

FRIDAY, FEBRUARY 19, 2021

PERSPECTIVE

9th Circuit reluctantly fends off constitutional challenge to FTC

By James Sigel
and Adam Sorensen

Changing the law through the lower federal courts can be a very slow process. The 9th U.S. Circuit Court of Appeals' recent decision in *Axon v. FTC*, 2021 DJDAR 881 (Jan. 28, 2021), demonstrates one reason why. All three members of the 9th Circuit panel were plainly sympathetic to the plaintiff's argument that various aspects of the Federal Trade Commission's administrative enforcement procedures violate the Constitution. All three also appeared to agree that the plaintiff *should* be able to press those constitutional claims. But in a divided opinion, the panel majority rejected the contention that plaintiff had properly invoked the jurisdiction of the federal courts, reluctantly adhering to binding precedent that, it believed, closed the courthouse doors — at least for now. As *Axon* shows, jurisdictional limits on the power of the courts tend to make efforts to change the status quo all the more daunting.

The case arose after Axon, a manufacturer of body-worn cameras, acquired one of its competitors. The FTC later directed Axon to spin off the competitor, threatening to bring an administrative enforcement action if Axon did not comply. Axon responded by suing the FTC in federal dis-



Shutterstock

All three members of the 9th Circuit panel were plainly sympathetic to the plaintiff's argument that various aspects of the Federal Trade Commission's administrative enforcement procedures violate the Constitution.

trict court. Axon claimed that the FTC's administrative procedures would violate its right to due process — emphasizing, among other things, that the FTC had not lost a case in its own internal proceedings for at least 25 years. Axon further contended that the FTC's structure contravened the separation of powers by insulating the presiding administrative law judges from presidential removal.

The district court dismissed for lack of subject matter jurisdiction, and the divided 9th Circuit panel affirmed. The majority, in an opinion by Judge Kenneth Lee, explained that, under the *Thunder Basin* doctrine (*Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)),

a statutory administrative-review provision may impliedly preclude district-court jurisdiction over any challenge to an agency's enforcement processes. *Thunder Basin*, the court held, precluded Axon's suit against the FTC.

First, the court explained, the statute establishing the FTC contained a “fairly discernible intent” to preclude district court jurisdiction over suits such as Axon's. That was because the statute “provides a detailed overview of how the FTC can issue complaints and carry out administrative proceedings.”

Next, the court addressed the key disputed question: whether Axon could “obtain meaningful judicial review in the stat-

utory scheme.” The majority held it could, reasoning that Axon would eventually be able to seek review of any FTC decision in a federal appellate court. That was the case, the majority explained, even if Axon would be unable to press its constitutional claims during the agency review process. The majority acknowledged that “it makes little sense to force a party to undergo a burdensome administrative proceeding to raise a constitutional challenge against the agency's structure before it can seek review from the court of appeals.” But the panel majority viewed the dissent's contrary contentions as precluded by the Supreme Court's decisions applying *Thunder Basin*. The majority concluded that so long as “there is eventual judicial review,” a party must go through the administrative process.

Finally, the majority addressed two other factors relevant to the jurisdiction-stripping analysis. Axon's claims were not, the court held, “wholly collateral,” as they constituted a “vehicle by which Axon seeks to prevail at the agency level,” thus making them less susceptible to district-court jurisdiction. But on the other hand, the majority continued, Axon's claims were “outside the agency's expertise,” which “weigh[ed] against jurisdiction-stripping.” Ultimately, the court held that it “agreed with the other circuits ... that under

Supreme Court precedent the presence of meaningful judicial review is enough to find that Congress precluded district court jurisdiction over the type of claims that Axon brings.”

Judge Patrick Bumatay dissented in part. He believed the relevant Supreme Court and 9th Circuit decisions establish a “straightforward” principle: “Absent legislative language the contrary, challenges to an agency’s structure, procedures, or existence, rather than to an agency’s adjudication of the merits on an individual case, may be heard by a district court.” Under that standard, he concluded, Axon should be permitted to press its separation-of-powers challenge to the structure of the FTC itself, along with at least some of its due process claims.

Axon illustrates the degree to which precedent and limits on subject matter jurisdiction restrain the ability of the lower federal courts to effect rapid changes in the law. It was apparent that every member

of the panel was sympathetic to Axon. The majority opinion made clear that it viewed Axon’s constitutional claims to be strong, expressly stating that Axon had raised both “substantial questions about whether the FTC’s dual-layered for-cause protection for ALJs violates the President’s removal powers under Article II,” and “legitimate questions about whether the FTC has stacked the deck in its favor in its administrative proceedings.” Indeed, even in rejecting Axon’s jurisdictional arguments, the majority expressed its disagreement with the standard it applied, declaring that if it “were writing on a clean slate, [it] would agree with the dissent.” Yet notwithstanding the dissent’s suggested “structural” challenges exception to *Thunder Basin*, the majority could not see a way to consider Axon’s claims.

Restraints on the jurisdiction and power of the federal courts are often seen as impediments to the advancement of what

might be characterized as more left-leaning legal causes. And certainly, there are some such limits that would seem necessarily to have that effect — the Antiterrorism and Effective Death Penalty Act’s restrictions on state prisoners seeking to challenge their convictions, for example, affect a predictable class of claims. But that is not always the case. The many pro-

cedural hoops through which plaintiffs often need to hop to press a constitutional claim may preclude, say, a Fourth Amendment claim regarding a discriminatory stop, but they may also prevent a claim hoping to make a dent in the administrative state. As *Axon* shows, such doctrines are often a check on judicial action more generally. ■

James Sigel is a partner in Morrison & Foerster’s Appellate and Supreme Court group. **Adam Sorensen** is an associate in Morrison & Foerster’s Appellate and Supreme Court group. Both are editors of *Left Coast Appeals*, leftcoast.mofocom.com, a blog devoted to all things 9th Circuit.

