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Industry Emboldened After Justices Galvanize Agency Attacks

By **Jeff Overley**

Law360 (May 17, 2024, 4:59 PM EDT) -- In the year since the U.S. Supreme Court said "extraordinary" and "far-reaching" attacks on administrative enforcers can skip agency tribunals and go straight to federal district court, ambitious challenges to regulatory powers are rapidly gaining traction, and the high court is poised to put them on an even firmer footing.

The new legal avenue opened up in April 2023 when the Supreme Court unanimously sided with a police-equipment seller and a certified public accountant in consolidated cases — Axon Enterprise Inc. v. Federal Trade Commission and U.S. Securities and Exchange Commission v. Cochran — over the constitutionality of in-house enforcement at the agencies.

If the streamlining sounds like small procedural potatoes, the aftermath has shown otherwise. New and audacious lawsuits backed by major corporations and conservative lawyers are forcing numerous agencies into federal courts, and older lawsuits are suddenly surviving the government's longtime position that they should be tossed until adjudication concludes.

Even more importantly, the types of suits eligible for fast-tracking tend to involve grand constitutional theories, and those theories are advancing as the Supreme Court contemplates gutting agency tribunals.

"Axon was a procedural case; it didn't really deal with the substance, but it opens the door to a lot more challenges to administrative adjudication," Mayer Brown LLP partner Andrew J. Pincus told Law360. "And it seems to me that's really an area that the [Supreme] Court hasn't touched significantly but could be changed dramatically."

In the Axon and Cochran cases, Justice Elena Kagan authored the main opinion and repeatedly made clear that the high court was greenlighting "extraordinary" challenges aimed at "the structure or very existence of an agency." Those challenges, Justice Kagan added, consist of "sweeping constitutional claims" that agencies are "wielding authority unconstitutionally in all or a broad swath" of their work, with implications that appear "fundamental, even existential."

Prior to the Axon decision, regulated parties already had a right to review in federal appeals courts after administrative proceedings. But that appellate review is "sharply limited" and "highly deferential" to agency findings, Justice Clarence Thomas noted when concurring in Axon, adding that the FTC had rarely if ever lost an in-house case during the past quarter-century.

"Even the 1972 Miami Dolphins would envy that type of record," Justice Thomas wrote, quoting a

reference to the undefeated NFL team from the Ninth Circuit's opinion in Axon's case.

The Miami Dolphins quote has proved popular during the wave of post-Axon challenges to agency authority. The drugmaker Amgen Inc. used it last year when accusing the FTC of preferring "its own tribunal, where the playing field is tilted significantly in its favor and, as a result, the FTC almost never loses."

Whatever the fairness of agency courts, the right to appellate review after adjudication might seem specious to many parties. Exercising that right often requires enduring interminable adjudication before trying to bankroll big-ticket litigation that encounters formidable resistance from the U.S. Department of Justice.

"How many people can afford to carry a case that far anyway?" Justice Neil Gorsuch asked when concurring in the Axon and Cochran cases, noting that administrative proceedings in the Cochran case had lasted seven years. "Thanks in part to these realities, the bulk of agency cases settle. Aware, too, that few can outlast or outspend the federal government, agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way."

Prior to the Supreme Court's decision, an entity that surmounted all those hurdles might still have struggled to focus a court's attention on constitutional qualms, rather than whatever business activities ignited enforcement in the first place.

"Even once in court, the entity would have to raise its challenge to agency authority alongside the merits and other arguments; the authority argument often got overlooked," Arnold & Porter Kaye Scholer LLP partner Allon Kedem told Law360. "Now, a regulated entity that has a strong authority claim can go straight to court, where the claim will be front and center."

Judging by the blitz of bold cases that have emerged in the year since Axon, quite a few regulated entities apparently believe they have strong claims in that regard.

Mere "Threat of Challenging Agency Authority" Becomes Powerful Tool

The post-Axon offensive has already targeted some of the

Key Anti-Agency Cases

The Supreme Court's 2023 decision in Axon Enterprise v. FTC joined a recent series of administrative law rulings, several more of which are expected in the high court's current term.

- Lucia v. SEC, 17-130 +
- Kisor v. Wilkie, 18-15 +
- Seila Law v. CFPB, 19-7 +
- AMG Capital Management v. FTC, 19-508 +
- U.S. v. Arthrex, 19-1434 +
- Collins v. Yellin, 19-422 +
- West Virginia v. EPA, 20-1530 +
- Axon Enterprise v. FTC, 21-86; SEC v. Cochran, 21-1239 +
- Biden v. Nebraska, 22-506 +
- Danco Laboratories v. Alliance for Hippocratic Medicine, 23-236; FDA v. Alliance for Hippocratic Medicine, 23-235 +
- CFPB v. CFSA, 22-448 +
- SEC v. Jarkesy, 22-859 +
- Loper Bright Enterprises v. Raimondo, 22-451; Relentless Inc. v. Department of Commerce, 22-1219 +
- Corner Post v. Board of Governors of the Federal Reserve System, 22-1008 +

Sources: Court records; Law360 reporting.

most prominent parts of the federal bureaucracy. They include the FTC and the Department of Justice as well as the Financial Industry Regulatory Authority, or FINRA; the National Labor Relations Board, or NLRB; the U.S. Environmental Protection Agency, or EPA; the Federal Energy Regulatory Commission, or FERC; the U.S. Department of Agriculture, or USDA; the National Credit Union Administration, or NCUA; the Consumer Product Safety Commission, or CPSC; and the Federal Deposit Insurance Corporation, or FDIC.

The alphabet soup of agencies has been battling an eclectic assortment of adversaries, including a Tennessee Walking Horse enthusiast, a securities broker-dealer, foes of an Appalachian natural gas pipeline, a seller of baby lounger pillows, a leukemia charity, Louisiana's GOP attorney general, commercial spacecraft juggernaut SpaceX and social media colossus Meta Platforms Inc.

Frank Garrison, an attorney at the libertarian-leaning Pacific Legal Foundation, which has represented challengers in several post-Axon challenges, told Law360 that there are now "more people emboldened to actually assert constitutional rights, whereas you wouldn't have seen that before Axon."

"Now they know that they can go to federal court and vindicate those constitutional principles right away," Garrison said.

Vindication has sometimes proved elusive. The government has prevailed in a number of post-Axon cases, including an anti-pipeline lawsuit against FERC that the Supreme Court sent back to the D.C. Circuit for reconsideration after Axon. In a February opinion, the D.C. Circuit said that "a careful review of Axon" led it to "again conclude that the Natural Gas Act explicitly strips district courts of jurisdiction" to review the matter, prompting the plaintiffs to again petition the Supreme Court.

But Axon has already benefited many challengers. As one example, a Louisiana federal judge in January applied Axon before enjoining an EPA civil rights policy; Louisiana's attorney general challenged the policy in a complaint that said EPA officials had "decided to moonlight as … social justice warriors fixated on race." As another example, a Texas federal judge last year cited the Axon and Cochran cases when rejecting the FDIC's contention that a banking executive's constitutional challenge wasn't ripe.

Despite early successes for agency antagonists, there are still practical impediments to using Axon's expedited pathway. Individuals and smaller entities might lack the greenbacks for attorney fees in litigation against Uncle Sam, and they might lack the appetite for accusing a powerful regulator of egregiously flouting the Constitution.

"Challenging the FTC on constitutional grounds is not a trivial matter, so I think it makes sense that plaintiffs would be large firms with a good deal at stake," International Center for Law and Economics senior scholar Daniel J. Gilman, a former attorney adviser at the FTC who has tracked Axon's fallout, told Law360.

Instead of suing, some parties might look for adjudication leverage in Axon, since it weakened the home-field advantage of agencies with internal tribunals.

"The government and private parties are now on something closer to even footing," Arnold & Porter's Kedem told Law360. "I've even had clients who effectively used the threat of challenging agency authority in court as a way to obtain favorable consideration in administrative proceedings."

Imminent High Court Decision Might Amplify Axon's Impact

Although faces and names vary widely in the post-Axon spree of suits, the legal grievances are less diverse. By and large, they involve constitutional principles — such as separation of powers, due process and jury trial rights — that apply almost universally, raising the prospect that a ruling against one agency could effectively be a ruling against many agencies.

One example of that scenario exists in a case brought by brokerage firm Alpine Securities Corp. against FINRA, a private regulator that reports to the SEC. Alpine sued shortly before Axon, but it has since relied extensively on the decision to battle its potential expulsion from FINRA for allegedly ripping off customers.

The case is now at the D.C. Circuit, where FINRA declared that "this suit poses an existential threat" to public-private partnerships in regulation, and further warned of an "onslaught of copycat challenges that would inevitably follow a decision in Alpine's favor." FINRA has good reasons to be fearful: the D.C. Circuit last year preliminarily enjoined Alpine's expulsion, and one judge wrote that "Alpine has raised a serious argument that FINRA impermissibly exercises significant executive power."

It's no coincidence that the same constitutional claims keep appearing in matters involving different industries and agencies. That overlap stems from how the Supreme Court in Axon carved out a shortcut to litigation. Under Axon, the shortcut is permitted if it's needed to ensure meaningful judicial review, if legal claims are distinct from whatever's being adjudicated, and if the claims fall outside an agency's expertise — factors derived from the high court's 1994 decision in Thunder Basin Coal Co. v. Reich.

Legal claims that can satisfy the so-called Thunder Basin factors tend to be broadly applicable, and for that reason, most of the post-Axon challenges are similar to Axon itself — they boil down to calling certain agency operations constitutionally illegitimate.

Similar to how the FINRA case could reverberate widely, a pending Supreme Court case called SEC v. Jarkesy could affect anti-agency litigation with no connection to the securities markets. Among other things, the Jarkesy case asks if imposing civil penalties via adjudication violates the Seventh Amendment's jury trial right, and prominent companies are eagerly awaiting the high court's answer.

"While Jarkesy involves a different agency, it concerns many of the same constitutional challenges asserted by Meta," the Facebook parent company recently told the D.C. Circuit in litigation against the FTC regarding a privacy settlement.

Elon Musk-owned SpaceX, formally called Space Exploration Technologies Corp., is also hoping to capitalize on Jarkesy as part of its constitutional challenge to the National Labor Relations Board. SpaceX's case is now at the Fifth Circuit, which ruled against the SEC in the Jarkesy case. In a May 1 motion, SpaceX said, "In Jarkesy, this court reaffirmed that the right to trial by jury 'is a fundamental component' of the American legal system."

At November's oral arguments in Jarkesy, conservative justices seemed to be leaning toward striking down the SEC's in-house court system, and they acknowledged the potential for a spillover effect at other agencies.

"Jarkesy is a big one," the Pacific Legal Foundation's Garrison told Law360. "If they get to the jury trial right issue, then I think the administrative state's going to have to take a hard look and reexamine exactly what types of cases can be brought in-house."

One certainty is that things would become even more dire at the beleaguered SEC. The commission already dialed back in-house proceedings after the Supreme Court in 2018 held in Lucia v. SEC that administrative law judges must be formally appointed, not simply hired like typical employees. And the Fifth Circuit relied on Lucia when concluding in the Jarkesy case that for-cause removal protections for administrative law judges are unconstitutional — a conclusion that the Supreme Court is reviewing alongside the jury trial issue.

Although the Jarkesy case followed the traditional process of adjudication followed by appellate review, it illustrates the importance of Axon's holding. The challenger, a hedge fund adviser named George R. Jarkesy Jr., found himself "in the SEC's crosshairs" starting in 2011, was "stripped of his right to a jury trial or to a real [federal] judge," and "endured a serpentine administrative process that finally ended in 2020 with substantial penalties and lifetime bars" from certain securities activities, according to a brief at the Fifth Circuit.

Axon cleared a path that would've saved Jarkesy a decade of administrative proceedings. And if Jarkesy prevails on constitutional claims that are ubiquitous in post-Axon cases, it'll be clear that Axon didn't just help agency critics have their day in court, but rather gave those critics a real shot at winning landmark decisions.

"Axon basically says that you can go to federal court when you have constitutional claims, before you have to go through this long administrative process," Garrison told Law360. "But if the Supreme Court actually rules on the doctrines that people are challenging under Axon, then that's going to provide people relief, quite obviously."

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 Katie Buehler and Jessica Corso. Editing by Robert Rudinger.
