

In Axon, Justices Continue Reining In Administrative State

By **Helgi Walker, Russell Balikian and Robert Batista** (April 21, 2023, 4:50 PM EDT)

On April 14, the U.S. Supreme Court cleared the way for parties facing agency enforcement actions to bring structural challenges to these actions directly in federal court, without first completing long and costly agency proceedings.

The high court's unanimous holding in *Axon Enterprise Inc. v. FTC and SEC v. Cochran*, resolved in a single opinion using the *Axon* caption, is a significant development in administrative law that will facilitate timely and important challenges to the scope of agency authority.[1]

Background

Axon Enterprise and *Michelle Cochran* are respondents in administrative enforcement actions pending before the Federal Trade Commission and the U.S. Securities and Exchange Commission, respectively.

Prior to receiving a final agency decision, *Axon* and *Cochran* filed suit in the U.S. District Court for the District of Arizona and the U.S. District Court for the Northern District of Texas, respectively, to enjoin the administrative proceedings.

Both parties argued that the agency's administrative law judges were improperly insulated from presidential removal authority, in violation of Article II of the U.S. Constitution. *Axon* also asserted that the FTC's combination of prosecutorial and adjudicative functions violated due process.

They both further claimed that the district court had jurisdiction to hear their claims under Title 28 of the U.S. Code Section 1331, the "federal question" statute, which authorizes district courts to hear "all civil actions arising under the Constitution [and] laws ... of the United States."

The district courts in both cases dismissed the claims for lack of jurisdiction, reasoning that the provisions of the FTC Act in *Axon* and the Securities and Exchange Act in *Cochran* authorizing judicial review of final agency decisions in the courts of appeals divested district courts of Section 1331 jurisdiction over the parties' claims.[2]

Axon and *Cochran* appealed, and the U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of



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Appeals for the Fifth Circuit, respectively, reached different conclusions on this issue, contributing to a larger split of authority. The Supreme Court took up both cases and considered them together.

Opinion of the Court

The justices unanimously held that the district courts had jurisdiction to hear Axon's and Cochran's structural constitutional claims against the FTC and SEC.

Justice Elena Kagan wrote the opinion of the court, approaching the question in two ways that both led to the same result.

The court first looked at the issue from "30,000 feet," asking whether Axon's and Cochran's claims were more like claims in past cases where the high court held that district court jurisdiction was precluded, or whether the claims were more like those in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, where the Supreme Court found in 2010 that a district court had jurisdiction to decide whether members of an oversight board were improperly insulated from the president's removal authority.[3]

The answer to this comparative question was "not very hard," according to the opinion.

Constitutional claims challenging the structure of the FTC and SEC were much more akin to the structural constitutional claim in *Free Enterprise Fund* than they were to those in other cases.

Like the petitioner in *Free Enterprise Fund*, both Axon and Cochran argued that the agency's administrative law judges were improperly insulated from presidential accountability through for-cause removal protections. Axon's due process argument similarly questioned the agency's constitutional authority to proceed at all with the enforcement action.

By contrast, the Supreme Court cases where district court jurisdiction was precluded — 1994's *Thunder Basin Coal Co. v. Reich* and 2012's *Elgin v. Department of Treasury* — did not involve structural claims. *Thunder Basin* dealt with statutory claims about union officials' access to the workplace and a due process claim about imposing fines before holding a hearing,[4] while *Elgin* concerned an equal protection claim arising from a personnel discharge.[5]

The court next engaged in a more granular analysis, considering three factors identified in *Thunder Basin*: (1) whether precluding district court jurisdiction would foreclose meaningful judicial review; (2) whether the claim is collateral to the statute's review provisions; and (3) whether the claim falls outside the agency's expertise to adjudicate.

The high court did not require all three factors to be satisfied; the ultimate question was whether Congress intended for claims of the type asserted to be channeled through the agency to the court of appeals.

The Supreme Court concluded that all three factors indicated that Axon's and Cochran's claims fell outside the statutory review scheme.

First, the court recognized that the structural constitutional harm that Axon and Cochran allege is a "here-and-now injury" that would be "impossible to remedy" once the agency proceedings are over, foreclosing meaningful judicial review.

Second, the claims are collateral to the underlying agency proceeding because they concern the agency's power to conduct the proceeding in the first place, rather than challenging any specific actions in the proceedings.[6]

And third, federal agencies have no special expertise in resolving structural constitutional issues.[7]

The Supreme Court thus held that federal district courts have jurisdiction to adjudicate structural constitutional claims, even while agency enforcement proceedings are ongoing.

Concurring Opinions

The high court was unanimous in its judgment, but Justices Clarence Thomas and Neil Gorsuch penned separate concurring opinions.

While Justice Thomas joined the majority opinion as a correct application of the court's precedent, he questioned whether the Constitution permits federal agencies to adjudicate claims involving core private rights, such as monetary rights and property ownership, with only deferential judicial review. He indicated that the Constitution likely requires courts to have plenary authority to resolve disputes involving private rights.

Justice Gorsuch concurred only in the court's judgment, explaining that he would reach the same conclusion through a more straightforward route. He would have held that nothing in the FTC's or SEC's special review provisions purports to divest district courts of jurisdiction to hear questions arising under the Constitution under Section 1331.

In his view, the judicial review provisions in the FTC Act and Exchange Act apply only to the review of final agency orders, which were not at issue — both cases involved ongoing agency proceedings. For that reason, he wrote, "Section 1331 grants district courts the power to hear Ms. Cochran's and Axon's claims and no other law takes that power away." [8]

Takeaways and Implications

The Supreme Court's ruling is significant. It allows parties facing administrative enforcement actions brought by the FTC and SEC — and likely other federal agencies — to raise certain structural challenges to the agency's authority in federal district court, without awaiting a final order by the agency.

Administrative enforcement proceedings can be long and costly, and parties often settle before a final order is issued. If district courts lacked jurisdiction to hear structural challenges to the agency's authority, regulated parties might never have an opportunity to vindicate the here-and-now injury of being subject to administrative proceedings they claim are unlawful.

Axon ensures meaningful judicial review of such claims by holding that district courts have jurisdiction to consider them, even when the administrative enforcement action is still pending.

While the full implications of the justices' decision will take time to determine, several key takeaways seem clear:

It likely applies to agencies with similar judicial review schemes.

The FTC and the SEC are not the only agencies whose final decisions are subject to review in the courts of appeals. Many other agencies are subject to similar judicial review mechanisms, including the Consumer Financial Protection Bureau,[9] the U.S. Environmental Protection Agency,[10] the Federal Aviation Administration,[11] the Federal Communications Commission,[12] the Federal Energy Regulatory Commission,[13] the National Labor Relations Board[14] and the Surface Transportation Board,[15] among others.

Axon's holding likely would extend to structural claims involving these agencies as well.

It appears to apply to other structural constitutional claims.

The justices' decision crystallizes two ways of assessing whether a structural challenge can proceed in district court while agency proceedings are still ongoing.

Courts can look at the case from 30,000 feet to see if the claims are more similar to Free Enterprise Fund and Axon than Thunder Basin and Elgin. And they can also apply the three Thunder Basin factors to ascertain whether Congress intended for the claims to be channeled through the special review scheme.

Satisfying either test appears to be sufficient under Axon.

Axon involved constitutional challenges to for-cause removal provisions and a structural due process claim, and it is likely that other constitutional claims would satisfy one or both Axon tests.

Examples could include claims that the agency lacks authority to adjudicate private rights under Article III and the Seventh Amendment (per Justice Thomas' concurrence), challenges under the appointments clause, separation-of-powers arguments under the Constitution's vesting clauses, claims that the agency is unconstitutionally funded, nondelegation arguments and structural due process assertions.

It could apply to certain statutory claims.

Although the Supreme Court focused on the structural constitutional claims that Axon and Cochran raised, the justices did not limit their reasoning to constitutional claims, and some statutory claims may satisfy either the 30,000-foot test or the Thunder Basin factors.

For example, claims asserting that Congress has statutorily prohibited an agency from proceeding with an action or that a set of actions categorically exceed the agency's authority may qualify.

Such claims could give rise to a here-and-now injury similar to claims that the agency has exceeded its constitutional authority, and they may be deemed collateral to the agency proceedings on the ground that, like Axon's and Cochran's claims, they "challeng[e] the [agency's] power to proceed at all" and assert the agency is acting unlawfully in a "broad swath" of its work.[16]

These claims also could be deemed to fall outside an agency's special expertise, at least where the statute is clear. Again, it remains to be seen whether courts will accept these arguments.

It incentivizes agencies to bring enforcement proceedings in district court.

The court's decision has unique implications for agencies, such as the SEC and the FTC, that can choose

whether to bring enforcement proceedings in-house or instead in federal district court.[17]

By affording parties earlier judicial review of structural challenges to agency proceedings, Axon will likely keep pressure on these agencies to file contested claims in district court in the first instance.

This will provide regulated parties with greater procedural rights and protections than are available in administrative proceedings.

Parties can continue raising structural claims on review of a final order.

Although some parties in enforcement proceedings will want to take advantage of the district court review that Axon authorizes, nothing in the justices' decision forecloses courts of appeals from continuing to review structural challenges after the conclusion of agency review.

For this reason, respondents in administrative enforcement proceedings should preserve such challenges during the agency proceedings as well.

Conclusion

Axon's unanimous holding facilitates earlier, more frequent and more meaningful judicial review of structural challenges to agency authority.

This important victory for regulated parties reflects the current Supreme Court's strong interest in reining in the administrative state by reinforcing constitutional limitations on the structure, composition and operation of administrative agencies.

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[1] Axon Enterprise, Inc. v. FTC, No. 21-86, decided together with SEC v. Cochran, No. 21-1239 (U.S. Apr. 14, 2023).

[2] 15 U.S.C. §§45, 78y(a)(1).

[3] 561 U.S. 477, 489–91 (2010).

[4] 510 U.S. 200, 207–15 (1994).

[5] 567 U.S. 1, 10–15, 21–23 (2012).

[6] Axon, slip op. 14.

[7] Axon, slip op. 16–17.

[8] Axon (Gorsuch, J., concurring in the judgment), slip op. 8.

[9] 12 U.S.C. §5563(b)(4).

[10] 42 U.S.C. §7607(b).

[11] 49 U.S.C. §46110(a).

[12] 47 U.S.C. §402(a)-(b).

[13] 15 U.S.C. §717r(b).

[14] 29 U.S.C. §160(f).

[15] 28 U.S.C. §2321(a).

[16] Axon (majority op.), slip op. 11, 14.

[17] See 15 U.S.C. §§45(b), (m) (FTC); *id.* §§78u, 78u–3, 78aa (SEC).