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Fifth Circuit Expresses Significant Doubt on NLRB's Constitutionality as Structured

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On August 19, 2025, the Fifth Circuit ruled on consolidated appeals stemming from preliminary injunctions sought by-and granted to-three companies challenging the National Labor Relations Board's ("NLRB") structure. Specifically, SpaceX, Energy Transfer, and Findhelp-all of whom faced unfair-labor-practice challenges-sought preliminary injunctions preventing NLRB action by arguing that the dual for-cause removal protections for both NLRB Board Members and Administrative Law Judges ("ALJ") likely violate the U.S. Constitution.

Under the NLRB's current structure, the President's ability to remove Board Members and ALJs is limited; the President may remove Board Members for "neglect of duty or malfeasance in office, but for no other cause,"[1] and he or she may remove ALJs "for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board."[2] Relying on its prior decision in *Jarkey v. Sec. & Exch. Comm'n*, wherein it concluded that identical removal protections for SEC ALJs were unconstitutional, the Fifth Circuit concluded that as inferior officers, the two layers of for-cause protection weaken the President's removal power, and thus, the control necessary to ensure that the laws are faithfully executed.

The court also concluded that because Board Members "execute the [National Labor Relations Act] through administrative, policymaking, and prosecutorial authority," the limitations on their removal are "constitutionally suspect under modern separation-of-powers doctrine."[3] In doing so, the court compared the NLRB to other boards that are politically divided along partisan lines. For instance, the court specifically noted that the FTC is a multimember board with a staggered appointment schedule that allows the President an opportunity to shape the FTC's leadership. In contrast, the President may fill four of the five NLRB Board seats with members of his or her own party, thereby undermining the "independence" rationale in *Humphrey's Executor*, a case that the Supreme Court has refused to extend to agencies that are not a mirror image of the FTC.

The Fifth Circuit also affirmed the lower courts' determination that the three companies faced the possibility of irreparable injury; indeed, the court concluded that there was a "here-and-now injury of being subjected to unconstitutional agency authority."[4] The court also noted that "[w]hen an agency's structure violates the separation of powers, the harm is immediate-and the remedy must be, too."[5]

Finally, the court concluded that the balance of the equities supports the lower courts' preliminary injunctions. According to the court, the Government suffers "no cognizable injury when a court halts unlawful agency action," "[n]or does the public interest suffer when an unlawful agency structure is prevented from subjecting countless individuals and companies to unconstitutional proceedings."[6]

The Trump Administration has been rather hostile towards the NLRB since the start of his second term, focusing on its structure rather than making appointments to reposition it from a policy perspective. In fact, for much of 2025, the NLRB has been unable to operate since it does not have a quorum. And, while the Supreme Court expressly avoided answering the question of constitutionality of the NLRB in *Trump v. Wilcox*, wherein the Court stayed an injunction that barred President Trump from removing NLRB Board Members, this decision in the Fifth Circuit means the Court is likely to have to rule on the NLRB's constitutionality sooner rather than later.

[1] 29 U.S.C. § 153(a).

[2] 5 U.S.C. § 7521(a). The Merit Systems Protection Board is an independent agency that decides federal employee appeals from agency actions.

[3] *Space Expl. Techs. Corp. v. Nat'l Lab. Rels. Bd.*, No. 24-10855, 2025 WL 2396748, at *10 (5th Cir. Aug. 19, 2025).

[4] *Id.* at 13. (quotation omitted).

[5] *Id.* at 2.

[6] *Id.* at 14 (quotation omitted).