

NLRB in the balance: Did Trump have the right to terminate a Board member?

By [David Phippen](#)
[Washington DC-Northern Virginia Office](#)

The legal dispute over President Donald Trump's removal of National Labor Relations Board Member Gwynne A. Wilcox may be on a fast track to review by the U.S. Supreme Court.

Ms. Wilcox, a Democrat appointed by President Biden, held a seat on the Board for a second term that would have expired August 27, 2028. President Biden appointed her Chairman of the NLRB in late December 2024. However, after President Trump took office in 2025, he named Republican Marvin Kaplan to be Chairman, and on January 28 Ms. Wilcox was removed from the Board completely. This action deprived the NLRB of a three-member quorum. Ms. Wilcox promptly [sued](#) in federal court in the District of Columbia.

In an [order](#) issued on March 6, Judge Beryl A. Howell, an Obama appointee, enjoined the Administration from terminating Ms. Wilcox or blocking her continuing service on the Board.

Board Members are nominated by the President, and all require Senate confirmation for specific seats on the Board with fixed, five-year terms. The National Labor Relations Act provides that a Member may be removed only for "malfeasance in office" or "neglect of duty" and that the Member has a right to "notice and a hearing." Judge Howell applied the NLRA and held that removal of Ms. Wilcox was illegal, unpersuaded by the arguments from the Trump Administration that these protections are unconstitutional.

This is not the end of the story.

The *Wilcox* case on appeal – taking it up!

The Trump Administration promptly took the case to the U.S. Court of Appeals for the District of Columbia Circuit, and requested an emergency stay and appeal Judge Howell's order. At issue are the scope of presidential removal power and the validity of restrictions on removal of so-called "independent" agency officials with job protections imposed by various statutes of Congress, such as those in the NLRA.

In the district court case, Judge Howell based her decision on the statutory protections against at-will termination of Board members. However, the Administration asserts that these protections unconstitutionally infringe on a President's executive powers under Article II of the U.S. Constitution and thus are invalid. The central issues before the D.C. Circuit – and, perhaps, eventually, the U.S. Supreme Court, are these:

To what extent, if any, does Article II of the U.S. Constitution allow Congress to limit the President's power to remove "independent agency" heads, or board or commission members, if the agency exercises or possesses "executive" powers?

And does the NLRB exercise or possess such "executive" powers?

The answers are likely to turn on judicial interpretation and the continuing viability of the Supreme Court's 1935 decision in *Humphrey's Executor v. United States*, as well as a series of more recent Court decisions, particularly a 2020 decision in *Seila Law v. Consumer Financial Protection Bureau*, which appears to have narrowed the scope of *Humphrey's Executor* and thus congressional power to constrain the President's removal powers.

The *Humphrey's Executor* decision involved the termination of a Commissioner of the Federal Trade Commission under President Herbert Hoover. The Commissioner was terminated before the expiration of his term by President Franklin D. Roosevelt.

The Supreme Court recognized that, generally, the Executive Branch does have the power to remove appointees in federal administrative agencies. However, the Court found an exception for agencies that function as "independent," quasi-judicial, and quasi-legislative bodies not exercising executive powers. The Court found that the FTC functioned as such a body, and therefore that removal protections in the Federal Trade Commission Act were valid and that Mr. Humphrey's termination before the end of his term was invalid.

In 2020, the Supreme Court held in *Seila Law* that the exercise by an agency or commission of *any* executive power takes the agency or commission out of the *Humphrey's Executor* exception.

Returning to Ms. Wilcox's challenge, the hearing before the D.C. Circuit will take place today. Regardless of the ruling, the case is likely to go to the Supreme Court for a decision on the constitutional question of whether the NLRB's Member removal protections, and indeed the very structure of the Board, are constitutional.

In the meantime, as a result of Judge Howell's decision and the currently pending case in the D.C. Circuit, Ms. Wilcox is reportedly back at the Board, and the Board's three-member quorum is restored, validly or invalidly.

Does the NLRB have and exercise “executive” powers?

The Trump Administration argues that Congress, by imposing removal protections in the NLRA, violated Article II of the Constitution.

Article I of the Constitution gives power to Congress to make the laws. Article II gives the President the executive power to execute the laws. Article III gives to the judiciary the power to interpret the Constitution and laws of the United States, with the Constitution prevailing over statute. In the Wilcox case, the courts will wrestle with the arguable clash between Article I and Article II presented by the NLRA Member removal protections.

The NLRB has a unique agency structure that, as a whole, is not “independent” of the Executive Branch, and it arguably does exercise (and has) executive powers.

The Board has a General Counsel who is nominated by the President and can be terminated at will by the President. This issue arose recently, when President Biden at the start of his term, discharged Peter Robb, the General Counsel under President Trump. The Office of the General Counsel is purportedly “separate” from the five-Member Board.

The General Counsel has three primary functions:

- Prosecution of unfair labor practice cases under Section 8 of the NLRA, with the NLRB as the adjudicator (typically first through a recommendation an NLRB Administrative Law Judge).
- Representation of the Board in enforcement and review proceedings of Board actions, including decisions in unfair labor practice cases under Section 8 of the NLRA, at the Circuit Court of Appeals level (Board decisions are not self-enforcing).
- Representation of the Board in federal court actions for injunctions, such as those authorized under Section 10(j) of the NLRA.

The five-Member Board is purportedly separate from the Office of the General Counsel, but arguably joined at the hip through the NLRA structure. The Board has decision-making power in unfair labor practices cases and representation cases, with cases coming to it from its Regional Offices and on recommended decisions and orders of Administrative Law Judges. But its actions do not stop there. The Board files legal actions for enforcement of its decisions in federal Circuit Courts of Appeal and seeks injunctions in federal District Courts, using the Office of the General Counsel as its legal representative in the court cases.

In short, the NLRB enforces the NLRA with private sector employers and the U.S. Postal Service.

In addition to its labor law enforcement powers, the NLRB promulgates rules and regulations, just as the Executive Branch agencies do.

For those who deal with labor law issues regularly, it is clear that the NLRB has and exercises what most observers would characterize as “executive” powers. Attorneys siding with the Trump Administration noted in their briefing that Judge Howell found that the Board may do the following:

- “Seek temporary injunctive relief in federal district court while a [labor] dispute is pending at the NLRB.”
- Issue “a cease-and-desist order to halt unfair labor practices or an order requiring reinstatement of terminated employees,” including with backpay.
- “[Seek] enforcement in a federal court of appeals.”
- “[P]romulgate rules and regulations to carry out its statutory duties.”

All of these seem to represent core executive powers, and there is no serious dispute that the Board exercises them. Judge Howell found that *Humphrey’s Executor* was still controlling and that its exception applied to the NLRB. It is possible that a higher court, relying on *Seila Law*, will reject Judge Howell’s decision and – without overruling *Humphrey’s Executor* – will find that the NLRB is not within the *Humphrey’s* rule exception. It is also possible that *Humphrey’s Executor* will be overruled.

It should be noted that there are several other cases challenging the terminations by the Trump Administration of so-called “independent” agency heads (or members or commissioners). Current challenges involve, in addition to the NLRB, the Federal Labor Relations Authority and the U.S. Merit Systems Protection Board. Two Supreme Court Justices (Justices Neil Gorsuch and Clarence Thomas) have openly criticized *Humphrey’s Executor* and indicated that it should be overruled.

The rest of the story – will *Seila Law* control?

Seila Law may be what ultimately blocks Ms. Wilcox from staying on the Board. The Trump Administration and supporting *amicus* parties are pushing for that outcome. Thus, assuming that Ms. Wilcox is, in fact, already back on the Board and participating in Board actions, those actions could be retroactively invalidated. We will keep you posted.

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