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NCLA Asks Full 5th Cir. to Find Federal Court Jurisdiction over Constitutional Claim Against SEC ALJ

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

Washington, DC (November 30, 2020)—Do the securities laws implicitly prevent federal courts from hearing a structural constitutional challenge regarding administrative proceedings conducted by the Securities and Exchange Commission (SEC) before administrative law judges (ALJs) who are insulated from removal by the President by multiple layers of tenure protection? That’s the question NCLA addresses in its [opening brief](#) on rehearing *en banc* filed today in the case of *Michelle Cochran v. U.S. Securities and Exchange Commission*. The Fifth Circuit vacated the panel decision in the case on October 30 and has scheduled the case for rehearing by the entire court.

In the brief, the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, argues that the federal district courts have jurisdiction over this case and must exercise it under controlling Supreme Court authority. The brief seeks reversal of a district court decision that [erroneously dismissed](#) Ms. Cochran’s claims for lack of jurisdiction.

The case, which has drawn strong [amicus support](#), ultimately challenges the constitutionality of SEC’s ALJs and requests that the case be heard before a real Article III federal court that is competent to decide the claims at issue. ALJs enjoy multiple layers of protection from removal by the President of the United States. Currently, 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. Such stacked, “Matryoshka doll”-like insulation of powerful bureaucrats from presidential control runs contrary to the original design of our Constitution.

The U.S. Supreme Court’s 2010 decision in [Free Enterprise Fund v. PCAOB](#) held that officers of the United States (which includes ALJs after the Court’s 2018 decision in *Lucia*) may enjoy only 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. That same decision unanimously held that district courts do have jurisdiction to hear removal-based constitutional challenges. Furthermore, another Supreme Court case, *Thunder Basin*, instructs that where a claim cannot be meaningfully reviewed, is collateral, and is outside agency competence and expertise, as in Ms. Cochran’s case, it should be heard in court.

In accordance with these precedents, Ms. Cochran instituted this challenge in the district court so that she would not have to endure a second—and ultimately a third—administrative enforcement proceeding when the second, like the first—is inevitably deemed void.

NCLA released the following statement:

“Michelle Cochran seeks only to vindicate her individual liberty right not to undergo an administrative proceeding before an officer who is constitutionally illegitimate. Ms. Cochran has already endured one such unconstitutional proceeding and now the SEC seeks to put her through yet another crushing administrative gauntlet. If a federal court does not step in, she will suffer *twice* the very constitutional harm she sued to avoid. In this case justice delayed truly is justice denied.”

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

For more information visit case summary page [here](#).

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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