

High Court Says US Judges Can Hear Attacks On FTC, SEC

By Jess Krochtengel

Law360 (April 14, 2023, 10:20 AM EDT) -- Constitutional challenges to the structure of the U.S. Federal Trade Commission and U.S. Securities and Exchange Commission can be brought in federal court without first going through administrative appeals, the U.S. Supreme Court said Friday.

In a unanimous decision, the Supreme Court sided with a private company and a certified public accountant that filed separate federal lawsuits over the constitutionality of in-house enforcement proceedings by the FTC and SEC. The court rejected the agencies' arguments that their authorizing statutes implicitly strip U.S. district courts of jurisdiction to hear challenges to an agency's constitutionality.

"The ordinary statutory review scheme does not preclude a district court from entertaining these extraordinary claims," the court said in an opinion written by Justice Elena Kagan.

The ruling does not address the merits of the constitutional challenges Axon Enterprise Inc. brought against the FTC and CPA Michelle Cochran brought against the SEC.

But the nature of those claims — attacks that strike at the core of what each agency does and how it operates — is what allows them to be brought directly in district court, rather than going from the administrative appeals process to a circuit court for review.

The claim that an agency's structure or existence itself violates the Constitution is not the type of claim contemplated by Congress in the review scheme it set out in the Securities and Exchange Act and the FTC Act, the court said.

Axon and Cochran are challenging the general power of the agencies themselves, not a specific application of that power, nor are they challenging agency decisions on procedure or evidence, the court noted. That makes their claims collateral to any agency orders or rules that they would otherwise have to challenge through administrative appeals and circuit court review, the court said.

And their claims are outside the agencies' expertise, the court said.

"The commission knows a good deal about competition policy, but nothing special about the separation of powers," the court said, referring to the FTC.

The court cited its 2021 ruling in *Carr v. Saul*, in which it allowed challenges to Social Security

administrative law judges in district court, for the point that "agency adjudications are generally ill suited to address structural constitutional challenges."

Two justices wrote separate concurrences.

Justice Clarence Thomas wrote separately to express "grave doubts" about whether it was ever proper for Congress to give administrative agencies primary authority to review cases that implicate "private rights" — including life, liberty and property. He said executive branch agencies do not have authority under the Constitution to adjudicate such claims, which should instead be heard by federal courts.

Justice Neil Gorsuch laid out a different line of reasoning to reach the conclusion that Axon and Cochran can challenge the agencies' structures in court.

The court analyzed Axon and Cochran's claims using a multifactor test drawn from its 1994 decision in *Thunder Basin Coal Co. v. Reich*, a coal mine labor dispute in which the court required the dispute to go through administrative agency review.

Justice Gorsuch said the court did not need to analyze the Thunder Basin factors because Title 28 of the U.S. Code, Section 1331 already gives district courts original jurisdiction of all civil actions arising under the Constitution or federal laws. Litigants should not be left to guess whether a court will decide whether the Thunder Basin factors shake out to give courts jurisdiction.

"Thunder Basin's throw-it-in-a-blender approach to jurisdiction imposes serious and needless costs on litigants and lower courts alike," Justice Gorsuch wrote.

Friday's decision is likely to expose the already embattled federal agencies to new lines of attack. Recent Supreme Court rulings have pared down the agencies' independence and enforcement tools.

Axon Enterprise became the subject of an FTC antitrust investigation after the police body camera maker bought a competitor, Viewu LLC, in 2018. Axon sued in federal district court the following year, claiming the FTC's in-house administrative proceedings violated its due process and equal protection rights and that the agency's administrative law judge was unconstitutionally protected from removal. The Ninth Circuit upheld the lower court's dismissal of the case on the grounds that the FTC Act "impliedly barred jurisdiction in district court" of such lawsuits.

In the second case, Michelle Cochran, a certified public accountant accused by the SEC of flouting auditing standards, sought to challenge that same scheme at the Wall Street regulator. Cochran won in the Fifth Circuit, setting up the government's appeal that the Securities and Exchange Act similarly stripped the court that heard the case of jurisdiction.

The Ninth Circuit's decision was reversed. The Fifth Circuit's was affirmed. Both were remanded for further proceedings.

"We are thrilled that the Supreme Court has unanimously vindicated Michelle Cochran's right to have her day in court to challenge the constitutionality of the administrative apparatus she has fought for nearly a decade against the SEC," Gregory Garre of Latham & Watkins LLP, a lawyer for Cochran, said Friday.

Another lawyer for Cochran, Peggy Little of the New Civil Liberties Alliance, said in a statement that the

ruling is a "victory for all Americans," especially targets of administrative enforcement actions who seek to question the constitutionality of the proceedings they are facing.

Axon's vice president of litigation, Pam Petersen, said in a statement Friday that the company is "heartened that no justice endorsed the alternative of making parties endure unconstitutional agency action before it can be challenged in court."

"Axon is thrilled with the Supreme Court's unanimous decision today vindicating what we have said all along: threshold constitutional challenges to the FTC's structure and existence belong in federal court where unconstitutional action can be enjoined before it inflicts irreparable harm," Petersen said.

The U.S. Department of Justice did not immediately respond to a request for comment.

The case was argued in November.

Axon Enterprise is represented by its own Pamela B. Petersen and by Paul D. Clement, Erin E. Murphy and Matthew D. Rowen of Clement & Murphy PLLC.

Cochran is represented by Gregory G. Garre, Charles S. Dameron and Blake E. Stafford of Latham & Watkins LLP and by Margaret A. Little, Markham S. Chenoweth, Richard A. Samp, Kara M. Rollins and Russell G. Ryan of New Civil Liberties Alliance.

The FTC and SEC are represented by Malcolm L. Stewart of the Office of the Solicitor General.

The cases are Axon Enterprise Inc. v. FTC, case number 21-86, and SEC v. Cochran, case number 21-1239, in the Supreme Court of the United States.

--Additional reporting by Matthew Perlman. Editing by Alyssa Miller.