

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Jan. 17–Jan. 23, 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

Last week, the Supreme Court issued a decision in one case for which it heard oral arguments:

- **Criminal Law & Procedure:** In an 8-1 decision, the Supreme Court held that a criminal defendant’s rights under the Sixth Amendment’s Confrontation Clause were violated when state prosecutors introduced statements from an unavailable witness—which were made in a plea allocation in another case—to rebut claims made by the criminal defendant. The witness’s statement was admitted under a state judicial rule allowing for the introduction of otherwise inadmissible evidence when the presiding court deemed it reasonably necessary to correct a misleading impression made by the defendant. The state judicial rule, the Supreme Court held, did not fall under a permitted exception to the Confrontation Clause’s general requirement that a criminal defendant must have a prior opportunity to cross-examine an unavailable witness in order for that witness’s testimony to be admissible (*Hemphill v. New York*).

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The Court also declined, by an 8-1 vote, an application for injunctive relief brought by former President Donald Trump:

- **Separation of Powers:** The Supreme Court denied former President Trump's request to prevent the House Select Committee to Investigate the January 6th Attacks on the U.S. Capitol from obtaining records in the National Archives' custody. The former President brought suit to prevent the National Archives from complying with the Committee's request, asserting some of the requested documents were protected by executive privilege. (President Biden, however, later determined that an invocation of privilege was inappropriate.) Following an adverse D.C. Circuit ruling, former President Trump asked the Supreme Court to prevent disclosure of the contested records pending the Court's review. In a brief unsigned order, the Court declined the former President's request. The Court also stated that because the D.C. Circuit ruled that former President Trump's assertion of privilege would have failed even if he were the incumbent, the circuit court's discussion of when executive privilege claims could properly be asserted by former presidents was non-binding dictum (*Trump v. Thompson*).

The High Court also added another case to its docket:

- **Indian Law:** The Court agreed to review a case from the Tenth Circuit to address whether states lack criminal jurisdiction over non-Indians for actions taken against Indians in "Indian Country" (*Oklahoma v. Castro-Huerta*).

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

Topic headings marked with an asterisk (\*) indicate cases where the appellate court's controlling opinion recognizes a split among the federal appellate courts on a key legal issue resolved in the opinion, contributing to a non-uniform application of the law among the circuits.

- **Bankruptcy:** The Tenth Circuit held that under 11 U.S.C. § 348(f)(1)(A), debtors in bankruptcy proceedings could keep the proceeds from the sale of their home where the sale occurred after they filed a petition for Chapter 13 bankruptcy (which generally allows debtors to maintain their real property while their finances are reorganized), but before they converted to a Chapter 7 bankruptcy (in which debtors' non-exempt assets are liquidated). While observing that its interpretation of § 348(f)(1)(A) might allow some converting debtors to shield the value of sold property from Chapter 7 creditors, the panel noted that other provisions address conversions made in "bad faith" and abusive practices; in any event, the panel's reading adhered to the statute's text (*In re Barrera*).
- **\*Civil Procedure:** The First Circuit considered the function served by the hearing requirement under the False Claims Act (FCA) when the government moves to dismiss a private party's *qui tam* action over that party's objection. (In a *qui tam* action, a private party may bring a claim on the government's behalf against someone who defrauded the United States and recover a share of the proceeds from the action.) The panel observed that appellate courts have taken differing approaches to this issue in light of the FCA's silence as to the nature of the required hearing, the government's burden in seeking dismissal, and factors that should be considered by a district court in reviewing the government's motion to dismiss. The First Circuit held that the government does not bear the burden of justifying its motion to dismiss, but must give reasons for seeking dismissal so that the private party may attempt to convince the government to withdraw its motion. If the government does not withdraw the motion, the district court should grant it unless the private party can show the government is either violating constitutional requirements or perpetuating a fraud on the court (*Borzilleri v. Bayer AG*).

- **Civil Rights:** Affirming a lower court’s ruling allowing plaintiff to pursue his discrimination claim under the Affordable Care Act (ACA), the Sixth Circuit ruled that such claims are subject to the standard, four-year federal statute of limitations. The panel held that although the ACA’s nondiscrimination provision incorporates the enforcement mechanisms of the Rehabilitation Act, the ACA does not incorporate that Act’s statute-of-limitations provisions, under which the plaintiff’s claim would have been untimely (*Tomei v. Parkwest Medical Center*).
- **\*Criminal Law & Procedure:** Splitting from two other circuits, a divided Fourth Circuit panel held that the U.S. Sentencing Commission’s commentary to the Sentencing Guidelines, even on matters where the relevant Guideline is unambiguous, is authoritative and binding on courts unless the commentary is inconsistent with law or the Guideline itself. The majority held that the Supreme Court’s 2019 decision in *Kisor v. Wilkie*, where the Court ruled that an agency’s interpretation of its own rules may be entitled to deference only when those rules are ambiguous, was not controlling in the Guidelines’ context, and that the High Court’s earlier decision in *Stinson v. United States* on the authoritative weight given to Guidelines commentary was controlling. Of note, in partial dissent, one panelist observed that the majority’s ruling on the inapplicability of *Kisor* conflicts with the assessment of another Fourth Circuit panel in a case decided a few weeks earlier (*United States v. Moses*).
- **Criminal Law & Procedure:** The Ninth Circuit joined several other circuits in recognizing that aiding and abetting an offense that is a “crime of violence” under 18 U.S.C. § 924(c) is likewise considered a “crime of violence,” resulting in the offender being subject to a mandatory minimum sentence and potentially facing other legal consequences (*Young v. United States*).
- **Environmental Law:** The D.C. Circuit remanded to the Department of Energy (DOE) a final rule that set boiler efficiency standards higher than the recognized industry standards. Although the Energy and Conservation Act permits DOE to set higher standards if certain evidentiary requirements are met, the panel held that the standard was not satisfied here. Rather than vacating the rule, the court remanded it to the agency with instructions to take appropriate remedial action within 90 days (*American Public Gas Ass’n v. DOE*).
- **Firearms:** A Ninth Circuit panel ruled that a county’s public health orders in the early months of the Coronavirus Disease 19 (COVID-19) pandemic that mandated closure of non-essential businesses—including local gun stores and firing ranges—for a period lasting 48 days violated the Second Amendment. The panel concluded that the orders were subject to strict scrutiny because they severely burdened a core Second Amendment protection, and the government failed to sustain its burden under this standard of showing the orders were the least restrictive means to further the government’s interest. (The panel also ruled that the orders would not have survived intermediate scrutiny.) As a result, the panel reversed the lower court’s dismissal of plaintiffs’ civil suit against the county for failing to state a claim, and remanded the case for further proceedings (*McDougall v. County of Ventura*). (Relying on their decision in this case, the panel also issued a **non-precedential ruling** that a similar COVID-19 order by another county, which resulted in an 11-day closure of nonessential businesses, also violated the Second Amendment.)
- **International Law:** The First Circuit vacated appellants’ convictions under the Maritime Drug Law Enforcement Act (MDLEA), with the majority holding that an Act’s extension of criminal jurisdiction to “vessels without nationality” on the high seas exceeded Congress’s constitutional authority. The majority held that Congress’s constitutional

- power to “define and punish . . . Felonies committed on the high Seas,” is limited by international law principles that served as the backdrop to the Framers’ drafting of the Define and Punish Clause, including those limiting nations’ jurisdiction over foreign nationals on foreign vessels. Because the MDEA’s definition of “vessels without nationality” included foreign ships that would not be considered stateless under international law, the panel majority held that Congress exceeded its constitutional authority (*United States v. Davila-Reyes*).
- **Veterans:** The Federal Circuit agreed with the Court of Appeals for Veterans Claims that 38 U.S.C. § 5313, which provides for the reduction of veterans’ disability compensation benefits during a period of a beneficiary’s felony incarceration, does not require the Department of Veterans Affairs to make a reduction during the actual period of imprisonment. Instead, the agency may permissibly make a post-incarceration decision to reduce benefits retroactively for the period of incarceration (*Gurley v. McDonough*).
- **Veterans:** The Federal Circuit upheld the Court of Federal Claims’ dismissal of a challenge to the validity of an action taken by a board of correction of military records, where it was argued, in part, that the board’s inclusion of retired servicemembers rendered its action invalid. Under 10 U.S.C. § 1552(a)(1), a board of correction of records must be “civilians of the executive part” of the relevant military department. The circuit court held that “civilians” under § 1552(a)(1) may include former or retired members of the military who serve in the civilian arm of the military organization at issue (*Nicely v. United States*).

## Author Information

Michael John Garcia  
Section Research Manager

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