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NCLA Amicus Brief Calls for Supreme Court to Review Unconstitutional FDIC ALJ Tenure Protections

Harry C. Calcutt, III v. Federal Deposit Insurance Corporation

Washington, DC (March 6, 2023) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, has filed an [amicus curiae brief](#) urging the Supreme Court to review a case, *Calcutt v. Federal Deposit Insurance Corporation*, that challenges the tenure protections enjoyed by FDIC’s administrative law judges (ALJs). In its brief, NCLA argues that the U.S. Court of Appeals for the Sixth Circuit declined to decide this important separation-of-powers question based on a mistaken belief that it could afford Calcutt no remedy.

Calcutt, a former bank executive and director, petitioned the Sixth Circuit to review a final FDIC administrative order that removed him from his position, permanently barred him from the banking industry, and imposed a \$125,000 penalty. In his petition, Calcutt argued, among other things, that FDIC’s Board of Directors and ALJs are unconstitutionally shielded from removal by the President. The Sixth Circuit ultimately declined to reach the substance of Calcutt’s separation-of-powers challenge, concluding that he would not be entitled to any remedy—even if successful—because he could not demonstrate particularized harm caused by the constitutional violation.

NCLA argues that the Sixth Circuit’s refusal to decide the merits of Calcutt’s challenge is an unconventional, even illogical approach that contrasts with Supreme Court precedent and the Fifth Circuit’s recent decision in *Jarkesy v. SEC*, an analogous case in which an administrative target challenged a final order resulting from a proceeding supervised by an SEC ALJ. Among several questions answered by *Jarkesy* was essentially the same one presented by Calcutt: whether the ALJ was unconstitutionally protected by multiple layers of protection from removal by the President. The Fifth Circuit in *Jarkesy* answered that question first—in the affirmative—and only then considered the appropriate remedy. That sequencing mirrored the Supreme Court’s approach in *Collins v. Yellen*, which likewise squarely decided the merits of a properly presented constitutional challenge *first*, even though the Court ultimately stopped short of providing the full measure of relief the challenger sought.

The Sixth Circuit’s approach disincentivizes removal-protection challenges and effectively allows ALJ tenure violations to persist indefinitely. The decision, if allowed to stand, would effectively preclude such challenges absent proof of particularized harm that will almost never exist, especially in the administrative proceedings context where only limited discovery is available. Agencies would be emboldened to pursue business as usual, resting assured that the constitutional legitimacy of their adjudicators is effectively immune from judicial scrutiny.

NCLA released the following statement:

“The Supreme Court has repeatedly extolled the virtue of incentivizing private litigants to raise meritorious separation-of-powers challenges, because our political branches of government cannot always be trusted to jealously guard their constitutionally defined roles when structuring government agencies. The Sixth Circuit’s approach disincentivizes such challenges, so it should be reversed.”

— **Russ Ryan, Senior Litigation Counsel, NCLA**

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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