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NCLA Amicus Brief Calls for Full Sixth Circuit to Reconsider Unconstitutional FDIC ALJ Protections

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

Washington, DC (August 1, 2022) – Congress has long protected federal agency Administrative Law Judges (ALJs) from removal, thus depriving Americans of their constitutional freedom to live under a government in which executive power is accountable to them through the President. The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an [amicus curiae brief](#) in a case addressing whether certain Federal Deposit Insurance Corporation (FDIC) officers, including the agency’s ALJs, are protected by multiple layers of tenure protection in violation of the “Take Care” clause of the Constitution. NCLA asks the Sixth Circuit Court of Appeals to grant the petition for rehearing in *Calcutt v. FDIC*.

The Sixth Circuit panel declined to decide this important constitutional question, instead taking a no-remedy-thus-no-decision approach. This avoidance strategy stands in stark contrast to 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 quasi-criminal law enforcement proceeding supervised by an ALJ working for the SEC. Among several questions presented in *Jarkesy* was essentially the same one presented by petitioner Calcutt: whether the ALJ was unconstitutionally protected by multiple layers of protection from presidential removal. The *Jarkesy* court answered that question first—in the affirmative—and only then considered the appropriate remedy.

The Sixth Circuit panel’s ruling in *Calcutt* disincentivizes removal-protection challenges and effectively allows ALJ tenure violations to persist indefinitely. The decision signals to would-be challengers of administrative tenure protections that courts won’t protect their constitutional rights to a lawful tribunal absent individualized proof of harm that will almost never exist, much less provide them with a remedy. The decision thus removes all incentive for individual citizens to invest the time, effort, and resources required to bring such challenges. Yet the Supreme Court has explicitly stated that lower courts should hear and provide remedies for structural constitutional challenges in order to incentivize judicial checks on agency non-compliance with the Constitution.

The Sixth Circuit should reconsider the panel decision, which would embolden agencies to forge ahead with business as usual, knowing that even if their adjudicative structures or processes contravene the Constitution, they are effectively immune from challenge or judicial scrutiny.

NCLA released the following statement:

“The Sixth Circuit declined to decide an important and recurring question based on the belief it could offer petitioner Calcutt no remedy even if it were to decide that his right to a constitutional adjudication was violated. That approach puts the proverbial cart before the horse and unfortunately disincentivizes future litigants from raising similar challenges.”

— **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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