

Speaker 1: Welcome to The Bill Walton Show, featuring conversations with leaders, entrepreneurs, artists, and thinkers. Fresh perspectives on money, culture, politics, and human flourishing. Interesting people. Interesting things.

Bill Walton: Welcome to The Bill Walton Show. I'm bill Walton. If you've been following [00:00:30] the show, you may have noticed that almost regardless of the topic, I'm always looking for line of action. Maybe it's the time I spent as a CEO, but I like to think in terms of solutions. In particular, I'm looking today with this show and with other shows we've done for lines of action against the enemies of liberty and freedom in America. Who's up against us? Power hungry politicians, bureaucrats, who seem eager to trample our constitutional [00:01:00] rights. In particular, what I call it's an eye glazing over name, but administrative state, which is all the federal agencies, which have become in effect our permanent governing class here in Washington. But the infection of the permanent governing class is not only true in Washington, but also in a lot of the state governments and even city governments.

Some of the things we're facing, and some of the things we want to talk about today are [00:01:30] vaccine mandates, diversity rules for corporate boards that are being pushed by NASDAQ and the Securities and Exchange Commission and unconstitutional federal agencies, in particular Elizabeth Warren's Consumer Protection Bureau.

Joining me to talk about this are returning guests, Jenin Younes, with the New Civil Liberties Alliance. The man who started it, Philip Hamburger [00:02:00] was on here also a couple of shows ago. We've brought along the powers that be here, the CEO, Mark Chenoweth to join us, and they've got extensive and long backgrounds, and I'll get into some of that as we begin to talk.

But I wanted them to really talk to us about what the mission of the New Civil Liberties Alliance is and what we're doing? What are the lines of actions to push back against the people we need to push back against? Mark, why don't you kick it off? [00:02:30] What is the New Civil Liberties Alliance and what are you trying to do?

Mark Chenoweth: Sure. The New Civil Liberties Alliance is a public interest litigation outfit. What we're trying to do is represent both plaintiffs and defendants who are having encounters with the administrative state, and make sure that their civil liberties are not being violated. What we see all too often is that these administrative agencies, as you were just saying, trample civil liberties as they're trying to enforce regulations or bring different kinds of enforcement actions.

[00:03:00] The kinds of protections that you would expect to have, if say a prosecutor from the Department of Justice were going after you in a federal district court, those same protections don't exist if it's a federal agency going after you in an administrative adjudication.

Bill Walton: Who do you represent? Who are your clients?

Mark Chenoweth: Sure. Our clients, they range widely. We have folks who can't afford their own representation. All of our clients [00:03:30] are pro bono. Some of those folks are impoverished, but we also have represented trade associations. We've represented prisoners, we've represented small business folks. We've represented people who are accountants or who own gun stores, lots of different kinds of folks who encounter administrative agencies. The whole alphabet suit of agencies infects all of our lives, whether we realize it or not. If you've been lucky enough not to have that happen to you [00:04:00] yet, then just wait a few years, you'll probably get to know-

Bill Walton: Eventually, they're going to come after all of us.

Mark Chenoweth: For sure.

Bill Walton: For all people that aren't going to watch the entire show, let's quickly get to the website where we can find you, if we want to hire you.

Mark Chenoweth: Sure.

Bill Walton: What's your website?

Mark Chenoweth: Nclalegal.org is the website.

Bill Walton: Okay.

Jenin Younes: But you can't hire us because-

Mark Chenoweth: Because we don't charge.

Jenin Younes: We don't charge.

Bill Walton: It's all pro bono.

Jenin Younes: Yeah.

Mark Chenoweth: It's pro bono.

Bill Walton: Even better.

Mark Chenoweth: But the key thing is that we're looking for cases [00:04:30] where we can change the law. It can't be a one off situation Somebody might have a very sympathetic story of where they've been harmed by an administrative agency. But if the particular rule or practice that we would be looking to change is only going to affect that one person, that's not really public interest law.

We're looking for opportunities to take away tools and tactics from the administrative state that it uses to violate lots of people's civil liberties. That's how we select our clients. We can't unfortunately [00:05:00] take every case that comes along.

Bill Walton: Okay. So, you're not going to help me fix my ticket.

Mark Chenoweth: It's not in our remit. Sorry.

Bill Walton: Jenin, you've got an incredibly interesting background. You spent almost 10 years as a public defender up in New York.

Jenin Younes: Yeah, that's right. Then I moved here about six months ago to join NCLA.

Bill Walton: Who were you defending as a public defender?

Jenin Younes: I defended indigent people who were in prison already. I did appeals. Well, not everybody was in prison, but [00:05:30] almost all of them. So, they were appealing their criminal conditions.

Bill Walton: What was the spark that led you down here to helping this-

Jenin Younes: It was COVID policies. I was really horrified by the government's overreach and response to the pandemic, with lockdowns and mask mandates. Then vaccine mandates are the latest now.

Bill Walton: Well, you're working on a case on vaccine mandates. In particular, you wrote a piece in the Wall Street Journal about vaccine mandates for children.

Jenin Younes: Yeah.

Bill Walton: What's going on with that?

Jenin Younes: [00:06:00] We don't have any cases involving children at the moment, but I see these mandates coming because the Pfizer BioNTech vaccine just received EUA approval. That's emergency use authorization. Given what happened with adult mandates, where we saw a vaccines mandated after they had only been approved for emergencies by the FDA, I suspect that, that will be coming for children.

In fact, San Francisco has already indicated an intent and have such a passport program for children. [00:06:30] Several private schools already have mandates. It's highly problematic because the EUA, the emergency use authorization statute has an informed consent provision which-

Bill Walton: What does that mean? As a non-law you're going to have to bring me down-

Jenin Younes: Yeah, I'll slow down.

Mark Chenoweth: Well, when Congress passed this statute, I forget if it was 2003 or '04, right in that area, they said, "Look, we want to make these drugs available on an emergency use basis, [00:07:00] if there is some pandemic or other unexpected thing that comes along, we want to be able to rush these drugs to market and not make them go through the ordinary FDA process, which can be very time consuming.

That's all fine. But one of the things that they said as part of that was look, we are going to make sure that these are done on a voluntary basis, that you can refuse administration of an emergency use authorized product, if you want to. No one [00:07:30] can mandate that. Well, this administration has ignored that part of the statute and they've blown right through the informed provision in the emergency use authorization statute and have started mandating that people take emergency use authorized vaccine, in this case.

But if the president has established that there isn't an informed consent provision in the EUA statute, then it could be any future president could mandate to take any drug, [00:08:00] and that's really not where we want to be as a society.

Bill Walton: Are you litigating on that now?

Mark Chenoweth: We are litigating on that issue.

Bill Walton: What's your case?

Jenin Younes: We have a few, we have more than one. We have two active ones, Norris v. MSU, which I think we talked about last time and then Rodden v. Fauci. The latter-

Bill Walton: It still bears repeating though.

Jenin Younes: Yeah. Norris is an employee MSU, and actually we joined a couple of other plaintiffs. So, it's three plaintiffs at MSU who don't want to take the vaccine because they have naturally acquired immunity.

Bill Walton: That's Michigan State University?

Jenin Younes: [00:08:30] Yeah.

Bill Walton: Okay.

Jenin Younes: We lost the preliminary injunction. So, we're currently pursuing the underlying lawsuit itself. Then Rodden v. Fauci is opposing the federal employee vaccine

mandate. That's Biden announced that all federal employees have to get the vaccine.

Mark Chenoweth: There's sort of two slightly different arguments in those two cases. In the Michigan State University case, what we're making is a supremacy clause based argument [00:09:00] in the constitution, federal law trump's state law. The fact that there is a federal statute on the books that says you can't mandate this, it would undermine the federal policy when it comes to emergency use authorized drugs to allow state entities to mandate something.

Well, that Michigan State University is a public university. They are mandating vaccines in a way that contradicts federal statute. That's part of the controversy there, part of what we're litigating in that case. The Rodden v. Fauci case is a little [00:09:30] bit different because there it's just federal employees who are involved. We're arguing more directly that the federal statute does not authorize the president or anyone else to force federal employees to get vaccinated, or at least they have this ability, under the statute to refuse administration of an EUA.

Bill Walton: This is our favorite guy, Anthony Fauci?

Jenin Younes: Yeah.

Mark Chenoweth: This is the one and the same.

Bill Walton: Is he being named as a defendant personally?

Mark Chenoweth: He is the first person named [00:10:00] in the defendants. Yes, he is.

Bill Walton: Can you do that? I thought federal employees were protected from lawsuits.

Mark Chenoweth: He's named in his official capacity.

Bill Walton: Okay. Well good. What are the odds of, we can begin rolling back some of these dates? There been some recent decisions that are helpful to us, aren't there?

Jenin Younes: Yeah. There have been some really good decisions-

Bill Walton: Not necessarily the one you guys have been handling, but other ones.

Jenin Younes: Well, we didn't get the worst decision. The judge, we moved for preliminary injunction or [00:10:30] temporary restraining order, and the judge basically thought that we sued the wrong people, that we should have sued the agencies themselves instead of focusing on the task force.

We're looking at amending the complaint accordingly. But there were a couple of good recent decisions over the past few days, actually. One court in Kentucky

stayed the federal contractor mandate. Biden had issued a federal contractor mandate requiring all [00:11:00] federal contractors to get the vaccine. That only applies in Ohio, Kentucky, and Tennessee.

But, it was a very good decision. There was a discussion about whether there's real emergency going on, and various aspects of the issue that I think a lot of Americans are getting frustrated with. Then, the healthcare workers, Biden's healthcare workers mandate was also stayed first, just in a few states and then another court extended it nationwide.

[00:11:30] That was a very good decision. Again, touched on a lot of issues, I think we're concerned about. There was actually an explicit discussion about why natural immunity hasn't been recognized, and the court said it was puzzled.

Mark Chenoweth: Well, one of the things I think is interesting about that case and this one's in the Western district of Louisiana, in the federal district court, is the judge said, "Well, CMS used to recognize natural immunity, and then they stopped recognizing that-"

Bill Walton: CMS is the-

Mark Chenoweth: The Centers for Medicare and Medicaid Services.

Bill Walton: Okay. All right.

Mark Chenoweth: It's the Medicare entity [00:12:00] in the federal government. They used to recognize it and they stopped. When a federal agency changes policy like that, it has to adequately justify and explain the change in policy. One of the things the judge said in granting the nationwide preliminary injunction is that CMS did not explain why it was going away from its prior recognition of natural immunity.

Bill Walton: This is The Bill Walton Show. I'm here with Mark Chenoweth and Jenin Younes, and we're talking about [00:12:30] vaccine mandates. I guess my question is, you've had a chance to come up against these people and these agencies. Why are they so passionate about making sure everybody gets vaccinated? When, in particular, people that have had the virus and gotten over it, where they've got natural immunity, there seems to be this obsession. It doesn't seem to be driven by public policy, health [00:13:00] consideration. It seems to be driven by something else.

Mark Chenoweth: I think you're absolutely right. I think the way that we know that is you just look at how all of these statutes are being deformed to try to get to the vaccine mandate-

Bill Walton: Deformed, what's that mean?

Mark Chenoweth: Well, just being used for purposes-

Bill Walton: You went to Yale, I understand you got to go... I went to Indiana.

Mark Chenoweth: Well, we're Purdue boiler makers in my family, so we-

Bill Walton: Okay, well, there we go. Well, that's a bigger issue.

Mark Chenoweth: We're going to be number one this week, I think in college basketball. [00:13:30] It just means that these statutes are being put to purposes other than the reason why Congress passed them, the reason why the statutes were adopted in the first place.

OSHA, Occupational Safety and Health Administration, or Occupational Safety and Health Act is about protecting workplace safety. It's about slip and fall situations or having toxic materials in the workplace, that kind of thing. It doesn't involve a national health issue that [00:14:00] affects workers and non-workers alike. That's not the kind of thing the OSHA statute was designed to combat. Yet, it's being brought to bear here to try to force vaccine mandates.

Same thing with the federal contractor situation. You have an ability to put certain kinds of conditions on federal contracts to ensure that the contracts are being performed in a responsible way, but that doesn't extend to forcing [00:14:30] all of the employees of the contractors to forcibly take an injection into their body. That's not something that's ever been part of federal contract law. We've never seen that before. This is an unprecedented reach and extension beyond the use of federal law.

I would frankly say the same thing with regard to the federal employee statute, which we're fighting down in the Southern district of Texas. We know that, sure, the president, the executive branch has a lot of control over federal employees, [00:15:00] but does that extend to forcing them to get a vaccine that they don't want, and they don't need, in the case of folks with natural immunity? That's unprecedented that we would see that.

In fact, what Congress has said is that the president has the ability to order soldiers to get vaccines. But the statute only talks about soldiers. I would think by negative implication, all other federal employees, he doesn't have that power. Yet, that's the power that he's claiming to have [00:15:30] in... Well, first, ordering the vaccine, and now, I guess for Christmas or something, they decided not to enforce it until January, but-

Bill Walton: I know you're both careful lawyers, so you don't like to speculate, but I'd love to have you speculate about motivation. What's behind why?

Jenin Younes: I-

Mark Chenoweth: Please.

Jenin Younes: I think it's political. I think the Democrats are trying to exploit this issue in order to blame-

Bill Walton: You used to be a Democrat.

Jenin Younes: [00:16:00] Yeah. I voted entirely Democrat my whole life till the end of 2020.

Bill Walton: Yeah. Anyway-

Jenin Younes: I think the virus is not going to go away, it's endemic. They can blame the bad Republicans who won't get the vaccines for this. I think it's just an exploitation for political gain. Actually, the court and at least one of the decisions, I think the healthcare worker one made a very good point, which is there's been no showing that these mandates do [00:16:30] anything. There really hasn't been a showing from the scientific perspective that these vaccines are good at stopping transmission, and it appears they might not be very good at stopping transmission.

Bill Walton: No, they're not. The jury's coming in.

Jenin Younes: Yeah. Then these mandates... A lot of people work remotely, a lot of people have natural immunity. These mandates just haven't been shown to do anything. Yet, they're tearing the country apart.

Mark Chenoweth: I'll tell you a funny story we've heard about... I say funny, but it's not a laughing matter.

Bill Walton: We could use a little humor here.

Mark Chenoweth: Yeah. We were contacted [00:17:00] by someone and I won't give any identifying information, except to say that this person drives nuclear waste for a living. Nuclear waste is generated at various sites around the country, and it has to be transported to other places. As you might imagine, this is very carefully, heavily regulated area. But what's the government concerned about? Whether or not this person who drives nuclear waste around has been vaccinated or not in the cab [00:17:30] of his truck where he is by himself.

That's where the focus of federal... It blows the mind to think about just the risk versus risk that you're looking at there is night and day. Yet, they would have this person fired from his job so that they can bring in somebody else who may not be as good at driving nuclear waste around, and doesn't have decades of experience doing it? That seems reckless to me.

But to your question, Bill, about [00:18:00] the why behind it, I think there's a couple of thing. Not to disagree with with Jenin, but I do think that control is a part of what's going on here. That there's a-

Bill Walton: I agree with that too.

Mark Chenoweth: Yeah. If the government can get people in the habit of just doing what they're told and controlling them, then that makes it easier to accomplish different kinds of socio-political objectives [00:18:30] that the government may have. It's the old, never let a crisis go to waste line that we heard from President Obama's Chief of Staff, and later, mayor of Chicago Rahm Emmanuel. I think that's what's happening here, they're not letting the crisis go to waste, they're exerting control.

Then I think there's a more innocuous explanation as well, which is, there's a certain narrow-mindedness in all of these federal agencies, because if you're in the agency in charge of [00:19:00] vaccines, then you're going to think that vaccines are the solution to the problem. It's the old, if you're a hammer, everything looks like a nail, right?

I think there's some of that going on as well. The CDC thinks, well, we have certain power, we should have a nationwide eviction moratorium in place and prevent anybody from getting kicked out of their home. Well, you're not in charge of housing policy, CDC, but that didn't stop them from doing it.

Bill Walton: Apart from the vaccine, and we've [00:19:30] got some other things we need to talk about too, but your charter is to deal with people who have been abused by the administrative state. This is not just vaccines, this is happening in all other areas of private life. I do think it's in part, political. I do think it's, in part, control.

But it seems like they're very interested in not... I don't know. [00:20:00] By the way, full disclosure, I've finished up my own case of COVID about five or six weeks ago, Virginia Department of Health called me and declared me safe for public consumption. So, I can drive nuclear waste now.

But I do think there's something called long COVID. The Chinese in their virus factory in Wuhan, I think did cook up something that was a gain of function virus, I'm speculating, [00:20:30] but that's what I believe. Anyway, I couldn't remember my next question.

Jenin Younes: Well, to the points we've been making too, I think there's been a shocking... I think this might just be stupidity, more than anything else, but there's a shocking lack of thought for unintended consequences. The government thinks they can just order people to do this, and they're going to do it. They're not thinking about the fact that, actually a lot of people are going to quit their jobs, including healthcare workers. One of the courts noted that and said, the purpose of the statute [00:21:00] that they're using to mandate the vaccines is to protect patients, and this is not protecting patients, because all of these healthcare workers are going to quit. That was actually one of the-

Mark Chenoweth: That'll be a problem for the patients.

Jenin Younes: Yeah, that'll be a problem for the patients.

Mark Chenoweth: Yeah. That's right.

Jenin Younes: Well, let's change gears to, we've got a couple topics. We've got the diversity rules, we've got the Elizabeth Warren Consumer Protection Bureau. Pick one.

Mark Chenoweth: Well, let's talk SEC, NASDAQ diversity [inaudible 00:21:29]

Bill Walton: SEC, [00:21:30] that's in my old world. Okay.

Mark Chenoweth: Sure.

Bill Walton: What's at stake? As I understand it, NASDAQ proposed diversity rules for every company that's listed to NASDAQ and their version of diversity rules is you need to have at least three women on the board? Or do they define diversity more broadly?

Mark Chenoweth: Yeah. There are a few different rules clicking around, including in California, but the federal rule or the NASDAQ rule that was approved by the [00:22:00] SEC has a few different components to it. One is that you have to have, at least one woman on the board of directors. You have to have... That's a separate requirement. Then in addition to having one woman on the board, you also have to have one underrepresented minority on the board.

That can either be a racial minority, or it can be a sexual orientation minority. Now, what your race or your sexual orientation has to do with your ability [00:22:30] to be a good steward of corporate resources, I haven't a clue. But that's what the rule requires. Then there's a second rule that NASDAQ has put out, and that SEC has approved that says we have a group of board ready candidates that you can tap so that if you are having problems identifying a woman or an underrepresented minority or someone of an underrepresented sexual orientation for your board, [00:23:00] you can pick somebody off of our pre-approved list and add them to your board.

Bill Walton: Whose list is this? NASDAQ has the list?

Mark Chenoweth: Exactly.

Bill Walton: There's a... Not that it matters, but there's a woman who's the CEO of NASDAQ. Could we say that she's self-interested here?

Mark Chenoweth: Well, I don't know, but it seems to me an odd idea that someone would be board ready to sit on every board in America. I just don't think that's right. I think that companies have different things that they're specialized [00:23:30] in. I don't think that Nike has the same needs that General Electric has, has the same needs that Exxon has. These are different companies doing different

things. I don't know that you would have somebody who would be board ready for all of those boards.

Bill Walton: Now, the SEC needs to approve these NASDAQ rules?

Mark Chenoweth: Those are probably not NASDAQ companies that I named, by the way.

Bill Walton: No, they're New York Stock Exchange, it doesn't matter though, because it's all going the same direction.

Mark Chenoweth: It is.

Bill Walton: What's your lawsuit?

Mark Chenoweth: The lawsuit is on behalf [00:24:00] of the NCPPR, the National Center or Public Policy Research here in Washington, D.C. NCPPR has done something interesting. They've gone-

Bill Walton: That's run by Justin Danhof?

Mark Chenoweth: I believe he runs the free enterprise project.

Bill Walton: Okay, as part of that.

Mark Chenoweth: Yeah.

Bill Walton: Okay.

Mark Chenoweth: NCPPR has done something interesting, they've gone out and bought shares in a bunch of different publicly held companies, including on NASDAQ and on NYSE. That gives them standing to object [00:24:30] to things like the rules that we're talking about.

Bill Walton: How many shares do they own? 100? Is it a round lot-

Mark Chenoweth: I don't know-

Bill Walton: It doesn't matter. Okay, not much.

Mark Chenoweth: It may not be even that many, but shareholder standing is something that NCLA wouldn't be able to sue on our own. We can file comments with SEC and complain about the rule or point out illegalities. But to actually sue over the rule, we have to have someone withstanding, which is just a legal term saying someone whose interests [00:25:00] are being negatively affected, someone who's being harmed by the rule.

NCPPR has that as a shareholder. We filed a lawsuit against the SEC over these board diversity rules. Our main objection to the rules, the thing that our... We haven't filed our brief yet. This will happen later this month, but what it will say is that the SEC doesn't have power from Congress to pass rules like this. That if you look at [00:25:30] the organic statutes for the SEC, that date back to the 1930s, what the agency was set up to do was to prevent force or to prevent fraud, rather, and to look out for the best interests of shareholders from a market governance standpoint. This doesn't have anything to do with that. This is a sociopolitical objective outside of the SEC's statutory authority.

Bill Walton: Well, that's really the heart of the matter. This is Bill Walton [00:26:00] Show. I'm here with Jenin Younes and Mark Chenoweth, who are with the New Civil Liberties Alliance who are helping fight back against the predations of the administrative state. I'm going to make the administrative state a very popular term.

Mark Chenoweth: I like predations. We're going to have-

Bill Walton: You can have predations.

Mark Chenoweth: Thank you.

Bill Walton: But that's really the heart of it. I was in a private equity business. I ran a public company and my job was to increase shareholder value, I thought. This was in the old days. [00:26:30] Either in a public company and a private company, I was looking for directors. I was looking for somebody who had industry expertise, who maybe knew something about technology or the market, or in particular, I like to hire people who'd been CEOs of other companies because they understood how to make decisions and how to live with them.

There's a whole set of really interesting criteria to pick a good board, and it can be quite diverse. It's not going to be all the same people. [00:27:00] But I never really thought in terms of what color or what sex they were. That's probably where we got to consider, if you're a shareholder of a company, do you want the board bringing people on who know about the business, or do you want people to fit a category?

Mark Chenoweth: Well, and the lawsuit that we're in is being joined to another lawsuit that was already being brought Boyden Gray's law firm here in Washington, D.C.

Bill Walton: Boyden's great.

Mark Chenoweth: [00:27:30] Yeah. They represent a largely anonymous group of companies and board directors and members of boards of directors and so forth, who are objecting to the rule. One of their clients, and again, this is someone who hasn't been publicly identified is a minority who is a member of a board and says,

"Hey, wait a minute, there's going to be stigma against me if this rule goes into effect.

Bill Walton: [00:28:00] That's exactly right. That's the problem with affirmative action. I'm sorry, continue.

Mark Chenoweth: They're focusing on those issues in the lawsuit and a 14th amendment, where, I guess, this is federal action. So, it would be a fifth amendment and a due process, equal protection concerns around the rule. Because he says, "Look, I'm on the board now. I'm well regarded in what I do. But if you pass this rule that requires the company to have minority members, then folks will think that I'm all me on the board because I'm filling a quota, and I don't want that."

Jenin Younes: Yeah. You also-

Bill Walton: As a recovering-

Jenin Younes: Lefty.

Bill Walton: As [00:28:30] a recovering lefty, what do you think about that? By the way, I think I'm a recovering lefty too, but I was a lot younger.

Jenin Younes: I find this practice really appalling. I don't have very much a experience or any experience with the corporate world, but when I was a public defender, there was actually, the last couple of years I was there, there was a push to have these hiring practices. A lot of this, I don't know, I guess Gen Z or younger millennials really wanted this sort of thing.

They ended [00:29:00] up sitting around with people's resumes, looking them up and, is this person black? It's so offensive, you're sitting there adjudicating this. I think a lot of people, I'm not exactly a minority, but I have some minority credentials, it's, you don't want to think that you were chosen for the part because of that. I think a lot of people, myself included are concerned that if this is the way society is going, people are going to assume we're actually not competent, and we only got the job for those reasons.

Bill Walton: [00:29:30] We talked about this before we came on. That's why I stopped, on purpose, labeling people, libertarian, conservative, this, that, or the other. I tend to think it's all the people that are lining up on the side of liberty and excellence and fairness and against the kind of, to use my new favorite word, predations, of the people who want to tell us how things ought to be and organize things by race, class and [00:30:00] gender.

Jenin Younes: I do believe that there are a lot of inequities that are built into society because of history. But I just don't think this is the right way to get about them, to go about fixing it. The right way to go about fixing it is, elementary school

education on, and it's now the Democrats who want to keep schools closed, because they're afraid of COVID.

Mark Chenoweth: Well, and boards are getting better. If you look at the statistics around board diversity, they're getting better on their [00:30:30] own. There are a lot more women on boards of directors than there were 10, 20, 30 years ago. There are more minorities on the boards. This is something that the companies are inclined to do on their own, maybe in response to public pressure, but you don't need a federal mandate to bring this about.

Bill Walton: There's so much virtue signaling in this whole world, because I know the head of Goldman Sachs came out and said, "We won't be the investment banker to any company that doesn't have diversity on its board." Well, turns out all their clients already [00:31:00] do. He basically was self-categorizing everything he already had in place.

The lawsuit though, you're up against a lot of people that don't agree, both the shareholder advisory shops, ISS and Glass Lewis, they're all for this rule. I'm sure BlackRock is for it, and Vanguard, [00:31:30] state street, they're all lined up on the other side. Have they weighed in on this suit, yet?

Mark Chenoweth: They haven't yet. They might, when it gets to the right stage. But the nice thing for us is it doesn't really matter what they think. There are federal statutes that dictate whether or not the SEC has power to do this, the opinion of corporate America on those statutes is irrelevant. The statute either gives us is power, or it doesn't. We think very strongly that it does not. If it doesn't have this power, [00:32:00] then it can't do it. If it wants to do it, then it needs to go back to Congress, suggest that Congress give the agency the power to do this. They can't just act beyond its statutory limits.

Bill Walton: Well, I hope you can make this something like a tip of the spear argument and get everybody emotionally engaged in this, because your point about the black man who didn't want to be identified, he wanted to be identified as somebody qualified. I think that really gets to the heart of the matter. The more we Balkanize everybody, according to [00:32:30] these various categories, the less you can feel good about your own achievements.

Mark Chenoweth: I think that's that's right.

Jenin Younes: Based on my own experience, too, the people who mainly push for these are actually young white people, these sorts of people and most of the people of color, I know, do not like these ideas.

Bill Walton: Well, that's interesting. The other one we wanted to talk about was the Elizabeth Warren agency, [00:33:00] the CPF?B?

Mark Chenoweth: Correct. Yes.

Bill Walton: Do I have that initial correct?

Mark Chenoweth: Well, they've changed it a couple of times, so it's-

Bill Walton: That's why. Okay.

Mark Chenoweth: What is it now? Well, CFPB, I think is what it is again, what it was originally, and then in between it was the Bureau of Consumer Financial Protection. Which is what is in the federal statute. But I think the reason that they've gone to CFPB is partly because of the logo. I think they like the logo. I think they also like [00:33:30] making it sound like the Consumer Product Safety Commission, the CPSC.

They like to reorder the letters, for some reason. But by any name, this is a noxious federal agency. What Elizabeth Warren did with the creation of this agency is they took about 10 or 11 federal statutes that were being enforced by different agencies and authorities-

Bill Walton: [00:34:00] This was constituted during the time of Dodd-Frank? Is this a piece of Dodd-Frank or did it come afterwards?

Mark Chenoweth: I don't remember-

Bill Walton: It doesn't matter.

Mark Chenoweth: It was right at the same time. I can't remember-

Bill Walton: Roughly.

Mark Chenoweth: ... whether it was part of the exact same statute as Dodd-Frank, I think it was, but I'm not 100% sure about that, but in any event, they took all these authorities and they brought them under one agency, and massively funded the agency in a way that... I worked at [00:34:30] the consumer product safety commission, once upon a time, that's my dirty little secret. That's an-

Bill Walton: You also worked for Mike Pompeo.

Mark Chenoweth: I did. I was his first chief of staff on Capitol Hill before anybody knew who Mike was.

Bill Walton: You did good.

Mark Chenoweth: Well, maybe if I had known he was going to be secretary of state, I would've stuck around a little bit longer.

Bill Walton: No, we need you where you are.

Mark Chenoweth: Well, that's what I told him at the time. I said, "I didn't come to Washington, D.C. [00:35:00] to be a hill rat. I wanted to do things like the public interest law that I'm doing now." Mike was fully supportive of that. But in any event, the CFPB is a Frankenstein of an agency, in a couple of respects. Maybe, most importantly, the power that the director of the CFPB has, is massive.

Federal judges have looked at this, including, I believe it was Judge Kavanaugh when he was on the D.C. Circuit, said that the head of the CFPB [00:35:30] has more power than anyone in the federal government, other than the president of the United States. That's problem enough that you've put that much power under one agency. But it's also an agency that is largely out of control because Congress deliberately removed itself from the oversight process, with regard to this agency.

At the time that this agency was set up, this was the first two years the Obama administration, you may remember there was something like... I think there were temporarily [00:36:00] 60 or 59 Democrat senators. They knew this was likely to be a high watermark for Democrat office holding on Capitol Hill, and they wanted to set up an agency that subsequent administrations or subsequent congresses couldn't reduce the power of. They took its funding mechanism outside of the congressional appropriations process.

Every other federal agency is funded on an annual basis by Congress in a law that is [00:36:30] passed by both houses of the legislature and signed by the president. Not so for CFPB. CFPB gets its funding directly from the federal reserve and the amount of funding that it gets was established in that original law. It goes up, there's an inflation adjuster, it goes up every year. The head of the CFPB asks for the money, and the fed has to say yes, and they just write the check and hand it over.

Bill Walton: Well, didn't the first director, Richard Cordray proceed to build a Taj Mahal for headquarters?

Mark Chenoweth: They spent a lot of money [00:37:00] on building the new headquarters for the agency. Absolutely.

Bill Walton: Well, I call it Taj Mahal. Now they want to put him on the Federal Reserve Board.

Mark Chenoweth: Oh, is that the latest?

Bill Walton: Yeah. He did so much good.

Mark Chenoweth: The people of Ohio loved him so much when he ran for governor-

Bill Walton: What does it do, and what's your lawsuit about? What are we trying to fight here, other than it's very existence?

Mark Chenoweth: [00:37:30] That is what's at issue in the lawsuit, but we-

Bill Walton: Because stepping back, the point you made is we want every agency to be accountable to the people.

Mark Chenoweth: Absolutely.

Bill Walton: Accountable to people through elected officials, congressmen, senators. What they did with this agency, they'd already done with a lot of other agencies. They just punted a lot of the power over to the administrative state, so they didn't have to get blame for what happened.

Mark Chenoweth: They did, but it's on steroids, compared to other agencies because of the lack [00:38:00] of oversight. The statute explicitly says that the congressional oversight committees don't have oversight over CFPB the way that they do the budgets of every other agency in the executive branch.

Then this funding stream being separate is the other problem. We represent a woman named Crystal Moroney. Crystal is an attorney. Her clients are largely folks who are in the debt collection business. She works with her clients [00:38:30] to try to make sure that they're staying compliant in the ways that they go about collecting debt from the people who are indebted to them, and that's what she does. She's not a debt collector herself, but she's an attorney connected, at the time that this enforcement action was brought, connected to them.

The CFPB came after her with a civil investigative demand, because they wanted information that she had about her clients. [00:39:00] Now, you might think, well, isn't that attorney-client privileged information? Well, a lot of it is, absolutely. That's why Crystal said, "I can't turn this information over to you. This is attorney-client privileged information." The agency said, "Well, we don't care. We want it any way." She said, "Well, I'm not going to turn it over to you."

That's when they brought this enforcement action. What crystal said is, "Look, if a federal court says you have to turn over this information, then my hands will be tied. I'll have to turn over the information." [00:39:30] But meanwhile, CFPB, you're unconstitutionally constituted. We made a couple of claims, initially, in the lawsuit. One of the claims we made was that the director of the CFPB was unlawfully... Had too much power in the way that the person was appointed, that they were protected from removal by the president in a way that you don't typically see.

You have, let's take the secretary of state, since you mentioned my old boss, [00:40:00] Mike Pompeo. If the president wants to remove the secretary of state and the last president did want to remove his first secretary of state, he can fire him immediately, right? There's no protection for that person. Well, that wasn't true of the director of the CFPB. The president couldn't directly

remove that person. It had to be for cause. We have for cause removal protection for multi-member agencies, like the SEC, like the CPSC, the Federal Trade Commission. There's some of these multi-member agencies [00:40:30] that the heads of those commissions can only be removed for cause. But we didn't have any single director agencies where the head of the agency could only be removed for cause.

Bill Walton: Can this go to the Supreme Court?

Mark Chenoweth: It can, and in fact, that already-

Bill Walton: Is that the goal?

Mark Chenoweth: Well, that was the goal, and another case beat us to the Supreme Court on that particular issue, and the CFPB already lost on that issue. But the interesting thing is about that issue [00:41:00] is that... Well, what that means now is that the agency is directly under the control of the president. Well, that might be better from a Democratic accountability standpoint that we were talking about earlier. You don't have the independence of this massively powerful agency. But it's also worse than another respect, which is that now the president is directly funding this agency. So, he doesn't have to go through Congress like he does for everything else that he does. He can just run this agency any way he wants to, without oversight, [00:41:30] without having to go back to Congress for more funding requests, and can just go haywire.

That's actually worse, and we argue is a separate constitutional violation, there's a separation of powers problem with the way that the CFPB is set up. Now, it's also, we think of violation of the appropriations clause of Article One of the constitution, the way that-

Bill Walton: Are the courts receptive to this point of view, or do you have people that are on the [00:42:00] left that say, "No chance, we're going to keep it the way it is." How do our odds look?

Mark Chenoweth: The receptivity hasn't... Well, it was great on the first issue, it went all the way to the Supreme Court successfully. That was good. On this broader objection to the CFPB's funding structure, we've had surprisingly little support for that, so far.

Now, the issue's on appeal to the Second Circuit, and we're hopeful that the Second Circuit will see things differently than the federal district court did [00:42:30] in New York. Because we do think that there's a strong argument here on multiple constitutional grounds. But it's not an argument... I think that many people, whether it's the CFPB or other agencies want to look over these constitutional niceties and just say, well, we support what that agency is doing. Jenin, you don't support what the agency is doing. So, you must be evil or bad since the agency's doing something good and you're against it.

What we're trying to do [00:43:00] at NCLA is, make people understand independently of whether you agree with what the agency is doing from a subject matter standpoint, it still has to follow the law. It still has to follow the constitution. It can't do things outside the statutes that Congress has passed. It can't do things that violate the constitution. It can't do things that violate people's civil liberties under the Bill of Rights. Yet, these agencies are, in their excitement or enthusiasm to maximally enforce the law in some cases, [00:43:30] or to achieve certain kinds of ends, are all the time trampling people's civil liberties, violating the constitution, ignoring the statutes that Congress has passed. That's where we come in and say, stop it, you can't do that. The federal courts are where we go because the federal courts have the power to tell the agencies to stop behaving in this way.

Bill Walton: I think you just summed up the show. Thank you. That was great.

Mark Chenoweth: Sure.

Bill Walton: Again, we can find you, the website-

Mark Chenoweth: [00:44:00] nclalegal.org.

Bill Walton: Do you have any other former lefties working for you besides Jenin?

Mark Chenoweth: Well, we don't ask the politics of our employees when we hire them.

Bill Walton: Interesting. It doesn't matter. How can we support you? How do we find that?

Mark Chenoweth: There is a Donate button at nclalegal.org. We're always happy to have folks support us. But look, we need more than financial support, we're building an alliance. The NCLA is about trying to find like-minded [00:44:30] folks who also want these federal agencies to stop violating people's civil liberties. This used to be a bipartisan issue. I think when the ACLU took a stand on first amendment issues, or when it took a stand against some of the civil liberties that were being violated, that wasn't viewed as necessarily a left, right issue. But over time, the ACLU abandoned that high ground, I think, and they've become a very partisan organization.

Well, we think [00:45:00] that high ground should still be occupied, and we're happy to jump up there if no one else is going to do it and defend people's civil liberties. We don't care about the politics of our clients. We don't ask our clients their politics. We have clients of all... I assume we have clients who disagree with some of the other cases that we're bringing, because that's not a requirement to be a client of ours.

We don't care about the politics of the people that we sue either. That's why people might say, well, you sound like you're a right-wing [00:45:30] organization. Well, really, we filed dozens of lawsuits against the Trump

administration, because if we saw a federal agency, and this gets back to the federal agencies aren't always under the control of any administration, we're going to sue. We don't care if it's a Republican administration or a Democrat administration, we care about whether people's civil liberties are being violated.

Bill Walton: Anything you want to add?

Jenin Younes: No, I think Mark did a good-

Mark Chenoweth: What's your experience [crosstalk 00:45:59] You [00:46:00] deal directly with our clients, Jenin, what's been your experience with our folks? Are we out there looking for right-wing zealots as our client base?

Jenin Younes: No, not at all. No. Actually-

Bill Walton: I didn't think you'd join if that were the case.

Jenin Younes: No. There are a couple of other, I would say, people, who I believe lean more to the left [inaudible 00:46:19]

Bill Walton: I'm optimistic a little bit when I hear you, because I think the overreach, as you pointed out earlier, just the political aspects, [00:46:30] the control aspects, I think more and more people are beginning to say, "Wait, you're really pushing every single button way too far, and we need to push back." I think that's why I wanted to get you guys back on, because that, I think, is our line of action, working through you.

Jenin Younes: Yeah. I think if Twitter's any indication, there are a lot of people who used to vote Democrat, who are very dis-affected with the way the party's going. The violations of civil liberties that it's embracing.

Mark Chenoweth: [00:47:00] There's a lot of great think tanks in town that think through these issues and put out white papers and that kind of thing-

Bill Walton: We don't need white papers.

Mark Chenoweth: But we're a do tank, not a think tank-

Bill Walton: The days of white papers are over. This has been The Bill Walton Show, and I've been here with Mark Chenoweth, and Jenin Younes, both with the New Civil Liberties Alliance. They're striking a blow for liberty and freedom, and, I think, represent the vast majority of Americans in their work. I'm really glad you guys are here, I'm glad you're doing [00:47:30] it. We'll get you back on when we have the next victory in our lawsuit.

Mark Chenoweth: Thanks very much.

Jenin Younes: Thanks so much for everything.

Bill Walton: Anyway, thanks for joining, and we'll be talking with you soon. Thanks.

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