

FTC's Existential Threat Inches Closer To Reality

By **Matthew Perlman**

Law360 (April 14, 2023, 9:44 PM EDT) -- The Federal Trade Commission could soon be fighting to save core parts of its enforcement program after a unanimous U.S. Supreme Court ruled Friday that constitutional challenges to the agency can be brought directly to federal court.

The looming threat comes from a majority opinion penned by Justice Elena Kagan that sided with Axon Enterprises Inc. and a certified public accountant, who are challenging the constitutionality of key aspects of the FTC and the U.S. Securities and Exchange Commission.

The agencies contended that federal courts lack jurisdiction to rule on the constitutionality of their actions until after their in-house enforcement proceedings wrap. But the justices disagreed, saying that the constitutional issues "are fundamental, even existential" and that this means they fall outside of the normal review process.

Wayne State University Law School professor Stephen Calkins, a former FTC general counsel, told Law360 on Friday that the question in front of the high court this time around was "pretty simple" but that it sets the table for a battle that's been brewing against administrative agencies generally, and the FTC in particular.

"This is really teeing up the questions the court did not address, as to whether or not there's something that is improper about how the FTC functions, or indeed, its very existence," Calkins said.

Axon contends in its 2020 suit that the FTC's in-house administrative proceedings violate due process and equal protection rights and that the agency's administrative law judge that presides over them is unconstitutionally protected from removal. The law enforcement equipment provider lodged the case the same day the FTC filed an administrative complaint seeking to unwind Axon's completed purchase of body camera supplier Viewu.

The lower court found, and the Ninth Circuit affirmed, that Axon has to go through the FTC's in-house proceedings before it can bring its constitutional claims in federal court.

But the high court's majority opinion on Friday said that even though the FTC Act has a review scheme that allows administrative rulings to be appealed to a federal circuit court after a final decision from the commission, that doesn't mean federal district courts lack jurisdiction to hear claims challenging the structure or existence of the agency.

"Our task today is not to resolve those challenges; rather, it is to decide where they may be heard," the opinion said.

The U.S. Chamber of Commerce was among a flurry of groups that filed amicus briefs with the Supreme Court supporting the position that parties should be able to challenge the constitutionality of administrative agencies before being dragged through the administrative proceedings that they claim are unconstitutional.

Jonathan Urick, associate chief counsel at the U.S. Chamber Litigation Center, told Law360 on Friday that the ruling is a "huge win" for the business community and agency accountability because it ensures that businesses can have their day in court right away. He said Axon is an exception and that most businesses don't have the resources to litigate for years before even having their constitutional arguments heard by a court.

"This decision ensures that they don't have to go through the very unconstitutional procedures that they're trying to challenge," Urick said. "They can immediately challenge those procedures."

Urick said the chamber does have concerns about the constitutional issues raised by Axon, and has expressed them before, but that the first-step is making sure the claims are heard in a "timely, prompt manner that allows for meaningful judicial review."

The American Antitrust Institute was the only group that filed an amicus brief with the justices supporting the government in Axon's case. The group's vice president for legal advocacy, Kathleen W. Bradish, told Law360 on Friday that the high court's ruling is disappointing and said the institute is concerned about potential delays that could be caused by other companies also trying to challenge the FTC's authority.

And the delays will persist, she said, until courts have definitively ruled on the merits of the constitutional challenges.

"In some cases it may mean that that enforcement is undermined if FTC actions are delayed while procedural issues get resolved," she said. "We're very concerned about that."

"The best we can hope for now," Bradish added, "is that it gets resolved quickly on the merits."

Alexander P. Okuliar, co-chair of the global antitrust practice group at Morrison Foerster LLP and a former attorney adviser at the FTC, told Law360 on Friday that he suspects companies will now think more seriously about making these types of constitutional arguments. He said this could give parties leverage over the agency when litigating or trying to negotiate a settlement.

This means the FTC will have to think hard about the companies targeted by a case, the willingness of those companies to make these arguments and how the agency is going to respond.

"That's something that the agency will have to contend with, it will be a serious implication of this ruling," said Okuliar, who's also a former U.S. Department of Justice Antitrust Division official. "In a sense, every time the agency thinks about bringing a challenge to court, they're likely going to have to defend the constitutionality of the agency," he said.

Wayne State University's Calkins contended that this added burden will not deter the FTC from trying to

challenge mergers, particularly in federal court, since Axon's attacks center on the administrative process. But he said the ruling will likely weigh on the commission's enforcement decisions and its assessments of potential settlements, at least for now.

"Eventually we're going to get this resolved one way or another," he said. "I don't really think this will serve as much of a discouragement to the FTC going about its job. I think they'll just shrug and say we need to do the best we can."

It remains to be seen when the merits of Axon's arguments will be fully resolved, but a concurring opinion on Friday from Justice Clarence Thomas indicated how at least one member of the court is likely to view the issues. Thomas joined the majority in full but said he was writing separately because he has "grave doubts" about the constitutional propriety of how administrative agency decisions are reviewed.

When private property rights are at stake, like in the Axon case, he said federal courts should be the ones making decisions.

"By permitting administrative agencies to adjudicate what may be core private rights, the administrative review schemes here raise serious constitutional issues," Thomas wrote.

Axon's arguments against the FTC include that the agency's administrative law judge is unconstitutionally protected from removal, and Calkins said a decision on that prong might not make it to the high court very quickly. He also said it would not mean the end of the agency if it has to change the way its ALJs are appointed.

Another of Axon's arguments, however, challenges the FTC's role as prosecutor and adjudicator in the administrative process since the commissioners vote to bring a case in the first place and then issue a final decision on the matter. Rulings finding that the agency's basic processes are unconstitutional, Calkins said, could carry more urgency because they would upend how the agency operates.

The administrative process is also a key factor that distinguishes the FTC from the DOJ's Antitrust Division, which shares enforcement duties.

"If you have a district court say I hereby order the FTC to never again file an administrative complaint. Well, that's pretty fundamental, so I assume that would get to the Supreme Court pretty quickly," he said.

The Axon ruling is also just the latest setback for the FTC on fundamental issues, following the Supreme Court's 2021 decision in *AMG Capital v. FTC*, where the justices found the commission does not have the authority to seek money for wrongdoing directly in court and must first complete an administrative case.

If courts now find that the FTC's in-house process is unconstitutional, the American Antitrust Institute's Bradish said, it could spur calls for legislative reform.

"Maybe it brings the legislation question to a head," she said.

—Additional reporting by Jess Krochtengel, Jessica Corso and Katie Buehler. Editing by Michael Watanabe.

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