

Unanimous Supreme Court Decision Allows for Early Challenges to Federal Agency Enforcement Actions

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On April 14, the Supreme Court [unanimously held](#) that federal district courts have jurisdiction to review constitutional challenges to the structures of the Federal Trade Commission (FTC) and Securities and Exchange Commission (SEC). This decision paves the way for parties subject to FTC, SEC, and potentially other federal administrative actions to bring early challenges to such actions via structural constitutional claims rather than undergoing the onerous process of challenging the actions during agency proceedings set forth in the FTC Act and Securities Exchange Act of 1934 (Exchange Act).

The Supreme Court's ruling in *Axon Enterprise, Inc. v. FTC* resolved a division between the Fifth and Ninth circuits concerning whether the essentially identical statutory review schemes contained in the Exchange Act and FTC Act displace a district court's federal-question jurisdiction over constitutional challenges to the SEC's and FTC's authority to proceed with enforcement actions.

The Exchange Act and the FTC Act respectively authorize the SEC and FTC to address statutory violations by instituting their own administrative proceedings. These administrative enforcement proceedings typically involve an initial adjudication by an administrative law judge (ALJ) and a subsequent review by the respective commission, either upon appeal of the ALJ's decision by the losing party or by the commission sua sponte. The commission issues a final decision following its review, or if no such review has occurred, the ALJ's decision becomes the final decision of the commission. Both acts provide for review of a final commission decision in a federal court of appeals, rather than a federal district court.

Circuit Court Cases

The Fifth Circuit, in *SEC v. Cochran*, examined the district court's jurisdiction over a constitutional claim brought by an individual respondent in an SEC enforcement action prior to the issuance of an ALJ decision. The respondent challenged the SEC ALJs' dual-layer protection from removal as violative of Article II's vesting of executive power in the president, which Cochran argued made the entire SEC proceeding unlawful. The Fifth Circuit reversed the district court's dismissal of the claim for lack of jurisdiction, holding that the Exchange Act's statutory review scheme does not preclude the district court's jurisdiction over this type of separation-of-powers claim under 28 U.S.C. § 1331 (federal-question authority).

The Ninth Circuit, in *Axon Enterprise, Inc. v. FTC*, analyzed the district court's jurisdiction over similar constitutional claims brought by a corporate respondent in an FTC enforcement action in the district court prior to the issuance of an ALJ decision. Axon asserted a claim like the one in *Cochran* based on the FTC ALJs' dual-

layer removal protection and also raised a due process challenge based on the FTC's combined prosecutorial and adjudicative functions. The Ninth Circuit affirmed the district court's dismissal of the claims for lack of jurisdiction, holding that the FTC Act's review scheme provides for "meaningful judicial review" of these constitutional challenges and thus precludes the district court's federal-question jurisdiction over these particular claims.

Supreme Court Decision

The Supreme Court determined that the district court does maintain jurisdiction under Section 1331 to review claims challenging the constitutionality of a federal agency's structure, and these particular claims are not the types that Congress "intended to be reviewed within [the] statutory structure" of the Exchange Act and FTC Act.

The Thunder Basin Factors

The Court based its determination on three considerations known as the "*Thunder Basin* factors," which originated from the Court's 1994 decision in *Thunder Basin Coal Co. v. Reich*, when the Court first took up the question of whether a statutory review scheme precludes district court jurisdiction over challenges to federal agency action. See 510 U.S. 200, 207-213 (1994).

First, the Court held that precluding district court jurisdiction would "foreclose all meaningful judicial review" of the claims. Cochran and Axon each alleged a "here-and-now injury" that they were being subjected to an unconstitutionally structured agency proceeding. That injury would be impossible to remedy at the appellate review stage provided for in the Exchange Act and FTC Act since the completion of the agency proceeding is a prerequisite to review by the court of appeals.

Second, the Court held that the claims are "wholly collateral" to the statutory review structures of the Exchange Act and FTC Act. The claims challenge the commissions' general authority to conduct these proceedings, rather than specific actions taken during the proceedings, and they do not relate to the substance of the enforcement actions or the kinds of procedural- or evidentiary-related matters that the commissions "regularly adjudicate."

Third, the Court found that the claims are outside the SEC's and FTC's expertise, citing its reasoning from its decision in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.* that constitutional challenges to agency action based on tenure protections, like those of the commissions' ALJs, raise "standard questions of administrative and constitutional law, detached from considerations of agency policy." See 561 U.S. 477, 490-91 (2010).

Although Axon only addressed district court jurisdiction over a party's challenge to federal administrative action by way of structural constitutional claims, in a concurring opinion, Justice Thomas expressed 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" and urged future consideration of the constitutionality of statutory review schemes that adopt an "appellate review model" like the Exchange Act and FTC Act as a method for adjudicating private rights.

This unanimous decision demonstrates the Court's willingness to use constitutional limitations on the structure of

federal agencies to constrain the bounds of the administrative state, and it provides an early opportunity for relief to parties subject to enforcement actions brought by the SEC, FTC, and likely other federal agencies with similar statutory review schemes, including the Consumer Financial Protection Bureau. And Justice Thomas' concurring opinion signals that consideration of the constitutionality of the statutory "appellate review model" as a whole could be on the horizon. We can look forward to this and other challenges to administrative proceedings working their way through the judicial system in the future.

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