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Constitutional Attacks on the NLRB: The Fifth Circuit and Beyond

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The End of the Administrative State As We Know It?

Four Core Claims

- (1) The NLRB's ALJs are unconstitutionally insulated from removal;
- (2) The NLRB Board Members are unconstitutionally insulated from removal;
- (3) The Board's Thryv remedies are akin to legal tort damages, thus entitling SpaceX to a jury trial;
- (4) The Board impermissibly mixes prosecutorial and adjudicative functions because the same Board Members who authorize seeking 10(j) relief

Removal Protections, pt. 1

- The Constitution vests in the President the power to appoint inferior officers, but allows Congress to place that authority in "the Heads of Departments." It also requires the President to "take Care that the Laws be faithfully executed."

- Overall, in *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court has held that the removal power is incident to the President's power under these two clauses.
- 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
- Starting in 2010, the conservative majority began to push back:
  - *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

Removal Protections, pt. 2

- Despite these holdings, the administrative state did not shut down.
  - *Free Enterprise Fund* and *Seila Law* held the removal protections to be severable from the statute.
- In *Collins v. Yellen,* 594 U.S. 220 (2021), the Supreme Court repeated its holding in *Seila Law* that a one-Director head of an independent agency cannot be protected from removal, but stated that plaintiffs were not entitled to relief from that agency's actions even if the protections were unconstitutional. This is because:
  - An officer who is insulated from removal was still lawfully appointed and therefore properly exercises executive power.
  - To get anything more than a holding that the officer is removable, 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 and ALJs

- All ALJs in the federal system can only be removed for cause. 5 U.S.C. 7521.
- If the agency wants to remove an ALJ, it has to go to the MSPB. MSPB members themselves have removal protections.
- ALJs are “inferior officers”. *Lucia v. SEC*, 583 U.S. 237 (2018).
- In the Fifth Circuit, two-level removal protections for ALJ are almost certainly unconstitutional. *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (contrary to the 6th, 9th, and 10th Circuits).

Removal Protections and Board Members

- Board Members can only be removed by the President “for neglect of duty or malfeasance in office, but for no other cause.” 29 USC 153(a).

- Would seem to fall comfortably within *Humphrey’s Executor*’s permission of removal protections for multi-member expert boards.

- The Fifth Circuit recently upheld similar removal protections for the Consumer Product Safety Commission, but complained that *Humphrey’s Executor* should be overruled. *Consumers’ Research v. CPSC*, 91 F.4th 342 (5th Cir. 2024).

Why are we in District Court at all?

- The Supreme Court unanimously held that where a plaintiff raises a "structural constitutional claim" that challenge "the structure or very existence of an agency" or that "an agency is wielding authority unconstitutionally in all or a broad swath of work" can go straight into district court. *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023).
- Loose language about how "subjection to an illegitimate proceeding, led by an illegitimate decisionmaker" cannot be remedied on appeal.

What are Employers Arguing?

- Employer know that, because of *Collins v. Yellen*, they can't undo a Board decision merely because the ALJ or Board Member was unconstitutionally insulated.
  - They can't show that the President wanted to remove any of these officials, and thus that the removal-restriction caused harm.
- So if they "win" the case… they would get an order stating that the President can remove the ALJ and nothing else.
- Employers are therefore seeking preliminary injunctions, arguing that the question of remedy can be determined at final judgment, but they need to preserve the "status quo" to avoid suffering "constitutional harm," relying on language in *Axon* about how proceeding before an unaccountable adjudicator is a harm that is irremediable on appeal

Tensions in the Argument

- *Seila Law* and *Free Enterprise Fund* awarded declaratory judgments ruling officers' removal restrictions unconstitutional to Plaintiffs who did not show a frustrated Presidential intent to remove.
- But *Collins* says that, despite the presence of an unconstitutional removal protection, the adjudicator is still valid and has authority to act.
  - Unless *Collins* overruled *Seila Law* and *Free Enterprise Fund*, it seems that Plaintiffs may still be entitled to a declaratory judgment, even if they should not be able to get an injunction against agency action.
  - So we need to push back against the notion that preliminary injunctions are "preserving the status quo" while the district court considers final declaratory relief
    - Possibility of a "tailored" injunction against the removal restrictions specifically, rather than against the proceeding?

State of Play Today

- Every employer challenge *outside* the Fifth Circuit has failed. Positive district court decisions in Ohio, Michigan, Illinois, and New Jersey, with the Third and Sixth Circuits also denying employers injunctions pending appeal.

- Every employer challenge *within* the Fifth Circuit has succeeded (or settled).
  - Four district courts have granted injunctions based on the ALJ claim, with one of those also holding that Board Members' removal restrictions are unconstitutional (one additional injunction involves DOL ALJs). 3 of those cases in consolidated briefing at CA5.
  - Two cases, *SpaceX* and *Amazon*, secured injunctions pending appeal following supposed "effective denial" of their injunctions by district courts. Argued yesterday in CA5.
- Board's litigation position post-Jan. 20?

Seventh Amendment

- "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."
- In the very first days of the NLRA, the Supreme Court held that the Board's proceedings were not subject to the Seventh Amendment. *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937).
- Because:

  * Section 7 created statutory rights with no analogues to the common law;

  * The Board's make-whole remedy was equitable rather than legal;

  * The Board enforced "public rights" – the injury to interstate commerce that would occur if workers' PCA were not protected – rather than the "private rights" of workers

SEC v. Jarkesy

- The Supreme Court held that (1) the SEC's securities fraud laws were analogous to common-law fraud claims; and (2) the SEC's civil penalties were not equitable because they were meant to punish by means of money damages.
  - *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024).

BUT:

- Statute allowed the SEC to go to federal court and seek the penalties
- The NLRB's penalties are clearly not punitive

Employer Argument: *Thryv* Remedies and the Seventh Amendment

- In 2022, the NLRB held that, in addition to backpay and reinstatement, the Board would order employers to compensate workers for "all direct and foreseeable pecuniary harms" suffered as a result of a ULP.
- Employers started to argue that this was the same as tort consequential damages—a legal and not equitable form of relief.
- Even though *Thryv* remedies may just be a small piece of the ultimate remedy, they claim that they are now entitled to a jury trial as to all claims.

Counterarguments

(1) This is really a statutory, not a constitutional claim!

(2) There really is no jurisdiction here!

(3) The case is extremely different from *Jarkesy* and the SEC

Implications – Removal Protections

* No Court outside the Fifth Circuit has bought this preliminary injunction theory.

* Still a possibility of winning in the Fifth Circuit – although danger of "auditioning" rulings to benefit Musk companies

* These cases should stop once the Supreme Court gives a yes-or-no answer on whether these removal restrictions are constitutional. Some indications that current Court would uphold them.

* The Supreme Court has never found removal restrictions of this nature to be inseverable, and the NLRA has an express severability clause.

* But does have potential to create real chaos and harm workers in several important states.

* Implications for quality and integrity of administrative state if ALJs do lose removal protections.

Implications – Seventh Amendment

(1) No Court has yet bought the theory;

(2) Jurisdictional arguments are technically strong;

(3) The courts are trying to get us to "think small" in terms of remedies

   (1) *Thryv* (and *Ex-Cell-O*?);

   (2) PRO Act consequential and liquidated damages and civil penalties (private right of action becomes important)

(4) Claims would be rendered moot if a new GC orders line staff to stop seeking *Thryv* remedies or the Board overrules *Thryv*