

Attacks on the Administrative State: The Year of Living Dangerously



Unconstitutional this Whole Time?

- Over approximately the past year, at least 27 district court actions seeking to enjoin NLRB proceedings based on arguments that the Board is unconstitutional
 - Metastasizing:
 - Affirmative defenses in ULP cases
 - Petitions for review
 - Motion to dismiss 10(J) petitions

Unconstitutional How?

- Some combination of these 4 arguments
 - The NLRB's ALJ are unconstitutionally insulated from removal
 - The Board Members are unconstitutionally insulated from removal
 - The Board awards legal remedies, and adjudicates private rights, and so violates the Seventh Amendment's jury right
 - In particular: *Thryv* remedies
 - The Board impermissibly mixes prosecutorial, legislative, and judicial functions

Where Does that Come From?

- Combining threads of conservative legal theories intended to reign in the administrative state:
 - 1) Unitary executive theory – President must have supervisory authority over all policy-making executive officials
 - Attack on independent agencies
 - 2) An Article III court is the only place where a case or controversy can be litigated
 - Attack on agency adjudication

Removal Protections

- Article II, Sect. 3 of the U.S. Constitution charges President with duty to “take Care that the Laws be faithfully executed”
- Since at least the Decision of 1789, this duty has been understood to include the authority to remove executive officials from office
 - *Myers v. United States*, 272 U.S. 52 (1926)
- Therefore, “the President’s removal power is the rule, not the exception.”
Seila Law LLC v. CFPB, 591 U.S. 197, 228 (2020).



Removal Protections (cont.)

- But the Supreme Court always recognized important exceptions to this rule:
 - *Humphrey's Executor v. United States*, 295 U.S. 602 (1935): principal officers of independent agencies that play “quasi-legislative” or “quasi-judicial” roles
 - *Morrison v. Olson*, 487 U.S. 654 (1988): one level of good-cause protections for inferior officers okay so long as President has other means of supervision

Removal Protections (cont.)

- Starting in 2010, the unitary executive theory began to take hold with the conservative majority on the Supreme Court:
 - *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010): two levels of tenure protections (PCAOB member who can be removed for cause only by an SEC commissioner also removable only for cause) unconstitutional
 - *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020): removal protections for a single Director—not a Board—in charge of an independent agency is unconstitutional
 - *Collins v. Yellen*, 594 U.S. 220 (2021): holding unconstitutional removal protections for another one-Director head of an independent agency
 - While none directly raised *Humphrey's Executor*, lots of language questioning continued viability

Removal Protections (cont.)

- But these cases had little practical effect:
 - *Free Enterprise Fund* and *Seila Law* held the removal protections to be severable from the statute.
- In *Collins*, the Supreme Court held that plaintiffs were not entitled to relief from that agency's actions even if the protections were unconstitutional. This is because:
 - An insulated officer was still lawfully appointed.
 - For more than declaratory judgment, a plaintiff must show "compensable harm" that is traceable to the removal protection, such as a frustrated presidential desire to remove the officer.



Removal Protections (cont.)

- *Axon Enterprises, Inc. v. FTC*, 598 U.S. 175 (2023):
 - Unanimous Court agreed that “here-and-now” injury of subjection to an unconstitutionally structured decisionmaking process cannot be remedied after the fact
 - Case involved question of subject matter jurisdiction, not relief



Space Exploration Techs. Corp. v. NLRB, **6:24-cv-00203, 2024 WL 3512082 (W.D. Tex. July 23, 2024)**

- Preliminary injunction against NLRB
 - ALJ, Board members unconstitutionally insulated from removal
 - Appearing before unconstitutionally insulated official a “here-and-now” injury
 - Largely dismisses NLRA’s severability provision



SpaceX (cont.)

- Now: 4 total district courts in Texas have issued preliminary injunctions on removal protections claim
- Fifth Circuit has enjoined or “stayed” 2 cases pending appeal of “effective” denial of preliminary injunctions
 - *SpaceX v. NLRB*, Case No. 24-40315 (5th Cir.)
 - *Amazon.com Servs. v. NLRB*, Case No. 24-50761 (5th Cir.)
 - Oral argument in both being held today, Nov. 18
- Unsuccessful outside of TX: at least 5 PIs denied, 2 motions to dismiss 10(j)s denied; 2 circuit courts have denied emergency PIs:
 - *YAPP USA Automotive Sys. v. NLRB*, Case No. 24-1754, 2024 WL 4489598 (6th Cir. Oct. 13, 2024)
 - *Spring Creek Rehabilitation and Nursing Center v. NLRB*, 24-3043, (3d Cir. Nov. 6, 2024)

Seventh Amendment – Jury Trial

- “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”
- *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)
 - Dismissed 7th Am. challenge



Seventh Amendment – Jury Trial (cont.)

- After *Jones & Laughlin*, consensus among Congress and courts that agency adjudication didn't implicate Seventh Amendment
- Conservative commentators began to question whether such adjudications could properly be assigned outside Art. III courts, and whether private rights could be adjudicated by agencies with a jury

Seventh Amendment – Jury Trial (cont.)

- *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024)
- “The Amendment [] embraces all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume.”
- Amendment “extends to a particular statutory claim if the claim is legal in nature.”

Seventh Amendment – Jury Trial (cont.)

- “To determine whether a suit is legal in nature, ... courts consider the cause of action and the remedy it provides.”
 - “remedy [is] the most important consideration”
- “What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to restore the status quo.”

Seventh Amendment – Jury Trial (cont.)

- SEC civil penalties are legal:
 - Availability of remedy under statute turns on “culpability, deterrence, and recidivism” “rather than to restore the victim”
 - Size of the penalty turns on “culpability of the defendant and the need for deterrence, not the size of the harm”
 - “SEC is not obligated to return any money to victims”

Seventh Amendment – Jury Trial (cont.)

- Rejected application of public rights doctrine
 - Distinguished, and did not overrule, *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977)
 - In doing so, cited *Jones & Laughlin* without questioning it

Seventh Amendment – Jury Trial (cont.)

- How do employers argue around *Jones & Laughlin*?
 - *Thryv, Inc.*, 372 NLRB No. 22 (2022)
 - Held that standard remedy would include compensation for all direct and foreseeable pecuniary harms caused by ULP
 - Argue this is compensatory damages, which is legal relief
 - This ignores the nature of the claims and the equitable nature of the remedy