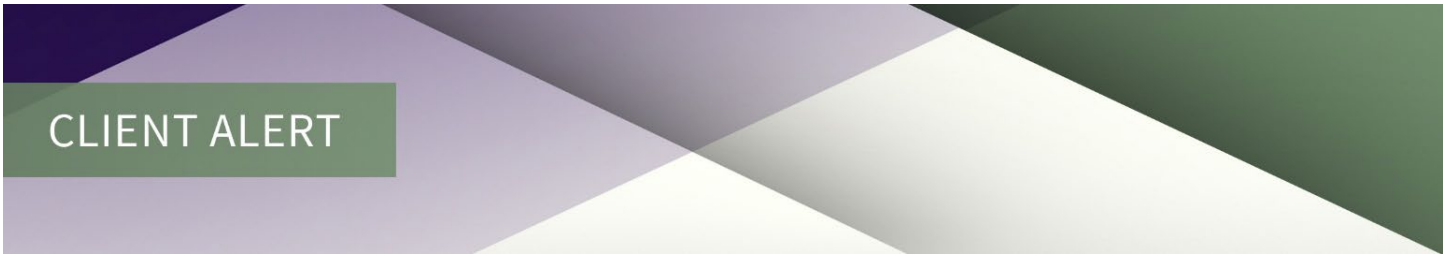

The Future of Administrative Proceedings

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The U.S. Supreme Court held earlier this year in *Axon Enterprise v. FTC* and companion case *SEC v. Cochran* that the federal district courts have jurisdiction to hear challenges to the constitutionality of administrative adjudications of the U.S. Securities and Exchange Commission (the "SEC") and of the Federal Trade Commission (the "FTC").[1] The decision allows litigants to make constitutional challenges in federal court at the outset of administrative proceedings, as opposed to after the issuance of an agency's final order.

Also, in *Jarkesy v. S.E.C.* a divided Fifth Circuit panel vacated the SEC's affirmation of an SEC administrative law judge's ("ALJ") determination that Jarkesy and Patriot28, LLC committed securities fraud.[2] The panel found that, among other things, the ALJ removal protections violate Article II, Section III (the "Take Care Clause") of the U.S. Constitution. In October 2022, the Fifth Circuit denied the petition by the SEC for rehearing en banc. A petition by the SEC for a writ of certiorari was granted by the Supreme Court on June 30, 2023 and oral argument has been scheduled for November 29, 2023.

Background

The SEC and the FTC possess authority to bring cases enforcing the Securities Exchange Act of 1934 (the "Exchange Act")[3] and the Federal Trade Commission Act (the "FTC Act")[4] through their own administrative adjudication process, as

1 *Axon Enter. v. FTC,* 598 U.S. 175 (2023).

2 *Jarkesy v. SEC*, No. 20-61007, slip. op. (5th Cir., May 18, 2022).

3 15 U.S.C §§ 78 *et. seq*.

4 15 U.S.C §§ 41 *et seq*.

opposed to in an Article III court. Specifically, the SEC may use its administrative courts to bring securities fraud cases and seek monetary penalties against registered and non-registered entities.[5] Likewise, the FTC may use its administrative courts to seek cease and desist orders against "unfair or deceptive" commercial practices.[6] The FTC has recently used its administrative proceedings to challenge high-dollar mergers, including Microsoft-Activision and Illumina-Grail.[7]

SEC and FTC administrative adjudications follow a similar process. At each agency, the Commissioners decide whether or not to bring an administrative case. The case is then heard by an ALJ. The SEC and FTC ALJs may only be removed from their duties by the respective agency "for good cause" as established and determined by the Merit Systems Protection Board (the "MSPB"), another independent federal agency.[8] Much like a federal district court judge, the ALJ may hold a hearing, make factual and legal determinations, and issue a decision.[9] The parties may then appeal to the relevant agency.[10] After a final order is entered, the parties may seek further review in the federal courts of appeal.[11]

Some litigants and commentators have raised due process concerns about the SEC and FTC's administrative adjudications.[12] They question whether the ALJs are truly independent and emphasize that the respective Commissions are responsible for both making the decision to bring a case and deciding the initial appeal. The FTC's proceedings in the Illumina-Grail merger exemplify these concerns. In that case, the merging parties actually won before an ALJ before the FTC reversed. The FTC's decision, written by Chair Lina Kahn, utilizes the expansive theories of competitive harm in vertical mergers that Kahn herself advocated in her own academic work and that motivated the FTC to bring the case in the

5 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80a-9(d), 80b-3(i).

6 5 U.S.C. §§ 45(a)(1).

7 *See In the Matter of Microsoft Corp. and Activision Blizzard, Inc.*, Docket No. 9412 FTC 2023 (Redacted Public Version) (Complaint); *In the Matter of Illumina, Inc., and Grail, Inc.*, Docket No. 9401 (Opinion of the FTC).

8 5 U.S.C. §§ 7521(a), 1202(d). Members of the MSPB are also only removable by the President for inefficiency, neglect of duty or malfeasance in office.

9 16 CFR §§ 3.21-3.56 (2021); 17 CFR §§ 201.221-201.360 (2021).

10 16 CFR §§ 3.52-53l; 17 CFR §§ 201.411(a).

11 15 U.S.C. § 78y(a)(1),(3), 5 U.S.C. §45(c).

12 For instance, Axon Enterprise raised such a claim in its federal district court complaint. See Complaint, No. 2:20-cv-00014 (D. Ariz.) DCD 1 at 26. *See also Supreme Court 9, Administrative State 0*, WALL STREET JOURNAL (April 14, 2023), https://www.wsj.com/articles/supreme-court-axon-v-ftc-sec-v-cochran-administrative-state-federal-court-elena-kagan-43f6b20; *Constitutional Thunder Out of the Fifth Circuit*, WALL STREET JOURNAL (May 22, 2022) (arguing that the SEC acts as "prosecutor, judge, and jury" in administrative adjudications), https://www.wsj.com/articles/constitutional-fifth-circuit-court-appeals-securities-and-exchange-commission-sec-jarkesy-administrative-state-supreme-court-constitutional-11653236377?mod=article_inline; The Honorable Jed S. Rakoff, Judge, Southern District of New York, PLI Securities Regulation Institute Keynote Address: Is the S.E.C. Becoming a Law unto Itself? (Nov. 5, 2014).

first place.[13] Also, commentators have expressed concerns that the costs of the administrative proceedings may encourage parties to settle before a federal appeal takes place, diminishing the safeguard provided by that review.[14]

The Supreme Court has already raised substantial separation-of-powers concerns related to administrative adjudication in recent years, focusing on issues of appointment and removal protection. First, in *Free Enterprise Fund v. PCAOB*, the Supreme Court held that a statutory scheme that insulated inferior federal officers from presidential oversight via two layers of "for cause" removal protection violated the President's Take Care Clause power to supervise the Executive Branch.[15] Then, in *Lucia v. SEC*, the Supreme Court found that the SEC's ALJs were inferior federal officers that needed to be appointed by "the President, Courts of Law or Heads of Departments" (and, in practice, had not been).[16]

Although the SEC remedied the appointments issue by reappointing ALJs in the constitutionally required fashion, the determination in *Lucia* that the SEC ALJs were inferior officers also implicated the constitutionality of their multilayered removal protections under *Free Enterprise Fund*.[17] The Supreme Court, however, did not reach the removal-protection issue in *Lucia*, meaning that the legality of SEC administrative adjudications remained an open question after the case was decided. And moreover, under the Administrative Procedure Act, the multilayered removal protections that protect the SEC ALJs also apply to all of the ALJs in the Executive Branch, including those at the FTC, the Federal Energy Regulatory Commission, the Department of Health and Human Services, and the Social Security Administration.[18] These multilayered removal protections are at issue in *Jarkesy*.

Axon Enterprise and Cochran

Axon Enterprise ("Axon") was subject to FTC administrative adjudications and Michele Cochran was subject to SEC administrative adjudications. The FTC alleged that Axon violated the FTC Act by purchasing its closest competitor in the body-camera market, VieVu LLC.[19] The SEC alleged that Cochran, a certified public accountant, violated auditing standards

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13 Compare *In the Matter of Illumina, Inc.*, and *Grail, Inc.*, Docket No. 9401 FTC (April 3, 2023) (Opinion of the FTC) at 42-48 (evaluating harm to competitors in the medical testing market, as opposed to considering prices and consumer welfare) with Lina Kahn, *Amazon's Antitrust Paradox*, 710, 731-37, YALE L.J. (2016) (arguing that the consumer welfare approach fails to adequately account for foreclosure of competitors in vertical merger cases).

14 *See e.g.*, Jennifer L. Mascott & Daniella Efrat, Adjudication *With a Stacked Deck*, YALE J. REG. (Notice & Comment Blog, Feb. 18, 2022), https://www.yalejreg.com/nc/symposium-decisional-independence-05/.

15 561 U.S. 477, 481 (2010).

16 138 S. Ct. 2044, 2041 (2018); *see also* U.S. Const. Art. II, § 2, Cl. 2.

17 Press Release, SEC Ratifies Appointment of Administrative Law Judges (Nov. 30, 2017), https://www.sec.gov/news/press-release/2017-215.

18 5 U.S.C. §§ 3105, 7521(a), 1202(d).

19 *In the Matter of Axon Enterprise, Inc., and Safariland, LLC.*, Docket No. D9389 FTC (Jan. 3, 2020) (Complaint).

set out in the Exchange Act.[20] Axon and Cochran sued the respective agencies in federal district court while their administrative cases were ongoing, challenging the constitutionality of the proceedings. The respective district courts dismissed both suits for lack of jurisdiction. On appeal, the Ninth Circuit affirmed dismissal of Axon's constitutional challenge, but the en banc Fifth Circuit reversed the dismissal of Cochran's suit. The Supreme Court then granted *certiorari* in both cases.

Article III of the Constitution vests Congress with the power to create inferior federal courts and control their jurisdiction.[21] Generally, under 28 U.S.C. § 1331, the federal district courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." But other statutes may override—or "strip"— the district courts of their jurisdiction over some federal claims.[22]

In the consolidated cases, the Office of the Solicitor General[23] argued that the FTC Act and the Exchange Act stripped the district courts of jurisdiction to hear Axon's and Cochran's claims.[24] Neither the FTC Act nor the Exchange Act expressly states that federal district courts cannot hear constitutional challenges to administrative adjudication. Rather, as described above, these statutes both establish a process for federal appellate review of final administrative orders. The Office of the Solicitor General emphasized that Axon and Cochran were raising their constitutional claims as defenses to administrative proceedings, arguing that the statutory review process therefore covered these claims.[25]

Justice Kagan's Majority Opinion. In a 9–0 decision, the Supreme Court held that the administrative adjudication and federal appellate review schemes set out in the FTC Act and the Exchange Act did not displace district court jurisdiction over Axon and Cochran's constitutional challenges.[26] Justice Kagan wrote for the majority of the Court, with Chief Justice Roberts and Justices Thomas, Alito, Sotomayor, Kavanaugh, Barrett, and Jackson joining her opinion.

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20 *In the Matter of David S. Hall, P.C. d/b/a The Hall*, Exchange Act Release No. 77718 (April 26, 2016) (Order Instituting Proceedings).

21 Congress, however, may not exercise this power in a manner that runs afoul of other constitutional provisions. *See*, *e.g.*, *Spokeo v. Robins*, 578 U.S. 330, 339 (U.S. 2016) (explaining that Congress cannot grant a plaintiff that does not satisfy Article III standing requirements the right to sue in federal court).

22 *See*, *e.g.*, *Lockerty v. Phillips*, 319 U.S. 182, 186 (1943) ("The Congressional power to ordain and establish inferior federal courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.").

23 The Office of the Solicitor General litigated the consolidated cases before the Supreme Court on behalf of the FTC and SEC.

24 Brief for the Federal Parties at 12, *Axon Enter. v. FTC,* Nos. 21-86 and 21-1239 (filed August 2022).

25 *Id.* at 42.

26 *Axon Enter.* at. 175.

Justice Kagan relied on *Thunder Basin Coal Co. v. Reich*, a case that set out three factors for discerning whether a constitutional claim falls within a congressionally established scheme for review of agency action.[27] These factors are whether: (1) precluding district court jurisdiction over the claim would "foreclose all meaningful judicial review," (2) the plaintiff's claims are "wholly collateral" to the statutory review scheme, and (3) the plaintiff's claims are "outside the agency's expertise."[28]

Justice Kagan found that all three *Thunder Basin* factors supported Axon and Cochran. Starting with the "availability of meaningful judicial review" factor, Justice Kagan acknowledged that the FTC Act and Exchange Act provide for federal appellate review of administrative actions. Nevertheless, Justice Kagan emphasized that the plaintiffs complained of being subjected to unconstitutional administrative proceedings. She reasoned that this injury could not be remedied by federal appellate review after these proceedings ended.[29]

Justice Kagan described the second and third *Thunder Basin* factors as clearly favoring district court jurisdiction. Axon and Cochran's claims were wholly collateral to the agency proceedings because they challenged the "Commissions' power to proceed at all, rather than actions taken in the agency proceedings."[30] And Axon and Cochran's claims solely raised structural constitutional issues, as opposed to the issues of securities and competition law that are within the FTC and SEC's respective expertise.[31]

Justice Gorsuch's Concurrence. Justice Gorsuch concurred in the judgment without joining Justice Kagan's majority opinion. In his concurrence, Justice Gorsuch argued that the Court should not imply congressional intent to strip jurisdiction given that the general grant of jurisdiction in 28 U.S.C. § 1331 to "all civil actions" arising under federal law is express.[32]

Justice Thomas's Concurrence. Justice Thomas joined Justice Kagan's opinion in full but wrote separately to express "grave doubts" about the constitutionality of administrative adjudication of private-rights claims.[33] Justice Thomas described private rights as "the three absolute rights, life, liberty, and property."[34] He argued that administrative adjudication of cases involving those rights may violate the Constitution's separation of powers by transferring judicial power to the Executive

27 510 U.S. 200, 207-15 (1990).

28 *Id.* (internal quotation marks omitted).

29 *Axon Enter.* at 191.

30 Id. at 192.

31 Id. at 194-195.

32 Id. at 211 (Gorsuch, J., concurring).

33 Id. at 196 (Thomas, J., concurring).

34 Id. at 198 (Thomas, J., concurring) (internal quotation marks omitted).

Branch and requiring the judiciary to adhere to a deferential standard of review. Additionally, Justice Thomas argued that administrative adjudication of private-rights cases may violate due process and the right to a jury trial.[35] According to Justice Thomas, the remedies sought by the SEC and FTC in their cases against Cochran and Axon, namely a civil penalty and the transfer of intellectual property, respectively, implicated core private rights. By contrast, Justice Thomas argued that cases about the distribution of government benefits and entitlements implicate only public rights.[36]

In the 1930s, the Supreme Court rejected constitutional arguments against administrative adjudication similar to those made by Justice Thomas. First, in *Crowell v. Benson*, the Court held that administrative adjudication did not violate Article III because of Congress's considerable power over federal jurisdiction.[37] Then, in *NLRB v. Jones & Laughlin Steel Corp.*, the Court found that claims involving statutory remedies fell outside the Seventh Amendment's jury-trial guarantee.[38] Justice Thomas acknowledged these cases, but he indicated that they may be wrongly decided and are ripe for reexamination.[39]

Jarkesy

On May 18, 2022, in *Jarkesy v. S.E.C.*, a divided Fifth Circuit panel vacated the SEC's affirmation of an SEC ALJ's determination that Jarkesy and Patriot28, LLC committed securities fraud.[40] The panel found that (1) the in-house adjudication of the case violated Petitioners' Seventh Amendment right to a jury trial, (2) Congress unconstitutionally delegated legislative power to the SEC by authorizing it to determine whether to bring these types of cases in an Article III court[41] or before an ALJ, and (3) the ALJ removal protections violate the Take Care Clause of the U.S. Constitution. The decision of the Fifth Circuit panel was previously covered in detail in a prior Client Alert;[42] set forth below is a brief summary of the decision.

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35 Id. at 202 (Thomas, J., concurring).

36 *Id*. at 199 (Thomas, J., concurring).

37 285 U.S. 22, 52 (1932).

38 301 U.S. 1, 57 (1937).

39 *Axon Enter.* at 204 (Thomas, J., concurring).

40 *Jarkesy v. SEC*, No. 20-61007, slip. op. (5th Cir., May 18, 2022).

41 An Article III court is one established pursuant to Article III of the U.S. Constitution, which establishes that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time, ordain and establish," and those courts' "judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made" as well as under several other circumstances. U.S. Const., Art. III §§1, 2. A presidentially appointed judge presides over these courts.

42 Robert Stebbins, Abigail Edwards, and Ari Blask, The *Jarkesy* Decision and Ramifications for Administrative Proceedings, Willkie Farr & Gallagher Client Memorandum (June 2, 2022), available here.

Right to a Jury Trial. The Fifth Circuit panel concluded that the SEC's decision to bring the case in front of an ALJ, rather than an Article III court, deprived Petitioners of their "fundamental" right to a jury trial under the Seventh Amendment.[43]

Non-Delegation Doctrine. The Fifth Circuit panel also held that the Dodd-Frank Wall Street Reform and Consumer Protection Act unconstitutionally delegated legislative power to the SEC by granting the SEC unfettered discretion in determining whether to bring securities fraud actions for monetary penalties in Article III courts or in the SEC's administrative courts.[44]

Article I, Section I of the Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States. . . ."[45] Under Supreme Court precedent, Congress may only grant an agency regulatory power if it provides an "intelligible principle," or a guiding condition that an agency must follow when promulgating rules or otherwise exercising quasi-legislative power.[46] This requirement that Congress moderate grants of delegated legislative authority is often referred to as the non-delegation doctrine.

Multilayer Removal Protection. The Fifth Circuit panel held that SEC ALJs are unduly protected from Presidential oversight by multiple layers of "for cause" removal protection, in violation of the Take Care Clause of the U.S. Constitution, as interpreted by the Supreme Court in *Free Enterprise Fund v. PCAOB*.[47]

For-cause removal protections for "officers of the United States" subject to the Appointments Clause of Article II of the U.S. Constitution present constitutional issues due to the inherent conflict between Congress's Article I legislative power to create and define the jurisdiction of regulatory agencies and the President's Take Care Clause executive power to supervise the Executive Branch. Two Supreme Court cases, *Myers v. United States*,[48] and *Humphrey's Executor v. United States*,[49] established a rule to balance congressional and executive power.[50] Congress cannot restrict the President's power to remove the principal officers of purely executive agencies, like the Department of State or the Department of Defense.[51] In

43 *Jarkesy* at 9.

44 *Jarkesy* at 25.

45 U.S. Const. Art. 1, § 1.

46 *See J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

47 561 U.S. 477 (2010).

48 272 U.S. 52 (1926).

49 295 U.S. 602 (1935).

50 *Free Enterprise Fund*, 561 U.S. at 493 (discussing the *Myers* and *Humphrey's Executor* holdings).

51 *Myers*, 272 U.S. at 164.

contrast, for-cause removal protections for the principal officers of quasi-legislative, quasi-judicial agencies Congress created, including the FTC and the SEC, are constitutionally permissible.[52]

In *Free Enterprise Fund*, the Supreme Court considered how the *Myers* and *Humphrey's Executor* cases applied to inferior officers insulated by two layers of for-cause removal protection. Specifically, the SEC Commissioners could only remove members of the Public Company Accounting Oversight Board (the "PCAOB")[53] for cause, and the President could only remove the SEC Commissioners themselves for cause. The Supreme Court first decided that both the SEC Commissioners and the PCAOB Board Members were inferior officers under the Appointments Clause, and then held that multiple layers of for-cause removal violated the Take Care Clause's vesting of executive power in the President.[54] The multilevel scheme, as opposed to the single level of protection at issue in *Humphrey's Executor*, was unconstitutional because "the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly."[55]

The Fifth Circuit panel in *Jarkesy* employed similar logic as the Supreme Court in *Free Enterprise Fund* in establishing that the removal restrictions for SEC ALJs violated the Take Care Clause of the U.S. Constitution. First, the Court noted that, per *Lucia*, SEC ALJs are inferior officers under the Appointments Clause.[56] The Court then emphasized that SEC ALJs can be removed by the SEC "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board," and the SEC Commissioners can only be removed for cause.[57] The Fifth Circuit panel in *Jarkesy* concluded that these multiple layers of removal protection for inferior officers under the Appointments Clause are unconstitutional.[58]

Supreme Court Review. In October 2022, the Fifth Circuit denied the SEC's petition for rehearing en banc. A petition by the SEC for a writ of certiorari was granted on June 30, 2023 and oral argument has been scheduled for November 29, 2023. Approximately 36 amicus briefs have been filed with the Supreme Court relating to this matter.

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52 *Humphrey's Executor v. United States*, 295 U.S. at 627–629.

53 The Sarbanes-Oxley Act of 2002 created the PCAOB to oversee the audits of public companies.

54 *Free Enterprise Fund*, 561 U.S. at 486–87.

55 *Free Enterprise Fund*, 561 U.S. at 481 (concluding that the President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them).

56 *Jarkesy* at 27.

57 *Jarkesy* at 27. The Fifth Circuit panel further noted that MSBP members themselves can only be removed by the President for cause, meaning that the SEC ALJs may be insulated from removal by three layers of for-cause protection.

58 *Jarkesy* at 28.

The Future

The immediate implication of *Axon* and *Cochran* is that litigants seeking to challenge the constitutionality of an administrative adjudication can now immediately do so in federal district court, before an agency issues its final order. This may encourage respondents to bring constitutional claims and seek injunctive relief in federal district court at the outset of administrative actions. Conversely, the SEC and FTC may be wary of bringing significant cases in-house, lest those cases become bogged down by constitutional disputes. In fact, commencing in 2018, the SEC's enforcement division drastically cut back on use of the administrative courts, especially as to litigated enforcement cases in which there was an available concurrent federal court forum for the respective claims.[59]

The *Jarkesy* case will have large implications for administrative adjudications throughout the Executive Branch of the federal government, as the multilayered removal protections that protect the SEC ALJs also apply to all of the ALJs in the Executive Branch, including those at the FTC, the Federal Energy Regulatory Commission, the Department of Health and Human Services, and the Social Security Administration. While the SEC has only a handful of ALJs and could instead file its cases in federal courts instead of administrative tribunals,[60] other federal agencies would have much more difficulty if the Supreme Court decides in favor of Jarkesy and is not able to fashion a workable remedy that allows federal administrative tribunals to continue to function. For example, the Social Security Administration employs about 1,400 ALJs that hold hearings on benefits disputes, the Department of Health and Human Resources has approximately 60 ALJs to conduct hearings on coverage and claim issues, and the Federal Energy Regulatory Commission employs 12 ALJs that oversee gas and electric market manipulation cases.[61]

In its brief filed with the Court, the SEC noted that while the Court in *Lucia* held that SEC ALJs are "Officers of the United States" the Court in *Free Enterprise Fund* did not announce any *per se* rule categorically foreclosing two layers of tenure protection for any inferior officers.[62] The SEC argued that the two layers of tenure protection for SEC ALJs comports with Article II of the U.S. Constitution as Congress has more leeway to grant tenure protection to adjudicators than to other executive officers, as the principal rationale for the President's removal power (ensuring that officers remain dependent on

[59] Certain types of proceedings (including 12(j) proceedings to revoke an issuer's Exchange Act registration) may only be brought by the SEC in its administrative courts.

[60] However, as noted above certain types of proceedings are currently required to be brought by the SEC before an ALJ. *See* the immediately prior note above. In addition, the SEC brings many settled enforcement proceedings before its ALJs; this allows the parties the convenience of avoiding having to file such matters in federal court.

[61] Social Security Administration, Program Provisions and SSA Administrative Data (Annual Statistical Supplement, 2020) https://www.ssa.gov/policy/docs/statcomps/supplement/2020/2f8-2f11.html (last visited November 8, 2023); Department of Health and Human Services, https://www.hhs.gov/about/agencies/dab/different/appeals- at dab/appeals-to-alj/index.html (last visited November 8, 2023); FERC Office of Administrative Law Judges Org. Chart, https://www.ferc.gov/office-administrative-law-judges-oalj (last visited November 8, 2023).

[62] Brief for Jarkesy at 48, *Jarkesy v. S.E.C.* (filed August 2023).

the President, who is in turn accountable to the people) applies with greater force to policymakers than to adjudicators, and history and Supreme Court precedents interpreting Article II permit this different treatment.[63] The SEC also argued that the standard for removing its ALJs is less demanding than the removal standard as to PCAOB members in *Free Enterprise Fund*.[64]

If the Supreme Court upholds the finding of the Fifth Circuit panel that the multiple "for cause" removal protections of SEC ALJs violate the Take Care Clause of the U.S. Constitution, given the impracticability of having thousands of disputes moved over to the Article III courts, we believe the Court will instead fashion a remedy that will allow the federal administrative tribunals to continue to function.

If the Court rules against the SEC, the most likely remedy would be to make the SEC ALJs removable by the SEC without cause. With this change, the SEC administrative tribunals would no longer suffer from any constitutional defect under the Take Care Clause and there would be no change to the ability of the SEC to bring matters in its internal courts. However, such a remedy would reduce the structural independence of ALJs and, depending on the Supreme Court's resolution of the holdings by the Fifth Circuit panel as to Jarkesy's Seventh Amendment and non-delegation doctrine claims, other parties to SEC administrative actions may continue to raise constitutional claims even after the removal issues are "fixed," especially if the SEC again brings cases in the internal courts affecting "core private rights" (see below). In addition, parties to administrative actions at other federal agencies could be expected to raise similar Seventh Amendment and non-delegation doctrine claims.

Another possible remedy was suggested by Justice Thomas in his concurring opinion in *Axon*. Justice Thomas suggested that any cases seeking civil penalties or otherwise affecting "core private rights" (life, liberty and property) must be brought in Article III courts.[65] If the Court were to agree with Justice Thomas that all "core private rights" cases must be brought by the SEC in Article III courts, the SEC would no longer be able to bring any proceedings in its internal courts in which the SEC seeks remedies such as civil monetary penalties. However, as set forth in Justice Thomas' concurrence, a different regime would prevail for "public rights" (such as governmental benefits and entitlements) as the Executive Branch may dispose of these public rights via non-Article III adjudications.[66] Thus, if the Court were to adopt the reasoning of Justice Thomas, the ALJ programs of the Department of Health and Human Services and the Social Security Administration could continue in the ordinary course of business. In this event, the Court would still need to address the removal issues. The

63 *Id.* at 50.

64 *Id.* at 59. In its brief the SEC also addressed the holdings of the Fifth Circuit panel as to Jarkesy's Seventh Amendment and non-delegation doctrine claims. *Id.* at 25-44.

65 *Axon Enter.* at 198 (Thomas, J., concurring).

66 "If private rights are at stake, the Constitution likely requires plenary Article III adjudication. Conversely, if privileges or public rights are at stake, Congress likely can foreclose judicial review at will." *Axon Enter.* at 198 (Thomas, J., concurring).

Court could make the SEC ALJs removable by the SEC without cause or could find that two layers of "for cause" removal protection for any such ALJs would not violate the President's Take Care Clause power to supervise the Executive Branch (perhaps because such ALJs would no longer adjudicate any matters involving "core private rights").

One advantage of Justice Thomas' distinction between administrative adjudication of private and public rights is that securities and competition cases of significance would be routed into the federal court system, ameliorating the concerns about the mixing of the prosecutor and adjudicator roles that Axon and other litigants and commentators in these areas have raised.[67] At the same time, administrative adjudication of social security and health benefits claims would be undisturbed, meaning that the federal court system would not be overburdened by taking on the caseload of the thousands of ALJs that currently handle social security and Medicare benefits disputes.[68]

If you have any questions regarding this client alert, please contact Robert Stebbins, Ariel Blask, or the Willkie attorney with whom you regularly work.

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67 *See supra* note 12.

68 Social Security Administration, Annual Statistical Supplement, 2022 (listing the number of SSA ALJs in 2021 at 1,235), https://www.ssa.gov/policy/docs/statcomps/supplement/2022/2f8-2f11.html; Department of Health and Human Services Office of Medicare Hearings and Appeals (describing ALJ hearings for appeals of Medicare claims denials), https://www.hhs.gov/about/agencies/omha/index.html.