AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Appointment and Removal Power

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

*The Coast Guard Court of Criminal Appeals is one of four intermediate courts of appeal within the military justice system. Federal statutes required that appellate military judges must be lawyers, but they could be either officers or civilians. In 1993, the court had two civilian members. They were originally assigned to the court by the general counsel of the Department of Transportation, who also serves as the judge advocate general of the Coast Guard. In January 1993, the Secretary of Transportation “adopted” those appointments as his own. In* Ryder v. United States *(1995), the Court held that civilian members of Coast Guard courts must be appointed in a manner consistent with the appointments clause of the Constitution.*

*Jon E. Edmond had been convicted by court martial of sexual misconduct, and his conviction had been upheld by the Coast Guard Court of Criminal Appeals after the Secretary of Transportation had “adopted” the appointment of the two civilian members. Edmond appealed, arguing that the appellate court that had heard his case had not been constitutionally constituted. The final appellate court in the military justice system affirmed those convictions, and Edmond appealed to the U.S. Supreme Court. The Court unanimously affirmed the lower courts, concluding that the civilian members of the court were inferior officers who could be constitutionally appointed by the general counsel.*

JUSTICE [SCALIA](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I215b0bc634f411e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I215b0bc634f411e9bc5c825c4b9add2e) delivered the opinion of the Court.

. . . .

Petitioners argue that the Secretary's civilian appointments to the Coast Guard Court of Criminal Appeals are invalid for two reasons: First, the Secretary lacks authority under 49 U. S. C. § 323(a) to appoint members of the court; second, judges of military Courts of Criminal Appeals are principal, not inferior, officers within the meaning of the Appointments Clause, and must therefore be appointed by the President with the advice and consent of the Senate. . . .

Congress has established the Coast Guard as a military service and branch of the Armed Forces that, except in time of war (when it operates as a service within the Navy), is part of the Department of Transportation. . . .

. . . . Petitioners contend that Article 66(a) of the Unified Code of Military Justice, 10 U. S. C. § 866(a), gives the Judge Advocate General of each military branch exclusive authority to appoint judges of his respective Court of Criminal Appeals. That provision reads as follows:

Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. . . . Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as senior judge on each panel.

. . . . In *Weiss v. United States* (1994)*,* we upheld the assignment of military officers to serve on military courts because they had previously been "appointed" as officers of the United States pursuant to the Appointments Clause, and because Congress had not designated the position of a military judge as one requiring reappointment. We noted in *Weiss* that Congress has consistently used the word "appoint" with respect to military positions requiring a separate appointment, rather than using terms not found within the Appointments Clause, such as "assign." . . .

Moreover, we see no other way to interpret Article 66(a) that would make it consistent with the Constitution. Under the Appointments Clause, Congress could not give the Judge Advocates General power to "appoint" even inferior officers of the United States; that power can be conferred only upon the President, department heads, and courts of law. Thus, petitioners are asking us to interpret Article 66(a) in a manner that would render it clearly unconstitutional—which we must of course avoid doing if there is another reasonable interpretation available. . . .

We conclude that Article 66(a) does not give Judge Advocates General authority to appoint Court of Criminal Appeals judges; that § 323(a) does give the Secretary of Transportation authority to do so; and we turn to the constitutional question whether this is consistent with the Appointments Clause.

. . . . By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches. This disposition was also designed to assure a higher quality of appointments: The Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body. . . . By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one. . . .

The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers. "[B]ut," the Appointments Clause continues, "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." This provision, sometimes referred to as the "Excepting Clause," was added to the proposed Constitution on the last day of the Grand Convention, with little discussion. As one of our early opinions suggests, its obvious purpose is administrative convenience -- but that convenience was deemed to outweigh the benefits of the more cumbersome procedure only with respect to the appointment of "inferior Officers." Section 323(a), which confers appointment power upon the Secretary of Transportation, can constitutionally be applied to the appointment of Court of Criminal Appeals judges only if those judges are "inferior Officers."

Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes. Among the offices that we have found to be inferior are that of a district court clerk, an election supervisor, a vice consul charged temporarily with the duties of the consul, and a "United States commissioner" in district court proceedings. Most recently, in *Morrison v. Olson* (1988), we held that the independent counsel created by provisions of the Ethics in Government Act of 1978, was an inferior officer. In reaching that conclusion, we relied on several factors: that the independent counsel was subject to removal by a higher officer (the Attorney General), that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited.

Petitioners are quite correct that the last two of these conclusions do not hold with regard to the office of military judge at issue here. It is not "limited in tenure," as that phrase was used in *Morrison* to describe "appoint[ment] essentially to accomplish a single task [at the end of which] the office is terminated." Nor are military judges "limited in jurisdiction," as used in *Morrison* to refer to the fact that an independent counsel may investigate and prosecute only those individuals, and for only those crimes, that are within the scope of jurisdiction granted by the special three-judge appointing panel. However, *Morrison* did not purport to set forth a definitive test for whether an office is "inferior" under the Appointments Clause. . . .

To support principal-officer status, petitioners emphasize the importance of the responsibilities that Court of Criminal Appeals judges bear. They review those court-martial proceedings that result in the most serious sentences. . . . We do not dispute that military appellate judges are charged with exercising significant authority on behalf of the United States. This, however, is also true of offices that we have held were "inferior" within the meaning of the Appointments Clause. . . . The exercise of "significant authority pursuant to the laws of the United States" marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley,* the line between officer and nonofficer.

Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior" officer depends on whether he has a superior. . . . [I]n the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

This understanding of the Appointments Clause conforms with the views of the first Congress. On July 27, 1789, Congress established the first Executive department, the Department of Foreign Affairs. In so doing, it expressly designated the Secretary of the Department as a "principal officer," and his subordinate, the Chief Clerk of the Department, as an "inferior officer. . . .

Supervision of the work of Court of Criminal Appeals judges is divided between the Judge Advocate General (who in the Coast Guard is subordinate to the Secretary of Transportation) and the Court of Appeals for the Armed Forces. The Judge Advocate General exercises administrative oversight over the Court of Criminal Appeals. He is charged with the responsibility to "prescribe uniform rules of procedure" for the court, and must "meet periodically [with other Judge Advocates General] to formulate policies and procedure in regard to review of court-martial cases." It is conceded by the parties that the Judge Advocate General may also remove a Court of Criminal Appeals judge from his judicial assignment without cause. The power to remove officers, we have recognized, is a powerful tool for control.

The Judge Advocate General's control over Court of Criminal Appeals judges is, to be sure, not complete. He may not attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings, and has no power to reverse decisions of the court. This latter power does reside, however, in another Executive Branch entity, the Court of Appeals for the Armed Forces. . . .

. . . .

We conclude that 49 U. S. C. § 323(a) authorizes the Secretary of Transportation to appoint judges of the Coast Guard Court of Criminal Appeals; and that such appointment is in conformity with the Appointments Clause of the Constitution, since those judges are "inferior Officers" within the meaning of that provision, by reason of the supervision over their work exercised by the General Counsel of the Department of Transportation in his capacity as Judge Advocate General and the Court of Appeals for the Armed Forces. The judicial appointments at issue in this case are therefore valid.

*Affirmed*.

JUSTICE SOUTER, concurring.

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Because the term "inferior officer" implies an official superior, one who has no superior is not an inferior officer. This unexceptionable maxim will in some instances be dispositive of status; it might, for example, lead to the conclusion that United States district judges cannot be inferior officers, since the power of appellate review does not extend to them personally, but is limited to their judgments. . . .

It does not follow, however, that if one is subject to some supervision and control, one is an inferior officer. Having a superior officer is necessary for inferior officer status, but not sufficient to establish it. . . .

In this case, as the Court persuasively shows, the Judge Advocate General has substantial supervisory authority over the judges of the Coast Guard Court of Criminal Appeals. As the Court notes, the Judge Advocate General prescribes rules of procedure for the Court of Criminal Appeals, formulates policies for review of court-martial cases, and is authorized to remove judges from their judicial assignments without cause. While these facts establish that the condition of supervision and control necessary for inferior officer status has been met, I am wary of treating them as sufficient to demonstrate that the judges of the Court of Criminal Appeals are actually inferior officers under the Constitution.

In having to go beyond the Court's opinion to decide that the criminal appeals judges are inferior officers, I do not claim the convenience of a single sufficient condition, and, indeed, at this stage of the Court's thinking on the matter, I would not try to derive a single rule of sufficiency. What is needed, instead, is a detailed look at the powers and duties of these judges to see whether reasons favoring their inferior officer status within the constitutional scheme weigh more heavily than those to the contrary. . . .