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NCLA Wins Major Fifth Circuit en Banc Decision Versus SEC: Court of Appeals Finds Subject-Matter Jurisdiction to Hear Unconstitutional Removal Protection Claim Against Administrative Law Judges

Michelle Cochran v. Securities and Exchange Commission

Washington, DC (December 13, 2021) – The full Fifth Circuit bench [ruled](#) today that Texas accountant Michelle Cochran has the right to challenge the constitutionality of her Administrative Law Judge’s (ALJ) removal protections in federal court *before* undergoing an administrative adjudication. The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, represents Ms. Cochran in [Michelle Cochran v. Securities and Exchange Commission](#). NCLA applauds this decision, which will allow our client to plead her case before a real Article III federal court rather than be subjected to an endless series of unlawful agency hearings.

At issue before the *en banc* panel was whether a provision of the Securities Exchange Act of 1934 implicitly strips federal district courts of subject-matter jurisdiction to hear structural constitutional claims. Judge Haynes’s opinion, joined by eight others, reverses and remands the district court’s reluctantly adverse decision. Her decision for the court holds that Section 78y of the Securities and Exchange Act of 1934 neither explicitly nor implicitly strips federal district courts of jurisdiction to decide Article II removal questions. The concurrence delivers a stinging rebuke and devastating renunciation of Wilsonian thinking, saying:

Section 78y reflects the thinking of men like Woodrow Wilson who argued that universal suffrage would make the three branches of government ignorant, indolent, and incapable of regulating modern affairs. Wilson’s solution? He wanted administrative agencies to operate in a separate, anti-constitutional, and anti-democratic space—free from pesky things like law and an increasingly diverse electorate.

As the concurrence pointed out, Woodrow Wilson asked his fellow statesmen to worry less about the constitution of government and more about its administration. The SEC asks the same today: get on with administration and worry less about how our administrative proceedings are constituted another time. The majority rightly rejected this line of thinking today.

The Fifth Circuit’s ruling is in line with the U.S. Supreme Court’s 2010 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, which held that officers of the United States, including SEC ALJs after the Court’s 2018 decision in *Lucia v. SEC*, may enjoy only one layer of for-cause removal protection from the President. The district court sought to distinguish *Free Enterprise Fund*, but the Fifth Circuit has shown that there is no basis to depart from *Free Enterprise Fund*’s jurisdictional holding. It has recognized that hearing Ms. Cochran’s claim is required by law—and compelled by the Constitution.

The SEC prosecutes people through a system of administrative proceedings before ALJs who are hired by the prosecuting agency. Ms. Cochran fell prey to this system in 2016, when the U.S. Securities and Exchange Commission (SEC) accused her of violating federal accounting standards. 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.

Today’s ruling protects the rights of citizens, like Ms. Cochran, to access federal courts when their liberty is threatened by executive-branch action that violates essential separation-of-powers principles. Under 28 U.S.C. § 1331 and Supreme Court precedent, Ms. Cochran has the right to ask ahead of time that her administrative proceeding conform to constitutional requirements. She’s entitled to her day in court. And that day is today.

NCLA released the following statements:

“The Fifth Circuit majority resoundingly vindicated Michelle Cochran’s right to be tried before a constitutional tribunal. In doing so, the court faithfully applied controlling Supreme Court precedent in *Free Enterprise Fund*, thereby correcting wayward decisions from five other circuit courts of appeals that had consigned Americans to be judged by SEC administrative law judges who enjoy unconstitutional tenure protections. These separation of powers principles are essential to preserving Americans’ individual liberties—as eloquently set forth in the majority and concurring opinions.”

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

“This case is an admirable victory not only for Cochran but also for the supremacy of law. The judges clearly understood the stakes and are standing up for the Constitution.”

— **Philip Hamburger, President, NCLA**

“Today’s *en banc* decision in *Cochran v. SEC* is a tour de force. The Fifth Circuit has pointed the way out of the labyrinth of endless administrative hearings that violate people’s civil liberties.”

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

For more information visit the case page [here](#) or watch the case video [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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