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Supreme Court Allows Structural Constitutional Challenges to FTC and SEC Proceedings in Federal District Court



The U.S. Supreme Court [ruled](#) in two related cases, *Axon Enterprise Inc. v. FTC* (No. 21-86) and *SEC v. Cochran* (No. 21-1239), that federal district courts have jurisdiction to hear structural constitutional challenges to the adjudicative authority of the Federal Trade Commission (FTC) and the U.S. Securities and Exchange Commission (SEC), and that litigants need not wait until the appeal of an adverse agency decision in the adjudication to raise such arguments in court.

### **The Statutory Frameworks and How These Cases Got to the Supreme Court**

The FTC and SEC have the authority under their enabling statutes (the FTC Act and the Exchange Act, respectively) to institute enforcement proceedings in one of two ways: (1) they may bring civil suits in federal district court or (2) institute proceedings before agency-specific administrative law judges (ALJs). When either agency elects the latter option, the ALJ has authority similar to an Article III judge in that they may "resolve motions, hold a hearing, and then issue a decision." The ALJ's ruling can be appealed to the Commission of each agency sitting as an adjudicative body. An adverse final ruling from each Commission can then be appealed by the respondent to a federal court of appeals.

Axon Enterprise, [a company subject to an FTC enforcement action before an ALJ](#) challenging a merger, and Michelle Cochran, [a certified public accountant subject to an SEC enforcement action before an ALJ](#) regarding compliance with auditing standards, each sued in federal district court while their ALJ cases were pending. Both suits challenged the limits on the President's ability to remove the ALJs as a violation of separation of powers. Axon also claimed that the combination of prosecutorial and adjudicative functions in the FTC made the FTC's

enforcement action unconstitutional. In both cases, the district courts held that the enabling statutes' judicial-review provisions deprived them of jurisdiction because they mandated the review of final agency orders by federal courts of appeals following the conclusion of the administrative process.

Both parties appealed. The U.S. Court of Appeals for the Ninth Circuit upheld the lower court's dismissal of the case on the grounds that the FTC Act barred jurisdiction in district courts. However, the en banc U.S. Court of Appeals for the Fifth Circuit disagreed that the Exchange Act barred jurisdiction because Cochran's claim would not receive "meaningful judicial review" in the court of appeals. The Supreme Court granted certiorari to resolve this split.

## **The Supreme Court's Ruling**

In an opinion by Justice Elena Kagan, the Supreme Court unanimously ruled that constitutional challenges to the authority of the FTC and SEC can be brought in federal district court before FTC and SEC administrative proceedings are complete rather than having to raise the argument in a federal court of appeals at the conclusion of the administrative process. Neither of the statutory review schemes in the Exchange Act nor the FTC Act strips a district court's jurisdiction over such claims.

In determining whether particular claims concerning agency action are the type that Congress wished to be reviewed within a statutory review scheme, the Court applies a three-factor test: (1) whether precluding district court jurisdiction would "foreclose meaningful judicial review," (2) whether the claim is "wholly collateral," and (3) whether the claim falls outside the expertise of that particular agency. In both cases, all three factors favored hearing constitutional challenges outside the agency's statutory review process. Regarding the first factor, the Court reasoned that Axon and Cochran both asserted "here-and-now" injuries, and "that injury is impossible to remedy once the proceeding is over, which is when appellate review kicks in." As to the second factor, the Court found that challenges to constitutional authority "have nothing to do with either [of] the enforcement-related matters" regularly adjudicated by the FTC and SEC and are thus wholly collateral. For the final factor, the Court explained that questions of constitutional law fall outside of "considerations of agency policy." While deciding where such constitutional challenges can be heard, the Court declined to resolve the merits of the challenges at issue, which will be decided on remand.

## **Takeaways**

The *Axon* and *Cochran* ruling erodes the FTC and SEC's enforcement authority, and presumably that of any agency, such as the Consumer Financial Protection Bureau (CFPB), that utilizes administrative adjudication. For years, questions have been raised about the fairness of permitting an agency to serve as de facto prosecutor and judge via the agency administrative adjudication process. While the full Court did not opine on this argument raised by *Axon* (or on the other constitutional challenges raised by *Axon* or *Cochran*), in a concurring opinion, Justice Clarence Thomas seemed to give credence to concerns about the fairness of the process, noting his "grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end." It seems all but certain that the FTC and SEC will face challenges based on Justice Thomas's suggestion, as well as challenges

regarding the removability of ALJs, among other constitutional claims when administrative enforcement proceedings are initiated, via requests to enjoin those proceedings.

In addition, this case comes on the heels of *AMG Capital Management v. FTC*, 141 S. Ct. 1341 (2021), in which a unanimous Supreme Court ruled that the FTC does not have the authority to seek equitable monetary relief in federal district court under Section 13(b) of the FTC Act. As a consequence, to obtain redress in consumer protection enforcement actions, the FTC must first proceed via administrative adjudication under Section 19 of the FTC Act. But after *Axon*, that may open the FTC up to constitutional challenges—leaving the FTC squeezed in those litigated consumer protection cases in which it seeks consumer redress.

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