

[Securities Regulation Daily Wrap Up, TOP STORY—5thCir.: Full Fifth Circuit finds district court jurisdiction over ALJ removal challenge, \(Dec. 14, 2021\)](#)

Securities Regulation Daily Wrap Up

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By [Rodney F. Tonkovic, J.D.](#)

The majority said that Supreme Court precedent controlled, but the dissent accused the majority of "champing at the bit" to create a circuit split.

The Fifth Circuit, sitting en banc, has concluded that district courts have subject matter jurisdiction to hear structural constitutional claims. In this case, a panel had affirmed a district court's conclusion that lacked jurisdiction to hear a constitutional challenge to an SEC enforcement proceeding. The en banc court reversed this judgment, finding that Section 25 did not limit the district court's jurisdiction here and that this case is not the type of claim Congress intended to funnel through the Exchange Act's statutory-review scheme. A dissent joined by seven judges, however, accuses the majority of creating a circuit split by departing from the reasoning of at least five other circuits. Cochran will have a chance to be heard via the established statutory scheme, the dissent says ([Cochran v. SEC](#), December 13, 2021, Haynes, C.).

The SEC brought an enforcement action against Michelle Cochran, a CPA, in 2016, charging her with failing to comply with PCAOB auditing standards when performing audits and reviews. An SEC ALJ imposed a penalty and five-year suspension, and the SEC adopted the decision, to which Cochran objected. At this point, the Supreme Court issued *Lucia v. SEC*, holding that SEC ALJs are officers under the Appointments Clause. In response, Cochran's case was reassigned to a new, constitutionally-appointed ALJ. Cochran then filed suit to enjoin the proceedings, asserting that the second ALJ was unconstitutionally insulated from the president's removal power.

The district court dismissed for lack of subject matter jurisdiction, finding that the Exchange Act strips district courts of jurisdiction to hear challenges to ongoing enforcement proceedings. The court reasoned that Cochran should have raised her claims in the ALJ proceeding and then petition for review in an appellate court. A Fifth Circuit panel [affirmed](#) in a 2-1 decision, stating that it was bound by the fact that every appellate court to address the question held that the statutory review scheme is the only path to asserting a constitutional challenge to SEC proceedings. An en banc hearing was then granted.

District court has jurisdiction. The sole issue addressed by the full court was whether the district court had jurisdiction over Cochran's removal claim. A majority of the court (nine out of sixteen judges) agreed that the district court had jurisdiction. The court accordingly reversed and remanded the dismissal of the removal power claim.

The court first rejected the SEC's argument that Congress implicitly stripped district courts of jurisdiction under Exchange Act Section 25. According to the court, the text of Section 25 says nothing about those who, like Cochran, have not yet received a Commission final order or who have claims unrelated to a final order, and the portion of the statute concerning petitions to the appellate court is not phrased in mandatory terms, which the court took as an opening to alternative routes to federal court review.

Next, *Free Enterprise Fund*, which rejected the same argument the SEC made here, is squarely on point, the court said. In that case, the Supreme Court held that the text of Section 25 neither expressly nor implicitly limits district court jurisdiction. The court rejected the SEC's attempt to distinguish Cochran's case, noting that Cochran is still not guaranteed an adverse final order. And, while other circuits have held that district courts lack jurisdiction, there are "powerful" dissents in those cases, and "the consensus view is not always correct."

The panel went on to analyze the case using the *Thunder Basin* factors and concluded that Cochran's removal power claim is not the type of claim Congress intended to funnel through the Exchange Act's statutory-review scheme. In this case Cochran's challenge is collateral to the Exchange Act's review scheme, outside of the SEC's expertise, and Cochran would be deprived of the opportunity for meaningful judicial review. The *Thunder Basin* inquiry, the court said, simply reaffirmed that *Free Enterprise Fund* controls this case.

Ripeness. The court also found that Cochran's case was ripe for review. There was no dispute that the removal power claim is a pure issue of law and that withholding consideration would force her to litigate before an ALJ who is insulated from removal.

Dissent. Seven judges joined in a dissent, arguing that the majority invented a new category of review and contravened the longstanding statutory scheme. The real issue, the dissent said, is not whether Cochran will have the opportunity to be heard, but where and when that will happen. The majority has created "a new category of midenforcement review to go along with traditional pre- and postenforcement review" that multiplies the number of court proceedings and makes separation-of-powers claims the first, rather than last, resort in resolving cases.

Above all, the dissent says that the majority decision has created a circuit split. Five circuits have considered whether Congress precluded district court jurisdiction from the SEC enforcement scheme, and every judge decided those cases found that the statutory scheme divests district courts of jurisdiction. The statute emphasizes, the dissent says, that once the agency's jurisdiction over the case ends, the court of appeals can then affirm, modify, or enforce the order. In addition, the majority's theory is at odds with the concept of implicit jurisdiction stripping, which, as the *Thunder Basin* court, put it, is meant to create "a single review process" and avoid pre-enforcement challenges that "might thwart effective enforcement of the statute." The majority's ruling allows a party facing and SEC enforcement action to sue the agency for any type of claim, the dissent said, and risks serious disruption of the Exchange Act's administrative scheme.

The separation of powers claim at issue in this case is of the type that Congress meant to exclude from district court jurisdiction, the dissent concluded. First, Cochran will have an opportunity for meaningful review following an adverse result before the SEC. And, Cochran's removal power claim may not be "wholly collateral" to the Section 25 scheme because she would not be asserting that claim but for the SEC's charges against her (a stance taken by at least three other circuits). Finally, the SEC may resolve the case on other grounds, obviating the need to address the constitutional challenge. Other targets of enforcement actions, Raymond Lucia, followed the established procedures to achieve a landmark ruling, the dissent says, and Cochran has the same opportunity.

Concurring judges. Six of the judges concurred in the majority opinion, but wrote to take issue with each point raised by the dissent. Covering nearly thirty pages, the concurrence hearkens back to the birth of the SEC and claims that the agency's founder did not trust courts to review the SEC's work. Section 25 as enacted by Congress, however, did not enshrine that mistrust, and does not strip the district court of jurisdiction over Cochran's claim.

The case is [No. 19-10396](#).

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