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What The Justices Are Thinking About In FTC And SEC Cases

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On Nov. 7, the U.S. Supreme Court heard approximately two hours of argument in *Axon Enterprise Inc. v. Federal Trade Commission and U.S. Securities* and *Exchange Commission v. Cochran* to resolve a circuit split regarding the jurisdiction of federal district courts to hear constitutional challenges to agency action prior to the conclusion of the administrative process.

In the first case, Axon filed suit in the U.S. District Court for the District of Arizona the same day the FTC filed an administrative enforcement action against the company. Axon asserted a structural constitutional claim arguing that the FTC's administrative law judges were unconstitutional because they enjoyed two layers of for-cause removal protection.

The district court dismissed the action on the basis that its jurisdiction was precluded by FTC administrative review. In January 2021, the U.S. Court of Appeals for the Ninth Circuit joined four other circuits [1] in holding that the district court lacked jurisdiction and Axon could not seek judicial review until the FTC's administrative proceeding concluded.

Later that same year, the U.S. Court of Appeals for the Fifth Circuit reached a contrary conclusion in *SEC v. Cochran*.

In response to an SEC enforcement proceeding, Michelle Cochran had filed an action in the U.S. District Court for the Northern District of Texas, challenging the constitutionality of the SEC's administrative law judges. The district court dismissed, finding it did not have jurisdiction.

A Fifth Circuit panel initially affirmed. But the Fifth Circuit, sitting en banc, reversed, holding that the district court had jurisdiction because the action "challenges the constitution of the tribunal, not the legality or illegality of its final order." [2]

The Supreme Court granted certiorari to resolve the circuit split and decide whether district courts have original jurisdiction over constitutional challenges to agency action prior to the conclusion of the administrative process. All nine justices participated in the argument, which focused on a few areas in particular.

Statutory Text

The court's conservative justices, and the private parties, focused much of the argument on the text of the statutory scheme.

Title 28 of the U.S. Code, Section 1331 provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." As argued by the private parties, a straightforward reading of this statute appears to grant district courts original jurisdiction over constitutional challenges to agency action.

As Justice Neil Gorsuch put it, "[Section] 1331 says that district courts have jurisdiction over these claims absent any other consideration. And, normally, we consider district courts bound to exercise their jurisdiction when they have a claim."[3]

The government argued that provisions of the FTC Act and the Exchange Act each create exclusive schemes of judicial review in the court of appeals after the completion of agency proceedings.[4] Accordingly, district courts should not have jurisdiction to hear these claims.

However, the conservative justices did not seem swayed by this argument since the acts speak only to appeals of final agency orders, and do not expressly strip district courts of original jurisdiction. Indeed, this was the principal basis for the Fifth Circuit's Cochran decision, where the court explained that Section 78y(a)(1) of the Exchange Act applied only upon the SEC's entry of a final order and, absent any such order, the district courts maintained jurisdiction under Section 1331.

Justice Gorsuch noted this distinction, stating "we have the FTC Act that says cease-and-desist orders can be reviewed in the courts of appeals rather than district courts" but "we don't have a cease-and-desist order here. I would have thought that might have been the end of the game."[5] In making this textual argument, Justice Gorsuch asked, "[W]hat am I missing?"[6]

Justice Clarence Thomas likewise pressed the government on the textual issue asking "[w]ould you at least give us your clearest textual argument? … [C]ould you at least argue textually why there is no jurisdiction?"[7] In response, the government pivoted to the Administrative Procedure Act and argued that the "APA confirms that the provision governing review of final [agency] orders is intended to cover not only the final order itself, but any challenge."[8]

Justice Elena Kagan viewed the statutory scheme differently from the conservative justices, suggesting that text favored the government and the government need not rely on the APA. Rather, according to Justice Kagan,

[The] statutory provision that says there's jurisdiction over these cease-and-desist or other final orders in the courts of appeals, that jurisdiction is exclusive. The question is, what does that subsume? … Normally, in our legal system, we understand that when you give exclusive jurisdiction to a court as to a final order it also subsumes a whole lot of interlocutory things leading up to it.[9]

Justices Ketanji Brown Jackson and Sonia Sotomayor were similarly supportive of the government's arguments in their lines of questioning.

The court thus faces the question: Can it infer from provisions of the FTC Act and the Exchange Act that Congress meant to divest district courts of jurisdiction over constitutional challenges to agency action?

The private parties urge that it cannot — that nothing in either act expressly precludes district court jurisdiction, so the broad jurisdictional grant of Section 1331 controls. That may end the question for some of the justices. However, should the court explore further, it will have to navigate a couple of its own precedents.

Thunder Basin and Free Enterprise

In going past the text, a focal point of the argument was the Supreme Court's 1994 decision in *Thunder Basin Coal Co. v. Reich*, which established a three-part framework for determining whether Congress implicitly precluded initial judicial review of agency action.[10]

Thunder Basin contemplates three considerations: (1) whether the preclusion of initial judicial review prevents meaningful judicial review; (2) whether the claims at issue are wholly collateral to the administrative proceeding; and (3) whether the claims lie beyond the agency's expertise.[11]

As an initial matter, Justice Samuel Alito noted that it is not clear if a party has to win on all three Thunder Basin factors to prevail. He asked the government "[o]n the Thunder Basin factors, does Axon have to win on all three, do you have to win on all three, or is the appropriate course to balance how they end up?"[12]

Without a satisfactory answer he again pressed, "Do you have to win on all three? Or can either of you win if one or more factors go in one direction and the other factor or factors go in the other direction?"[13]

As to the factors themselves, Justice Kagan noted that "it seems to me that the hardest of the Thunder Basin factors for [the private parties] is the meaningful review factor because," for appeals generally, parties "have to wait until the end."[14] On the other hand, the justice noted that she thought "the other two factors are pretty darn bad for [the government]."[15]

Justice Kagan explained that another Supreme Court case, 2010's *Free Enterprise Fund v. Public Company Oversight Board*,[16] "just says [the government] lose[s] on [agency] expertise," and on collateral, the ordinary understanding is whether the claim is "unrelated to the essence or the subject matter of the dispute," and as here, "a claim that goes to the legitimacy of the agency structure as a whole is completely unrelated to the subject matter of the suit."[17]

Kagan concluded, "Aren't those two pretty easy wins for [the private parties]?"[18]

Justice Brett Kavanaugh, also focusing on Free Enterprise, indicated that the wholly collateral prong could be dispositive against the government because constitutional challenges to administrative law judges have nothing to do with the facts of the underlying agency proceedings. He proposed that "a simpler way to deal with this [is] just to" say that "a challenge to the structure of the agency is wholly collateral, end of story."[19]

Free Enterprise, authored by Chief Justice John Roberts, and deemed squarely on point by the Fifth Circuit in Cochran, held that a constitutional challenge to the structure of an SEC-appointed accounting board was properly brought in the district court because the claims were wholly collateral to the agency's action.[20]

Justice Kavanaugh also noted that Free Enterprise appeared to be responding to the government's argument that private parties could just get review after the agency proceedings were complete, and that the case said "no, not in this particular circumstances because" the challenge was to the investigation itself.[21]

Finally, the private parties also argued that the third prong favors them because "not only does the agency lack expertise in these constitutional issues, it is wholly outside [the agency's] authority to declare itself unconstitutional or strike down removal restrictions on ALJs."[22]

The government conceded that agency "Commissioners probably don't have anything about their own removal protections that a court would find useful," and that the agency "couldn't declare the statute unconstitutional, so it couldn't provide relief on that ground at the end of the day."[23]

The government argued that the agency could still provide something that could be useful to a reviewing court, such as the advantages and disadvantages of removal protections for administrative law judges.[24]

Practical Implications

While the statutory text and Thunder Basin and Free Enterprise could be dispositive, the arguments also alluded to the practical implications of the court's decision.

Justice Jackson expressed concern that immediate district court review might allow the courts to superintend the agency process or "do an end run around it."[25] She appeared concerned that intertwining the agency's proceedings with those in the district court would muddy the administrative process.

Similarly, Justice Sotomayor noted "that the whole purpose of a special review scheme … is to consolidate rather than bifurcate review of agency action."[26]

The conservative justices instead focused on the burdens imposed on citizens subject to agency action. Cochran, for instance, has endured years of an enforcement action and appellate proceedings when, according to her, the constitutionality of the SEC administrative law judge appointments could have been decided at the outset.

Justice Kavanaugh asked "what makes the most sense" for the citizens, government and court system,[27] and in answering his question, said "I think cutting against [the government] … is you can get more certainty, more clarity quicker about a basic fundamental question about the constitutionality of the agency itself or the agency's structure" with initial judicial review.[28]

Justice Kavanaugh recognized the issues raised by Justices Jackson and Sotomayor, noting he was concerned about opening floodgates, delay and obstruction, but noted the upside of the clarity, certainty and speed, of allowing the challenge to go forward in district court.[29]

Justice Alito held a similar sentiment, asking "[w]hat sense does it make for a claim that goes to the very structure of the agency having to go through the administrative process?"[30]

What to Expect

Based on the arguments, Justices Gorsuch, Alito and Thomas are likely to side with the private parties. Given Chief Justice Roberts' opinion in Free Enterprise, he may end up there as well.

Justice Kavanaugh's comments indicate he is also leaning toward siding against the government, although he previously joined the U.S. Court of Appeals for the D.C.'s Circuit's opinion in *Jarkesy v. SEC*, which sided with the government on a similar issue.[31]

A vote from Justice Coney Barrett or any of the liberal justices would also result in victory for the private parties.

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[1] Bennett v. SEC, 844 F.3d 174 (4th Cir. 2016); Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016); Tilton v. SEC, 824 F.3d 276 (2d Cir. 2016); Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015); Bebo v. SEC, 799 F.3d 765 (7th Cir. 2015).

[2] Cochran v. Sec. & Exch. Comm'n, 20 F.4th 194, 200 (5th Cir. 2021).

[3] No. 21-86 tr. 34:9–14.

[4] 15 U.S.C. § 45(c) (granting jurisdiction to the court of appeals after cease and desist order entered by FTC); 15 U.S.C. § 78y(a)(1) (granting jurisdiction to the court of appeals over SEC "final orders").

[5] No. 21-86 tr. 4:15–23.

[6] Id. at 35:2–18.

[7] Id. at 47:6–11.

[8] Id. at 49:3–7.

[9] Id. at 53:17–54:6.

[10] 510 U.S. 200 (1994).

[11] Free Enter. Fund. v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 489–90 (2010) (quoting Thunder Basin, 510 U.S. at 213).

[12] No. 21-86 tr. 79:5–9.

[13] Id. at 81-4-7.

[14] Id. at 27:18–28:3.

[15] Id. at 72:16–20.

[16] Free Enter. Fund. v. Public Accounting Oversight Bd., 561 U.S. 477 (2010).

[17] No. 21-86 tr. 72:21–73:10.

[18] No. 21-1239 tr. 17:8–13.

[19] Id. at 87:12–88:3.

[20] Free Enter. Fund, 561 U.S. at 484, 489–91.

[21] No. 21-86 tr. 85:23–86:15.

[22] Id. at 4:20–25.

[23] Id. at 65:3–25.

[24] Id. at 65:16–25.

[25] Id. at 42:22–43:1, 44:10–16.

[26] No. 21-1239 tr. 26:12–16.

[27] Id. at 47:14–23.

[28] Id. at 47:24–48:4.

[29] Id. at 48:5–19.

[30] No. 21-86 tr. 64:20–24.

[31] Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015).

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