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NLRB Likely Unconstitutional

In a closely watched case out of Texas, the United States Court of Appeals for the Fifth Circuit held today that the structure of the National Labor Relations Board (NLRB) is likely unconstitutional. The implications are unquestionably significant but not entirely clear.

The National Labor Relations Act (NLRA) protects workers' rights to organize (i.e., unionize) and bargain collectively over the terms of their employment. To enforce these rights, the Act created the NLRB – which acts as both prosecutor and judge over alleged violations. The judicial function is carried out by Administrative Law Judges appointed by the NLRB and by the Board which is appointed by the President. The NLRA places significant limitations on the reasons for which both the ALJs and the Board members may be removed from their positions.

In a case involving union organizing at Space X, Elon Musk's rocket company, the company challenged this structure of the Board as unconstitutional. The argument was that only the President has such executive authority under the constitution and, while the president can delegate those responsibilities (in this case to the Board), he must retain the ultimate authority over such decisions. By limiting the President's ability to remove Board members and ALJs, the actual decisionmakers have been insulated from presidential control – which violates the constitution.

The Court of Appeals agreed: Space X should not be required to defend its actions in a constitutionally invalid proceeding. Because of the procedural posture of the case, the decision is not the final word, but it gives a very strong indication of how the case ultimately will be decided. Whether the case makes its way to the Supreme Court will likely depend on whether the Trump administration decides to appeal a decision which is largely in line with its view on executive power. Our bet is they won't.

As the Board not only judges whether the Act has been violated, but determines the scope of bargaining units, conducts representation elections and decides whether to seek injunctions from the federal courts, the implications of this decision could be staggering.

If you have any questions or would like additional information, please contact Al Vreeland at (205) 323-9266 or avreeland@lehrmiddlebrooks.com.