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LEGISLATIVE ACTION ALERT

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The President does not have the authority to terminate members of the National Labor Relations Board at will



On Jan. 27, 2025 the 45th and 47th president sent Gwynne A. Wilcox a late-night email tarring her as a ***“far-left” NLRB appointee who had “no place” in the second Trump administration.***

“An American President is not a king,” a federal judge wrote in ruling against President Donald Trump on Thursday. U.S. District Judge Beryl Howell in the District of Columbia made the stark statement in rejecting Trump’s bid to fire Gwynne Wilcox from the National Labor Relations Board.

“The President does not have the authority to terminate members of the National Labor Relations Board at will, and his attempt to fire plaintiff from her position on the Board was a blatant violation of the law,” Howell wrote.

As I noted when Wilcox filed her lawsuit against what she called Trump’s “unprecedented and illegal” action, the case sets up a possible test of a longstanding Supreme Court precedent called *Humphrey’s Executor*, a 1935 decision that, as Wilcox put it in her complaint, “has ensured the independence of critical government agencies.”

Humphrey’s Executor played a big role in Howell’s ruling. The judge wrote that it “remains not only binding law, but also a well-reasoned reflection of the balance of power between the political branches sanctioned by the Constitution.”

The judge wrote that the precedent and subsequent cases citing it “control the outcome of this case and require that plaintiff be permitted to continue her role as Board member of the NLRB and her termination declared unlawful and void.”

“The Framers made clear that no one in our system of government was meant to be king — the President included — and not just in name only,” Howell writes. “Indeed, the very structure of the Constitution was designed to ensure no one branch of government had absolute power, despite the perceived inefficiencies, inevitable delays, and seemingly anti-democratic consequences that may flow from the checks and balances foundational to our constitutional system of governance.”

“In the ninety years since the NLRB’s founding, the President has never removed a member of the Board,” the opinion continues. “His attempt to do so here is blatantly illegal, and his constitutional arguments to excuse this illegal act are contrary to Supreme Court precedent and over a century of practice.”

Under the terms of the NLRA, members of the NLRB can only be fired for two reasons: “neglect of duty or malfeasance in office.” These limited bases are known as “for-cause” removal protections.

A President who touts an image of himself as a “king” or a “dictator,” perhaps as his vision of effective leadership, fundamentally misapprehends the role under Article II of the U.S. Constitution. In our constitutional order, the President is tasked to be a conscientious custodian of the law, albeit an energetic one, to take care of effectuating his enumerated duties, including the laws enacted by the Congress and as interpreted by the Judiciary. At issue in this case, is the President’s insistence that he has authority to fire whomever he wants within the Executive branch, overriding any congressionally mandated law in his way. Luckily, the Framers, anticipating such a power grab, vested in Article III, not Article II, the power to interpret the law, including resolving conflicts about congressional checks on presidential authority. The President’s interpretation of the scope of his constitutional power — or, more aptly, his aspiration — is flat wrong.

“The President seems intent on pushing the bounds of his office and exercising his power in a manner violative of clear statutory law to test how much the courts will accept the notion of a presidency that is supreme,” the opinion concludes. “The Constitution and caselaw are clear in allowing Congress to limit the President’s removal power and in allowing the courts to enjoin the executive branch from unlawful action ... An American President is not a king — not even an ‘elected’ one — and his power to remove federal officers and honest civil servants like plaintiff is not absolute, but may be constrained in appropriate circumstances, as are present here.”