

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Dec. 27, 2021–Jan. 2, 2022)

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The federal courts issue hundreds of decisions every week in cases involving diverse legal disputes. This Sidebar series selects decisions from the past week that may be of particular interest to federal lawmakers, focusing on orders and decisions of the [Supreme Court](#) and precedential decisions of the courts of appeals for the [thirteen federal circuits](#). Selected cases typically involve the interpretation or validity of federal statutes and regulations, or constitutional issues relevant to Congress’s lawmaking and oversight functions.

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## Decisions of the Supreme Court

No Supreme Court opinions were issued last week, and no new cases were added to the Court’s docket.

## Decisions of the U.S. Courts of Appeals

- **Civil Liability:** The False Claims Act (FCA) not only empowers the federal government to bring claims against those who defraud the United States, but also allows private parties to bring such claims on the government’s behalf and recover a share of the proceeds in *qui tam* actions. The Eleventh Circuit concluded that the FCA does not require the United States to have formally intervened in a *qui tam* action in order to seek dismissal of the action, even when the United States had earlier declined to intervene in the case. Any constraints on the government’s ability to seek dismissal are found outside the FCA. Two members of the three-judge circuit panel joined a concurring opinion observing that this outcome was required by binding circuit precedent recognizing a

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similar principle regarding the government's ability to file a motion to settle a *qui tam* action without first intervening, but argued that this precedent should be overturned by the Eleventh Circuit sitting en banc (*United States v. Republic of Honduras*).

- **Civil Liability:** The Eleventh Circuit held that damages and statutory penalties awarded in a *qui tam* action under the FCA are subject to the Eighth Amendment's prohibition on excessive fines, even if the United States is not a formal party to the case. The court reasoned that *qui tam* actions serve to enforce the United States' interests under the FCA, and the government shares in the proceeds. Still, the circuit court affirmed the verdict and monetary award in the case before it, concluding the award imposed in the *qui tam* action did not violate the Excessive Fines Clause (*Yates v. Pinellas Hematology & Oncology, P.A.*).
- **Communications:** The D.C. Circuit largely rejected challenges to a Federal Communications Commission (FCC) order that opens the 6 gigahertz (GHz) band of radiofrequency spectrum to unlicensed devices (e.g., routers and connected devices like laptops and smartphones), subject to certain safeguards to prevent interference with licensees using the 6 GHz band (e.g., commercial communication providers, public safety operators, and network broadcasters). The panel concluded the petitioners generally failed to provide a basis for questioning the FCC's conclusion that its order's safeguards protect against a significant risk of harmful interference. However, the panel concluded the FCC had not adequately responded to a request by licensed radio and television broadcasters that it reserve a portion of the 6 GHz band for exclusive use by mobile licensees; the court remanded the case to the FCC to provide further explanation on that issue (*AT&T v. FCC*).
- **Immigration:** The First Circuit reviewed a district court's grant of declaratory and injunctive relief to a class of aliens held in immigration custody under 8 U.S.C. § 1226(a), which permits detention of persons during the pendency of removal proceedings, but allows their release on bond or their own recognizance unless otherwise subject to mandatory detention. The panel affirmed the district court's declaratory judgment that those held under § 1226(a) are entitled to a bond hearing at which the government, to support the detainees' continued detention, bears the burden of proving the alien either (1) is a danger to others (by clear and convincing evidence) or (2) is a flight risk (by a preponderance of evidence). However, the divided appellate panel concluded the district court was barred by a different statute, 8 U.S.C. § 1252(f)(1), from granting class-wide injunctive relief, likely meaning such claims would need to be adjudicated on an individual basis (*Brito v. Garland*).
- **Insurance:** In the wake of the Coronavirus Disease 2019 (COVID-19) pandemic, several courts have considered challenges to insurance-claim denials brought by businesses whose properties were closed because of government shutdown orders and other measures to deter the spread of the disease. The Second Circuit joined at least six other circuits in concluding that, under relevant state laws governing insurance claims for "direct physical loss of property," a suspension of operations due to COVID-19-related measures would not give rise to a claim because the suspension was not due to a physical alteration to the covered property (*10012 Holdings, Inc. v. Sentinel Insurance Co.*).
- **International Law:** The D.C. Circuit affirmed a district court's enforcement of a foreign arbitral award against the Ukraine under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which generally requires courts of contracting parties to recognize and enforce commercial arbitration agreements made in the jurisdiction of other contracting parties, subject to limited

- exceptions. The panel rejected various arguments against enforcing the award, including that non-enforcement would be consistent with the New York Convention's recognition that a country may deny enforcement on public policy grounds. Observing that this exception has been construed narrowly to situations where the enforcement would violate a party's most basic notions of morality and justice, the panel held the United States does not have a public policy against enforcing arbitral awards predicated solely on an award's alleged violation of foreign law (*Tafnet v. Ukraine*).
- **Tax:** The Eleventh Circuit reversed a Tax Court order that barred petitioners from carrying over charitable deductions related to the donation of a conservation easement, after rejecting the Commissioner of the Internal Revenue Service's interpretation of the governing regulation, 26 C.F.R. § 1.170A-14(g)(6)(ii), as arbitrary and capricious in violation of the Administrative Procedure Act. The court reached this conclusion because significant comments were not addressed during the notice-and-comment process prior to promulgation of the regulation (*Hewitt v. Commissioner of IRS*).

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