

# SCOTUS Decides Constitutional Challenges to FTC and SEC Administrative Proceedings May Be Brought in District Courts in the First Instance

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On April 14, 2023, the Supreme Court issued a unanimous decision in *Axon Enterprise, Inc. v. Federal Trade Commission* holding that federal district courts have jurisdiction to hear constitutional challenges to the Federal Trade Commission (FTC) and Securities and Exchange Commission's (SEC) administrative proceedings in the first instance. The Court's decision will provide parties accused of wrongful conduct by independent agencies with new avenues to more quickly raise constitutional challenges to enforcement actions.

## Parallel Challenges to Commission Structures

The Court decided two consolidated cases, *Axon Enterprise, Inc. v. FTC* and *SEC v. Cochran*, raising similar separation of powers claims. The SEC protects investors in securities markets while the FTC promotes fair competition. Each enforces the Securities Exchange Act and FTC Act, respectively. Both agencies are independent, headed by five commissioners who the President may remove only under limited circumstances prescribed by Congress. Under the Acts, the SEC and FTC can address statutory violations either by bringing civil suits in federal court or instituting their own administrative proceedings. When either the FTC or SEC elect to institute administrative proceedings, the Commissions delegate initial adjudication of the issue to an administrative law judge (ALJ). Typically, the ALJ will resolve motions, hold a hearing, and issue a decision, which can then be reviewed by the Commission.

Both Axon Enterprise Inc. and Cochran claimed that the agencies' ALJs are insufficiently accountable to the President, in violation of separation-of-powers principles. Axon also attacked the combination of prosecutorial and adjudicatory functions in a single agency. The FTC Act and Exchange Act both provide that a party who is aggrieved by a commission's order may obtain judicial review of that order in the court of appeals. Neither of these cases, however, took that route. In both cases, the subject of the administrative enforcement sued in federal district court before an ALJ decision. Each suit alleged that the commission's structure violated the Constitution, and the violation rendered the entire proceeding unlawful.

In the district court, both cases were dismissed for lack of jurisdiction—both courts found that the Exchange Act and the FTC Act's review schemes divested the district courts of jurisdiction. On appeal, the Ninth and Fifth Circuits split. The Ninth Circuit, considering Axon's case, affirmed, but the Fifth Circuit reversed, finding that Cochran could not receive "meaningful judicial review" by belated judicial review of the SEC's decision.

## The Supreme Court's Decision

The Supreme Court agreed with the Fifth Circuit and reversed the Ninth Circuit. The Court held that, if district courts could not review Axon’s and Cochran’s claims, it would foreclose all meaningful judicial review because the harm they alleged was being subjected to an unconstitutional agency authority—a “here-and-now” injury impossible to remedy once the proceeding is over. Because they raised constitutional claims challenging the commissions’ power to proceed at all, rather than actions taken in the agency proceedings, the challenges did not risk intruding on the agencies’ expertise. The Court did not, however, decide the merits of the constitutional challenges, leaving that for the lower courts in the first instance. Nonetheless, both Justice Thomas and Justice Gorsuch wrote concurring opinions expressing skepticism of the constitutional propriety of the “appellate review model” both the SEC and FTC employ.

## Takeaways

With this decision, the Supreme Court has opened up a powerful new avenue to challenge FTC powers. Indeed, parties subject to an FTC merger challenge are already citing *Axon* to raise constitutional issues in federal district court. See *FTC v. Intercontinental Exchange, Inc. et al.*, No. 3:23-cv-01710-AMO, Dkt. No. 23. Justices Thomas and Gorsuch left the door open for others to raise challenges regarding the FTC’s structure. Until the Supreme Court determines whether the FTC’s structure is constitutionally firm, parties before the FTC will likely continue to seek to avoid the agency’s administrative procedures by raising constitutional claims in federal district courts. Parties subject to any FTC investigations or actions should follow these developments closely and consider their own possible claims.

3 Min Read

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