

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Sept. 19–Sept. 25, 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 acted in response to an emergency application:

- **Criminal Law & Procedure:** In an unsigned order, the Court decided by a 5-4 vote to vacate a district court’s injunction that barred Alabama from carrying out an inmate’s scheduled execution by any means other than through nitrogen hypoxia which the inmate has requested. While the Alabama statute provides inmates with the choice to be executed by nitrogen hypoxia instead of lethal injection, the state asserted it had not received a timely request for this alternative method, which the state had never employed before. Despite the Court’s action, the inmate’s execution has been postponed because it could not be completed before the death warrant expired (*Hamm v. Miller*).

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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.

- **Abortion:** The Fifth Circuit dismissed Louisiana's emergency motion to vacate a permanent injunction blocking the implementation of a state law restricting abortion access, and rejected the state's petition to compel the lower court to provide immediate relief. In the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which held there is no constitutional right to abortion, Louisiana requested a district court to vacate an injunction immediately. The injunction was issued years earlier and barred the state from enforcing a law requiring physicians performing abortions to have admitting privileges at a facility within 30 miles of where the abortions are performed. Without reaching the merits, the lower court denied the state's motion pending full briefing on the issue. The Fifth Circuit held it lacked appellate jurisdiction, characterizing the district court's decision as a non-reviewable scheduling order. It also ruled that the extraordinary remedy of mandamus was inappropriate, and directed the lower court to address any merits claims raised expeditiously (*June Med. Servs., L.L.C. v. Phillips*).
- **Bankruptcy:** The Ninth Circuit affirmed an order allowing a Chapter 11 debtor-in-possession to assume an unexpired commercial lease under 11 U.S.C. § 365(b)(1), which required the court to determine whether the circumstances triggered statutory preconditions for assumption during reorganization. The court held that preconditions set forth in § 365(b)(1) for the assumption of an unexpired lease, which hinge on the existence of a "default," apply even where the default was already cured by the debtor. The court also interpreted the provision's use of "default" to be in the ordinary sense—that is, an omission or failure to perform a legal or contractual duty. The court concluded that the bankruptcy court erred in interpreting "default" more narrowly to cover only those defaults sufficiently material to warrant lease forfeiture under the applicable state law (*In re Hawkeye Entertainment, LLC*).
- **Environmental Law:** A divided Ninth Circuit held that agencies operating the Twitchell Dam in California had discretion to adapt original water management plans to accommodate a subsequently enacted statute. The majority held that the *Endangered Species Act* (ESA) could be read in harmony with the plain meaning of the 1954 federal statute authorizing construction of the dam. Specifically, the authorized purposes of the dam included water conservation, flood control, and "other purposes" which could potentially include ESA compliance. Further, the statute required that the dam operate "substantially in accordance," rather than in strict compliance, with water flow rate recommendations issued in 1953 by the Secretary of the Interior. The Ninth Circuit remanded for further proceedings, including for the district court to consider in the first instance whether the agencies might be required to exercise their discretionary authority to come into compliance with the *Endangered Species Act* and thus release dam water to protect the Southern California Steelhead (*San Luis Obispo Coastkeeper v. Dep't of the Interior*).
- **Federal Courts:** The Sixth Circuit denied a criminal defendant's motion to compel a forensic examination of a juror's cellphone, computer, or other electronic device as part of a *Remmer* hearing, in which a court investigates whether outside influence upon a juror deprived the defendant of the *Sixth Amendment* right to a fair trial by an impartial jury. The majority held that although a juror may be questioned in a *Remmer* hearing,

neither a district court's inherent nor statutory authority empowers it to order a search of a juror's belongings. The majority observed that if a court conducting a *Remmer* hearing suspects criminal wrongdoing by a juror, that is a matter for a prosecutor, rather than a judge, to investigate, including by seeking a warrant from a neutral and impartial magistrate (*In re Sittnefeld*).

- **National Security:** In a non-precedential per curiam opinion, the Eleventh Circuit ruled that the Department of Justice (DOJ) could begin reviewing documents marked classified that were seized from former President Donald Trump's Mar-a-Lago property, pending appeal of a district court ruling that directed the DOJ to return the documents for further review by a special master, and enjoined a subset of documents from being used in a criminal investigation. The appellate court determined the district court abused its discretion in issuing a partial stay. Circuit case law permits a district court to exercise equitable jurisdiction over a pre-indictment motion to return seized property only when certain factors are met, including the callous disregard of the plaintiff's constitutional rights, but the lower court concluded this factor was not met here. The appellate court also determined (1) the former President lacked an individual interest in the seized documents and would not suffer a substantial injury from government retention of the documents; (2) the United States would suffer irreparable harm if its access to seized classified documents was limited by the district court; and (3) public interest considerations relating to the secure storage of classified documents supported staying the lower court's order (*Trump v. United States*).
- **Speech:** The Second Circuit directed a district court to dismiss a civil suit brought by the National Rifle Association (NRA) against a New York state official who issued guidance letters urging regulated banks and insurance companies to stop doing business with the NRA in the wake of a school shooting. The district court allowed the NRA to proceed with its suit alleging that the state official abridged the organization's First Amendment rights by attempting to chill its protected speech and retaliate against it for engaging in such speech. The Second Circuit held that the statements the organization identified did not cross the line between a lawful attempt to convince and an unlawful attempt to coerce. Even assuming the NRA plausibly alleged a First Amendment violation, the court concluded the official was entitled to qualified immunity because she acted reasonably and in good faith in her role as a regulator and when she made her statements, it was not clearly established that they violated the First Amendment (*Nat'l Rifle Ass'n of Am. v. Vullo*).
- **Torts:** On remand from the Supreme Court, a divided Sixth Circuit held that the Federal Tort Claims Act's (FTCA's) judgment bar, 28 U.S.C. § 1346(b), applies not just to future lawsuits, but also to claims brought in the same action where judgment on an FTCA claim was rendered. Section 1346(b) provides that a judgment rendered against the United States on an FTCA claim "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." Here, the plaintiff initially filed an FTCA claim against the United States, along with *Bivens* claims against individual federal law enforcement officers in their personal capacity, for excessive force used by those officers after mistakenly identifying plaintiff as a fugitive. The district court held that it lacked subject-matter jurisdiction over the FTCA claim, and the Supreme Court ultimately ruled that this triggered the FTCA's judgment bar, but left undecided whether the judgment bar applied to the remaining *Bivens* claims. On remand, the Sixth Circuit majority held that it did, reasoning that intervening Supreme Court precedent did not affect a prior Sixth

[Circuit ruling](#) requiring related claims in the same lawsuit to be dismissed if there was judgment on the FTCA claim (*King v. United States*).

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