FEDERAL JURISDICTION AND PROCEDURE

Administrative Law — Structural Constitutional Challenges — Statutory Review Schemes — Thunder Basin *Test* — Axon Enterprise, Inc. v. FTC

When an administrative agency initiates an enforcement action, a regulated entity has an array of defenses at its disposal. It might contend it is factually not liable.[1] It might attempt to show that the agency has misinterpreted the law.[2] Or it might make the ambitious claim that some aspect of the agency's structure is unconstitutional, making the entire proceeding unlawful.[3] Traditionally, these "structural" challenges were brought as defenses to enforcement actions under an agency's statutory review scheme, with appellate review by an Article III court.[4] But last Term, in *Axon Enterprise, Inc. v. FTC*,[5] the Supreme Court short-circuited the FTC's statutory review scheme, concluding that regulated entities could seek an injunction against an imminent enforcement action in federal district court on the grounds that the agency suffered from a structural infirmity that rendered all of its actions constitutionally invalid.[6] Left unmentioned in *Axon*, however, was the issue of whether regulated entities had Article III standing to bring structural claims in the first place. Removal challenges — that is, challenges to officers' insulation from at-will removal by the President — raise problems with the causation prong of standing that are neither present in other structural contexts nor clearly addressed by existing law. And unless the Court broadly expands existing doctrine, these problems suggest that most regulated plaintiffs bringing removal claims cannot sue.

In May 2018, Axon, a company that makes and sells policing equipment, announced that it had acquired Vievu, a competitor.[7] About a month later, the FTC initiated an antitrust investigation into the acquisition.[8] For more than eighteen months, Axon cooperated with the FTC's investigative requests.[9] But in late 2019, the FTC made Axon a settlement offer: "rescind its acquisition of Vievu"[10] or face an

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[1] *See, e.g.*, Standard Oil Co. v. FTC, 340 U.S. 231, 246 (1951) (quoting FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759–60 (1945)).

[2] *See, e.g.*, NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters of N.Y. & Vicinity, Loc. Union No. 638, 429 U.S. 507, 522 n.9 (1977) (citing Interstate Com. Comm'n v. Clyde S.S. Co., 181 U.S. 29, 32–33 (1901)).

[3] *See* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1599, 1619 (2018).

[4] *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2050 (2018).

[5] 143 S. Ct. 890 (2023).

[6] *See id.* at 897–98.

[7] Complaint for Declaratory and Injunctive Relief ¶ 24, Axon Enter., Inc. v. FTC, 452 F. Supp. 3d 882 (D. Ariz. 2020) (No. 20-cv-00014) [hereinafter Axon Complaint].

[8] *See id.* ¶ 25.

[9] *See id.* ¶ 26.

[10] *Axon*, 452 F. Supp. 3d at 886.

administrative enforcement action.[11] Axon subsequently filed suit in the U.S. District Court for the District of Arizona on January 3, 2020, invoking the court's general federal question jurisdiction under 28 U.S.C. § 1331.[12] Axon sought to enjoin the imminent enforcement proceeding on various constitutional grounds. First, it argued that the FTC's commissioners wielded the powers of "prosecutor, judge, and jury" in violation of the Fifth Amendment's Due Process Clause.[13] Second, it argued that the FTC's Administrative Law Judges (ALJs) were unconstitutionally insulated from presidential control,[14] since they were removable only by the Merit Systems Protection Board, itself an independent agency whose members were removable only for cause by the President.[15] The FTC responded that the district court lacked jurisdiction over Axon's claims because the Federal Trade Commission Act[16] (FTC Act) created a "comprehensive statutory review scheme" that required Axon to raise its arguments before the agency, with the ability to appeal a final cease-and-desist order to a federal circuit court.[17]

The district court dismissed the action, relying on *Thunder Basin Coal Co. v. Reich*[18] to conclude that the FTC Act implicitly barred the court from exercising federal question jurisdiction over Axon's claims.[19] In *Thunder Basin*, the Supreme Court offered three factors to analyze whether Congress had implicitly precluded district court jurisdiction over a challenge to an agency action[20]: whether the challenger's claims could be "meaningfully addressed" by a circuit court on appellate review,[21] whether the claims were "entirely collateral" to the merits of the enforcement action,[22] and whether they were within the agency's substantive expertise.[23] The district court concluded that all three factors weighed against it having jurisdiction over Axon's suit: First, Axon's claims would ultimately be reviewable in the Ninth Circuit under the FTC Act.[24] Second, Axon's claims were not "wholly collateral" to the "issues to be adjudicated during the administrative proceeding," since Axon could raise its constitutional arguments before the agency.[25] Third, the FTC's "expertise could be brought to bear" on the questions

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[11] *See id.* at 887.
[12] *See* Axon Complaint, *supra* note 7, ¶ 16.
[13] U.S. CONST. amend. V; *Axon*, 452 F. Supp. 3d at 886.
[14] *See id.*
[15] *See Axon*, 143 S. Ct. at 897–98.
[16] 15 U.S.C. §§ 41–58.
[17] Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 4, *Axon*, 452 F. Supp. 3d 882 (No. 20-cv-00014).
[18] 510 U.S. 200 (1994).
[19] *See Axon*, 452 F. Supp. 3d at 886, 888–89.
[20] *Id.* at 893.
[21] *Thunder Basin*, 510 U.S. at 215.
[22] *Id.* at 213 (quoting Mathews v. Eldridge, 424 U.S. 319, 330 (1976)).
[23] *See id.* at 213–15.
[24] *See Axon*, 452 F. Supp. 3d at 895.
[25] *Id.* at 901.

presented, since part of Axon's suit hinged on its contention that it had not violated antitrust law.[26]

The Ninth Circuit affirmed.[27] Writing for the panel, Judge Lee[28] determined that the *Thunder Basin* factors pointed in multiple directions but held that the eventual availability of appellate review, standing alone, was enough to conclude that Congress had impliedly precluded district court jurisdiction over Axon's claims.[29] The fact that the FTC could not declare itself unconstitutional was irrelevant[30]: in *Elgin v. Department of the Treasury*,[31] the Supreme Court had held that "even if the agency cannot decide constitutional claims, a meaningful judicial review exists as long as the party ultimately can appeal to an 'Article III court fully competent to adjudicate'" such claims.[32] In light of *Elgin*, the Ninth Circuit concluded that Axon's claims were "of the type meant to be reviewed within the [FTC Act's] statutory scheme."[33] This remained so even though Axon's constitutional claims were "arguably 'wholly collateral'" to the FTC's enforcement proceeding (in that they were not "*substantively* intertwined with the merits dispute"),[34] and the FTC "lack[ed] agency expertise to resolve [Axon's] constitutional claims."[35] In a partial concurrence and partial dissent,[36] Judge Bumatay agreed that the district court lacked jurisdiction over Axon's separation-of-functions claim,[37] but disagreed that the FTC Act guaranteed "meaningful [judicial] review" of Axon's removal claim.[38]

At the same time that the FTC was investigating Axon in 2019, an accountant named Michelle Cochran sued the SEC in federal district court in Texas, seeking to enjoin an enforcement action against her on the grounds that the SEC's ALJs were unconstitutionally insulated from presidential removal.[39] And almost a year after the Ninth Circuit decided *Axon*, the en banc Fifth Circuit concluded that the Securities

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[26] *Id.* at 903.

[27] Axon Enter., Inc. v. FTC, 986 F.3d 1173, 1177 (9th Cir. 2021).

[28] Judge Lee was joined by Judge Siler, a Sixth Circuit judge sitting by designation. *Id.* at 1176.

[29] *See id.* at 1187.

[30] *Id.* at 1183.

[31] 567 U.S. 1 (2012).

[32] *Axon*, 986 F.3d at 1183 (quoting *Elgin*, 567 U.S. at 17).

[33] *Id.* at 1181; *see also id.* at 1183.

[34] *Id.* at 1185.

[35] *Id.* at 1186.

[36] *Id.* at 1189 (Bumatay, J., concurring in the judgment in part and dissenting in part).

[37] *See id.* at 1196–97.

[38] *Id.* at 1195–96.

[39] *See* Cochran v. SEC, No. 19-CV-066-A, 2019 WL 1359252, at *1 (N.D. Tex. Mar. 25, 2019). In *Cochran v. SEC*, 969 F.3d 507 (5th Cir. 2020), the SEC brought an enforcement action against Cochran for allegedly failing to comply with auditing standards. *Id.* at 510. After a series of administrative proceedings before an ALJ, Cochran brought her structural removal challenge in the U.S. District Court for the Northern District of Texas. *See Cochran*, 2019 WL 1359252, at *1. The district court held that it lacked jurisdiction under *Thunder Basin*, *id.* at *3, and a Fifth Circuit panel affirmed, *see Cochran*, 969 F.3d at 518.

Exchange Act of 1934[40] (Exchange Act) did not strip the district court of jurisdiction over Cochran's claim.[41]

The Supreme Court granted certiorari in both cases and unanimously held that district courts could hear Axon's and Cochran's claims.[42] Writing for a majority of eight, Justice Kagan[43] concluded that Axon's and Cochran's suits were not "'of the type' Congress thought belonged within a statutory [review] scheme."[44] The Court's 2010 decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[45] Justice Kagan explained, was squarely on point: in that case, the Free Enterprise Fund alleged, inter alia, that the Public Company Accounting Oversight Board's members were improperly insulated from presidential control by two layers of removal protection, precisely the sort of challenge Axon and Cochran brought against the FTC and SEC ALJs, respectively.[46] And the *Free Enterprise* Court, after applying *Thunder Basin*, concluded that those claims "belonged in district court," so it would be "surprising to treat the claims [by Axon and Cochran] differently."[47]

Justice Kagan then walked through the *Thunder Basin* factors. First, she concluded that because of the unique nature of Axon's and Cochran's purported injuries, no "meaningful . . . review" was available absent district court jurisdiction.[48] *Thunder Basin* hinged on a coal company's challenge to an administrative penalty, which "could have [been] remedied" by an appellate court after the fact.[49] But in Axon's and Cochran's structural challenges, the alleged injury was that the regulated entities were being subjected to "an illegitimate proceeding, led by an illegitimate decisionmaker"; appellate review after the fact could "do nothing" to remedy such a harm.[50] Second, Justice Kagan concluded that Axon's and Cochran's claims were collateral to the merits of the enforcement proceedings, since the agencies' constitutionality "ha[d] nothing to do with" whether Axon or Cochran had broken the law.[51] Third, Justice Kagan emphasized that the constitutional challenges at issue were outside the agencies' expertise and "detached from

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[40] 15 U.S.C. §§ 78a–78rr.

[41] Cochran v. SEC, 20 F.4th 194, 212 (5th Cir. 2021).

[42] *Axon*, 143 S. Ct. at 900.

[43] Justice Kagan was joined by Chief Justice Roberts and Justices Thomas, Alito, Sotomayor, Kavanaugh, Barrett, and Jackson.

[44] *Axon*, 143 S. Ct. at 902 (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212 (1994)).

[45] 561 U.S. 477 (2010).

[46] *See Axon*, 143 S. Ct. at 902.

[47] *Id.*

[48] *Id.* at 902–03 (quoting *Thunder Basin*, 510 U.S. at 212–13).

[49] *Id.* at 903.

[50] *Id.* at 903–04.

[51] *Id.* at 904–05.

'considerations of agency policy.'"[52] So the three factors all "point[ed] in the same direction": toward the district courts having jurisdiction.[53]

Justice Thomas concurred.[54] Writing alone, he expressed "grave doubts" about the constitutionality of the so-called "appellate review model" embodied in statutes like the FTC Act and the Exchange Act.[55] Traditionally, the government could not take away "private rights" — like the property rights the FTC and SEC threatened to strip from Axon and Cochran — without "full Article III adjudication."[56] But the political branches could dispose of public rights "at will," including through administrative proceedings.[57] In the early twentieth century, however, the Court began to permit agencies to adjudicate factual questions in the first instance, even where apparently private rights were at stake, with a deferential standard of judicial review on appeal.[58] Justice Thomas expressed a concern that this model might violate Articles II and III.[59]

Justice Gorsuch concurred in the judgment, also writing alone.[60] To him, the cases were easy: § 1331 provided that the "district courts shall have original jurisdiction" over "all civil actions arising under" federal law.[61] And the FTC Act and the Exchange Act did not revoke this jurisdiction.[62] The majority's use of *Thunder Basin* to try and "divine" implied preclusion of § 1331 jurisdiction defied the basic principle that federal courts' jurisdiction is defined by Congress using statutory command, not by federal courts making inferences about congressional intent.[63] Making matters worse, *Thunder Basin* itself was "incoheren[t]."[64] The "better way," argued Justice Gorsuch, would be to jettison *Thunder Basin* and look at the statutes themselves.[65] Both statutes permitted appellate review of final agency actions (cease-and-desist orders and final orders, respectively), and were silent as to structural claims.[66] Thus, the district courts plainly had § 1331 jurisdiction.[67]

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[52] *Id.* at 905 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 (2010)).

[53] *Id.* at 906.

[54] *Id.* (Thomas, J., concurring).

[55] *Id.* at 906, 908.

[56] *Id.* at 907.

[57] *Id.* at 908.

[58] *See id.* at 908–09; *see also* Crowell v. Benson, 285 U.S. 22, 80–81 (1932) (upholding the appellate review model against, inter alia, an Article III challenge).

[59] *See Axon*, 143 S. Ct. at 909–10 (Thomas, J., concurring).

[60] *Id.* at 911 (Gorsuch, J., concurring in the judgment).

[61] *See id.*

[62] *See id.* at 913 (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989)).

[63] *Id.*

[64] *Id.* at 912.

[65] *Id.* at 914.

[66] *See id.* at 914–15.

[67] *See id.* at 911.

Axon will likely open the floodgates to interlocutory challenges to agency structure,[68] leaving lower courts to adjudicate an array of novel constitutional claims. These courts will invariably have to consider whether the subjects of administrative enforcement actions have Article III standing to sue in the first place. The contemporary standing inquiry contains a causation element, which most structural challenges easily satisfy. But a removal challenge is different: an enforcement action brought by an agency whose officials are improperly insulated from removal does not necessarily violate Article II unless the President has tried (and failed) to remove those officials. This issue, coupled with the Court's unusually narrow description of the causation prong of standing in recent cases, suggests that most regulated plaintiffs bringing *Axon* claims that raise Article II removal challenges lack standing to sue unless the Court aggressively expands existing doctrine.

Challenges to executive officials' tenure protections are nothing new. The Constitution is silent as to whether the President has the power to remove subordinates at will, and the issue continues to provoke robust scholarly debate.[69] In recent years, the Court has expressed interest in returning to the baseline set almost a century ago in *Myers v. United States*,[70] in which Chief Justice Taft relied on the unitary executive theory to hold that the President enjoyed a general removal power.[71] In *Free Enterprise*, for example, the Court held that insulating officials with more than one layer of removal protections violated Article II.[72] And in *Seila Law LLC v. Consumer Financial Protection Bureau*,[73] the Court held that an agency headed by a single member protected from at-will removal was similarly unconstitutional.[74] The incompatibility of *Myers* with many modern agency structures,[75] coupled with the Roberts Court's resurgent enthusiasm for the unitary executive,[76] has led regulated entities and individuals like Axon and Cochran to aggressively invoke the removal issue to try and defeat enforcement actions.[77]

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[68] *See* Ronald Mann, *Court Approves Early Challenge to Agency Proceedings*, SCOTUSBLOG (Apr. 14, 2023, 6:05 PM), https://www.scotusblog.com/2023/04/supreme-court-approves-early-challenge-to-federal-agency-proceedings [https://perma.cc/FU4Y-DRS7].

[69] *Compare, e.g.*, Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023), *with* Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404 (2023).

[70] 272 U.S. 52 (1926).

[71] *See id.* at 122, 135.

[72] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010).

[73] 140 S. Ct. 2183 (2020).

[74] *See id.* at 2192.

[75] *See, e.g.*, *Free Enter.*, 561 U.S. at 541 (Breyer, J., dissenting) (approximating forty-eight agencies containing officers insulated by at least two layers of removal protections).

[76] *See generally* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83 (2021).

[77] *Cf. Free Enter.*, 561 U.S. at 544 (Breyer, J., dissenting) (predicting that the majority's ruling would allow regulated entities to challenge the very "existence" of regulators).

To bring a claim in federal court, however, a plaintiff must have standing to sue — a jurisdictional hurdle the Court has linked to Article III's mandate that the federal judiciary hear only "Cases" and "Controversies" between adverse parties.[78] In *Lujan v. Defenders of Wildlife*,[79] the Court explained that the "irreducible constitutional minimum" of standing has three elements: the plaintiff must have suffered an "injury in fact," there must be a "causal connection between the injury and the conduct complained of," and the injury must be "likely" to be "redressed by a favorable [judicial] decision."[80] As Justice Kagan emphasized in *Axon*, the Court's recent case law involving structural challenges to administrative action has made clear that "'being subjected' to 'unconstitutional agency authority'"[81] counts as a "here-and-now injury"[82] sufficient to satisfy the injury-in-fact prong of *Lujan*.[83] Whether such challenges satisfy *Lujan*'s causation prong, however, is less clear.

Start with the typical formulation of causation, which asks whether a link exists between the plaintiff's "injury" and the agency's allegedly unlawful "conduct."[84] In 2021, the Court in *California v. Texas*[85] complicated the picture by suggesting that the relevant inquiry is narrower and hinges on whether the injury is traceable to the challenged "*statutory provision*" rather than the agency's activity writ large.[86] If taken seriously, *California v. Texas* would require regulated entities bringing removal challenges to show that an official's statutory tenure protection caused their injury (most likely because a less insulated official would not have initiated an enforcement proceeding).[87] Under such a test, "the only plaintiffs that could reliably bring" removal challenges are "officers who are fired notwithstanding their tenure protections."[88] The earliest

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78 *See* U.S. CONST. art. III, § 2, cl. 1; Muskrat v. United States, 219 U.S. 346, 357 (1911).

79 504 U.S. 555 (1992).

80 *Id.* at 560–61 (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).

81 *Axon*, 143 S. Ct. at 903 (quoting Brief for Petitioner at 36, *Axon*, 143 S. Ct. 890 (No. 21-86)).

82 *Id.* (quoting Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2196 (2020)).

83 *Seila L.*, 140 S. Ct. at 2196.

84 *See Allen*, 468 U.S. at 757.

85 141 S. Ct. 2104 (2021).

86 *Id.* at 2120 (emphasis added). *California v. Texas* arose after Congress in 2017 zeroed out the Affordable Care Act's tax penalty for individuals who failed to obtain minimum essential coverage. *Id.* at 2112. A group of states challenged the constitutionality of the ACA's minimum essential coverage provision, and the Court concluded that they lacked standing, in part because the asserted injury — increased costs as a result of individuals enrolling in state healthcare programs — was not "fairly traceable" to enforcement of the "'allegedly unlawful' provision of which the [state] plaintiffs complain[ed]." *Id.* at 2119 (quoting *Allen*, 468 U.S. at 751).

87 *See* Josh Blackman, Collins*,* California*, and Standing-Through-Inseverability*, REASON: VOLOKH CONSPIRACY (June 25, 2021, 6:34 PM), https://reason.com/volokh/2021/06/25/collins-california-and-standing-through-inseverability [https://perma.cc/B4LP-RSZE].

88 *Id.* It is worth noting that in 2020, *Seila Law* expressly rejected the notion that plaintiffs in removal cases had to demonstrate but-for causation. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2196 (2020). But *California v. Texas* was decided the following Term, creating uncertainty as to the strength of *Seila Law*'s pronouncement.

removal cases, such as *Myers* and *Humphrey's Executor v. United States*,[89] had precisely this posture: the President tried to fire a tenure-protected official, who contested the removal through a backpay claim.[90] The removal provision made the firing allegedly illegal and so entitled the official to backpay, so the suit would have satisfied *California v. Texas*.[91] On the other hand, removal challenges brought by plaintiffs like Axon and Cochran fail under *California v. Texas*, since it is difficult — or impossible — to prove that an agency official would not have brought an enforcement action absent a statutory tenure protection.[92]

Alternatively, regulated plaintiffs could argue that their injury is being subject to an *unconstitutional* proceeding, and it is the removal restriction that causes the proceeding to be unconstitutional. This circumvents the tension between *California v. Texas* and prior causation cases, since the alleged injury arises from both the agency's "conduct" (the enforcement proceeding) and the statutory tenure protection. But a knottier issue would remain: the mere presence of an unconstitutional removal restriction does not necessarily make an enforcement proceeding unlawful.[93] In *Collins v. Yellen*,[94] a removal challenge brought against the single-member head of the Federal Housing Finance Agency (FHFA), the Court assumed without deciding that the "lawfulness of the agency action turn[ed] on the lawfulness of the removal restriction."[95] In *Seila Law*, the Court established that an investigative demand initiated by an officer improperly insulated from removal was an injury in fact that could be challenged by regulated parties outside the *Myers* and *Humphrey's Executor* context of "contested removal," but did not describe the causation requirements, if any, for such a challenge.[96] And in *Free Enterprise*, standing was not litigated. So the Court has never squarely confronted the relationship between unlawful removal restrictions and ultra vires agency action.

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[89] 295 U.S. 602 (1935).

[90] *See* Blackman, *supra* note 87.

[91] *Id.*

[92] *Id.*

[93] *See* Jack Ferguson, Note, *Severability and Standing Puzzles in the Law of Removal Power*, 98 NOTRE DAME L. REV. 1731, 1752 (2023) ("[I]n removal power cases, the unlawfulness of a removal clause has no bearing on the agency's actions, at least not where the President has not intervened.").

[94] 141 S. Ct. 1761 (2021).

[95] *Id.* at 1791 (Thomas, J., concurring).

[96] *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2196 (2020); *see also Collins*, 141 S. Ct. at 1793 n.5 (Thomas, J., concurring) (arguing that in *Seila Law*, the Court "did not address whether an officer acts unlawfully if protected by an unlawful removal restriction"). After the CFPB declined to defend the judgment in its favor below, the *Seila Law* Court appointed Paul Clement as amicus to litigate this position. Clement raised an array of causation arguments, but they hinged on the fact that "two of the three [CFPB] Directors who have in turn played a role in enforcing [the challenged agency action] were (or now consider themselves to be) removable by the President at will." *Seila L.*, 140 S. Ct. at 2195.

The notion that an agency automatically acts unlawfully "if a removal restriction is unlawful in the abstract"[97] is in deep tension with existing causation case law. In *Clapper v. Amnesty International USA*,[98] for instance, the Court dismissed a suit brought by attorneys who alleged that their conversations with individuals abroad were being surveilled by the government.[99] The Court held that the plaintiffs lacked standing because the alleged injury was premised on an attenuated chain of causal inferences.[100] Removal challenges suffer from the same deficiency. An agency's structure makes its proceedings unlawful if that structure deprives the decisionmaker of the authority to wield executive power.[101] In the removal context (assuming the decisionmaker is lawfully appointed), this requirement would only be met if the President tried to remove the decisionmaker and the decisionmaker ignored the President and continued to adjudicate the proceeding.[102] Then — and only then — would the exercise of executive power be illegitimate; otherwise, the causal chain is too attenuated under *Clapper*.[103]

There are two potential solutions to the ultra vires puzzle, but both require doctrinal innovations that have yet to occur. First, the Court could characterize being subjected to a proceeding before an officer with unlawful tenure protections as a "procedural" injury with a relaxed causation burden.[104] As *Lujan* explained, when an agency's failure to adhere to a legally mandated procedure affects the distinct concrete interests of a regulated entity, that entity can sue "without meeting all the normal standards for redressability and immediacy."[105] On this theory, presidential control over agency personnel is a "procedural requirement" akin to, say, an agency's obligation to prepare an environmental impact statement before licensing construction of a dam.[106] And disregarding this requirement "impair[s]" the plaintiff's "separate concrete interest"[107] in not being subjected to an unlawful enforcement action, relaxing the degree of causation the plaintiff must show. Then again, procedural injuries typically arise when agencies fail to "follow[] proper procedure

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97 *Collins*, 141 S. Ct. at 1789 (Thomas, J., concurring).

98 568 U.S. 398 (2013).

99 *Id.* at 406, 422.

100 *See id.* at 410.

101 *See* William Baude, *Severability First Principles*, 109 VA. L. REV. 1, 39–40 (2023).

102 *See id.* at 40 (noting that the directors of the CFPB in *Seila Law* and the FHFA in *Collins* were "validly appointed under Article II," and thus "validly vested with executive power"); Ferguson, *supra* note 93, at 1752.

103 *See* Ferguson, *supra* note 93, at 1752 (observing that a removal protection "changes nothing about an officer's relationship with private individuals"). In this way, removal challenges are distinct from other structural claims, like Appointments Clause challenges, that directly implicate the agency's authority to act. *See* Baude, *supra* note 101, at 40.

104 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992).

105 *Id.*

106 *See id.* at 572 & n.7 (discussing this example).

107 *Id.* at 572.

as set out in a particular statute," so constitutional removal challenges do not fit neatly within the concept as it is currently understood.[108]

Second, and more aggressively, the Court could expand the unitary executive theory to hold that officers with unlawful tenure protections cannot wield executive power at all. In *Nguyen v. United States*,[109] the Court hinted at this sort of reasoning in the context of a tenure-related structural challenge to an *Article III* proceeding. *Nguyen* vacated the decision of a Ninth Circuit panel consisting of two Article III judges and an Article IV territorial judge sitting by designation.[110] The Court explained that because the Article IV judge lacked life tenure, he lacked "the powers attached" to the position of an Article III judge,[111] which in turn meant that the panel was "improperly constituted" and could not lawfully hear the case in question.[112] The Court could similarly conclude, as Justice Gorsuch wanted to do in *Collins*, that because an executive official's tenure protections make him impermissibly unaccountable to the President, that official cannot exercise any Article II executive power.[113] Such an interpretation effectively collapses the distinction between unlawful appointments and unlawful tenure protections, providing that both implicate the agency's authority to wield power and render any enforcement actions unconstitutional. But it would require a bold extension of existing law.[114]

At bottom, removal challenges lay bare two tensions in the Court's case law related to causation — one between *California v. Texas* and prior precedents, and the other between unlawful removal provisions and ultra vires agency action. *Axon*'s jurisdictional holding may indeed open the floodgates to interlocutory structural challenges to agency proceedings. But unless the Court stretches the concept of procedural injuries to cover removal challenges, or adopts an expansive version of the unitary executive theory, regulated entities like Axon and Cochran appear to lack standing to bring constitutional removal challenges at all. As lower courts adjudicate *Axon* claims, then, they should remain cognizant of the fact that Article III "does not extend the judicial power to every violation of the [C]onstitution."[115]

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[108] Brian J. Gatchel, *Informational and Procedural Standing After* Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENV'T L. 75, 77 n.6 (1995).

[109] 539 U.S. 69 (2003).

[110] *See id.* at 73–74.

[111] *Id.* at 80 (quoting McDowell v. United States, 159 U.S. 596, 601 (1895)).

[112] *Id.* at 82.

[113] *Cf.* Collins v. Yellen, 141 S. Ct. 1761, 1795 (2021) (Gorsuch, J., concurring in part) (arguing that Appointments Clause and removal challenges should be treated equivalently, since "[e]ither way, governmental action is taken by someone erroneously claiming the mantle of executive power — and thus taken with no authority at all"). *But see* Baude, *supra* note 101, at 40 (critiquing Justice Gorsuch for "gloss[ing] over the 'vires' in ultra vires").

[114] *See* Baude, *supra* note 101, at 40 ("We must stretch the ultra vires doctrine some length to get it to cover removals.").

[115] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405 (1821).