

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (July 4–July 10, 2022)

July 11, 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.

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Decisions of the Supreme Court

No Supreme Court opinions or grants of certiorari were issued this week. The Supreme Court’s next term begins October 3, 2022.

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.

- **Banking:** The D.C. Circuit held that the Federal Deposit Insurance Corporation (FDIC) did not exceed its regulatory authority when it decided that proposed payments to former executives of a troubled financial institution would constitute prohibited “golden parachute” payments, even though the FDIC had not been presented with a precise dollar amount that the executives would receive (*Bauer v. FDIC*).

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- **Bankruptcy:** The Second Circuit held that two Bankruptcy Code provisions, [11 U.S.C. § 362\(a\)\(1\) and \(a\)\(2\)](#), which automatically stay most debt-collection actions by creditors when a debtor declares bankruptcy, were violated by a foreclosure sale of a property in which the debtor had a possessory interest (*In re Fogarty*).
- **Criminal Law & Procedure:** In considering the retroactive effect of the Supreme Court's 2019 decision in *Rehaif v. United States*, which held that knowledge of felony status is an essential element of the crime of possessing a firearm as a felon under [18 U.S.C. § 922\(g\)\(1\)](#), the Fifth Circuit held that *Rehaif* established a "new rule" of law in certain circumstances. Where the petitioner had been convicted under § 922(g)(1) before *Rehaif*, and the jury had not been instructed that the prosecution needed to prove he was aware of his felony status, the circuit court applied *Rehaif* retroactively because the action was an *initial* petition brought for collateral review under [28 U.S.C. § 2255](#) by a criminal defendant who sought to vacate or set aside his § 922(g)(1) conviction. The court differentiated this case from those decided by other circuits that concluded that *Rehaif* does not provide a basis for a *second or successive* motion under § 2255 (*United States v. Kelley*).
- **Freedom of Information Act (FOIA):** Reversing the district court, the Second Circuit held that the Secret Service properly withheld release of schedules and visitor information from the campaign and transition of President-elect Donald Trump. Because the Secret Service obtained these records to provide security to the future President, and the sharing of the records was subject to an understanding of confidentiality, the court ruled that the records were not "agency records" covered by FOIA. Even if the records were covered, the court ruled that they were still protected from release by [FOIA Exemption 7\(c\)](#), which limits disclosure of records compiled for law enforcement purposes when their release could reasonably be expected to constitute an unwarranted invasion of privacy (*Behar v. Dep't of Homeland Security*).
- **Health:** A divided Seventh Circuit permitted a hospital to move forward with its suit under [42 U.S.C. § 1983](#), seeking to compel Illinois, in its administration of the state's Medicaid program, to enforce a provision of the Medicaid Act ([42 U.S.C. § 1396u-2\(f\)](#)) that requires Medicaid-managed care organizations to make timely payments to health care providers. The circuit court decided that § 1396u-2(f), which was enacted as an exercise of Congress's Spending Clause power, included necessary rights-creating language to be enforceable through a § 1983 suit. In reaching this decision, the court cited a 2021 case in which it had similarly held that a different statute enacted under Congress's Spending Clause power created an enforceable right under § 1983; the Supreme Court has agreed to review that earlier decision (*Health & Hospital Corp. of Marion County, Indiana v. Talevski*) in its coming term (*St. Anthony Hosp. v. Eagleson*).
- ***Immigration:** A day apart, the Fifth and Sixth Circuits issued conflicting decisions on the lawfulness of a [Fall 2021 Department of Homeland Security \(DHS\) memorandum](#) setting forth immigration enforcement priorities and guidance for immigration officers. On July 5, 2022, the Sixth Circuit reversed a district court's nationwide preliminary injunction that sought to block enforcement of the guidance. (The panel earlier issued a [stay](#) blocking the injunction from going into effect pending the appeal.) The Sixth Circuit concluded that (1) the state governments challenging the memo likely lacked standing to bring suit; (2) the memo was likely not considered final agency action subject to review under the Administrative Procedure Act (APA); (3) the guidance's detention and removal priorities did not contravene two immigration statutes because, although those statutes used mandatory language in discussing immigration officers' arrest, detention, and removal responsibilities, those statutes did not displace DHS's long-standing discretion in

enforcing the nation's immigration laws; and (4) beyond the likelihood that DHS would succeed on the merits in its legal defense of the policy, other factors supported reversing the injunction (*Arizona v. Biden*).

The next day, the Fifth Circuit affirmed a district court's vacatur of the DHS memo, differing from the Sixth Circuit in its resolution of the key legal issues. In a per curiam opinion, the panel concluded that the state government plaintiffs in the case before it had standing, the memo was final agency action reviewable under the APA, and the detention and removal priorities set forth in the memo contravened the mandatory language of the governing statutes. Observing the Sixth Circuit reached a different conclusion, the Fifth Circuit said its decision was informed by controlling circuit precedent and the benefit of a complete trial record (*Texas v. United States*).

- **Immigration:** The Ninth Circuit held that 8 U.S.C. § 1182(a)(9)(C)(i)(II), which renders permanently inadmissible an alien who illegally re-enters the United States after being removed, applies retroactively to those who unlawfully reentered before April 1, 1997, provided they failed to apply for adjustment to legal status before that date (*Vega v. Garland*).
- **National Security:** The D.C. Circuit ruled that the Department of Commerce could hold a company strictly liable for aiding and abetting violations of the [Export Controls Act of 2018](#) under [implementing regulations](#). The court concluded that the Act's text, circuit precedent, and deference given to executive branch decisions in matters of national security and foreign affairs all supported the Department's interpretation of its regulatory authority (*Fed. Express Corp. v. U.S. Dep't of Commerce*).
- **Securities:** The D.C. Circuit vacated a 2020 Securities and Exchange Commission (SEC) order that sought to consolidate the public dissemination of equity market data into a single consolidated plan and prescribe rules involving the plan's governance. Currently, collection and dissemination of this data involves three plans administered by self-regulatory organizations (SROs), which mainly include national securities exchanges. To address concerns about conflicts of interest, the SEC's order required that the committee overseeing the new consolidated plan include specified categories of non-SRO market participants as voting members. The circuit court held that this requirement was not a reasonable interpretation of [Section 11A of the Securities and Exchange Act](#). Because the court decided that the order's provision on non-SRO involvement was not severable, the court vacated the entire order. The court largely upheld, however, a related order directing SROs to propose a new plan regarding equity market data (*Nasdaq Stock Market LLC v. SEC*).

- **Separation of Powers:** The D.C. Circuit upheld a congressional committee’s authority to subpoena financial records of former President Donald Trump. Applying the framework established by the Supreme Court in *Trump v. Mazars USA, LLP*, however, the court ruled that the subpoena must be narrowed. The case began when then-President Trump sued to block his financial and accounting firms from complying with various House committee subpoenas for his personal financial records. Lower courts upheld the subpoenas, but the Supreme Court reversed and remanded, announcing a nonexhaustive four-part test for evaluating congressional subpoenas for certain presidential documents. A House committee reissued a subpoena for the now-former President’s financial records and, before doing so, issued a memorandum explaining the legislative purpose for its demand. The district court, applying the *Mazars* framework with reduced scrutiny, upheld aspects of the subpoena but narrowed its reach. On appeal, the D.C. Circuit decided that the *Mazars* framework governed review of the subpoena of the now former President’s financial records, at least given the unique circumstances of this case, where the reissued subpoena mirrored the one issued when former President Trump was in office. The court also ruled that, when assessing the legislative need for the subpoenaed information, it could consider not only the justification proffered when the subpoena was issued originally, but also the more fulsome justification offered by the committee when it was reissued. Applying *Mazars*, the court held that the subpoena was overbroad, but the committee could appropriately demand information about (1) payments made to President Trump or his business interests from foreign or domestic governmental actors during his tenure in office; (2) President Trump’s lease agreement with the General Services Administration for the Trump Old Post Office Hotel; and (3) alleged omissions and misrepresentations made by President Trump in financial disclosures as a candidate and as President (*Trump v. Mazars USA, LLP*).
- **Tax:** The Fourth Circuit held that a business entity is a distinct person from its agents under 26 U.S.C. § 7602, which bars the Internal Revenue Service (IRS) from issuing a summons “with respect to any person” against whom a Department of Justice (DOJ) criminal referral is in effect. As a result, the court held that the IRS was not barred from issuing a summons for tax information to a business entity whose lone agent was subject to a DOJ criminal referral (*Equity Investment Associates, LLC v. United States*).

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