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NCLA Amicus Brief Exposes Decades-Old Unconstitutional Enforcement Regime at DOL

Oracle America Inc. v. U.S. Department of Labor, et al.

Washington, DC (May 4, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group filed an [amicus brief](#) Friday in the U.S. District Court for the District of Columbia in support of Oracle’s case against the Department of Labor (DOL). Oracle has challenged a portion of the regulations that set up the enforcement and adjudication system in the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP). NCLA objects to OFCCP’s regulatory regime, because Congress never authorized DOL to *internally* adjudicate race or sex discrimination claims. Therefore, NCLA believes the Court must grant Oracle summary judgment, and OFCCP must stop prosecuting these cases internally unless Congress authorizes it.

OFCCP purports to draw its authority from an Executive Order issued by President Lyndon Johnson in 1965, which sought to establish nondiscrimination and affirmative action practices in government contracting. These requirements are mostly enforced by including an Equal Opportunity Clause in federal government contracts, which places a compliance obligation on government contractors, and subcontractors.

But there is one major problem—the Executive Order cited no statutory support authorizing this program’s existence—and there is not any. Under the Constitution, Congress has to pass a law *before* DOL can authorize its administrative law judges (ALJs) to issue binding rulings. Because neither the President nor a federal agency has any inherent power to make law, **it appears DOL has been operating a completely unconstitutional enforcement program for the past 40 years!**

Under the original 1965 Executive Order, OFCCP would refer potential enforcement cases to the Department of Justice (DOJ) or the Equal Employment Opportunity Commission (EEOC). But in 1977 DOL issued a Final Rule citing the 1965 Executive Order as its sole authority. Since that time OFCCP has instituted enforcement proceedings for violating the Equal Opportunity Clause based on triggering events like the results of complaint investigations and compliance reviews, the analysis of a contractor’s affirmative action program, or a contractor’s refusal to take certain actions. Although OFCCP’s cases dealing with veterans and disabled employees do have a statutory basis, its other coverage areas (including alleged disparate impact race and sex discrimination) do not.

DOL contends that the 1949 Procurement Act authorizes OFCCP. But that act only gave power to write implementing regulations to the General Services Administration (GSA), not to DOL. And when Congress has created ALJs at other agencies for enforcement purposes, it has provided separate statutory authority for them (not relied on the Procurement Act). So, this latter-day rationalization for the 1977 Final Rule is unconvincing.

NCLA is also concerned with DOL’s use of unconstitutional ALJs at OFCCP. Like ALJs at SEC (whom NCLA is currently suing in the Fifth, Ninth, and Eleventh Circuits over this same issue), DOL’s ALJs enjoy more than one layer of for-cause removal protection. The Supreme Court has held multiple layers of protection from removal to be a violation of Article II’s Take Care Clause, which obliges the President to ensure that the laws are faithfully enforced. The Supreme Court has ruled that the President is handicapped in carrying out that duty if his executive officers (like ALJs) are too difficult to remove.

NCLA released the following statement:

“NCLA does not support race or sex discrimination in any way, shape, or form. As a civil rights organization, we support efforts to root out discrimination from federal contracting. However, hiring and pay discrimination charges are serious allegations, and parties facing such charges deserve due process. Instead, OFCCP has set up an internal adjudication regime without Congressional authorization overseen by ALJs who enjoy unconstitutional layers of protection from removal. Until Congress can fix it, OFCCP’s unconstitutional regime needs to stop.”

—**Kara Rollins, Litigation Counsel, NCLA**

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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