

# Supreme Court Ruling Questions Constitutionality of FTC's and SEC's Administrative Adjudications Processes—Is OSHA Next?

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On April 14, 2023, the Supreme Court of the United States opened the door for new challenges to the federal administrative state. In a unanimous [decision](#) in a pair of consolidated cases, *Axon Enterprise, Inc. v. Federal Trade Commission* and *Securities and Exchange Commission v. Cochran*, Nos. 21-86 and 21-1239, the Supreme Court held that U.S. district courts have jurisdiction to consider structural constitutional claims against administrative agencies. Axon and Michelle Cochran sought to enjoin the Federal Trade Commission (FTC) and Securities and Exchange Commission (SEC), respectively, from administratively adjudicating claims asserting that the tenure protection afforded to agencies' administrative law judges (ALJs) made them insufficiently accountable to the president and violated separation-of-powers principles.

## Quick Hits

- Federal district courts have jurisdiction to consider constitutional challenges to the Federal Trade Commission's and Securities and Exchange Commission's enforcement actions, the U.S. Supreme Court held.
- In concurring opinions, Justices Gorsuch and Thomas expressed concerns about the powers of federal agencies.
- The Sixth Circuit Court of Appeals recently heard arguments in a case involving OSHA's rulemaking authority.

Both cases were dismissed for lack of jurisdiction at the district court level. On appeal, the Ninth Circuit Court of Appeals, in *Axon*, affirmed, holding that the district court's jurisdiction to consider constitutional challenges, such as the one brought by Axon, was implicitly divested by the agency's administrative review scheme (administrative review followed by judicial review in a federal court of appeals). The en banc Fifth Circuit Court of Appeals disagreed as to the equivalent question

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in *Cochran*, holding that the administrative review scheme would deprive Cochran of ““meaningful judicial review”” and that the challenges were ““wholly collateral to the Exchange Act’s statutory-review scheme.””

Justice Elena Kagan, writing for the Court, agreed with the Fifth Circuit, holding that district courts had jurisdiction to consider constitutional challenges to agency enforcement actions. Justice Clarence Thomas joined Justice Kagan’s opinion and filed a separate concurrence and Justice Neil Gorsuch filed a separate opinion concurring in the judgment. The Court’s opinion concluded that structural constitutional claims—such as those challenging the constitutionality of ALJs—were not claims “of the type” that the U.S. Congress intended to place exclusively within the statutory scheme. In reaching this conclusion, the Court explained that the regulatory appeals process (administrative review followed by judicial review in a federal court of appeals) did nothing to prevent the alleged harm, being subject to an unconstitutionally structured decision-making process, thus depriving Axon and Cochran of meaningful judicial review. The Court also noted that constitutional challenges, such as the ones brought by Axon and Cochran, were “outside the Commissions’ sphere of expertise,” which supported a finding of jurisdiction for the district court.

While the opinion focused solely on the jurisdictional question, the concurrences used the cases as an opportunity to express views about the administrative state. Justice Thomas’s concurrence begins, “I write separately, however, because I have 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 expressed a similar opinion about the administrative state, noting, “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.”

Undeniably, litigating against the government is anything but an even fight—particularly when the prosecution and factfinder are employed by the same agency. It appears that this obvious imbalance has started to boil over with more and more agencies facing constitutional challenges. For employers, the most challenging of these agencies is the Occupational Safety and Health Administration (OSHA). While OSHA was not involved in *Axon* and *Cochran*, it may be the focal point of the Supreme Court’s next case addressing the administrative state. In addition, in April 2023, the Sixth Circuit Court of Appeals held oral argument in *Allstates Refractory Contractors, LLC v. Walsh*, a case where the court is considering whether the U.S. Congress vested too much discretion in the executive branch by failing to place sufficient boundaries on OSHA’s rulemaking authority. The concurrences in *Axon* and *Cochran* suggest that this may be an issue the Supreme Court is willing to take up.

## Key Takeaways

The landscape of administrative litigation is starting to shift. In the coming years, employers may have new ways to defend against OSHA citations and other administrative actions.

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