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SEC Proceeding Violated Constitutional Right to Jury and Vesting & Take Care Clauses, 5th Cir. Rules

George R. Jarkesy, Jr., et al. v. U.S. Securities and Exchange Commission

Washington, DC (May 18, 2022) – The U.S. Court of Appeals for the Fifth Circuit handed down a major [decision](#) today, vacating SEC’s decision in *Jarkesy v. SEC* and finding that the agency’s in-house adjudication of Mr. Jarkesy violated his constitutional rights. The New Civil Liberties Alliance filed an [amicus brief](#) in support of his appeal of an SEC Final Order that imposed sanctions for alleged violations of securities laws. NCLA’s brief argued that the Administrative Law Judge (ALJ) was improperly insulated from presidential removal and Mr. Jarkesy was deprived of his right to a trial by jury. Siding with NCLA, the court ruled in his favor on both claims.

George R. Jarkesy, Jr. was an investment professional and host of a nationally syndicated talk-radio program. Years after an initial investigation, SEC issued an Order Instituting Proceedings in 2013 against Mr. Jarkesy and his investment group, alleging violations of securities laws to be tried before an ALJ. Although Mr. Jarkesy tried to challenge the constitutionality of SEC’s administrative proceedings in federal court, the U.S. Court of Appeals for the D.C. Circuit denied jurisdiction in 2015. Thereby forced to undergo a seven-year journey through the administrative gristmill, he renewed those constitutional claims on his appeal of the SEC’s Final Order.

Writing for the majority, Judge Jennifer Elrod stated that the proceedings against Mr. Jarkesy suffered from three independent constitutional defects: (1) Petitioners (Jarkesy and his company) were deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to SEC by failing to provide an intelligible principle by which it could exercise such delegated power; and (3) the statutory restrictions on removal of SEC ALJs violate separation-of-powers principles by interfering with the President’s control of the Executive Branch. The opinion cites NCLA’s founder, Prof. Philip Hamburger, several times. It invokes *Cochran v. SEC* too, a 2021 NCLA Fifth Circuit victory, on which the U.S. Supreme Court granted certiorari earlier this week to address the separate question of when individuals who face administrative proceedings before the SEC may bring their structural constitutional claims to a federal court.

The Fifth Circuit’s ruling recognizes SEC’s ALJ regime is unconstitutional because the removal protections ALJs enjoy make them unaccountable to the President. In 2010, the U.S. Supreme Court’s *Free Enterprise Fund* case made clear that multiple levels of “for-cause limitations ... contravene the Constitution’s separation of powers.” Today’s decision also held that the federal securities laws—by authorizing SEC to impose civil penalties in an administrative proceeding—violated Mr. Jarkesy’s Seventh Amendment right to a trial by jury. Finally, the Fifth Circuit ruled that SEC’s in-house adjudication scheme delegates law-making power to an unaccountable and unelected administrative agency, whereas Article I of the Constitution vests *all* legislative power in Congress.

NCLA released the following statements:

“The Supreme Court held in 2010 that executive branch officers may not enjoy more than one layer of protection from removal. By vacating this SEC proceeding seven long years after irremediable constitutional, financial and

reputational damage has been done, the Fifth Circuit’s ruling exposes the irrational and ruinous heart of darkness that is compelled agency adjudication.”

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

“SEC and other federal agencies for too long have gotten away with denying jury-trial rights to those whom they target in enforcement actions. The Fifth Circuit’s decision resoundingly affirms the jury-trial right guaranteed by the Seventh Amendment in all ‘suits at common law,’ a category that includes SEC’s claim here.”

— **Rich Samp, Senior Litigation Counsel, NCLA**

“NCLA applauds the Fifth Circuit’s recognition that Article I, Section 1 of the Constitution vests *all* legislative power in Congress. The Constitution separates legislative, enforcement and adjudicative power into three different branches precisely to protect liberty. Uniting those separate powers in the hands of one agency directly led to SEC’s violation of Mr. Jarkey’s constitutional rights.”

— **Mark Chenoweth, NCLA President**

For more information visit the *amicus* 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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