



TO WHAT EXTENT CAN WALMART'S SUCCESSFUL BLOCKING OF AN ADMINISTRATIVE LAW JUDGE IN THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW EXTEND TO IMMIGRATION JUDGES?

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On March 25, 2024 Chief Justice J. Randal Hall of the United States District Court for the Southern District of Georgia, Statesboro Division granted Walmart's motion for summary judgment in [Walmart Inc. v. Jean King](#), which alleged that the administrative proceedings against the company for violations of immigration-related recordkeeping requirements should be halted because they were "being conducted by an administrative law judge ("ALJ") who is unconstitutionally shielded from the President's supervision. ALJs like Jean King, who was presiding over the proceedings against Walmart and is the [Chief Judge within the Office of the Chief Administrative Hearing Officer](#) (OCAHO), can be removed from their position only for "good cause" as determined by the Merits System Protection Board (MSPB) and by the president for "only for inefficiency, neglect of duty, or malfeasance in office". Walmart alleged that this system violates the Constitution by insulating ALJs "from presidential control by two levels of removal protection". Walmart argued that Article II of the Constitution, which commands the President to "take Care that the Laws be faithfully executed", requires him to have the power to remove executive officers. Only two types of officers have been determined to be exempt from the President's removal power – principal officers, who report directly to the President, and inferior officers, who are appointed by the President but supervised by others. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021). Walmart argued that ALJs do not within either of these exceptions, "so the removal scheme that protects them is

unconstitutional twice over". Judge Hall agreed with Walmart and granted the motion for summary judgement, finding that "the multilevel protection from removal present for the OCAHO ALJs is contrary to Article II, and contrary to the executive power of the President."

This case is just one in a string of recent examples of constitutional challenges to the authority of ALJs. In a [previous blog](#), we discussed [*Securities and Exchange Commission v. Jarkesy*](#), which, in part, concerns whether the Congress' decision to allow ALJs to be removed only for "good cause" violates Article II. The Supreme Court heard oral argument in *Jarkesy* in November 2023, and its decision in the case could have sweeping consequences for the future of ALJs. We also reported on SpaceX's [successful challenge](#) against the DOJ's prosecution of discrimination allegations against it under INA 274B. SpaceX's Appointments Clause challenge was unique as it argued that the Attorney General, despite appointing OCAHO ALJs, does not review their decisions under INA 274B as an aggrieved party under INA § 274B(g)(1) must seek review in the court of appeals.

Jarkesy and *Walmart* also raise the possibility about whether Immigration Judges (IJs), too, could face constitutional challenges. Like the OCAHO, they too are housed within the Executive Office for Immigration Review under the purview of the Department of Justice.

However, in [*Fortunato de Jesus Amador Duenas v. Garland*](#), the Ninth Circuit rejected an argument that the removal process for IJs violates Article II. The Court reasoned that the Attorney General (AG), who supervises IJs, enjoys the unrestricted authority to remove them at his discretion. Historically, AGs have exercised this power fairly liberally. John Ashcroft, the AG under President George W. Bush, fired a number of IJs who had reputations for being lenient toward immigration. See Jill Family, *Regulated Immigrants: An Administrative Law Failure*, 29 Bender's Immigration Bulletin 401, 415 (March 14, 2024). Jill Family's article in providing a fascinating history of the APA points out that Congress exempted deportation and exclusion cases from the Administration Procedure Act. See Supplemental App. Act of 1951, Pub. L.64 Stat. 1044 (1951). During the Trump administration, AG Jeff Sessions similarly [removed](#) IJ Steven Morley from handling the *Castro-Tum* case and replaced him with a different judge after Morley had previously administratively closed it. On the other hand, IJs are also subject to the Merits System Protection Board (MSPB) like the ALJ in the Walmart case. In [*Roy v. MSPB*](#), the only reason why Susan Roy, a former

Immigration Judge, could not make a claim in the MSPB is because she had not served two years. Otherwise, *Roy v. MSPB* shows that IJs who have completed two years can challenge their removal to the MSPB. IJs are also subject to [union control](#), which was not brought up in [Fortunato de Jesus Amador Duenas v. Garland](#).

Even if the Supreme Court in *Jarkesy* ultimately rules that ALJs are unconstitutional, it is unlikely that the holding would extend to IJs notwithstanding the fact that IJs may also receive some modicum of protection from removal. IJs have historically been susceptible to removal by the AG who is appointed by the President. They can be reassigned from a case and the AG also has the authority to certify decisions made by an IJ to himself and overrule them. There is another part of *Jarkesy* that brought a Seventh Amendment challenge because Mr. Jarkesy was subject to an administrative proceeding against him and was deprived of a jury trial in federal court. If the Supreme Court rules in favor of Mr. Jarkesy on his right to a jury trial, this may invite challenges with respect to the authority of IJs. Even here, S. Michael McCulloch, counsel for Jarkesy, argued that the court should hold that when the government brings a case with the “same essential function” as a traditional lawsuit for claims such as fraud, it should have to bring the case in federal court, where a jury trial right would apply. However, when pressed further he [emphasized](#) that *Jarkesy* should not apply to adjudicating government benefits and debts and that the authority of IJs should not be impacted by the outcome of the case.

It remains to be seen whether a broad ruling in *Jarkesy* will strike at the heart of the immigration court system. If the Supreme Court’s holding brings about the evisceration of the immigration courts, Congress could be forced to create an independent immigration court system under [Article I](#) of the Constitution as a replacement. An Article 1 court would [ensure that IJs are independent from political interference](#) as they are currently under the purview of the Attorney General within the Department of Justice.

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