

Supreme Court Holds that Constitutional Challenges to Administrative Agencies' Structure Can Be Brought in District Court

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The Supreme Court held today that constitutional challenges to administrative agencies' structure can be brought in federal district court and need not be raised through an administrative proceeding with subsequent appellate review. The decision in *Axon Enterprise, Inc. v. Federal Trade Commission* (U.S. Apr. 14, 2023) – which involved challenges to two federal agencies' use of Administrative Law Judges ("ALJs") for enforcement proceedings – considered only the issue of *where* such challenges can be brought. The Court did not address substantive questions about whether the ALJ process or the agency structure itself is constitutional – hot topics that could come before the Court in other matters.

Background

The *Axon* case arose from two unrelated enforcement proceedings brought before ALJs by the Securities and Exchange Commission and the Federal Trade Commission. In each case, the respondent sued in federal district court to enjoin the proceeding. Each suit alleged that some fundamental aspect of the Commission's structure was unconstitutional, that the entire administrative proceeding was therefore unlawful, and that being subjected to an allegedly illegitimate proceeding caused injury independent of any alleged harm resulting from rulings that the ALJ might make in that proceeding.

The district courts dismissed both challenges, holding that the plaintiffs should have followed the administrative-review scheme specified in the Securities Exchange Act and the FTC Act. According to the courts, the plaintiffs should have raised their challenges before the agency and then sought review in a federal appellate court from any adverse rulings.

The Ninth Circuit (in the FTC case) affirmed the ruling below. But the en banc Fifth Circuit (in the SEC case) reversed, holding that the plaintiff was entitled to go directly to federal court without needing to raise her constitutional challenge in the SEC's administrative proceeding.

The Supreme Court's Decision

The Supreme Court unanimously reversed the Ninth Circuit's decision and affirmed the Fifth Circuit's ruling. The 8-1 majority opinion held that the administrative-review schemes in the Exchange Act and the FTC Act "do not displace district court jurisdiction over [plaintiffs'] far-reaching constitutional claims." Justice Gorsuch concurred in the judgment.

The Court began by acknowledging that "[a] special statutory review scheme . . . may preclude district courts from exercising jurisdiction over challenges to federal agency action." The Court's 1994 decision in *Thunder Basin Coal Co. v. Reich* had propounded a three-step analysis to determine whether Congress intended such preclusion, and the Court applied that analysis here to hold that the Exchange Act and the FTC Act did not preclude the plaintiffs' constitutional challenges.

The first *Thunder Basin* factor considers whether "preclusion of district court jurisdiction could foreclose all meaningful judicial review." The plaintiffs here did not claim injury from any particular rulings by the ALJ; they complained about "an illegitimate proceeding, led by an illegitimate decisionmaker." For that grievance, the availability of appellate review after an adverse administrative decision "can do nothing: A proceeding that has already happened cannot be undone" by an appellate court. This factor therefore favored allowing a direct suit in district court.

The second *Thunder Basin* factor considers whether the claim is "wholly collateral to [the] statute's review provisions." That factor was also satisfied because the plaintiffs "are challenging the Commissions' power to proceed at all, rather than actions taken in the agency proceedings."

The third *Thunder Basin* factor considers whether the claim is “outside the agency’s expertise.” That factor was met because the agencies had no particular expertise in determining the constitutional challenges at issue, including (i) whether the tenure protections for ALJs violate the constitutional provisions granting the President supervision and removal authority over federal officials and (ii) whether “the combination of prosecutorial and adjudicative functions in the [FTC] renders all of its enforcement actions unconstitutional.”

Accordingly, the Court concluded that all three *Thunder Basin* factors “point in the same direction – toward allowing district court review of [plaintiffs’] claims that the structure, or even the existence, of an agency violates the Constitution.”

Justice Thomas joined the majority opinion but wrote a separate concurrence to express 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.”

Justice Gorsuch concurred in the judgment because, in his view, the answer to the question raised “has nothing to do with the ‘*Thunder Basin* factors,’ . . . but follows directly from 28 U.S.C. § 1331,” which grants district courts jurisdiction over claims raising federal questions, including those under the Constitution.

Implications

The *Axon* case is, to some extent, a sideshow to the main event: an eventual ruling on whether the ALJ structure, and perhaps even the whole administrative-agency scheme, is constitutional. Some of those questions are currently the subject of a certiorari petition seeking review of another Fifth Circuit decision (*Jarkesy v. SEC*), which held that the statutory removal restrictions for SEC ALJs are unconstitutional, and that Congress unconstitutionally delegated legislative power to the SEC by allowing the SEC to choose whether to bring enforcement actions in Article III courts or within the agency itself. *Axon*, in contrast, addressed only the forum question of where such substantive challenges can be brought.

Axon could lead to more federal-court suits raising constitutional challenges to structural aspects of administrative agencies. But the practical ramifications of that outcome could depend to some extent on whether and how the Supreme Court ultimately resolves the underlying substantive issues.

Axon also is a preview of how Justice Thomas – and perhaps Justice Gorsuch – might vote on those substantive issues. Justice Thomas distinguished between “core private rights” (which belong to “individuals” and include “life, liberty, and property”) and “mere public rights” (which “belong to the people at large”). In Justice Thomas’ view, “whether any form of administrative adjudication is constitutionally permissible likely turns on the nature of the right in question. If private rights are at stake, the Constitution likely requires plenary Article III adjudication. Conversely, if privileges or public rights are at stake, Congress likely can foreclose judicial review at will.” The concurrence suggests that Justice Thomas believes “core private rights” to be at issue in cases such as the present ones.

Justice Gorsuch’s concurrence did not address the underlying substantive issues to the extent Justice Thomas did. He focused only on the language of the general federal-question statute and concluded that nothing in the Exchange Act or the FTC Act actually carved out an exception to that statute. However, in describing administrative proceedings, Justice Gorsuch made comments that seem to echo arguments raised in substantive challenges to administrative proceedings: “Agencies like the SEC and FTC combine the functions of investigator, prosecutor, and judge under one roof. They employ relaxed rules of procedure and evidence – rules they make for themselves. The numbers reveal just how tilted this game is. From 2010 to 2015, the SEC won 90% of its contested in-house proceedings compared to 69% of the cases it brought in federal court. . . . Meanwhile, some say the FTC has not lost an in-house proceeding in 25 years. . . . That review is available in a court of appeals *after* an agency completes its work hardly makes up for a day in court *before* an agency says it’s done.”

We will see how the Court treats the pending certiorari petition in *Jarkesy*.

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