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2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

A Regression to Politics? Recent Court Decisions Could Give Partisanship Even More Influence at the NLRB.

by Alex MacDonald

Last month, a pair of federal district courts fired warning shots at the National Labor Relations Board. Each court blocked the Board from processing unfair-labor-practice charges because, the courts found, the Board seemed to have structural constitutional flaws. The courts agreed on one flaw: the Board's administrative law judges were too insulated from presidential control. That flaw alone would have thrown a wrench in the Board's operations. But one court also found a second flaw: Congress had done too much to protect the Board's own members. And that second flaw could revolutionize federal labor policy for a generation.

Partisanship and Labor Policy

The Board we know today sprouted from a field seeded with strife. At the turn of the 20th century, labor relations was a bitter affair: unions and management scrapped for dominance workplace by workplace. Their struggle produced a wave of industrial warfare, which sometimes spilled into national markets. That spillover made labor relations a federal problem. So to harmonize relations, Congress created the National Labor Board. This original Board operated like mediator. It included representatives from management, labor, and government, who brought the parties together and tried to broker voluntary agreements. But that model ultimately failed, in part because it was seen as biased. The parties didn't trust the partisan representatives, and negotiations often devolved into bickering and recrimination. And while the Board did have the power to issue "rulings"—effectively, opinions on the merits of a dispute—it had no independent enforcement power. So its decisions often went ignored.

So in 1935, Congress tried a different model. It created the National Labor Relations Board as an independent expert agency. This new Board would still be a multi-member, quasi-adjudicative body. But unlike the old Board, it would have no representatives from management or labor. Instead, each member would represent the public. These members wouldn't broker deals between the parties, but instead, would resolve disputes directly. And they would enforce their decisions in federal court.

That model would work, however, only if the members could operate independently. They needed space to develop labor policy objectively and rationally. And that meant they needed insulation from partisan politics. So Congress built in checks against political interference. It provided that Board members would serve a fixed, five-year term. And during their terms, they could be removed

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Alex MacDonald is a Shareholder with Littler Mendelson in its Washington, DC office. He is is a core member of the firm's Workplace Policy Institute (WPI).

only for "neglect of duty or malfeasance in office."

Too Much Independence?

For a time, that sort of removal protection was common in administrative agencies. Congress designed multiple New Deal agencies in much the same way. And in a case involving the Federal Trade Commission, *Humphrey's Executor v. United States*, the Supreme Court blessed that approach. The Court held that Congress could legitimately insulate multi-member, independent agencies from presidential control. As long as those agencies were doing quasi-legislative or quasi-judicial things, removal protections didn't interfere too much with the president's ability to run the executive branch. Congress could effectively install those agencies' members for fixed terms and screen them from political influence.

But in recent years, that doctrinal ground has started to shift. In several cases, the Court has found that Congress took removal protections too far. For example, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court struck down a double-layer protection scheme. *Free Enterprise Fund* involved the Public Accounting Oversight Board, a nonprofit agency Congress established to oversee private audits. The board's members could be removed only for cause by the commissioners of the Securities and Exchange Commission. And the commissioners themselves could be removed only for cause by the president. So in effect, the board members were insulated from presidential control by two layers of protection. And that kind of double insulation, the Court held, was too much: it interfered with the president's ability to control the executive branch.

A few years later, the Court applied a similar logic to agencies run by a single person. In *Seila Law v. Consumer Financial Protection Bureau*, it held that Congress had improperly protected the director of the CFPB from removal. The CFPB director had only one layer of protection; he could be removed directly by the president. So the government argued that *Free Enterprise* didn't apply; Congress could properly insulate the director under *Humphrey's Executor*. But according to the Court, *Humphrey's Executor* applied only to multi-member bodies with staggered terms and quasi-legislative functions. The CFPB director, by contrast, was a single official with vast executive and policymaking powers. He effectively wielded executive power. So Congress could not insulate him from presidential control.

Those decisions caused some observers to take a fresh look at the Board. Like the FTC, the Board is a multi-member body whose members serve staggered terms. But like the CFPB director, the Board members wield significant executive and policymaking power. They oversee union elections, resolve unfair labor practices, and authorize litigation in federal courts. They are effectively responsible for developing the nation's labor policy. So are they really just a quasi-legislative, quasi-judicial expert body? Or, like the CFPB, are they basically exercising executive power without presidential oversight?

A Paradigm Shift for Labor Relations

Last month, the Western District of Texas came down on the CFPB side of that question. Ruling on a request for a preliminary injunction, the court held that the Board was (probably) too insulated from presidential control. The Board exercised a lot of executive power, and the Board's removal protections gave it little reason to respond to presidential directives. So the members' removal protections prevented the president from effectively running the executive branch. And that made the protections (probably) unconstitutional.

Again, that ruling was preliminary. But if it holds, it could transform American labor law. The court's ruling could essentially strike out the Board members' removal protections. And if the

members aren't insulated from presidential control, they can be fired at any time. Their five-year terms aren't guaranteed. An incoming president could, theoretically, clean house every four years. Something similar happened in 2021, when incoming President Biden fired the Board's General Counsel, Peter Robb, on day one. If a president can do the same thing with Board members, he or she will be able to dictate the direction of labor policy with a single phone call. And that means we could see broader and faster policy swings from administration to administration.

In some sense, that change would be one of degree rather than of kind. The Board is already notorious for shifting with the political winds. Members appointed by Democratic presidents almost always side with unions, and members appointed by Republicans almost as often side with management. In fact, according to some studies, partisan balance already matters more than the merits of any given case. A panel of Democratic members is nearly 50% more likely to side with unions than one made up of Republicans. That difference isn't just statistically significant; it's almost comical.

But that isn't to say things couldn't get worse. As politics in general have grown increasingly partisan, so has labor policy. Federal labor policy almost always breaks along partisan lines. Pro-labor bills typically attract universal Democratic support and near-universal Republican opposition. And for now, the Board is at least ostensibly separated from that kind of raw political calculus. But if presidents can remake the Board every four years—or really, whenever they want to—even that ostensible separation could vanish. Board decisions could devolve into little more than partisan vote counting.

That result would leave us basically where we were under the old National Labor Board. Some Board members would represent labor, some would represent management, and none would be truly independent. The only difference would be that this new partisan Board would wield a lot more power than the old one. It would have all the enforcement authority and none of the neutrality that Congress envisioned.

That's hardly the kind of design anyone would have chosen in the first instance. But if the current protections go down, the only one with the power to fix it will be Congress. And in our hyper-partisan age, waiting for Congress to agree on anything is too often an exercise in futility. So we may have no choice but to accept the reality: the Board, like too many other federal agencies, will be doing not policy, but politics.

