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EOIR POLICY MEMORANDUM ON INFERIOR OFFICERS OPENS UP CLAIMS TO INVALIDATE PROCEEDINGS

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Acting Director Sirce Owen of the Executive Office for Immigration Review (EOIR) issued Policy Memorandum (PM) 25-23 stating that, in the context of any future personnel actions and after additional review, EOIR may decline to recognize the multiple layers of for-cause removal restrictions for all of EOIR's inferior officers if they are determined to be unconstitutional.

The EOIR Policy Memorandum followed shortly after the Department of Justice (DOJ) notified Congress of its conclusion that the multiple layers of removal restrictions for Administrative Law Judges (ALJs) are unconstitutional and that it will no longer defend those restrictions in litigation. The DOJ press release states:

> Today the Department of Justice determined that multiple layers of removal restrictions shielding administrative law judges (ALJs) are unconstitutional.
>
> Unelected and constitutionally unaccountable ALJs have exercised immense power for far too long. In accordance with Supreme Court precedent, the Department is restoring constitutional accountability so that Executive Branch officials answer to the President and to the people.

The Policy Memorandum applies this policy not just to EOIR's ALJs within the Office of the Chief Administrative Hearing Offer but to all of EOIR's inferior officers which includes all Immigration Judges, members of the Board of Immigration Appeals , all ALJs, the Chief Administrative Hearing Officer, the

General Counsel and the Assistant Director of Policy. Inferior officers are recognized in Article II of the US Constitution as officers who are directed by a principal officer, who in turn is appointed by the President with the advice and consent of the Senate.

The Policy Memorandum is striking because it recognizes that all inferior officers in the EOIR may be constitutionally infirm because they cannot be easily removed by the President. Would this open up challenges to the validity of ALJs and the Immigration Court system?

In *Walmart v. Jean King*, which we have commented on in a prior blog, a federal court granted Walmart's motion for summary judgment to halt an administrative proceeding against the company for violations of immigration-related recordkeeping requirements because they were conducted by an administrative law judge ("ALJ") who was unconstitutionally shielded from the President's supervision. ALJs can be removed from their position only for "good cause" as determined by the Merits System Protection Board (MSPB) and by the president "only for inefficiency, neglect of duty, or malfeasance in office". See 5 U.S.C. sections 1202(d) and 7513(a), 7543(a). Walmart alleged that this system violated 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.

If Walmart was successful in blocking an ALJ from ruling against it for I-9 violations, can a similar argument be made that IJs are also subject to for-cause removal restrictions and render them and the Immigration Court system invalid? 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.

Now Ms. Owen's Policy Memorandum clearly acknowledges that IJs, ALJs and other inferior officers are subject to removal restrictions, and as their positions may be unconstitutional, can a plaintiff like Walmart invalidate the Immigration Court? On the other hand, the Policy Memorandum cites *Collins v. Yellen*, which held that actions taken by properly appointed constitutional officers are not void absent a showing of harm, even if those officers are subject to unconstitutional removal restrictions. Ms. Owens, relying on *Collins v. Yellen*,

states accordingly that "even if an inferior officer's removal restrictions are determined to be invalid, EOIR will generally continue to recommend defending that officer's official actions absent a showing of harm connected to the restriction themselves." This raises the possibility that if it can be shown that there was a notorious IJ or BIA member, a plaintiff could demonstrate that the president (more than likely President Biden) could have fired him or her. But in *Collins v. Yellen*, the plaintiff sought to invalidate an action of the agency director because he was unconstitutionally subject to removal restrictions, and the Supreme Court held the action to be valid because the director was still properly appointed. However, in *Walmart v. Jean King* the court held that the ALJ proceeding was invalid as the ALJ was subject to unconstitutional removal restrictions, as has now been affirmed in the Policy Memorandum. Walmart was broadly attacking the legitimacy of the ALJ to impose a fine and succeeded.

Collins v. Yellen also suggests a possible opening for invalidating a decision:

> That does not necessarily mean, however, that the shareholders have no entitlement to retrospective relief. Although an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment), it is still possible for an unconstitutional provision to inflict compensable harm. And the possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect cannot be ruled out. Suppose, for example, that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have "cause" for removal. Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way. In those situations, the statutory provision would clearly cause harm.

Can a future plaintiff thus claim that all EOIR officers identified by Ms. Owens in the Policy Memorandum are constitutionally infirm? Notably, the district court in in *Walmart* did not cite *Collins*. Attempting to utilize the Policy Memorandum to challenge removal proceedings or the immigration court system more broadly could be challenging in light of 8 USC 1252(b)(9):

> "Judicial review of all questions of law and fact, including interpretation

> and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact."

A challenge to removal proceedings would thus have to go through the petition for review process, and would be limited by *Collins* unless one can show harm was suffered through the removal restriction itself. *Walmart* involved administrative proceedings against a company for alleged I-9 violations, not removal proceedings, and so this issue was averted. Thus, the Policy Memorandum may not provide a viable pathway for attacking the entire immigration court system. However, a removal decision can still be challenged through a petition for review. The policy memorandum may also provide an enhanced basis for challenging administrative proceedings against employers decided by ALJs, like those at issue in *Walmart*.

By acknowledging that there are unconstitutional removal restrictions for all inferior officers within the EOIR, the Policy Memorandum may pave the way for more claims to invalidate proceedings against ALJs and also against IJs in limited circumstances. At the same time, officers within the EOIR will have less job security as EOIR may decline to recognize removal restrictions if they are determined to be unconstitutional.

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