# Essay

# Set Up to Fail: National Labor Relations Board

*Mher Mkrtchian**

## Abstract

*The National Labor Relations Board ("NLRB") can no longer be described as an independent agency. The structural separation of the agency's adjudicative and prosecutorial powers under the Taft-Hartley Amendments to the Wagner Act effectively permits the General Counsel to control a lion's share of the agency's policymaking discretion. The Trump administration's NLRB is a prime but cautionary example of the immense power wielded by the General Counsel. This development comes alongside judicial decisions that signal a resurgence of separation of powers formalism. The current jurisprudential landscape suggests that the Supreme Court would likely find that the General Counsel is a principal officer who serves at the pleasure of the President. To limit the prospect of total presidential capture of what has been described as an "independent agency," this Essay offers two legislative solutions for Congress's consideration. Both solutions closely track the agency models endorsed by the Supreme Court in* Free Enterprise Fund v. Public Company Accounting Board *and* Morrison v. Olson.

## Table Of Contents



* J.D. 2023, The George Washington University Law School. I would like to thank Professor Robert L. Glicksman and Professor Aram A. Gavoor for their guidance and feedback in developing this Essay. I am sincerely thankful to the members, associates, and editors of *The George Washington Law Review* for their feedback and tireless work throughout the editorial process. Finally, there are no words to describe the debt of gratitude I owe to my family for their unwavering love and support.

## Introduction

Within hours of his inauguration, President Biden sacked the General Counsel of the National Labor Relations Board ("NLRB" or "Board"), marking the first time in the agency's history that a President removed the General Counsel before the expiration of his term.[1] Quicker than the President's decree were the partisan responses. Some welcomed the removal of "[a] union-busting lawyer" while others protested the action as an affront to the agency's independence.[2] Although the NLRB's statutory design had ostensibly justified the agency's constitutional independence, the agency today is less politically independent than ever before almost ninety years after its creation. Indeed, the modern NLRB is so beholden to the will of the President that it is functionally no different than an executive agency.[3] With little guidance

1 Email from Catherine Russell, Assistant to the President & Dir. of Off. of Presidential Pers., White House, to Peter B. Robb, Gen. Couns., NLRB (Jan. 20, 2021), https://www.freedomfoundation.com/wp-content/uploads/2021/06/NLRB-2021-000457-final-records-Robb-termination.pdf [https://perma.cc/BTV7-TR36]. No General Counsel of the NLRB had previously been removed; the closest instance was when General Counsel Robert N. Denham resigned under pressure from President Truman in 1950. Joseph A. Loftus, *Denham Quits Job with Reluctance; Truman Tersely Accepts His N.L.R.B. Counsel Resignation, to Take Effect Tomorrow*, N.Y. Times (Sept. 17, 1950), https://www.nytimes.com/1950/09/17/archives/denham-quits-job-with-reluctance-truman-tersely-accepts-his-nlrb.html [https://perma.cc/XET5-9UVC].

2 Eli Rosenberg & Reis Thebault, *Biden Fires Trump-Appointed Labor Board General Counsel and Deputy Who Refused to Resign*, Wash. Post (Jan. 21, 2021, 7:05 P.M.), https://www.washingtonpost.com/business/2021/01/20/biden-fires-nlrb-peter-robb/ [https://perma.cc/DMN8-KFXP].

3 *See* Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. v. Lockridge, 403 U.S. 274, 288 (1971) ("[W]hen it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body

from the courts and Congress on the President's ability to remove the General Counsel, it is appropriate to review the independent status of the NLRB and the threats facing the agency's ability to carry out its legislative purpose.[4]

Under the National Labor Relations Act ("NLRA")[5], the NLRB is governed by both a five-member Board[6] and a single General Counsel.[7] The Board's primary functions are to adjudicate labor complaints and to make "such rules and regulations as may be necessary to carry out" the NLRA.[8] The Board members are appointed by the President and confirmed by the Senate to five-year terms, and they are removable "by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."[9] Whereas the Board performs quasi-legislative[10] and quasi-judicial[11] functions, the General Counsel has unreviewable prosecutorial and investigative responsibilities, including managerial functions over all officers and employees in the agency's twenty-six regional offices.[12] The General Counsel is appointed by the President, with Senate confirmation, to a four-year term with no statutory provision specifying the President's removal powers.[13] The General Counsel, as the agency's top administrative officer, supervises all attorneys employed by the Board, oversees the agency's regional offices, and, most importantly, has final authority to investigate and prosecute unfair labor complaints before the Board.

---

rather than the federalized judicial system."); Lee Modjeska, *The NLRB Litigational Processes: A Response to Chairman Dotson*, 23 WAKE FOREST L. REV. 399, 409 n.62 (1988) (describing "[j]udicial (and other) antipathy to NLRB independence"); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600 (2010) (describing the NLRB as a "stalwart[]" independent agency because the President does not have the power to remove Board members for purely political reasons).

4 At the time of writing, only one case has been litigated on the question of the President's power to remove the General Counsel. *See* Exela Enter. Sols., Inc. v. NLRB, 32 F.4th 436, 441 (5th Cir. 2022) (rejecting petitioner Exela's argument that the President's removal of General Counsel Peter Robb was unlawful because "no provision of the NLRA protects the General Counsel of the NLRB from removal").

5 29 U.S.C. §§ 151–169.

6 *Id.* § 153(a) ("The National Labor Relations Board . . . shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate:").

7 *Id.* § 153(d) ("There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years.").

8 *Id.* § 156.

9 *Id.* § 153(a).

10 *See id.* § 156 (authorizing the Board to promulgate regulations necessary to carry out the provisions of the NLRA).

11 *See id.* § 160(c) (authorizing the Board to adjudicate labor disputes).

12 *See id.* § 153(d).

13 *See id.*

The NLRB's bifurcated Board and General Counsel structure is the result of amendments to the NLRA in the Labor Management Relations Act of 1947 (also known as the Taft-Hartley Act),[14] which stripped the Board of its prosecutorial function and reassigned the responsibility to the General Counsel.[15] Prior to the Taft-Hartley Act, the NLRB was indistinguishable from other commission-based agencies like the Securities Exchange Commission ("SEC") and Federal Trade Commission ("FTC") because the five-member Board itself retained the power to prosecute labor complaints. In both the SEC and FTC, the decision to prosecute securities violations or unfair trade practices rests with the multimember commissions of the agencies,[16] but the Taft-Hartley Act gave the General Counsel "unreviewable discretion to refuse to institute . . . complaint[s]" before the Board.[17]

This bifurcated structure places the NLRB Board's capacity to steer or create labor policy largely in the hands of the General Counsel. As such, this Essay reconsiders the functional independence of the NLRB by evaluating the increasingly powerful role played by the Counsel. Starting with the precursors to the modern NLRB, Parts I and II analyze the agency's history by exploring its background and structural changes over the years. The goal is to demonstrate that the General Counsel's power over the agency's policymaking apparatus has long been underappreciated. Part III answers the constitutional question of whether the General Counsel can be removed by the President without cause. Finally, Part IV offers legislative solutions aimed at reasserting the NLRB's adjudicative independence.

## I. Background: The Road to Taft-Hartley

### *A. Labor and the Inadequacies of the Judiciary*

The modern NLRB is the product of Congress's recognition that national labor policy cannot adequately develop under the auspices

---

14 *Id.* §§ 141–197.

15 *See* Jonathan B. Rosenblum, *A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint Under the NLRA*, 86 Yale L.J. 1349, 1353 (1977) (noting that the Wagner Act was criticized for creating a Board that served as both the prosecutor and jury of cases before it and that the Board had an active role in the selection of cases as there was no administrative officer like the General Counsel who would bring cases for the Board's consideration).

16 *See e.g.*, 15 U.S.C. § 45(b) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition . . . it shall issue and serve upon such person . . . a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed . . . . ").

17 Vaca v. Sipes, 386 U.S. 171, 182 (1967); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138 (1975) ("Congress has delegated to the Office of the General Counsel 'on behalf of the Board' the unreviewable authority to determine whether a complaint shall be filed." (quoting 29 U.S.C. § 153(d))).

of the judiciary. Congress's constitutional bargain in constructing the independent labor board was to remove labor management issues from judicial oversight by placing it in an executive or legislative body, which would theoretically be more attuned to societal demands to protect unionizing efforts.[18] Although Congress's early invention, the Wagner labor board, initially succeeded to limit judicial intervention in national labor policy, subsequent amendments to the Board under the Taft-Hartley Act reintroduced sources of policymaking intervention, this time from the Executive. Thus, the modern NLRB is entirely exposed to the presidential policies in much of the same way as executive cabinet departments are exposed to presidential directives.

During the late nineteenth century, judicial regulation of labor relations presented challenges to a rapidly industrializing society. Case-by-case judicial resolution across various state jurisdictions created unpredictable legal rules which failed to address increasing societal demands for comprehensive labor standards.[19] The late nineteenth century "mark[ed] the dawn of the era of the modern trade union."[20] The number of union members during the 1890s increased by more than fifty percent from 583,000 in 1890 to 993,000 in 1900.[21]

Although the promise of "appreciably higher wages and shorter hours" generated interest in unions, efforts to organize confronted judicial hostility under the common law conspiracy doctrine.[22] Some of the earliest cases involving concerted activities by workers were condemned as coercive conspiracies. In *People v. Fisher*,[23] several shoemakers agreed not to work for less than a specified wage and to penalize any shoemaker that violated the agreement.[24] When one of the workers breached by accepting a lower wage, the other shoemakers threatened to strike unless their employer terminated the breaching worker.[25] The

---

18 *See* Robert L. Glicksman & Richard E. Levy, Administrative Law: Agency Action in Legal Context 34 (Saul Levmore et al. eds., 3d ed. 2020) (noting that the Supreme Court during the early 1900s "often took an anti-union stance, as reflected in *Loewe v. Lawlor*, 208 U.S. 274 (1908) . . . , which held that labor unions constituted a conspiracy in restraint of trade that violated the Sherman Act").

19 *See* Samuel Bagenstos, Lochner *Lives On*, Econ. Pol'y Inst. (Oct. 7, 2020), https://www.epi.org/unequalpower/publications/lochner-undermines-constitution-law-workplace-protections [https://perma.cc/7W2D-A7K7] (discussing state laws like New York's Bakeshop Act of 1895 and Oregon's maximum hours law in the backdrop of the *Lochner* Supreme Court which invalidated many state laws designed to protect laborers).

20 Barry Eichengreen, *The Impact of Late Nineteenth-Century Unions on Labor Earnings and Hours: Iowa in 1894*, 40 Indus. & Lab. Rel. Rev. 501, 501 (1987).

21 *Id.*

22 *Id.* (quoting Paul Douglas, Real Wages in the United States, 1890–1926 (Houghton Mifflin Co. ed., 1930)).

23 14 Wend. 9 (N.Y. 1835).

24 *Id.* at 9–10.

25 *Id.* at 10.

shoemakers were indicted for engaging in a coercive conspiracy, and the presiding court held that preventing another shoemaker from accepting lower wages was injurious to commerce.[26]

The resulting criminal sanctions from cases like *Fisher* led to an "overwhelmingly adverse public reaction."[27] Many states responded by passing statutes that sought to decriminalize organizing activities, and courts began to narrow the criminal conspiracy doctrine by requiring additional elements of illegal purpose or means to sustain a criminal conviction.[28] By the late 1800s, the judicial regulation of union activity was mainly in "the context of civil proceedings for damages or injunctions, rather than in criminal prosecutions."[29] However, the resulting legal standards for judging the legality of union activities remained elusive. Federal courts judged the legality of organizing activities under an illegal means test, while state courts like Massachusetts focused on the purpose of the activity.[30] Such fact-specific approaches relied heavily on the economic sophistication and political biases of presiding judges.[31] It was therefore not uncommon that in a single case, one judge could interpret a labor strike for the purpose of expanding union membership as unjustified, while another judge could interpret the activity as justified because it enhanced the union's bargaining position with the purpose of raising wages.[32]

Because the substantive law produced unpredictable outcomes, many employers turned to equitable remedies, such as temporary injunctions, to restrain concerted labor activities.[33] Such remedies provided a practical and expedient means to inhibit the momentum of labor strikes and its effects on business.[34] Even if the courts

---

26 *Id.* at 12, 14–20.

27 The Developing Labor Law: The Board, The Courts, and the National Labor Relations Act § 1.II (John E. Higgins, Jr. ed., 8th ed. 2022) [hereinafter The Developing Labor Law].

28 *See id.*; Commonwealth v. Hunt, 45 Mass. 111, 129–30 (1842) (reversing criminal conspiracy conviction).

29 The Developing Labor Law, *supra* note 27, § 1.II.

30 *See* May v. Wood, 51 N.E. 191 (Mass. 1898) (holding that conduct of unionizing parties is actionable unless justified).

31 The Developing Labor Law, *supra* note 27, § 1.II (noting that "the economic sophistication and bias of an individual judge were often pivotal when such balancing was undertaken").

32 *Id.* (stating that "one judge might conclude that a concerted refusal to work . . . was not justified" while another judge "might find that the same strike was . . . privileged"). *Compare* Plant v. Woods, 57 N.E. 1011, 1015 (Mass. 1900) (finding that the purpose of the defendant's unionizing activities was unjustified because "[t]he purpose . . . was to force the plaintiffs to join the defendant association, and to that end they injured the plaintiffs in their business, and molested and disturbed them in their efforts to work at their trade"), *with id.* (Holmes, C.J., dissenting) (finding that the actions of the defendant union in threatening a boycott for the purpose of increasing its membership was justifiable because the "immediate object and motive was to strengthen the defendants' society . . . to make a better fight on questions of wages or other matters of clashing interests").

33 The Developing Labor Law, *supra* note 27, § 1.II.

34 *Id.*

ultimately vacated such injunctions, the damage to the union's ability to extract concessions had already been inflicted. Moreover, the fact that most controversies reached the court after intense industrial strife limited the range of judicial remedies and generally exposed the judiciary's inability to address the issues presented by the labor movement.[35]

While the common law of various states remained unpredictable, the Supreme Court's posture in the early 1900s became decidedly anti-union. This was largely due to Congressional action such as passing the Sherman Antitrust Act of 1890.[36] Under the Act, unionizing activities were considered to be anticompetitive agreements "in restraint of trade or commerce."[37]

One of the first cases to test the application of the Sherman Act in the context of organized labor was *United States v. Workingmen's Amalgamated Council of New Orleans*.[38] There, the United States challenged a labor strike which prevented the loading of ships as an unlawful restraint of interstate and foreign commerce.[39] The court, citing *Fisher*, held that the purpose of the union's strike was to "force[] stagnation of all the commerce" and was therefore unlawful under the Sherman Act.[40]

The Supreme Court cited *Amalgamated Council of New Orleans* approvingly in *Loewe v. Lawlor*,[41] which held that *any* concerted action in the form of unionization was a per se violation of the Sherman Act.[42] In *Loewe*, the plaintiff Danbury Hatter was a hat manufacturer that refused to require its employees to join a union as a condition for employment.[43] The Court's decision in *Loewe* resulted in a strike and nationwide consumer boycott of its products by the United Hatters of North America and the American Federation of Labor.[44] The boycott persuaded retailers to cut ties with Loewe until it agreed to unionize its business.[45] In a unanimous opinion, the Supreme Court held that a

---

35 *Id.*

36 15 U.S.C. §§ 1–7.

37 *Id.* § 1; *see* United States v. Workingmen's Amalgamated Council of New Orleans, 54 F. 994 (C.C.E.D. La. 1893). The case arose three years after the passage of the Sherman Act in which plaintiff employer argued that dock laborers and others conspired to prevent the manning and loading of ships in restraint of interstate and foreign commerce. *Id.* at 995. The court held that the Sherman Act applied to conspiracies about laborers to discontinue labor and restrain trade. *Id.* at 1000.

38 54 F. 994 (C.C.E.D. La. 1893).

39 *Id.* at 995.

40 *Id.* at 1000.

41 208 U.S. 274 (1908).

42 *Id.* at 303.

43 *Id.* at 305.

44 *Id.* at 303.

45 *Id.* at 305.

conspiracy by members of a labor union to "cripple" Loewe's interstate business fell squarely within the meaning of a "restraint of trade" under the Sherman Act.[46] Because the Sherman Act is both a criminal and civil enforcement statute, all unionizing activity fell under the scope of criminal sanction and possible treble damages.

Under the auspices of the federal and state judiciaries, it was clear by the early 1900s that a cogent and proworker labor policy was simply not forthcoming. Despite this, union membership between 1897 and 1904 increased from 447,000 to 2,070,700.[47] The law's dissonance with society was not only becoming apparent, but larger unions, like the American Federation of Labor, were increasingly becoming a political force.[48]

Congress took steps to address the concerns of organized labor with the passage of the Erdman Act in 1898.[49] The law was the first major federal intervention in railway labor disputes and made it a federal crime to discharge unionized railway workers on interstate trains and established compulsory arbitration procedures to resolve disputes.[50] Section 10 of the Act specifically prohibited railroad companies from making employment offers contingent on a prospective employee's agreement not to join a union.[51] After the courts retained jurisdiction over labor disputes, the Supreme Court significantly weakened the Erdman Act by invalidating section 10 as an unconstitutional restraint of the freedom to contract.[52]

The invalidation of section 10 of the Erdman Act and *Loewe*'s sweeping rule were decided during the Supreme Court's so-called *Lochner* era,[53] a period in which the Court consistently invalidated state and federal legislation that was perceived to interfere with free market principles, the power to contract, property rights, or separation of powers.[54] With a Supreme Court destined to overturn any legislation that interfered with business or formal separation of powers principles, hopes for prolabor policies and protections would, at least for the time being, not be realized.

---

46 *Id.* at 307, 309.

47 Philip Taft, *Expansion of Unionization in the Early 20th Century*, Monthly Lab. Rev., Sept. 1976, at 32, https://www.jstor.org/stable/pdf/41840306.pdf [https://perma.cc/4PN7-NK3W].

48 *See id.*

49 30 Stat. 424 (1898).

50 *See generally* David McCabe, *Federal Intervention in Labor Disputes Under the Erdman, Newlands, and Adamson Acts*, 7 Acad. of Pol. Sci. 94 (1917).

51 Adair v. United States, 208 U.S. 161, 169 (1908).

52 *Id.* at 282–83.

53 The *Lochner* era was a period of jurisprudence from 1877 to 1934. *See generally* Barry Cushman, *Teaching the* Lochner *Era*, 62 St. Louis U. L.J. 537 (2018).

54 Glicksman & Levy, *supra* note 18, at 6.

### *B. The Great Depression and the NLRA*

By the early 1930s, the abrupt economic devastation caused by the Great Depression left little optimism for free-market capitalism. The techniques of mass production and mechanization, which had for decades unleashed unprecedented levels of productive output, were now contributing to runaway deflation and persistent underconsumption.[55] Despite the economic upheaval, the election of the progressive Franklin D. Roosevelt created a favorable political climate to enact major prolabor legislation. During Roosevelt's first one hundred days in office, Congress enacted the National Industrial Recovery Act ("NIRA").[56] One of the Act's principal aims was to regulate downward price pressures and underconsumption through the enactment of codes of fair competition, minimum wage regulation, price controls, and relaxed antitrust enforcement standards.[57] The Act declared that "employees shall have the right to organize and bargain collectively . . . and shall be free from the interference, restraint, or coercion of employers."[58] As such, NIRA became the nation's first comprehensive labor law to expressly recognize the right of employees to organize and to be free from employer interference.[59]

Despite the recession and the perceived need for government intervention, the Supreme Court, operating under *Lochner* era principles, nullified NIRA as an unconstitutional delegation of power. Chief Justice Hughes, writing for a unanimous Court in *A.L.A. Schechter Poultry Corp. v. United States*,[60] declared that Congress cannot delegate broad legislative power to prescribe rules of commerce to the executive without imposing standards and restrictions on the exercise of that power.[61] With *Schechter Poultry*, the judiciary undercut the President's economic agenda. Liberal politicians, finding support in the distressed

---

55 *See* Chiaki Moriguchi, *The Evolution of Employment Relations in U.S. and Japanese Manufacturing Firms, 1900–1960: A Comparative Historical and Institutional Analysis* 34–37 (Nat'l Bureau of Econ. Rsch., Working Paper No. 7939, 2000).

56 Pub. L. No. 73-67, 48 Stat. 195 (1933).

57 Barbara Alexander, *The Impact of the National Industrial Recovery Act on Cartel Formation and Maintenance Costs*, 76 Rev. Econ. & Stat. 245, 245–46 (1994).

58 NIRA § 7.

59 *See id.* ("[N]o employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his choosing.").

60 295 U.S. 495 (1935).

61 *Id.* at 537. Under NIRA, Congress authorized the President to develop fair codes of competition among businesses in like industries. NIRA § 7. NIRA did not provide the standards by which the President would implement these codes of competition. *See id.* Chief Justice Hughes, writing for a unanimous Court, held that the Act constituted an unconstitutional delegation of legislative power. *Schechter Poultry*, 295 U.S. at 537. According to the Court, when Congress required the President to authorize codes of fair competition, it left the President "without standards to

masses, blamed the Court for prolonging the economic crisis and favoring the rich.[62] Impatient with the judicial impasse, Roosevelt sought to permanently change the Supreme Court by enlarging its size from nine to fifteen Justices.[63] Although Roosevelt's battle to pack the Court with Justices sympathetic to his policies ultimately failed, "he won the war for control" over the Court.[64] As the only President to serve for over twelve years in office, Roosevelt succeeded to appoint eight Justices, thus shifting the ideological direction of the Court's jurisprudence.[65]

By 1937, the *Lochner* era began to wane as the need for comprehensive economic regulation remained unchanged. After the invalidation of NIRA, Congress in 1935 passed the NLRA (also known as the Wagner Act).[66] Like its predecessor, the new NLRA was seen "as an 'affirmative vehicle' for economic and social progress."[67] The Act provided employees "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."[68] Unlike NIRA, however, the new Act featured a robust enforcement regime through the newfound NLRB.[69] The new Act eliminated private rights of action over labor disputes and closed the temporary injunction loophole by giving the Board exclusive jurisdiction over the prosecution, investigation, and adjudication of unfair labor practices and employee representation issues.[70]

When challenges to the new NLRA reached the Supreme Court, the Court's "constitutional jurisprudence had changed course."[71] The most notable example of this jurisprudential shift was *West Coast Hotel Company v. Parrish*.[72] The case arose in the context of a state minimum wage law, which was challenged as an unlawful restriction of the freedom to contract.[73] In a 5–4 decision written by Justice Charles Evans Hughes, the Court held that the minimum wage law was a constitutional

---

guide" his determinations. *Id.* at 540. As such, Congress unconstitutionally delegated its power to the President. *Id.* at 542.

62 William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 Sup. Ct. Rev. 348, 351.

63 Barry Cushman, *The Judicial Reforms of 1937*, 61 Wm. & Mary L. Rev. 995, 998 (2020).

64 William H. Rehnquist, *Judicial Independence*, 38 U. Rich. L. Rev. 579, 595 (2004).

65 *See id.*

66 29 U.S.C. §§ 151–166.

67 The Developing Labor Law, *supra* note 27, § 2.III (quoting Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 Geo. Wash. L. Rev. 199, 218 (1960)).

68 *Id.* (quoting 29 U.S.C. § 157).

69 29 U.S.C. § 157.

70 The Developing Labor Law, *supra* note 27, § 2.III (quoting 79 Cong. Rec. 7565 (1935)).

71 Glicksman & Levy, *supra* note 18, at 35.

72 300 U.S. 379 (1937).

73 *Id.* at 386.

exercise of state police powers.[74] *West Coast* overruled a case decided in the preceding year, which held that a New York minimum wage law was an unconstitutional interference on the freedom to contract.[75] With greater judicial tolerance for New Deal policies, the Court put aside the *Lochner* era rationale and ultimately upheld the new Act's constitutionality.

As such, the NLRA embodied Congress's understanding that labor policy cannot adequately protect workers if left under the auspices of the judiciary. Common law doctrines, developed in 19th century cases like *Fisher*, *Amalgamated*, and *Loewe*, left little room for the growth of organized labor. When times demanded for comprehensive labor regulation in the early 20th century, the Court disavowed any attempt through the invalidation of NIRA to give the President a broad mandate to regulate labor and commerce.[76] As such, the wisdom of the NLRA was to place labor regulation in an expert board of adjudicators who did not fall squarely within any individual branch of government. Indeed, this is the rationale of independence which Congress was seeking to achieve in creating an expert body of labor regulators protected by for-cause removal restrictions.[77]

Like other administrative agencies at the time, the Wagner-era Labor Board did not have an independent prosecutor.[78] Its three-member Board, who was protected from direct presidential removal, had the ultimate authority to investigate, prosecute, and adjudicate labor disputes.[79] In practice, however, the prosecutorial and adjudicative roles were delegated to certain departments to provide some degree of functional separation. Although separation of function was in practice somewhat effective, the law did not foreclose the possibility of consolidating both the prosecutorial and adjudicative duties in the independent board.[80]

The possible consolidation of the prosecutor, judge, and jury functions under a single entity created the impression that the Board's

---

74 *Id.* at 386, 400.

75 *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 618 (1936).

76 A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935).

77 Section 3(a) of the NLRA, which was later amended by the Taft-Hartley Act, provides that members of the Board are protected by for-cause removal restrictions. 29 U.S.C. § 153(a) (1935) ("Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.").

78 The agency's first Annual Report states that the agency "follows closely the familiar provisions of the Federal Trade Commission Act, a procedural pattern which has been repeatedly approved as an appropriate and constitutional method for the administration of Federal Law." 1 NLRB ANN. REP. 1, 11 (1936).

79 John E. Higgins, Jr., *Labor Czars—Commissars—Keeping Women in the Kitchen—The Purpose and Effect of the Administrative Changes Made by Taft-Hartley*, 47 CATH. U. L. REV. 941, 943 (1998).

80 *See* Wagner Act, ch. 372, §3(b), 49 Stat. 451 (1935).

adjudicative procedures might be unfair.[81] The agency failed to reassure Congress that the Board exerted little influence on the decision to prosecute cases. The Board's Third Annual Report to Congress made matters worse by acknowledging that "[t]he Board itself decides whether complaints should be issued *in only a very small proportion of the* cases, and then only if the preliminary investigation indicates that the case involves a particularly difficult question of fact."[82] By participating in the decision to prosecute "case[s] encoura[ing] . . . difficult question[s] of fact," the Board confirmed the consolidation of functions and implicitly acknowledged the importance of prosecutorial discretion in steering the agency's policy objectives.[83] Despite the NLRB's assurances of its self-enforced separation of prosecutorial and adjudicative functions, the absence of statutory limits on the combination of prosecutorial and adjudicative functions was deemed contrary to the Constitutional principle of separation of powers.[84] Today, the intermingling of prosecutorial and adjudicative functions would run afoul of the Administrative Procedure Act, which forbids agency prosecutors from participating in or advising in the substance of the adjudication of cases.[85]

Aside from these structural issues, there were also complaints about the Board's tendency to be prolabor. The Board, as exclusive adjudicators of labor policy under the NLRA, took to heart the mandate to "encourage[e] the practice and procedure of collective bargaining . . . by protecting the exercise by workers of full freedom of association."[86] With constitutional challenges to the NLRA put to rest,[87] critics decried the statute as a "one-sided legislation, slanted heavily in favor of organized labor" and devoted their efforts to lobbying for an outright repeal or amendment.[88]

Less than two decades into its existence, the agency's prevailing attitude in the country was "adjudicating with an unduly partisan

---

81 *See* Morgan v. United States, 304 U.S. 1, 22 (1938) (recognizing that such an arrangement, also known as the judge-jury-executioner problem, was a "vital defect").

82 3 NLRB Ann. Rep. 5 (1938) (emphasis added).

83 Higgins, *supra* note 80, at 958.

84 *See* S. Comm. on the Judiciary, 79th Cong., Administrative Procedure Act 24–25 (Comm. Print 1945) ("[A] man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions.").

85 5 U.S.C. § 554(d)(2) ("An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.").

86 29 U.S.C. § 151.

87 *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the constitutionality of the NLRA).

88 2 The Developing Labor Law, *supra* note 68, at 5.

(pro-labor) attitude."[89] Congressman Howard W. Smith described the work of labor boards as motivated by "alien and subversive doctrines."[90] Congressional backlash was echoed by increasing public frustration over tactics such as picketing small retail outlets, union rivalries, exorbitant membership dues, and cases of racketeering.[91] These tensions set the stage for a statutory overhaul in the Taft-Hartley Act of 1947.

However, the Wagner Board's activities represented an era in which labor policy developed through a truly independent body of adjudicators. Despite the Wagner Board's commingling of the investigation, prosecution, and adjudication functions, the core policymaking discretion emanated from a body of experts who were unencumbered by the threat of removal. If the purpose of creating a national labor policy outside the common law was, as Congress described, to aid workers to "attain freedom and dignity . . . by cooperation,"[92] then the Wagner Board had achieved its objective. Under the NLRA, the law's treatment of unionization evolved from per se condemnation[93] to being perceived as "slanted heavily in favor of organized labor."[94] With the forthcoming Taft-Hartley amendments, national labor policy once again became subordinated to a constituent branch of government.

## II. The Modern NLRB and the Rise of the General Counsel

Whereas the focus of the pre-Wagner era was to limit judicial interference with the development of prolabor policies, the post-Wagner changes to the NLRB placed the agency within the scope of presidential power through the creation of the office of the General Counsel. Under the Taft-Hartley amendments, the General Counsel has the "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints."[95] The Act therefore strips the truly independent Board, protected from at-will presidential removal, of its prosecutorial powers and ability to set the agency's policy agenda. By establishing a bifurcated policymaking process in which the General Counsel has unreviewable discretion to decide which cases and issues come before the Board, the Taft-Hartley amendments gave the General Counsel an important gatekeeping function. The problem with the

89 James R. Ryan, Note, *Taft-Hartley—Separation of Function in N.L.R.B.*, 99 U. Pa. L. Rev. 641, 642 (1951).

90 H.R. Rep. No. 76-3109, pt. 1, at 4 (1941).

91 *Id.*

92 Keyserling, *supra* note 66 (quoting Senator Wagner's Senate floor speech, 79 Cong. Rec. 7565 (May 15, 1935)).

93 *See supra* notes 18–55 and accompany text.

94 The Developing Labor Law, *supra* note 27, § 2.IV.

95 29 U.S.C. § 153(d).

Taft-Hartley NLRB, however, is the statute's silence on the procedures required to remove the General Counsel from office.

### *A. Mandated and Self-Inflicted Deference to the General Counsel*

The modern NLRB is the product of structural amendments arising from the Taft-Hartley Act of 1947, which sought to change the *unitary* power of the Board and construct a *decentralized* agency.[96] The main structural difference between the Wagner-era and the Taft-Hartley NLRB is the separation of prosecutorial and adjudicative functions through the creation of the independent General Counsel.[97] Unlike the Wagner Board, which would occasionally make prosecutorial decisions in "case[s] involving . . . difficult question[s] of fact," the Taft-Hartley Board does not have the power to prosecute any cases.[98] Rather, the Board's primary responsibilities are limited to quasi-judicial or court-like adjudications and, when necessary, rulemaking.[99] The General Counsel, therefore, is an "independent [a]dministrator" with the power to investigate private complaints of unfair labor practices, launch complaints before the Board on behalf of aggrieved parties, and seek enforcement orders from the courts.[100] Therefore, the Board's quasi-judicial powers are triggered *only* when the General Counsel initiates a complaint and decides to prosecute an employer or union.[101]

Among the early opponents to this change was President Truman, who warned that an independent General Counsel would allow "a single administrative official" to "usurp the Board's responsibility for establishing policy under the act."[102] Despite the President's veto, Congress ultimately enacted the Taft-Hartley amendments.[103] Under the Taft-Hartley Act, the General Counsel is appointed by the President to a four-year term.[104] As mentioned previously, however, the Act is silent on the procedural requirements for the General Counsel's removal from office before the expiration of her term. Like the former Wagner Board, the Taft-Hartley Board is insulated from direct presidential

---

96 Ryan, *supra* note 90, at 641.

97 29 U.S.C. § 153 (the Taft-Hartley Act separated the General Counsel from the Board and increased the size of the Board from three members to five members).

98 Higgins, *supra* note 80.

99 29 U.S.C. § 156 (the Board has the authority "from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions" of the NLRA).

100 Rosenblum, *supra* note 15, at 1352–53.

101 29 U.S.C. § 160(b)–(c).

102 H.R. Doc. No. 80-344, at 6 (1947).

103 *See generally id.*

104 29 U.S.C. § 153(d).

control through a provision that conditions removal in situations of "neglect of duty or malfeasance in office."[105]

Arguably, the Board's general rulemaking power to make "such rules and regulations as may be necessary" could be used to undercut its policy reliance on the General Counsel to introduce novel cases.[106] In other words, rather than relying on the General Counsel to issue complaints and give the Board an opportunity to change its rules, the Board could theoretically invoke its rulemaking powers to influence labor policy without the need for case-by-case adjudication.

Nevertheless, the choice to use rulemaking does not come without risks. Until the recent resurgence of conservative jurisprudence, courts interpreted general grants of rulemaking, like the NLRB's "such rules and regulations" provision, broadly.[107] An illustrative case of this permissive construction of rulemaking authority is *National Petroleum Refiners Ass'n v. FTC*.[108] There, the FTC issued a rule requiring gas stations to post octane ratings on gas pumps pursuant to its general rulemaking authority to "make rules and regulations for the purpose of carrying out" provisions in the FTC Act.[109] The defendant, National Petroleum, argued that the FTC did not have the power to issue broad substantive rules requiring octane rating notices.[110] The court rejected the defendant's argument and construed the FTC's rulemaking authority broadly, finding that the process of rulemaking allowed the agency to efficiently resolve recurring issues and incorporate "wide public participation" in the "imposition of a new and inevitably costly legal obligation."[111]

There are, however, indications that *National Petroleum Refiners* might not sufficiently represent the state of the law. Take, for example, *Chamber of Commerce v. NLRB*.[112] The NLRB promulgated a rule pursuant to section 156 of the NLRA, which like the FTC Act in *National Petroleum Refiners* vests power to the FTC, grants the NLRB with the authority "to make . . . such rules and regulations as may be necessary to carry out the provisions of" the Act.[113] The NLRB adopted a regulation that required employers to post information about workers' rights under the NLRA. The plaintiff, Chamber of Commerce, argued that the NLRB as a quasi-judicial agency does not have the "authority to assert jurisdiction over any employer absent the filing of a representation

105 *Id.* § 153(a).
106 *Id.* § 156.
107 *Id.*
108 482 F.2d 672 (D.C. Cir. 1973).
109 *Id.* at 675–76 (citing 15 U.S.C. § 46(g)).
110 *Id.*
111 *Id.* at 683.
112 721 F.3d 152 (4th Cir. 2013).
113 *Id.* at 155; 29 U.S.C. § 156.

petition or unfair labor practice charge."[114] The Fourth Circuit agreed with the Plaintiffs and struck down the rule, holding that the Board, as "a *reactive* entity," does not have the power to define unfair labor practices through rulemaking.[115] *Chamber of Commerce* appears to stand for the proposition that the Board cannot easily circumvent the General Counsel's role in the adjudicatory enforcement process. Determining that the NLRB was a "reactive" entity, the court relegated the affirmative policymaking powers of the Board to strictly within the domain of the case-by-case adjudicatory process. It therefore put the onus on the independent General Counsel to decide when and under what circumstances the Board will be exposed to novel legal issues.[116]

Although the NLRB has at times exhibited more willingness to engage in rulemaking, such as during the Obama and Biden Administrations,[117] narrow judicial interpretations like *Chamber of Commerce* "are likely to drive the NLRB back to adjudication as the principal policymaking vehicle."[118] Plaintiffs in future cases challenging NLRB rulemaking will likely be successful, especially because conservative Supreme Court Justices, currently in the majority, have endorsed a narrow construction of rulemaking authority. For example, in *United States Telecom Ass'n v. Federal Communications Commission*,[119] then-Judge Kavanaugh argued that the Communications Act's general delegation of rulemaking authority did not authorize the Commission to reclassify internet service providers because Congress did not *explicitly* authorize such regulation.[120] The requirement that Congress *explicitly* authorize regulation means that the NLRB Board is even more beholden to the General Counsel's prosecutorial discretion.

### *B. General Counsel's Deference to the President*

By limiting the Board's responsibilities to adjudication and greatly impeding its rulemaking capacity, the core of the NLRB's administrative, prosecutorial, and investigatory activities falls under the purview

---

114 Verified Complaint for Injunctive Relief at 6, Chamber of Commerce v. NLRB, No. 11-cv-02516, 856 F. Supp. 2d 778 (D.S.C. 2012).

115 *Chamber of Commerce*, 721 F.3d at 161 (4th Cir. 2013) (emphasis added).

116 *See id.*

117 Consider the Biden-era NLRB's proposed rulemaking on the standard for determining whether two employers are joint employers under the NLRA. Notice of Proposed Rulemaking and Request for Comments, 87 Fed. Reg. 54,641 (proposed Sept. 7, 2022) (to be codified at 29 C.F.R. § 103). The new proposed standard seeks to revise the 2020 Trump Administration's rule which reversed the rule arising from Obama-era *Browning-Ferris Industries*, 362 N.L.R.B. 186 (2015).

118 Glicksman & Levy, *supra* note 18, at 529 (citing Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 Emory L.J. 1469 (2015)).

119 855 F.3d 381 (D.C. Cir. 2017).

120 *See id.* at 417–26. (Kavanaugh, J., dissenting).

of the independent General Counsel. The General Counsel has "final authority" in the investigation and issuance of complaints that the Board adjudicates.[121] Although the Board retains some administrative control, like hiring decisions,[122] critical administrative tasks like budgetary control and supervision of agency attorneys are assigned to the General Counsel.[123] As such, the General Counsel today not only has immense prosecutorial discretion but also controls the agency's administrative apparatus through its budget and hiring practices.[124] Although some commentators have recognized the implications of the General Counsel's administrative and unreviewable prosecutorial authority, they have steered clear from supporting President Truman's contention that that the independent General Counsel is akin to a "Labor Czar."[125] Career NLRB attorney and former Deputy General Counsel John E. Higgins, for example, concluded that "General Counsels have generally done very well" in handling their responsibilities.[126] But Higgins was writing in 1998, when the open vilification and subversion of the federal bureaucracy was beyond the pale of political debate and presidentialism. In the post-Trump Administration Era, little, if any, normative restraints remain on executive action.[127]

---

121 29 U.S.C. § 153(d).

122 *Id.* § 154.

123 The Board retains control over the appointment of Administrative Law Judges. *See* Press Release, NLRB, NLRB Administrative Law Judges Validly Appointed (Aug. 6, 2018), https://www.nlrb.gov/news-outreach/news-story/nlrb-administrative-law-judges-validly-appointed [https://perma.cc/2564-RRYU].

124 *Id.* According to Paul M. Herzog, then Chairman of the NLRB, the purpose of the delegation was to deal with a statutory dilemma that "provided that the Board should hire everybody, but where attorneys were concerned the General Counsel should exercise general supervision. . . . It made no sense, as we agreed with [the General Counsel], to have one outfit hire people and fire them, and another outfit conduct the supervision." *Labor Management Relations: Hearing on H.R. 115 Before the H. Comm. on Educ. and Lab.*, 83rd Cong. 259 (1953) (statement of Paul M. Herzog, Chairman of the NLRB).

125 To be clear, President Truman did not directly refer to the Taft-Hartley's independent General Counsel as a "Labor Czar." Truman argued that the Taft-Hartley General Counsel "might usurp the Board's responsibility for establishing policy under the act." H.R. Doc. No. 80-334, at 6 (1947). Rather, it was Senator Joseph Christopher O'Mahoney of Wyoming who during the Taft-Hartley debates in Congress said: "[B]y the terms of the bill itself it becomes clear that the first action under the bill will be the institution of a violent intra-agency row between the newly established or expanded Labor Relations Board and the newly created independent general counsel of the Board. The bill ought to be called a bill to create a labor czar and promote discord." 93 Cong. Rec. 7523, 7524 (June 23, 1947) (statement of Sen. O'Mahoney).

126 Higgins's conclusion is informed by an evaluation of "(1) the record of mandamus litigation against the General Counsels; (2) the record of the Equal Access to Justice Act litigation against the NLRB; (3) the General Counsel's merit factor; and (4) the NLRB's settlement rate." Higgins, *supra* note 80, at 971.

127 Consider the Trump Administration's assault on the federal bureaucracy by intentionally refraining to make federal appointments or removing civil servants from the competitive service which threatens to erode the independence of federal Administrative Law Judges who preside

The net result is that the General Counsel, who is presumably under the direct oversight of the President given the absence of any removal restriction, has the power to exert disproportionate control on the agency's policymaking capacity—whether it be through the manipulation of its administrative apparatus or its prosecutorial function. Recall from the earlier discussion that removing labor policy from the auspices of the judiciary and placing it in an independent quasi-legislative and quasi-executive body was primarily to allow labor policy to develop outside the common law.[128] The assumption was that an independent, expert-driven labor policy would be responsive to the rights of workers to unionize. In other words, the legislative intent going back to the early Wagner Act was distinctly prolabor. Indeed, the modern NLRA, as amended by the Taft-Hartley Act, explicitly provides that the purpose of the statute is to cure the "inequality of bargaining power" of employees and to ensure the "right of employees to organize."[129] But by placing so much power in the General Counsel, the modern NLRB's capacity to be independent from anti-union policies emanating from any branch of government is *no more effective* than the pre-Wagner era of labor policy under the auspices of the judiciary. Thus, the pre-Wagner era's anti-union judiciary is similar to an anti-union Executive, who through the General Counsel could exert tremendous influence over the nation's labor laws.

In some ways, the placement of the nation's labor laws under the auspices of the unitary Executive is more insidious to rights to unionize than the pre-Wagner era of judicial control. Although executive and legislative policy tend to be unpredictable and static, the common law develops through a more predictable exhaustion of judicial rationality as courts encounter novel factual situations. By way of example, consider the earlier discussion about the shift from *Lochner* era to progressive judicial philosophy during the Roosevelt administration.[130] Thus, one can reasonably argue that if labor law was left under the auspices of the judiciary, it may have become prolabor. Indeed, cases like *West Coast*, which upheld state minimum wage laws as constitutional, suggest one possible direction that the post-Depression labor jurisprudence could have gone.[131] But under the current NLRA, as amended by the Taft-Hartley Act, there is no private right of action. Therefore, aggrieved businesses and individuals cannot bring lawsuits without the decision of the General Counsel to file a complaint. Left to the common

over thousands of administrative hearings. *See generally* Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 Minn. L. Rev. 39 (2020).

128 *See supra* Part I.

129 29 U.S.C. § 151.

130 *See supra* notes 61–86 and accompanying notes.

131 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 386, 400 (1937).

law, people and businesses could have filed suits to change the law. But as things currently stand, this power rests exclusively in the hands of a General Counsel beholden to the President.

Any doubt regarding the consequential power wielded by the modern General Counsel is quickly put to rest when considering recent experiences of NLRB under the leadership of the Trump-appointed General Counsel, Peter Robb.

### *C. Case Study of NLRB Under the Trump Administration*

Although some commentators have argued that the General Counsel has been "successful" in upholding the NLRA's original legislative intent,[132] the Trump Administration's NLRB proves otherwise. Almost immediately after Peter Robb was appointed as General Counsel, Robb embarked on an extensive campaign to centralize and gut the agency's administrative capacity. First came his proposal to reorganize the agency's regional offices into smaller districts, giving the General Counsel more authority over prosecutorial decisions.[133] Regional offices house attorneys, who may initiate and prosecute in the district courts. By reducing the number of districts, the agency would presumably handle less cases, giving the General Counsel more latitude to exercise control over regional decisions to prosecute certain cases. Next, Robb sought to overhaul the agency's case management procedures by imposing strict time limits on investigations and encouraging early resolution through settlement rather than Board adjudications.[134] Along with centralization efforts, Robb dramatically reduced the size of the agency's workforce and refused to spend more than $5 million of the agency's budget in 2019.[135] According to the Government Accountability Office, the NLRB

---

132 This Essay defines "success" here as the ability to carry out the NLRA's legislative purpose in 29 U.S.C. § 151 (1947) ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."). Higgins describes the role of the independent General Counsel as a model of "resounding success" for the NLRB. Higgins, *supra* note 80, at 971.

133 Lawrence E. Dubé, *Labor Board Shakeup Could Centralize Control over Cases*, Bloomberg L. (Jan. 17, 2018, 11:35 AM), https://news.bloomberglaw.com/daily-labor-report/labor-board-shakeup-could-centralize-control-over-cases [https://perma.cc/A2HJ-ZW47].

134 Hassan A. Kanu, *Labor Board Moves Spark Internal Discord*, Bloomberg L. (Mar. 2, 2018, 6:31 AM), https://bnanews.bna.com/daily-labor-report/labor-board-moves-spark-internal-discord [https://perma.cc/7Y5M-4QRW].

135 U.S. Gov't Accountability Off., GAO-21-242, NLRB: Meaningful Performance Measures Could Help Improve Case Quality, Organizational Excellence, and Resource Management (2021), https://www.gao.gov/assets/gao-21-242.pdf [https://perma.cc/9PXD-55ER].

experienced a 26% staff reduction between 2010 and 2019, from 1,733 to 1,281 employees.[136] The staff reductions were disproportionately in the NLRB's regional field offices, where unfair practice charges are investigated and union representation elections are held.[137] In the annual Federal Employee Viewpoint Survey, NLRB staff expressed concern about their workloads, warning that the conditions "reduced employee morale and work quality."[138] Robb's tenure likely slowed the development of labor policies through the manipulation of the NLRB's administrative apparatus.

Robb's term in office represents the first time in the NLRB's history where the General Counsel used the powers of the office to reduce the agency's capacity to recognize and adjudicate labor complaints. His tenure as General Counsel is a modern example of the power of the General Counsel in shaping the cases the agency decides to prosecute and influencing the outcome of cases using creative legal arguments. The most apparent illustration of the General Counsel's policymaking influence is through the power to instruct regional offices to defer cases concerning certain issues to the General Counsel.[139] In 2019, Peter Robb's decided to dismiss all complaints by rideshare drivers arguing that their employers misclassified them as "independent contractors" instead of "employees."[140] By refusing to bring cases of this nature, Robb not only foreclosed the Board's capacity to clarify precedent or alter policy but also eviscerated the rights of more than one million ride-share drivers to pursue potential labor violations.[141] Although it has generally been assumed that the General Counsel would, for the most part, "discharge[] his duties intelligently and responsibly," Robb's

---

136 *Id.*

137 *Id.*

138 *Id.*; *see also* Steven Porzio & Shanice Z. Smith-Banks, *NLRB Suffers Significant Turnover in Agency Staffing*, Proskauer Rose LLP (Mar. 31, 2021), https://www.laborrelationsupdate.com/nlrb/nlrb-suffers-significant-turnover-in-agency-staffing/ [https://perma.cc/PYX4-7XJX].

139 President Biden's appointed General Counsel Jennifer Abruzzo instructed regional offices to send cases concerning Trump-era decisions to her office. *See* Jennifer L. Mora & Jeffrey A. Berman, *Don't Let the Pendulum Hit You as It Swings: NLRB General Counsel Previews a Pro-Labor Agenda*, Seyfarth Shaw LLP (Aug. 18, 2021), https://www.seyfarth.com/news-insights/dont-let-the-pendulum-hit-you-as-it-swings-nlrb-general-counsel-previews-a-pro-labor-agenda.html [https://perma.cc/9RL3-NP57].

140 Memorandum from Jayme L. Sophir, Assoc. Gen. Couns., to Jill Coffman, Reg'l Dir., Region 20, Uber Techs. Inc, Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483 (Apr. 16, 2019), https://src.bna.com/Ibt [https://perma.cc/3LXN-R4BA].

141 *See A First Step Toward a New Model for Independent Platform Work*, Uber Newsroom (Aug. 10, 2020), https://www.uber.com/newsroom/working-together-priorities/ [https://perma.cc/B6GN-QQZ2]. Recall that private parties do not have a private right of action to pursue labor violations under the NLRA in a court of general jurisdiction. *See* Amalgamated Util. Workers v. Consol. Edison Co., 309 U.S. 261, 267–69 (1940) (holding that the right to be free from unfair labor practices is a "public" right that is ripe for administrative adjudication).

tenure proves that the General Counsel has real power to shape the nation's labor laws by creating artificial administrative and procedural bottlenecks.[142]

The Trump-era NLRB tested the extent of the General Counsel's grip over the nation's labor policy. With decades of eroding private sector union participation and the consequent loss of the political power of unions, there is little reason to think that a future anti-union President will not direct the General Counsel to wreck more havoc on the agency's policymaking capacity.[143]

Up to this point, this Essay has assumed that the NLRA's silence about the General Counsel's removal implies that the President has the constitutional authority to terminate the General Counsel without cause. The next Part tests the legal basis for this assumption.

## III. The General Counsel Serves at the Pleasure of the President

After *Seila Law LLC v. Consumer Financial Protection Bureau*[144] and *Collins v. Yellen*,[145] the General Counsel must serve at the pleasure of the President.[146] Indeed, these cases preclude Congress from amending the NLRA to protect the General Counsel from no-cause removal by the President.

The first case to interpret the scope of presidential powers over agency officials was *Myers v. United States*.[147] In that case, President Woodrow Wilson demanded the resignation of the Senate-confirmed Postmaster of Portland.[148] When the Postmaster refused to resign, the President simply fired him.[149] The Postmaster sued, arguing that his position was protected by a statutory removal provision requiring "the concurrence of the Senate" before the Postmaster could be fired.[150] The Court, applying a separation of powers rationale,[151] held that the President had the unfettered right to remove officials like the Postmaster because they perform quintessentially executive functions.[152] According

142 Rosenblum, *supra* note 15, at 1359–60.

143 Lawrence Mishel, Lynn Rhinehart & Lane Windham, *Explaining the Erosion of Private-Sector Unions*, Econ. Pol'y Inst. (Nov. 18, 2020), https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion/ [https://perma.cc/P6KP-94P7].

144 140 S. Ct. 2183 (2020).

145 141 S. Ct. 1761 (2021).

146 *Seila L. LLC*, 140 S. Ct. at 2192; *Collins*, 141 S. Ct. at 1787.

147 272 U.S. 52 (1926).

148 *Id.* at 106.

149 *Id.*

150 *Id.* at 153.

151 Recall that this was the same rationale that the Court used to invalidate the National Industrial Recovery Act. *See supra* note 142 and accompanying text.

152 *Myers*, 272 U.S. at 117, 153.

to the Court, "the President needs as an indispensable aid . . . the disciplinary influence upon those who act under him of a reserve power of removal."[153] As such, the Court held that "[t]he power of removal is incident to the power of appointment" because, without it, the President cannot faithfully execute the laws.[154]

Interestingly, *Myers* did not address the impact of its holding on the Commissioners of the FTC and the Board of Governors of the Federal Reserve System, who were also protected by for-cause removal restrictions at the time.[155] Perhaps the character of these agencies are not "quintessentially executive," thus not truly resembling the executive functions exercised by the Postmaster.[156] The implication of *Myers* is that the President's power to remove members in agencies whose functions are not purely executive is not an "indispensable aid" for the faithful execution of the laws.[157] This suggests that the removal restrictions on the pre-Wagner Act NLRB, which exercised both quasi-judicial and prosecutorial functions, would also be constitutional under *Myers*. However, this implication would likely not be true for the General Counsel of the modern NLRB because the General Counsel, like the Postmaster, exercises executive functions, such as administrative and prosecutorial tasks.

In the decade following *Myers*, the proliferation of different types of agencies stemming from the New Deal forced the Court to expand *Myers*. In *Humphrey's Executor v. United States*,[158] President Roosevelt sought to remove William E. Humprey, a commissioner on the FTC by asking for Humphrey's resignation, noting "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection . . . ."[159] When Humphrey refused to resign, Roosevelt fired him despite the FTC Act's express for-cause removal restriction requiring the President to show "inefficiency, neglect of duty, or malfeasance in office."[160] The Supreme Court held that the limits on the president's removal power were justified because of the judicial and legislative "character" of the

153 *Id.* at 132.

154 *Id.* at 122.

155 Peter Straus, *On the Difficulties of Generalization—PCAOB in the Footsteps of* Myers, Humprey's Executor, Morrison, *and* Freytag, 32 Cardozo L. Rev. 2255, 2260–61 (2011).

156 *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2189 (2020) (describing "quintessentially executive" as functions which are not merely legislative or judicial but rather "administrative and enforcement" such as the "power to seek daunting monetary penalties against private parties in federal court").

157 *Myers*, 272 U.S. at 132.

158 Humphrey's Ex'r v. United States, 295 U.S. 602, 618–19 (1935).

159 *Id.* at 618.

160 *Id.* at 619; 15 U.S.C. § 41.

commission that Congress intended to create.[161] Unlike the postmaster in *Myers* who performed "executive functions,"[162] the FTC commissioner's duties in creating rules and adjudicating unfair trade practices are "predominantly quasi-judicial and quasi-legislative."[163] In defining the scope of presidential removal powers based on the function of the agency, the Court noted that departments with nonexecutive functions "should be free from the remotest influence, direct or indirect, of either of the other two" branches of government.[164]

The Court expanded functionalist approach of *Humphrey's* two decades later in *Wiener v. United States*,[165] which held that removal restrictions for commissioners in the War Claims Commission was constitutional due to the quasi-judicial character of the agency.[166] *Wiener* involved a lawsuit for back pay initiated by a former member of the War Claims Commission who claimed that he was illegally removed from his post.[167] The War Claims Commission was composed of three members appointed by the President for three-year terms with the advice and consent of the Senate.[168] Under the War Claims Act of 1948, Congress granted the Commission jurisdiction to adjudicate claims by internees, prisoners of war, and religious organizations injured during World War II.[169] The War Claims Act, however, like the NLRA, was silent on the appropriate removal mechanism for commissioners.[170] Like the rationale employed in *Humphrey's*, the Court interpreted the statute's silence on presidential removal and judicial character of the commission as evidence of the legislature's intent to "preclude[] the President from influencing the Commission" through no-cause removal.[171] Because the War Claims Commission, similar to the FTC, adjudicated cases like a court, it fell squarely outside the domain of *Myers*'s "executive" functions.[172]

Although *Humphrey's* and *Wiener* dealt with the statutory for-cause removal restrictions for agency officials exercising quasi-judicial powers, it remained unclear if the court would permit for-cause removal provisions over officials exercising purely executive powers. Note that in *Myers* the issue was whether a statutory congressional concurrence

161 *Humphrey's Ex'r*, 295 U.S. at 631.

162 *Id.* at 627.

163 *Id.* at 624.

164 *Id.* at 630 (quoting 1 The Works of James Wilson 367 (James DeWitt Andrews ed.,1896)).

165 357 U.S. 349 (1958).

166 *Id.* at 356.

167 *Id.* at 349.

168 *Id.* at 350.

169 *Id.* at 349–50.

170 *Id.*

171 *Id.* at 356.

172 Humphrey's Ex'r v. United States, 295 U.S. 602, 627 (1935).

requirement was constitutional. *Myers* did not address the constitutionality of a for-cause removal provision that requires the President to state a statutory cause for her decision to fire an agency official.

The Court attempted to clarify constitutionality of for-cause removal restrictions in *Morrison v. Olson*.[173] There, the Supreme Court prohibited the President from removing an independent counsel appointed by the judiciary to investigate potential wrongdoings in the executive branch.[174] The independent counsel was removable only "for cause" by the Attorney General.[175] The Court held that the constitutionality of a "for cause" removal restriction on a purely executive officer, like the independent prosecutor, turned on whether the official's independence interferes with the President's constitutional duties to take care that the laws are faithfully executed.[176] Because the independent prosecutor had limited policymaking authority and his jurisdiction was limited to investigating allegations of wrongdoings in the executive branch, the Court held that limiting the President's power to remove the prosecutor was constitutional.[177]

*Morrison* provides insight into the constitutionality of limiting the President's power to remove the General Counsel of the NLRB. First, to argue that the General Counsel should be protected from no-cause removal under *Morrison* requires finding that the General Counsel has limited policymaking authority. But unlike the independent counsel in *Morrison*, the General Counsel of the NLRB has a wide range of executive functions, including the "final authority" to prosecute virtually all labor complaints provided for under the NLRA.[178] Moreover, the General Counsel's jurisdiction goes far beyond that of the independent counsel. Among the General Counsel's responsibilities include the power to prosecute violations, investigate labor violations, represent the agency in federal court when seeking enforcement orders, promulgate internal agency rules, and handle all agency personnel decisions.[179]

---

173 487 U.S. 654 (1988).

174 *Id.* at 693.

175 *Id.* at 691–93.

176 *Id.* at 689–90.

177 Morrison v. Olson, 487 U.S. 654, 689–90 (1988) (stating the ultimate question was whether the inability to remove an official "at will" interfered with "the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed'"). The Court developed a four-factor test to determine whether an officer can be removed at will by the President: (1) the official's policymaking discretion, (2) whether the official is removable by a more superior official serving at the pleasure of the President, (3) the official's scope of jurisdiction, and (4) the official's tenure in office. *Id.*

178 *See* NLRB Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board, 20 Fed. Reg. 2175–76 (Apr. 1, 1955).

179 *See id.* at 191–93.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[180] the Court invalidated a removal provision in the Sarbanes-Oxley Act of 2002, which permitted removal of members in the Public Company Accounting Oversight Board ("Accounting Board") only for-cause.[181] The Accounting Board is a department within the SEC, an agency governed by a multimember commission protected from removal by the President without cause.[182] In effect, members of the Accounting Board were doubly insulated from the President because *only* members of the SEC could remove them, and then only with good cause. The Court held that such a dual layer of removal protection is unconstitutional because it interferes with the President's ability to effectively execute the laws.[183]

*Free Enterprise Fund* may "logically impl[y] the unconstitutionality of agency independence" because it forbids statutory limits on the President's ability to remove officers that "he believes is not faithfully executing the laws."[184] There are, however, good reasons to conclude that the Court did not intend such a conclusion. The Court did not invalidate the entire independent structure of the SEC but merely severed the invalid for-cause restriction insulating the members of the Accounting Board from at-will removal by the SEC.[185]

Although *Free Enterprise Fund* reflects the modern judicial attitude toward independent agencies, the Court's most recent decisions in *Seila Law LLC v. Consumer Financial Protection Bureau* and *Collins v. Yellin* offer the strongest arguments for why the General Counsel of the NLRB can be removed by the President without cause. In *Seila*, the Court held that the for-cause removal provision in the Consumer Financial Protection Act of 2010, protecting the sole director of the Consumer Finance Protection Bureau ("CFPB") from removal, was unconstitutional.[186] The Act limited the President's power to remove the Director of the CFPB only for "inefficiency, neglect of duty, or malfeasance in office."[187] Unlike traditional independent agencies headed

---

180 561 U.S. 477 (2010).

181 *Id.* at 478.

182 *Id.*

183 *Id.* at 501.

184 Neomi Rei, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 Fordham L. Rev. 2541, 2575 (2011).

185 *Free Enterprise Fund*, 561 U.S. at 508, 514. Glicksman and Levy interpret the Court's holding as pushing the final constitutional disposition of independent agencies to a later date. *See* Glicksman & Levy, *supra* note 18, at 183–84 (noting the Court's emphasis that the parties did not ask the Court to reexamine removal power precedents as a "sign[] that the Court might be willing to reconsider the constitutionality of independent agencies").

186 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020). Specifically, the Court invalidated 12 U.S.C. § 5491(c)(3), which limited the President's power to remove the Director of the CFPB only for "inefficiency, neglect of duty, or malfeasance in office." *Id.*

187 12 U.S.C. § 5491(c)(3).

by multimember commissions, the CFPB's prosecutorial and adjudicative apparatus is led by a single director.[188] The Court emphasized that the Constitution vests all the executive power in the President and that Congress may restrict removal only in situations where the agency performs a "quasi-legislative" or "quasi-judicial function," as in *Humphrey's Executor* or *Wiener*.[189] The CFPB's single director, however, "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy."[190] As such, the single director encapsulated an unconstitutional tripartite of power by wielding executive, quasi-legislative, and quasi-judicial powers. Moreover, unlike most agencies, the CFPB was doubly insulated from Congressional oversight because it receives its funding directly from the Federal Reserve System in an "amount determined by the Director to be reasonably necessary."[191] All agencies, except the Federal Reserve System and the CFPB, receive funding through the Congressional appropriations process.[192] In addition, the CFPB director was not beholden to any "boss, peers, or voters," and would therefore be utterly unaccountable if oversight authority did not fall within the President's domain.[193] Given the CFPB's unique autonomy in the federal system, the Supreme Court held that "[t]he CFPB Director's insulation from removal by [a politically] accountable President is enough to render the agency's structure unconstitutional."[194]

Despite the unique factual circumstances in *Seila* of an insulated CFPB director with power over "a vital segment of the economy," the Supreme Court extended the case to strike down even modest removal restrictions for far less significant agency heads.[195] In *Collins v. Yellen*, the Court invalidated the statutory removal restriction for the single Director of the Federal Housing Finance Agency ("FHFA").[196] Unlike statutes with traditional removal restrictions like *Seila*'s malfeasance standard, the FHFA simply provided that the Director may be "removed . . . for cause by the President."[197] In the absence of any "inefficiency, neglect of duty, or malfeasance in office" standard, the President had the power to

188 *Seila L.*, 140 S. Ct. at 2189.

189 *Id.*

190 *Id.* at 2191.

191 12 U.S.C. § 5497.

192 U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); *see also* Adam J. White, *The CFPB's Blank Check—or, Delegating Congress's Power of the Purse*, Yale J. on Regul.: Notice & Comment (Nov. 27, 2022), https://www.yalejreg.com/nc/the-cfpbs-blank-check-or-delegating-congresss-power-of-the-purse/ [https://perma.cc/8V3S-M5ML].

193 *Seila L.*, 140 S. Ct. at 2191.

194 *Id.* at 2204.

195 *Id.* at 2204.

196 Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021).

197 *Id.* at 1781–82 (quoting 12 U.S.C. § 4512(b)(2)).

remove the FHFA Director for simply refusing to follow a lawful executive order or for failing to advance the President's policy objectives.[198] Indeed, the Court recognized as much in noting that the "for-cause standard would be satisfied whenever a Director 'disobey[ed] a lawful [presidential] order,' including one about the Agency's policy discretion."[199] "[T]he Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer."[200]

Unlike *Seila*, where the CFPB had the authority to regulate millions of private businesses, the FHFA is jurisdictionally constrained to regulate Fannie Mae, Freddie Mac, and eleven other Federal Home Loan Banks.[201] The FHFA's duties include establishing standards for government sponsored home loan banks relating to risk management, internal auditing, and minimum capital requirements.[202] The extent of the Director's executive powers included oversight of thirteen government sponsored entities and the power to fine, which had not been used in the agency's thirteen-year history, unlike the CFPB, which had collected billions of dollars of fines.[203] Indeed, the court in *Seila* distinguished the FHFA's regulatory and enforcement authority from the CFPB, holding that the FHFA's authority was not "remotely comparable to that exercised by the CFPB" and that "[t]he CFPB's single-Director structure is an innovation with no foothold in history or tradition."[204] As such, the Court's willingness to extend *Seila*'s rationale to *Collins* suggests an unequivocal rejection of restrictions on the President's power to remove the head of an agency that exercises the kind of executive power that is analogous to the FHFA or CFPB.

Returning to the General Counsel of the NLRB, the jurisprudential landscape after *Collins* strongly suggests that any challenge to the President's power to remove the General Counsel is unlikely to succeed. The absence of *any* for-cause removal protection provided to the General Counsel in the NLRA, as amended by the Taft-Hartley Act, implies far greater presidential discretion than the minimal restrictions that

198 *Id.* at 1786 (quoting *Seila L.*, 140 S. Ct. at 2193).

199 *Id.* (alterations in original) (quoting Brief for Court-Appointed Amicus Curiae at 41, *Collins*, 141 S. Ct. 1761 (2021) (19-422)).

200 *Id.* at 1787 (quoting *Seila L.*, 140 S. Ct. at 2205).

201 *Id.* at 1803.

202 *See* 12 U.S.C. § 4513b(a).

203 *Collins*, 141 S. Ct. at 1806 (Sotomayor, J., concurring in part and dissenting in part).

204 *Seila L.*, 140 S. Ct. at 2202. Justice Sotomayor's concurrence in *Collins* notes that "one of the FHFA's main powers is assuming the mantle of conservatorship or receivership" of government-sponsored home loan banks. *Collins*, 141 S. Ct. at 1806 (Sotomayor, J., concurring in part and dissenting in part). Justice Sotomayor noted that "the FHFA does not possess significant executive power" and that the authority it does possess is exercised over government actors, which suggests *Morrison*'s "trained inward" rationale is applicable. *Id.*

were nullified in *Collins*. Moreover, the General Counsel's bottleneck on the agency's policymaking discretion given the Board's questionable rulemaking authority suggests that the General Counsel wields far more executive power as the chief prosecutor than the directors in *Seila* and *Collins*. Indeed, the General Counsel's unreviewable prosecutorial discretion and capacity to steer the agency's labor policies is strongly indicative of the kind of purely executive functions that implicate the President's constitutional duties under *Morrison* and *Myers*. Like the single director of the CFPB, the General Counsel's prosecutorial discretion over labor issues, especially as it pertains to its unreviewable discretion to pursue certain cases over others, impacts a "vital segment of the economy" and "affect[s] millions of Americans."[205]

Perhaps one could distinguish the single director structure of *Seila* from the bifurcated structured of the NLRB, which is comprised of a General Counsel and the Board, but this bifurcated structure and the single director of the CFPB are not truly distinguishable because the CFPB "is an independent bureau within the Federal Reserve System."[206] The Court in *Seila* simply disregarded this fact and decided to treat the CFPB as a separate agency despite being within the Federal Reserve System. Consistent with the treatment of the CFPB in *Seila*, a court reviewing the issue can view the General Counsel as an independent bureau within the NLRB system. Recognizing the President's at-will removal power over the General Counsel is therefore consistent with *Seila*'s invalidation of the for-cause removal provision insulating the single director of the CFPB. As such, the General Counsel serves at the pleasure of the President. In finding support for the President's power to terminate the General Counsel at-will, the final Part offers a legislative solution to reinvigorate the NLRB's independence.

## IV. Legislative Solutions for Restoring "Independence"

To reinvigorate the original legislative intent of Congress in entrusting the development of labor policy to an independent board of adjudicators, Congress should amend the Taft-Hartley Act to reflect one of two options to address the removal procedure of the General Counsel and restrict the General Counsel's prosecutorial discretion. The first option is to insulate the General Counsel through a for-cause removal provision exercisable by an Executive cabinet official. The second, alternative, option is to retain the at-will removal of the General Counsel but allow removal only by the Board of the NLRB. Regardless of the option chosen, Congress should also restrict the General

205 *Seila L.*, 140 S. Ct. at 2204.

206 *Consumer Financial Protection Bureau*, Fed. Reg., https://www.federalregister.gov/agencies/consumer-financial-protection-bureau [https://perma.cc/6QNL-HHR7].

Counsel's unreviewable prosecutorial discretion by permitting private litigants to seek Board review of the General Counsel's refusal to issue a complaint under the deferential plainly erroneous standard.

Insulating the General Counsel through a for-cause removal provision under the purview of some executive cabinet official aligns the NLRB's structure with the model endorsed in *Morrison*. Recall that in *Morrison* the independent special counsel was removable for cause by the Attorney General, and the Attorney General, in turn, is removable at will by the President.[207] As such, section 153(d) of the Taft-Hartley Act should include language that authorizes a presidential cabinet official, like the Secretary of the Department of Labor, to remove the General Counsel "for neglect of duty or malfeasance in office, but for no other cause."[208] The specific Cabinet official chosen to hold this power is immaterial to the analysis, although Congress might find that granting the power to an Executive Department that has some natural synergy with labor policy might be optimal. A key difference between the independent special counsel in *Morrison* and the General Counsel is the scope of the latter's policymaking discretion arising from its unreviewable prosecutorial discretion. As such, a standalone removal restriction exercisable by the Secretary of Labor would not be enough to survive constitutional muster, if challenged. To ensure fidelity to the model endorsed by *Morrison*, Congress must also limit the prosecutorial discretion of the General Counsel by making its decisions to prosecute reviewable by the Board. A modest review under a deferential plain error standard will likely not inundate the Board with protracted disputes but helps close the power gap between the General Counsel and the special counsel in *Morrison*.

Moreover, this proposed structure places a barrier between the General Counsel and the President while retaining political accountability and independence. Upon review of such a structure's constitutionality, a court will likely defer to *Free Enterprise Fund v. Public Company Accounting Oversight Board*, which held that for-cause removal restrictions are permissible if the officer has a superior whose removal is not limited with for-cause protections.[209] The Secretary of Labor is removable by the President *at will*.[210] By insulating the General Counsel through a for-cause provision exercisable only by an at-will intermediary, i.e., the Secretary of Labor, the General Counsel

---

207 Morrison v. Olson, 487 U.S. 654, 689–90 (1988).

208 *Cf.* 29 U.S.C. § 153(a) (the for-cause removal provision insulating the Board from at-will removal).

209 Free Enterprise Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 478 (2010).

210 Secretary of Labor is a member of the President's Cabinet and therefore mainly enforces the laws. *See* Myers v. United States, 272 U.S. 52, 126 (1926) (noting that "the power of appointment and removal is clearly provided for by the Constitution" when it comes to executive officers who exercise purely executive functions).

will have a greater degree of independence from presidential policy and oversight. As such, the NLRB could continue relying on adjudication as its primary mode of policymaking without casting doubt on the independence of its policymaking process.

The second option involves preserving at-will removal over the General Counsel but making removal exercisable only by the independent Board of the NLRB. This solution tracks the model endorsed by the Supreme Court in *Free Enterprise Fund*. There, the Supreme Court invalidated for-cause provisions that protected members of the Accounting Board but preserved the exclusive power of the independent Securities and Exchange Commissioners to remove the Accounting Board members without cause.[211] The advantage of this alternative over the former is that it makes the NLRB's structure distinguishable from the single-director models deemed unconstitutional in both *Collins* and *Seila*.[212] If the General Counsel is removable at-will by the Board, then the court will find it difficult to analogize the General Counsel with CFPB as an independent bureau within a larger system.

Either alternative will help address the fundamental problem that this Essay has identified—contrary to Congress's original legislative intent, contemporary labor policy is vulnerable to being overrun with pressures from the Executive. Congress created a labor board after its experience with the direction of labor policy under the auspices of the judiciary. Left to the judiciary, the resulting law was embodied in cases like *Fisher*, *Amalgamated*, and *Lawlor*, which simply condemned unionizing efforts.[213] In deciding that labor under the common law cannot adequately develop to satisfy the economic realities of the twentieth century, Congress placed labor policy under the purview of an independent body of experts. Although Congress succeeded to limit the role of what was then a decidedly anti-union judiciary, the Taft-Hartley amendments of 1947 left open the possibility that the executive would one day come to exert the same anti-union pressures on the development of the nation's labor policies. The Trump-era NLRB tested the scope of power wielded by the General Counsel, and Biden's unprecedented removal of Peter Robb confirmed that real power over labor policy resides in the executive. If Congress truly has the exclusive domain to legislate, then it should ensure that its decision to allow workers to "attain freedom and dignity . . . by cooperation" is not subdued by the creeping power of the executive.[214]

---

211 *Free Enterprise Fund*, 561 U.S. at 478.

212 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020); Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021).

213 *See supra* Section I.A.

214 79 Cong. Rec. 7565 (1935) (statement of Sen. Robert F. Wagner).