The SEC Puts Itself on Moot—Answering Justice Robert Jackson's Eight-Decade-Old Query—Has the SEC Become a Law Unto Itself?

*Margaret A. Little**

The Supreme Court's opinion in *Axon Enterprise Inc. v. FTC* (*Axon/Cochran*)[1] is full of surprises, from its inception—launched despite a seemingly impenetrable barrier of five adverse circuit precedents (hereinafter the *SEC ALJ Cases*)[2]—to conclusion in a unanimous victory that overruled all those cases. Its significance is still playing out in the courts—and will continue to do so in litigation across all administrative agencies. Its abrupt denouement, with the SEC dismissing all 42 open cases that could be affected by the decision including Michelle Cochran's, conjures up a kind of agency seppuku—or perhaps kabuki. It's hard to know.

The object of this paper is to bring to the surface what all too often gets buried or omitted altogether in necessarily selective academic commentary and judicial opinions. Paul Clement, who argued the appeal for Axon, has called the case "a sleeper" that will have surprising and far-ranging repercussions. As counsel for Michelle Cochran, I agree.

* Senior Litigation Counsel, New Civil Liberties Alliance. I am indebted to my colleagues Russ Ryan, Kara Rollins, and Sheng Li for their contributions to this article. Many thanks to Randy Quarles and Jessica Moeller for research and editorial support. Any errors are mine alone.

[1] 143 S. Ct. 890 (2023).

[2] Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015); Bebo v. SEC, 799 F.3d 765 (7th Cir. 2015); Tilton v. SEC, 824 F.3d 276 (2d Cir. 2016); Bennett v. SEC, 844 F.3d 174 (4th Cir. 2016); Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016). Dear Westlaw and Lexis: Your Shepardizing and Case Analysis functions correctly show that *Axon/Cochran* reversed the Ninth Circuit *Axon* decision. However, you both still show the five *SEC ALJ Cases* as good law. They are not.

I. The Problem

For many decades, critics of SEC and FTC administrative adjudication have expressed grave concerns with the utter lack of due process, structural biases, lack of jury trial, and baked-in prejudgment inherent in agency adjudication. For both agencies, the Commission first votes to charge you, then its enforcement staff prosecutes you before a "judge" who is employed by your prosecutor, then your first right of appeal goes back to the agency that charged you in the first place—with no jury of your peers to curb prosecutorial excesses. These defects also include tenure protections that put administrative law judges (ALJs) beyond executive control or accountability, sharply curtailed discovery with parsimonious rights to call and cross-examine witnesses, a dearth of any of the procedural protections provided by the Federal Rules of Evidence and Procedure that are available in real courts, and asymmetrical rules and extensions that make no pretense about always favoring the agency. When you finally make it to an Article III court, you are at a federal court of appeals that has to defer to the administrative record shaped by the very gang that prosecuted you. This is what Justice Clarence Thomas dubs in his *Axon*/*Cochran* concurrence the "appellate review model." Notice how it extinguishes any possibility of a trial judge or jury mediating the exercise of administrative power—including *judicial* power—by structurally unaccountable bureaucrats.

With the procedural and substantive deck thus stacked against targets, is it any wonder that the SEC, which only wins 61 percent of the time in real courts, has an over 90 percent win rate before its own in-house judges? Targets of FTC enforcement reportedly have it worse—they lose 90–100 percent of the time in its in-house proceedings. Even if you prevail before the FTC's ALJ, the Commission often reverses that win.[3]

Other structural defects include:

- "Unlike Article III judges, executive officials are not, nor are they supposed to be, 'wholly impartial.' They have their own interests, their own constituencies, and their own policy goals—and when interpreting a regulation, they may

[3] *See Axon*/*Cochran*, 143 S. Ct. at 917–918.

choose to 'press the case for the side [they] represen[t]' instead of adopting the fairest and best reading."[4]

- Agency administrative law procedures generally provide significantly fewer protections for respondents than corresponding district-court rules; administrative proceedings lack early dispositive motions, admit hearsay, reportedly shift the burden to the accused, and curtail witness testimony and rights of cross-examination.[5]
- The most prominent procedural disadvantage is that targets are hurried into a three-track system that gives them as little as four months (and no more than 10 months) to prepare a defense against an agency that has been investigating them for years.[6]
- Once the foreshortened hearing takes place, agency proceedings take far longer than trials before real judges. "[D]ata suggest that after factoring in delays associated with Commission review, 'the overall period for completion of an administrative proceeding is likely *slower* than the time required to complete a trial in district court.'"[7]

Agency enforcement respondents thus have the worst of both worlds. They are rushed to summary proceedings with far less time to prepare than in federal district court, and then they are forced to remain in limbo for years longer than those privileged to be in a real court.

[4] Kisor v. Wilkie, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., concurring in judgment) (quoting Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370, 390–91 & n.58 (1947)).

[5] *See generally* Douglas J. Davison, *Litigating with the SEC* at 709, SEC Compliance and Enforcement AB 2015 (2015), https://tinyurl.com/y29xkbxz.

[6] 17 C.F.R. § 201.360(a)(2)(ii). "The SEC administrative courts' unrealistic time constraints relating to decision issuances are perhaps the forum's most prominent procedural disadvantage." Ryan Jones, *Comment: The Fight Over Home Court: An Analysis of SEC's Increased Use of Administrative Proceedings*, 68 SMU L. Rev. 507, 524 (2015) (citing Peter J. Henning, *The S.E.C.'s Use of the 'Rocket Docket' is Challenged*, N.Y. Times Dealbook (Aug. 25, 2014), https://tinyurl.com/529kjbtt).

[7] Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and the Prospects for Reform Through Removal Legislation*, 85 Fordham L. Rev. 1143, 1164 (2016) (quoting Ctr. For Capital Mkts. Competitiveness, U.S. Chamber Of Commerce, Examining U.S. Securities And Exchange Commission Enforcement: Recommendations On Current Processes And Practices 16 (2015)).

And at the end of all this, until *Axon*/*Cochran*, you could only have the constitutionality of this scheme reviewed by a real court in a court of appeals after the unconstitutional protracted agency adjudication takes place and the agency issues a final order! That's right. You have to undergo the very unconstitutional proceeding and appeals to which you object before you can go to a court and argue that the whole costly, depleting, reputation-destroying shebang is unconstitutional. And if you win? Congratulations, you face a renewed years-long agency prosecution!

When I first ventured into challenging these "quasi-judicial" aspects of administrative power, I was warned that the word "Kafkaesque" would frequently come to mind—an oracle that would prove to be an understatement. Welcome to the world of Axon Enterprise and Michelle Cochran.

Lucia *Sheds Light*

The first hint of how lawless these schemes are and have always been came in 2018 when the SEC was caught with its pants down trying to conceal that *none of its ALJs had ever been constitutionally appointed*.[8] This is like having five federal judges preside over thousands of cases for decades without ever having been properly nominated, confirmed, and sworn in. Once this embarrassing omission slipped out of SEC's grasp of attempted concealment, the agency hurriedly "ratified" its ALJs *on the day after the Supreme Court granted certiorari* in *Lucia v. SEC*,[9] the landmark case that would hold a few months later that this lack of appointment meant that SEC ALJ decisions in open cases had to be vacated. For the Supreme Court, the SEC's "shotgun" appointment ratification would not legitimize the baby—and so about a hundred cases were sent back to be retried before different ALJs who had since been lawfully appointed by the Commission. To this day, even though *Lucia* meant all federal agencies had

[8] The fact that *all* of the SEC ALJs lacked a constitutionally required appointment came to light in a case involving Timbervest LLC. *See* Timbervest, LLC v. SEC, 2015 U.S. Dist. LEXIS 132082, *35. The SEC responded to an erupting scandal by refusing to say whether the appointments were constitutional and instead filing cryptic affidavits and unsworn notices regarding both the ALJ hiring process and the agency's non-conformity with the Office of Personnel Management hiring process. *See* Affidavit of Jayne L. Seidman, https://tinyurl.com/5a6d6epv. *See also* SEC Notice, http://bit.ly/2CprDyj.

[9] 138 S. Ct. 2044, 2055 n.6 (2018).

to properly appoint their ALJs, agencies simply have not bothered to do so.

The Supreme Court had nothing to say about the thousands of SEC targets who had been haled before and judged by these lawless ALJs for many decades. The *Lucia* case was crucial because it cracked the door of freedom from the administrative maze in which Americans had been trapped for nearly 90 years.

II. Nine Surprising Aspects of *Axon/Cochran*

A. "This is what a win looks like under Thunder Basin"

The first surprise of the SCOTUS opinion in *Axon/Cochran* is that one Justice, Neil Gorsuch, made an unusual decision to set forth for "consider[ation] some of the facts of Ms. Cochran's case that do not find their way into the Court's opinion." These facts tell the story of the costs of this "appellate review model":

> A single mother of two and a certified public accountant, Ms. Cochran began looking for part-time work in 2007. Eventually, she found a position at a small company called The Hall Group. Soon, however, she discovered that the owner, David Hall, was not just abrasive but dishonest. At one point, he even added Ms. Cochran's name to the firm's business license without her permission, all to facilitate his idea of rebranding his company as "The Hall Group CPAs." When Ms. Cochran protested, Mr. Hall offered her a choice: become a nonequity partner with no increase in pay so that he could use the new name or leave the firm. Ms. Cochran chose to quit and put the whole ordeal behind her.
>
> Or so she thought. Years later, in 2016, Ms. Cochran learned that the SEC had initiated an enforcement proceeding against Mr. Hall, another of his former employees, and herself. . . . In English, the SEC alleged that Ms. Cochran had failed to complete auditing checklists, leaving certain sections of certain forms "blank." The agency brought these charges even though there was "no evidence" that the incomplete paperwork had resulted in any "monetary harm to clients or investors."[10]

[10] *Axon/Cochran*, 143 S. Ct. at 916 (Gorsuch, J. concurring in judgment) (citing *In re Hall*, SEC Release No. 3-17229, p. 1, 12–13, 28 (2017)).

Now in the administrative maze, Cochran learns firsthand how bad it can get:

> The SEC elected to proceed against Ms. Cochran before its own internal tribunal rather than (as it could have) a court of law. The agency assigned the case to [an ALJ] . . . Reportedly, that ALJ made a practice of warning defendants during settlement discussions that he had "never ruled against the agency's enforcement division."[11] It seems, though, Ms. Cochran didn't take the hint. She refused to settle and sought to represent herself in the hearing that followed. It did not go well. Just as her hearing was about to start, her former boss settled his own case and then turned about to testify against Ms. Cochran. In the end, the ALJ fined Ms. Cochran $22,500 and banned her from practicing before the SEC as an accountant for at least five years.[12]
>
> Ms. Cochran responded by asking the full Commission to review the ALJ's decision. Around the same time, this Court held in an unrelated case [*Lucia*] that the ALJ who presided over Ms. Cochran's case had been unconstitutionally appointed. . . . Ms. Cochran might have thought that would bring her own case to a close. But the SEC chose instead to take a mulligan. In 2018, the agency vacated the initial decision against Ms. Cochran and assigned a different, properly appointed ALJ to retry the case. So two years after her administrative proceedings began, they began again.[13]

Cochran immediately sued to vindicate her constitutional rights, because if she acceded to the new in-house prosecution and won years later on her constitutional challenges in the appellate courts, that "win" would mean she was subject to a *third* prosecution to begin over a decade after the uncompleted paperwork at issue. To end this

[11] *Id*. (citing Jean Eaglesham, *SEC Judges' Fairness Is in Spotlight*, Wall St. J., Nov. 23, 2015, p. C6).

[12] This shout-out confers the dubious distinction on former SEC ALJ Cameron Elliot of being named, disqualified, and negatively quoted in two Supreme Court decisions. *See Lucia*, 138 S. Ct. at 2055. Elliot was also name-checked by two SEC Commissioners in Ray Lucia's appeal to the Commission, who noted in dissent that ALJ Elliot had made up the grounds for liability out of "whole cloth." Statement, Daniel M. Gallagher & Michael S. Piwowar, Comm'rs, SEC, Opinion of Commissioner Gallagher and Commissioner Piwowar, Dissenting from the Opinion of the Commission (Oct. 2, 2015), https://perma.cc/8WDQ-SJ3X.

[13] *Axon/Cochran*, 143 S. Ct. at 916–17.

cruel and unending process of serial, to-be-repeated prosecutions by the SEC, Cochran had to sue in district court—to stop the madness.

Because the five *SEC ALJ Cases* had already denied jurisdiction for just such claims, Cochran's district court judge, John McBryde, reluctantly dismissed her constitutional challenge, noting the injustice of the existing weight of authority:

> The court is deeply concerned with the fact that plaintiff already has been subjected to extensive proceedings before an ALJ who was not constitutionally appointed and contends that the one she must now face for further, undoubtedly extended, proceedings likewise is unconstitutionally appointed. She should not have been put to the stress of the first proceedings, and, if she is correct in her contentions, she again will be put to further proceedings, undoubtedly at considerable expense and stress, before another unconstitutionally appointed administrative law judge.[14]

By contrast, Cochran's panel majority opinion derided McBryde's concerns:

> This appeal is not about whether Cochran will have the opportunity to press her separation-of-powers claim. She will. It instead asks: Where and when? . . . To be sure, requiring the adjudication to run its course before we consider her constitutional claim could impose unnecessary costs on Cochran. But . . . Cochran may raise her removal-power claim before the ALJ and, if she loses before the agency, in a court of appeals. She may even be able to get her claim all the way to the Supreme Court as Lucia did.[15]

The concurring opinion in the Fifth Circuit *en banc* did not share this sanguine view of respondents having to go all the way to the Supreme Court—for Lucia it would have been *two* trips—to secure a constitutional adjudication:

> [A]llowing Cochran to raise her removal-power challenge at the beginning of her enforcement proceeding may prove *more* efficient than requiring her to first wade through the potentially unconstitutional review process. To see why,

[14] Cochran v. SEC, No. 4:19-CV-066-A, 2019 WL 1359252, at *2 (N.D. Tex. Mar. 25, 2019) (McBryde, J.).

[15] Cochran v. SEC, 969 F.3d 507, 511, 516, 518 (5th Cir. 2020).

> consider the case of Raymond Lucia—a case the dissent cites for the proposition that Cochran could get meaningful post-enforcement review of her constitutional claim. . . . Lucia, using § 78y, prevailed in the Supreme Court after years of SEC enforcement proceedings and appellate review. . . . So, the Court said, Lucia was entitled to a new hearing before a new, properly appointed ALJ. . . . [B]ecause the Supreme Court chose not to address his removal-power challenge, . . . Lucia was still proceeding before an ALJ he contended was constitutionally illegitimate.[16]

Like Cochran, Lucia sued in district court, to stop the madness. The district court tossed his claims, saying he must await *another* SEC final order before pursuing the removal constitutional claim. Lucia appealed, but unlike in *Cochran*, the Ninth Circuit refused to stay his case pending appeal.[17] Lucia, then age 70, threw in the towel and settled.

> At that point, Lucia had had enough; like many others in this situation, he settled after eight years of administrative proceedings and federal court litigation—thus sacrificing the constitutional claim that Cochran now must press instead. So much for efficiency.[18]

Justice Gorsuch likewise lays bare the illogic and years of financial and human costs of forcing respondents through serial administrative adjudications:

> A year and a half later, a panel of the Fifth Circuit . . . affirmed. 969 F.3d 507 (2020). A year and a half after that, the en banc Fifth Circuit took another look and largely reversed. 20 F.4th 194 (2021). Now, more than four years after Ms. Cochran filed her complaint, this Court balances the *Thunder Basin* factors anew and holds that her case *belonged in district court all along*.[19]

[16] Cochran v. SEC, 20 F.4th 194, 235 (5th Cir. 2021) (en banc) (Oldham, J. concurring) (cleaned up).

[17] The stay pending appeal that Cochran was able to secure from a Fifth Circuit motions panel (Jones, Higginson, and Oldham, JJ.) was crucial. The panel generously allowed argument on the stay, which was granted just hours after argument, so that Cochran did not have to litigate these matters on parallel judicial and administrative tracks—another way agencies strong-arm respondents into submission.

[18] Cochran v. SEC, 20 F.4th 194, 235 (5th Cir. 2021) (en banc) (Oldham, J., concurring) (cleaned up).

[19] *Axon/Cochran*, 143 S. Ct. at 917 (Gorsuch, J., concurring in judgment) (emphasis added).

This is what they mean when they say the process is the punishment.

One cannot overstate the importance of Cochran's trial and en banc judges, now joined by Justice Gorsuch, setting out in detail *exactly* the enormous imposition of human and economic costs and life disruption of this constitutionally and procedurally flawed scheme. That is because, by the SEC's own reckoning, 98 percent of respondents settle their cases because they lack the resources to mount a real defense.

Justice Thomas asked at oral argument in *Cochran*, "How many years has this been going on?"[20] The answer given was that it has been going on at least since Dodd-Frank expanded administrative jurisdiction. But at a higher level of generality, this has been going on since Congress set up James Landis's experiment in rule by expert, combining lawmaking, enforcement, adjudication, and appeals in "efficient" expert agencies.[21] As powerfully argued by the Fifth Circuit in the en banc concurring opinion in *Cochran*, Landis's plan for agency assumption of all powers of government has allowed "administrative agencies to operate in a separate, anti-constitutional, and anti-democratic space—free from pesky things like law and an increasingly diverse electorate."[22]

Why do neither the courts (including the Supreme Court) nor the public know about what my colleague Russ Ryan calls "the SEC's version of the Hotel California—The accused can check out, but they can never leave"?[23] The answer is simple and comes in two parts. Shockingly, for 50 years a *non-negotiable* condition of settlement with

[20] Transcript of Oral Argument at 6:15-16 (Thomas, J.), SEC v. Cochran, 143 S. Ct. 890 (2023) (No. 21-1239).

[21] *Cochran*, 20 F.4th at 213–237 (concurrence by Oldham, Smith, Willett, Duncan, Engelhardt, Wilson, JJs.) (considering "the 80-plus year history of the SEC," the purported policy "benefit[s] of agency expertise," and the supposed "efficiency" purpose of § 78y's appellate review model).

[22] *Id.* at 214.

[23] Russell Ryan, Opinion, *The Dangers of the SEC's 'Hotel California' Docket*, LAW360 (Nov. 28, 2022) (emphasis added), https://perma.cc/WXN8-ZR78. Ryan observes: "For decades, the SEC and other agencies have assured courts and litigants that the notoriously paltry due process protection they offer in their captive, home-court administrative tribunals is worth the deprivations because administrative adjudication is so much more streamlined and efficient, thereby producing prompt decisions. The SEC's Hotel California docket demonstrates exactly the opposite reality."

the SEC has been a *lifetime gag order*,[24] which has cruelly silenced thousands of Americans subjected to this Kafkaesque regime. People can't publicly air these injustices under threat of reprosecution! Judges Edith Jones and Kyle Duncan of the Fifth Circuit acknowledge that this is an unlawful prior restraint, the worst and most serious of First Amendment violations: "If you want to settle, SEC's policy says, 'Hold your tongue, and don't say anything truthful—ever'—or get bankrupted by having to continue litigating with the SEC. A more effective prior restraint is hard to imagine."[25] District Judges Jed Rakoff and Ronnie Abrams of the Southern District of New York have also called out the gag's unconstitutionality.[26]

The second reason no one knows about Hotel California is that no one is watching the regulators. Courts are under a regular duty to report to the Administrative Conference about the time to resolution of all cases on their docket. Had the SEC prosecuted Michelle Cochran for her uncompleted paperwork in district court in Texas, the time to resolution through a full trial would have averaged 20.4 months, with early resolution on motion or settlement averaging 7.1 months.[27] As it stands, Cochran has been in administrative limbo for seven years.

Not one of the *SEC ALJ Cases* paid any mind whatsoever to these wrenching human and financial costs and disruption. The Second Circuit's cavalier dismissal in *Tilton* was particularly brazen, but characteristic of the *SEC ALJ Cases*: "The litigant's financial and emotional costs in litigating the initial proceeding are simply the price of participating in the American legal system . . . [and] endur[ing]

[24] 17 C.F.R. § 202.5(e). A petition to review and revoke this SEC policy, which was unlawfully promulgated without notice and comment, was filed nearly five years ago. New Civil Liberties Alliance, Petition to Amend (Oct. 30, 2018), available at https://bit.ly/3qQGbBJ.

[25] SEC v. Novinger, 40 F.4th 297, 308 (5th Cir. 2022).

[26] SEC v. Citigroup Glob. Markets Inc., 827 F. Supp. 2d 328, 333 n.5 (S.D.N.Y. 2011), *vacated and remanded on other grounds*, 752 F.3d 285 (2d Cir. 2014) ("On its face, the SEC's no-denial policy raises a potential First Amendment problem."); SEC v. Moraes, No. 22-cv-8343, 2022 WL 15774011, at *4 (S.D.N.Y. Oct. 28, 2022) ("[T]he Constitution prevents courts from enforcing the waiver of First Amendment rights as a condition of settlements.").

[27] Median time for civil cases from filing to disposition in the Northern District of Texas was 7.1 months, and from filing to trial it was 20.4 months, for the year ending March 21, 2017. That data holds steady for the surrounding years. *See* U.S. Dist. Ct., Nat'l Jud. Caseload Profile, available at https://tinyurl.com/28k2jah3 (last accessed August 1, 2023).

'substantial' expense and disruption before the administrative proceeding concluded . . . [is just a] . . . hardship . . . [that is] 'part of the social burden of living under government.'"[28] And because 98 percent of the victims of this scheme can never talk about this insane and unjust system or otherwise question the prosecution against them, the constitutional infirmities of agency adjudication have languished unvindicated for over eight decades.

Axon's Shocking Treatment by FTC

This madness was and is not confined to the SEC. Justice Gorsuch recognized that Axon, an Arizona maker of police body cameras, "endured a similarly tortuous path."[29] Indeed, Axon's treatment by the FTC was beyond lawless. The FTC sought to block Axon's acquisition of a small competitor without any showing of anticompetitive effect. Axon was willing to divest the company but balked when the FTC demanded that Axon also surrender its intellectual property to the now-competitor—or else be haled before an FTC ALJ. The FTC lacks any power to force companies to surrender their intellectual property in this manner. So, rather than submit to a years-long administrative trial where FTC wins 100 percent of the time, Axon sued in district court so that its case might be heard before a constitutional adjudicator. Axon, like Cochran, was denied relief and also lost on appeal over a powerful dissent—where even the majority recognized the constitutional problems.[30]

[28] Tilton v. SEC, 824 F.3d 276, 285–286 (2d Cir. 2016) (quoting in part FTC v. Standard Oil of California, 449 U.S. 232, 244–45 (1980)). And just in case this heartless and unjust message wasn't clear, the Second Circuit poured salt into the wound: "Cf. Learned Hand, *The Deficiencies of Trials To Reach the Heart of the Matter*, 3 Association of the Bar of the City of New York, Lectures on Legal Topics 89, 105 (1926) (musing that becoming a party to a lawsuit should be 'dread[ed] . . . beyond almost anything else short of sickness and death')." *Id.* n.5.

[29] *Axon/Cochran*, 143 S. Ct. at 917 (Gorsuch, J., concurring in the judgment).

[30] "Axon's argument makes sense from a policy perspective: it seems odd to force a party to raise constitutional challenges before an agency that cannot decide them. . . . As the Supreme Court cautioned in *Free Enterprise*, the 'growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.'. . . Further, Axon raises legitimate questions about whether the FTC has stacked the deck in its favor in its administrative proceedings. Axon claims—and FTC does not appear to dispute—that FTC has not lost a single case in the past quarter-century. Even the 1972 Miami Dolphins would envy that type of record." Axon Enter. v. FTC, 986 F.3d 1173, 1187 (9th Cir. 2021).

Fortunately, Cochran was finally able to persuade a majority of the judges of the Fifth Circuit Court of Appeals, sitting en banc, that this process makes no sense. Her en banc victory broke through a now six-circuit roadblock (including Axon's 2–1 loss in the Ninth) to create the circuit split that launched both *Cochran* and *Axon* to the Supreme Court.

B. That Axon/Cochran *Was Necessary at All*

In *Free Enterprise Fund v. PCAOB* (*FEF*), the Supreme Court already unanimously decided that nothing in the text or structure of 15 U.S.C. § 78y ousts federal court jurisdiction to hear constitutional questions:

> The Government reads § 78y as an exclusive route to review. But the text does not expressly limit the jurisdiction that other statutes confer on district courts. See, *e.g.*, 28 U.S.C. §§ 1331, 2201. *Nor does it do so implicitly*. . . . We do not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory [of exclusive jurisdiction]. . . . Petitioners' constitutional claims are also outside the Commission's *competence* and expertise. . . . We therefore conclude that § 78y did not strip the District Court of jurisdiction over these claims[.][31]

That binding and unanimous holding from 2010 predated *all* of the *SEC ALJ Cases.* It is an enduring, and ultimately inexplicable mystery why this litigation was necessary at all—at least for Cochran where the statutory review scheme was identical to that in *FEF*.[32] Ray Lucia, Michelle Cochran—and uncounted others—spent over a decade in litigation purgatory over an issue the Court had already decided—on both jurisdiction and the merits![33] Justice Elena Kagan's opinion for the Court unambiguously agreed: "The answer appears from 30,000 feet not very hard. . . . The claims here are of the same ilk as the one in *Free Enterprise Fund*."

> They are instead challenges, again as in *Free Enterprise Fund*, to the structure or very existence of an agency: They charge

[31] Free Enterprise Fund v. PCAOB, 561 U.S. 477, 489–91 (2010) (emphases added).

[32] Further, *FEF* also held that more than one level of insulation from removal of executive officers was unconstitutional.

[33] "What's curious about [the SEC's] argument [in Lucia's district court challenge] is that the Supreme Court has already rejected it." Joel Nolette, *Post*-Lucia, *It's Déjà Vu with the SEC*, LAW360 (Apr. 22, 2019), https://perma.cc/S9Z8-N6ST.

> that an agency is wielding authority unconstitutionally in all or a broad swath of its work. Given that equivalence, it would be surprising to treat the claims here differently from the one in *Free Enterprise Fund*—which we held belonged in district court.[34]

Or, as Justice Kagan pithily told the government at argument: "I thought Free Enterprise Fund pretty clearly put the kibosh on your cause of action argument."[35]

C. Thunder Basin *And its Discontents*

How do we explain the decade of darkness? One culprit is certainly the judge-made, atextual *Thunder Basin* multi-part test that the circuit courts felt compelled to apply. At oral argument, the Justices displayed confusion over and open discomfort—if not disdain—for *Thunder Basin*. Appendix A to this piece sets forth excerpts from the oral argument about *Thunder Basin* that argue more eloquently than I can in favor of abandoning the doctrine.[36]

The *Thunder Basin* factors, named after the case in which the test was first announced, are generally understood to consider (1) whether the issue for which district court jurisdiction is sought is wholly collateral to the specific merits of the case; (2) whether the agency has the competence and expertise to decide the question; and (3) whether the delayed circuit court review of the appellate review model provides "meaningful judicial review."[37]

Thunder Basin's multi-part test spawned much confusion and inconsistent, if not incoherent, holdings over seven circuits. District and circuit courts differed on whether there are stages or tiers in which the factors are applied (compare *Jarkesy* with *Axon/Cochran*). "[T]he D.C. Circuit in [*Jarkesy*] reversed the burden of proof, stating that the *plaintiff* must demonstrate 'a strong countervailing rationale' against implied preclusion. Besides misanalysing the issue, the appellate courts have labored to resolve the litigation in the SEC's favor. At times, their

[34] *Axon/Cochran*, 143 S. Ct. at 902.

[35] Transcript, *supra* note 20, at 59:21.

[36] Available on the Cato Institute's website at https://tinyurl.com/bdekatwr.

[37] Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207, 212–13 (1994).

reasoning has been almost nonsensical."[38] No one could ever figure out whether all of the factors mattered, whether some mattered more than others, and what weight to give them when the factors pointed in opposite directions. The systematic misapplication of those factors put thousands of Americans in involuntary, protracted thrall to ALJ adjudications and called into question the use of such atextual, judge-made, multi-part tests. A test this vague and indeterminate flunks its own multiple-choice exam.

This ten-year jaunt in the wilderness of incoherent doctrine was enormously costly to the few litigants who could fight against this misdirection—to say nothing of those who had to surrender and settle without ever vindicating their constitutional rights (and, because of the gag order, give up even constitutional rights). As Professor Jellum has observed, "Losing before the SEC would effectively end their careers because the appellate court does not automatically grant a stay of the SEC's orders . . . during appeals to federal court. And the SEC typically denies stay requests" and "has no expertise interpreting the U.S. Constitution." She argues that "the SEC should not have the power to decide its own constitutionality. . . . [nor should plaintiffs] be dragged through years of litigation at the SEC before an Article III court can resolve their constitutional claims."[39]

By the time this doctrine reached the Northern District of Arizona in *Axon*,[40] *Thunder Basin* had ascended into a "trilogy" of cases along with *Elgin v. Department of Treasury*,[41] and *FEF*. Once a trilogy, *Thunder Basin* and *Elgin* served to knock the wits out of *Free Enterprise Fund*—the only relevant precedent.[42] Thus do we consecrate and expand error. Thankfully, the Supreme Court

[38] Linda D. Jellum, *Why the SEC is Wrong About Implied Preclusion*, The Regulatory Review, (Aug. 22, 2022) https://bit.ly/3PbZ7Dl. *See also* Linda D. Jellum, Opinion, *Why the SEC Is Wrong About Implied Preclusion*, Regul. Rev. (Aug. 22, 2022), https://perma.cc/RB9U-SHGZ.

[39] *Id. See generally* Linda D. Jellum, *The SEC's Fight to Stop District Courts from Declaring Its Hearings Unconstitutional*, 101 Texas L. Rev. 339 (2022) [hereinafter Jellum, *The SEC's Fight*], for a masterful, detailed analysis of how illogical and incorrectly reasoned appellate opinions have enabled the SEC to hold respondents captive in its unconstitutional in-house courts.

[40] Axon Enter., Inc. v. FTC, 452 F. Supp. 3d 882 (D. Ariz. 2020), *aff'd*, 986 F.3d 1173 (9th Cir. 2021), *rev'd*, 143 S. Ct. 890 (2023).

[41] 567 U.S. 1 (2012)

[42] *See also* Jellum, *Why the SEC Is Wrong*, *supra* note 38.

correctly applied the *Thunder Basin* factors in *Axon*, affirming *Cochran* and overruling six circuit courts of appeals' misapplication of those factors.

The most insightful explanation I have heard about *Thunder Basin* was from retired Second Circuit Judge Christopher Droney, the first circuit judge to dissent from the calamitous circuit chorus of conformity and correctly apply the *Thunder Basin* factors as *Axon/Cochran* ultimately would.[43] At a panel discussion on this issue, Judge Droney said, "I just don't think there's real, faithful application of the three factors."[44] And perhaps one may be forgiven for wondering if long habits of judicial deference to agencies—especially under a test that raised agency expertise and "eventual" judicial review—was all too reflexively familiar to courts.

D. That It Was Unanimous and That The Majority Opinion Failed To Even Mention a Single Adverse Circuit Decision That Had Reached a Diametrically Opposed Conclusion

Logic lies at the heart of Justice Kagan's opinion applying the "meaningful review" prong of *Thunder Basin*. After cycling through the other factors, which many courts conceded argued in favor of district-court jurisdiction, Kagan noted that "a problem remains, stemming from the . . . timing of review." That problem is what the Supreme Court in *Seila Law* recognized as a "here-and-now" injury:[45]

> The claim . . . is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker. And as to that grievance, the court of appeals can do nothing: A proceeding that has already happened cannot be undone. Judicial review of Axon's (and Cochran's) structural constitutional claims would come too late to be meaningful.[46]

True, but obvious, and compelled since 2010's *FEF* holding.

[43] *See Tilton*, 824 F.3d at 292–99 (Droney, J., dissenting) (applying all three *Thunder Basin* factors to argue in favor of district-court jurisdiction of structural constitutional claims).

[44] *When Your Judge's Boss Is Also Your Prosecutor*, at 41:28, NCLA (Oct. 1, 2020), https://tinyurl.com/murs73v3.

[45] Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2196 (2020).

[46] *Axon/Cochran*, 143 S. Ct. at 903–04.

The Court's reasoning on what far too many circuit courts persisted in calling *Thunder Basin*'s "agency expertise" factor also merits a reminder that *FEF* held that agencies lack relevant "*competence* and expertise"[47] on constitutional questions. The fact that agency ALJs lack competence to decide constitutional questions is decisive. The *Axon/Cochran* decision correctly quotes both aspects of the test but fails to completely deliver when it falls into sloppy verbiage, noting that "[t]he Commission knows a good deal about competition policy, but nothing special about the separation of powers. For that reason, . . . 'agency adjudications are generally ill suited to address structural constitutional challenges.'"[48] The problem is not that they are "ill-suited"—they lack *competence*. It was just this kind of verbal slippage on the expertise prong that allowed six circuits to be so wrong for so long.[49]

The majority decision never once mentions any one of the *SEC ALJ Cases*, presumably because their flaws in reasoning and decade-long defiance of the ruling compelled by *FEF* made such discussion uncomfortable. It would be nice if an admonishment about precision in language and logic was the only fallout. Sadly, scores of litigants were held captive in the administrative maw enduring serial to-be-vacated proceedings while a decade of persistent misreadings of clearly written precedents gained momentum, checked only by the Fifth Circuit, and even then requiring an en banc court to make the correction.

[47] *See id.* at 902, 905 (emphasis added).

[48] *Id.* at 905.

[49] The circuits also bandied about a "mootness" argument in applying *Thunder Basin* that the *Axon/Cochran* majority neatly demolishes: "On this last factor, even the Government mostly gives up the ghost. Its argument goes: 'Even when an agency lacks expertise in interpreting the Constitution, it can still "apply its expertise by deciding other issues"—whether "statutory, regulatory, or factual"—"that 'may obviate the need to address the constitutional challenge.'"' . . . The first clause of that sentence concedes the expertise point—and the rest cannot reclaim it. . . . But the Government here does not pretend that Axon's and Cochran's constitutional claims are similarly intertwined with or embedded in matters on which the Commissions are expert. (It is precisely because those claims are not so entangled that the Government must try to redefine what it means for claims to be 'collateral' to an agency action. . . . [R]uling for Axon and Cochran on expertise-laden grounds would not 'obviate the need' to address their constitutional claims—which, again, allege injury not from this or that ruling but from subjection to all agency authority. Those claims of here-and-now harm would remain no matter how much expertise could be 'brought to bear' on the other issues these cases involve." 143 S. Ct. at 905–6 (cleaned up). Again, these points are obvious. The unanimous Court's dissection of such poor reasoning may explain why none of the errant circuit court cases get even a mention in the majority opinion.

E. That Axon/Cochran *Fails to Mention That the Court Could Have Decided That SEC ALJ's Were Unconstitutionally Insulated From Removal Five Years Ago*

Which brings us to Ray Lucia, whose 2018 case was a tragic missed opportunity to address not only SEC ALJs' lack of appointment, but also their unconstitutional multi-layer removal protections. In *Lucia*, the Solicitor General—on behalf of the government—had confessed error not only on appointments but removal, asking the Supreme Court to also find that SEC ALJs enjoyed unconstitutional multi-layer removal protection under *FEF*'s directly-on-point decision allowing pre-enforcement challenges.[50]

Justice Kagan's *Lucia* decision declined to hear the removal protections challenge so that the Court could await lower courts' consideration of this point.[51] The majority opinion ordered that to cure the constitutional error, the SEC had to retry Lucia before a "properly appointed" ALJ "or the Commission itself." But percolation on this issue was not needed! The Supreme Court had already decided in 2010 that any more than one level of tenure protection violated the law—and had unanimously held that federal courts had jurisdiction to hear such claims—even in a pre-enforcement posture under the very same SEC statute, 15 U.S.C. § 78y.

To put this starkly: the government admitted it put Ray Lucia through six years of lawless, soon-to-be-vacated proceedings, and the Court allowed the SEC to require him *to do it all over again* on what Justice Stephen Breyer's dissent made clear was a logically related "embedded" constitutional question. In this context, awaiting percolation amounted to judicial abdication.

Justice Gorsuch's separate opinion directly discusses the human cost associated with flawed doctrine:

> Maybe even worse is what *Thunder Basin* means for others. Not many possess the perseverance of Ms. Cochran and Axon. The cost, time, and uncertainty associated with litigating a raft of opaque jurisdictional factors will deter many people from even trying to reach the court of law to which they are entitled.

[50] *See Lucia*, 138 S. Ct. at 2050 n.1 (outlining the Solicitor General's request); *id.* at 2057–58 (Breyer, J., concurring in the judgment in part and dissenting in part) (outlining the *Free Enterprise* framework).

[51] *Id.* at 2050 n.1 (majority opinion).

> Nor is the loss of a day in court in favor of one before an agency a small thing. . . . 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.[52]

F. That Axon/Cochran *Generated Two Alternate Paths to the Same End*

Justice Thomas, characteristically visionary, wrote separately even though he joined the majority opinion's application of *Thunder Basin*. He called into serious question any use of administrative adjudication to decide private rights. Justice Gorsuch declined to descend into *Thunder Basin*'s morass, instead arguing that a plain reading of the statute as conferring jurisdiction on federal courts to enforce the constitution was all that was needed. Relying on the jurisdictional statute is also in harmony with, if not compelled by, *FEF*:

> [E]quitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally[.]" "[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]" . . . If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so.[53]

Justice Gorsuch ended his opinion with a call to discard the *Thunder Basin* experiment. It might be a good time for the Court to reconsider *Elgin* as well. *Elgin*'s dissent (Justices Samuel Alito, Ruth Bader Ginsburg, and Kagan) is far better reasoned than the majority opinion, and considering the composition of the Court, it is an open question whether the case would be decided the same way if first presented today.

[52] *Axon/Cochran*, 143 S. Ct. at 917 (Gorsuch, J., concurring in the judgment).

[53] *FEF*, 561 U.S. at 491 n.2 (cleaned up). A federal court "properly appealed to in a case over which it has by law jurisdiction" is duty-bound to take such jurisdiction. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 358–59 (1989). "The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Id.* at 359.

Justice Ketanji Brown Jackson's questioning at oral argument displayed considerable discomfort with Gorsuch's statutory approach, so it is a fair assumption that the price of *Axon*/*Cochran*'s unanimity was to hitch the wagon to *Thunder Basin*. If that is correct, one cannot tell which, if any, of the other Justices would join in a later adoption of either the Thomas concurrence regarding private rights or Justice Gorsuch's separate opinion urging adherence to 28 U.S.C. § 1331's conferral of jurisdiction on district courts to decide constitutional questions. No colloquy between opinions enlightens that question.

G. The "Control Deficiency" That Dare Not Explain its Name

Just as Cochran's case was headed to the Supreme Court, damning evidence confirming the worst fears of respondents was disclosed by the SEC. On April 5, 2022, the SEC filed an alarming Notice with the Supreme Court and district court in *Cochran*[54] and also with the Fifth Circuit in the landmark *Jarkesy*[55] case:

> The Commission has identified a control deficiency related to the separation of its enforcement and adjudicatory functions within its system for administrative adjudications . . .
>
> The Commission has determined that, for a period of time, certain databases maintained by the Commission's Office of the Secretary were not configured to restrict access by Enforcement personnel to memoranda drafted by Adjudication staff. As a result, in a number of adjudicatory matters, administrative support personnel from Enforcement, who were responsible for maintaining Enforcement's case files, accessed Adjudication memoranda via the Office of the Secretary's databases. Those individuals then emailed Adjudication memoranda to other administrative staff who in many cases uploaded the files into Enforcement databases.

As the *Wall Street Journal* put it

> It's the equivalent of a party in litigation having access to a judge's briefs from her law clerks . . . This breach reinforces

[54] SEC v. Cochran, 143 S. Ct. 890 (2023), Notice at 21-1293, Dkt. 3; Cochran v. SEC, 2019 WL 1359252, Notice at 4:19cv66, Dkt. 45.

[55] Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) (Jarkesy II), Notice at 20-61007, Dkt. 00516268389.

> the problem with the SEC's administrative process in which the commission has total discretion to deprive parties of their ability to have matters litigated in federal court.[56]

Instapundit declared: "The SEC needs a Special Counsel Investigation," stressing,

> Understand: The "prosecutors" at the SEC illegally accessed files belonging to the "judges." This raises serious questions about the trustworthiness of the SEC, and demands an outside investigation with subpoena power.[57]

What really happened here? We don't know. The SEC will not tell us.

On July 19, 2022, Congress called SEC Chairman Gary Gensler for questioning, but Gensler sent SEC Director of Enforcement Gurbir Grewal in his stead. Asked if SEC's Inspector General (IG) was investigating, Grewal claimed ignorance, telling Rep. William Huizenga: "I would direct you to the office of [the] Inspector General."[58] Avoiding the IG process allows the agency to avoid mandatory criminal referrals to the Department of Justice and detailed reports to Congress.

Instead, SEC hired the Berkeley Research Group (BRG) to conduct an internal investigation. Public records show that BRG regularly provides expert witness and other services to the SEC in its enforcement actions under contracts totaling millions of dollars.

The notices filed with the *Cochran* and *Jarkesy* courts represented that BRG found "nothing to see here," while adding that the investigation was not complete and the breach had also occurred in other, unnamed cases.

Promptly filed Freedom of Information Act (FOIA) requests of the SEC turned up nothing other than a redacted copy of the BRG contract, blacking out the cost and hourly rates for this

[56] Dave Michaels, *SEC Says Employees Improperly Accessed Privileged Legal Records*, Wall St. J. (April 6, 2022), https://tinyurl.com/42cz9mbm.

[57] Glenn Reynolds, *The SEC Needs a Special Counsel Investigation*, Instapundit.com (April 14, 2022, 10:14 AM) https://tinyurl.com/2xm5px6b.

[58] U.S. House Committee on Financial Services-Oversight of the SEC's Division of Enforcement [hereinafter House Hearing] (July 19, 2022), https://tinyurl.com/3evp9kr6, at 26:00–28:00.

internal investigation.[59] FOIA litigation against SEC is pending in *Cochran* and in the Southern District of Texas for *Jarkesy*. The SEC produced no documents, emails, or witness interviews relating to the breach.

Grewal represented to Congress that the control deficiency was publicly reported when it happened.[60] Later in the hearing, Rep. Huizenga presented him with information from the *Wall Street Journal* that the breach dated back to 2017 and the SEC discovered it in the fall of 2021, but only disclosed it in April of 2022.[61]

H. Case Dismissed! Oh Wait, 42 Cases Dismissed!

The next-to-final and most intriguing aspect of *Axon*/*Cochran* is what happened afterwards. Guests at The Hotel California sought release. Marian Young, who had been trapped in the administrative maze for years, had a fully briefed mandamus petition before the Fifth Circuit that was ripe for decision. Just days after *Axon*/*Cochran*, Christopher Gibson filed a complaint in a Georgia district court. And Michelle Cochran was ready to file a fresh complaint in the Northern District of Texas.

So . . . rather than allow Michelle Cochran—or Gibson or Young—to challenge the constitutionality of their SEC administrative enforcement proceedings, on June 2, 2023, the SEC dismissed all 42 open proceedings that could have brought these questions to an Article III Court. Forty-five industry bar orders were also lifted. A 10-year quest by at least 12 intrepid plaintiffs for judicial review of these unconstitutional proceedings was wiped out in the blink of an eye. Untold years of enforcement resources over 10 years and millions of taxpayer dollars were tossed to the wind.

[59] If there is one thing that is clearly not covered by any FOIA exception, it would be the cost incurred by SEC privatizing an investigation to a vendor with a conflict of interest, when a taxpayer-supported IG office is salaried and charged with the duty of conducting such internal investigations. For what the SEC does to private individuals who engage in internal coverups, see *SEC v. Engler*, 2022 WL 4596745 (E.D.N.Y. 2022).

[60] House Hearing, *supra* note 58, at 26:24-28:00.

[61] *Id.* at 1:28:00. The *Wall Street Journal* article states that the breach was discovered in the fall of 2021. Rep. Huizenga likely erred in saying the fall of 2020. In any event, there was at least a six-month delay in notifying only two—Cochran and Jarkesy—of the many affected respondents, and that notification came only in a public filing. The other 40 respondents were not informed for over a year and a half. SEC claims that it owes no disclosure in affected cases that are closed or settled.

What reason did the SEC give for its unprecedented, sweeping attempt to insulate its administrative processes from judicial review?

The "control deficiency."

The same one SEC said was a nothingburger. Where SEC says no one's rights to a fair adjudication were compromised, while fighting any disclosure whatsoever in the Freedom of Information proceedings and in the FOIA federal suit.

These unprecedented dismissal orders and lifts of industry bars in nearly 90 matters were accompanied by a report apparently prepared by BRG. It's a sorry piece of work, long on conclusory exculpatory statements and devoid of primary documents, interviews, or any other material that Cochran, Gibson, and others could have readily obtained in litigation to test those *ipse dixit* claims that there is "nothing to see here." The SEC has taken the position in the FOIA litigation that this is all the public will get. The SEC's view is that enforcement targets in closed or settled cases tainted by the "control deficiency" should get no relief at all, even though they may be the ones most damaged by a corrupted prosecution.

The sole exception to the dismissal orders? George Jarkesy, whose case produced a blockbuster ruling by a Fifth Circuit panel holding that those administrative proceedings were unconstitutional because:

> (1) the SEC's in-house adjudication of [Jarkesy's and his fund's] case violated their Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I's vesting of "all" legislative power in Congress; and (3) statutory removal restrictions on SEC ALJs violate the Take Care Clause of Article II.[62]

Jarkesy is now the lone standard bearer. SEC likely felt that having just petitioned for certiorari, it could not include the case in the June 2 dismissal orders. Certiorari was granted in *Jarkesy* on June 30, 2023.

The fallout from this unprecedented mass dismissal seriously impacts the rule of law. People in settled cases are silenced. Enforcement respondents in closed cases are forever denied relief. And in

[62] *Jarkesy II*, 34 F.4th at 449.

the 42 just-dismissed cases, the SEC seeks massive nullification of their constitutional rights—and *forever denies them exoneration on the merits or any relief for the SEC's misconduct*. SEC's undeniable goal is obviously to bury the record of what went on using the "control deficiency" as a cynical ploy to control the federal dockets by dismissing any case that could bring the "fundamental, even existential" claims that SEC, "as currently structured, [is] unconstitutional in much of [its] work."[63]

I. A Record of Deception and Defiance Across Agencies

This article opened with a bill of particulars about the defects of agency adjudication, the most glaring and dangerous of which is "the combination of prosecutorial and adjudication functions." When your judge's boss is also your prosecutor, this constitutes not only a structural constitutional violation but an obvious due process violation. Throw in regulation by enforcement, where agency ALJs make up rules out of whole cloth that they apply retroactively, and an enforcement division that uses prior ALJ rulings, settlements, and guidance as sources of law,[64] and it becomes clear that Americans' civil liberties are at the mercy of agencies that have become governments unto themselves. When agencies exercise law making, enforcement and adjudication powers in one "efficient" and wildly unconstitutional agency, "it is the very definition of tyranny."[65]

[63] *Axon/Cochran*, 143 S. Ct. 890, 897.

[64] *See* Commissioner Hester Peirce, SEC, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018), https://bit.ly/44swzuw ("[A] settlement negotiated by someone desperate to end an investigation that is disrupting or destroying her life should not form the basis on which the law applicable to others is based."; "Enforcement is a faster and more convenient approach to establishing obligations than rulemaking given how cumbersome and time-consuming the rulemaking process is under the Administrative Procedure Act ('APA'). However, the APA's obstacles to rulemaking are intentional; before imposing a new regulatory burden, an agency must take a set of steps designed to ensure that there is a problem that needs fixing and that the agency's solution is appropriate.").

[65] "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Federalist No. 47 (Madison).

The SEC is far from the only administrative agency that thinks it is a law unto itself. Despite the *Lucia* case's requirement that all federal agencies properly appoint their ALJs, the Department of Transportation (DOT) has yet to do so. DOT has not only conceded that it ignored *Lucia*, allowing an unappointed officer to preside over its in-house adjudications for the last four years; it disclosed this in order to avoid answering for that official's unconstitutional removal protections.[66] Just days after the removal challenge was deemed mooted by this disclosure, that same unappointed, tenure-protected ALJ issued penalties in another enforcement action.[67] In other words, DOT strategically revealed predicate ALJ unconstitutionality to dodge the removal bullet, but it was happy to continue in its merrily multiplied unconstitutional ways.[68] In what world does this make any sense?

III. Conclusion

Axon/Cochran is a cross-agency ruling with legs that will travel well beyond the SEC and FTC. Challenges to the FDIC, DOT, and other agencies are already being litigated in the federal courts.[69] This means that however hard the SEC tries to avoid judicial oversight of the constitutionality of its adjudications—including tossing unlawful cases like a speakeasy before a raid—these challenges will continue in the courts with respect to any agency that deprives Americans of their constitutional liberties.

This discussion has not only sought to explore the many formal constitutional and due process deficits of administrative adjudication. It has also delved into the dark underbelly of agency

[66] Polyweave Packaging v. DOT, 2023 WL 1112247 (6th Cir. 2023), Motion at 21-4202, Dkt. 29.

[67] Metal Conversion Tech. v. DOT, 2023 WL 4789084 (11th Cir. 2023), Petition at 22-14140, Dkt. 1-2.

[68] I am indebted to my colleague Sheng Li for this example of agency defiance of the Supreme Court's administrative law rulings.

[69] *See e.g.*, Burgess v. FDIC, No. 7:22-cv-00100-O, 2022 WL 17173893 (N.D. Tex. Nov. 6, 2022); Alpine Securities Corp. v. FINRA, No. 23-5129, 2023 WL 4703307 (D.D.C. Jul. 5, 2023); John Doe v. PCAOB, No. 3:23-cv-00149-S, 2023 WL 2988259 (N.D. Tex Jan. 26, 2023); Polyweave Packaging Inc. v. DOT, 51 F.4th 675 (6th Cir. 2023); gh PACKAGE PRODUCT TESTING AND CONSULTING, INC., v. Buttigieg, 1:23-cv-00403-MRB (S.D. Ohio 2023); Colt & Joe Trucking v. DOT, 23-9564 (10th Cir 2023); POSTMEDS, INC. v. DEA, No. 1:23-cv-00648 (E.D. Va. 2023); Illumina, Inc.v. FTC, No. 23-60167 (5th Cir. 2023).

misconduct, particularly, but not solely, at the SEC. From the SEC's attempt to suppress the truth about its ALJ's lack of appointments in *Timbervest*, to Judge Elliot's myriad abuses of power,[70] to the DOT's assumption of immunity from law, to the FTC's delusion that it has the power to order Axon to surrender its intellectual property to a competitor, to the SEC's illegally promulgated gag rule;[71] to the SEC's lockup of respondents for years in a Hotel California; to the "control deficiency" showing years-long illegal file sharing in scores of cases, and the SEC's current disdain for and refusal to disclose to Congress, FOIA and the courts any records regarding that breach—all lead to the conclusion that our agencies are out of control.

Justice Gorsuch showed his concern about such lawlessness when he noted that agencies can "outlast or outspend" their targets and use this power "as leverage to extract settlement terms they could not lawfully obtain any other way."[72] This applies to gags, Axon's IP, settlement conditions on use of insurance or tax deductions, and even penalties that follow a regulated person from one company to another and purport to bind a new company that was not a party to the proceeding.[73]

Justice Robert Jackson famously stated in *Chenery II*, "Surely an administrative agency is not a law unto itself."[74] Sadly, in the modern government it is! The Founders understood all too well that men are not angels. The control deficiency that tainted the *Cochran* and *Jarkesy* adjudications and the FTC's lawless demand that Axon surrender its

[70] Peggy Little, *Ray Lucia's Mythic Lift*, NCLA (Jun. 19, 2020), https://tinyurl.com/6axtvr24.

[71] Petition to Amend SEC Gag Rule, October 30, 2018, https://tinyurl.com/bdhff7dh; Petition to Amend CFTC Gag Rule, July 18, 2019, https://tinyurl.com/bdzb5xrs.

[72] *Axon/Cochran*, 143 S. Ct. at 918. *See also id.* at 907 n.4: *See* P. Hamburger, Purchasing Submission: Conditions, Power, and Freedom 223 (2021) (describing this as "regulatory extortion"); Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlement: The Culture of Consent*, *in* 1 William E. Kovacic: An Antitrust Tribute 177 (N. Charbit et al. eds. 2013) ("Consent decrees create potential for an enforcement agency to extract from parties under investigation commitments well beyond what the agency could obtain in litigation").

[73] In the Matter of Drizly, LLC, No. C-4780, Decision & Order, 10 (F.T.C. Jan. 9, 2023). https://tinyurl.com/4hnrtwnr, the consent order provision is at PDF page 21 (consent order page 10).

[74] *SEC v. Chenery Corp.* (II), 332 U.S. 194, 215 (1947) (Jackson J., dissenting).

patents shows, like nothing else can, how wise the Framers were to insist that the powers of government be separated.

The Fifth Circuit's en banc concurrence in *Cochran* found the Supreme Court's prescient warnings in *Jones v. SEC* to be an oracle about the dangers of runaway administrative power:

> The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. . . . If [administrative agencies] . . . are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.[75]

The SEC's disturbing evasions of law and defiant shrugging off of judicial review should serve as a catalyst for all Americans to take the agencies to court when they infringe upon personal liberties—to keep the administrative state within constitutional bounds, its regulatory guardrails, and the law.

[75] *Jones v. SEC*, 298 U.S. 1, 23–25 (1936).