

SITUATING STRUCTURAL CHALLENGES TO AGENCY AUTHORITY WITHIN THE FRAMEWORK OF THE FINALITY PRINCIPLE

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INTRODUCTION

In the upcoming term, the Supreme Court will hear argument in *Cochran v. SEC*,¹ in which the *en banc* Fifth Circuit departed from its sister circuits² to hold that federal courts may entertain constitutional challenges to administrative agency structure even when administrative proceedings are pending. On the one hand, the cognate doctrines of finality³ and implied preclusion⁴ would lead courts to stay their hands and await the outcome of the administrative proceeding to determine whether their intervention is needed. On the other, forcing the litigant to raise the structural claim before an administrative entity that has no power to declare itself unconstitutional seems futile and a waste of the litigant's resources.

In this Essay, I argue that *Cochran* was wrongly decided, critiquing that court's reasoning as well as academic support for its stance.⁵ To stake out that position, I compare judicial review of challenges to agency legitimacy to that of appellate review over analogous challenges in federal district court to the authority of non-Article III judicial officials. Even when litigants challenge the propriety of federal district court orders requiring arbitration or appointment of masters and magistrates, no appeal as of right is allowed. Congress, rather, has directed that all claims be raised together on appeal after a final judgment has been entered. I conclude that the concerns for finality and efficiency that underlie the final judgment rule strongly

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1. 20 F.4th 194 (5th Cir. 2021) (*en banc*). The case is consolidated with *Axon Enter, Inc. v. F.T.C.*, 986 F.3d 1173 (9th Cir. 2021).

2. *See, e.g.*, *Bebo v. SEC*, 799 F.3d 765, 768 (7th Cir. 2015); *Bennett v. SEC*, 844 F.3d 174, 177 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236, 1239–40 (11th Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 14 (D.C. Cir. 2015); *Tilton v. SEC*, 824 F.3d 276, 278–79 (2d Cir. 2016); *Gibson v. SEC*, 795 Fed. App'x. 753 (11th Cir. 2019).

3. 5 U.S.C. § 704. *See, e.g.*, *F.T.C. v. Standard Oil Co.*, 449 U.S. 232 (1980). Although the Administrative Procedure Act does not require exhaustion of remedies, see *Darby v. Cisneros*, 509 U.S. 137 (1993), the doctrine is similar. *See, e.g.*, *McCarthy v. Madigan*, 503 U.S. 140 (1992).

4. *See, e.g.*, *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984).

5. For an argument defending *Cochran*, see Linda D. Jellum, *The SEC's Fight to Stop District Courts from Declaring Its Hearings Unconstitutional*, (forthcoming *Texas L. Rev.* 2022), <https://ssrn.com/abstract=4041454>. The article focuses on application of the *Thunder Basin* factors, *see infra*, text accompanying note 35, which viewed in isolation, plausibly supports the court. The wider context and deeply embedded norm of delaying review of nonfinal orders is not considered. *See also* Adam M. Katz, Note, *Eventual Judicial Review*, 118 *COLUM. L. REV.* 1139 (2018) (arguing in favor of judicial review of comparable challenges to agency structure).

militate holding off judicial review until the administrative agency concludes its proceeding.

I

In *Cochran*, the SEC brought an enforcement action against an accountant, Michelle Cochran, asserting that she conducted audits out of compliance with SEC standards. The Administrative Law Judge (ALJ) assigned to the case ruled against her, but in light of the intervening Supreme Court decision in *Lucia v. SEC*,⁶ holding that SEC ALJs are inferior officers, the SEC granted her a new hearing before a different ALJ who was appointed in conformance with Article II of the Constitution. She then brought suit in district court, asserting that, not only had the initial ALJ been improperly appointed, but that both ALJs' protection from at-will removal by the SEC violated Article II in diluting the President's power to coordinate agency action via the removal authority.

The *Cochran* court inquired whether the constitutional claim was subject to implied preclusion in light of Congress's delegation to the SEC of the power to adjudicate enforcement claims and its concomitant decision to lodge review of such agency determinations in the courts of appeals.⁷ It rejected the implied preclusion claim for a number of reasons, principally because the constitutional challenge was collateral to the enforcement proceeding and because the SEC lacked the authority to grant the relief requested—"Cochran's removal power claim is outside the SEC's expertise."⁸ The court stated further that, to the extent the harm identified can be characterized as being subject to an unconstitutional proceeding, no remedy other than immediate Article III court review was possible to avoid the harm.⁹ In other words, by raising the claim during the administrative proceeding, Cochran might prevent others from having to undergo an unconstitutional proceeding if she prevailed but for her, the victory would be pyrrhic. And, if she won on grounds based on the SEC charges against her, judicial review of the important structural claim would be unavailable.¹⁰ The dissent lamented the majority's failure to follow precedent¹¹ and retorted that "[m]ultiple layers of unsuccessful pre-enforcement judicial review will be costly to the parties and the courts while substantially delaying the agency proceeding."¹² The *Cochran* court remanded the case to the district court for resolution of the removal issue.¹³

When Congress delegates the power to an agency such as the SEC, Federal Trade Commission (FTC), or Commodity Futures Trading Commission (CFTC) to preside over enforcement claims and, at the same time, provides a path to judicial review,

6. 138 S. Ct. 2044 (2018).

7. 15 U.S.C. § 78y(a)(1).

8. *Cochran v. SEC*, 20 F.4th 194, 207 (5th Cir. 2021).

9. *Id.* at 212.

10. *Id.* at 208 n.12.

11. *Id.* at 236 (Costa, J., dissenting).

12. *Id.* at 249.

13. The court would address the removal issue in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), holding that ALJs in independent agencies must be removable at will. *See infra*, note 82.

courts have long held that only final agency action is reviewable in courts.¹⁴ Nothing is unique about the administrative structure Congress established for SEC enforcement actions. Courts in the past have assumed that Congress, in creating such an administrative scheme, intended courts to stay their hand until after the administrative proceedings finalized.¹⁵ Courts have deployed related administrative law doctrines to that end.

Consider, for instance, the Supreme Court's decision in *F.T.C. v. Standard Oil Company*,¹⁶ which addressed the doctrine of finality¹⁷ in the Administrative Procedure Act (APA).¹⁸ There, Standard Oil sued in court to stop an FTC proceeding immediately after the FTC had filed a complaint. Standard Oil argued that the FTC had no cause to investigate its activities, that the complaint responded rather to public frustration during the Oil Embargo, and that the challenge would be lost after the proceedings unfolded because either the FTC would find in its favor or, if against it, the question would be whether the FTC's decision on the merits was sound, not whether the FTC initially had cause to investigate it. The Court found against justiciability on the ground that filing a complaint did not represent "final" agency action under the APA.¹⁹ It recognized that a refusal to hear the claim might result in needless expenditure of time and that the original claim might never be resolved. Nonetheless, the Court stressed that immediate judicial review is not available for those litigants who can point only to the "expense and disruption of defending [themselves] in protracted adjudicatory proceedings."²⁰ Such inconveniences are simply "part of the social burden of living under government."²¹ Litigation-based harm is insufficient to justify immediate review. And, the fact that the claim might never be heard also did not militate to the contrary.²²

Indeed, Congress through the APA seemingly required firms and individuals subject to agency enforcement to seek review only *after* the agency reaches a final decision. The APA provides that "[a]gency action made reviewable by statute and final agency action . . . are subject to judicial review."²³ Moreover, "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."²⁴ Thus, Congress contemplated that, as with the final judgment rule,²⁵ only final agency decisions could be subject to judicial review.

14. *Whitney Nat. Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965).

15. In that respect, the doctrine of implied preclusion and exhaustion of remedies converge. *See Air Espana v. Brien*, 165 F.3d 148 (2d Cir. 1999) (withholding judicial review once administrative review process was initiated).

16. 449 U.S. 232 (1980).

17. 5 U.S.C. § 704.

18. 5 U.S.C. § 501.

19. *Standard Oil Company*, 449 U.S. at 243–44.

20. *Id.* at 244.

21. *Id.*

22. *Id.*

23. 5 U.S.C. § 704.

24. *Id.*

25. 28 U.S.C. § 1291. *See generally* Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809 (2018).

The D.C. Circuit relied in part on *F.T.C. v. Standard Oil Co.* in dismissing a separation of powers challenge to the FTC filed upon issuance of a complaint in *Ticor Title Insurance Co. v. F.T.C.*²⁶ The claim, similar to that in *Cochran*, alleged that the FTC was unconstitutionally structured because the President did not wield sufficient supervisory authority over the independent members of the FTC. Although each member of the panel used different reasoning, the three judges concurred that the structural challenge, albeit collateral to the unlawful trade practice proceeding, should not be decided until after the proceeding unfolded. Even though the FTC lacked the authority to deem itself unconstitutional, the court held that Ticor had to submit itself to the costs of the proceeding before obtaining judicial review. Judge Williams reasoned that:

[E]ven if we accept the dubious proposition that unconstitutional burdens are *ipso facto* 'heavier' than those of statutory illegality, the constitutional dimension of appellants' burden entails a concern that militates powerfully against immediate review: the 'fundamental rule of judicial restraint,' forbidding resolution of constitutional questions before it is necessary to decide them.²⁷

Judge Edwards, for his part, stressed the "policy [against] rendering judgment on the constitutionality of proceedings *while* the proceedings themselves are going on."²⁸ He stated that, even when the constitutional challenge can be resolved without the benefit of agency factfinding or expertise, courts should stay their hand to "discourage the 'frequent and deliberate flouting of administrative processes' that might 'weaken the effectiveness of an agency by encouraging people to ignore its procedures.'"²⁹ He summarized that courts should be "'loath to interfere' with ongoing administrative proceedings, even where plaintiffs challenge the very constitutionality of those proceedings."³⁰

The Supreme Court bolstered its insistence on finality through elaboration of the implied preclusion doctrine. In *Block v. Community Nutrition Institute*, the Court held that Congress implicitly precluded judicial review when it created a detailed administrative review structure to permit challenges to milk marketing orders by milk handlers.³¹ The Court reasoned that permitting consumers to obtain judicial review directly, while requiring handlers of the milk to use the congressionally created administrative structure, would frustrate the very purpose of the congressional scheme, which in part was to ensure that the agency ruled on challenges prior to judicial review.³² The Court posited that Congress, in creating detailed administrative review structures, intended that affected parties channel any

26. 814 F.2d 731 (D.C. Cir. 1987).

27. *Id.* at 748 (emphasis in original).

28. *Id.* at 733 (emphasis in original) (citing *Hastings v. Jud. Conf. of the U.S.*, 770 F.2d 1093, 1102 (D.C. Cir. 1985)).

29. *Id.* at 740. *See also* *Rosenthal & Co. v. Bagley*, 581 F.2d 1258 (7th Cir. 1978) (dismissing similar collateral constitutional challenges on exhaustion grounds).

30. *Ticor*, 814 F.2d at 738 (citing *Hastings*, 770 F.2d at 1102).

31. 467 U.S. 340 (1984).

32. *Id.* at 352.

legal challenges first through the administrative tribunal before obtaining judicial review.

The Court elaborated on that approach in *Thunder Basin Coal Company v. Reich*, adding gloss on the statutory interpretation question of when to imply preclusion.³³ The Court considered three factors: (1) whether “a finding of preclusion could foreclose all meaningful judicial review”; (2) whether the claims were “wholly “collateral” to a statute’s review provisions”; and (3) whether the claims were “outside the agency’s expertise” to consider if an intent to preclude review is discernable in the statute.³⁴ The second and third factors at first glance opened the agency to claims such as those in *Ticor* and *Cochran*. In both cases, the challenge to agency structure was collateral to the claims that would be raised in an administrative review proceeding, and the claims were outside the agency’s expertise. Yet, in *Thunder Basin* itself, the Court held that jurisdiction over statutory and constitutional claims outside the agency’s authority to resolve were precluded in light of the detailed statutory scheme for reviewing administrative orders under the Federal Mine Safety and Health Act,³⁵ which is structured much like the SEC Act at stake in *Cochran*. To the Court, the interest in the integrity of the administrative process prevailed, as long as judicial review ultimately could be attained. The first factor, in other words, is the most important. The APA, after all, directs that “[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute.”³⁶

The Court later held in *Elgin v. Department of the Treasury*³⁷ that the Civil Service Reform Act evinced Congress’s determination that all claims connected to employee discipline, even if based on constitutional challenges, be raised first through the administrative process. The Court reasoned that whenever the review structure established by Congress manifested a “fairly discernable” intent for such review to be exclusive, litigants must raise constitutional claims in that forum before obtaining judicial review.³⁸ Applying the *Thunder Basin* factors did not change the calculus because the agency designated to resolve employment claims, the Merit Systems Protection Board (MSPB), might still address “preliminary questions unique to the employment context [that could] obviate the need to address the constitutional challenge.”³⁹ The decision suggested that the *Thunder Basin* factors taken alone would not defeat a clear congressional decision to channel claims through an administrative process, as long as judicial review would be available afterward. Admittedly, the *Thunder Basin* factors suggest that the APA’s finality provision is not conclusive in and of itself, but nonetheless the decision retains the strong presumption that Congress intends to preclude judicial review when it channels claims through an administrative process. Furthermore, the analysis in

33. 510 U.S. 200 (1994).

34. *Id.* at 212–13.

35. *Id.* at 207.

36. 5 U.S.C. § 703.

37. *See* 567 U.S. 1 (2012).

38. *Id.* at 9–10. The Court has clarified that it may consider constitutional claims raised after the proceeding has concluded as well. *Carr v. Saul*, 141 S. Ct. 1352 (2021).

39. *Elgin*, 567 U.S. at 22–23.

Thunder Basin preserved the principle articulated by Judge Williams in *Ticor* of the importance of constitutional avoidance.

The *Cochran* court correctly noted that the Supreme Court opened the door to such structural claims—at least to some extent—in *Free Enterprise Fund v. PCAOB*.⁴⁰ There, the Court reached out to entertain a claim challenging (in part) an infringement of the President’s removal authority under Article II *prior* to commencement of a formal administrative process. The Public Company Accounting Oversight Board (PCAOB) had released a report critical of an accounting firm and proceeded to investigate the firm for improper auditing practices. The firm filed suit in federal court, seeking to stop the investigation on the ground that the PCAOB was unconstitutionally structured because members of the PCAOB could only be removed for cause by the SEC, while the SEC members themselves were also insulated from removal by the President except for cause. In other words, the firm argued that inferior officers could not be protected from at-will removal unless their superiors were removable at-will.

The Supreme Court held that review was appropriate. The Court stated that:

Generally, when Congress creates procedures ‘designed to permit agency expertise to be brought to bear on particular problems,’ those procedures ‘are to be exclusive.’ But we presume that Congress does not intend to limit jurisdiction if ‘a finding of preclusion could foreclose all meaningful judicial review’; if the suit is ‘wholly collateral to a statute’s review provisions’; and if the claims are ‘outside the agency’s expertise.’ These considerations point against any limitation on review here.⁴¹

The Court articulated the *Thunder Basin* factors, but held that review was appropriate because, unlike in *Cochran*, it was not clear that an enforcement action would ensue in which the litigant could raise the structural claim. In order otherwise to obtain judicial review, plaintiffs would have had to risk a potentially significant penalty.⁴²

Free Enterprise Fund should be viewed as a limited exception because no administrative proceeding was pending.⁴³ Indeed, the norm for generations recognizes that “[g]enerally, when Congress creates procedures ‘designed to permit agency expertise to be brought to bear on particular problems,’ those procedures ‘are to be exclusive.’”⁴⁴ To read the SEC Act narrowly to require only resolution of claims arising out of the securities provisions in the administrative tribunal would permit immediate resort to court for an indeterminate number of collateral statutory and constitutional challenges, adding burden on the courts and delaying the administrative process.

40. 561 U.S. 477 (2010).

41. *Id.* at 489–90 (citations omitted).

42. *Id.* at 490.

43. *Id.* at 492. Moreover, as a more technical matter, Congress had provided that the PCAOB was not an agency subject to the APA, 15 U.S.C. § 7211(a)–(b), so the *Free Enterprise Fund* precedent is not directly on point given that the APA finality principle was not implicated and the Court never addressed it in its decision.

44. *Free Enterprise Fund*, 561 U.S. at 489 (quoting *Whitney Nat’l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)).

The concern for delay and piecemeal review is far from fanciful. Consider the recent case of *Wirtgen American, Inc. v. United States*.⁴⁵ There, the International Trade Commission (ITC) had banned importation of machines by a construction company that it found had violated a patent. The construction company then attempted to import machines that were slightly modified, but the U.S. Customs and Border Control (“Customs”) denied entry to the redesigned machines. The company: (1) appealed the ITC’s original order that it violated a competitor’s patent to the Federal Circuit; (2) challenged the bar on entry of the modified machines in a proceeding before Customs, which it subsequently appealed to the Court of International Trade; and (3) filed yet another action directly in district court, in part asserting that Customs was unconstitutionally structured. The court, wary of the party’s litigiousness, stated that “[e]ven if Customs lacked the authority to consider such a challenge in the first instance, ‘so long as a court can eventually pass upon the challenge, limits on an agency’s own ability to make definitive pronouncements about a statute’s constitutionality do not preclude requiring the challenge to go through the administrative route.’”⁴⁶ Structural claims are often intertwined with claims on the merits as in *Wirtgen*, and requiring affected parties to bring all claims in one tribunal not only preserves judicial resources, but limits delay. Otherwise, litigation may proceed in several different fora at once.

Indeed, the Supreme Court in a number of recent cases has entertained a structural challenge to an agency’s authority first raised *after* the administrative proceeding concluded. In *Carr v. Saul*,⁴⁷ the Court considered Appointments Clause challenges to an ALJ superintending an enforcement action, and in *NLRB v. Noel Canning*,⁴⁸ it considered a challenge under the Recess Appointment Clause. Withholding judicial review until the enforcement scheme concluded still enables ventilation of important constitutional challenges, albeit once the administrative law claims have been resolved.

II

Cochran’s departure from the norm is even more jarring when contrasting its holding to jurisdictional holdings in closely related contexts outside of administrative law. Although the implied preclusion test is unique to administrative law, the law of finality is not. In federal court litigation, litigants at times seek immediate appellate review to prevent suffering the harm of having to go through an allegedly defective proceeding, as in *Cochran*. Denial of a motion for summary judgment based on separation of powers claims analogous to those raised in *Cochran* is not appealable, even though the error may force the complaining party to undergo the expense and time of a trial before an appeal is possible. Similarly, a party who loses a motion to dismiss on jurisdictional grounds cannot gain an immediate appeal, whether based on the lack of standing or jurisdiction.⁴⁹ And, denials of motions to recuse judges are

45. 443 F. Supp. 3d 198 (D.D.C. 2020).

46. *Id.* at 218 (citation omitted).

47. 141 S. Ct. 1352 (2021).

48. 573 U.S. 513 (2014).

49. *See* *Catlin v. United States*, 324 U.S. 229 (1945) (subject matter jurisdiction); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988).

also not entitled to appeal as of right,⁵⁰ even when the litigant asserts personal bias.⁵¹ The harm in such cases is nearly identical to that in *Cochran*, forcing a party to undergo a proceeding that it claims is unlawful.⁵² Nonetheless, the final judgment rule prevents appellate courts from entertaining such claims as of right.⁵³ The Supreme Court has “declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order.”⁵⁴

Indeed, a close parallel to the administrative enforcement context lies in objections to a district court order to arbitrate a dispute.⁵⁵ Objecting parties cannot obtain judicial review of the order to arbitrate. Comparable to the SEC context, the party in that context is alleging that the order to arbitrate not only is without basis in law, but that undergoing the arbitration exposes the party to the very harm that it seeks to avoid—the cost of an allegedly unwarranted procedure before a non-Article III judge. Moreover, similar to the SEC context, the arbitrator lacks authority to second-guess the court’s order to arbitrate.

Yet, the Supreme Court in *Green Tree Financial Corp- Alabama v. Randolph*⁵⁶ held that no appeal of an order compelling arbitration is appropriate if the lower court stayed the action pending arbitration.⁵⁷ There simply is no final order from which to appeal. For instance, in *ATAC Corp. v. Arthur Treacher’s, Inc.*,⁵⁸ a franchisee sued for failure to comply with a franchise agreement and pursued discovery. After amending its complaint, Arthur Treacher’s filed a counterclaim arguing that the dispute was subject to arbitration based on contract. The franchisee responded that Arthur Treacher’s had defaulted the arbitration claim.⁵⁹ The district court agreed with Arthur Treacher’s, ordered arbitration, and retained jurisdiction to determine if other relief such as discovery sanctions would be appropriate after the arbitration. The franchisee immediately appealed, contesting the district court’s conclusion that arbitration was appropriate in the context. The Sixth Circuit dismissed the franchisee’s appeal. Even if the very evil to be avoided is the arbitration itself, as long as jurisdiction is retained in the district court pending arbitration, then no appeal of the order to arbitrate is permitted.⁶⁰ Similarly, in *Preferred Care of Delaware v. Estate of Hopkins*,⁶¹ the court of appeals dismissed an appeal of an order compelling

50. See *Kellogg v. Watts Guerra LLP*, 41 F.4th 1246 (10th Cir. 2022); *City of Pittsburgh v. Simmons*, 729 F.2d 953 (3d Cir. 1984); *In re Roldan-Zapata*, 872 F.2d 18 (2d Cir. 1989).

51. See, e.g., *Kellogg*, *supra* note 50; *Albert v. U.S. Dist. Ct.*, 283 F.2d 61 (6th Cir. 1960).

52. *Digit. Equip. Corp. v. DeskTop Direct*, 511 U.S. 863, 869 (1994) (holding that the final judgment rule applies even when defendant asserts a “right not to stand trial altogether”).

53. Irreparable harm is rarely the lynchpin for an immediate appeal. Protestations of burdensome discovery typically are insufficient as are claims for erroneously denying a motion to change venue. See generally Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175 (2001).

54. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989).

55. Orders denying requests to arbitrate are appealable under 9 U.S.C. § 16.

56. 531 U.S. 79 (2000).

57. *Id.* at 87 n.2.

58. 280 F.3d 1091 (6th Cir. 2002).

59. *Id.* at 1094.

60. See also *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002).

61. 845 F.3d 765 (6th Cir. 2017).

arbitration because the Federal Arbitration Act “does not suspend the final-judgment rule”⁶² notwithstanding that the appeal in that case was based on unconscionability.⁶³

Reference to non-Article III adjudicators also arises with respect to special masters under Fed. R. Civ. P. 53 and magistrates under 28 U.S.C. § 636(b). In such contexts, district courts refer issues requiring examination or monitoring to masters⁶⁴ and pretrial issues such as discovery to magistrates,⁶⁵ subject to limited review by the district courts. Parties have objected to such references on numerous grounds, at times contesting the constitutional legitimacy of the reference.⁶⁶ To provide a striking example, in *NORML v. Mullen*,⁶⁷ the United States objected to a district court’s appointment of a special master under Fed. R. Civ. P. 53 to monitor the federal government’s compliance with a wide-ranging decree that the government respect the rights of California landowners whom they suspected of, at the time, illegally growing marijuana. The district court had held that the federal government, along with state law enforcement agencies, had violated the Fourth Amendment rights of growers through warrantless aerial searches and seizures. Accordingly, the court enjoined the defendants from violating the landowners’ Fourth Amendment rights in the future. Thereafter, landowners alleged continuing violations and sought a contempt citation. Although the court found no evidence that the federal government intentionally violated the decree, there was evidence of negligence. The court subsequently appointed a master under Fed. R. Civ. P. 53 to oversee compliance with its order, and directed that the master have the right to learn of aerial surveillance ahead of time, to be present during such surveillance, and to be apprised of relevant briefings to the joint federal-state law enforcement task force combatting illegal marijuana growing. The federal government immediately appealed, arguing that the district court’s reference transformed the master into an investigator, at odds with the judicial role. And, there would be no way to avoid the separation of powers injury it alleged unless an immediate appeal was available. Despite the potentially wide-ranging impact on federal and state law enforcement, the Ninth Circuit held

62. *Id.* at 768.

63. *See Preferred Care of Del., Inc. v. Estate of Hopkins*, No. 5:15-CV-00191-GNS-LLK, 2016 U.S. Dist. LEXIS 81620, at *1 (W.D. Ky. June 23, 2016). *See also Corion Corp. v. Chen*, 964 F.2d 55 (1st Cir. 1992).

64. *See, e.g., Mississippi v. Arkansas*, 415 U.S. 289 (1974); *La Buy v. Howes*, 352 U.S. 249 (1957).

65. *See generally Gomez v. United States*, 490 U.S. 858 (1989); *Mathews v. Weber*, 423 U.S. 261 (1976).

66. Indeed, in *Ford v. Estelle*, 740 F.2d 374 (5th Cir. 1984), both parties objected to reference to a civil rights case to a magistrate for trial, arguing that such a reference was in violation of Article III. In light of the lack of an appeal route, the parties were forced to proceed to trial before the magistrate, whose decision was later vacated by the Fifth Circuit. *Id.* at 380–81. *See also Fiedler v. Wells Fargo Bank*, No. 18-13441-J, 2018 U.S. App. LEXIS 30205, at *1 (11th Cir. Oct. 25, 2018) (objection to reference to magistrate not immediately appealable); *Reaves v. South Carolina*, 198 F.App’x 306 (4th Cir. 2006) (same).

67. 828 F.2d 536 (9th Cir. 1987).

that no appeal could be taken.⁶⁸ Thus, even in the face of a reference that arguably violated separation of powers principles, an appeal was not available.⁶⁹

To be sure, in egregious cases, mandamus is permitted in federal court⁷⁰ to challenge a non-final district court order, but is rarely used because it is “an extraordinary remedy, to be reserved for extraordinary situations.”⁷¹ Courts typically balance several factors in assessing whether mandamus is appropriate, such as whether the party seeking the writ has no other adequate means (e.g., a direct appeal) to attain the relief he or she desires; whether the party will be damaged or prejudiced in a way not correctable on appeal; whether the error is clearly erroneous as a matter of law; and finally, whether the district court’s order is an oft-repeated error, or manifests a persistent disregard of the federal rules.⁷² Not all factors will be present in any given factual context, but mandamus review is available in an exceptional case despite the lack of a final judgment. Thus, in egregious cases, appellate courts will consider a trial court judge’s refusal to recuse him or herself, but no appeal as of right is allowed.

In addition to mandamus, a discretionary appeal is possible under 28 U.S.C. § 1292(b) if the district court certifies that its interlocutory ruling “involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” For cases turning on issues of standing or jurisdiction, certification under § 1292(b) is possible. Even then, an appellate court need not accept the certification.

In short, claims such as that in *Cochran* challenging the legitimacy of the tribunal are not uncommon outside of the administrative law context, and the losing party generally must await the outcome of the trial court proceeding before lodging an appeal.⁷³ And, in contrast to the mandamus paradigm, *Cochran* permitted review

68. *Id.* at 541. The court also denied mandamus because, while the district court’s reference to the master may have been wrong, it was not clearly wrong—there was no prior authority conditioning appointment of a master only upon a voluntary violation of a district court injunction.

69. Similarly, the federal government could not appeal as of right the district court’s order appointing a master to sift through the documents seized from former President Trump’s Mar-a-Lago estate. *Trump v. United States*, No. 22-81294, 2022 U.S. Dist. LEXIS 159738, at *1 (S.D. Fla. Sept. 5, 2022). The government could appeal the injunctive aspects of the Order, but not the appointment of a master itself, despite the separation of powers issues at stake.

70. The mandamus remedy has been codified in 28 U.S.C. § 1651(a).

71. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). For instance, although litigants seeking recusal cannot gain an immediate appeal, in egregious cases they can pursue mandamus. *See, e.g., In re Hatcher*, 150 F.3d 631 (7th Cir. 1998) (no immediate review of appeal from judge’s refusal to recuse himself from the case); *In re Antar*, 71 F.3d 97 (3d Cir. 1995) (same). *See also* 28 U.S.C. § 1291.

72. The Supreme Court has focused on the first three factors, *see, e.g., Cheney v. U.S. District Court*, 542 U.S. 367, 380–81 (2004), while the lower courts have considered the final one, *see, e.g., United States v. U.S. District Court*, 864 F.3d 830, 834 (9th Cir. 2018).

73. District court remands to administrative agencies also are not appealable. *N.C. Fisheries Ass’n v. Gutierrez*, 550 F.3d 16, 19 (D.C. Cir. 2008); *Sierra Club v. USDA*, 716 F.3d 653, 656 (D.C. Cir. 2013). An exception arises, however, when it is the agency seeking appeal because the agency would have no right to appeal if it subsequently prevailed at the

even where the issue at stake—the stature of ALJs—was not clearcut, and when similar claims had been rejected by a number of courts previously.⁷⁴ Given that ALJs had presided over comparable hearings for seventy-five years, any argument that the constitutional right asserted for greater presidential superintendence under Article II was clear seems far-fetched. Parties, whether individuals, businesses, or the government, must expend the resources and time to litigate before the judicial tribunal they assert is illegitimate, prior to obtaining judicial review of that very claim, and, in turn, the doctrine of finality preserves the principle of constitutional avoidance.

This is not to suggest that a party subject to a runaway administrative agency should be without a remedy. In considering the mandamus remedy again, several courts have recognized that mandamus is available to correct ongoing abuses of discretion by an administrative agency when other relief would be inadequate as a remedy.⁷⁵ Thus, a safety valve exists when agencies act contrary to clearly established norms.

To review, the question underlying *Cochran* is whether Congress intended to preclude judicial review of challenges to an ongoing administrative enforcement action until the enforcement action is resolved. Congressional intent with respect to barring immediate appeal from interlocutory orders entered by trial courts is telling. Courts in the United States have long predicated appeal on a final judgment,⁷⁶ and the Supreme Court enforced that rule rigorously in the period just before Congress's enactment of the APA in 1946, holding that appeal can only be pursued from an order that “ends the litigation on the merits—and leaves nothing for the court to do but execute the judgment.”⁷⁷ The finality principle enacted in the APA must be viewed within that framework. Indeed, the Court only articulated the collateral order exception in *Cohen v. Beneficial Industrial Loan Corp.*⁷⁸ after Congress's passage of the APA. When Congress embraced the finality principle in the APA, it implicitly precluded interlocutory challenges raised after the specialized administrative proceedings commenced. Otherwise, as in *Cochran* and *Wirtgen*, piecemeal review can result in an inefficient and arguably unwise use of judicial resources and delay the administrative process from concluding, one way or the other.

That the *en banc* court in *Cochran* departed so markedly from the norm against piecemeal review may well have arisen from skepticism about the administrative

administrative hearing. *See* *Alsea Valley All. v. Dep't of Com.*, 358 F.3d 1181, 1184 (9th Cir. 2004).

74. *See* *Calcutt v. FDIC*, 37 F.4th 293, 319 (2d Cir. 2022); *Decker Coal v. Pehringer*, 8 F.4th 1123, 1135 (9th Cir. 2021); *Duka v. U.S. SEC.*, 103 F. Supp. 3d 395–96 (S.D.N.Y. 2015). The Court in *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.* explicitly held that it was reserving the question whether a different removal assessment would be appropriate in the context of ALJs. 561 U.S. 477, 507 (2010).

75. *See* *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (mandamus appropriate to require agencies to perform nondiscretionary duties); *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1998) (same); *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319 (9th Cir. 1979) (same).

76. *See* John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 201–02 (1994).

77. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

78. 337 U.S. 541 (1949).

state. In *Cochran*, Judge Oldham in concurrence warned of agencies operating in “a separate, anti-constitutional, and anti-democratic space.”⁷⁹ Moreover, he continued that the very premise of agencies was in part to “eliminate or at least minimize the role of courts in our Constitutional system.”⁸⁰ And, he derisively summarized that the SEC’s argument, in this case, is “a combination of ‘trust us, we’re the experts’ and ‘there will be time for judicial review.’”⁸¹ However, not only have doctrines such as finality and implied preclusion existed for years, we only permit review of objections to references to arbitrators and other non-Article III judicial officials—no less than challenges to administrative agency structure—*after* the proceedings have completed. The normative question is whether we should trust arbitrators and masters more than administrative agencies, but however one comes out on that assessment, Congress has insisted upon finality in all contexts.

Indeed, the *Cochran* decision can be viewed as judicial aggrandizement of legislative power. Congress has established administrative review schemes and then provided for judicial review thereafter. As long as such avenues are open, permitting judicial review earlier not only would bog down the administrative review process, it would counter congressional direction. Moreover, courts have intervened only to review claims based on Article II but not other constitutional claims, let alone those based on statute.⁸² Nothing in the congressional structure created suggests that courts should intervene early to address constitutional claims they deem fundamental as opposed to others. Such a system is imaginable, but Congress has not so specified.

CONCLUSION

No party is eager to expend resources before a tribunal it believes is unlawfully structured. The frustration and expense are lamentable. But, the Supreme Court has often stated that undergoing such costs constitutes the “social burden” of living under government. When Congress determines that judicial review is only available after a final order, challenges to an administrative proceeding should be withheld until the proceeding has run its course, no less than when litigants challenge proceedings before other non-Article III officials, such as arbitrators, masters, and magistrates.

79. *Cochran*, 20 F.4th at 214 (Oldham, J., concurring).

80. *Id.* at 219.

81. *Id.* at 225. Thereafter, the Fifth Circuit in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), reviewed even broader constitutional challenges to SEC enforcement actions in the wake of an SEC finding that George Jarkesy, a hedge fund founder, had engaged in a variety of unlawful business practices. The court ruled for him on several sweeping constitutional grounds, including that the administrative scheme was unconstitutional because—as alleged in *Cochran*—the ALJ was protected from at-will dismissal. *Id.* at 462–65. The court also held that adjudicating securities claims before the SEC violated the Seventh Amendment, *id.* at 454–59, and that the congressional delegation itself violated the nondelegation doctrine, *id.* at 459–62.

82. The *Cochran* court declined to hear the Due Process challenge raised, focusing only on the Article II claim. *Cochran*, 20 F.4th at 211. In contrast, Judge Bumatay, who dissented in part from the Ninth Circuit’s decision in *Axon Enterprises*, would have allowed the district court to hear Axon’s Article II claim and one of its Due Process claims, but not another. 986 F.3d at 1192.

Although Congress might make an exception for “structural” challenges in all contexts, it has not done so. Accordingly, the Supreme Court should stay the course and hold review untimely in *Cochran*.