

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Feb. 28–Mar. 6, 2022)

March 7, 2022

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.

Some of the cases identified in this Sidebar, or the legal questions they address, are examined in other CRS general distribution products. Members of Congress and congressional staff may [click here](#) to subscribe to the *CRS Legal Update* and receive regular notifications of new products and upcoming seminars by CRS attorneys.

Decisions of the Supreme Court

Last week, the Supreme Court issued decisions in four cases for which it heard oral arguments:

- **Abortion:** In an 8-1 ruling, the Court held that the Sixth Circuit erred in not permitting the Kentucky attorney general to intervene in a legal challenge to a Kentucky law restricting abortion access, after other state officials (including the attorney general’s predecessor) declined to defend the law following adverse rulings (*Cameron v. EMW Women’s Surgical Center, P.S.C.*).
- **Criminal Law & Procedure:** In a 6-3 decision, the Court reinstated the death penalty for Dzhokhar Tsarnaev, concluding that the First Circuit improperly vacated his capital sentences for numerous crimes arising from his participation in the 2013 Boston Marathon bombing (*United States v. Tsarnaev*).
- **National Security:** A fractured majority of Justices concluded the United States could invoke the state secrets privilege—a government privilege that may prevent the compelled disclosure of state and military secrets—to prevent a Guantanamo detainee

Congressional Research Service

<https://crsreports.congress.gov>

LSB10703

from obtaining certain information regarding his detention and treatment at a secret Central Intelligence Agency site in the aftermath of the September 11, 2001, terrorist attacks (*United States v. Zubaydah*).

- **National Security:** In a 9-0 decision, the Court held that a Foreign Intelligence Surveillance Act provision setting forth a process for review of electronic surveillance conducted under the Act did not displace the state secrets privilege. The Court did not reach the question of whether the privilege applied to evidence the government sought to shield from disclosure in the case before it, and the Court remanded the case for further proceedings (*FBI v. Fazaga*).

The Court also granted certiorari in four cases that have been consolidated for oral argument:

- **Indian Law:** The Court agreed to review cases from the Fifth Circuit involving various constitutional challenges to the Indian and Child Welfare Act (ICWA). ICWA establishes minimum federal standards for removal of Indian children from their families, and sets forth general preferences governing those children's placement in foster care or adoptive homes. The Court is asked to consider, among other things, whether ICWA impermissibly commandeers states to carry out a federal program, and whether the statute's child placement preferences impermissibly disfavor non-Indian families (*Haaland v. Brackeen*; *Cherokee Nation v. Brackeen*; *Texas v. Haaland*; *Brackeen v. Haaland*).

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.

- **Civil Rights:** The Sixth Circuit held that a district court improperly dismissed a Title IX suit against a university, wherein the plaintiff alleged the school was deliberately indifferent to an instructor's sexual harassment of her while she was a student. The circuit court held the lower court erred in applying the stringent standard used to consider deliberate-indifference claims involving student-to-student harassment. Instead, the circuit court endorsed a deliberate indifference standard for teacher-to-student harassment that requires the plaintiff to show (1) the school did not respond reasonably to the harassment allegation, and (2) the plaintiff thereafter experienced further harassment or had to take reasonable steps to avoid harassment that deprived the plaintiff of educational opportunities available to other students (*Warner v. University of Toledo*).
- ***Class Actions:** Adding to a circuit split, the Fourth Circuit joined the majority of appellate courts in holding that the Class Action Fairness Act of 2005 does not require that attorney fees be based on the value of "coupons" that had been awarded to class members in lieu of monetary awards. Instead, a court may employ the lodestar method, calculating the amount of time the attorney could reasonably have been expected to work and multiplying that amount by a reasonable hourly rate (*Cantu-Guerrero v. Lumber Liquidators, Inc.*).
- ***Criminal Law & Procedure:** A divided Fifth Circuit, sitting *en banc*, affirmed a criminal defendant's sentence under the federal aggravated identity theft statute, 18 U.S.C. § 1028A, based on the defendant overbilling Medicaid by falsifying the scope of services provided to a patient. The *en banc* court agreed with an earlier three-judge circuit panel's ruling that the defendant's activities fell under the statute's prohibition on the "use[, without lawful authority]" of another person's means of identification to commit certain enumerated offenses, including offenses related to Medicaid fraud. Furthering a

circuit split, the Fifth Circuit held that § 1028A applied to the misuse of another's identity even if it did not involve an attempt to impersonate the person whose means of identification was misused or an attempt to act on that person's behalf (*United States v. Dubin*).

- **Environmental Law:** The Ninth Circuit upheld a U.S. Fish and Wildlife Service program designed to remove invasive barrel owls lethally from certain habitats they share with northern spotted owls, a threatened species under the Endangered Species Act (ESA). The panel concluded that even if the proposed removal of barrel owls might incidentally harm northern spotted owls and their habitat, the Service had shown that the proposed action would still produce a "net conservation benefit," consistent with ESA implementing regulations, by providing the agency with information to improve protection of the northern spotted owl (*Friends of Animals v. U.S. Fish & Wildlife Service*).
- ***Federal Courts:** Splitting with the Second Circuit, the First Circuit held that federal courts lack inherent authority to order the release of sealed grand jury records based on historical interest in those records, absent a need to ensure the fair administration of justice in a legal proceeding. The First Circuit therefore reversed a district court order that instructed the disclosure to a historian of 1971 grand jury materials related to the "Pentagon Papers" concerning the Vietnam conflict (*In re: Petition for Order Directing Release of Records*).
- **Immigration:** A divided First Circuit upheld the Board of Immigration Appeals' determination that the petitioner's state conviction was for "an offense relating to obstruction of justice" rendering him removable under the Immigration and Nationality Act (INA). The majority held that the INA did not unambiguously require that an individual's crime be related to a *pending or ongoing* investigation or judicial proceeding. The majority deferred to the BIA's interpretation of "an offense relating to obstruction of justice" to cover additional crimes where the offender seeks to interfere with a *reasonably foreseeable* investigation or proceeding (*Silva v. Garland*).
- **Immigration:** The D.C. Circuit held that immigration authorities could rely on a Centers for Disease Control and Prevention order to expel rapidly certain aliens arriving at the U.S.-Mexico border, but the government could not transfer those persons to countries where they would likely face torture or persecution. The court remanded the case for further proceedings (*Huisha-Huisha v. Mayorkas*).
- **Religion:** The Fifth Circuit declined the government's request for a partial stay pending appeal of a district court's preliminary injunction blocking the U.S. Navy from enforcing COVID-19 vaccination requirements against several special warfare personnel. The Navy denied the plaintiffs' requests for religious-based exemptions to these requirements, and plaintiffs alleged the Navy's COVID-19 vaccine policy on its face and as applied specifically to the plaintiffs violated the First Amendment's Free Exercise Clause and the Religious Freedom and Restoration Act. In a *per curiam* opinion, the circuit court agreed that plaintiffs raised justiciable claims, the Navy had not shown a compelling interest in denying religious accommodations to each plaintiff, and the Navy failed to show the injunction caused irreparable harm. The court described the preliminary injunction as allowing the Navy to make deployment and other decisions based on neutral factors while preventing it from taking adverse action against the plaintiffs due to COVID-19 vaccination noncompliance (*U.S. Navy SEALS 1-26 v. Biden*).
- **Speech:** The Ninth Circuit affirmed a district court's dismissal of Twitter's First Amendment retaliation suit against the Texas attorney general. Twitter alleged that the

- attorney general’s demand that Twitter produce documents relating to its content moderation discussions was done in response to the company banning former President Donald Trump from its platform. The panel agreed with the district court that the case was not prudentially ripe for consideration because the attorney general had not yet made an allegation of wrongdoing against Twitter; the facts of the case were not yet developed; Twitter was not legally compelled to comply with the information demand; and the company could challenge the information demand in Texas state court if it was enforced (*Twitter, Inc. v. Paxton*).
- **Tax:** The Sixth Circuit set aside an Internal Revenue Service (IRS) rule requiring the reporting of transactions involving cash-value life insurance policies on the grounds that the agency issued the rule without following the Administrative Procedure Act’s notice-and-comment requirements (*Mann Construction, Inc. v. United States*).
- **Tax:** A divided Ninth Circuit concluded that a bankrupt couple was entitled to seek a mortgage interest deduction from the IRS following their mortgage lender’s short sale of their home to extinguish their nonrecourse debt (*Nguyen v. United States*).
- **Torts:** A divided Ninth Circuit panel held that a district court improperly dismissed a federal prisoner’s monetary suit against a correctional officer for violating the prisoner’s Eighth Amendment rights. The suit is premised on the Supreme Court’s recognition in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* of an implied cause of action for persons seeking money damages against a federal agent for a constitutional violation, even in the absence of an authorizing statute. While the Supreme Court has limited the availability of a *Bivens* remedy to a narrow set of circumstances, the Ninth Circuit panel majority believed this case—involving a suit against a correctional officer for allegedly placing a bounty for other prisoners to assault the plaintiff—represented only a modest expansion from previously recognized *Bivens* claims, and no special factors counseled against recognition in this circumstance (*Hoffman v. Preston*).

Author Information

Michael John Garcia
Deputy Assistant Director/ALD

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS’s institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.