Committee on Style.<sup>486</sup> Significantly, Morris and Sherman were the architects of the compromise that resulted in the default appointments process. Morris represented the interests of the “large” or populous states, which favored presidential appointment; Sherman represented the interests of the small states, which favored senatorial appointment.<sup>487</sup>

James Madison suggested the proposed Excepting Clause did “not go far enough if it be necessary at all.”<sup>488</sup> He proposed a friendly amendment, adding “superior officers” below the Heads of Departments to the Excepting Clause’s enumerated recipients of the appointments power.<sup>489</sup> Madison’s proposed use of the word “superior” together with “inferior officer” could be read to suggest that the meaning “subordinate” was intended. Morris replied that Madison’s proposed change to his amendment was unnecessary and offered that “[b]lank commissions [could] be sent.”<sup>490</sup> By this, Morris was (apparently) suggesting that commissions, which give a person a right to an office, could be left undesignated (i.e., “blank”) by the formally appointing authority. Thus, Morris contemplated that the Clause would permit a Head of Department—who would retain formal authority over the appointment—to leave

to an officer below the actual selection of a named officeholder. Initially, the amendment failed on a tie vote.<sup>491</sup> Subsequently, after argument that the Excepting Clause was “too necessary to be omitted,” it was adopted on a second vote without Madison’s proposed change and without opposition.<sup>492</sup> Thus, the Excepting Clause “was intended merely to make clear (what Madison thought already was clear) that those officers appointed by the President with Senate approval could on their own appoint their subordinates.”<sup>493</sup>

The Appointments Clause’s purpose of political accountability favors the subordinate interpretation. The Excepting Clause, like the Appointments Clause, serves political accountability by permitting the vesting of appointment power in one person (e.g., the President alone or the Heads of Departments) or in a small numbers of persons (e.g., the Courts of Law). If the vested appointment authority is interpreted to extend only to appointing subordinates—such as appointees within the same branch of government who themselves are responsible to the appointing authority—political accountability for poor or excellent appointees is furthered.

Similarly, the Appointments Clause’s purpose of limiting presidential power favors the subordinate interpretation of “inferior.” Although the Excepting Clause does not provide for a case-by-case senatorial check, it does require that the Senate and the House authorize “by law”

<sup>486</sup> 2 Records of the Federal Convention of 1787, at 627 (Max Farrand ed., rev. ed. 1966); see also *Morrison v. Olson*, 487 U.S. 654, 720 (1988) (Scalia, J., dissenting) (“Nobody thought [the Excepting Clause] was a fundamental change . . .”).

<sup>487</sup> *Comiskey*, *supra* note 139. The “large” or populous states anticipated wielding greater influence in the selection of a President under the electoral college. *Id.* The “small” or not-so-populous states anticipated such an outcome too and there-

fore favored the Senate’s egalitarian two-votes-per-state approach to representation. *Id.*

<sup>488</sup> 2 Records of the Federal Convention of 1787, *supra* note 173.

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> The vote was five, five, one. *Id.*

<sup>492</sup> *Id.* at 628.

<sup>493</sup> *Morrison v. Olson*, 487 U.S. 654, 720–21 (1988) (Scalia, J., dissenting) (citation omitted).

(i.e., by legislation) the vesting of appointments. The subordinate interpretation further checks the presidential appointment power by disallowing vested cross-branch appointments of judicial officers. If the President alone could be given the power to appoint lower judicial officers, that exception would undo the careful compromise that created the Appointments Clause. Of course, the vesting of the appointment of executive officers in the Courts of Law would check the exercise of executive power, but such an arrangement would undermine the purpose of promoting clear lines of political accountability for poor appointments.

### **c. Contemporaneous Historical Practice**

The historical evidence of early appointment practice favors the subordinate interpretation. Each time the First Congress opted out of the default appointment regime, the appointed office was subordinate to the principal one. For example, in drafting the organic statute of the Department of Foreign Affairs, Congress created the office of “Secretary for the Department of Foreign Affairs,” which it denominated as a “principal” office.<sup>494</sup> It then created the office of “chief Clerk in the Department of Foreign Affairs” and denominated it an “inferior office” to be filled by the principal officer’s appointee.<sup>495</sup> The statute then defined the

duties of the office of chief clerk as “to be employed therein as [the principal officer] shall deem proper.”<sup>496</sup>

Congress followed a parallel pattern in creating the Department of War,<sup>497</sup> Department of the Treasury,<sup>498</sup> and the Judiciary.<sup>499</sup> Each act authorized principal and inferior offices, with the inferior office answering as a subordinate to the principal. Thus, contemporaneous historical practice favors the subordinate interpretation.

### **The Court’s Interpretations of “Inferior Officer”**

Two landmark Supreme Court cases have adopted competing interpretations of “inferior.” *Morrison v. Olson* interpreted “inferior officer” as one with “lesser” power and duties.<sup>500</sup> *Edmond v. United States* interpreted “inferior officer” as one who is “subordinate” to a supervisor.<sup>501</sup>

#### **a. The Lesser Interpretation**

*Morrison v. Olson* occupies a leading place in the separation of powers canon generally, and in Appointments Clause jurisprudence specifically. The independent counsel provisions at issue were the product of a dramatic Nixon- era standoff. In 1978, Congress passed the Ethics in Government Act following the attempted Watergate cover-up and President Richard Nixon’s resignation.<sup>502</sup> Nixon had wielded his executive power to thwart the efforts of Justice Department

<sup>494</sup> An Act for Establishing an Executive Department, to be denominated the Department of Foreign Affairs, ch. 4, § 1, 1 Stat. 28, 29 (1789).

<sup>495</sup> *Id.* § 2, 1 Stat. at 29

<sup>496</sup> *Id.* (emphasis added).

<sup>497</sup> An Act to Establish an Executive Department, to be denominated the Department of War, ch. 7, §§ 1–2, 1 Stat. 49, 49–50 (1789).

<sup>498</sup> An Act to Establish the Treasury Department, ch. 12, § 1, 1 Stat. 65 (1789). The organic act of the Treasury Department did not explicitly call the Secretary of the Treasury a “principal officer.” However, it created the office of the Assis-

tant to the Secretary of the Treasury (appointable by the Secretary), and did make that office subordinate to the Secretary. *Id.*

<sup>499</sup> The Judiciary Act of 1789 granted the courts the power to appoint their clerks. An Act to Establish the Judicial Courts of the United States, ch. 20, § 7, 1 Stat. 73, 76 (1789). Their oath suggests they are subordinates of the Court. *Id.*

<sup>500</sup> 487 U.S. 654, 670–73 (1988).

<sup>501</sup> 520 U.S. 651, 662–63 (1997).

<sup>502</sup> Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

prosecutors seeking evidence of criminal misconduct by high-level executive branch officers. He had asserted executive privilege over White House audiotapes sought by special prosecutor Archibald Cox.<sup>503</sup> Nixon, as head Executive, ordered his subordinate, Attorney General Elliott Richardson, to fire Cox.<sup>504</sup> Rather than obey, Richardson and then Deputy Attorney General William Ruckelshaus resigned.<sup>505</sup> Solicitor General Robert Bork, the ranking Justice Department official, obliged the head Executive and fired Cox.<sup>506</sup> Nixon's highly visible efforts to scuttle the prosecution led to tremendous political pressure for him to reappoint a new special prosecutor and, eventually, to resign in the shadow of a credible impeachment threat.

Notwithstanding Nixon's resignation, Congress sought to guarantee the independence of future investigations of high-ranking executive branch officers by creating an office of independent counsel: a special prosecutor appointed by Article III judges with decisional independence from the executive hierarchy.<sup>507</sup> By design and definition, the independent

counsel was subordinate neither to the President nor to any other officer.<sup>508</sup> This arrangement presented an Appointments Clause difficulty. If the independent counsel was not subordinate to anyone, how could she be an "inferior" officer appointed pursuant to the Excepting Clause?

*Morrison* interpreted "inferior officer" in the sense of an officer who is "lesser," or less powerful, in the abstract, than principal officers.<sup>509</sup> Chief Justice Rehnquist justified this conclusion by borrowing from and adapting prior cases that distinguished between "officers" and non-officers. These decisions balanced tenure, duration, emolument, and duties to determine whether criminal defendants were "officers" within the meaning of federal criminal statutes.<sup>510</sup> *Morrison* adapted the balancing test. It substituted "removability" and "jurisdiction" as factors to be considered in lieu of "emolument" and "duration."<sup>511</sup> It then balanced the factors to distinguish principal from inferior officers and thereby justified "inferior" officer status for the independent counsel<sup>512</sup>. Accordingly, the Court held

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<sup>503</sup> In *Nixon v. United States*, the Supreme Court ordered Nixon to comply with a subpoena duces tecum for the now-infamous Nixon tapes. 418 U.S. 683, 715 (1974).

<sup>504</sup> Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, Wash. Post, Oct. 21, 1973, at A1.

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*

<sup>507</sup> 28 U.S.C. § 591 (2006).

<sup>508</sup> *Morrison v. Olson*, 487 U.S. 654, 671 (1988). The Attorney General could remove an independent counsel only upon good cause shown or physical or mental incapacity. 28 U.S.C. § 596(a)(1). The independent counsel argued that this provision made the counsel subordinate to an executive superior. Brief for Appellant at 36, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279). The Court declined to find that a provision allowing for removal for cause rendered the independent counsel subordinate to the Attorney General.

<sup>509</sup> *Morrison*, 487 U.S. at 670–73.

<sup>510</sup> For example, in *United States v. Hartwell*, the Court balanced tenure, duration, emolument,

and duties to determine whether a criminal defendant was subject to indictment under a public anti-corruption statute that applied only to "officers." 73 U.S. (6 Wall.) 385, 393 (1867). Similarly, in *United States v. Germaine*, the Court balanced these same considerations to conclude an army doctor was *not* an officer. 99 U.S. 508, 512 (1878).

<sup>511</sup> *Morrison*, 487 U.S. at 671–72.

<sup>512</sup> Justice Scalia observed that the balancing in the criminal law cases sought only to distinguish between officers and nonofficers. *Id.* at 719 (Scalia, J., dissenting). This observation may overlook a charitable reading of the majority that it supposed a spectrum between principal officer and nonofficer with the inferior officer located somewhere along the continuum. It remains that the independent counsel never characterized *Hartwell* or *Germaine* as offering a test that could sort principal officers from inferior ones. Brief for Appellant at 36, *Morrison*, 487 U.S. 654 (No. 87-1279). She did argue it appropriate to examine the duties, powers, tenure, and compensation assigned to an office by Congress to determine whether an officer was inferior. *Id.* at 33.

that her appointment comported with the Excepting Clause.<sup>513</sup>

Justice Scalia dissented, and argued that, in light of the separation of powers, the subordinate interpretation of “inferior” was correct.<sup>514</sup> He would have concluded the independent counsel was *not* “inferior.” Morrison was not subordinate to any superior executive officer. This independence would disallow appointment pursuant to the Excepting Clause. Scalia would later suggest a *per se* rule that being removable at will renders an officer subordinate to the officer with power to remove.<sup>515</sup> The decision’s consequences reached further than the Appointments Clause. His solo dissent criticized the appointment and the restriction on removal as undermining the unitary Executive’s ability to appoint and control officers exercising the executive power.<sup>516</sup> A restriction on removal thereby interfered with the separation of powers.

#### ***b. The Subordinate Interpretation***

Less than ten years later, the subordinate interpretation of “inferior” officer, expressed in Scalia’s *Morrison* dissent, prevailed in *Edmond v. United States*.<sup>517</sup> Criminal defendants questioned the validity of the appointments of the judges of the Coast Guard Court of Appeals who had affirmed their military convictions.<sup>518</sup> The defendants argued the executive branch adjudicators constituted principal officers, and that therefore the Appointments Clause required presidential nomination with Senate

advice and consent.<sup>519</sup>

Assuming the validity of *Morrison*’s interpretation of “inferior” as “lesser,” they emphasized the importance neither of the judges’ responsibilities— including the ability to affirm death sentences— and argued that the judges were neither limited in tenure nor in jurisdiction.<sup>520</sup>

The Court brushed aside *Morrison* as “not purport[ing] to set forth a definitive test for whether an office [was] ‘inferior.’”<sup>521</sup> Instead, it adopted the subordinate interpretation.<sup>522</sup> It noted that being a powerful officer does not preclude one from being “inferior” under the subordinate interpretation.<sup>523</sup> The exercise of “significant authority” separates only officers from nonofficers, not principal from inferior ones.<sup>524</sup> Inferior officers too may exercise significant authority of the United States, provided they are subordinate to an appointing superior.<sup>525</sup> This decision was surprising because *Edmond* did not overrule *Morrison*—at least not explicitly, yet it adopted Scalia’s interpretation of “inferior” as subordinate.

### **III. Three Narratives About the Relationship Between *MORRISON* and *EDMOND***

*Morrison* and *Edmond*’s uneasy coexistence has not gone unnoticed by the lower courts and commentators. Several courts have observed a “tension” between the two cases.<sup>526</sup> Other courts and commentators, perhaps recognizing them as irreconcilable, preferred one decision to another. A Ninth Circuit panel

<sup>513</sup> *Morrison*, 487 U.S. at 672.

<sup>514</sup> *Id.* at 719 (Scalia, J., dissenting).

<sup>515</sup> *Edmond v. United States*, 520 U.S. 651, 664 (1997)

<sup>516</sup> *Morrison*, 487 U.S. at 708–09 (Scalia, J., dissenting).

<sup>517</sup> *Edmond*, 520 U.S. at 663.

<sup>518</sup> *Id.* at 655–56.

<sup>519</sup> *Id.*

<sup>520</sup> *Id.* at 661–62.

<sup>521</sup> *Id.* at 661.

<sup>522</sup> *Id.* at 662.

<sup>523</sup> *Id.*

<sup>524</sup> *Id.*

<sup>525</sup> *Id.*

<sup>526</sup> *United States v. Hilario*, 218 F.3d 19, 25 (1st Cir. 2000); *United States v. Sotomayor Vazquez*, 69 F. Supp. 2d 286, 289 (D.P.R. 1999).

followed *Morrison* while failing to acknowledge *Edmond*,<sup>527</sup> another attempted to reconcile them.<sup>528</sup> A leading student treatise on constitutional law mentions *Morrison* but neglects to mention *Edmond*.<sup>529</sup> Justice Souter too concurred separately in *Edmond* to protest the departure from *Morrison*.<sup>530</sup> On the other hand, Professor Steven Calabresi has characterized *Edmond* as “essentially displac[ing] the faulty Appointments Clause analysis of *Morrison v. Olson*.”<sup>531</sup>

Below, this Article offers three alternative narratives that attempt to explain the relationship between

*Morrison* and *Edmond*, and their competing interpretations of “inferior officer.”

#### - *The Reconciling Narrative*

Courts have attempted to reconcile *Morrison* and *Edmond* as consistent. To accomplish this feat, they appeal to the distinction between necessary and sufficient conditions. The Ninth Circuit first suggested this approach in *United States v. Gantt*.<sup>532</sup> *Gantt* addressed whether an interim U.S. Attorney constituted an “inferior officer” such that Congress could

vest the appointment in the U.S. District Court.<sup>533</sup> On the one hand, it rejected subordination as the necessary condition for inferior officer status, and thereby accounted for *Morrison*: an officer could be deemed inferior, even without any superior, if the discretionary balancing of factors warranted it.<sup>534</sup> On the other hand, *Gantt* acknowledged that a superior officer’s supervision guarantees, or suffices, to make one an inferior officer.<sup>535</sup> This reconciliation explains partially *Edmond*’s apparent equating of inferior officer status with having a superior. Thus, the *Gantt* narrative views *Morrison* and *Edmond* as “articulat[ing] two equally plausible and equally valid methods . . . for determining whether an officer rises to the level of principal status under the Appointments Clause.”<sup>536</sup>

The Lewis Libby prosecution illustrates the attempt to reconcile the two approaches to defining “inferior” officer. *Libby* addressed the defense’s contention that special prosecutor Patrick Fitzgerald did not constitute an inferior officer, such that the vesting of his appointment with the Acting Attorney General was constitutionally invalid.<sup>537</sup> To answer this

<sup>527</sup> See *Stanley v. Gonzales*, 476 F.3d 653, 659–60 (9th Cir. 2007) (failing to acknowledge *Edmond* and applying *Morrison*).

<sup>528</sup> *United States v. Gantt*, 179 F.3d 782 (9th Cir. 1999), amended by 194 F.3d 987, 999 n.6 (9th Cir. 1999).

<sup>529</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* (3d ed. 2007); see also Daniel A. Farber et al., *Constitutional Law, Themes for the Constitution’s Third Century* 1163 (3d ed. 2003) (noting *Edmond* in the case book but failing to acknowledge any tension or inconsistency with *Morrison*).

<sup>530</sup> *Edmond*, 520 U.S. at 667–69 (Souter, J., concurring). Justice Souter wrote separately because he disagreed with the majority’s analysis of the Appointments Clause issue. Although he viewed subordination as a necessary condition to “inferior officer status,” he did not consider it “a single sufficient condition.” *Id.* At 668.

<sup>531</sup> Steven G. Calabresi, *The Structural Constitution and the Countermajoritarian Difficulty*,

22 *Harv. J.L. & Pub. Pol’y* 3, 5 (1998); see also Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court’s New Appointments Clause Jurisprudence*, 98 *Colum. L. Rev.* 1103, 1119–20 (1998).

<sup>532</sup> 194 F.3d at 999 n.6.

<sup>533</sup> *Id.* at 999.

<sup>534</sup> *Id.* at 999 n.6.

<sup>535</sup> *Id.*

<sup>536</sup> *United States v. Libby*, 498 F. Supp. 2d 1, 16 (D.D.C. 2007). *Libby* has taken *Gantt*’s logic a step further. If neither *Morrison* nor *Edmond* definitively state a test for inferior officerhood, then there “might be other factors, unarticulated in either *Edmond* or *Morrison*, that should sometimes be given primacy when undertaking an Appointments Clause analysis, depending upon the facts of a particular case.” *Id.* at 16 n.23. Thus, there may be more than two valid methods for determining officer status.

<sup>537</sup> *Id.* at 5.

argument, the *Libby* court offered a justification for the *Gantt* synthesis that relied principally on *Edmond*'s failure to repudiate *Morrison*.<sup>538</sup> *Edmond* did not claim explicitly to overrule *Morrison*; indeed, it included *Morrison* in a seriatim string cite of precedents finding officers to be inferior.<sup>539</sup> Moreover, *Edmond* did not purport to displace *Morrison* as the new rule governing prospectively. Instead, it observed that the Court's Appointments Clause jurisprudence "[has] not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes."<sup>540</sup> *Libby* misread *Edmond* to say that there was no exclusive criterion, rather than reading it to say that the Court had failed to articulate an exclusive criterion prior to *Edmond*. Finally, even though *Edmond* brushed off *Morrison* as "not purport[ing] to set forth a definitive test for whether an office is 'inferior' under the Appointments Clause,"<sup>541</sup> *Libby* concluded this statement did not "amount to a repudiation of the *Morrison* calculus"<sup>542</sup> and doubted that *Edmond*

"even significantly abrogate[d] *Morrison* as binding precedent," let alone overruled it.<sup>543</sup>

Although several courts have adopted this reconciliation,<sup>544</sup> its synthesis reverses the Supreme Court's analysis. In *Gantt*, the Ninth Circuit claimed "supervision by a superior officer is a sufficient *but perhaps not a necessary condition* to the status of inferior officer."<sup>545</sup> Thus, *Gantt* claims it is not necessary to be a subordinate in order to be an inferior officer.<sup>546</sup> But Justice Scalia, who penned *Edmond* and partially followed his *Morrison* dissent, had explained the exact opposite. "Whether one is an 'inferior' officer depends on whether he has a superior."<sup>547</sup> As he put it in his *Morrison* dissent, "it is surely a *necessary condition* for inferior officer status that the officer be subordinate to another officer."<sup>548</sup> Likewise, Justice Souter agreed that "[h]aving a superior officer is necessary for inferior officer status," even though he disagreed that subordination was sufficient to establish inferior officerhood.<sup>549</sup>

<sup>538</sup> *Id.* at 15–20.

<sup>539</sup> *Edmond v. United States*, 520 U.S. 651, 661 (1997).

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*

<sup>542</sup> *Libby*, 498 F. Supp. 2d at 16

<sup>543</sup> *Id.* at 15.

<sup>544</sup> See *United States v. Hilario*, 218 F.3d 19, 25 (1st Cir. 2000) (adopting the *Gantt* synthesis); accord *United States v. Baker*, 504 F. Supp. 2d 402, 412 (E.D. Ark. 2007).

<sup>545</sup> *United States v. Gantt*, 194 F.3d 987, 999 n.6 (9th Cir. 1999) (emphasis added).

<sup>546</sup> *Id.*

<sup>547</sup> *Edmond v. United States*, 520 U.S. 651, 662 (1997).

<sup>548</sup> *Morrison v. Olson*, 487 U.S. 654, 722 (1988) (Scalia, J., dissenting).

<sup>549</sup> *Edmond*, 520 U.S. at 667 (Souter, J., concurring); see also *id.* at 668 ("The mere existence of a 'superior' officer is not dispositive."). Scalia's views about subordination's sufficiency changed between his *Morrison* dissent and his *Edmond* majority opinion. In *Morrison*, he had said that

subordination was not sufficient to make an officer inferior. *Morrison*, 487 U.S. at 722. He had subscribed to this view because the language of a failed proposal advanced by Madison would have permitted superior officers beneath the Heads of Departments to exercise the appointments power, thereby suggesting one could be a subordinate and still not be an inferior officer. *Id.* Scalia probably inferred too much from this unadopted addition. Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 Ohio St. L.J. 783, 830 (2006). Scalia's prior position could be attributable in part to the fact that the *Morrison* litigants who framed the issue never claimed that subordination was sufficient, only the more modest position that it was necessary. See, e.g., Transcript of Oral Argument at 60, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279) (statement of Charles Fried, Solicitor General of the United States) ("We do not say that every subordinate person is an inferior officer . . . . What we say is that subordinacy is a necessary condition for a person being an inferior officer . . . .").

Notwithstanding their different views in *Edmond* about the sufficiency of subordination, both Justices agreed on one basic proposition: to be inferior, a nofficer must necessarily be supervised.

The First Circuit, while itself adopting the *Gantt* approach, acknowledged candidly this inconsistency.<sup>550</sup> It attempted to diminish its significance, by deemphasizing the weight, as separate opinions, to be accorded Scalia's *Morrison* dissent and Souter's *Edmond* concurrence.<sup>551</sup> In doing so, it "[left] the nuances laid out in [their] separate opinions" to the Court.<sup>552</sup> That approach, neglects the fact that Scalia's opinion on this issue matters. He may have been *Morrison*'s dissenter, but he became *Edmond*'s author. And significantly, as the First Circuit itself observed, *Edmond*'s approach to defining inferior officer "drafted by Justice Scalia—bears a striking similarity to his dissent in *Morrison*."<sup>553</sup> Thus, his dissenting opinion in *Morrison*, particularly when coupled with *Edmond*, ought not to be ignored. Whether inferior officer status requires subordination is not a mere "nuance." It is the central issue in *Edmond* and *Morrison*.

### **B. The Distinguishing Narrative**

The second narrative enthrones *Edmond* as the governing authority for intrabranh appointments, but leaves *Morrison* authoritative over interbranch appointments. This explanation acknowledges *Edmond* and *Morrison*'s uneasy cohabitation. It is difficult to harmonize a case that adopts subordination as the reigning principle with another that eschews it, at least where both cases enjoy the status of "good law." If the

otherwise mutually irreconcilable approaches govern in *different contexts*, they can coexist coherently. Most intra-branch appointees will be subordinate to the appointing superior. In such cases, Congress would have elected not to authorize a cross-branch appointment, and therefore would likely not have intended to insulate the appointed officer from superior officers in the branch in which he or she would function. By contrast, when Congress vests an officer's appointment in a different branch, as it did in *Morrison*, that choice may well signal a congressional intent to insulate the appointed officer from officers within that branch. Because an interbranch appointee is by design unlikely to be subordinate to either the interbranch appointing authority or superior officers in the branch in which he/she would function, a *Morrison*-like standard may preserve congressional flexibility, a virtue in the estimation of functionalists.

This narrative finds support in *Freytag v. Commissioner*,<sup>554</sup> a case situated chronologically between *Morrison* and *Edmond*. In *Freytag*, the Chief Judge of the U.S. Tax Court appointed a special trial judge to preside over a tax dispute.<sup>555</sup> The taxpayer disputed the judge's orders by challenging his appointment's validity.<sup>556</sup> *Freytag*, however, did not use or cite *Morrison*'s balancing approach to determine whether the judge was an "inferior officer." The omission is notable because the Court had decided *Morrison* just three years prior by a seven to one majority. Justice Scalia, who concurred separately, approved the implicit judgment that inferior officers were at stake by relying on his *Morrison* subor-

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<sup>550</sup> United States v. Hilario, 218 F.3d 19, 25 n.4 (1st Cir. 2000).

<sup>551</sup> *Id.*

<sup>552</sup> *Id.*

<sup>553</sup> *Id.* at 25 n.3.

<sup>554</sup> 501 U.S. 868 (1991)

<sup>555</sup> *Id.* at 871.

<sup>556</sup> *Id.* at 872.



dination theory.<sup>557</sup> No other explanation offered, the Court emphasized that “[a]n important fact about the appointment in this case should not be overlooked. This case does not involve an ‘interbranch’ appointment.”<sup>558</sup> Whether the appointing Chief Judge of the Tax Court constituted a Head of a Department or “the Courts of Law”—a contested point—the judge’s appointment would be intrabranched: either wholly within the Executive Department, or wholly within the Judicial Department. Thus, *Freytag*, like *Edmond*, fits the theory that intrabranched appointments employ subordination analysis. On this account, *Freytag* may represent a point on an arc retreating from *Morrison* by limiting its inferior officer analysis to the context of interbranch appointments.

Notwithstanding this narrative’s appeal, there is reason to doubt *Freytag* so distinguished *Morrison*, or that it provided any basis for explaining *Edmond*’s and *Morrison*’s relationship. First, context suggests that the absence of any *Morrison* balancing test may have more to do with how *Freytag* was litigated than any substantive choice on the Court’s part to abandon *Morrison* for intrabranched appointments. The Court

labors under institutional limitations imposed by the ‘case-or-controversy’ requirement, including the way the parties and their amici frame the litigated issues. If the Court approaches adjudication like a passive umpire, it will restrict itself to their contentions. In *Freytag*, the thrust of the taxpayer’s argument was that special trial judges were officers, not employees, and that the Chief Judge of the U.S. Tax Court constituted neither a “Head of Department” nor “the Courts of Law.”<sup>559</sup>

*Freytag* admitted that special trial judges were inferior officers.<sup>560</sup> Thus, the Court never had a very clear shot at the principal officer/inferior officer question. The context best explains why the Court did not rely on *Morrison*’s balancing test or the subordination approach to conclude that special trial judges were inferior rather than principal officers.<sup>561</sup>

Second, although *Freytag* emphasized that the judge’s appointment was intrabranched, it did not claim to distinguish *Morrison*’s method of determining who is an inferior officer. Indeed, Justice Blackmun added the opinion’s sole references to *Morrison* only to avoid a separate concurrence by Justice Stevens.<sup>562</sup> In turn, Justice Stevens was

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<sup>557</sup> See *id.* at 920 (Scalia, J., concurring) (“The Constitution is clear, I think, about the chain of appointment and supervision that it envisions: Principal officers could be permitted by law to appoint their *subordinates*.” (emphasis added)).

<sup>558</sup> *Id.* at 883 (majority opinion).

<sup>559</sup> *Id.* at 888.

<sup>560</sup> Brief for Petitioners at 27, *Freytag*, 501 U.S. 868 (No. 90-762). Sullivan had intimated that the special trial judges might be principal officers, but relegated that argument to a footnote. *Id.* at 28 n.26. The IRS characterized as “fanciful” petitioners’ suggestion that the judges might be principal officers. Brief for the Respondent at 33 n.26, *Freytag*, 501 U.S. 868 (No. 90-762).

<sup>561</sup> . The Court did consider their powers, but its emphasis was not to assess whether they were principal or inferior officers. *Freytag*, 501 U.S. at 882. It was inquiring only whether the judge was an employee or an inferior officer. The answer to that question, apparently, was not free from doubt either. See, e.g., Conference Notes, *Freytag v. Comm’r*, No. 90-762 (Apr. 26, 1991), in Papers of Harry A.

Blackmun, box 579, folder 1 [hereinafter The Blackmun Papers] (on file with the Library of Congress) (reporting, under Justice Souter’s name, “We assume [a special trial judge] is an inferior officer. Is he?”); Transcript of Oral Argument at 18, *Freytag v. Comm’r*, 501 U.S. 868 (1991) (No. 90-762) (statement of O’Connor, J.) (“Well, have we really gone into any depth in defining who is an inferior officer and who is an employee?”)

<sup>562</sup> Justice Stevens’s supplemental language in the final opinion provided that: An important fact about the appointment in this case should not be overlooked. This case does not involve an ‘interbranch’ appointment. However one might classify the chief judge of the Tax Court, there surely is nothing incongruous about giving him the authority to appoint the clerk or an assistant judge for that court. We do not consider here an appointment by some officer of inferior officers in, for example, the Department of Commerce or Department of State. The appointment in this case is so obviously appropriate that petitioners’ burden of persuading us that it violates the Appointments

answering Justice Scalia's concurrence on a different point.<sup>563</sup> his contention the Chief Judge of the U.S. Tax Court was a "head of department," not "the Courts of Law."<sup>564</sup> Stevens argued that whether one classified the Chief Judge a "Head of Department" or "the Courts of Law" mattered little; the judge's appointment would be intrabranched.<sup>565</sup> As such, it did not present any incongruity issue, an analysis undertaken in *Morrison* only after it was determined that the Appointments Clause permitted the appointment.<sup>566</sup> The added language does not try to distinguish the applicability of *Morrison*'s balancing test based on appointment context; it emphasized only that *Freytag* did not present any incongruity issue both because the appointment was intrabranched and "obviously appropriate."<sup>567</sup>

Finally, one might expect *Edmond* to distinguish *Morrison* on the basis of whether an appointment is intrabranched or not, if that is what indeed it was doing. It does not. Moreover, *Edmond* neither cited nor relied on *Freytag* for this particular proposition.<sup>568</sup>

### C. The Overruling Narrative

The final narrative concludes that *Morrison* and *Edmond* are incompatible. It would acknowledge *Edmond* as having overruled *Morrison* *sub silentio*, at least with respect to the question of "inferior officers."

According to this account, *Edmond* represents a quiet counterrevolution in the Court's separation of powers jurisprudence.<sup>569</sup>

This explanation finds support both in *Morrison* archival sources as well as Scalia's view of precedent. First, evidence external to the opinions—from Justice Blackmun's conference notes—suggests Chief Justice William Rehnquist, the *Morrison* majority's author, *switched* his view of subordination in *Edmond*. In *Morrison*, Rehnquist rejected subordination as the sine qua non of inferior officerhood.<sup>570</sup> This rejection of subordination by Rehnquist was explicit in the case conference.<sup>571</sup> In light of his prior view, it is telling that Rehnquist assigned Scalia the task of writing the majority's

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Clause is indeed a heavy one. Although petitioners bear a heavy burden, their challenge is a serious one. Memo from Ann Alpers to Harry Blackmun Re: *Freytag v. Comm'r*, No. 90-762, (June 19, 1991), in The Blackmun Papers, *supra* note 248, box 578, folder 7. A law clerk to Justice Blackmun claimed she persuaded Justice Stevens's clerk to agree to the inclusion of the language in the majority opinion thereby mollifying Justice Stevens and avoiding a separate concurrence. *Id.*

<sup>563</sup> *Id.*

<sup>564</sup> *Freytag*, 501 U.S. at 901–02 (Scalia, J., concurring).

<sup>565</sup> Memo from Ann Alpers to Harry Blackmun Re: *Freytag v. Comm'r*, No. 90-762 (June 19, 1991), in The Blackmun Papers, *supra* note 248, box 578, folder 7.

<sup>566</sup> *Morrison v. Olson*, 487 U.S. 654, 676 (1988).

<sup>567</sup> *Id.*

<sup>568</sup> *Edmond v. United States*, 520 U.S. 651, 659, 662, 665 (1997).

<sup>569</sup> On this account, Scalia declared the subordination principle by using the "[g]enerally speaking" language, *id.* at 662, to acknowledge silently *Morrison*. He thereby allowed a dispensation for *Morrison* as a constitutional trespass while

clarifying that it was not the rule.

<sup>570</sup> See *Morrison v. Olson*, 487 U.S. 654, 671 (1988) ("*Although appellant may not be 'subordinate' to the Attorney General . . . the fact that she can be removed by the Attorney General indicates that she is to some degree 'inferior' in rank and authority.*" (emphasis added)).

<sup>571</sup> Harry Blackmun's notes reflect Rehnquist and O'Connor on record rejecting outright the Solicitor General's subordination argument. Conference Notes, *Morrison v. Olson*, No. 87-1279 (Apr. 29, 1988), in The Blackmun Papers, *supra* note 248, box 507, folder 8 (reporting, under Chief Justice Rehnquist's name, "no buy SG's subordination argmt" and, under Justice O'Connor's name, "rejected SG's subordinate proposition"); see also Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 Stan. L. Rev. 1735, 1757–58 (2006). Although the use of judicial history "may [eventually] make such sources unreliable," Adrian Vermeule, *Judicial History*, 108 Yale L.J. 1311, 1343 (1999), nothing suggests that the Justices' conference comments—which are consistent with *Morrison*'s majority opinion—were less than candid or authentic.

opinion revisiting the same issue in *Edmond*.<sup>572</sup> Rehnquist knew well Scalia's opposing views on the issue of inferior officers. Nonetheless, he exercised his prerogative as Chief Justice to invite Scalia to author the majority opinion on the very subject on which they had disagreed nine years earlier.<sup>573</sup> It is difficult to harmonize the opinions as reconcilable given Rehnquist and Scalia's prior disagreement. *Edmond* appears to represent Rehnquist's acquiescence to Scalia's view of the law in this area. Second, such a *sub silentio* approach to overruling by Justice Scalia is consistent with his judicial behavior elsewhere, and his general approach to precedent. For example, *Printz v. United States*,<sup>574</sup> decided within a month of *Edmond* and also authored by Scalia, adopted a theory of the unitary executive that *Morrison* had rejected.<sup>575</sup> Again, *Printz* did not purport to overrule *Morrison*. *Edmond* may simply be a *sub silentio* assault on one of *Morrison's* other fronts.

This brushing off of precedent represents more than mere mischief. Scalia is a civilian at heart, who subscribes only half-heartedly to the application of common-law stare decisis to the interpretation of constitutional text. In A

*Matter of Interpretation*, Scalia observed approvingly that no requirement of stare decisis exists "in the civil-law system, where it is the text of the law rather than any prior judicial interpretation of that text which is authoritative. Prior judicial opinions are consulted for their persuasive effect, much as academic commentary would be; but they are not binding."<sup>576</sup> For Scalia, constitutional and statutory text enjoy priority over inconsistent judicial interpretations of them,<sup>577</sup> particularly those precedents—such as *Morrison's* free-form interpretation of "inferior officer"—that fail to account for the text's plain meaning, structural context, purpose, and history. This approach would fit a classic Scalia pattern of "rationaliz[ing] the existing messy pattern of cases by grandfathering in a few exceptions."<sup>578</sup> But did *Edmond* really overrule rather than merely clarify *Morrison*? After all, it acknowledges the *Morrison* factors and explains that the decision did not purport to articulate a "definitive test"—not obviously a pronouncement that *Morrison* is dead.<sup>579</sup> Moreover, given the unavailability of any Justices' papers in *Edmond*, no post-mortem is possible by resort to judicial history.

<sup>572</sup> The case was not a five to four decision where Scalia's vote might have been necessary to maintain a majority.

<sup>573</sup> See Bybee & Samahon, *supra* note 258, at 1758 & nn.143–44.

<sup>574</sup> 521 U.S. 898 (1997).

<sup>575</sup> Again, Chief Justice Rehnquist assigned his former *Morrison* opponent the task of writing the majority's opinion, including the section purporting to adopt a theory of the unitary executive. See generally Jay S. Bybee, Essay, *Printz, the Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 Notre Dame L. Rev. 269 (2001) (inquiring whether Scalia's *Printz* majority opinion undoes *Morrison*).

<sup>576</sup> Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation*, Federal Courts and the

Law 3, 7 (1997); see also Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 Const. Comment. 257, 259 (2005) (articulating the case for priority of constitutional text over inconsistent interpretive precedent).

<sup>577</sup> *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) ("I agree with Justice Douglas: 'A judge . . . remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.'" (quoting William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949))).

<sup>578</sup> Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 87 (1992).

<sup>579</sup> *Edmond v. United States*, 520 U.S. 651, 661 (1997).

Perhaps the most telling evidence of incompatibility is that the subordination rule, if it were applied in *Morrison*, would reverse its outcome.<sup>580</sup> *Morrison* concluded that the independent counsel constituted an inferior officer, such that her appointment by the D.C. Circuit's Special Division was valid.<sup>581</sup> Significantly, the Court said she was not subordinate to any superior,<sup>582</sup> but concluded nonetheless that she was an inferior officer by weighing the attributes of office.<sup>583</sup> The subordinate interpretation, however, would have resulted in her appointment being declared unconstitutional. This inconsistency of outcome suggests that *Edmond* is no mere clarification of *Morrison* but a wholesale rewrite.

A possible objection to declaring *Morrison* "overruled" *sub silentio* is that lower courts may have relied on the case. Very few lower courts, however, have relied on *Morrison*'s approach to determining who is an inferior officer.<sup>584</sup> This makes it less consequential to declare *Morrison* overruled.<sup>585</sup>

Moreover, those cases involving intrabranched appointments would have been resolved the same way under the *Edmond* subordination rule.<sup>586</sup> Finally, although overruling a case creates some unpredictability due to surprise in the short term, to the extent that the new interpretation is susceptible to less varied application, the net result will be more

predictability for the legislature and litigants, not less.

#### **D. The Values Embedded in the Narratives**

Laying aside the narratives of what *Edmond* may have intended or how the Court would handle the inferior officer issue in the future, which of the narrative approaches *ought* the Court to take? The doctrinal approaches embodied by each of the narratives reflect competing policy values. For example, some litigants and commentators have characterized the choice between *Morrison* and *Edmond* as a choice between a standard and a rule.<sup>587</sup>

Such characterization suggests an appeal to the longstanding debate between the purported merits and demerits of standards versus rules.<sup>588</sup> Generally, standards reflect a substantive value choice that casts fairness in terms of substantive justice (i.e., courts should treat similar cases alike).<sup>589</sup> Standards are adaptable to changing circumstances because of the discretion involved.<sup>590</sup>

Similarly, standards force judicial accountability and deliberation because judges have discretion.<sup>591</sup>

Rules reflect a different set of substantive values. They reduce official arbitrariness, increase predictability, and curtail jurocracy by securing the legislature's role as chief policymaker.<sup>592</sup> As

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<sup>580</sup> Bravin, *supra* note 218, at 1137.

<sup>581</sup> *Morrison v. Olson*, 487 U.S. 654, 672 (1988).

<sup>582</sup> *Id.* at 671.

<sup>583</sup> *Id.* at 671–72.

<sup>584</sup> See, e.g., *Varnadore v. Sec'y of Labor*, 141 F.3d 625 (6th Cir. 1998); *Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs.*, 80 F.3d 796 (3rd Cir. 1996); *Silver v. U.S. Postal Serv.*, 951 F.2d 1033 (9th Cir. 1991).

<sup>585</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (noting that little reliance on the past precedent to be overruled is an exception to the traditional barrier to overruling).

<sup>586</sup> See, e.g., *Silver*, 951 F.2d at 1038 (concluding the Postmaster General was an inferior officer because he was merely an agent of the Board

of Governors).

<sup>587</sup> In *Libby*, the defendant characterized *Edmond*'s approach to the inferior officer question as supplanting *Morrison*'s balancing approach in favor of a "straightforward rule." *United States v. Libby*, 498 F. Supp. 2d 1, 15 (D.D.C. 2007).

<sup>588</sup> For some skepticism about the rule-standard dichotomy, see Pierre Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379 (1985).

<sup>589</sup> Sullivan, *supra* note 265, at 66.

<sup>590</sup> *Id.*

<sup>591</sup> *Id.* at 67.

<sup>592</sup> *Id.* at 62–65; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178–79 (1989).

Justice Scalia has put it, “[o]nly by announcing rules do we hedge ourselves in.”<sup>593</sup> On this account, Congress might find a rule-based approach to the inferior officer question particularly valuable in the context of structural constitutional law, where predictability is of paramount importance. Framing institutions requires a stable, predictable constitutional foundation. Consider that, under *Morrison’s* approach, the addition of new duties, jurisdiction, etc., to an officer invites rebalancing. Balancing, as a dynamic undertaking, permits challenges over every incremental grant of authority. At each amendment, it may be asked whether the addition of authority had converted an inferior officer into a principal one. In contrast, amendments adopted against the backdrop of a rule may prove less susceptible to perpetual reexamination.

The choice between *Morrison* and *Edmond*, is not merely a methodological dispute about the preferable form of the inferior officer test. After all, the Court could adopt the subordination interpretation (per *Edmond*),<sup>594</sup> yet implement that principle doctrinally using a multi-factored balancing test, rather than a rule. Alternatively, the Court could subscribe to *Morrison’s* definition that an “inferior officer” is a lesser or less significant officer,<sup>595</sup> yet implement that approach by use of a formal rule. Thus, beyond the substantive values embodied in the methods (standards or rules), the two cases additionally represent substantive views about the content of the separation of powers.

The overruling narrative has an important policy consequence. It precludes

interbranch appointments pursuant to the Excepting Clause. Subordination prevents such appointments because, for example, an officer exercising judicial power cannot be subordinate to an appointing officer from the executive branch. A judicial officer subject to an executive officer’s supervision would violate the separation of powers. Subordination requires that appointments pursuant to the Excepting Clause follow the Constitution’s departmentalization of power. Such an outcome is desirable because intrabranched appointments reinforce departmental political accountability.

Further, disallowing interbranch appointments diminishes the emphasis placed on the distinction between inferior and noninferior officers. Under *Morrison*, the linchpin of the Excepting Clause analysis is whether an officer is principal or inferior.<sup>596</sup> This reliance on the inferior/principal officer distinction may cause the question of who is an inferior officer and who is a principal officer to bear far too much weight.<sup>597</sup>

As then-Solicitor General Charles Fried argued in *Morrison*:

*It is only when you have cross branch appointments that it becomes crucially important to decide whether a particular person is important enough, subordinate enough to be subject to the inferior officer clause or the principal officer clause.*

We submit that these are problems which the framers did not intend us to face and that we need not face, because the appropriate thing to do is simply to recognize and to maintain the integrity of each of the branches, and not countenance a system which would allow the Executive

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<sup>593</sup> Scalia, *supra* note 279, at 1180.

<sup>594</sup> See *Edmond v. United States*, 520 U.S. 651, 662–63 (1997).

<sup>595</sup> See *Morrison v. Olson*, 487 U.S. 654, 670–73 (1988).

<sup>596</sup> *Id.*

<sup>597</sup> Transcript of Oral Argument at 61, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279) (statement of Charles Fried, Solicitor General of the United States).

Branch to be shattered into a thousand small offices, each of whom would be appointed by courts of law.<sup>598</sup>

If interbranch appointments are impermissible, it remains important only that the officer is subordinate.

This approach avoids the risk that the threshold between inferior and principal officer has been crossed with each change in the office. To be sure, deemphasizing the inferior/principal distinction shifts the weight of the inquiry toward whether an officer is “subordinate,” which a court may construe as a malleable standard rather than a bright-line rule. But even that uncertainty could be cabined if the Court gave the subordinate interpretation a construction that resorted to bright-line rules rather than standards.<sup>599</sup>

#### **IV. Two Challenges to Opting Out Bankruptcy Judges**

Congress may entrust the circuit courts with the power to appoint inferior officers pursuant to the Excepting Clause. “The Courts of Law” encompass the Supreme Court, the circuit courts, and the rest of the Article III judiciary. Whether or not bankruptcy judges constitute principal or inferior officers, is the key interpretive issue in a challenge to their appointments’ validity. This issue turns on whether the subordinate or lesser interpretation of “inferior” officer governs.

In Part III, this Article offered three competing narratives that explain the relationship between *Morrison* and *Edmond* and their competing interpretations of “inferior officer.” Under the “reconciling” narrative, *Morrison* may yet have vitality. This fact carries great significance for bankruptcy judges. Its

interpretation of “inferior officer” raises serious doubts about the permissibility of the present method of appointing bankruptcy judges. This challenge is outlined in section B, below.

If either the “distinguishing” or “overruling” narratives govern, a *Morrison*-type challenge would be unavailable. However, even were the court to settle upon the “subordinate” interpretation of “inferior officer,” it does not follow apodictically that bankruptcy judges are “inferior officers” permissibly opted out of advice and consent. There remains the further question of the judicial construction of “subordinate,” i.e., the necessary doctrinal implementation required to apply the subordinate interpretation to the case of bankruptcy judges. An *Edmond*-type challenge, based on competing constructions, might still be available. It is outlined in section C, below.

#### **- The Origin of the Appointments Clause Challenge**

The Legislature, the Executive, and the Courts have said little about whether bankruptcy judges constitute inferior officers. What has been said provides surprisingly mixed support for the proposition that bankruptcy judges are inferior officers.

#### **1. The Legislature—Creating the Problem**

When Congress vested the appointment of bankruptcy judges in the U.S. courts of appeals, it expressed its view that the judges are inferior officers. Similarly, it implicitly acknowledged bankruptcy referees under the 1898 Act as inferior officers when it vested their appointments in the U.S. District Courts.<sup>600</sup>

<sup>598</sup> *Id.* at 62.

<sup>599</sup> See discussion *infra* Part IV.C.

<sup>600</sup> See *Birch v. Steele*, 165 F. 577, 587 (5th

Cir. 1908) (characterizing referees as officers whose appointments were vested in “the courts of bankruptcy”).

Despite this, the status of BAFJA bankruptcy judges as “inferior officers” has a checkered legislative pedigree. In hearings leading up to the 1978 Act, Congress had considered vesting the appointments of the bankruptcy judges in the courts, as BAFJA does today.<sup>601</sup> Chairman Peter Rodino of the House Judiciary Committee had invited distinguished law professors and practitioners to comment on the proposed selection method.<sup>602</sup> All the experts agreed that the judges were, at a minimum, officers of the United States, and thus subject to the Appointments Clause.<sup>603</sup> Several of the experts, however, doubted that the bankruptcy judges would be *inferior* officers, subject to the Excepting Clause. They expressed serious reservations about the constitutionality of bypassing advice and consent.

Professor David Shapiro elaborated his view that “anything short of Presidential appointment, with the consent of the Senate, would raise the most serious constitutional questions.”<sup>604</sup> He noted that

the bankruptcy judges would enjoy “powers considerably broader than those of bankruptcy referees under present law, and although subject to judicial review, it would, I think be essentially an independent body.”<sup>605</sup> Moreover, the judges would exercise “broad-ranging functions ... [and] would hold the highest positions in the new court.”<sup>606</sup> Although acknowledging he could point to no controlling authority, he thought principal officer status was “supported by the scope of the judges’ functions and the responsibility they will exercise.”<sup>607</sup> Two other witnesses concurred with his conclusion.<sup>608</sup> Only one witness thought the proposed appointments regime constitutionally defensible.<sup>609</sup>

Perhaps as a result of the testimony, the 1978 Act followed the default rule of presidential nomination with appointment after Senate confirmation.<sup>610</sup>

Of course, what weight this expert testimony ought to bear on BAFJA judges is disputable. BAFJA judges do wield less power than the 1978 Act judges.<sup>611</sup>

But, absent any settled rule about the boundary between principal and inferior

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<sup>601</sup> H.R. Rep. No. 95-595, at 63 (1977), reprinted in 1978 U.S.C.A.N. 5963, 6023.

<sup>602</sup> Rodino, *supra* note 79, at 2682–84.

<sup>603</sup> See, e.g., Letter from Thomas G. Krattenmaker, Professor, Georgetown Univ. Law Ctr., to Peter Rodino, Chairman, House Judiciary Comm., Subcomm. on Civil and Constitutional Rights 72 (June 30, 1976), reprinted in *Hearings*, *supra* note 79, at 2690 (“I have no doubt that such judges would be ‘officers of the U.S.’ within the meaning given that phrase in *Buckley* . . .”).

<sup>604</sup> Letter from David L. Shapiro, Professor, Harvard Law Sch., to Peter Rodino, Chairman, House Judiciary Comm., Subcomm. on Civil and Constitutional Rights 84 (May 17, 1976), reprinted in *Hearings*, *supra* note 79, at 2703.

<sup>605</sup> *Id.*

<sup>606</sup> *Id.*

<sup>607</sup> *Id.* at 2704.

<sup>608</sup> See Letter from Erwin N. Griswold, Partner, Jones, Day, Reavis & Pogue, to Peter Rodino, Chairman, House Judiciary Comm., Subcomm. on Civil and Constitutional Rights 69 (May 24, 1976),

reprinted in *Hearings*, *supra* note 79, at 2688; Letter from Paul J. Mishkin, Professor, Univ. of Cal., Berkeley, to Peter Rodino, Chairman, House Judiciary Comm., Subcomm. on Civil and Constitutional Rights 78 (June 22, 1976), reprinted in *Hearings*, *supra* note 79, at 2697.

<sup>609</sup> See Letter from Brice M. Clagett, Partner, Covington & Burling, to Peter Rodino, Chairman, House Judiciary Comm., Subcomm. on Civil and Constitutional Rights 65–66 (June 3, 1976), reprinted in *Hearings*, *supra* note 79, at 2684 (“Under [the Excepting Clause], all judges of inferior courts—that is, of all courts other than the Supreme Court—could be selected, pursuant to Act of Congress, by means other than presidential appointment and Senate confirmation . . .”).

<sup>610</sup> Another possible explanation is that Democrats controlled the Congress and the presidency and in view of such they may have been unwilling to vest the judges’ appointments in the politically insulated Courts of Law when they controlled the ‘political ball.’

<sup>611</sup> See discussion *supra* Parts II.B.2–3.

officer, it is unclear whether the BAFJA judges would present the same concerns as the 1978 Act judges. But, as one of the House conferees on BAFJA put it, the present selection method is “not free from constitutional doubt.”<sup>612</sup>

## 2. The Executive—Missing the Problem

The executive branch was largely inattentive to whether bankruptcy judges constituted inferior officers. The Office of Legal Counsel (OLC), which reviews the constitutionality of proposed legislation, gave only cursory consideration to BAFJA’s implicit classification of “bankruptcy judges” as “inferior officers.” Then—Assistant Attorney General Theodore Olson asserted that “[t]here can be no doubt that in the 1984 Act Congress could have placed the appointment power in the President, with or without the advice and consent of the Senate, the Heads of Departments, or the Courts pursuant to the Appointments Clause.”<sup>613</sup> This assessment adopted implicitly the predicate that bankruptcy judges are “inferior officers.” It, however, offered no reasons for its conclusion. Similarly, in a bill review memorandum, OLC concluded, again without discussion, that proceedings directed by bankruptcy judges appointed by the courts of appeals were “unquestionably valid.”<sup>614</sup>

## 3. The Courts—Dodging the Problem

Neither the Supreme Court nor any other court has resolved squarely whether a bankruptcy judge constitutes an “inferior officer” for purposes of the Excepting Clause. Only two reported cases have broached that issue, and only in passing.<sup>615</sup> The adversarial proceeding *Wilkey v. Inter-Trade, Inc.* questioned whether bankruptcy judges constitute inferior officers.<sup>616</sup> The defendants challenged the court’s jurisdiction and authority, including the “allegedly defective appointment process for Bankruptcy Judges.”<sup>617</sup> The bankruptcy judge remarked in passing that he questioned whether he would constitute an “inferior officer” rather than a principal one under *Morrison’s* balancing test.<sup>618</sup> He did not address the issue at any length, but “observe[d] that by applying this test to determine whether sitting Bankruptcy Judges are inferior officers, we stretch the definition of inferior officer to its broadest boundaries.”<sup>619</sup> Opining that the ability to conduct a jury trial would tip the *Morrison* balance away from “inferior officer” and toward “principal officer,” the judge perceived a “Catch 22.”<sup>620</sup> If he were to claim authority to conduct a jury trial, then he would constitute a principal officer.<sup>621</sup> But if he were a principal officer, then his appointment would violate the Appointments Clause.<sup>622</sup> His appointment thus

<sup>612</sup> 130 Cong. Rec. 20,225 (1984) (statement of Rep. Edwards).

<sup>613</sup> 7 Op. Off. Legal Counsel 183, 198 (1983) (on file with The Hastings Law Journal).

<sup>614</sup> Memorandum from Ralph W. Tarr, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Carol Dinkins, Deputy Attorney Gen., U.S. Dep’t of Justice 4 (July 6, 1984) (on file with The Hastings Law Journal). To be sure, the Office of Legal Counsel had focused on a different objectionable aspect of the bill. See *supra* note 106 and accompanying text.

<sup>615</sup> A third case characterized (in passing) bankruptcy judges as “inferior officers” of the district

courts. *Boyer v. Johnson (In re Golden Gulf, Ltd.)*, 73 B.R. 685, 694 (Bankr. E.D. Ark. 1987). 303. *Wilkey v. Inter-Trade, Inc. (In re Owensboro Distilling Co.)*, 108 B.R. 572, 577 (Bankr. W.D. Ky. 1989).

<sup>616</sup> *Wilkey v. Inter-Trade, Inc. (In re Owensboro Distilling Co.)*, 108 B.R. 572, 577 (Bankr. W.D. Ky. 1989).

<sup>617</sup> *Id.* at 577.

<sup>618</sup> *Id.*

<sup>619</sup> *Id.*

<sup>620</sup> *Id.*

<sup>621</sup> *Id.*

<sup>622</sup> *Id.*



voided, he would then lack authority to conduct a jury trial.<sup>623</sup> Rather than answer the dilemma, the judge resolved the issue by transferring the case to the district court and concluding he lacked any authority to conduct a jury trial.<sup>624</sup> He thereby dodged squarely answering whether he was an inferior officer, but suggested that he might not be one if he had the power to conduct jury trials. Interestingly, Congress amended the code to authorize explicitly bankruptcy judges to conduct jury trials in 1994.<sup>625</sup>

Bankruptcy judges today would constitute principal officers under *Wilkey's* dictum.

On the other hand, *In re Benny*, an Appointments Clause challenge to the statutory retroactive extension of transition period judges, opined in its dictum that bankruptcy judges were inferior officers.<sup>626</sup> Judge Norris's concurrence found that "providing for appointment of new judges by the Courts of Appeals . . . [was] unobjectionable"<sup>627</sup> and that "[t]here was nothing to prevent the Courts of Appeals, vested with the appointment power under the 1984 Act, from reappointing the slate of incumbent judges."<sup>628</sup> Although the concurrence's dictum was unequivocal, the issue was never briefed by the parties, and unnecessary to the case's outcome. The only appointments issue raised was

whether the retroactive extensions constituted reappointments in violation of the Appointments Clause.

To be sure, a circuit court in 1908 had implicitly categorized early bankruptcy referees as "inferior officers."<sup>629</sup> It observed that "[t]he Constitution confers the power on Congress to vest in the courts the authority to appoint referees," citing the Appointments Clause and the enumerated legislative power to provide for bankruptcy laws.<sup>630</sup> Bankruptcy judges, however, differ in kind from referees as they existed at the turn of the century. Referees, who served for two-year terms at the pleasure of the district court, handled principally administrative matters, not adjudicative tasks, and lacked most of the jurisdiction and duties exercised by the modern bankruptcy bench.<sup>631</sup> *Birch*, then, provides only weak authority for the idea that today's bankruptcy judges are inferior officers.

### **B. The Challenge Under Morrison**

*Morrison* attempted to determine who is an "inferior officer" by considering four factors, expressed in terms specifically applicable to the executive office of independent counsel. These factors include whether the officer's tenure was limited, whether the officer was subject to removal by a higher officer, whether

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<sup>623</sup> *Id.*

<sup>624</sup> *Id.* at 578. It is unlikely such a dodge would long avert an appointments challenge. This issue would recur whenever bankruptcy judges attempted to enter orders. There would be ample occasions for parties to raise the nettlesome issue until it was definitely resolved. Moreover, a party could sidestep withdrawal of the reference by simply sandbagging and raising the challenge for the first time on appeal. See *Freytag v. Comm'r*, 501 U.S. 868, 878–79 (1991) (permitting an Appointments Clause challenge to be raised for the first time on appeal); accord *Glidden v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality). But see *Peretz v. United States*, 501 U.S. 923, 953 (1991) (Scalia, J., dissenting) (arguing that failure to raise an Appointments Clause challenge

below waived any later appeal of the issue); accord *Freytag*, 501 U.S. at 892–901 (Scalia, J., concurring).

<sup>625</sup> 28 U.S.C. § 157(e) (2006).

<sup>626</sup> *Benny v. England (In re Benny)*, 812 F.2d 1133, 1149 n.16 (9th Cir. 1987) (Norris, J., concurring) (entertaining challenge to sections 106 and 121 of BAFJA).

<sup>627</sup> *Id.* at 1142.

<sup>628</sup> *Id.* at 1145.

<sup>629</sup> See *Birch v. Steele*, 165 F. 577, 586 (5th Cir. 1908).

<sup>630</sup> *Id.*

<sup>631</sup> Act of July 1, 1898, ch. 541, §§ 34, 38–39, 30 Stat. 544, 555–56 (repealed 1978).

the officers exercised only limited jurisdiction, and whether the duties they exercised were limited.<sup>632</sup> *Morrison* elaborated these factors in terms particularly relevant to inferior executive officers. To use this test outside that context, it is necessary to transpose these factors into the context of bankruptcy judges. Below, the Article considers and balances the four factors and concludes that the bankruptcy judges are likely principal officers under *Morrison*'s test.

### **1. Balancing Tenure, Safeguard Against Removal, Duties, and Jurisdiction**

#### **a. Tenure**

*Morrison* requires a court to consider whether the officer's tenure was "limited,"<sup>633</sup> i.e., whether the appointment was essentially to accomplish a single task at the end of which the office is terminated.<sup>634</sup> The American Bar Association in *Morrison* had argued that the independent counsel was an "inferior" officer because she "may only investigate and prosecute a single, defined matter delineated by the court. . . . Upon conclusion of the defined investigation, the office is terminated."<sup>635</sup> The Special Division of the D.C. Circuit tasked the independent counsel in *Morrison* with investigating Assistant Attorney General Theodore Olson and two other Reagan

administration officials for allegedly making false statements to Congress under oath.<sup>636</sup> When the investigation concluded, the counsel's office terminated. Thus, the tenure was "limited."

Bankruptcy judges are not "limited" in tenure within the meaning of *Morrison*. Their office extends beyond the completion of a single case or task. Only the earliest predecessors to bankruptcy judges held such case-specific tenures.<sup>637</sup> Since that time, Congress has provided registers, referees, and modern bankruptcy judges with fixed tenures that have grown over time. Bankruptcy judges now hold their offices for fourteen years,<sup>638</sup> a term which one judge characterized as approximating the average actual tenure served by Article III judges.<sup>639</sup> Many principal officers serve far fewer years than bankruptcy judges.<sup>640</sup>

#### **b. Safeguard Against Removal**

Whether an officer is subject to easy removal by a higher officer favors the status of inferior rather than principal officer.<sup>641</sup> The Independent Counsel Act limited the grounds for dismissing an independent counsel:

[The] independent counsel ... may be removed from office ... only by the personal action of the Attorney General and only for good cause, physical or

<sup>632</sup> *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988).

<sup>633</sup> *Id.* at 672.

<sup>634</sup> *Id.*; see also *Edmond v. United States*, 520 U.S. 651, 661 (1997).

<sup>635</sup> Brief of Am. Bar Ass'n as Amicus Curiae in Support of Appellant at 11, *Morrison*, 487 U.S. 654 (No. 87-1279).

<sup>636</sup> *Morrison*, 487 U.S. at 665–67.

<sup>637</sup> See discussion *supra* note 27.

<sup>638</sup> 28 U.S.C. § 152(a)(1) (2006).

<sup>639</sup> *Mund*, Part Three, *supra* note 82, at 364 n.80. But see Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 *Cardozo L. Rev.* 579, 616 (2005) (determining average duration of service to be

twenty to twenty-five years for lower federal court judges in the modern era).

<sup>640</sup> Some bankruptcy judges had even argued colorably—but unsuccessfully—they were entitled to reappointment to another fourteen-year term absent a showing of failure to perform their office. See, e.g., *Scholl v. United States*, 61 Fed. Cl. 322, 326 (2004) (denying the government's renewed motion to dismiss), *rev'd sub nom. In re United States*, 463 F.3d 1328, 1336 (3d Cir. 2006); *Bason v. Judicial Council of the D.C. Circuit*, 86 B.R. 744, 750 (D.D.C. 1988). Regardless of any right to be reappointed, over 90% of bankruptcy judges who sought reappointment were successful. See *LoPucki*, *supra* note 135, at 21.

<sup>641</sup> *Morrison*, 487 U.S. at 671.

mental disability ... or any other condition that substantially impairs the performance of such independent counsel's duties.<sup>642</sup>

Although this enumeration of grounds for removal restricted the President's traditional ability to remove senior executive officers at will,<sup>643</sup> it nonetheless preserved a means of removal for "good cause."<sup>644</sup> In *Bowsher v. Synar*, the Court had interpreted limited grounds for removal, such as "neglect of duty" and "malfeasance" in office, as potentially "very broad" grants of discretion that "could sustain removal ... for any number of actual or perceived transgressions."<sup>645</sup>

Bankruptcy judges enjoy greater protection against removal than the already heavily safeguarded independent counsel. Although the judges may be removed from office only for limited statutory grounds,<sup>646</sup> they are further entitled to "a full specification of charges" against them and an opportunity to rebut them.<sup>647</sup> Thus, unlike *Bowsher*, the procedural safeguards of notice and an opportunity to be heard cabin what might otherwise be a purely discretionary determination. Moreover, bankruptcy judges are not removable upon the "personal action" of a single officer. The removal of an independent counsel required only the Attorney General's

say-so. A bankruptcy judge, by contrast, is ousted only upon a majority vote of the circuit's judicial council, which is likely to be almost the exact same group of officers who originally appointed the officer.<sup>648</sup> Of course, a bankruptcy judge may be impeached and removed from office, as may all officers of the United States—whether principal or inferior.<sup>649</sup> But her security in office does not suggest a bankruptcy judge is of "lesser" power or duties.

### **c. Duties**

A court hearing an Appointments Clause challenge would consider whether the officer "perform[ed] only certain, limited duties."<sup>650</sup> In *Morrison*, the independent counsel could investigate and prosecute certain enumerated federal crimes.<sup>651</sup> In the adjudicative context, "duties"—i.e., powers and tasks in furtherance of the officer's jurisdiction—could include the review of sentences, the verification that factual and legal findings are correct (including weighty constitutional issues), and the weighing and admitting of evidence.<sup>652</sup>

Bankruptcy judges exercise several significant duties that could constitute them as principal officers. They exercise broad equitable powers.<sup>653</sup> They may

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<sup>642</sup> 28 U.S.C. § 596(a)(1).

<sup>643</sup> *Myers v. United States*, 272 U.S. 52, 118 (1926).

<sup>644</sup> Scalia doubted that the removal factor favored the conclusion that the independent counsel was an inferior officer. *Morrison*, 487 U.S. at 716 (Scalia, J., dissenting) ("[M]ost (if not all) principal officers in the Executive Branch may be removed by the President at will. I fail to see how the fact that appellant is more difficult to remove than most principal officers helps to establish that she is an inferior officer." (emphasis omitted)).

<sup>645</sup> 478 U.S. 714, 729 (1986).

<sup>646</sup> 28 U.S.C. § 152(e) ("A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for

incompetence, misconduct, neglect of duty, or physical or mental disability . . .").

<sup>647</sup> *Id.*

<sup>648</sup> *Id.* For a rare example of a forced resignation, see *Bankruptcy Judge Dismissed for Tax Fraud*, Grand Rapids Press, Apr. 29, 2001, at A26.

<sup>649</sup> U.S. Const. art. II, § 4. No bankruptcy judge to date has been impeached.

<sup>650</sup> *Morrison v. Olson*, 487 U.S. 654, 671 (1988).

<sup>651</sup> 28 U.S.C. § 591.

<sup>652</sup> *Edmond v. United States*, 520 U.S. 651, 662 (1997).

<sup>653</sup> 11 U.S.C. § 105(a) (2006); *Marrama v. Citizens Bank of Mass.*, 127 S. Ct. 1105, 1116–17 (2007); see *supra* note 111 and accompanying text.

enjoin other courts.<sup>654</sup> If the district court designates and the parties consent, they may conduct a jury trial.<sup>655</sup> Although the Bankruptcy Code does not make it “clear whether and what contempt power exists,”<sup>656</sup> that has not prevented bankruptcy judges from exercising it—both in its civil<sup>657</sup> and its criminal dimensions.<sup>658</sup> There is even some question whether bankruptcy judges, in discharging these duties, must follow district court precedent in their decision-making.<sup>659</sup>

#### **d. Jurisdiction**

A court must consider whether an officer is “limited in jurisdiction.”<sup>660</sup> If so, it favors the conclusion that the officer is inferior.<sup>661</sup> *Morrison* concluded that jurisdiction was limited where the Independent Counsel Act itself restricted the exercise of jurisdiction to a set of federal officials “suspected of certain serious federal crimes.”<sup>662</sup> Moreover, the Act further provided the Special Division of the D.C. Circuit with authority to “define that independent counsel’s prosecutorial jurisdiction.”<sup>663</sup> An assessment of limited jurisdiction had two dimensions. First, the independent counsel exercised investigative and prosecutorial jurisdiction over a limited number of individuals or parties.

Second, she exercised jurisdiction over a limited number of subjects.

This limited jurisdiction inquiry may be transposed from the context of an executive investigative and prosecutorial officer to the context of judicial officers. Courts exercise both subject-matter jurisdiction, or power over certain subjects in dispute, and personal jurisdiction, or power over parties.

Bankruptcy judges may hear and decide a broad array of disputes. Indeed, notwithstanding a state’s sovereign immunity, bankruptcy judges may entertain claims brought against state entities,<sup>664</sup> a power that most district courts may not exercise, except when they sit as a court in bankruptcy. In addition to deciding questions that are decidedly about “bankruptcy,” they may also hear disputes that cross many legal specialties including “taxes, torts, negotiable instruments, contracts, spendthrift and other trusts, mortgages, conveyances, landlord and tenant relationships, partnerships, mining, oil and gas extraction, domestic relations, labor relations, insurance, Securities and Exchange Commission statutes, regulations and decisional law.”<sup>665</sup> Although the post-*Marathon* regime restricted what and how a bankruptcy court could handle different disputes, “BAFJA does not represent a significant congressional retreat from the jurisdictional provisions of the 1978 Code.”<sup>666</sup>

<sup>654</sup> See, e.g., *Manville Corp. v. Equity Sec. Holders Comm.* (*In re Johns-Manville Corp.*), 801 F.2d 60, 64 (2d Cir. 1986) (allowing a bankruptcy judge to enjoin a state court action that interfered with estate administration).

<sup>655</sup> 28 U.S.C. § 157(e).

<sup>656</sup> 1 *Collier on Bankruptcy* ¶ 3.09(2)(a), 3-111 (Lawrence P. King et al. eds., 15th ed. rev. 2008).

<sup>657</sup> See, e.g., *Placid Refining Co. v. Terrebonne Fuel & Lube, Inc.* (*In re Terrebonne Fuel & Lube, Inc.*), 108 F.3d 609, 613 (5th Cir. 1997) (relying on 11 U.S.C. § 105(a) for its civil contempt power).

<sup>658</sup> See, e.g., *Brown v. Ramsay* (*In re Ragar*), 3 F.3d 1174, 1178 (8th Cir. 1993) (upholding criminal contempt order that permitted the attorney to file objections and seek the district court’s de novo

review). *But see* *Knupfer v. Lindblade* (*In re Dyer*), 322 F.3d 1178, 1197 (9th Cir. 2003) (concluding no inherent power to levy punitive sanctions).

<sup>659</sup> Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *Stan. L. Rev.* 817, 870–71 (1994).

<sup>660</sup> *Morrison v. Olson*, 487 U.S. 654, 672 (1988).

<sup>661</sup> *Id.*

<sup>662</sup> *Id.*

<sup>663</sup> 28 U.S.C. § 593(b) (2006).

<sup>664</sup> *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 359 (2006).

<sup>665</sup> H.R. Rep. No. 95-595, at 10 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5971.

<sup>666</sup> *Warner*, *supra* note 126, at 997.

The power and independence of bankruptcy judges to resolve these disputes depend on whether they may be characterized as “core” or “non-core” proceedings. Bankruptcy judges may hear and enter self-executing, final orders in all core proceedings, subject only to appellate review by the district court.<sup>667</sup>

Core proceedings include not only matters of administration of a debtor’s estate (although it certainly includes that), but also avoidance actions, and the property of the estate.<sup>668</sup> These categories encompass many potential disputes.<sup>669</sup> Core proceedings constitute most of the work of bankruptcy judges; less than 5% of bankruptcy proceedings are non-core.<sup>670</sup>

Bankruptcy judges also exercise power to entertain non-core proceedings that are supported by federal court “related to” jurisdiction.<sup>671</sup> In deciding these matters, bankruptcy judges act more like magistrate judges. They may hear non-core matters (i.e., anything relating to the debtor’s estate).<sup>672</sup> In such cases, the bankruptcy judge prepares proposed findings of fact and conclusions of law, and submits them to the district court.<sup>673</sup> The district court has power to review them *de novo* and enter final orders.<sup>674</sup> What constitutes a non-core proceeding “related to” a bankruptcy case is potentially very broad. If its outcome could conceivably have an effect on the bankruptcy estate and . . . (1) involve causes of action owned by the debtor that became property of a title 11 estate under

section 541 . . . or (2) are suits between third parties that in the absence of bankruptcy, could have been brought in a district court or a state court.<sup>675</sup>

Bankruptcy judges determine their own jurisdiction as well as the treatment of proceedings as core or non-core.<sup>676</sup> Their conclusions are dispositive orders, which may be appealed on an interlocutory basis.<sup>677</sup> Such an arrangement gives bankruptcy judges far more power than the independent counsel in *Morrison*. In *Morrison*, it was the Court of Appeals that determined the independent counsel’s jurisdiction. Here, it is the officers themselves.

It might be argued that a bankruptcy judge’s exercise of jurisdiction in both core and non-core proceedings is limited by a district judge’s ability to “withdraw the reference” of the exercise of federal court jurisdiction to a bankruptcy judge.<sup>678</sup> Under the 1978 Act, Congress tried to get around the issue of non-Article III judges deciding cases by using “flow-through” jurisdiction.<sup>679</sup> The statute gave the district court all of the bankruptcy jurisdiction, and then a second statute provided that the bankruptcy courts “shall exercise all of the jurisdiction conferred by this section on the district courts.”<sup>680</sup> Thus, Congress vested in the district court all jurisdictional power, and then by statute mandated it delegated to the bankruptcy court. In *Marathon*, the Supreme Court struck down the provision as unconstitutional.<sup>681</sup>

<sup>667</sup> 28 U.S.C. § 157(b)(1).

<sup>668</sup> *Id.* § 157(b)(2).

<sup>669</sup> *Id.*

<sup>670</sup> Thomas E. Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 BYU L. Rev. 545, 561 n.73 (1990). Section 157(b)(2) provides an illustrative, but not exclusive, list of what constitutes a “core proceeding.” 28 U.S.C. § 157(b)(2).

<sup>671</sup> *Id.* § 157(c).

<sup>672</sup> *Id.* § 157(c)(1).

<sup>673</sup> *Id.*

<sup>674</sup> *Id.*

<sup>675</sup> 1 Collier on Bankruptcy, *supra* note 343, ¶ 3.01(4)(c)(ii), 3-24 (footnotes omitted) (internal quotation marks omitted).

<sup>676</sup> 28 U.S.C. § 157(b)(3).

<sup>677</sup> *Id.* § 158(a).

<sup>678</sup> *Id.* § 157(d).

<sup>679</sup> *Id.* § 1471(a), (c) (1976).

<sup>680</sup> *Id.* § 1471(c).

<sup>681</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

Post-*Marathon*, Congress vested jurisdiction in the district court.<sup>682</sup> But then, Congress, rather than mandating its delegation to bankruptcy judges, merely permitted the district courts to refer cases to the bankruptcy court: “[e]ach district court *may* provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”<sup>683</sup>

Unfortunately, the power to withdraw the reference does not serve the function its authors intended of making bankruptcy judges less important or even subordinate to an Article III court. First, it is uncommon for a district court to withdraw the reference in bankruptcy cases.<sup>684</sup> Bankruptcy judges are “functionally final” in their adjudicatory work.<sup>685</sup> They “may have as much real judicial independence as Article III judges.”<sup>686</sup> Although on its face the statute may seem like a permissible arrangement, in its application there is no control due to the volume and press of business. The reality is that district courts almost never withdraw the reference. Second, even when a district court would like to withdraw the reference, that power is not discretionary, but is limited to withdrawal of the reference for cause only.<sup>687</sup>

Bankruptcy judges are not limited in their jurisdiction over parties. They are authorized to exercise power over any party located within the United States or who may have minimum contacts with the United States.<sup>688</sup> This authority is broader than the jurisdiction district judges ordinarily exercise in civil matters, except

when they hear bankruptcy cases.<sup>689</sup> Moreover, bankruptcy venue rules are less restrictive than those generally applicable in civil cases, again granting bankruptcy judges broad authority to exercise power over parties.<sup>690</sup>

### **1. Potential Objections and Responses**

A *Morrison*-type challenge would face several objections. Below are some probable objections and responses.

#### **a. “Bankruptcy Judges Are Like Magistrate Judges”**

A court deciding whether bankruptcy judges constitute inferior officers would analogize them to other judicial officers, such as magistrate judges, who are also appointed by “the Courts of Law.” A court might conclude that because magistrate judges are said to be inferior officers, bankruptcy judges are as well. This comparison does not withstand closer inspection.

First, the comparison between bankruptcy and magistrate judges has its limitations. Although magistrate judges, like bankruptcy judges, may not be removed from office except for good cause, they serve only four or eight-year terms.<sup>691</sup> Jurisdictionally, and in terms of their duties, magistrate judges are subject to more formal and actual oversight than bankruptcy judges. For example, unlike magistrate judges, bankruptcy judges may issue self-executing orders without the parties’ consent in “core proceedings,” subject to being halted only if reversed on appeal.<sup>692</sup> To be sure, bankruptcy judges have a magistrate judge-like

<sup>682</sup> 28 U.S.C. § 1334(a).

<sup>683</sup> *Id.* § 157(a) (emphasis added).

<sup>684</sup> LoPucki, *supra* note 135, at 85.

<sup>685</sup> Resnik, *supra* note 326, at 610.

<sup>686</sup> Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 622 (1998).

<sup>687</sup> 28 U.S.C. § 157(d).

<sup>688</sup> Fed. R. Bankr. P. 7004.

<sup>689</sup> Fed. R. Civ. P. 4(k).

<sup>690</sup> 28 U.S.C. §§ 1408–1410.

<sup>691</sup> *Id.* § 631(e).

<sup>692</sup> *Id.* § 157(b).

authority. They may try non-core civil proceedings and issue proposed findings of fact and conclusions of law, which require a district judge's formal approval to become final orders.<sup>693</sup> But such non-core proceedings constitute a numerically small portion of a bankruptcy judge's work.<sup>694</sup>

Second, although it is received wisdom that magistrate judges and magistrates before them are "inferior officers," upon closer scrutiny, the status of the *modern* magistrate judge has not been squarely decided.<sup>695</sup> Often, there is a propensity for a court to point to a distant case, label commissioners or magistrates (the predecessors of the modern magistrate judge) as inferior officers and then, having declared the issue asked and answered, end the inquiry.<sup>696</sup> Such a static analysis assumes that the statutory regime defining the officers' responsibilities does not change. This assumption does not take *Morrison* seriously. *Morrison* asks whether the balance of factors favors classification as an inferior officer upon weighing an office's characteristics.<sup>697</sup>

The balancing of these considerations is not fixed when Congress subsequently amends statutes. Reliance on an earlier period's resolution of whether magistrate

judges are inferior officers is indefensible because the office is dynamic, not static. That the predecessor of the modern magistrate judge was deemed an inferior officer in 1901, 1931, or even 1984, does not settle the question whether the modern magistrate judge is an inferior officer. Analysis by job title, without considering the evolving, underlying job description, neglects the legal heavy lifting required by *Morrison*.<sup>698</sup>

The modern office of magistrate judge is a story of growth in tenure, safeguard against removal, and enhanced jurisdiction and duties. Consider just some of the *Morrison*-relevant developments in the office since the 1931 *Go-Bart* decision that declared commissioners "inferior officers."<sup>699</sup> In 1940, Congress authorized commissioners with additional jurisdiction to try petty offense cases on federal enclaves upon the parties' consent.<sup>700</sup> In 1968, Congress enacted the Federal Magistrates Act,<sup>701</sup> thereby abolishing the office of U.S. Commissioner, and creating the new office of U.S. Magistrate to "emphasize the judicial nature of the position and to denote a break with the commissioner system."<sup>702</sup> Tenure was lengthened and secured. Whereas commissioners served part-time only and were removable at will,

<sup>693</sup> *Id.* § 157(c).

<sup>694</sup> Carlson, *supra* note 357, at 561 n.73.

<sup>695</sup> For example, the leading case of *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc) (Kennedy, J.), characterized magistrates as inferior officers within the meaning of the Excepting Clause. No party, however, had raised an Appointments Clause challenge, and none of the briefs, either to the three-judge panel or to the en banc court, had addressed the issue. The lack of briefing and the doubtful necessity of the Ninth Circuit's declaration suggest the statement is merely obiter dictum.

<sup>696</sup> See, e.g., Landry v. FDIC, 204 F.3d 1125, 1143 (D.C. Cir. 2000) (citing the 1984 decision in *Pacemaker* and claiming "it has long been settled

that federal magistrates are "inferior officers" without considering the intervening changes to that office).

<sup>697</sup> *Morrison v. Olson*, 487 U.S. 654, 672 (1988).

<sup>698</sup> Similarly, such an analysis would not tell us, under *Edmond*, whether an officer today is subordinate to a superior.

<sup>699</sup> *Go-Bart Importing Co. v. United States*, 282 U.S. 352 (1931).

<sup>700</sup> Act of October 9, 1940, ch. 785, 54 Stat. 1058, 1058–59.

<sup>701</sup> Federal Magistrates Act of 1968, Pub. L. No. 90-578, sec. 101, 82 Stat. 1108, 1108–14 (1968).

<sup>702</sup> Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 Harv. J. on Legis. 343, 348 (1979).

magistrates were granted eight-year terms and could be removed only for good cause.<sup>703</sup>

Similarly, magistrates' jurisdiction and attendant duties enlarged. The 1968 Act authorized magistrates to exercise all the powers that commissioners enjoyed, and then added to them.<sup>704</sup> Magistrates would now aid with pretrial and discovery proceedings, review habeas corpus petitions, and act as special masters.<sup>705</sup> In addition, the Act authorized a catchall grant of authority. District courts could grant to magistrates the authority to perform any other duty not contrary to law or the Constitution.<sup>706</sup> In 1976, Congress authorized the referral of pretrial motions, the conduct of evidentiary hearings, and the issuance of reports and recommendations, subject to de novo review.<sup>707</sup> In 1979, Congress expanded magistrates' jurisdiction to include all federal misdemeanors and authority to conduct jury trials in those cases.<sup>708</sup> Most significantly, the 1979 Act authorized magistrates, with the parties' consent, to conduct jury trials in civil cases and enter final judgments.<sup>709</sup> In 1990, Congress changed the office's title to "magistrate judge" to acknowledge the evolution in the office.<sup>710</sup> In 2005, Congress authorized magistrate judges to mete out contempt sanctions without a district court's intervention.<sup>711</sup>

Pre-*Morrison*, *Geras v. Lafayette Display Fixtures, Inc.* equated being an inferior (judicial) officer with being an adjunct of a court.<sup>712</sup> It defined a judicial adjunct as "one who is dependent on the

Article III judges and does not have authority to independently exercise the judicial power."<sup>713</sup> It then considered "the values and purposes of Article III judicial protections" to determine whether "the magistrates are sufficiently dependent on Article III judges so as to be considered 'inferior officers' and thus to exercise authority within constitutional limits."<sup>714</sup> To determine whether an officer is adequately dependent on the court, *Geras* looked to (1) the consent of parties, and (2) the independence of the judiciary.<sup>715</sup> The latter it operationalized as the question of whether the district court retained supervisory authority over the adjunct, whether the adjunct had the ability to enter a final judgment, and whether the adjunct enjoyed a self-executing contempt power.<sup>716</sup> Interestingly, under the Seventh Circuit's superseded approach, neither magistrate judges nor bankruptcy judges would constitute inferior officers. Their appointments by the Courts of Law would be unconstitutional under *Geras*. Thus, magistrate judges do not provide a good baseline for asserting that bankruptcy judges are "inferior officers."

**b. "Bankruptcy Judges Are Like Special Trial Judges of the U.S. Tax Court"**

The special trial judges of the U.S. Tax Courts may also present a tempting analogy for the modern bankruptcy judge. *Freytag v. Commissioner* concluded that they constituted inferior officers.<sup>717</sup>

<sup>703</sup> Federal Magistrates Act of 1968 sec. 101, 82 Stat. 1109–10.

<sup>704</sup> *Id.* at 1113.

<sup>705</sup> *Id.*

<sup>706</sup>

<sup>707</sup> Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729

<sup>708</sup> Federal Magistrate Judges Act of 1979, Pub. L. No. 96-82, sec. 2, 93 Stat. 643.

<sup>709</sup> *Id.* sec. 2(c).

<sup>710</sup> Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

<sup>711</sup> 28 U.S.C. § 636(e) (2006).

<sup>712</sup> 742 F.2d 1037, 1040 n.1 (7th Cir. 1984).

<sup>713</sup> *Id.*

<sup>714</sup> *Id.*

<sup>715</sup> *Id.* at 1040.

<sup>716</sup> *See id.* at 1043–44.

<sup>717</sup> 501 U.S. 868, 892 (1991).



Unfortunately, *Freytag* provides less guidance than one might hope. It did not engage in any explicit analysis of what makes a special trial judge an “inferior” rather than a “principal” officer. Thus, *Freytag* did not substantially clarify the status of bankruptcy judges.

The lower courts addressed at length the status of special trial judges as “inferior officers.” In *Samuels, Kramer & Co. v. Commissioner*, the Second Circuit undertook a *Morrison* balancing analysis and concluded the special trial judges were inferior officers.<sup>718</sup> Significant to the court was their easy removal and lack of tenure.<sup>719</sup> In addition, the Chief Judge of the Tax Court exercised “absolute control” over the extent of the judges’ duties.<sup>720</sup> Special trial judges’ findings for certain proceedings could be made final only when adopted by the Tax Court.<sup>721</sup> The Second Circuit did note that the special trial judges were not mere employees. They did, after all, take testimony, conduct trials, rule on evidentiary matters, and enforce discovery orders.<sup>722</sup>

Bankruptcy judges resemble tax court judges more than the special trial judges whom the tax court judges supervise. Tax court judges enjoy lengthy fifteen-year tenures and may be removed only for cause.<sup>723</sup> They exercise nationwide jurisdiction over a specialized subject matter and discharge the broad duties of trial judges.<sup>724</sup> Bankruptcy judges, also appointed for lengthy tenure and removable for cause only, exercise

comparatively broader subject-matter jurisdiction than the tax court judges, as bankruptcy judges have power to hear many civil disputes that potentially affect the value of a debtor’s estate.<sup>725</sup> It is perhaps significant, then, that the President appoints tax court judges with Senate advice and consent.<sup>726</sup> This fact may reflect no more than a policy judgment not to opt these officers out of advice and consent, but it may evidence Congress’s view that tax court judges are principal officers subject to the default appointments process.

**c. “The Distinction Between Inferior and Principal Officers Is Formalistic”**

It might be argued that the judiciary ought not to police a formal distinction between inferior and principal officers. “[W]here ... the label that better fits an officer is fairly debatable, the fully rational congressional determination surely merits more tolerance ...”<sup>727</sup> After all, the Constitution equips each department of government with the political tools to protect its institutional interests.<sup>728</sup> If the President were unhappy with the proposed grant of appointment power to the judiciary, he could veto it. Similarly, Congress could elect not to propose the legislation, or if dissatisfied with the arrangement, repeal the authorization. In either instance, the judiciary would defer to the choice of the democratic branches.

There are several replies to such a line of argument. First, it might be argued that

<sup>718</sup> 930 F.3d 975, 985 (2d Cir. 1991).

<sup>719</sup> *Id.*

<sup>720</sup> *Id.*

<sup>721</sup> *Id.* In the estimation of the trial court, magistrates “had more authority and greater protection from removal than special trial judges.” *First W. Gov’t Sec. v. Comm’r*, 94 T.C. 549, 558 (1990).

<sup>722</sup> *Samuels*, 930 F.3d at 986.

<sup>723</sup> 26 U.S.C. § 7443(f) (2006).

<sup>724</sup> *Id.* § 7442.

<sup>725</sup> 28 U.S.C. §§ 157, 1334 (2006).

<sup>726</sup> 26 U.S.C. § 7443(b), (e).

<sup>727</sup> *In re Sealed Case*, 838 F.2d 476, 532 (D.C. Cir. 1988), *rev’d sub nom. Morrison v. Olson*, 487 U.S. 654 (1988) (Ginsburg, J., dissenting) (proposing such an approach in the context of interbranch appointments).

<sup>728</sup> *Cf. Bowsher v. Synar*, 478 U.S. 714, 776 (1986) (White, J., dissenting) (asserting that political checks grant “each branch ample opportunity to defend its interests” and thereby maintain the separation of powers).

the call for judicial deference places too much faith in political safeguards as a means of adequately policing the separation of powers. It may be very hard, as a practical matter, to return to the default appointment arrangement once the power has been vested elsewhere. Congress can repeal the vesting of the appointment power only by statute, and a President may veto any such bill.<sup>729</sup> A veto would force Congress to secure bicameral supermajorities to override the veto. In that context, a filibuster, perhaps by a President's Senate confederate, could derail a proposal to divest appointment power lodged with the executive branch. The choice to delegate proves asymmetric: power will be easier to give than retrieve.<sup>730</sup> To be sure, delegation of appointment power to the judiciary, rather than the President, presents a slightly different concern. The judiciary itself is not in a position to block legislatively the retrieval of appointment power, but a President or a Senate minority pleased with the status quo of judicial appointment may block the effort. Thus, vested appointments may not represent a present majority's policy preferences, but the decisions of a former Congress and President cemented by asymmetric political inertia.

Second, political checks alone fail to safeguard against what subsequent, incremental developments may follow an initial choice to vest appointing power. Congress's choice becomes more significant when, as frequently happens, the appointed office gradually accumulates power over time. There is a recurring story of offices opted out of advice and consent that slowly grow in power. This is the case with bankruptcy judges, judges

of the criminal courts of appeals for the various armed services, and the special trial judges of the tax court. In such instances, the vesting of the appointments of such powerful officers outside the usual process does not reflect a considered policy decision. Congress backs into the choice unwittingly over the course of years. At the very least, it is unclear that the outcome reflects a deliberate democratic choice.

Finally, the view against judicial policing assumes that the dividing inferior/principal line is arguable and indistinct and that the difference is only one of degree. As the argument goes, courts ought to defer to the still arbitrary, but at least, democratic line drawing of the political branches. In fact, the difference is not one of degree, but one of kind. The sine qua non of inferior officerhood is that the officer must be subordinate to a superior officer. Whether an officer is more powerful or less powerful in the abstract is not the inquiry. The defining distinction between principal and inferior officers is subordination to a superior.

The distinction between principal and inferior officers implicates our system of checks and balances. Challengers may argue that the appointment of bankruptcy judges by other judges means the political check of the President's nomination and the Senate's confirmation will not apply to powerful officers. It means appointment by the circuit courts—essentially appointment by committee—may diminish democratic accountability for poor appointments, particularly where the process lacks transparency. Moreover, the whole arrangement risks a self-replicating judiciary where jurists entrench their jurisprudence by appointing

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<sup>729</sup> U.S. Const. art. I, § 7

<sup>730</sup> Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 Vand. L. Rev. 1347,

1377–78 (1996). One reply might be that Congress could grant appointment authority that sunsets and requires congressional reauthorization, such as was done in the case of the independent counsel.

the next generation of judges.<sup>731</sup> Democratic accountability may suffer from an arrangement that excludes external political checks.

**d. “This Challenge Takes Morrison Too Seriously”**

Does a challenge that relies on *Morrison* take it too seriously as a constraint on judicial discretion? After all, if the independent counsel could constitute an “inferior officer,” then under *Morrison*’s balancing test, just about any officer could be labeled “inferior.” It is uncertain as a predictive matter whether the Court, presently constituted, would conclude that bankruptcy judges are principal officers. *Marathon*, however, provides a counterexample of the Court using a slippery standard—what constitutes the “essential core” of the judicial power—to strike down an important grant of jurisdiction to the bankruptcy courts.<sup>732</sup> Further, judicial opinion writing serves a public justificatory function that aids the Court in promoting and retaining its institutional legitimacy. Balancing tests may be elastic, but not infinitely so. At some point, the proverbial laugh test may inspire judicial candor.

But given the inherent discretion of balancing, what would motivate the Court to strike down section 152(a), particularly

in light of the hard landing that would result?<sup>733</sup> One source of motivation may arise from the different institutional interests represented within the Courts of Law. Such interests may depend on hierarchical position. For example, the Court has an interest in maintaining discipline over the circuit courts. They choose the judges who serve on the bankruptcy bench and thereby may shape that bench’s jurisprudence. As a result, the bankruptcy judges’ cases may receive less intermediate appellate scrutiny than warranted, and even less scrutiny from the Court, particularly in light of its shrinking docket. The default appointment process might assure greater viewpoint diversity on the bankruptcy bench and help the Court guarantee that issues are fairly aired and scrutinized by the circuits. Hierarchical jealousy may also animate the Court to take an appointments challenge seriously. After all, Congress vested the power to appoint bankruptcy courts in the circuit courts and not the Court itself. If Congress had given to the Court the power to appoint bankruptcy judges, a different result might obtain, but not for any good legal reason.<sup>734</sup>

**e. “The Challenge Is Too Untimely to Be Meritorious”**

If the challenge is meritorious, why did no one raise it earlier? First, although

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<sup>731</sup> Resnik, *supra* note 326, at 607 (“[C]onstitutional judges therefore not only shape the law through adjudication; they also shape the law by deciding who will serve as our statutory judges.”); cf. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1067 (2001) (noting selection of judges as a means to cement or perpetuate a particular jurisprudential ideology).

<sup>732</sup> *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 87 (1982).

<sup>733</sup> The Supreme Court has declined to soften the impact of Appointments Clause challenges through the use of the de facto officer doctrine. See *Ryder v. United States*, 515 U.S. 177, 180 (1995). Moreover, it is unclear whether the Court would invalidate the actions of unconstitutional appointees

prospectively only as it now prohibits “selective temporal barriers to the application of federal law in noncriminal cases.” *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993).

<sup>734</sup> In addition, individual judges might have idiosyncratic reasons to rule against the bankruptcy appointment regime. To the extent that appellate judges perceive appointments by their circuits to be “political,” “partisan” or “ideological,” they might vote to strike down the existing appointment arrangement, even if only in noisy dissent. Similarly, certain district judges might be willing to strike down bankruptcy appointments based on the extra-legal, historical antipathy between certain district judges and the bankruptcy bench. See *Mund, Part Two*, *supra* note 64, at 184.

litigants could point back to BAFJA's 1984 enactment without fear of any constitutional statute of limitations, the perceived "timeliness" of a challenge may have some persuasive value. This concern may depend on how the litigants anchor the relevant time frame. Luckily for the litigants, each new day is potentially a new world under *Morrison's* balancing test. Whenever Congress gives a bankruptcy judge new duties and jurisdiction, it risks altering the balance of the officer's status. Whenever the courts interpret the bankruptcy code to authorize new exercises of power, these cases may tip the balance. Parties could characterize more recent changes as the tipping point at which the officer became a principal officer, thereby placing the constitutional violation closer in time.<sup>735</sup> The *Bowsher v. Synar* challenge to the Gramm- Rudman-Hollings Act<sup>736</sup> presented a similar framing issue.<sup>737</sup> In 1985, Congress had granted executive powers to the office of Comptroller General— an office that had since the early 1920s been subject to congressional removal.<sup>738</sup> The Court concluded that this removal power, when coupled with the recently added executive power, rendered the office unconstitutional.<sup>739</sup>

Second, the delay in recognizing the Excepting Clause issue may say less about its merits and more about the happenstance that conspired to obscure its timely identification. The earlier *In re Benny* Appointments Clause challenge, which did not address the inferior officer issue, may have served as a proverbial

"fire in the trash can" that hid the then not-yet-ripe issue from future litigants.<sup>740</sup> In addition, it has only been since *Morrison* in 1988 that a precedent cast doubt on the status of bankruptcy judges as inferior officers. Further, bankruptcy judges may have been able to dodge the issue by ordering withdrawal of the reference.<sup>741</sup> Lastly, bankruptcy counsel might understandably be reluctant to challenge the validity of their local bankruptcy judge's appointment. They are repeat players who will litigate again before their judge. Nonbankruptcy attorneys or pro se litigants might be those most willing to rock the proverbial boat. The issue, however, may be comparatively invisible for these nonspecialists.

### **B. The Challenge Under EDMOND — Competing Constructions**

Beyond interpreting "inferior" as subordinate, *Edmond* also offered a construction of what it means to be subordinate: to have your "work ... directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."<sup>742</sup> If originalist interpretation is ascertaining the public meaning of words within context, then construction is the necessary judicial lawmaking required to implement an interpretation.<sup>743</sup>

#### **1. Directed and Supervised at Some Level**

Although *Edmond* says that to be an inferior officer is to be a subordinate to a

<sup>735</sup> For example, Congress granted the courts authority to entertain claims against state governmental departments in 1994. 11 U.S.C. § 106(a)(1) (1994).

<sup>736</sup> Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038.

<sup>737</sup> 478 U.S. 714, 743 (1986).

<sup>738</sup> 31 U.S.C. § 703(e)(1)(B) (2006).

<sup>739</sup> *Bowsher*, 478 U.S. at 732, 736

<sup>740</sup> See *supra* notes 103–06 and accompanying text.

<sup>741</sup> See *supra* note 311 and accompanying text.

<sup>742</sup> *Edmond v. United States*, 520 U.S. 651, 663 (1997).

<sup>743</sup> Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 108–09 (2001).

superior officer, the Appointments Clause does not itself provide guidance on what makes one subordinate. Scalia supplied his construction of the vague subordinate interpretation as a rule of decision: an inferior officer is one “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.”<sup>744</sup> Applying this construction, Scalia permitted supervision of an inferior officer to be split between different hierarchical superiors<sup>745</sup> and suggested that control need not be complete.<sup>746</sup> He further noted the power of a superior officer in *Edmond* to remove “without cause” the inferior officers,<sup>747</sup> and noted that the inferior executive officers’ actions required a superior’s approval before they became finalized.<sup>748</sup> It is unclear whether these last two considerations were necessary to Scalia’s conclusion or sufficient to establish it.

Under a strong reading of *Edmond*, supervision by way of appellate review of work product and by promulgation of rules governing inferiors would suffice to constitute subordination. A “weak” reading might require that a superior have a plenary removal power, *together* with appellate review and rule promulgation, in order to effect sufficient control to make an officer inferior.

Depending on one’s reading of *Edmond*, Scalia’s construction might allow bankruptcy judges to be characterized as inferior officers. For non-core

proceedings, bankruptcy judges are supervised closely. They prepare proposed findings of fact and conclusions of law, which they submit to district judges (who are appointed by advice and consent).<sup>749</sup> They, in turn, may enter a final order or judgment after reviewing de novo any objection to the proposed findings.<sup>750</sup>

Core proceedings, where bankruptcy judges may enter final orders and judgments, present a closer question, but neither do they present any problem for Scalia’s construction. Although district courts do not approve these orders before they become effective, the bankruptcy judges’ work product remains subject to appellate review, first by the district courts and then by the courts of appeals (and perhaps intermediately by a bankruptcy appellate panel).<sup>751</sup> The district courts and courts of appeals—both appointed by advice and consent—supervise bankruptcy judges “at some level” by appellate review as of right, even if that review may be deferential as to certain matters.<sup>752</sup> It is of no moment that this supervision may be layered and not immediate. Scalia’s construction allows discretionary space for inferior officer autonomy.<sup>753</sup> The bankruptcy judges ultimately “have no power to render a final decision . . . unless permitted to do so” by superior judicial officers, even if that “permission” results from a party’s failure to take an appeal as of right to supervisory judicial officers.<sup>754</sup> In addition to this

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<sup>744</sup> *Edmond*, 520 U.S. at 663. Scalia’s formulation is too specific to the appointment at issue in *Edmond*. The President may appoint inferior officers if so vested, but of course the President is not appointed by advice and consent. U.S. Const. art. II, § 1. The revised construction would provide that to be subordinate means to be supervised and directed at some level by the appointing authority.

<sup>745</sup> *Id.* at 664.

<sup>746</sup> *Id.* at 665.

<sup>747</sup> *Id.* at 664. In *Morrison v. Olson*, Justice Scalia suggested that removal at will would

constitute per se subordination. 487 U.S. 654, 716 (1988) (Scalia, J., dissenting).

<sup>748</sup> *Edmond*, 520 U.S. at 665.

<sup>749</sup> 28 U.S.C. § 157(c) (2006).

<sup>750</sup> *Id.* § 157(c).

<sup>751</sup> *Id.* § 158(a).

<sup>752</sup> See, e.g., *Zurich Am. Ins. Co. v. Int’l Fibercom, Inc.* (*In re Int’l Fibercom, Inc.*), 503 F.3d 933, 946 (9th Cir. 2007) (reviewing a bankruptcy court’s factual determination under the clearly erroneous standard).

<sup>753</sup> See *Edmond*, 520 U.S. at 663.

<sup>754</sup> *Id.* at 665.

supervision of work product, bankruptcy judges are supervised administratively. The Supreme Court promulgates the rules of procedure and evidence that regulate proceedings before bankruptcy judges,<sup>755</sup> and the courts of appeals retain a (qualified) power to remove them for enumerated grounds for cause.<sup>756</sup>

## 2. Sufficient Control—the Marathon Adjunct Test

The *Marathon* plurality developed a concept in the Article III context closely analogous to “subordinate” that could be employed in the Article II context. Whether bankruptcy judges could be characterized as true adjuncts to a court depended on whether they “were subject to sufficient control by an [Article] III district court.”<sup>757</sup> This concept of “sufficient control” as the sine qua non of “adjunctness” is nearly synonymous with the “supervision and direction” construction of subordinate. Both concepts serve the separation of powers in their respective contexts by preserving ultimate decision-making authority with hierarchically superior judicial officers.<sup>758</sup>

That “supervision and direction” overlaps with “sufficient control” implies that challenges asserted under Article II and Article III may rise and fall together. If bankruptcy judges present an Appointments Clause problem because they are inadequately supervised as inferior officers, it suggests an Article III problem because of insufficient control.

Conversely, if there is an Article III problem (i.e., the bankruptcy judge is not an adjunct), there may also be an Article II Appointments Clause problem because the officer is not subordinate to a superior. This parallelism also suggests that, rather than adopt approaches to supervision/control that differ depending on context, the Court would be better off developing a construction of “subordinate” that answers both the demands of Articles II and III.

The *Marathon* plurality provided some guidance on what constituted “sufficient control.”<sup>759</sup> It cited magistrates as true adjuncts: they considered motions only upon the district court’s reference, their proposed findings of fact and recommendation were subject to de novo review, and they were appointed and subject to removal by the district court (upon good cause).<sup>760</sup> In contrast, the plurality rejected the notion that the 1978 bankruptcy judges were under “sufficient control” of the district courts: they could issue final judgments that were binding and enforceable<sup>761</sup> and their judgments were subject to review only under a deferential standard.<sup>762</sup> *Marathon* rejected the notion that “some degree of appellate review” amounted to “sufficient control” to qualify bankruptcy courts as Article III adjuncts.<sup>763</sup>

Applying *Marathon*’s standard in the Article II context, today’s bankruptcy judges do not constitute inferior officers under a “sufficient control” construction

<sup>755</sup> 28 U.S.C. § 2075.

<sup>756</sup> *Id.* § 152(e). *Edmond* might be read to require an unqualified power to remove an inferior officer. If that is the case, the circuit courts do not sufficiently supervise the bankruptcy judges. Alternatively, *Edmond* might suggest that a plenary power to remove suffices to establish supervision but was not necessary in light of the other mechanisms of control that established a supervisory relationship.

<sup>757</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79 (1982).

<sup>758</sup> *Id.* at 83.

<sup>759</sup> *Id.* at 79.

<sup>760</sup> *Id.* (citing *United States v. Raddatz*, 447 U.S. 667, 676–77 (1980)).

<sup>761</sup> *Marathon*, 458 U.S. at 85–86.

<sup>762</sup> *Id.* at 85.

<sup>763</sup> *Id.* at 86 n.39.

of supervision. Appellate review over core proceedings will not prove “sufficient control.” Moreover, bankruptcy judges’ orders in core proceedings are self-executing. There is no need for approval from a superior judicial officer before the order or judgment may take effect.

### **3. Personal Supervision**

The final construction of “subordinate” might require even closer supervision. In *In re Sealed Case (Morrison v. Olson)*, D.C. Circuit Judge Lawrence Silberman offered his construction that to be subordinate is to be “subject to personal supervision.”<sup>764</sup> He opined in dicta that Article III judges would not constitute inferior officers because they are “not subject to personal supervision.”<sup>765</sup> He thought that appellate review of judicial opinions rather than supervision of the judges themselves did not suffice.<sup>766</sup> For the same reason, he would not allow that rules of evidence and procedure constitute the supervision of judges.<sup>767</sup>

The Silberman construction would not support the conclusion that bankruptcy judges are inferior officers. Although the courts of appeals review the decisions of the bankruptcy judges and promulgate their procedural rules, the rules do not extend to the persons of bankruptcy judges, only to their work product. To be sure, the courts of appeals may remove bankruptcy judges for good cause.<sup>768</sup> Silberman’s construction, however, would not allow that such a qualification of removal power could still amount to supervision in the case of the independent counsel. After all, the Attorney General could remove the independent counsel upon a showing of good cause, but Silberman deemed that insufficient to render that officer subordinate.

## **V. Policy Prescriptions and Implications**

Although this Article has questioned the method of appointing bankruptcy judges, it has not suggested that bankruptcy judges are undesirable. Bankruptcy judges are useful judicial specialists who handle a substantial caseload for the federal courts. Were there a challenge, it would jeopardize these officers’ appointments, and cause tremendous disruption to their work. Part V proposes a means of saving these officers from challenge, and further suggests a possible policy innovation that could obtain under one scenario of an *unsuccessful* appointments challenge.

### **- Saving Bankruptcy Judges from an Article II Challenge**

Congress could proactively adopt several strategies to save these appointments from a successful challenge. The most direct, anticipatory solution would be to amend section 152(a) to provide for presidential appointment and Senate confirmation. Those judges serving presently would need to be nominated, confirmed, and appointed *en masse*. Such an approach would inoculate officers against an Appointments Clause challenge *prospectively*.

Two other anticipatory responses are possible, depending on the type of challenge feared. First, Congress could cut back on the office of bankruptcy judge in anticipation of a *Morrison*-type challenge. It could abbreviate the length of tenure and make removal at will, or it could grant the office less jurisdiction and remove important duties, such as the ability to conduct jury trials. Second, if Congress anticipated an *Edmond*-type

<sup>764</sup> *In re Sealed Case*, 838 F.2d 476, 483 (D.C. Cir. 1988).

<sup>765</sup> *Id.*

<sup>766</sup> *Id.*

<sup>767</sup> *Id.* at 483 n.14

<sup>768</sup> 28 U.S.C. § 152(e) (2006).

challenge, it could ease the restrictions on removal of bankruptcy judges by giving the courts of appeals the ability to remove them at will. Such power would reinforce the hierarchical superior-inferior relationship.<sup>769</sup> These solutions make bankruptcy judges either less useful, or less independent, but they help diminish the possibility of successful challenge.

**- Retaining Appointment by the Courts of Law While Granting Article III Tenure to Bankruptcy Judges**

If inferior officerhood turns on a “strong” reading of *Edmond*—such that a challenge to the appointments were to fail, an interesting implication is that a bankruptcy judge’s tenure is irrelevant to the question of whether they are inferior officers. Bankruptcy judges could be clothed with Article III tenure, and yet remain inferior officers appointable by the courts.<sup>770</sup> Such a judge may still be “directed and supervised at some level”—i.e., supervised by a superior—in the absence of at-will tenure.<sup>771</sup> To be sure, easy removeability does establish an inferior’s “here-and-now subservience” to an authority wielding a removal power.<sup>772</sup> Under a strong reading of *Edmond*, however, a superior officer could still direct and control an inferior by other means short of removal, including

ordinary appellate review, and the ability to promulgate procedural rules for inferiors.<sup>773</sup> Thus, Article III tenure for bankruptcy judges, and appointment by the Courts of Law, do not necessarily present mutually exclusive choices.<sup>774</sup> This result should be welcome news for scholars concerned that the necessity of bankruptcy judge reappointment may result in judges attempting to curry favor with the local bar.<sup>775</sup> Article III bankruptcy judges would not be subject to the same post-appointment external threats to judicial independence.

On the other hand, if *Morrison* controls, granting bankruptcy judges Article III tenure would neither avoid nor ameliorate the potential Appointments Clause difficulty elaborated in this Article. In fact, such an approach could possibly *aggravate* the appointments problem. Per *Morrison*, officers’ tenure and removeability must be weighed in determining whether they are inferior or principal officers. Were bankruptcy judges to possess Article III tenure during good behavior, these *Morrison* factors would weigh against the conclusion that they are inferior officers and toward the conclusion that they are principal officers. That conclusion would undermine the permissibility of appointment by the courts.

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<sup>769</sup> *Morrison v. Olson*, 487 U.S. 654, 716 (1988) (Scalia, J., dissenting).

<sup>770</sup> For the debate over whether bankruptcy judges should be granted Article III tenure, compare Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 Am. Bankr. L.J. 529 (1998), with Plank, *supra* note 373. See also Nat’l Bankr. Review Comm’n, *Bankruptcy: The Next Twenty Years* 34–35 (1997) (recommending procedural and jurisdictional simplification by granting the bankruptcy judges Article III status).

<sup>771</sup> *Edmond v. United States*, 520 U.S. 651, 663 (1997).

<sup>772</sup> *Cf. Bowsher v. Synar*, 478 U.S. 714, 720 (1986) (characterizing comptroller general as subservient to Congress because it could remove

him from office).

<sup>773</sup> *Cf. Edmond*, 520 U.S. at 664. In addition to being subject to a superior’s procedural rules and appellate review, the Court of Criminal Appeals judges were also subject to removal by their superiors. *Id.*

<sup>774</sup> *But see* Plank, *supra* note 373, at 628 (asserting that the present method of judicial selection would not permit bankruptcy judges to be vested with Article III tenure).

<sup>775</sup> LoPucki, *supra* note 135, at 20–21. Such a change might not solve the problem of competition for big cases, but it would avoid the necessity of reappointment and the attendant incentive to curry favor with the local bankruptcy bar.



### **C. Appointing Article III Judges by the Courts of Law**

If *Edmond* governs the definition of “inferior officer,” and depending on the construction of subordination adopted, Congress could authorize hierarchically superior federal courts to appoint inferior court judges. This outcome would be permitted because the judges of the inferior courts—the court of appeals and district courts—constitute “inferior Officers” within the meaning of the Appointments Clause. The Clause enumerates only “Judges of the supreme Court” as principal officers subject to the default appointment rule.<sup>776</sup> It does not mention expressly the judges of the inferior courts. Article III, by comparison, uses “Judges . . . of the supreme . . . Court[]” in contradistinction to “Judges . . . of the . . . inferior Courts.”<sup>777</sup> The Clause’s sole enumeration of “Judges of the supreme Court” does not encompass “Judges of the inferior Courts.”

Instead, inferior court judges fall within the catchall category of the Appointments Clause: “all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”<sup>778</sup> Congress establishes the inferior courts and the accompanying offices by law. Article III judges are “officers of the United States” because they exercise “significant authority” of the United States.<sup>779</sup>

The Court, however, has never held these judges to be *principal*, rather than *inferior*, officers.<sup>780</sup> Inferior court judges may constitute “inferior officers” provided that they are “directed and supervised at some level” by superior officers.<sup>781</sup>

Although several commentators have questioned whether the judges of the inferior Article III courts are “inferior officers,”<sup>782</sup> their arguments do not foreclose that possibility. First, Professor David Stras and Ryan Scott argue that although the Appointments Clause enumerates “Judges of the supreme Court” as subject to presidential appointment with Senate advice and consent, the omission of the “Judges of the inferior Court” is less revelatory than the language would suggest.<sup>783</sup> After the Philadelphia Convention, it was uncertain there would be any inferior courts to staff, as the Madisonian Compromise on lower courts granted Congress only the discretionary power to create lower courts.<sup>784</sup> It did not guarantee their creation. Thus, the contingency of the inferior courts (and their officers) suggests an alternative reason for the absence of parallel language covering inferior court judges: the Excepting Clause neglected to provide for the contingent existence of these officers, and/or captured them in the Appointments Clause catchall of “all other Officers of the United States, whose Appointments are not herein otherwise provided for, and

<sup>776</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>777</sup> U.S. Const. art. III, § 1; cf. *United States v. Eaton*, 169 U.S. 331, 343 (1898) (enumeration of “consul” in Appointments Clause “does not embrace a subordinate and temporary officer like that of vice consul”).

<sup>778</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>779</sup> *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

<sup>780</sup> Individual Justices and judges have expressed their views. Compare *Edmond v. United States*, 520 U.S. 651, 667 (1997) (Souter, J., concurring) (doubting inferior court judges are “inferior officers”), with *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1053 (7th Cir. 1984)

(Posner, J., dissenting) (presuming “inferior Officers” would encompass judges of the inferior courts).

<sup>781</sup> *Edmond*, 520 U.S. at 663.

<sup>782</sup> See, e.g., Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 Yale L.J. 255, 275 n.103 (1992); David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 Cornell L. Rev. 453, 500 n.327 (2007).

<sup>783</sup> E-mail from Ryan W. Scott, Attorney, U.S. Dep’t of Justice, and David R. Stras, Assoc. Professor of Law, Univ. of Minn. Law School, to Author (June 6, 2007, 08:37 CST) [hereinafter Scott E-mail] (on file with author).

<sup>784</sup> U.S. Const. art. III, § 1.

which shall be established by Law.”<sup>785</sup> The Clause does not relegate inferior judges to inferior officer status by its silence.

Reading the Constitution intratextually, however, suggests that this silence was not an oversight. For example, Article III, section 1 does anticipate that Congress might choose to create and staff inferior courts, and provided contingently for the conditions of their office. The section provides that “[t]he Judges, both of the supreme and the inferior Courts, shall hold their Offices during good Behaviour.”<sup>786</sup> This anticipation of “the inferior Courts” illustrates that the Constitution contemplated the possibility—even the probability—of such inferior court judges. In light of this, the neglect hypothesis seems less probable. Of course, it remains that inferior court judges might be captured by the catchall (“all other Officers of the United States”), as none numerated principal officers nonetheless subject to the Appointments Clause. But the Clause does not foreclose textually the possibility that inferior court judges may be inferior officers.

Second, Stras and Scott suggest that permitting the President alone to appoint inferior court judges would undo the plan of the Convention.<sup>787</sup> The Philadelphia Convention had considered and rejected appointments of principal officers (judicial or otherwise) by the President alone.<sup>788</sup> The Framers reached a carefully negotiated compromise in which the President would nominate and, upon Senate advice and consent, appoint officers of the United States.<sup>789</sup> Thus, the argument goes, it would be strange if the

Appointments Clause were interpreted in such a way that Congress could vest the President with the sole power to appoint inferior judges.<sup>790</sup> If *Morrison* were the law of the land, and interbranch vested appointments were permitted, this critique would have some force. Under *Edmond*, inferior court judges would not be subordinate to the President. Congress could not vest “the President alone” with the power to appoint them. Opting judicial officers out of advice and consent would not unravel the Convention’s appointments plan as the

President would never have the sole power to appoint judges.

Third, Stras and Scott claim a settled historical practice that Article III judges are principal officers of the United States subject to presidential nomination and Senate advice and consent.<sup>791</sup> They note Joseph Story’s famous dictum that Congress had never opted Article III judges out of the default appointments process.<sup>792</sup>

Story, however, acknowledged that “[w]hether the Judges of the inferior courts of the United States are such inferior officers . . . is a point, upon which no solemn judgment has ever been had.”<sup>793</sup> He noted that among the political branches of 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.”<sup>794</sup> That Congress has not vested the appointment of Article III judges in the Courts of Law reflects a policy choice on the part of Congress. The long track

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<sup>785</sup> *Id.* art. II, § 2, cl. 2.

<sup>786</sup> *Id.* art. III, § 1 (emphasis added).

<sup>787</sup> Scott E-mail, *supra* note 470.

<sup>788</sup> *Id.*

<sup>789</sup> *Id.*

<sup>790</sup> *Id.*

<sup>791</sup> *Id.*

<sup>792</sup> 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1593, at 456 n.1 (Boston, Hilliard, Gray & Co. 1833).

<sup>793</sup> *Id.*

<sup>794</sup> *Id.* § 1530, at 386 (emphasis omitted).

record of not opting out is evidence only that Congress will not take the option often.<sup>795</sup> It, however, remains an option to take. It may eventually exercise the option with respect to Article III judges.

Finally, Lee Liberman Otis has argued that the permissible vesting of the appointments power in the Courts of Law (including the inferior courts), the Heads of Departments, and the President alone “strongly suggests that *all* members of the ‘Courts of Law’ are principal officers who must receive Senate confirmation.”<sup>796</sup> It is unclear why it should be assumed that officers who are permissible appointers must necessarily be subject to confirmation. After all, Congress may vest the “President alone” with the appointment power, but he does not receive his office by confirmation. If the argument is that only officers who are the heads of branches may be given appointment power, it is unclear why the Heads of Departments—hierarchically inferior to the President—would be eligible to receive the appointment power. If the argument is that district and circuit judges must receive confirmation because they are powerful, it is a resort to the discredited *Morrison* approach of distinguishing inferior from principal officers: an officer is inferior not because supervised but because the officer is “lesser”—with respect to duties, etc. Lastly, *Edmond* may have foreclosed this argument by decoupling an officer’s principal/inferior status from the question of who may appoint.<sup>797</sup>

## Conclusion

Whether “bankruptcy judges are unconstitutional” may depend on the question asked: the normative one (“ought they be unconstitutional under existing law?”) or the predictive one (“would the courts actually hold the bankruptcy courts unconstitutional?”). The answer to the first question depends on whether *Morrison* survives *Edmond*. Bankruptcy judges, who are powerful officers, probably tip *Morrison*’s balancing test toward principal officers. But, under *Edmond*, the power of the office is irrelevant to the definition of inferior officer. Inferior officers can be powerful officers. Although an inferior’s removability by a superior remains a mark of supervision and control, the Excepting Clause’s bottom line requires that the officer be subordinate, which in turn may depend on particular judicial constructions of what it means to be a subordinate officer. Thus, the present method of appointing bankruptcy judges is probably permissible under the subordinate interpretation, but not under *Morrison*.

If *Edmond* controls, the answer to the predictive question is likely “no.” In such a case, the Court need not be particularly stouthearted, just candid. It could (and should) recognize forthrightly that *Edmond* overruled *Morrison sub silentio*. Such an act might require a stiff spine, but not as much as the alternative of invalidating the appointments of hundreds of bankruptcy judges. Moreover, there is a reward for the candor. For the lower courts and commentators, it would clear up the Court’s intentions with respect to

<sup>795</sup> Samahon, *supra* note 236, at 833.

<sup>796</sup> Calabresi & Lawson, *supra* note 469, at 275 n.103 (emphasis added).

<sup>797</sup> In *Weiss v. United States*, Justice Souter had characterized the Chief Judge of the U.S. Tax Court at issue in *Freytag* as a principal officer. 510 U.S. 163, 191–92 (1994) (Souter, J., concurring). He reasoned that must be the case because Con-

gress had entrusted him with the power to appoint special trial judges. *Id.* In *Edmond*, the majority rejected that position and explained that *Freytag* decided only whether the special trial judge was an inferior officer. 520 U.S. 651, 663 (1997). This clarification suggests that wielding appointment authority does not necessarily imply principal officer status.

*Morrison*. Until *Morrison* is red flagged with the words “no longer good for at least one point of law,” its unpredictability menaces the appointments of powerful officers, who have been opted out of confirmation generally, and the validity of bankruptcy appointments specifically.

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