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IN THE WALMART CASE, THE GOVERNMENT CANNOT HAVE ITS CAKE AND EAT IT TOO

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In a previous blog, excerpted here, we analyzed *Walmart, Inc. v. Jean King*, which involved a challenged by Walmart to the administrative proceedings against it for violations of immigration-related recordkeeping requirements on the ground that the proceedings 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". Chief Justice J. Randal Hall of the United States District Court for the Southern District of Georgia agreed with Walmart and granted its 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."

The federal government appealed this finding, and the US Court of Appeals for the Eleventh Circuit heard in the case on Friday, June 6. Attorney Jeff Johnson, representing Walmart, argued that the statutory defect invalidates ALJs' authority, stating: "I'm saying when you bake in an unseverable removal restriction, that takes away their power to act just as much." The government, on the other hand, stated that it would not defend the constitutionality of the removal provisions for ALJs, but, at the same time, argued that ALJs should still be left with the authority to penalize Walmart and other employers in enforcement proceedings. Joshua Salzman, attorney for the government, stated:

"Here they are saying all I-9 enforcement has to stop unless and until Congress is able to act. And it's not just I-9 enforcement — that actually wildly understates the stakes of the potential implications of their argument", noting the wide range of administrative proceedings over which ALJs preside.

"I could go on and on and on...but the logic of the district court's opinion here is, all of it stops unless and until Congress amends the statute."

The Supreme Court has previously held that 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). As it stands, ALJs may not fall within either of these categories. Even if they are considered inferior officers, because they cannot be easily removed, their appointment may still be unconstitutional. If the court can sever only the problematic removability clause from the statutory provision giving authority to ALJs, perhaps ALJs can be interpreted to be constitutionally appointed. The 11th Circuit panel indicated that if the government was unwilling to defend the constitutionality of the removal provisions, it would appoint a third party to take up the defense of those protections' constitutionality. "The court can't simply accept the government's concession of unconstitutionality without evaluating the issue for itself," they said.

It is noteworthy that the administration has refused to defend the constitutionality of the removal procedures of ALJs. Earlier in February 2025, 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. If the government is unwilling to defend the statute regarding the removal procedures for ALJs, and the court cannot remedy it, then Congress should step in to amend it. Although it is easy to assume that Congress is in a logjam and is not capable of intervening, it should nonetheless do its job and act. Otherwise, the ALJ system should be dismantled and judges who are not constitutionally appointed should have no authority to sanction employers. The government cannot have its cake and it it too!

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