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Skadden Discusses Scotus Endorsement of Early Challenge to Agency Proceedings

[By Boris Bershteyn, Shay Dvoretzky, Bradley A. Klein, Scott D. Musoff and Susan L. Saltzstein](#) April 26, 2023

Comment

The Supreme Court has made it easier to challenge the constitutionality of administrative tribunals housed at federal agencies. On April 14, 2023, the Court unanimously held in *Axon Enterprise, Inc. v. Federal Trade Commission* that parties subject to enforcement actions before such in-house tribunals at the Federal Trade Commission (FTC) or the Securities and Exchange Commission (SEC) can bring constitutional challenges in federal court without first litigating them before the administrative tribunals. In so doing, the Court resolved a split between the Fifth and Ninth Circuits.

The Fifth Circuit case involved the SEC's enforcement action against Michelle Cochran for allegedly violating the Securities Exchange Act, in which an SEC administrative law judge imposed penalties. In 2018, the Supreme Court determined in *Lucia v. SEC* that the agency's administrative law judges had been appointed in an unconstitutional manner, so the SEC sought to institute a new proceeding against Cochran after attempting to cure the appointment problem. But Cochran then filed suit in federal district court, arguing that the SEC's in-house adjudication was still unconstitutional — this time, because the administrative law judges are excessively protected from removal.

The Fifth Circuit held that the federal district court had jurisdiction to hear Cochran's constitutional challenges to the SEC's administrative law judge system and that Cochran need not first litigate those issues in administrative tribunals. The Ninth Circuit reached the opposite conclusion in reviewing a constitutional challenge to the FTC's internal tribunal by Axon Enterprise, upholding a district court's dismissal of Axon's claims on the grounds that the FTC Act "implicitly barred" district court jurisdiction over them.

Siding with the Fifth Circuit, the Supreme Court held that Congress did not intend to bar district courts from hearing constitutional challenges to the agencies' tribunal systems. While the Court recognized that Congress had "divest[ed] district courts of their ordinary jurisdiction" to review most agency actions, the Court concluded that structural constitutional challenges are not subject to that limitation. The Court reasoned that constitutional challenges to the FTC's and SEC's structures were not "of the type" Congress thought belonged within the usual statutory review scheme for several reasons.

First, the Court held that requiring Cochran and Axon to litigate their constitutional challenges through the agency review process would effectively withhold all meaningful judicial review because "Axon and Cochran will lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over." The Court emphasized that "the nature of the claims and accompanying harms" that Cochran and Axon are asserting made their claims different than the mine-run of challenges to agency actions that first must be exhausted before administrative tribunals.

Next, the Court ruled that Cochran's and Axon's "separation-of-powers claims" were collateral to the agencies' enforcement actions because they did "not relate to the subject of the enforcement actions." In other words, a district court could resolve their claims without reviewing the substance of the enforcement actions facing them.

Finally, the Court held that the separation-of-powers challenges brought by Cochran and Axon were outside of the agencies' respective expertise. The Court recognized that it had previously concluded that "agency adjudications are generally ill suited to address structural constitutional challenges," and nothing about the FTC's or SEC's particular know-how suggested otherwise. Accordingly, the Court concluded that Congress did not intend to divest district courts of jurisdiction to hear separation of powers challenges to the FTC's and SEC's structures.

The Court's opinion did not address the merits of Cochran's and Axon's constitutional challenges, but ruled that they now could be heard in the district courts. That outcome is welcome news for targets of enforcement proceedings by agencies that continue to utilize administrative tribunals. As agency procedures confront increasing scrutiny from the federal courts, the *Axon Enterprise* decision offers a more practicable avenue for challenging the constitutionality of those tribunals.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "SCOTUS Unanimously Endorses Early Challenge to Agency Proceedings, Limiting Enforcement Agency Power," dated April 17, 2023, and available [here](#).