

The Axon Side-Step: Defendants' New Dance to Avoid Agency Enforcement Actions

Minding Your Business on July 17, 2023

The FTC and SEC have their own administrative dispute resolution regime, presided over by their own administrative judges (“ALJs”). Until now, those regimes were virtually immune from attack on a constitutional basis, because any such challenge had to wait until appeal to the federal courts (which only happened after a full trial and appeal to the agency itself). No longer. On April 14, 2023, the Supreme Court held that the Federal Trade Commission Act and the Securities Exchange Act do not create an alternative review scheme in which constitutional challenges must first go through the agencies, and only later receive federal court review in a court of appeals.

The Supreme Court’s decision likely heralds a tumultuous period—perhaps limited—for not only the FTC and SEC, but for *any* agency with a statutory scheme that previously precluded federal court jurisdiction in the first instance. Companies and individuals subject to administrative agency review now have a new, earlier-in-time avenue to challenge agency actions on constitutional grounds. We call it the *Axon* Side-Step. Under the Court’s logic in *Axon*, if the structure of an agency requires individuals to go through that agency’s enforcement proceeding and subsequent review channels *before* a challenge to that very structure can reach the courts, an injury arises that “is impossible to remedy once the proceeding is over, which is when appellate review kicks in.” In short, “[a] proceeding that has already happened cannot be undone.”

So, the *Axon* Side-Step allows respondents in administrative enforcement actions to immediately bring constitutional challenges in federal court. No need to wait. This will likely change the behavior and strategy of both agencies and their targets. To avoid constitutional challenges, agencies may seek to bring contested claims to federal district courts in the first instance. And targets are more likely to raise constitutional challenges to the extent available, whether the agency initiates its action in federal court or in front of an ALJ.

An ongoing lawsuit concerning the FTC may provide a glimpse into the post-*Axon* future. The FTC finds itself in federal district court in San Francisco, where it requested a preliminary injunction to halt a deal whereby Intercontinental Exchange (“ICE”), the parent company of the New York Stock Exchange, would acquire data analytics company Black Knight. The FTC is also proceeding with an administrative hearing on the legality of the sale, which is scheduled to begin on July 12. Responding to the agency’s district court action, ICE brought a challenge to the constitutionality of the FTC’s structure, arguing that “[b]ecause the FTC’s administrative process will adjudicate ICE’s right to engage in a private commercial transaction with heavily constrained judicial review and without any right to a jury trial, it violates Article III of the Constitution and the Seventh Amendment.” ICE’s “side-step” came just days after the Supreme Court issued its decision in *Axon*.

Like the Charleston of the 1920s, the *Axon* Side-Step is likely to be a limited-time fad. There are only so many constitutional challenges to be made, and once the issues are adjudicated and settled, the administrative regimes will have either survived or not. Of course, any change to the administrative processes will open the doors to new challenges. So if any of these initial challenges are successful, we could find ourselves in the beginning of a cycle of challenges, followed by reforms, followed by more challenges.

But one such challenge – in fact the one presented in *Axon* – may soon be resolved, as the Supreme Court considers the constitutionality of adjudication via administrative law judge. In [*Jarkesy v. SEC*](#), the Fifth Circuit found that administrative enforcement of securities law violates the Constitution on three grounds: (i) by depriving individuals of their Seventh Amendment right to a trial by jury in private law matters; (ii) by violating the non-delegation doctrine and acting without an intelligible principle from Congress; and (iii) by violating Article II’s Take Care Clause in affording two layers of for-cause protection to ALJs. The Supreme Court granted certiorari on June 30, to review the Fifth Circuit’s decision. If the Court shares the separation of powers concerns Justice Thomas expressed in concurrence in *Axon*, the structures of agencies like the SEC may no longer be permitted at all, reducing the utility and further numbering the days of the *Axon* Side-Step.

* * *

Special thanks to summer associate Brandon McCoy for his contributions to the post.

[View original.](#)

Related Professionals

- **Colin Kass**
Partner
- **David A. Munkittrick**
Partner
- **Erica Taylor Jones**
Associate