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NCLA Seeks D.C. Cir. Rehearing to Urge Jurisdiction over Constitutional Claim Against USDA ALJs

Joe Fleming, et al. v. U.S. Department of Agriculture

Washington, DC (April 1, 2021) – A two-judge majority of the U.S. Court of Appeals for the District of Columbia Circuit erred in *Fleming v. USDA* in February when it refused to address the constitutionality of the multiple layers of for-cause removal protection enjoyed by administrative law judges (ALJs) at the U.S. Department of Agriculture (USDA). The court remanded the issue back to USDA for initial consideration by the very ALJ whose constitutional status is under challenge. That remand not only failed to resolve the structural constitutional problem inherent in the statute but generated a second issue: whether USDA's permissive claim-processing rules themselves bind Article III courts.

The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, today filed a petition for panel rehearing or rehearing *en banc* so that: (1) USDA may not shield its unconstitutional ALJs through strategic and inconsistent administrative exhaustion claims; and (2) the D.C. Circuit does not embrace a novel variety of "administrative exhaustion" that would force all issues appealed from agencies to first be heard by an ALJ. The statute requires exhaustion of administrative *process*, not prior raising to the ALJ of every *issue*, especially where the agency has signaled that it would not have ruled on an issue even if it had been raised more explicitly.

NCLA began as *amicus curiae* in this case, but the Fleming Petitioners are now NCLA clients. Those Petitioners, several horse trainers from Tennessee accused of violating the Horse Protection Act (HPA), should not be subjected to the needless delay and futility the majority's remand order will cause. Their HPA liability, if any, should be determined promptly by a federal district court—or at least by an ALJ who does not enjoy unconstitutional protection from Presidential removal.

As Judge Rao established in her dissent, the Supreme Court made clear in *Free Enterprise Fund v Public Co. Accounting Oversight Board* that officers of the United States may not be insulated from removal by multiple layers of protection without running afoul of the clause in Article II of the Constitution that requires the President to "take Care that the Laws be faithfully executed." NCLA's *amicus* brief originally brought this very issue to the fore: As a consequence of the U.S. Supreme Court's 2018 decision in *Lucia v. SEC*, USDA's ALJs are executive "officers" and must be *removable* in a way consistent with the Appointments Clause.

The Petitioners raised an Appointments Clause challenge to USDA's ALJs during an agency HPA enforcement action. USDA insisted the issue must await an Article III court, but once in court, USDA reversed its stance and argued that Petitioners' constitutional challenge must first go through the administrative process. A majority of the D.C. Circuit panel accepted the USDA's reversal and remanded the case. The panel ruled that a statute requiring Petitioners first to go through the administrative process before seeking judicial review impliedly also required Petitioners to comply with every one of USDA's claim-processing rules. According to the majority, an Article III court is powerless to waive non-compliance.

NCLA argues that the panel majority erred in creating the new variety of exhaustion, a non-jurisdictional yet mandatory exhaustion, that has no basis in law. In doing so, the panel converted USDA's claim-processing rules into statutory requirements, which Congress did not do. The panel ruling strips courts of their inherent equitable discretion and robs Congress of its exclusive authority to set the jurisdiction of Article III courts. The decision also conflicts with precedential decisions of the D.C. Circuit indicating that there is no such thing as exhaustion that is mandatory but non-jurisdictional.

NCLA awaits decision in another ALJ case, *Cochran v. SEC*, from the *en banc* U.S. Court of Appeals for the Fifth Circuit. NCLA has also filed several *amicus* briefs on ALJ appointments and removal protection issues in *Axon v. FTC* and recently in *Jarkesy v. SEC*. The issue of administrative exhaustion has been previously raised in NCLA's *amicus* brief in *Carr v. Saul*.

NCLA released the following statements:

"By avoiding an important constitutional issue squarely before the court, the panel majority created yet another constitutional issue. Courts must not hesitate to perform their judicial duty, or else another branch of government will fill that void and upset our system of checks and balances."
— Jared McClain, Litigation Counsel, NCLA

"The panel's decision makes little sense. It defers its decision on an important constitutional issue until after an administrative agency can address the issue, despite acknowledging that the agency lacks authority to decide it."
— Richard Samp, Senior Litigation Counsel, NCLA

"Circuit courts' refusal to hear properly presented challenges to agency ALJs' removal protections in the order logic requires—*before* an unconstitutional to-be-vacated adjudication takes place—defies reason and disserves justice."
— Peggy Little, Senior Litigation Counsel, NCLA

For more information about this case visit 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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