

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (May 16–May 22, 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 decisions in two cases for which it heard oral arguments:

- **Election Law:** When a candidate for federal office loans money to his or her own campaign, Section 304 of the Bipartisan Campaign Reform Act of 2002 sets a \$250,000 cap on the amount of post-election contributions that a campaign may use to reimburse the candidate. In a 6-3 opinion, the Court held that this restriction impermissibly burdens the First Amendment rights of candidates and campaigns to engage in political speech (*Federal Election Commission v. Ted Cruz for Senate*).
- **Immigration:** In a 5-4 decision, the Court held that federal courts lack jurisdiction to review underlying facts in immigration proceedings related to the granting or denial of discretionary forms of relief listed in 8 U.S.C § 1252(a)(2)(B)(i). Several types of relief listed in that provision would permit an otherwise removable alien to remain in the United States and adjust to legal permanent resident status (*Patel v. Garland*).

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The Supreme Court also granted certiorari to review two cases:

- **Criminal Law and Procedure:** The Supreme Court granted certiorari in a case from the Eighth Circuit on the interplay between the federal habeas corpus statute, 28 U.S.C. §§ 2241 and 2255, which governs collateral attacks by federal inmates to their criminal sentences. A federal inmate may seek a federal writ of habeas corpus under § 2241 when a motion under § 2255 “is inadequate or ineffective to test the legality of his detention.” The Court is asked whether a federal inmate can proceed under § 2241 when a subsequent Supreme Court decision indicates that the criminal statute of conviction may not apply to him, but the inmate is procedurally barred from raising that issue under § 2255 (*Jones v. Hendrix*).
- **Securities:** The Supreme Court agreed to hear a case from the Fifth Circuit on whether a federal district court has jurisdiction to review a suit by a party seeking to enjoin an ongoing Securities and Exchange Commission (SEC) administrative proceeding because of alleged constitutional defects in the statutory provisions governing the removal of the administrative law judge conducting the proceeding (*SEC v. Cochran*).

Decisions of the U.S. Courts of Appeals

Topic headings marked with an asterisk (*) indicate cases in which 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 Second Circuit held that under the Bankruptcy Code, a bankruptcy court’s power to impose contempt sanctions, which traditionally includes power to award damages and attorneys’ fees, includes the ability to award appellate attorneys’ fees incurred by the victim as a result of the contempt (*In re DiBattista*).
- **Freedom of Information Act (FOIA):** Reversing the district court, the D.C. Circuit held that the Department of Justice properly withheld certain documents related to the drafting of a letter to the Census Bureau requesting the addition of a citizenship question to the 2020 census. The panel held the bulk of the requested documents were exempted from FOIA’s general disclosure requirements under the deliberative process privilege. The circuit court remanded the case so the district court could assess whether five redacted emails fell within the scope of the privilege (*Campaign Legal Center v. Dep’t of Justice*).
- **Intellectual Property:** The Ninth Circuit upheld a preliminary injunction in favor of an e-cigarette and vaping manufacturer in a copyright and trademark infringement action, rejecting the defendant’s argument that the manufacturer could not own a valid trademark because its cannabis-related products were prohibited by federal law. The panel observed that the Farm Act exempted “hemp” from the definition of marijuana in the Controlled Substances Act, and ruled that based on the available record, the manufacturer’s product met the statutory definition of “hemp” because it contained “not more than 0.3 percent” of delta-9–tetrahydrocannabinol. The panel further observed that any congressional intent to limit the Farm Act’s legalization of hemp to that used for industrial purposes, and not to potentially psychoactive substances, was not reflected in the applicable federal statutes’ text (*AK Futures LLC v. Boyd Street Distro, LLC*).
- **Labor and Employment:** The Third Circuit set aside a National Labor Relations Board (NLRB) order that found a supervisor of an online political and social commentary magazine, who had posted a message on Twitter that the magazine’s employees would be sent “back to the salt mine” if they ever attempted to unionize, had engaged in an unfair labor practice. The NLRB’s order was prompted by a complaint filed by a person who

viewed the supervisor's tweet but was not a magazine employee. The panel majority held that the Board's authority under the National Labor Relations Act to address unfair labor practices permitted it to act on the complaint of a person not aggrieved by the alleged practice. Even so, the panel held that the NLRB's determination that a reasonable employee would view the supervisor's tweet as a threat was not supported by substantial evidence given the surrounding context in which the tweet was posted, the message's farcical nature, evidence of the employees' subjective understanding of the tweet as non-threatening humor, and the delivery of the message to a general Twitter audience instead of to the employees directly (*FDRST Media, LLC v. NLRB*).

- **Public Health:** The Sixth Circuit declined to grant plaintiffs' motion for an injunction pending their appeal in a case challenging a Coronavirus Disease 2019 (COVID-19) vaccine mandate imposed by the Department of Health and Human Services for Head Start program staff, contractors, and volunteers. The circuit court concluded that plaintiffs were unlikely to succeed on the merits of their legal challenge (*Livingston Educational Service Agency v. Becerra*).
- **Public Health:** The Ninth Circuit vacated a criminal defendant's conviction and remanded for a new trial in a case where the district court, during the height of the COVID-19 pandemic, barred members of the public from attending the defendant's trial and a related hearing on a motion to suppress evidence. The panel ruled that this blanket prohibition on public access violated the defendant's Sixth Amendment right to a public trial. While the panel acknowledged the trial court's interest in limiting the spread of COVID-19, the panel ruled that the complete prohibition of public attendance was not narrowly tailored to achieve that interest. Among other things, the panel suggested the trial court could have allowed a limited number of persons into the courtroom, or allowed a livestream video of the proceedings that could be witnessed by members of the public in a different room of the court (*United States v. Allen*).
- **Securities:** A divided Fifth Circuit panel held unconstitutional the use of in-house administrative law judges (ALJs) by the SEC to adjudicate securities fraud cases. The majority vacated an ALJ judgment against the petitioners after concluding (1) Congress acted unconstitutionally by delegating the SEC unfettered discretion to choose whether to bring enforcement actions administratively or through a suit in an Article III court, without giving the agency an intelligible principle to guide its exercise of that delegated power; and (2) the SEC's in-house adjudication of the cases against the petitioners violated their Seventh Amendment right to a jury trial. The majority also held that the statutory removal protections given to SEC ALJs unconstitutionally infringed on the President's power to remove executive officers, but it declined to decide whether this deficiency would be an independent basis for vacating the SEC's judgment (*Jarkesy v. SEC*).
- **Territories:** A divided First Circuit held that the Financial Oversight and Management Board of Puerto Rico, which Congress established through the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) to oversee the restructuring of the commonwealth's debt, was not immune from all causes of actions raised under territorial law. The court assumed without deciding that the Board was an arm of Puerto Rico, and that Puerto Rico was shielded under the Eleventh Amendment from suit in federal court without its consent. Still, the majority recognized that Congress, acting pursuant to its plenary power to legislate on behalf of U.S. territories, had abrogated the Board's immunity through PROMESA. As a result, the court allowed the plaintiffs' suit to proceed against the Board requesting the disclosure of certain documents (*Centro de Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for Puerto Rico*).

Author Information

Michael John Garcia
Deputy Assistant Director/ALD

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