Transcript of the NYU Center for Labor and Employment Law and Institute of Judicial Administration (IJA) webinar on November, 14, 2024 with Faculty Director Samuel Estreicher (Dwight D. Opperman Professor of Law, NYU School of Law)(moderator), Richard F. Griffin, Jr. (Bredhoff & Kaiser, former NLRB General Counsel), Prof. David L. Noll '08 (Rutgers Law), and Howard Z. Robbins '94 (Proskauer).

00:00:05.250
Estreicher (NYU Law): Good afternoon, everyone. My name is Sam Estreicher. I'm a professor of labor and employment law here at NYU School of Law, and I also run the Center on Labor and Employment Law. This is an event sponsored by the NYU Center for Labor and Employment Law.

The National Labor Relations Act has been a major part of my career. Back in the thirties there were challenges to the constitutionality of the National Labor Relations Act, and they were put to rest by the by the Supreme Court. And now we have a renewed set of challenges to the National Labor Relations Act and to the National Labor Relations Board.

If we have time remaining after the discussions, we will take questions and answers. You're directed to end them to us in the chat box and we'll take a look at them, and hopefully we will answer them in the course of our presentations.

00:01:09.260 Estreicher (NYU Law): We're going to start with an overview of the Supreme Court decisions in this area.

NYU Alum, David Noll, my co-author, a tremendous professor of administrative law at Rutgers University School of Law. David.

00:01:28.010
Noll (Rutgers Law): Well, thanks very much. It's a pleasure to be with this distinguished panel. Let me do just a little bit of framing for our discussion to get some of the background case law on the table, and then we can delve into some of the current issues. So one of the defining features of constitutional law in the Roberts Court era is the Court's willingness to reopen settled institutional arrangements in administrative law. This is reflected in the Court's flirtation, or perhaps engagement with the unitary executive theory, as well as its general distrust of administrative agencies. And over the past decade or so we've seen a series of cases that have opened up lines of arguments that broadly impact the way agencies operate. And specifically the way the Board operates. So there's three specific lines of doctrine or argument that I want to flag, that the Court has revived which, carried to their limits, raise the possibility that some, or perhaps all, of the NLRA will be declared unconstitutional. And then, later in the discussion, we can talk about just how far these go, their merits, as well as some of the remedial issues they raise.

00:02:48.710
Noll (Rutgers Law): So the 1st area that the Court's been focused on involves the appointment and removal of administrative officers. The less contentious issue here has to do with how agency officers are appointed. The Constitution's appointments clause provides that officers are supposed to be appointed by the President, with the advice and consent of the Senate, unless Congress by law provides otherwise.

And there's been a string of cases where the Court has been elaborating who is an officer who has to be appointed in conformity with the appointments clause. Those all trace back to a decision from the seventies, *Buckley v. Valeo*[1], which holds that an officer for appointments clause purposes is someone who exercises significant authority on behalf of the United States.

The more impactful issue has to do with the President's ability to remove administrative officers. There's a debate going back to the first Congress over who has the power to fire executive officers once they are in office, and one position is that the President, as the person who appoints administrative officers has plenary authority over appointees in the executive branch. The other view is that Congress, under the necessary and proper clause and other parts of Article I, has authority to protect these officers against presidential removal, and to limit the circumstances in which they can be removed in office.

[1] *Buckley v. Valeo*, 424 U.S. 1 (1976).

00:04:20.209 Noll (Rutgers Law): So, beginning with the *Free Enterprise Fund*[2] case in 2010, the Court has all but repudiated the view associated with *Humphrey's Executor*[3] that Congress can provide officers with removal protections to ensure that they faithfully carry out their duties. And in *Free Enterprise Fund*, for people who forgot the details of the case, you had the Public Company Accounting Oversight Board [PCAOB] being located within the SEC. And the case was decided on the assumption that SEC Commissioners were protected from removal, and PCAOB Board members also had significant removal protections.

Chief Justice Roberts's opinion for the Court said that two layers of removal protection unconstitutionally infringed with the President's authority to execute the laws under Article II.

So, after *Free Enterprise Fund* right, one of the main questions has been whether this two-layer principle applies to other appointees below the agency head level, and particularly whether administrative law judges who we can think of all kinds of reasons why perhaps they should have removal protections are subject to *Free Enterprise Fund*, and whether…

00:05:37.120 Estreicher (NYU Law): So, David, there are two layers here. There are the principal officers of the United States, right? And then there are inferior officers of the United States. The principal officers of the United States are appointed by the President and the other officers of the United States can be appointed by the President, by courts or heads of departments. And I assume in the NLRB context the head of the department is the chair, or is it the entire Board?

00:06:01.510 Noll (Rutgers Law): It's the Board.

00:06:03.280 Estreicher (NYU Law): Now there are no issues with respect to the appointment of the NLRB Members. Is that correct?

00:06:09.770 Noll (Rutgers Law): So far as I know, no issues.

00:06:11.880 Estreicher (NYU Law): They're appointed by the President.

00:06:13.070 Noll (Rutgers Law): *Free Enterprise Fund* holds that members of a multi-member Board can be principal officers.

00:06:19.040 Estreicher (NYU Law): Right, but they're appointed by the President in the NLRB context.

00:06:22.330 Noll (Rutgers Law): Precisely.

00:06:23.030 Estreicher (NYU Law): And the ALJs [administrative law judges] are, I think, appointed by the NLRB. You know putting aside the appointments issues, it's not really a salient issue in the context of the National Labor Relations Act. The removal issues are.

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[2] *Free Enterprise Fund v. Public Company Oversight Board,* 561 U.S. 477 (2010).

[3] Humphrey's Executor v. United States, 295 U.S. 602 (1935).

I would like to turn to injunctions. There's a case called *Axon*[4].

By the way, I failed to introduce my two practitioners and members of the Labor Center board. One is a Dick Griffin who is a former member of the NLRB, and also a former general counsel of the NLRB, who is now a very distinguished lawyer at Bredhoff and Kaiser. And Howard Robbins, who's a graduate of NYU [Law] and a very highly regarded partner at Proskauer, where he does a good deal of the private sector collective bargaining and sports and entertainment work. I appreciate both for being on the panel.

I'd like to ask the question. Let's talk about the case called *Axon*, which is a decision by Justice Kagan for the Court where she seems to say for the Court that if you're complaining about the way an agency is constituted under the Constitution, you have suffered an injury if you're required to hear your case before that improperly constituted agency. And that's essentially what's going on in the SpaceX[5] case and these other cases. The Court, I think, was unanimous on this point. It could be wrong on the fact of injury. There was injury for standing purposes if you're being forced to proceed or defend in an unconstitutionally constituted agency. You have an injury.

Now the question is what does that mean? And what the Court says, I think unanimously, that you can bypass the ordinary statutory procedure. Now we have lots of labor lawyers in this audience, and they know what the usual NLRB procedure is. But you can go right into district court and raise your constitutional claims now as I understood it, maybe I'm wrong. You bypass the statutory procedure. And now you're in front of the district court, and the district court can only grant an injunction if the normal requirements for such relief are present. Am I missing something? I'd like to put that on the table because we now are getting district courts, as in the case that's going to be argued very soon in the 5th circuit involving SpaceX. We're getting district courts issuing injunctions because the defendant should never be exposed to an improperly constituted proceeding. Any thoughts on that, Dick?

00:09:35.030 Griffin (Bredhoff Kaiser): Well, I have a couple of thoughts. The first is that the answer to whether or not you can allege a harm that allows you to proceed in the district court is different from whether or not you can obtain relief for actually demonstrated harm. And so *Axon* may get you in the door, but it doesn't answer the question of whether you're entitled to any relief.

I also think, before getting into the question of entitlement to relief that it's important to note that at least in the 5th circuit, the issue of your challenge to the composition of an agency, specifically the National Labor Relations Board is waivable. So if you haven't raised it in a timely fashion, there's an Amazon case right now in the 5th Circuit, where that issue is in front of the court because Amazon waited a considerable period of time through a number of proceedings before raising it. But there's a case called *Flex Frac Logistics*[6] in the 5th circuit, where, on the much more serious constitutional issue of the improper recess appointment, the court held that that was waivable, so,

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[4] *Axon Enterprise, Inc. v. Federal Trade Commission, l.* 598 U.S. 175 (2023*).*

[5] *SpaceX v. NLRB, et al. No. 6:2024cv00203 - (W.D. Tex. 2024) currently on appeal.*

[6] *Flex Frac Logistics, LLC v. NLRB, 746 F.3d 205, 207(5th Cir. –08 2014).*

assuming for purposes of discussion, that the question hasn't been waived by the party, and you're seeking an injunction of the agency proceedings, then the question is, do you meet the criteria for obtaining a preliminary injunction? And, in my view, unless you can demonstrate that the particular constitutional problem at issue somehow has an impact on your situation….

00:11:30.480 Estreicher (NYU Law): Probably mean the non-removability.

00:11:32.350 Griffin (Bredhoff Kaiser): The non-removability. And so, if you, these people, are all the Board members are all properly nominated by this President, they're all confirmed by the Senate. There's no indication that this President is in any way dissatisfied with any of their actions, and so it seems kind of backwards if you excuse my legal legalese way to interpret the unitary executive to say that any Tom, Dick, or Harry litigant can raise the President's authority when the President, him or herself, hasn't chosen to exercise that authority. So on the first, and I'll finish on the first point, which is whether or not you're likely to prevail on the merits. In my view, you aren't.

00:12:17.160 Estreicher (NYU Law): Howard, your thoughts on this?

00:12:20.630 Robbins (Proskauer): So I hate to agree with Dick too often, but I will to some degree that even the 6th Circuit in a decision upholding one of the district court decisions that has disagreed with the SpaceX case. This case, *YAPP*[7], a few weeks ago noted that in Collins, what you need is for the President to try to remove the unconstitutional agency individual before you have something live. [

00:12:55.140 Estreicher (NYU Law): Actually the fact pattern in *Humphrey's Executor*, which is the 1930s decision that basically….

00:13:00.120 Griffin (Bredhoff Kaiser): Which is still good law, despite being subject to, you know, narrowing as per David's presentation.

00:13:09.750 Estreicher (NYU Law): *Humphrey*'s was an action for pay. It was an action by his executor for pay because he had died in the interim.

00:13:18.000 Robbins (Proskauer): Right. Well, whether *Humphrey's Executor* gets revisited by the Supreme Court is a whole different issue, right, but assuming it survives. And you know, another interesting thing came up. I think it was just yesterday in an oral argument in this case called Care One9. At the 2nd Circuit before Judge Raggi -the posture at that point was the case had proceeded to the Board, and the judge said, Okay, well, now, it's at the Board. So you're gonna have the procedures that are appropriate. Now, what's the big deal at this point? So if it's a speed bump basically, where's the irreparable harm? So then, what you have, as Sam Estreicher noted, are the cases that are within the 5th Circuit. Having looked at this, say in a separation of powers case, you're wronged by having the burden of an unconstitutional hearing. So it's really a question of whether you accept that as a harm. The 2nd Circuit, you know we don't have a decision yet, doesn't seem to embrace that, nor does the 6th, so we'll see.

[7] *YAPP USA Automotive Systems, Inc. v. National Labor Relations Board,* No. 24-12173 (E.D. Mich. Sep. 9, 2024).

00:14:19.690 Estreicher (NYU Law): The question here is whether the alleged harm of having to make your defense before an agency where there are these constitutional removability issues. Whether that is sufficient to make out a violation that requires a remedy.

00:14:37.710 Noll (Rutgers Law): Yeah, can I just jump in the idea that being in a unconstitutionally appointed proceeding creates a sufficient harm, is somewhat in tension with the Court's decision in *Collins v. Yellen*[8] where the argument was that because the Fannie Mae and Freddie Mac administrator wasn't subject to presidential removal, all of the deals that that the administrator had overseen had to be unwind. And there's a very interesting part at the end of that opinion, where the Court essentially reads a causation requirement into the discussion of what the remedy should be.

00:15:16.960 Estreicher (NYU Law): Implied here. The argument would be that the removability problem has to cause some substantive harm.

00:15:22.820 Noll (Rutgers Law): Exactly, and it's, you know, sort of if you apply that too, you know. All right, being forced to appear before the Board. Particularly when you're looking at a requirement of irreparable injury. You know a question arises around is, you know, is a rich company like Amazon having to send in a lawyer to appear before the Board. Really is this what we're talking about when we talk about irreparable injury? And is it enough of an injury to justify shutting down a Board proceeding?

00:15:50.440 Estreicher (NYU Law): Let's turn now.

00:15:51.480 Griffin (Bredhoff Kaiser): If I may, Sam, particularly given that, as we know, for better or for worse, Board decisions are not self-enforcing, and so you don't have an enforceable decision, until in the ordinary process, you go to the circuit court of appeals, and even in the *Noel Canning*[9] situation, in order to avoid the constitutional question, the D.C. Circuit, when it was considering the recess appointments, looked at the underlying merits of the unfair labor practice to see whether there was substantial evidence supporting it. Had they found there was not substantial evidence supporting it, they could have decided the thing on statutory grounds, and avoided the constitutional question, and this notion that you can rush into district court when you have all these other options available to you through the ordinary course before there's a legally enforceable decision strikes me as contrary to the whole history of the gatekeeping function for getting real cases and controversies into the courts. This…

00:17:02.560 Estreicher (NYU Law): All right.

00:17:03.040 Griffin (Bredhoff Kaiser): An injury.

00:17:03.730 Estreicher (NYU Law): Howard, do you have any view on that point?

00:17:10.480 Robbins (Proskauer): Look. The *SpaceX* Court, you know, cited some language in Collins.

[8] *Collins v. Yellen*, 346 U.S. 464 (2021).
[9] *NLRB v. Noel Canning,* 573 U.S. 513 (2014).

00:17:14.450 Estreicher (NYU Law): That's the district court decision.

00:17:17.000 -Robbins (Proskauer): Correct, one of the Texas district courts, relying on *Collins* and noting that there's language in there that would support the assertion that having the hearing- and it's a separation of powers issue- that's a harm. It's a non-frivolous argument.

00:17:34.530 Estreicher (NYU Law): Yes, and I've heard myself. I did a moot court on this case 2 or 3 days ago, and a federal judge said, if it's a harm it's not remediable how, after the fact, it's not remediable after the fact. Now, Justice Kagan said it was a harm, at least for standing purposes. Is it really a remediable harm, other than the remedy of letting you bypass the ordinary statutory procedure? So my view would be, that's the remedy for the alleged harm, the pleaded harm. But we'll have to see where the courts go on that let's turn to the merits of the removal issue.

00:18:19.740 Estreicher (NYU Law): NLRB Members are properly appointed, but they can only be removed for certain reasons. What are those reasons? Misconduct. I don't have the statutory text in front of me. Let's say, basically.

00:18:34.620 Robbins (Proskauer): One of the issues is that the NLRA provision is a slightly different formulation than it is for other agencies, some other agencies have inefficiency as one of the grounds, and that is not a grounds for removal of a member of the Board.

00:18:47.250 Estreicher (NYU Law): As did the Federal Trade Commission in *Humphrey's Executor*- efficiency was one of the grounds, and for some reason it's not in the National Labor Relations Act, but misconduct can. In your view, Howard, can a Board member be fired by the President because the President doesn't like his policy views or her policy views?

00:19:10.336 Robbins (Proskauer): No, I mean that actually was addressed pretty squarely by the Supreme Court, where- and this is about the interpretation of how much it means to have removed the term efficiency, right- and one of the more thoroughly written recent district court cases is this *Alivio Medical Center*[10] case. Case was out of Chicago and the court there noted that the Supreme Court in *Seila*[11]o which is that 2020 case that David was referring to? The Court in didn't interpret this standard that includes the term efficiency to give such wide discretion to the President and the Court. The Supreme Court actually rejected the invitation to broadly construe that term, even including efficiency

00:20:16.530 Estreicher (NYU Law): In this distinction with *Humphrey's Executor*, in the absence of the ground of efficiency in the NLRA, you say, was efficiency as a ground for removal by the President was discounted in the silence.

00:20:30.440 Robbins (Proskauer): Not. Yeah, not efficiency, not inefficiency specifically, but that that whole standard together wasn't

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[10] Alivio Medical Center v. Abruzzo et al, No. 1:2024cv07217 (N.D. Ill. 2024).

[11] *Seila Law LLC v. Consumer Financial Protection Bureau,* 591 U.S.__(2020).

viewed as giving the President the right to remove a member over policy. Disagreements, policy disagreements aren't within that.

00:20:49.710 Estreicher (NYU Law): Very good point. What about the fact that *Seila* also deals with Elizabeth Warren's creation, the Consumer Financial Protection Board, where we had a single member agency -- unlike the NLRB, which has 5 members, 3 are, appointed from the President's party, 2 are appointed from the other party, I mean, not from the party, but they have to be representatives of the other party. In this *Seila* case we had this single member agency and it was given removal, protection and the Court held that that was unconstitutional. But the Court also said that it's not dealing with multi-member agencies. And I think it cited *Humphrey's Executor*. It wasn't blessing *Humphrey's Executor*, but it specifically carved out *Humphrey's Executor*. I think it said removal protections for multi-member agencies, David, correct me if I'm wrong here, that do not exercise substantial executive power, may be…

00:21:49.990 Noll (Rutgers Law): The way the Court puts it these days is it says that *Myers*[12], right, going all the way back to the 1920s, establishes a presumption- or sorry establishes a default rule that the President may remove appointees, and then sort of the language of *Free Enterprise Fund* and *Seila* is that we've recognized an exception to the President's authority to remove officers for multi-member agencies. That's odd, you know, depending on the case, might also exercise some adjudicatory functions or…

00:22:20.160 Estreicher (NYU Law): That to get a majority, the Court had to make a concession to multi-member agencies.

00:22:28.060 Noll (Rutgers Law): Right. And the sort of the thinking is that right?

00:22:31.460 Griffin (Bredhoff Kaiser): So.

00:22:31.820 Noll (Rutgers Law): Thinking is that's driven by a felt need to preserve the independence of the Fed. Because if you say that all boards we must have…

00:22:40.820 Estreicher (NYU Law): That is gonna..

00:22:41.470 -Noll (Rutgers Law): Removable, it will. Then the Federal Reserve Chair becomes…

00:22:44.590
Estreicher (NYU Law): Federal Chair has already indicated...

00:22:46.653 Noll (Rutgers Law): He's gonna fight it.

00:22:48.970 Griffin (Bredhoff Kaiser): And just recently the 5th Circuit had an en banc decision with respect to the Consumer Products Safety Commission[13], which is a multi-member agency, and they split 7-6, but upheld *Humphrey's Executor*. It went to the Supreme Court on a cert petition, and the Supreme court denied cert so, at least in the 5th circuit, at least for that agency and agencies that are similar, which I

[12] *Myers v. United States*, 272 U.S. 52 (1926).
[13] *Consumers' Research v. Consumer Products Safety Commn.*, No. 22-40328 (5th Cir. 2024).

think there's a good argument that the NLRB is similar in all relevant aspects in terms of a multi-member Board with staggered terms representatives of both parties. The 5th Circuit precedent would appear to be that *Humphrey's Executor* is still good law in that context.

00:23:39.820 Estreicher (NYU Law): There's also a 5th Circuit decision before the Supreme Court's decision in *Jarkesy*[14], saying that the ALJs of the SEC were unconstitutional, so we don't know where the 5th Circuit is going to end up. Let me ask you this question. A very pragmatic question, how can the President say we really believe in a strong executive. We start off with that proposition. The President is going to decide who's a member of this Board and the President's going to pick his friends or people who are allied with the philosophy of his party. At least 3 members of that Board, and I think also can pick the other 2. But there may be political constraints on the President's ability to pick friends that represent the minority party. The point is the President's in control of this process, and therefore the constitutional concern about the President being the master of the policymaking function of the executive, it actually obtains through the appointments power.

I've been around the NLRA you know, many years. It's 45 years. I don't remember. A member of the Board that was appointed by the President voicing policy disagreements with the President's party. I mean, they're an independent agency. I always say they're not independent. They can't be fired, that's true, but they know they're there to play a role. Am I missing something?

00:25:12.940 Robbins (Proskauer): There are 5 year term. There are 5 year terms that overlap administration. So.

00:25:16.710 Estreicher (NYU Law): That's true. But they're still there. So in other words, is it enough? If there's a change in office, the President may want to remove the members. Okay, I can see that.

00:25:30.480 Griffin (Bredhoff Kaiser): Yeah, but absent the President doing, I mean, the whole point in these cases is that it's the President's authority to remove. It's not some litigant's authority to raise unexercised presidential authority.

That's the key point. It seems to me, if you believe in a unitary theory of the executive. And if you believe that these independent agency board members need to be responsive to the President, then you shouldn't allow a President who has appointed people who approves of their conduct, to have his policies subverted by any litigant who's charged with an unfair labor practice- that doesn't seem to make any sense as a coherent theory of constitutional law.

00:26:19.240 Estreicher (NYU Law): Howard, do you agree with that the President has to express his desire to remove the officer? You gave us the scenario of a change in administration? Does the President of the new administration have to express disapproval with the actions of Board members as a prerequisite?

00:26:36.560 Robbins (Proskauer): I mean, this is kind of circular about the separation of [powers] injury question, and whether there's an

[14] *SEC v. Jarkesy,*No. 31-15255 (6th Cir. 2022).

immediate harm it gets back to how you view *Collins*. You know. You got a bunch of courts deciding differently as to whether that's a real harm. You know it's again- it's a non-frivolous argument. I mean, the issues of consistency
are tricky, right? I mean, you know, one of the issues about removal is whether the Board exercises executive authority at all, right- and some of these cases are paying attention as to whether this is a quasi-judicial body, or is it? Is it executive? And one of the trickier things I think, in these cases, for the Board is the 10(j)[15] authority which is delegated typically, or indeed routinely, to the [NLRB] General Counsel. But it is still with the Board. If they didn't.

00:27:29.465 Estreicher (NYU Law): Decision.

00:27:30.550 Robbins (Proskauer): Right. And so it's a little ironic. I hope you'll forgive me for being a little snarky. It's a little ironic that the NLRB's joint employer rule that was proposed in 2023, hinged on potential authority, not exercised authority. That was enough to be a joint employer. But wait, that's not enough. If the NLRB has the potential authority to seek 10(j) relief, but it delegates it, but doesn't really have that authority, I mean you know, you can get tripped up on these things.

00:27:59.360 Estreicher (NYU Law): Yes. So do you think the combination of functions is a problem, or it only becomes a problem after we've decided?

00:28:07.100 Robbins (Proskauer): I think the 10(j) thing is a difficult hump to get over.

00:28:12.340 Estreicher (NYU Law): FTC in*Humphrey's Executor* had that authority as well. There's no question about it. So I'm not sure. Do we have to overturn *Humphrey's Executor*?

00:28:22.590 Robbins (Proskauer): Well, look at the NLRB, which was modeled after the FTC. But both agencies are exercising executive authority.

00:28:38.800 Griffin (Bredhoff Kaiser): Just to be clear, you know the Supreme Court just reviewed the 10(j) process in some detail in the *Starbucks versus McKinney*[16] case, and no question was raised in that case, or even a concurrence that said that- 'Oh, there must be some problem with the Board blessing the general counsel's recommendation, and authorizing the general counsel to seek 10(j) relief'. And, moreover, the cases that have looked at - you know this is not a new argument- although it's been raised previously as a due process argument as opposed to a separation of powers argument. But it's not a new argument that somehow the way the Board is set up is problematic from a constitutional standpoint in terms of its accumulation of authority. But every circuit that has looked at this has said that the way its set up is constitutional now, maybe…

[15] Section 10(j) of the National Labor Relations Act authorizes the Board to seek temporary injunctions against employers and unions in district courts to stop unfair labor practices while the case is being litigated before administrative law judges and the Board.

[16] *Starbucks Corp. v. McKinney*, 602 U.S. ___ (2024)

00:29:44.090 Estreicher (NYU Law): Really funny about.

00:29:44.850 Griffin (Bredhoff Kaiser): …in the context of separability, you know, that may be revisited, and I get that. But the precedent as it currently stands is that the Board is perfectly constitutional given its mix of authorities.

00:29:58.130 Estreicher (NYU Law): I agree with you completely as an old administrative law professor and legislation and regulatory state professor as well. That argument has not held up for many, many years, but may be revived now. But it's an odd argument to understand, because in the NLRB context, the general counsel is going to drive these 10(j)s, that's true. The general counsel has to have authorization from the Board, delegation from the Board, but the general counsel, as you know, Dick, is the driver of these 10(j)s, and in the NLRA context the general counsel is removable at the will of the President. So it's an odd context to sort of take this argument seriously, in my view.

Let's turn to separability. So let's assume… Oh, before we do that, ALJs, we've been talking about Board members and whether the 5 members of the Board and their removability protections create a problem for the constitutionality of the National Labor Relations Board. Let's turn to ALJs, which used to be called, you know, hearing examiners. And then at some point, you know, we boosted their status, which is what our Dean does here. He makes it sound important, but he doesn't change our pay. So basically, these hearing examiners became administrative law judges. And they have like double removal protection. The Board itself has to recommend their removal, I believe, and the Board is insulated from presidential political removal. We've talked about that for now. And then, on top of that, even if the Board recommends removal, the ALJs get a hearing before the Merit Systems Protection Board. The MSPB. And they and the members of the Merit System Protection Board are themselves protected from removal.

So a number of people out there have said, you take 2 things. You take the Supreme Court's decision in *Lucia*[17]-. It was an FTC administrative law judge, but the functions are not really different, in my view from NLRB administrative judges. You take the fact that they're now officers of the United States. They're inferior officers of the United States. They don't have to be appointed by the President. They can be appointed by the head of the agency, or by a court, or the President. That the ALJs are inferior officers of the United States. You take that piece and you combine it with another piece from *Free Enterprise Fund*, which, as Professor Noll pointed out to you, involved the issue in a very different context, where we were dealing with the removal protection of the Public Company Accounting Oversight Board, they were going to make accounting policy for the entire nation, for all private companies, for all public companies I should say.

00:32:49.070

[17] *Lucia* v. SEC, 585 US _ (2018)

Estreicher (NYU Law): And, by the way, the Court recognizes that that's going to exercise substantial executive power, that, at least with respect to accounting standards for public companies.

Now we take an ALJ, and you know we love ALJs, especially when they rule for our side, our client. And you know they're not always an unalloyed joy. But you know, they're basically 1st level adjudicators. They're there to make sure that testimony is in the record, and they may make credibility assessments for the NLRB to consider. And they may rule on contumacious behavior. For sure, like, like any adjudicator anywhere in the world. How are they excising substantial executive power? If I'm right, I may be wrong. The Public Company Accounting Board concern about double for cause protection only applies where the agency is exercising substantial executive power. How is an ALJ- with all respect to the ALJs that may be in this audience or former ALJs that may be in this audience- how are they exercising substantial executive authority? Everything they do is going to be subject to NLRB review. And at the end of the day everything the NLRB does is going to be subject to court of appeals review in order to be enforced. So I'm just- help me out here, Howard, you're my man. Thank you

00:34:11.980 Robbins (Proskauer): As you said in *Lucia*, the Court gives a long description of what an ALJ does at the SEC, right. And the district court in that Alivio Medical case said, take a look at that. That looks like adjudication. Looks like what a federal judge does in a bench trial case. So I think I'd have to agree. The better argument seems to be that's not an executive authority issue. I don't think that's too facile, but maybe David or Dick disagree.

00:34:41.800 Estreicher (NYU Law): Now there are cases, *Weiner v. United States*[18]. I did a little archaeology on this issue in preparation for this webinar. You know, *Weiner v. the United States* involved an Article I court that was set up to adjudicate property claims coming out of World War II. And so it had only adjudicatory authority. But it was not an Article III Court. And the Supreme Court was dismissive of the argument that the President can bounce these people because he disagrees with them, that, in other words, there were removal protections that Congress put in place, and they don't violate the President's executive authority. Now, you might argue that *Weiner* is also favorably discussed in Justice Scalia's opinion, objecting to *Morrison v. Olson*[19]. So back to *Weiner*. But you might argue that in that case it is a purely adjudicatory function.

Estreicher (NYU Law): Now they're employees of the agency. If the agency does nothing, their decision will stand as the law. They're part of the executive function. That's the argument. They're not exclusively judicial. If they were exclusively judicial, it would be another story. I also have a policy concern with declaring ALJs unconstitutional because of their non-removability. If we have administrative law judges that are politically removable, what integrity does the adjudication have? Now? Obviously, if you like, the politics of the President, you'll be very happy with the ALJs. What if you're on the other side of that particular dispute? And the President can bounce one of these folks now he, the

[18] Wiener v. United States, 357 U.S. 349 (1958)
[19] *Morrison v. Olson*, 487 U.S. 654 (1988)

President, doesn't have to bounce them. If you know you're going to be bounced, you could be bounced, you're going to play ball, so there's a real problem with the integrity of the agency adjudication process as I see it. If, in fact it is unconstitutional to insulate them from political removal.

00:36:55.720 Noll (Rutgers Law): Well, let me let me jump in. I think, sort of the argument that *Free Enterprise Fund* applies jot for jot to ALJs. You know, I think the courts that are accepting that argument are getting a little ahead of their skis, and they're, you know, as someone who teaches the introductory class, it reminds me a little bit of when students, you know, find one passage in a case, and it says, 'Oh, two layers of removal protection is too much'. And it's as if that's the entirety of the case. But *Free Enterprise Fund*, really, the case is about the significant policymaking role that PCAOB played, and that the Court thought it was problematic. That was, you know, I think persuasively argued that that it was insulated from the President. But if you…

00:37:41.420 Estreicher (NYU Law): Acronym that we use.

00:37:42.500 Noll (Rutgers Law): Oh, sorry. PCAOB, yeah.

00:37:44.090 Estreicher (NYU Law): Public Company Accounting Oversight Board.

00:37:46.470 Noll (Rutgers Law): But you know even the strongest case for applying that to ALJs is, we all know that judges elaborate policy. We all know that sort of the way that you interpret the law, you know, contains an element of discretion, even if you accept all of that to me the stumbling point is that ALJ decisions are reviewable by the Board right, and don't become final right until the Board has an opportunity to weigh in. And so, even if you accept all of the things that the Court said in *Lucia* about the powers of an ALJ, the fact that they are subject to reversal. If the Board, which is a presidentially appointed policymaking body, disagrees with what the ALJ says takes you out of any sort of simple application of *Free Enterprise Fund*. And so the fact that you know there's these sort of short district court opinions

00:38:38.580 Noll (Rutgers Law): shutting down Board proceedings on the basis of you know what I might call the double removal protection principle, but, you know, moves very quickly in granting injunctive relief.

00:38:52.050
Estreicher (NYU Law): Let's turn to …

00:38:52.930 Griffin (Bredhoff Kaiser): Could I…

00:38:54.090 Estreicher (NYU Law): Go ahead. Dick. Sorry.

00:38:55.030 Griffin (Bredhoff Kaiser): Because I agree very strongly with what David just said. I think that it's crucial to examine what the ALJs under each particular statute do, and to his point, what the ALJs do is they issue a recommended decision. Which then, in order to become the decision of the Board, the Board has to adopt, and the Board can overturn and can agree or not agree, and then for the, for the decision to have the force of law, it has to be enforced. It's not a self-enforcing

decision at the Board level. So there are two layers. If you want to use the two layer formulation. There are 2 layers of difference between the authority of the entity that was found to be problematic in *Free Enterprise* and the authority.

00:39:48.330 Estreicher (NYU Law): I agree.

00:39:48.790 Griffin (Bredhoff Kaiser): That's right. That is true as well.

00:39:51.300 Robbins (Proskauer): For whatever reason. Except for this case yesterday argued at the 2nd Circuit, I'm not aware of the courts really digging into this issue about the process between the ALJ stage and then the Board and the fact that I think if I'm correct, that then, if nobody takes exceptions to an ALJ decision, it has no precedential value. It's really just between those parties. I think the Board has clarified that, you know, within the last 10 years or so, so.

00:40:19.820 Estreicher (NYU Law): No one takes exceptions. It's not the agency, it's not the decision of the agency. It's only I thought, when, if maybe I'm wrong, the ALJ issues a ruling a recommended decision and Findings of fact. If the Board does nothing. It is the decision of the Board.

00:40:38.090 Robbins (Proskauer): Those parties, but I think that there...

00:40:39.930 Estreicher (NYU Law): Only binding those parties?

00:40:41.440 Robbins (Proskauer): Yeah, I, Dick, correct me if I'm wrong, but I thought that the view about precedential value of an ALJ decision that there's not the same kind of deference to one as to which the Board hasn't reviewed.

00:40:51.710 Griffin (Bredhoff Kaiser): Well, I think you're right. But it's 100% the case that the ALJs, if presented with a change to Board law, will say they don't have the authority to change Board law. You can make that argument to the Board, and you're seeing that anytime a general counsel is arguing for a change in Board precedent. They have to argue it to keep the case, you know, to save it, preserve the issue. But in terms of getting it to the Board, the ALJ is not going to issue a decision disagreeing with the extant Board law.

00:41:28.230 Estreicher (NYU Law): That's another important point, vis-a-vis, the *Lucia* point.

00:41:31.680 Griffin (Bredhoff Kaiser): And also in *Lucia* there was an issue of who appointed the judges, and there it was the head SEC judge, not the members of the SEC. Whereas the Board, it's the Board members collectively who appoint the judges, and they are to your point earlier, Sam, the heads of the agency, so that appointment process is constitutional.

00:41:54.510 Estreicher (NYU Law): Fantastic. I need to take a pause for one second, that is, for folks that are interested in CLE credit. [CLE code read].

00:42:03.600 Estreicher (NYU Law): All right. I now want to talk about remedy. Assume there are these constitutional problems with removability? What's the appropriate remedy? This raises the question of separability? I, personally do not believe anything is lost by saying that the President's appointments to the NLRB can be removable at will. I know that's not what the statute says, but if we excised removal protection? Ad I think if you see, let me put it this way, if you are of the same point of view as SpaceX, and you think that these removability protections are preventing you from having a fairly constituted proceeding, and the district court agrees.

It would seem to me that separability is incumbent. By the way, we've also looked at the NLRA, and many people don't look at the statute anymore. There is an an express NLRA separability provision. So I don't know if it goes this far, but it could be invoked. We need to look at it. We just sever. I, personally don't think anything is lost from a policy standpoint.

If we just sever the removal protections for the Board members, not for the ALJs, but for the Board members.

So what is the proper remedy here? How should we think about it?

00:43:20.830 Noll (Rutgers Law): Well, I'll jump on. You know. The law here comes out of *Free Enterprise Fund*, where you know the exact same arguments were made right because PCAOB Board members were improperly appointed. Everything that they did was null and void, and you know the the petitioners there were sorry the respondents there were asking for a sort of very strong remedy, a declaration that the entire statute, or the entire provision of Dodd-Frank, was unconstitutional, and so on, and so forth. The Court sort of offered a very strong recitation of unitary executive theory but issued a very narrow remedial ruling, which is, you know, in essence, that the remedy has to be tailored to the constitutional injury, and so in *Free Enterprise Fund*, the Court says right, the appropriate remedy is to excise, not enforce the removal.

00:44:12.720 Estreicher (NYU Law): Is the appropriate remedy.

00:44:14.160 Noll (Rutgers Law): At the second level. And so you know what you're seeing, you know Dick and Howard can speak to this more because they're closer to the cases that are being litigated is, I think you're seeing a real divide emerge between the lower courts, which are jumping in with big remedies and the kinds of remedies that the Supreme Court has upheld in these separation of powers, cases.

00:44:34.780 Estreicher (NYU Law): What did the Supreme Court do in Bowsher[20] Did it? Simply did it just excise the removal issue.

00:44:40.000 Noll (Rutgers Law): Oh, that's not fair to ask me to remember the facts of Bowsher.

00:44:43.910Estreicher (NYU Law): I think generally the Court finds a problem with removability, they've excised it.

[20] Bowsher v. Synar, 478 U.S. 714 (1986).

00:44:50.720 Noll (Rutgers Law): And you know you see it again in Collins. The Court effectively converts the high level appointees into appointees who can be removed at will by the President.

00:45:02.590 Estreicher (NYU Law): And.

00:45:03.050 Griffin (Bredhoff Kaiser): There. There's very to your point, Sam and I agree with David. There's a very broad severability provision. It's called separability, as opposed to severability provision. It's Section 16 of the NLRA, and it seems to me that even though I feel very strongly that these provisions are not unconstitutional, and they are not to be demonstrated to be unconstitutional by the litigants as opposed to the President exercising the authority at the end of the day.

If somebody finds, if the Supreme Court finds they are, the answer is to sever the restriction on removability from the statute and the agency proceeds. Now it proceeds with potentially the threat of removal, which is different. But there have been before Board members who were very concerned about being reappointed, who made tough decisions and then weren't reappointed, and that this is only kind of a variation on that theme, it seems to me. But…

00:46:11.400 Noll (Rutgers Law): So let me just follow up. If Amazon or Starbucks goes to district court, as they're allowed to do under *Axon* and says, you know we have a problem with, say, the removal protections that ALJs have, are you saying that it's an adequate remedy for the district court to declare or to hold, that the President has authority to remove Board members, and that that addresses the constitutional injury.

00:46:36.530 Robbins (Proskauer): What are you talking about in an injunction context? Because then it's I mean in the *SpaceX* case, I think the court there said yeah, on a preliminary injunction it's premature to talk about separability. Right? I mean, we just need to do this until that ultimate decision.

00:46:52.400 Estreicher (NYU Law): The court issued the preliminary injunction in *SpaceX*. It's premature. So, since there are no factual issues here, I don't know why you don't decide the separability issue at the same time you decide whether there's a basis for an injunction.

So it goes back to the point that you made, Howard, that what is the injury that's recognized in *Axon*? An injury that is fully remedied by the fact you've been allowed to bypass the statutory procedure? Or is it an injury that's not remedied until you basically tell the agency that it cannot continue to function as constituted?

00:47:32.390 Robbins (Proskauer): And but you raise an interesting issue, you know, in an injunction. Is it appropriate to get the relief that you're ultimately seeking in a preliminary decree?

00:47:40.500 Estreicher (NYU Law): Well, the concern is that the district courts. One reason we're seeing a lot of flip-flopping in the courts is that district courts have different points of view, and you can to some extent pick your district court, right or left, Democrat or Republican. And you know, issuing an injunction, will have a significant

interrorem effect on the operation of these agencies. And you know it's a- it's a way of forestalling the operation of a legitimate agency that has been properly appointed under the appointments clause. So it's a concern. Are there other issues.

00:48:16.080 Griffin (Bredhoff Kaiser): This. This goes to the whole issue of why these objections are being interposed in the first place, with respect to the merits or whether they are essentially efforts to delay legitimate proceedings in the hope that that will advantage the clients of the people who are advancing these objections, and just as an example, and I hate to keep returning to the recess appointment issue.

Griffin (Bredhoff Kaiser): But I was, you know, I had a little bit of a personal interest in that. There in *Noel Canning* you had a black letter law, labor law, violation. It went up to….

00:48:59.140 Estreicher (NYU Law): And in the underlying, in the actual underlying…

00:49:03.420 Griffin (Bredhoff Kaiser): Yeah. The underlying unfair labor practice was the refusal to sign a collective bargaining agreement that had been agreed to, which, I think is pretty black letter law violation. It went up to the Supreme Court. The Supreme Court said the recess appointees were, you know, in that case Terry Flynn and Sharon Block were not legitimately appointed, and therefore it had to go back down. A reconstituted Board appropriately appointed found the violation, and it went back to the D.C. Circuit, and the violation was found. So there wasn't any question about the underlying merits of the unfair labor practice. And that's true in many of these cases, these objections are interposed solely for purposes of delay, as far as I'm concerned

00:49:50.250 Estreicher (NYU Law): Howard, you want to speak to that?

00:49:52.300 Robbins (Proskauer): Well, that's a terribly cynical view.

00:49:56.930 Estreicher (NYU Law): It's, its news to me that lawyers do things and make arguments they don't necessarily think are present.

00:50:07.100 Robbins (Proskauer): No, but that's what…

00:50:08.610 Estreicher (NYU Law): Policy.

00:50:09.730 Robbins (Proskauer): But in all seriousness, I mean, I think there's a larger agenda here which you can agree with or not about the powers of these administrative agencies, and whether *Humphrey's Executor* should be revisited. I mean, there are real issues here.

00:50:25.010 Estreicher (NYU Law): Absolutely.

00:50:25.821 Robbins (Proskauer): You know, there's a case that just got filed on behalf of I think it's on behalf of a Starbucks employee in Washington about separation of powers. That's not an injunction case. Right? That's not a delay case. That's to tee up these substantive issues. So I think- I'm not going to speak to any particular case, but I think it's too much to say this is all about delay. There are real arguments being made about…

00:50:52.850 Estreicher (NYU Law): Yeah, you'd agree, Howard, is that *Axon*, as it's being interpreted, creates too easy a way to disrupt the underlying proceeding. You agree with that? I know you're an employer's counsel.

00:51:08.210 Robbins (Proskauer): Look. It creates great delay. And that's a problem on all fronts. There are times that you know, employers wait eons for the Board to do anything, and I know they're underfunded and I get it. But delays are a problem all around. I mean, we can throw stones at each other about that forever.

00:51:27.450 Estreicher (NYU Law): Let's not do that. Another issue about the NLRA. If, in fact, let's assume hypothetically, that again I think the Board members removal protection is not long for this earth. I usually don't like to make short term predictions. I'll tell you what happens in 20 years. 30 years, depending on my life expectancy, but on this one I'm willing to bet that. So there's going to be either an overruling of *Humphrey's Executor* or a substantial diminishment of it by saying that *Humphrey's Executor* only works with a multi-member agency that does not exercise significant executive authority, in which case I don't think there's a multi-member agency out there that doesn't excise some modicum of significant executive authority.

But on the ALJs, let's assume now that just for purposes of discussion that the President can remove an ALJ based on disagreement with what the ALJ has been ruling. I don't see how the ALJ process has any more - integrity for one side of the dispute. And you know, the functional, the practical problem is the NLRB does not have the alternative course of proceeding that the SEC had in *Jarkesy*. The SEC, if you knock out the administrative tribunal they can go to court. The NLRB does not have the authority under this statute, as is presently constituted, to go into court except in the 10(j) context. Any thoughts on that point?

00:52:58.700 Griffin (Bredhoff Kaiser): Well, I think that that, should that happen, all parties will ultimately rue the day that a process with a very strong, capable ALJ corps that calls it the way they see it with review that's limited only in terms of credibility and certain other aspects when it goes up to the Board. Any substitute for that process is going to be worse. In my humble opinion, anybody who thinks you can do better by going into district court and getting a timely resolution, ought to talk to people who are plaintiffs' Title VII lawyers, or ought to talk to people who represent plaintiffs in duty of fair representation cases, and see how efficient the district courts handle civil cases when their criminal dockets are overloaded, and they have obligations to handle all kinds of other matters. Not to mention the lack of expertise with respect to labor law questions that is currently present in the cohort in the district courts. There are very, very few district court judges who have any familiarity with the intricacies of labor law. So I think to your point, Sam, without predicting whether or not it's going to happen, if it does, people will rue the day on both sides.

00:54:35.490 Estreicher (NYU Law): I actually think employers will rue the day as well if the National Labor Relations Act is off the books. Because in the old days the states were quite opposed to collective action and we now have very different states with a different orientation on labor issues. And if Taft Hartley preemption drops away-it's a new game- and secondary boycott restrictions drop away. I shouldn't be making predictions but I think I think there's an argument that things can get worse before they get better.

On the jury trial issue. Is there a jury trial issue here in light of SEC v. *Jarkesy*? *Jarkesy* held that because Sarbanes-Oxley gave the SEC authority to adjudicate, to resolve securities, fraud issues, and gave them the authority to do it in administrative ALJ proceedings, that violated the Seventh Amendment to a right to a civil jury. And because securities fraud is quite analogous, says the Supreme Court, to common law fraud. Now we know that the general counsel of the NLRB, in her remarkable ingenuity, may have come up with a new damages-light claim. Because this, the Board's authority was entirely equitable. In other words, you can reinstate the employee, and with back pay there was no damages authority. Now there may be some damages authority, so the question is.

00:56:20.970 Griffin (Bredhoff Kaiser): You're speaking of the *Thryve*[21] case. The *Thryve* case is worded as a make whole remedy. We know that the Board does not have authority to do what the SEC could do in *Jarkesy*, which is impose penalty-type damages. The Board can only do, make whole remedies, and if the Board exceeds that authority, then there are cases, plenty of them, where, if the Board exceeds its remedial authority and goes to something that's punitive as opposed to remedial, then that's a decision in excess of the Board statutory authority and the court of appeals will revise the remedy and say that. So it's a statutory question. It doesn't present a Seventh Amendment jury trial, and *Jones and Laughlin Steele*[22] was explicit on that question. In *Jarkesey*, the Supreme Court cited *Jones and Laughlin Steele* without in any way casting aspersions on that decision. And so I don't think there's a Seventh Amendment question here at all.

00:57:33.990
Estreicher (NYU Law): Because it's a make whole remedy. Howard, any thoughts here?

00:57:36.290 Robbins (Proskauer): Well, I mean, I think Dick is right. The problem is that the NLRB has extended what the definition is of" make whole" to things that feel like penalties, the foreseeable harm issue. But again, the remedy there is statutory, which it is. It doesn't mean that structurally, there's a Seventh Amendment issue here. It just means that as applied, you've gone too far, Dick. I think that's what you were.

00:58:02.980 -Griffin (Bredhoff Kaiser): Yeah, that's.

00:58:03.780 Noll (Rutgers Law): Right.

00:58:04.180 Griffin (Bredhoff Kaiser): That's right.

[21] Thryve, Inc. 372 NLRB No. 22 (2022).
[22] *NLRB v. Jones & Laughlin Steel Corp).*

00:58:04.630 Noll (Rutgers Law): And so the Seventh Amendment, as it's interpreted in *Jarkesy*, becomes a backdrop for the statutory analysis rather than, as you saw in *Jarkesy*, right, a freestanding constitutional argument against it.

00:58:16.600 Estreicher (NYU Law): What do you mean by a backdrop? What do you mean by a backdrop to the constitutional analysis? What do you mean?

00:58:21.750 Noll (Rutgers Law): So you'd be saying, does the Board under the NLRA have authority to order what some would say are, you know, compensatory like damages, and you would say right? Precisely because that would trigger a Seventh Amendment right to a jury trial. We read the statute as…

00:58:39.640 Estreicher (NYU Law): That's a possible option.

00:58:40.770 Noll (Rutgers Law): That's a concept.

00:58:42.190 Griffin (Bredhoff Kaiser): Constitutional avoidance argument.

00:58:44.610 Estreicher (NYU Law): Courts will not go as far as the general counsel wants them to go.

00:58:49.886 Noll (Rutgers Law): Just note something from the chat function that relates to our earlier discussion. A commentator notes that the NLRB has held that when the Board adopts findings of an ALJ, in the absence of exceptions, the findings are not considered precedent for any other case, and that's from the *Colgate Palmolive*[23] case.

00:59:10.820 Estreicher (NYU Law): This bears on what sort of executive authority the ALJ is actually exercising? Any. I don't see any other questions.

00:59:21.180 Noll (Rutgers Law): There's another provocative question, which is that won't the Supreme Court just find a way to keep all the restrictions on labor while ruling the benefits of the NLRA unconstitutional. Is that the play here? Is it.

00:59:33.790 Estreicher (NYU Law): I don't. I can't predict that far out.

00:59:35.780 Noll (Rutgers Law): Well.

00:59:36.600 Griffin (Bredhoff Kaiser): I mean there is a statute, the Norris- LaGuardia Act[24] that prevents federal courts from issuing injunctions. What I took, and some states have little Norris-LaGuardia Act that prevent injunctions in labor disputes. And so, if what you did was you did away with the NLRA protections, but you didn't address the Norris LaGuardia Act, you probably would have limited ability to restrain parties, certainly to restrain…

01:00:07.640 Estreicher (NYU Law): The NLRA is off the...

[23] *Colgate Palmolive Co.,* 323 NLRB 515 (1997).
[24] 29 U.S.C. §101 et seq/ (1932).

01:00:08.730 Griffin (Bredhoff Kaiser): Organizations.

01:00:10.070 Estreicher (NYU Law): If the NLRA is off the books we go back to, how the teamsters were able to organize the trucking industry: "hot cargo: clauses, secondary boycotts and no Taft-Hartley preemption.

Now, that's not necessarily how things are going to resolve. But then preemption becomes less important to the pro-union point of view, because many of these states are supportive of collective action, they were not in the past. So that's something to think about as well.

01:00:38.580 Griffin (Bredhoff Kaiser): Yeah. And I think I mean, and I don't want to step on Howard's, you know, area here. But it seems to me that given the way interstate commerce works and the way most employers work, that the theory is that you would prefer a national uniform framework to 50 different states going 50 different ways, even if some of them are going to be more favorable to you, and some of them are going to be more favorable to labor. The historic view has been a uniform national framework is preferable than the vagaries of.

01:01:17.830 Estreicher (NYU Law): May have to go back to an old piece of constitutional jurisprudence. The dormant commerce clause which is..

01:01:27.090 Robbins (Proskauer): Let me look there. We're all coming into our crystal ball here. There are different ways in which the razor could be wielded here. Right. I mean, you could leave section 301 intact, and have federal courts deal with things rather than state courts. I mean, there are a lot of different flavors which all have their upsides and downsides here.

01:01:48.340 Estreicher (NYU Law): That's why it's very hard to make predictions which I generally avoid. Any final words? I don't see any questions so we've resolved all the questions. Any final words from the three of you?

01:02:02.690 Griffin (Bredhoff Kaiser): Could I ask David a question given his expertise? And he, he clearly is a close observer of the Supreme Court. What is your prediction about the fate of multi-member agencies? Do you think that this notion that *Humphrey's Executor* is going to be a dead letter is accurate? Or do you think there is some notion that in order for the President to faithfully execute the laws that Congress passed, Congress can assure that there are adjudicators who are not subject to arbitrary and capricious actions by the President.

01:02:43.650 Noll (Rutgers Law): Well, a couple of things on that, I think, sort of, you know, the political science research confirms this sort of the idea of a Board that's actually independent of the President, you know, reality has sort of caught up with us, and people have found that even when you have a formally independent Board like the FTC or the NLRB, the degree of independence in terms of policy from the President is not that significant. The exception, of course, is the Federal Reserve, which, under presidents of both parties, exercises genuine independence. With respect to, you know, setting the federal funds, rates, and other matters. And so, you know, I think on the one hand, you know, sort of as Sam says, not a lot is lost if you convert the Board into an executive agency. But I would imagine that the sort of the doctrinal puzzle the

Justices are thinking through is can we do that consistent with our general view of presidential power without putting the Fed at risk. And the theories that I've seen for preserving the Fed, personally, I'm not persuaded by any of them. There's an argument that the Fed doesn't exercise executive power, and various, "the Fed is different" arguments. And so I think, sort of you know what we're likely to see is that the court, avoiding the multi-member agency question because of fears about how it will affect the Fed and the Court's entirely correct recognition that a Fed independence is compromised. It think that would be an enormously destabilizing decision. So I think I part ways from Sam. I think the Court's going to continue to avoid the issue. And it may be a situation where you know. Maybe the 5th Circuit tries to push it, and at some point the Court can't avoid taking it up, but I don't think the Court's in a rush to get there.

01:04:43.150 Estreicher (NYU Law): One reason not to make short-term predictions, but I think David's point's a very good one. It would have to be done in some way to preserve the Federal Reserve.

01:04:52.450 Griffin (Bredhoff Kaiser): Yeah, no, I appreciate very much that because, you know, when we are immersed in labor Law and the National Labor Relations Act, it's sometimes hard to see the broader picture and the way what might be moving the court. And certainly, if we're making arguments to preserve protections under the National Labor Relations Act invoking the potential downside risk in the direction of the Fed may be a useful argument to make, so I appreciate very much that thought. I learned. You educated me.

01:05:29.670 Estreicher (NYU Law): Trying to think of another question. I think we've covered everything. Dick, haven't we? Or is there something else? What about the obligation of lawyers? Lawyers that have derived all of their bread and butter from the NLRA seem to be quick to join these litigations challenging the NLRA. Now. Lawsuits are directed by clients, I mean, but if lawyer want clients and clients is the big problem for lawyer welfare. They're a necessary evil for lawyers, or maybe a benefit. Is there a professional responsibility point here, Dick?

01:06:21.230 Griffin (Bredhoff Kaiser): Well, I'll just return to the- I keep using the recess appointment situation because I think it teaches some lessons. You know. The recess appointed Board issued something like over 600 decisions. Only 200 of those, or 195, or some less than 200 ended up being challenged and going to the courts of appeals, and having to be decided. What that meant was that there were a majority of litigants who decided, for whatever reason, to comply with the Board order, or to settle the case, or to do something like that. And I think that that's going to be the case here, but not in every instanc. Is it going to be in someone's client's interest, whether it's a union, whether it's an employee, whether it's an employer to raise these issues, and you're going to have to be guided by your client's wishes? But certainly I don't think there's any obligation to argue that the Act is unconstitutional. When there are so many arguments to the contrary, and as far as I'm concerned, meritorious arguments.

01:07:31.340 Robbins (Proskauer): Well, just to play devil's advocate on that which is given, that this is a real question, and with the possibility of *Humphrey's Executor* being revisited, and you don't know what the Court will do. Not to preserve this argument, right, even if you

don't seek an injunction, but not to preserve the argument seems imprudent, I mean, why not make it?

01:07:52.060 Estreicher (NYU Law): I agree with Howard on that one, for sure. Preserve the argument. Otherwise you're going to look like a total idiot down the road.

01:07:59.310 Griffin (Bredhoff Kaiser): My only point is…

01:08:00.290 Estreicher (NYU Law): That much of that.

01:08:01.950 Griffin (Bredhoff Kaiser): To resolve this thing without fighting every inch of.

01:08:06.230 Estreicher (NYU Law): That as well. Both of you are right.

01:08:10.400 Griffin (Bredhoff Kaiser): Some say yes, some say no. I tend to agree.

01:08:12.780 Estreicher (NYU Law): Yes, David, any further remarks from you?

01:08:16.590 Noll (Rutgers Law): I think we covered it.

01:08:39.359 Estreicher (NYU Law): All right.

Good is out. Thank you very much, folks. I think it was a great. We have it on tape, and I think it was a great conversation. Thank you very much. Each one of you.

01:08:51.840 Griffin (Bredhoff Kaiser): Thank you.

01:08:52.350 Robbins (Proskauer): Thank you.

01:08:52.729 Griffin (Bredhoff Kaiser): I'm very happy to have participated.

[END]