The Future of the Securities & Exchange Commission

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[00:00:00] Jeffrey Rosen: On November 29th, the Supreme Court heard oral arguments in Securities and Exchange Commission versus Jarkesy. The case involves three separate constitutional challenges to the structure of the SEC and it could reshape the ability of the government to regulate the securities markets.

[00:00:17] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, we'll break down the arguments in this important case, we'll touch on the nondelegation doctrine, the scope of presidential authority, and the right to a jury trial, and we'll hear from our guest about how the case might shape the future of the administrative state.

[00:00:50] Jeffrey Rosen: Joining me to explore these questions are Noah Rosenblum, Assistant Professor of Law at NYU and Ilan Wurman, Assistant Professor at the Sandra Day O'Connor College of Law at Arizona State University. Noah Rosenblum is an Assistant Professor of Law at NYU School of Law, where he was previously the Samuel I. Golieb Fellow in Legal History. He works on state and federal administrative law among other topics and he recently wrote a piece in The Atlantic on the SEC case, The Case That Could Destroy the Government. Noah, it is wonderful to welcome you to We the People.

[00:01:25] Noah Rosenblum: Thank you for having me. So delighted to be here.

[00:01:27] Jeffrey Rosen: And Ilan Wurman is Associate Professor at the Sandra Day O'Connor College of Law at Arizona State University where he teaches Administrative Law and Constitutional Law. He's the author of several important books including, A Debt Against the Living: An Introduction to Originalism and The Second Founding: An Introduction to the Fourteenth Amendment. Ilan, great to welcome you back to We the People.

[00:01:49] Ilan Wurman: Glad to be back. Thanks for having me and I look forward to sparring with Noah for the first time.

[00:01:53] Jeffrey Rosen: Wonderful. Well, Noah, in your piece in the, The Atlantic, the headline was, The Case That Could Destroy the Government. You may not have written the headline, but tell us why this is an important case and what the stakes are.

[00:02:07] Noah Rosenblum: So I can't take credit for the headline. That was my amazing editor, Becca Rosen, but she totally captured the spirit of the piece. And when I was writing it, I was worried about two of the three arguments that I think we're going to discuss. When Jarkesy's case was heard at the Fifth Circuit, two of the reasons the Fifth Circuit gave for upholding his arguments were that the delegation to the Securities and Exchange Commission was so broad as to render its exercise of power on constitutional and that the administrative law judges that the Securities and Exchange Commission relied on to hear the case against Jarkesy were too independent from the president, the issue of constitutional ruling. And I thought both of those arguments, if they were accepted, could have really devastating ramifications for the rest of the administrative state.

[00:02:56] Jeffrey Rosen: Great. Well, we'll explore both of those arguments and more. Ilan, do you think that this is a case that could destroy the government or not?

[00:03:05] Ilan Wurman: I don't think so, but the extent of the damage. Now, some people might like damage here. Okay, I'm just using damage mutually. The extent of the damage would depend, I agree with Noah, on the basis on which the decision ultimately is decided and I do think it's probably going to be decided under the Article III Seventh Amendment, judicial power jury trial issue. If it's decided under executive power with this, there are these two layers of for-cause removal protections for the agency adjudicator, how many of those kinds of adjudicators are there with two layers? There are quite a few, but it's a relatively easy fix.

[00:03:43] Ilan Wurman: The Article III Seventh Amendment issue there, I have proposed some relatively easy fixes, other scholars have proposed some relatively easy fixes even if that's the direction that the court goes in. I agree with Noah that the nondelegation doctrine, if that's the basis, it portends a lot more possible ramifications.

[00:04:06] Jeffrey Rosen: Sounds great. Well, let us work through the major arguments in the case. Let's begin perhaps with this question of whether the Seventh Amendment's right to civil jury trial is triggered that depends on whether or not the right in question is considered a public or a private right. Lots of discussion on this Noah, tell us what the arguments on both sides of this issue are.

[00:04:28] Noah Rosenblum: I hate to disagree with you Jeffrey because it's such a tiny little obnoxious nitpicky thing, but in fact the way that you frame the question illustrates why this issue is so complicated 'cause the Seventh Amendment issue, at least as I understand it, doesn't turn on the public right, private right question. It's just a textual issue. It has to do with Suits at common law. And on the one hand, that seems pretty obvious, right? Oh, if you're in front of a judge in a Suit at common law, then you're entitled to a jury trial under some circumstances. But that just pushes the question back and in some ways the move you just made where you said public rights, private rights is to start to follow the logic of the doctrine. And then we have to ask, "Well, wait, when might you be entitled to a civil suit at common law?" And that's gonna get us into questions of public rights and private rights, but it could also more broadly get us into a discussion of the relationship between Article III adjudication and Article I adjudication.

[00:05:22] Noah Rosenblum: So when law professors talk this way, we're making the distinction between pieces that represent exercises of the judicial power, which under the Constitution needs to be exercised by judges appointed by the president and confirmed by the Senate, right? That's Article III of the Constitution, which invest the judicial power. Or does it involve the kinds of things that you could handle through other procedures? We sometimes refer to these as Article I adjudications. What we mean by that is just the Congress passes a lot or create some sort of a regulatory apparatus and as part of that, they assign the decision to somebody within that world that are created by Article I.

[00:06:00] Noah Rosenblum: There are lots of examples of these kinds of folks. And I got to say, for your average American, it can be hard to keep track of them. So a regular district judge that's an Article III judge, but a bankruptcy judge that's an Article I judge, and many of the decisions an Article III judge makes are actually made after referring it to a magistrate judge, which is technically an Article I judge, even though most litigants would never know the difference.

[00:06:25] Jeffrey Rosen: Many thanks for that and for that important clarification. Ilan, this is complicated stuff. Step back and sort of help listeners explain why there's a dispute about whether or not the Seventh Amendment applies, where this public/private right distinction comes from. It's a case called the Atlas case, which came up a lot in the oral argument and, and what the stakes are.

[00:06:52] Ilan Wurman: So I'm going to find myself in possibly rare agreement with Noah. We'll find out how rare it is. You shouldn't get too used to it. That public and private rights has something to do with the jury, but it's indirect. It really has to do with this question of whether a case must be adjudicated in an Article III court. What makes an Article III an Article III court, by the way? It's lifetime tenure, salary protection, judicial independence, right? Or is it the kind of case that can be decided by a non-Article III adjudicator, whether it's a bankruptcy judge or an administrative logic or an executive branch official like a federal prosecutor or a U.S. attorney, right? That's the stake, where can these cases be heard?

[00:07:31] Ilan Wurman: The public/private rights distinction tells us the answer. At least theoretically, people, you know, dispute where the line is. All cases involving private rights must be heard, ultimately resolved I should say, finally resolved with a real court, whether it's a state court or an Article III court exercising judicial power. Matters involving public rights, and we'll need to go over what those are, can be heard in the executive branch. The historical reason for this has something to do with sovereign immunity. It's not the government coming after you for your life or your property. It's not a dispute between two private parties. You want something from the government, like a public land grant or a welfare benefit. And if it was wrongfully withheld from you, you didn't have a right to sue. They didn't have to consent to be sued. Congress didn't have to consent to be sued.

[00:08:16] Ilan Wurman: So sovereign immunity leads to this doctrine of public rights that could be entirely adjudicated in the executive brand. So what is the relationship between all of these to the jury trial? Well, all cases involving public rights do not need a jury because if it's a public right, it can be heard exclusively in the executive branch and the executive branch doesn't impanel juries. Juries belong in courts for the most part, right? So if it's a matter of public rights. You can assign it to the agency, administrative agency and then you're done. It resolves both the Article III question and the Seventh Amendment question. But what

happens if it's a private rights case, something involving your life or your property or the government's coming after you? As in Jarkesy, the question is whether seeking civil penalties, monetary penalties, right, is a private right.

[00:09:06] Ilan Wurman: Well, then it has to be heard at least under the formalist originalist understanding in a real court, in Article III court. And then the question becomes, okay, now, that you're in an Article III court, do you also get a jury trial right? And the question then has to do with what kind of relief is the government seeking or what kind of relief are you seeking? If it's legal relief, meaning monetary damages that can be collected through attachment of property let's say, okay? That is a legal claim. Equitable claims that actually require the defendant to do something or to stop doing something, those do not require a jury historically and there are also cases involving admiralty which are not common law claims. Historical claims I suppose, where are you gonna get a jury of your peers on the high seas. Okay, fine, you know, whatever the reason, admiralty is excluded, equitable relief is excluded. But if it's a legal remedy like damages that is being fought, then you get the jury trial right.

[00:10:05] Ilan Wurman: So how would this play out in Jarkesy? Well, I think whatever the relief being sought, the argument that some formalist make is this is private right. He's been banned from the securities industry for violation of fraud, he's been asked to pay civil penalties, give up his property, his money. As a result, this is a private right. Sovereign immunity doesn't play into it. It belongs in the court. Then the question is, does he also get a jury trial right? And the answer is probably yes for the claim for civil monetary penalties because that's not equitable relief. It's not something that can only be resolved through asking the defendant to take some action or not take some action. It's just the payment of money, which can be accomplished without any action at all through attaching property for example.

[00:10:50] Ilan Wurman: So that's how a formalist would decide this case. It's not that simple. I tried to simplify it. Hopefully, that makes some sense. But it's not easy. This stuff isn't easy.

[00:11:00] Jeffrey Rosen: One more beat on the Seventh amendment question, which came a lot in the oral argument. Justice Gorsuch had had an extended exchange with counsel about when the Seventh Amendment was triggered as a textualist. Chief Justice Roberts asked, could the government adjudicate questions involving healthcare outside of a civil jury trial? And Justice Thomas just asked straight out “How would you define public rights?” And the counsel responded that “When the federal government, an agency is enforcing a federal state in the exercise of its sovereign powers, that's a matter involving public rights.” Noah, what were the justices' digging in on and what would consequences be if the court were to hold that a civil jury trial were required in this case?

[00:11:45] Noah Rosenblum: So those are two great questions. So on the first one though, you know, what are the justices digging in on here? The public rights, private rights distinction is notoriously confused. I think Roberts in the same argument said something like, before Justice Thomas asked this question, "You know, counsel, the distinction between public rights and private rights in our jurisprudence is not very clear." So I just wanna start, you know, what are the judges digging in on here? They are wrestling with the same question that Ilan and I are wrestling with, which is, wow, if you're really gonna go into this area of law, things are hard and complicated and it really isn't just a matter of partisan disagreement

or even formalist versus functionalist tendencies. We're all grappling to figure out the bounds here.

[00:12:26] Noah Rosenblum: But that gets us to the second part of your question, which is some version of what's at stake and how it would change. And here again, I find myself in violent agreement with Ilan. The underlying question is, what kinds of claims need to go in front of what kind of adjudicators? And the simplest way to think about it is if you allow a lot of claims to go into the category of say public rights or claims in which you're not entitled to a jury trial or it can go to an Article I adjudicator. Then you can have administrative law judges and commissions and people who are not life tenured federal judges or state judges, although we're not really talking about state regulatory regimes, make decisions about those questions. Whereas if you shrink that category and you make the other category, the Article III or private rights or jury trial category bigger, then those cases have to go in front of a federal judge.

[00:13:21] Noah Rosenblum: What does that mean for something like this case? Well, for something like the SEC, it might not actually mean all that much. Because as came up several times in the course of argument, the statute at issue let the SEC choose whether to bring these enforcements actions in front of a law judge, an administrative law judge inside the agency or go to federal court. And it seems like the SEC, in part because of these legal worries, has been bringing these cases in front of federal judges and the truth is that if you're a fraudster who's defrauding the markets and you go in front of the federal judge, you tend to do about as well as you do in front of an administrative law judge in front of the agency. So hard to see how much of difference it makes.

[00:14:01] Noah Rosenblum: Small asterisk here, there's reason to believe that people who are investigated by the SEC often prefer to go to administrative law judges because it's faster and cheaper, even though they get a lot of the same procedure. So ultimate the take away here is that it might just make things a little more expensive, but for the SEC, it might not change all that much. The reason people like me get a little worried about it is that as Ilan alluded to, there are a lot of administrative law judges and adjudicators throughout the government and I have not gone agency by agency to try to figure out, wait, are you allowed to impose civil penalties? And my two worries on that, score one would be if there are a lot of places that do civil penalties, you might be shifting a lot of work into the federal courts, and we can talk about whether we think that's good or bad. But on the flip side, civil penalties, all things considered are a relatively light liberal in the kind of classical liberal sense of punishing wrongdoing.

[00:14:58] Noah Rosenblum: Whereas Ilan alluded to, there's a real distinction here between equitable remedies and common law remedies. Equitable remedies can be awfully more invasive. Taking away somebody's license can really mean preventing them from practicing their profession, banning somebody from the airwaves, right? Those are the kinds of things that I think you could do without a jury trial under almost anyone's reading. And if you're going to make it harder for agencies to get money sanctions, you might incentivize them to pursue these other much more invasive forms of regulation. So I think the classical liberals might. And I'm not a classic liberal, but if you were, you might be anxious on the liberty front about some of the consequences of a ruling like this.

[00:15:39] Jeffrey Rosen: Ilan, what is your sense of what the consequences of a decision against the SEC on the Seventh Amendment question would be? Are there lots of other agencies that delegate these decisions to non-Article III courts and how big a deal would it be?

[00:15:55] Ilan Wurman: So let me start with the Deputy Solicitor General's argument that as long as Congress creates the statute and allows a federal officer to enforce it, it's a public right. So it's something to that effect. That cannot possibly be right and even Justice Ketanji Brown Jackson was like, "This argument is circular." Right? The whole question in this case is what cases can be assigned to the executive branch, which can't and you're saying, the government was saying, "Well, anytime Congress chooses to assign it to the executive branch, it can do it because then it's not the case within the meaning of the Seventh Amendment or instut-" That's totally circular and Justice Jackson had some of the best questions. She's not gonna rule with the Conservatives, but she had some of the best questions.

[00:16:35] Ilan Wurman: It just can't be true, that line because when you think about it, every U.S. attorney, a federal prosecutor would meet that definition. They prosecute offenses and crimes, pursuant to statutes the Congress enacts and no one thinks that somehow a federal prosecutor could bring an action and another federal prosecutor can adjudicate that action and just decide. I mean, no one would think that that's correct. So if the modern doctrine can justifiably diverge from that formalist conception that I started with, it has to have something to do with technical expertise, narrow and specialized areas, which is how the doctrine actually labels it. Congress can't just give it to the executive branch. It has to be in a narrow and specialized and technical area, which is all probably wrong again, an originalist or formalist matter, but it certainly a better line than well, if Congress decides, then, then Congress gets to decide, which is totally circularly.

[00:17:29] Ilan Wurman: As to the ramifications, this was asked time and again as you mentioned at the oral argument. Something like 80% of adjudicators are Social Security adjudicators. Social Security is a public right. It's public benefits. Public welfare benefits are the quintessential example of a public right because it's not the government coming and asking you for something out of your bank account or for your real property or for your liberty or for your life. If you want something for the government, the government says, "No, you're not entitled to Social Security benefits." And again, sovereign immunity says they don't have to let you sue them. That is a classic public right, it's a public benefit.

[00:18:06] Ilan Wurman: By the way, Noah, I think licensing airwaves is also a public right. I've done some work on this in the Fourteenth Amendment context because it's a fixed national resource, and I do think that's a public right. But to the extent there are agencies that do involve lots of private rights, Federal Trade Commissions, Securities and Exchange Commission, probably the FTC for campaign finance violations. Could those be tried in an agency? So those cases would all be implicated. And I will say that there is a solution. There's a solution to this. There are two solutions.

[00:18:39] Ilan Wurman: One is to the extent of these have to be in Article III courts. Okay? With or without juries. What's to stop Congress from creating a system in which administrative law judges make findings of fact and conclusions of law and submit those as reports and recommendations, the objections to wish will be reviewed de novo by a real

district court. I mean, you get the administrative expertise, it's solve as 95% of the issues because you're not gonna object to every single issue, you're gonna object discreetly. This is exactly what magistrate judges do, have, have their reports and recommendations or review de novo by a district court. It's how bankruptcy court's private rights claims are adjudicated by a federal district court. Why not do that for agency adjudicators?

[00:19:21] Ilan Wurman: Now, it doesn't solve the jury trial problem if the relief that is sought is legal rather than equitable, but for them, as I think Noah alluded to this and Chris Walker and I think a colleague of his has a paper saying, why not allow people who are subject to this jury trial right to choose to remove their case from the agency to federal court? And if they choose not to remove their case, well, consent waves the jury trial right. And a lot of people might prefer to be in front of an agency adjudicator. So between those reported recommendation process and this right of removal and consent I think you solve, you know, a lot of the problem to the extent it's a big problem anyway which is not clear again because most of these adjudicators are in public benefits programs.

[00:20:05] Jeffrey Rosen: Many thanks for that. Well, let us turn now to the second of the questions in the case, and that involves nondelegation. Noah, in your article, you said that Jarkesy's most far-reaching constitutional argument is built on the nondelegation doctrine, which holds that there may be some limits on the kinds of powers Congress can give to agencies and you say his argument is wild stuff. Indeed, you call it a chutzpah and I think Justice Kagan may have been quoting you in the oral argument where she said "Nobody has had the chutzpah." Bringing this argument up since at this briefing. So tell us about the nondelegation argument and why you think it's both chutzpah and constitutionally unconvincing.

[00:20:49] Noah Rosenblum: Well, obviously, as one Jew living in New York listening to another when Justice Kagan said that, I was delighted and of course my mother made sure that I was aware of it as well. So I'd like to believe she was quoting me, although I don't have any reason to actually believe that. And I think the nondelegation argument illustrates something happening in the background in this case, which is connected to the Seventh Amendment piece, which is really about why these claims are being brought. So that nondelegation argument is really straightforward. It's that Congress cannot delegate to agencies certain kinds of decisions absent some form of constraint or guidance. And people fight a lot about exactly how much constrain your guidance there should be. The current dominant test is called The Intelligible Principle Test, although Neil Gorsuch and some others have suggested that's not a good test and there should be another one.

[00:21:43] Noah Rosenblum: The key thing to understand is that administrative state skeptics have been making this exact argument over and over again for more than 90 years and at every turn, it has been laughed out of court with one exception that happened twice just under 90 years ago during the New Deal. And the two statutes at issue in those two cases are so completely different from the statute at issue here that there's no comparing. Moreover, as I highlight when I teach these cases in Con Law, those two cases don't even obviously turn on the nondelegation argument. There are a bunch of other arguments in those cases about why those two particular delegations were unconstitutional, including many things related to process.

[00:22:26] Noah Rosenblum: So the fact that Jarkesy is making this argument isn't surprising because anti-administrativists have been looking for hooks to undermine the legitimacy and legality of the administrative state for as long as it's been around. And for what it's worth, that to me is the connection to the Seventh Amendment argument. Come back to a point that Ilan made just a second ago, if you really take the Seventh Amendment Article III argument seriously, there are some pretty easy solutions that don't disrupt things, but that's not why George Jarkesy is making that argument. George Jarkesy is making that argument because he doesn't wanna have to own up to the fraud that he committed and he's looking for ways to frustrate the enforcement of the laws against him.

[00:23:05] Noah Rosenblum: That's the same thing happening in the nondelegation argument. The only different is that until recently, there weren't enough fringe judges to give credence to that argument. It just happens that there were two on this Fifth Circuit panel and so now we have to worry about it.

[00:23:17] Jeffrey Rosen: Many thanks for that. Ilan, as Noah suggests, the SEC counters the nondelegation argument by saying that the decision about whether to bring an enforcement action is a question of law enforcement not lawmaking, and Noah calls, an eccentric reading by the Fifth Circuit to hold otherwise. You disagree in your brief. Tell us why and whether how serious you think the nondelegation issue is in this case.

[00:23:42] Ilan Wurman: So I'm gonna find myself somewhat violent agreement with Noah, but not total agreement here. I don't think it's a great nondelegation argument, but I don't think it's frivolous either. I actually in my brief to the court, I point out this it is consistent possibly within the meaning of executive power and enforcement discretion. Certainly to bring enforcement actions or not is a question of executive power. But that's not what's actually at issue here. At issue here is the choice when you do bring in enforcement action, what forum do you bring it in? And obviously, that's quite significant for Jarkesy whether he actually cares about the constitutional principle or not because again, what's at stake here is the politically insulated Article III adjudicator judge, or, a- an executive branch agency that's both prosecuting you and judging, adjudicating your case.

[00:24:34] Ilan Wurman: Now, as Noah said, in reality ALJs tend to be very professional and insulated also, an independent of the agency that gets to the for-cause removal protections that we have yet to talk about, but we will talk about. And so it's not really clear how this shakes out, but theoretically it's certainly is not unimportant. I mean, certainly if Congress hadn't created the option o- of an administrative adjudication and simply said "Agency, decide if you get to bring these in court or if you want, create an adjudicatory system entirely within the SEC if you want."

[00:25:06] Ilan Wurman: I don't think anybody would say that the nondelegation argument is frivolous there. The problem here is what more could Congress really have done? Congress said, "Look, we understand sometimes you need efficient expert adjudicators so we allow for the adjudication within the agency. Sometimes, you know, maybe more liberty and property is at stake or some more serious liberty interest is, is at stake and so we think a district court would be more appropriate." And so it's said, "You have the option. You have the discretion."

[00:25:34] Ilan Wurman: So Congress, I think decided kind of all we can expect it to do. True, it didn't say, very important liberty cases should go to the district court, it didn't say, right? It didn't give guiding principles in that sense. But look, the Supreme Court has upheld delegations in the public interest. So the fact that it's absent from the statute, we presume that the SEC's decision are made in the public interest as opposed to the private interest, right? As Justice Alito said, in a different case, it'd be freakish, right? To single that out for simply not having the magic words, public interest. So look, it's not totally frivolous, okay? I do think it is the weakest argument here. So call that semi-violent agreement with Noah.

[00:26:16] Jeffrey Rosen: Noah, in your Atlantic piece, you say the Fifth Circuits claim that regulation and the separation of powers are incompatible. It's not simply bad history, like much of the rest of originalist jurisprudence. It's selective history served up to justify a preferred political outcome. In fact, voluminous scholarship has decisively established, you know, regulation was pervasive in the Early Republic. You're teaching a class on this important question and it's a very large one before the Supreme Court today. Give our listeners a sense of why you think that the so called originalist case against broad delegation of legislative power is bad history.

[00:26:52] Noah Rosenblum: The easiest answer is that if you just open the statutes at large from the very first Congress and start reading your way through it, you will come across tons of examples in which the Congress decides that the best way to realize its regulatory goal is to give power to an agency with a broad delegation. And that goes from very specific things that you might have thought were immediately assigned to Congress, like say the sighting of post roads in which you see Congress do both. Sometimes Congress tells you where the roads have to go and sometimes they say, "Hey Postman, why don't you just figure out where to put the roads." And then much bigger issues like, I don't know, how to manage the national debt, which is a problem from the very beginning of the Republic, as those of you will remember from your high school American history class.

[00:27:41] Noah Rosenblum: The federal assumption of state that it's a fundamental part of the creating of the modern constitution, which then raises the question of how do you manage this new debt. And Congress decided to create this entity that actually has representatives on it from all the branches of government, totally violating what you might imagine as a formalist separation of powers and then gives it a relatively broad mandate to figure out how to deal with the debt.

[00:28:03] Noah Rosenblum: So if you get into the history, I argue, and this isn't my research. That point about the Sinking Fund Commission, this incredible scholar at Marquette University, Christine Kexel Chabot, the post road stuff isn't written about by a lot of other people. But there are other great examples. There's a giant of administrative law, Jerry Mashaw, who wrote this very influential book The History of Administration. And if you read the preface he says, "I was planning to write about something else and I just thought, 'You know, I should go check out when to start and I picked up statutes at large and what I found was modern administration.'" And Jerry was being dramatic to make a point, but the underlying reality that of course, the late 18th century government was different from the government today, but in some critical ways, it was the same and the way in which it was most the same is that government was innovating in pragmatic ways to try to address pressing problems.

[00:28:54] Noah Rosenblum: And the last thing I'll say on this is that this shouldn't surprise us because after all, the problem with the Articles of Confederation was that it created a weak federal state. Everybody, conservatives and liberals, progressives and reactionaries, textualists and living constitutionalists, everybody knows that. The underlying point of the creation of the Constitution was constituting strong federal power. So it didn't surprise us to find a strong federal government that is using its powers in interesting ways to create a functional national state.

[00:29:28] Jeffrey Rosen: Many thanks for that. Ilan, Noah has cited a series of examples about how regulation was pervasive in the Early Republic from the establishment of the wonderfully named Sinking Fund, which Alexander Hamilton created. To all of these examples in the first Congress, from the Northwest Ordinance the, the, the, two internal improvements to statutes to forbid trade with the American Indian tribes. I'm reading from another Atlantic piece that he linked to in his original piece. This is a central dispute in originalist and textualist scholarship. What is your response to the claim that the argument that nondelegation is deeply rooted in history is just simply bad history?

[00:30:10] Ilan Wurman: I don't think it's necessarily bad history. There is some bad history, but it's mostly fine history from which people draw incorrect conclusions and inferences, okay? So this is to be charitable to all the folks on the other side of this like Julian Mortenson and Nick Bagley and Nick Parrillo and Christine Chabot and, and other excellent scholars, right? And so I like to joke, I have other law professors that I spar with on history. Jed Shugerman on removal of power, for example, where I say, "Look, you are entitled to the inferences that you draw from the history, but you're not entitled to ownership over the historical fact themselves."

[00:30:44] Ilan Wurman: I actually think that a lot of the history is right, but I interpret the conclusions for the them differently. I think that the interpretations that these historians and law professors have given are overstating what they find. So to take the post roads example, yeah, it's true that there were some delegations there, but the broad delegation was rejected, right? There was a motion to let the postmaster general decide where the post roads should be and this was rejected on constitutional grounds. Now, Julian Mortenson disagrees with me that it was constitutional grounds. I go through each of the statements. It is constitutional grounds. So the reader, and by the way his paper, Delegation at the Founding, my paper, Nondelegation at the Founding, for those who want to go and find this debate, right?

[00:31:28] Ilan Wurman: So they specified the roads in great detail. And then what did they do? Yes, it's true, they gave the postmaster general the power to cite the post offices. Well, it's okay, they already decided where the roads are gonna be. We know all the big towns that their going through. That's where the post offices are, that's where the deputy postmasters will be. So yeah, it's some discretion, but it's not this broad kind of discretion where we feel the Congress has somehow given up the right to make important policy decisions, if you will.

[00:31:56] Ilan Wurman: The Sinking Fund, I'm not sure if this was exactly from the Sinking Fund but Christine Chabot, Professor Chabot has another example where there was broad delegations to the president to negotiate loan terms with other nations. Which again, the question for me is, what was Congress supposed to do? You could say it must be 2% interest. Okay, but what if France doesn't want 2% interest? What if they demand 10%

interest, right? I mean, so what more was Congress supposed to do? The direct tax example that Professor Perillo has. Again, I think it's much narrower than they've let it on.

[00:32:28] Ilan Wurman: Now having said all that, here's where I think I might agree a bit more with Ilan. Though actually I disagree, but it's a friendly disagree. I don't think modern statutes are as broad as people seem to think. So I don't actually know that there would be that many statues that raise nondelegation concerns under what I understand the nondelegation doctrine to be. I should be clear, by the way, because my reading of the history is different than Justice Thomas's for example. Justice Thomas's, if any regulation that affects private rights is legislative power, that means I think that every legislative rule under the APA, every regulation with a force and effect of law, I think is legislative power. That would utterly destroy the administrative state if that were the nondelegation doctrine. I don't think anybody other than Thomas really agrees with that and I don't think the history shows that, okay? But I don't think the history is as broad as someone like Noah, Julian and Nick and, and Christine.

[00:33:24] Ilan Wurman: So yes, I don't think there's gonna be this big revival of the nondelegation doctrine. Why not? Number one, Chevron deference is on the fringe, okay? Chevron deference, judicial deference to agency interpretations of law, you defer even if it's not the best reading. This has invited executive adventurism in interpreting statutes. Well, all of a sudden if Chevron goes away and you give statutes their best reading, that gives agencies less discretion than they had under Chevron. After that, the major questions doctrine, or if it's an important issue, we demand a clear statement. That takes even more discretion away from agencies. And then add to that this point where I think scholars are showing that a lot of these delegations are not as broad as they think.

[00:34:03] Ilan Wurman: Professor Jodi Short at UC Hastings or UC San Francisco College, I don't remember exactly what the new name is, I apologize, formerly UC Hastings, has an excellent paper explaining what public interest means. It turns out it's quite narrow to most of the agencies that have these standards.

[00:34:19] Ilan Wurman: Gary Lawstein has explained that just and reasonable rates had a common law meaning. That meant a certain fair rate of return on investment. And a lot of these broad statutes maybe aren't so broad. So between that and the no Chevron and the major questions doctrine, are we really gonna see revival of the nondelegation doctrine? Now, you might think getting rid of Chevron and, and the major questions doctrine is a problem, but that's a separate problem if, if you will. I don't think it's a nondelegation problem necessarily.

[00:34:47] Jeffrey Rosen: Great. Thank you so much for that. Well, let us now turn to the third of the big arguments in the case, and that is that the internal adjudicator first heard Jarkesy's case had too much independence and therefore violates the requirements of Article II of the Constitution, that the president take care that the laws be faithfully executed. In other words, the fact that the adjudicator is non-removable, the argument goes, it violates the Constitution. Noah, tell us about that argument and why you believe that it's not only unconvincing, but that it's a misreading of the previous opinions of the great champion of executive power, Chief Justice William Howard Taft.

[00:35:31] Noah Rosenblum: So there's something puzzling about this argument from the get-go 'cause if you think back to the beginning of our conversation together, we were talking about the Seventh Amendment and the importance of the jury trial and the idea is something like, we wanna make sure that you are having your case heard by an independent adjudicator who's not subject to political pressure. That's part of why a jury trial is so important and why you can go to court. And that intuitively I think resonates with a lot of us. It feels weird to have somebody be both prosecutor and judge. So it's awfully strange, and one might even say, there's an awful lot of chutzpah and then saying, actually the problem with the internal adjudicator that I was in front of is that they were not accountable to the president, that they were too politically independent.

[00:36:15] Noah Rosenblum: So to come back to my recurring theme that U.S. to take the legal issues seriously, but we should not lose track of the underlying argument here, which seems to be less about legal issues than just I wanna keep committing fraud and not have to pay the price for it. The juxtaposition of these two arguments, right, "I want an independent court to hear my case. And also the guy who heard my case isn't independent enough," makes me think that maybe he's less concerned about the rule of law values that are motivating some of our conversations.

[00:36:43] Noah Rosenblum: That's just an opening observation. Okay, what's the merit of the legal argument? Well, it goes something like this, just as you alluded to, Jeff, under Article II of the Constitution, the president has responsibility to take care that the law be faithfully executed. And under a line of cases that I argue in a piece that's actually coming out just next month with Andrea Katz that the kind of foundational decision here in court president is a 1926 case written by William Howard Taft called Myers v. United States. That case, it sort of fallen into desuetude, but it's been revived in the last 13 years by the Roberts Court and, and that line of cases suggests that the way for the president to faithfully execute the law is to have some kind of control over everyone in the government who is not either part of the legislative branch or part of the judiciary.

[00:37:33] Noah Rosenblum: So this is sometimes called the unitary theory of the executive. And the administrative law judges are a problem here because they cannot be removed by the President of the United States, except according to statute for cause. And it gets even messier because technically because of the kind of tenure the administrative law judges enjoy, the any complaints against them are heard by a different board in the government that ensures merit protection, which may or may not run afoul of a different set of arguments that come out of a case called Free Enterprise Fund that come out against these two layers of removal protection. But the underlying logic is the same as the argument in Myers, which is that for the president to fulfill his constitutional responsibilities, he needs some kind of control over everyone in the government.

[00:38:19] Noah Rosenblum: And the reason removal is so central here is that if you think about what constitutional tools the president might have for control, there's nothing in the Constitution that would lead you to believe that if the president gives an order to somebody outside of the army in time of war, that that person needs to follow the order. So, Ilan has actually written about this, but importantly, the Constitution gives the president the power to request opinions in writing from Cabinet officers, but not to like tell them to do something.

[00:38:50] Noah Rosenblum: So if you're Taft and you believe that the president needs control to fulfill his constitutional responsibilities, but there isn't any language in the Constitution that says you get control, well, what can you do for control? And that's where removal comes in. And the idea is something like, well, if I can fire you, then I can threaten to fire you. And with the threat to fire you, I can get you to do what I want you to do. So in the case of Myers v. United States, right, there's a postman. Fire the postman and if you don't fire the postman, I'll fire you. Oh, well, then I better fire the postman 'cause otherwise the president will fire me.

[00:39:26] Jeffrey Rosen: I love it. Fire the postman or I'll fire you. It sounds like the title of great novel or maybe even a musical. Ilan, you argue in your brief that superior officers must have the ability to oversee inferior officers within the executive. And in most cases, the only option for the president is removal, but this is different 'cause here the inferior officers make decisions that their superiors can overrule, I'm just reading from your brief, so it's not necessarily unconstitutional for Congress to forbid the SEC from removing the law judges. Do I have it right, and tell us why you think that's the case.

[00:40:00] Ilan Wurman: I guess Noah and I are in agreement once again, mostly agreement. So let me first just say something about his conclusion, which I think is right. That's my view. It's not the view that most formalist have. My view is that there's no direct power to control. Anybody could speak, right? So the president can speak. Nothing prohibits the president from barking and ordering somebody, right? The question is the constitutional obligation of other officers to obey. And the opinions clause and other history that I talk about in a forthcoming paper and then I talk about in the brief suggests that absent a statute, right, there's no constitutional obligation of the officer to obey. The only obligation is to provide opinions, to what end? So that the president may exercise the executive power to oversee the execution of the laws, which means removal if necessary.

[00:40:50] Ilan Wurman: Now, the removal power can be abused of course, which might make the president liable for impeachment, okay? But that's doesn't mean the power doesn't exist, right? Madison said in 1789, "The wanton removal of meritorious officers would make the president himself liable to impeachment." Okay? So the fact that it could be abused, doesn't mean it doesn't exist. I agree with Noah about the absence of the ability to control. So my question to him when the mic gets back to him is, how else would you do it, but through removal the removal of power.

[00:41:19] Ilan Wurman: Okay, now, the issue is as Noah alluded is a bit more complicated here because there are two layers. Okay, there's the principal officers. Theoretically, we don't actually know, the statute doesn't say it, but everyone assumes that the SEC commissioners cannot be removed except for cause by the president. And then the ALJs who are inferior officers cannot be removed except for cause by the SEC commissioner. So in this case called Free Enterprise Fund, which Noah also alluded too, the Supreme Court Fed. Well, two layers of for-cause removal is too much. Too much independence from the president. So what did they do? They struck that second layer, right? So they kept the SEC commissioners, removable only for cause, but the protections for the inferior officers went away.

[00:41:59] Ilan Wurman: That is exactly the wrong answer. It's doubly wrong. Okay, here, here's why. The answer, the correct formalist constitutional answer and other formalist will disagree with me, but they're wrong, okay? The correct formalist answer here is that the

inferior officers can be protected from at will removal. There's a long precedent about this including a case involving a naval cadet who couldn't just be discharged without a court-martial. Okay? This is called Perkins. But why is that okay? Why was that okay? Well, because the naval cadet still has to follow orders, okay? In war or peace. That's what it means to be an inferior officers. Inferior officers have to follow the orders of their principals or principals have the ability to revise and reverse their decisions, which is exactly what we have here. The agency, the SEC could always reverse and revise the inferior office, the inferior ALJ's decision.

[00:42:51] Ilan Wurman: So executive power remains intact. You can protect them from removal because in theory, they have to follow orders. Okay, the question is, what about principal officers? Well, the discussion that Noah and I just had suggested there's no obligation on the part of the principal officers to obey the president outside the opinions clause. And so my view is they must be removable, right? But the inferior officers, as inferior officers do have an obligation to follow the principal, right? And so that's the difference between the two. So I think you got to get rid of that first layer if it even exists rather than that second layer.

[00:43:23] Jeffrey Rosen: Well, it's time for closing thoughts in this wonderful discussion. And Noah, you argued that most dangerously in this case ending independence for internal agency adjudicators would undermine the rule of law. Without independence, adjudicators would be beholden to the politicians who oversee agencies. And in an interview with The New Yorker recently, you expressed concern about candidate Donald Trump's plan to declare war on the independent agencies and said that it could have great consequences if the Supreme Court undermine protections for heads of agencies that insulated them from executive pressure. Tell us what the stakes are and why are you concerned.

[00:44:09] Noah Rosenblum: The basic issue here is what kind of government did the Constitution set up. And there's a stream of thought that I think Donald Trump is the furthest instantiation of that the Constitution creates a government that should be able to operate as an extension of the personality of the chief executive. And I think that is completely wrong. I think that's an undermining of the text of the Constitution. I think it's a betrayal of the values of our Founders, and I think it's bad to government. I also think that over the course of the last 200 and some odd years, we've constructed a government in line with the Constitution that allows for efficacious administration while guarding against that very possibility. And yet, it seems to me like current Supreme Court doctrine is trending in the same direction that Donald Trump is pushing.

[00:44:59] Noah Rosenblum: So what I worry about in the assault on the independence of agency adjudicators isn't whether the SEC is going to have to bring its cases in front of a federal judge or in front of an internal adjudicator. It's that by making more and more aspects of the administrative state directly responsive to the personality of the chief executive, and by that I mean to the president as a person, as an individual by creating these kinds of chains of command. As Ilan is alluding to, right, the threat of removal in this kind of way, that you will increasingly reorient the government so that an individual realizing their whims could operationalize the state without any sort of a check.

[00:45:40] Noah Rosenblum: So the worry that I expressed in The New Yorker interview dovetails perfectly with the anxiety I have in The Atlantic article, which underlies a lot of my

scholarship and my concern about the direction of Supreme Court's article to jurisprudence, which is that they seem to have forgotten that nowhere does the Constitution require this vision of presidential power. So to rely on the Constitution to implement it is not only bad law, but at the end of the day, dangerous for the American people.

[00:46:08] Jeffrey Rosen: Ilan, last word in this great discussion. As to you and Noah has argued that giving the president unfettered control over the administrative state would embrace a vision of a populist demagogue more in line with Andrew Jackson or perhaps Thomas Jefferson has more extreme moments than Alexander Hamilton and therefore it is bad originalism as well as bad constitutional structure. What is your response?

[00:46:35] Ilan Wurman: I agree and should we find someone more disagreeable? But, in all seriousness, I agree with Noah. I mean, I don't know about the Donald Trump stuff, maybe, maybe not. I don't think that much about Donald Trump. I try not to for mental health reasons and all sorts of things, but what I will say as a general matter, okay, what Noah says is right and I think it's under my understanding of the opinions clause and executive power, it protects the independence of these officers. Because under my conception of executive power that I tried to articulate in a response to Noah earlier, Congress can assign discretion to independent agencies and it is their duty to exercise their discretion. And according to their best judgments.

[00:47:20] Ilan Wurman: Now the president can suggest, can order, can threaten to fire, but as I argue in the forthcoming paper, the threat of firing comes at a huge political cause, right? Just ask Richard Nixon who effectively had to fire two attorneys general in order to get the special prosecutor, right? Tell that to George W. Bush and Alberto Gonzalez when they removed U.S. attorneys for not investigating democrats for voter fraud or whatever in 2004 and 2005, whenever that happened. What about Jim Comey being fired, right? Firing has a political cost and the cost increases, right, with a view in which the president doesn't have a constitutional right of control.

[00:47:56] Ilan Wurman: So I don't think anything under this formalist conception prevents Congress from giving independent duties to agencies, making a requirement a bipartisanship staggard terms and so on. And so I'll end in a slightly hoarse voice, hoarse note that I think I generally agree with Noah about this.

[00:48:13] Jeffrey Rosen: Thank you so much Noah Rosenblum and Ilan Wurman for a vigorous, illuminating and superb discussion of the SEC case and the future of the administrative state. Noah, Ilan, thank you so much for joining me.

[00:48:28] Noah Rosenblum: Thank you, Jeff. This is really such a pleasure. And thank you, Ilan.

[00:48:31] Ilan Wurman: Thank you both.

[00:48:35] Jeffrey Rosen: Today's episode was produce by Lana Ulrich, Bill Pollock, and Samson Mostashari. Was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere who's eager to know about the future of the administrative

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