



For Immediate Release

NCLA Asks Fifth Circuit Court of Appeals to Put an End to Unconstitutional SEC Hearings

Administrative Law Judges who are too insulated from removal violate the U.S. Constitution

Washington, DC, Jun 11, 2019 - The New Civil Liberties Alliance today filed a [brief](#) with the U.S. Court of Appeals for the Fifth Circuit asking to reverse the district court's decision to dismiss the case of NCLA's client, Michelle Cochran, for lack of subject-matter jurisdiction.

The U.S. Securities & Exchange Commission is trying to force Ms. Cochran, a single mom living in Texas, to submit to yet another unconstitutional enforcement proceeding before an administrative law judge (ALJ)—and she is not alone. Today, Americans are 10 times more likely to be tried by an unelected bureaucrat than by a federal judge. Ms. Cochran's case is one of more than 100 invalid SEC hearings nullified following the U.S. Supreme Court's decision last June in *Lucia v. SEC*.

In March the lower court expressed "deep concern" with the SEC's proceedings against her—and the fact she now faces the prospect of prolonged proceedings in a second unconstitutional hearing. Nevertheless, the Court held that precedent compelled its conclusion that Congress gave exclusive jurisdiction over cases such as this to the SEC's administrative process. But Congress never gave SEC the power to force defendants into hearings in front of unconstitutional ALJs whose decisions cannot stand.

The district court erred in concluding it lacked jurisdiction to hear Ms. Cochran's objections to the SEC's unconstitutional hearing. As NCLA's brief shows, the *Lucia* decision changed the legal landscape which held that SEC's ALJs are "officers" of the United States. Under an earlier precedent called *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Supreme Court made clear that officers of the U.S. may not be insulated from removal by multiple layers of tenure protection without running afoul of the clause in Article II of the Constitution. The clause requires the President to "take Care that the Laws be faithfully executed." In other words, the President cannot fulfill that obligation if he cannot remove ALJs who are failing to discharge their duties adequately. That case also demonstrated that courts do have jurisdiction to hear removal-based challenges.

Congress created a scheme designed to allow the SEC to resolve certain types of *statutory* claims, but that scheme does not permit the SEC to feign ignorance of its ALJs' constitutional defects and thereby subject individuals like Ms. Cochran to serial enforcement proceedings that will be void. By trying to force Ms. Cochran into a hearing before one of its unconstitutional ALJs, the SEC is trying to take advantage of the courts' reluctance to hear issues before the administrative process is exhausted.

NCLA expects the Fifth Circuit puts an end to this series of void enforcement hearings whose only purpose can be to make the process the punishment.

“The SEC knows that its ALJs violate Article II. It could have brought an enforcement proceeding against Michelle Cochran in federal court, or the Commission could have presided over her proceeding. Instead, the SEC chose to force her into an unconstitutional hearing before an ALJ who lacks the authority to hear her case. The federal courts should not stand by idly and allow the SEC to ignore the Constitution.”

—**Steve Simpson, Senior Litigation Counsel**

“Due process requires governments to bring only valid cases in a timely fashion before lawful courts. Neither the ALJ nor the SEC is empowered to decide whether the ALJ is properly in office. If this appeal fails, it will take years before Ms. Cochran can get back to a federal court empowered to vindicate her rights. Worse, even if she wins, which she will, she then will have to endure a third hearing. No rational—or constitutional—justice system would require such endless appeals and futile proceedings.” —**Peggy Little, Senior Litigation Counsel**

ABOUT NCLA

NCLA is a nonprofit civil rights organization founded by legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other *pro bono* advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights. For more information visit us online: NCLAlegal.org.

Judy Pino

Communications & Marketing Director

New Civil Liberties Alliance (NCLA)

Direct line: 202-869-5218

1225 19th Street NW, Suite 450

Washington, DC 20036

Judy.pino@NCLA.legal