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## **SEC Enforcement Staff Accessed Adjudicatory Documents in Midst of Administrative Proceedings**

*Securities and Exchange Commission v. Michelle Cochran*

**Washington, DC (April 6, 2022)** – The U.S. Securities and Exchange Commission (SEC) has disclosed that its enforcement staff [accessed](#) documents in at least two adjudicatory matters currently in litigation in federal court, including *SEC v. Michelle Cochran*. The New Civil Liberties Alliance represents Ms. Cochran in a lawsuit challenging the constitutionality of SEC’s in-house Administrative Law Judges (ALJs), who enjoy multiple layers of protection from removal by President Biden. In December 2021, the *en banc* U.S. Court of Appeals for the Fifth Circuit [ruled](#) in favor of Ms. Cochran, declaring that she has the right to challenge the constitutionality of her ALJ’s removal protections in federal court *before* undergoing an administrative adjudication.

SEC released a statement yesterday admitting that “administrative support personnel from Enforcement, who were responsible for maintaining Enforcement’s case files, accessed [restricted] Adjudication memoranda via the Office of the Secretary’s databases.” This self-described “control deficiency” is actually an outrageous breach of ethics—and possibly law—by SEC that illustrates why the Constitution forbids housing prosecutorial functions and adjudicatory functions in a single agency.

SEC filed in *Cochran* simultaneously with publishing the statement, so Ms. Cochran was not informed of SEC’s “control deficiency” when it was discovered. NCLA and Ms. Cochran were only made aware of the Commission’s breach when it was publicly disclosed. The Commission has known about this issue long enough to hire outside investigators, conduct an audit with “dozens of interviews,” and collect documents. Yet critical details, including who knew what and when, remain undisclosed. If this breach of ethics had occurred in private litigation or before a federal court, it would raise red flags. SEC claims “this access did not impact the actions taken by the staff investigating and prosecuting the cases or the Commission’s decision-making in the matters.” At present, there is no way to verify that this breach did not impact Ms. Cochran’s case. To make matters worse, SEC hired an outside firm that regularly does millions of dollars of business with the agency to investigate the scandal. Hiring a firm with a conflict of interest to investigate a conflict of interest hardly inspires confidence.

Restoring the “controls” that were disregarded here is not enough. As this breach has demonstrated, it would be impossible to monitor the internal controls at SEC sufficiently to guarantee that agency staff would not make the same error again. A computer correction of a purported “control deficiency” cannot repair the all-too-human impulse to abuse power, win at all costs, and share information inside an agency. Whatever controls are baked into the software, none of those can remedy the inherent problems that combining the enforcement and adjudication power inside an agency create. The two powers must be structurally separated. Until the adjudicative function is returned exclusively to Article III courts, and those courts rein in SEC’s abusive regulation by guidance and other efforts to expand their regulatory power far beyond what Congress ever contemplated under the Securities Exchange Act of 1934, constitutional order will not have been restored at the SEC.

**NCLA released the following statements:**

“NCLA has been at the forefront of challenging the concentration of executive, adjudicative, and legislative powers within administrative agencies. This week’s revelation shows, as nothing else can, that SEC allowed its enforcement staff access to the adjudicatory staff’s work product on cases where respondents were fighting for their professional lives and reputations. The Founders, with their deeper understanding of human nature, understood from the beginning that separation of these awesome powers is a precondition of securing liberty. This problem will never be solved until the adjudicative function is returned exclusively to Article III courts.”

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

“SEC says it deeply regrets these breaches, but its deep regret does not undo the harms that occurred because of its negligence. It is hard to accept the Commission’s statement of contrition at face value when it did not see fit to disclose the breach to affected parties like our client, Ms. Cochran, until the same time as it informed the general public. Its disclosure fails to establish when the breach was identified and by whom, how long the breach persisted, when the Commission was made aware of the breach, and how many other individuals and entities going through SEC enforcement proceedings—or who have already settled their cases—have been affected. To paraphrase Justice Brandeis, sunlight would be the best disinfectant here.”

— **Kara Rollins, Litigation 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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