

NLRB Firing May Need Justices' Input On Removal Power

By **Blythe Lovinger and Alex Seidenberg** (March 31, 2025)

President Donald Trump did not waste any time shaking up the labor and employment law landscape. On Jan. 27, he removed National Labor Relations Board Democratic member Gwynne Wilcox, who was serving a five-year term set to expire in August 2028. This move was completely unprecedented.

Never before, since the NLRB's founding 90 years ago, has a president removed a board member. Trump's removal of Wilcox is particularly controversial because it eliminated the board's quorum, preventing it from issuing decisions.

Wilcox's firing, together with the removal and same-day firing of NLRB general counsel Jennifer Abruzzo — who was a President Joe Biden appointee serving a four-year term set to expire in July — immediately disrupted the expansive pro-labor agenda under Biden, and paved the way for a pro-management agenda under Trump.

Trump's termination of Wilcox has prompted a further examination of the president's executive power and removal authority under Article II of the U.S. Constitution.

Wilcox swiftly filed a lawsuit in federal court against Trump challenging her termination and the president's power to remove officials of independent federal agencies established by Congress.

This lawsuit is sure to be closely watched, as it seems likely to reach the U.S. Supreme Court and cause the justices to examine a 90-year-old precedent that has upheld the constitutionality of statutory protections that limit the president's removal authority.

Wilcox sues Trump.

On Feb. 5, Wilcox filed a lawsuit in the U.S. District Court for the District of Columbia against Trump and current NLRB Chair Marvin Kaplan, challenging her dismissal as unlawful and seeking injunctive relief to return to her position.

In *Wilcox v. Trump*, Wilcox alleges that Trump violated Section 3 of the National Labor Relations Act, which allows for the removal of NLRB members — who are appointed by the president "with the advice and consent of the Senate" for staggered five-year terms — only "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."^[1] This is unlike the general counsel, who can be removed for any reason.

Wilcox's legal challenge relies on *Humphrey's Executor v. U.S.*, a long-standing Supreme Court precedent in a case involving the Federal Trade Commission that held that the president's power to remove officers of quasi-legislative and judicial agencies could be limited by express statutory conditions.^[2]

Since 1935, it has reinforced the principle of separation of powers and protected the autonomy of independent federal agencies from executive overreach.



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In her complaint, Wilcox asserts that "Congress has relied on that precedent for ninety years in structuring independent agencies, and abandoning it now could cast a cloud over a wide variety of agency decision-making." [3]

On Feb. 10, Wilcox filed an expedited motion for summary judgment, seeking a declaration that her termination was unlawful and an injunction requiring her immediate reinstatement to the board. Wilcox argued that her removal was unlawful under the NLRA, and further, that Congress has the authority to impose limits on the president's removal power, as supported by *Humphrey's Executor*.

Trump argued that the restrictions on the president's removal authority are unconstitutional as they are inconsistent with the executive power vested in the president. He also argued that the Supreme Court has reaffirmed the president's power to remove individuals who wield executive power on his behalf, and that the exceptions to the president's removal power, as set forth in *Humphrey's Executor*, do not apply.

The district court sides with Wilcox.

On March 6, after briefing and a hearing, U.S. District Judge Beryl A. Howell issued an order granting summary judgment in favor of Wilcox. The court declared Wilcox's termination unlawful under the NLRA and that Wilcox remains a member of the board until her term expires, reinstating Wilcox to her position unless she is terminated beforehand pursuant to the limitations under the NLRA.

In a scathing 36-page decision, Judge Howell agreed with Wilcox and noted that:

The President's interpretation of the scope of his constitutional power — or, more aptly, his aspiration — is flat wrong. The President does not have the authority to terminate members of the National Labor Relations Board at will, and his attempt to fire plaintiff from her position on the Board was a blatant violation of the law. [4]

The court examined the constitutional framework and separation of powers issues, emphasizing that the U.S. Constitution does not explicitly grant the president absolute removal power. It further explained that the constitutionality of removal protections for members of independent agencies, like the NLRB, are supported and have been expressly upheld in Supreme Court precedent.

The court relied heavily on *Humphrey's Executor* and found that the NLRB, which closely resembles the Federal Trade Commission, is a multimember body designed to operate independently of the president's direct control.

Judge Howell wrote, "[t]hat Congress can exert a check on the President by imposing for-cause restrictions on the removal of leaders of multimember boards or commissions is a stalwart principle in our separation of powers jurisprudence." [5]

The court rejected the argument that the NLRB exercises substantial executive power that would exempt it from such protections.

The court also distinguished Wilcox from the Supreme Court's 2020 holding in *Seila Law LLC v. Consumer Financial Protection Bureau*. In its ruling, the Supreme Court interpreted *Humphrey's Executor* and held that the leadership structure of the CFPB — an agency led by a single director — which restricted the president's ability to remove the director only for

cause, violated the separation of powers doctrine.[6]

According to Judge Howell, "Seila Law made key distinctions between single-head offices and multimember boards or commissions that reinforce why placing restrictions on removal of leaders of the latter is not problematic under our Constitution." [7]

In closing, Judge Howell remarked, "[a]n American President is not a king — not even an 'elected' one — and his power to remove federal officers and honest civil servants like plaintiff is not absolute, but may be constrained in appropriate circumstances, as are present here." [8]

Trump quickly appealed and sought a stay of the district court's order. Judge Howell denied Trump's motion to stay on March 8.

On March 10, Trump filed an emergency motion with the U.S. Court of Appeals for the District of Columbia Circuit, seeking a stay pending appeal of the district court's order.

The emergency stay motion argued that "statutory restriction on the President's removal power is unconstitutional," and that "Wilcox will not suffer irreparable harm in the absence of immediate reinstatement." It further argued that "the balance of the equities and the public interest favor a stay," and specifically that "the relief Wilcox obtained — an order requiring the President to reinstate a person he has chosen to remove from office — is extraordinary and virtually unheard of." [9]

The D.C. Circuit sides with Trump.

On March 28, after convening to hear oral arguments in a consolidated appeal with a similar case, the D.C. Circuit granted Trump's emergency stay motion of the district court's order. Consequently, Wilcox's termination was deemed lawful as her legal challenge continues.

The similar case, *Harris v. Bessent*, involved the president's removal of Merit Systems Protection Board Chair Cathy Harris, whose removal, like Wilcox's, was deemed unlawful by the district court.

U.S. Circuit Judges Justin R. Walker, a Trump appointee, and Karen LeCraft Henderson, a George H.W. Bush appointee, wrote separate concurrences. U.S. Circuit Judge Patricia A. Millett, an Obama appointee, dissented.

Judge Walker expressed that the government is likely to succeed in showing that the statutory removal protections are unconstitutional for NLRB members, like Wilcox, and that "the NLRB and the MSPB 'exercis[e] substantial executive authority,'" [10] which Congress cannot restrict the president's removal authority over.

Judge Henderson mostly agreed with Judge Walker, but explained that she viewed "the government's likelihood of success on the merits as a slightly closer call" and that "reasonable minds can — and often do — disagree about the ongoing vitality of the *Humphrey's* exception." [11]

On the other hand, Judge Millett strongly dissented, writing that "[t]he Supreme Court's decisions in *Humphrey's Executor* and [*Wiener v. U.S.* in 1958] squarely foreclose the government's arguments on appeal," and added that her colleagues' "opinions voting to grant a stay rewrite controlling Supreme Court precedent and ignore binding rulings of this

court, all in favor of putting this court in direct conflict with at least two other circuits." She also called the stay decision "unprecedented" and a "wholly unwarranted use of this court's stay power."^[12]

Within hours of the decision, Wilcox filed a motion for an emergency administrative stay of the D.C. Circuit's order, which would allow Wilcox to expeditiously file a petition for initial en banc review. According to Wilcox, en banc review is warranted to address the D.C. Circuit's decision, which conflicts with Supreme Court precedent and other circuit rulings.

The D.C. Circuit quickly denied Wilcox's stay motion on March 30.

At least for now, the D.C. Circuit's order granting Trump's emergency stay motion marks a significant victory for the president, and signals that the D.C. Circuit will likely side with the government on the merits.

If so, the Wilcox case will almost surely be appealed to the Supreme Court, where the justices will have an opportunity to further examine and clarify the limits, or lack thereof, of the president's removal powers and the scope of Humphrey's Executor.

The NLRB loses its quorum again.

In the near term, the D.C. Circuit's decision strips the board of a quorum. As Judge Millett noted, this means the board cannot decide the hundreds of cases pending before it. Thus, uncertainty once again looms over the board's ability to operate.

After Trump terminated Wilcox on Jan. 27, the board was left with only two members: Democratic member David Prouty and Kaplan, a Republican whom Trump appointed as chair.

Under the NLRA, as clarified by the Supreme Court's 2010 ruling in *New Process Steel LP v. NLRB*,^[13] the board must have a three-member quorum in order to issue decisions.

With only two members from Jan. 27 until the district court's decision on March 6, the board was unable to adjudicate disputes and issue decisions.

By the D.C. Circuit's order, Wilcox will not be able to serve as a board member unless her termination is deemed unlawful — either by the D.C. Circuit or the Supreme Court — even though she had briefly returned to her position for a few weeks.

As Judge Millett noted, "nothing obligates the President to appoint replacement members," which could render the board inoperable for an extended period.

While the D.C. Circuit has seemingly paved the way for the Trump administration to prevail in Wilcox's lawsuit, the NLRB has already started rolling back Biden-era labor policies. We can expect this trend to continue as the general counsel sets and oversees the enforcement of management-friendly federal labor policy.

On Feb. 14, NLRB acting general counsel William Cowen, a former Republican board member, rescinded a number of memos issued under Abruzzo.

Among them were controversial guidance regarding severance agreements, such as in the 2023 *McLaren Macomb*^[14] decision; noncompete agreements; and the 2023 decision in *Cemex Construction Materials Pacific LLC*,^[15] which modified the union

election framework and made it more challenging for employers to respond to requests for union recognition.

While general counsel memos are not binding law — although they can contribute to decisions that modify or reverse existing board precedent — they are used to instruct field offices of the general counsel's priorities, and are also informative as to the board's policy and enforcement agenda.

While rescinding these memos was expected, it is an important lens into how federal labor law will likely change under the Trump administration, and employers should take note.

What's next?

Without a quorum, a core function of the board has been stymied as it cannot issue decisions and set legal precedent. This will likely lead to a backlog of cases that will continue to accumulate, potentially for an extended period of time. However, underlying cases will proceed as usual.

The board's administrative law judges will still issue decisions on unfair labor practice cases, and regional directors will continue to process petitions for election.

As it stands, a quorum will only be restored if Wilcox is successful on the merits before the D.C. Circuit — which seems unlikely given its emergency stay order — or the Supreme Court.

After a win at either court, the president could always appoint a replacement board member before the end of his term and restore the quorum, but he has no obligation to do so and may choose not to.

The Wilcox case, which some view as merely a vehicle for the Supreme Court to reconsider Humphrey's Executor, will likely have a sizable impact in both defining the scope of the president's removal power, and informing future legal challenges by officials in multimember agencies established by Congress.

Humphrey's Executor has historically protected multimember bodies, but it remains to be seen how much longer it will continue to do so.

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[1] 29 U.S.C. § 153(a).

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

[3] Compl., Wilcox v. Trump, No. 25-cv-334 (D.D.C. filed on Feb. 5, 2025) (ECF No. 1).

[4] Memorandum Opinion, *Wilcox v. Trump*, No. 25-cv-334 (D.D.C. filed on Mar. 6, 2025) (ECF No. 35).

[5] *Id.*

[6] *Seila Law LLC v. Cons. Fin. Protection Bureau*, 591 U.S. 197 (2020).

[7] Memorandum Opinion, *Wilcox v. Trump*, No. 25-cv-334 (D.D.C. filed on Mar. 6, 2025) (ECF No. 35).

[8] *Id.*

[9] *Wilcox v. Trump*, No. 25-5057 (D.C. Cir. filed on Mar. 10, 2025) (ECF No. 2104700).

[10] *Wilcox v. Trump*, No. 25-5057 (D.C. Cir. filed on Mar. 28, 2025) (ECF No. 2108335).

[11] *Id.*

[12] *Id.*

[13] *New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674 (2010).

[14] *McLaren Macomb*, 372 N.L.R.B. No. 58 (2023).

[15] *Cemex Const. Materials Pacific, LLC*, 372 N.L.R.B. No. 130 (2023).