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Supreme Court's *Axon* Decision Opens the Door for Collateral Attacks on Agency Enforcement Actions

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Executive Summary

In *Axon Enterprises, Inc. v. FTC* (April 14, 2023), the Supreme Court unanimously held that respondents in FTC and SEC administrative actions can file separate lawsuits in federal court to challenge the constitutionality of the agencies and thereby enjoin the agency proceedings. Although the Court did not decide whether the SEC and FTC are unconstitutionally structured, its decision opens the door to such challenges in the future. Companies and individuals that are the target of administrative enforcement actions or other proceedings should therefore consider making these types of challenges in federal court as part of their defensive strategy.

Background

Axon and a second case decided in the same opinion (*SEC v. Cochran*) involved district court proceedings commenced by respondents facing enforcement actions in the FTC and SEC, respectively. In the federal suits, the respondents argued that the agencies' administrative tribunals were unconstitutional and, in *Axon*, that the FTC itself is unconstitutionally structured. But both federal cases were dismissed for lack of jurisdiction. The district courts held that, because both agencies have review schemes in which respondents can appeal agency decisions to federal court *after* the administrative proceedings are complete, Congress impliedly precluded federal courts from hearing collateral attacks in the first instance. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994). The Ninth Circuit affirmed dismissal in the SEC case and the Fifth Circuit, sitting *en banc*, reinstated the FTC case.

The Supreme Court reversed the Ninth Circuit and affirmed the Fifth Circuit, remanding for the federal courts to exercise jurisdiction over the independent challenges brought by the respondents in the administrative proceedings. The Court held that while the FTC and SEC review schemes preclude concurrent federal court review of non-final administrative actions, Congress did not preclude the particular type of challenges these respondents brought in federal court. To make that determination, the Court applied the three *Thunder Basin* factors, which ask whether the claim (1) could be meaningfully reviewed even without allowing an immediate challenge in federal court, (2) is "wholly collateral" to the review scheme, and (3) is outside the agency expertise. The Court concluded that the *Thunder Basin* factors favored federal court jurisdiction in this context.

First, the targets of the agency actions alleged that the entire agency proceedings were unconstitutional, such that they could not obtain meaningful review through a back-end appeal. Their claims also had nothing to do with the subject matter of the enforcement actions—they challenged the underlying structure of the agencies—and thus were wholly collateral. Last, the claims were outside the agencies' expertise because they involved constitutional interpretation, not securities law or competition policy.

Justices Thomas and Gorsuch concurred in separate opinions. Justice Thomas wrote to express concern about administrative agencies adjudicating core private rights—life, liberty, and property—with only deferential Article III review on the back end. In his view, private rights can be adjudicated only by Article III courts, not executive branch agencies. Justice Gorsuch would have done away with *Thunder Basin's* "judge-made, multi-factor balancing test" altogether. In his view, not only is the test incoherent and unpredictable, but only Congress—and not the judiciary—has constitutional authority to limit federal jurisdiction.

Key Takeaways

Axon is likely to have significant ramifications in administrative law. Most immediately, the SEC and FTC will likely be the targets of a host of constitutional challenges—not just the two types of collateral claims at issue in *Axon*, but also other claims that attack structural aspects of the agencies. While these challenges may or may not succeed on the merits, the agencies will still have to defend against them in federal court, increasing the risk of bringing administrative actions and potentially deterring in-house adjudication in general.

To the extent agencies elect to initiate actions in federal court more frequently because of *Axon*, that is itself a victory for companies and individuals subject to administrative enforcement actions. Agency proceedings do not have the same evidentiary rules and procedural protections as do federal courts, and the agencies almost always win in their home forums. Additionally, as Justice Thomas pointed out in his concurrence, federal court review of agency decisions is highly deferential. Because agency adjudication is a risky endeavor for enforcement targets, many of them settle before they are able to appeal the agency action to a federal court. *Axon* may alter that calculus, as it allows the targeted company or individual to go on the offensive before having to endure years of costly proceedings.

Notably, there are several plausible claims that companies and individuals can bring challenging certain aspects of the SEC and FTC—and other agencies—as unconstitutional, particularly with a Supreme Court that is increasingly skeptical of administrative power. Some agencies wield both executive and judicial power in a way that potentially violates the constitutional separation of powers and the due process rights of defendants, who are prosecuted by officials who also sit as judges in the case. Some agencies have officials, including but not limited to ALJs, who may be unconstitutionally insulated from presidential removal. And, finally, as Justice Thomas pointed out in his *Axon* concurrence, it is possible that executive agencies do not have any constitutional power to deprive individuals of life, liberty, or property. Many similar challenges and separation-of-powers theories are percolating in the lower courts and making their way up to the Supreme Court.

Companies and individuals facing administrative enforcement actions should therefore think carefully and creatively about whether a challenge to the agency's structure or adjudicatory process in federal court is a viable part of an overall defensive strategy. In addition to potentially providing a complete victory, such challenges also may lead the agency to resolve the proceedings (or bring suit in federal court) to avoid constitutional scrutiny. Companies should closely evaluate each agency and its internal tribunals, looking for constitutional defects that may be grounds for a collateral attack.

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Weil's attorneys are experienced in handling administrative law challenges of all types, including in cases involving the separation of powers and other constitutional limitations. If you have questions about or are seeking counsel regarding potential constitutional challenges to agency action, please contact the principal authors of this Alert:

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