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NCLA Client Michelle Cochran Absorbs Temporary Setback from Fifth Circ. Court of Appeals Decision

Michelle Cochran v. U.S. Securities and Exchange Commission

Washington, DC (August 11, 2020) – Today’s 2-1 Fifth Circuit Court of Appeals [decision](#) in *Michelle Cochran v. U.S. Securities and Exchange Commission* was sorely disappointing. After winning a preliminary injunction against the SEC last fall, Ms. Cochran had hoped her constitutional challenge to the agency’s Administrative Law Judges (ALJs) would soon be resolved. Instead, the panel ruling decided that its hands were tied by a prior Fifth Circuit case. Its resulting decision would force Ms. Cochran to defend herself—for a *second* time—in front of an unconstitutional tribunal inside the SEC before getting to raise her constitutional objections before a real Article III federal court that is competent to decide the validity of her claims. Once she wins her constitutional claim, Ms. Cochran then presumably will have to defend herself—for a *third* time—before a lawfully removable SEC ALJ many years hence. Judge Catharina Haynes’s superbly reasoned dissent would have prevented this injustice.

Ms. Cochran’s constitutional claim is simple. SEC ALJs enjoy multiple—and therefore unlawful—layers of for-cause protection from removal by the President. That is, the ALJs can only be removed for cause *and* the only people who can remove them are SEC Commissioners and Merit Systems Protection Board members—people whom the President can only remove for cause. The Supreme Court’s 2018 decision in [Lucia v. SEC](#) ruled that ALJs are inferior federal officers. The Supreme Court’s 2010 decision in [Free Enterprise Fund v. PCAOB](#) ruled that such officers may only enjoy one layer of for-cause removal protection. Otherwise, the President’s Article II duty to ensure that federal officers are doing their jobs is unduly restricted.

The panel relied on an earlier, distinguishable decision in this circuit in the *Bank of Louisiana v. FDIC* case, and it misconstrued the central jurisdictional holding of the United States Supreme Court in *Free Enterprise Fund*. That case demonstrated that district courts do have jurisdiction to hear removal-based constitutional challenges.

NCLA believes the court erred in its decision. First it admittedly takes the easy way out stating that “a prior panel has already done our ... work for us,” even though it admits that the FDIC statute, unlike SEC’s, expressly stripped jurisdiction. Second, it fails to quote or even contend with the Supreme Court’s ruling in *Free Enterprise Fund* that nothing in the SEC laws expressly or implicitly strips jurisdiction over removal questions. Finally, admittedly following other circuits in lockstep, it misapplies each of the three factors that *Free Enterprise Fund* found required jurisdiction in the federal courts. NCLA plans to appeal today’s decision and will assess its options in due course.

Read full case summary [here](#).

NCLA released the following statements:

“No rational, or constitutional system of justice would require a defendant to first undergo an unconstitutional proceeding before she can challenge its constitutionality. That question has now been before six judges of the Fifth Circuit and four of them agree with Cochran that her claims are likely to succeed on the merits. To make her cycle through another years-long exercise in futility before an ALJ and then the Securities and Exchange Commission, which both lack competence to hear her claims, is a disturbing judicial abdication of the court’s constitutional responsibilities.”

— **Peggy Little, Senior Litigation Counsel, NCLA**

“NCLA knew that Michelle Cochran was bravely fighting an uphill battle, but we did not expect the U.S. Court of Appeals for the Fifth Circuit to be an impediment to her pursuit of justice. All Americans have a right to demand a lawful court to be heard in. This ruling, if left to stand, imposes enormous human, professional, reputational and financial costs on SEC defendants. It also represents a profligate waste of government prosecutorial and judicial resources. NCLA will not rest until Americans recover their right to a constitutional hearing.”

— **Mark Chenoweth, Executive Director and General Counsel, NCLA**

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent 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.

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