

## Recent Challenges to the FTC's Constitutionality

FEBRUARY 2024

tl;dr

**Background:** Created by Congress in 1914, the Federal Trade Commission (FTC) has employed in-house administrative adjudications for more than a century. The agency's constitutionality was challenged early in its existence, and upheld by the U.S. Supreme Court in its 1935 [Humphrey's Executor](#) decision. Federal courts have, in the years since, been hesitant to invalidate an agency that has been functioning without issue for decades.

**But...** Recent rulings in [Seila](#) (2020) and [Axon](#) (2023) have raised questions about the extent to which the Supreme Court would still recognize the agency's legitimacy. In *Seila*, the Court held that *Humphrey's Executor* applies only when an agency "do[es] not wield substantial executive powers." In *Axon*, it held that federal courts can entertain constitutional challenges even while an administrative adjudication is pending.

Such rulings have paved the way for challenges to the FTC's constitutionality. Most notably, Meta filed a [challenge](#) in November 2023 after the FTC sought to use administrative adjudication to modify a 2020 consent decree. [Amgen](#) brought a similar challenge in response to merger proceedings, as did Walmart during anti-fraud [proceedings](#). Six primary arguments have been raised against the FTC's constitutionality.

### KEY TAKEAWAYS

#### FTC COMMISSIONERS ARE INSULATED FROM PRESIDENTIAL REMOVAL

By statute, the president of the United States may remove commissioners of the FTC only "[for inefficiency, neglect of duty, or malfeasance in office.](#)" *Humphrey's Executor* upheld this process, because the FTC was not deemed to exercise executive power.

But the FTC has changed dramatically over the past century. In the 1970s, Congress broadened its authority to [pursue injunctive relief in federal court](#) and to [seek civil penalties](#), which would typically be considered executive functions. The agency now functions primarily as an enforcer of laws, and much more rarely exercises its quasi-judicial and quasi-legislative powers.

In short, there is a question whether the FTC, in its current form and operations, violates the constitutional separation of powers.

#### THE FTC IS BOTH PROSECUTOR AND JUDGE

The FTC's administrative-adjudication process has also raised constitutional questions. FTC staff may, following a preliminary screening, be authorized to investigate a potential violation of the law. That investigation, in turn, can lead commissioners to vote on whether to issue a complaint.

If it is not settled, the complaint is heard by an administrative law judge (ALJ) who, under recently revised agency process, issues a “recommended decision” to the commission. Previously, the ALJ would issue an “initial decision” that would stand unless the FTC or defendant sought review.

The FTC then decides whether to accept, revise, or wholly replace the recommended decision with one of its own. Serving as both a prosecutor and judge may violate the Fifth Amendment’s Due Process Clause.

---

### IMPROPER DELEGATION OF LEGISLATIVE POWER

Congress enabled the FTC to decide whether to pursue adjudication in federal courts or within its own administrative process. But under the Constitution’s nondelegation doctrine, when Congress delegates any of its legislative powers, it must provide an “intelligible principle” for an agency to use that power. Some of the recent challenges argue there is no such principle governing which avenue the FTC pursues, rendering the delegation of powers unconstitutional.

---

### PRIVATE RIGHTS MUST BE ADJUDICATED IN ARTICLE III COURTS

Among the broad powers conferred to the federal courts under Article III, Section 2 of the Constitution is exclusive jurisdiction to adjudicate private rights. But the FTC has been granted authority to hold administrative adjudications that can result in the deprivation of private rights (*e.g.*, deprivation of property). Such proceedings may be unconstitutional.

---

### CIVIL PENALTIES WITHOUT A JURY TRIAL

The Seventh Amendment secures the right to jury trial whenever civil penalties exceed \$20. This typically applies to deprivation of property

rights, as well. But the FTC’s administrative adjudication does not provide for a jury trial.

---

### DISPARATE MERGER-REVIEW PROCESSES

Under the Hart-Scott-Rodino Act, mergers exceeding certain thresholds must be notified to both the U.S. Justice Department (DOJ) and the FTC. The agencies then follow a so-called “clearance” process to determine which will review the transaction. But the process is largely arbitrary, with some matters allocated based on one agency having more relevant experience, and some on a taking-turns basis.

Unlike the FTC, the DOJ can only challenge transactions before Article III courts, rather than in-house administrative proceedings. These alternative procedures have meaningful procedural and substantive differences. If that leads to disparate treatment, it may violate both the Fifth Amendment’s Equal Protection and Due Process clauses.

---

*For more on this issue, see Daniel Gilman’s Law360 piece [“Why Challenges To FTC Authority Are Needed.”](#)*

## CONTACT US



**Nathaniel Harris**  
Nonresident Scholar  
[harrisnathanielj@gmail.com](mailto:harrisnathanielj@gmail.com)



**Daniel J. Gilman**  
Senior Scholar  
[dgilman@laweconcenter.org](mailto:dgilman@laweconcenter.org)

ICLE



International Center  
for Law & Economics