

Axon Enterprise, Inc. v. Federal Trade Commission, No. 21-86, and *Securities and Exchange Commission v. Cochran*, No. 21-1239

Introduction: Today, the Supreme Court voted 9-0 to allow constitutional challenges to federal agencies' investigatory and adjudicatory authority to be brought as separate lawsuits in federal court before the agency adjudication has concluded—and, in some contexts, as soon as the beginning of an agency investigation. The Court rejected the federal government's argument that these challenges must first be raised in the agencies' own internal enforcement proceedings, and may be addressed by courts only on judicial review of the agency's final decision. In a concurring opinion, Justice Thomas more broadly questioned the constitutionality of agency authority to adjudicate a broad category of claims.

Background: Like many other administrative agencies, the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) institute enforcement investigations and, if they wish to commence an enforcement proceeding, may choose whether to file an action in federal court or institute an internal enforcement proceeding before an agency administrative law judge. The statutes governing internal agency adjudications provide that the target of such a proceeding may seek judicial review after the agency has rendered its final decision.

In these consolidated cases, Michelle Cochran (the subject of an internal SEC enforcement adjudication) and Axon Enterprise, Inc. (the target of an FTC investigation), chose not to wait for a final decision and instead commenced lawsuits in federal district court arguing that the Constitution barred the agencies from conducting the investigation and the adjudicatory proceeding. In both cases, the district courts dismissed for lack of jurisdiction, holding that the statutory provisions governing review of agency action precluded district courts from hearing those constitutional claims. The Ninth Circuit affirmed the dismissal of Axon's case against the FTC, while the Fifth Circuit (ruling en banc) held that Cochran could bring her case against the SEC directly in federal court.

Issue: Whether constitutional challenges to SEC and FTC enforcement proceedings may be brought as separate lawsuits in federal court, or must first be raised in the agencies' internal proceedings.

Court's Holding: In a unanimous opinion authored by Justice Kagan, the Supreme Court held that the constitutional challenges in these cases could proceed directly in federal district court before the conclusion of the agency's internal investigatory and adjudicatory processes. The Court applied a three-factor test derived from *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), asking (1) whether the statutory review scheme would foreclose all meaningful judicial review of the claim; (2) whether the claim is wholly collateral to the matters the review scheme is designed to address; and (3) whether the claim is outside the agency's expertise. The Court held that all three factors favored allowing these parties to bring their constitutional challenges directly in federal district court. The constitutional claims asserted by Axon and Cochran did not target "any specific substantive decision," but rather "challenge[d] . . . the structure or very existence of an agency: They charge that an agency is wielding authority unconstitutionally in all or a broad swath of its work."

The Court's decision is a significant change in the law that will open the door to many more constitutional challenges to federal agencies' structure and authority. Many targets of agency investigations or administrative enforcement actions enter into settlements to avoid an agency determination of a violation of law that can have negative collateral consequences, especially for highly regulated businesses. The rule rejected today—that permitted judicial consideration of constitutional challenges only if the targeted individual or entity litigated to an adverse determination—therefore substantially deterred assertion of constitutional challenges because the target of agency action would have to litigate to a final agency action and could not settle. The Court's decision upholding the target's ability to bring a collateral lawsuit, and retain the ability to settle if the constitutional claim is rejected, should increase the assertion of these claims.

Justice Thomas wrote a concurring opinion, in which he broadly questioned federal agency adjudicatory authority. He expressed "grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary [adjudicatory] authority . . . with only deferential judicial review on the back end" when the adjudication affects "core private rights." Justice Thomas further explained that these agency proceedings affected private rights, because "the threat of significant monetary fines" implicates "the core private right to property." The Court may decide to confront this issue soon. A pending certiorari petition, *Securities and Exchange Commission v. Jarkesy*, No. 22-859, asks the Court to decide whether SEC enforcement proceedings seeking civil fines violate the jury-trial guarantee of the Seventh Amendment, as the Fifth Circuit held in that case.

Read the opinion [here](#).