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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Nov. 14–Nov. 20, 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.

Some 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

The Court did not issue any opinions or agree to hear any new cases last week, but took action in response to an emergency application in one case involving congressional authority:

- On November 14, 2022, the Supreme Court declined to enjoin the enforcement of a subpoena issued by the House Select Committee to Investigate the January 6th Attack on the United States Capitol. The House Select Committee issued the subpoena to T-Mobile seeking call records from the phone of the Arizona Republican Party Chair from November 2020 through January 2021. As discussed in an earlier edition of the *Congressional Court Watcher*, Justice Kagan temporarily stayed enforcement of the subpoena in order to permit the full Court to consider whether to issue a stay pending the outcome of the party chair's First Amendment challenge to it. Justices Thomas and Alito indicated they would have granted the stay (*Ward v. Thompson*).

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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.

- **Bankruptcy:** A divided Ninth Circuit held that a bankruptcy trustee may not avoid and preserve for the estate a tax penalty lien on the debtor's exempt property. The Internal Revenue Service (IRS) held a tax lien on the debtor's house. The debtor filed for Chapter 7 bankruptcy and claimed a homestead exemption in the house. The exempted property generally could not be used by the bankruptcy estate, but remained subject to the tax lien. The Chapter 7 trustee moved to avoid the tax lien and preserve it for the benefit of the estate under 11 U.S.C. § 724(a) and § 551, which would allow the trustee to essentially step into the shoes of the IRS and recover on the tax lien for the benefit of the estate. The Ninth Circuit majority held that Section 724(a) only permits the avoidance of liens that attached to property of the estate at the time of distribution and that a properly exempted property interest is not subject to avoidance because it is withdrawn from the estate (*In re Tillman*).
- **Communications:** The Eighth Circuit affirmed a district court's dismissal of a claim based on a fax alleged to be an "unsolicited advertisement" under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b)(1)(C). Joining the Sixth Circuit, the Eighth Circuit held that an advertisement must promote goods or services to be bought or sold and have profit as an aim. The court therefore concluded that the TCPA did not prohibit the primarily informational fax at issue in the case (*BPP v. CaremarkPCS Health, L.L.C.*).
- **Communications:** The Ninth Circuit affirmed a district court's dismissal of a claim based on the TCPA's prohibition of certain uses of an "automatic telephone dialing system" (autodialer), 47 U.S.C. § 227(b)(1)(A). The plaintiff alleged that the defendant used a sequential number generator to pick the order in which to call customers who had provided their telephone numbers. The Ninth Circuit concluded that this sequential number generator was not an autodialer. The court held that the TCPA's autodialer definition only covers systems that generate and dial random or sequential *telephone* numbers, not systems that generate other numbers (*Borden v. eFinancial, LLC*).
- **Criminal Law and Procedure:** The Fifth Circuit held that the federal forfeiture statute required a defendant who committed wire fraud to forfeit net proceeds, not all proceeds from the crime. The federal forfeiture statute, 18 U.S.C. § 981(a)(2), provides two definitions of proceeds subject to forfeiture. The first applies to proceeds derived from an activity that is inherently illegal and requires forfeiture of all proceeds, while the second applies to proceeds derived from the provision of lawful goods or services in an illegal manner and only requires forfeiture of net proceeds. The government urged the court to define the defendant's activity as wire fraud, an inherently illegal activity. The court determined, however, the defendant's underlying activity was operating a vocational school for veterans, a lawful activity that the defendant conducted in an unlawful manner (*United States v. Davis*).
- **Education:** The Eighth Circuit issued a nationwide injunction pending the disposition of an appeal brought by six states challenging the Biden Administration's student loan cancellation program. The injunction pauses the implementation of the program. The court concluded that the State of Missouri had shown that it likely has legal standing to bring its suit by alleging harm to the Missouri Higher Education Loan Authority. The

court further found that the injunction should issue because, on balance, the likelihood that the plan would cause irreparable harm to Missouri outweighed any harm that an injunction would impose on borrowers because student loan payments and interest are currently suspended (*Nebraska v. Biden*).

- **Firearms:** The Third Circuit rejected a Second Amendment challenge to a federal statute prohibiting firearms possession by a person convicted of a felony or felony-equivalent offense, 18 U.S.C. § 922(g)(1). The plaintiff, who previously pleaded guilty to a state crime of welfare fraud, argued that the statute violates the Second Amendment to the degree it disarms individuals who have not displayed a dangerous propensity for violence. Examining history and tradition in accordance with the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, the Third Circuit determined that all felons are excluded from "the people" constitutionally entitled to bear arms and that the statute's prohibition is consistent with historical tradition (*Range v. Attorney General*).
- **Foreign Sovereign Immunities Act (FSIA):** In a case involving a contract dispute between an international broker, the Republic of South Korea**,** and Lockheed Martin, the Fourth Circuit ruled that the FSIA bars suit against a foreign country that purchases military hardware that was only available to a sovereign nation. The FSIA grants immunity to foreign nations from suit in courts of the United States except, among other exceptions in 28 U.S.C. § 1605, when the foreign nation engages in "commercial activity carried on in the United States by the foreign state." The court held that despite its appearance as a commercial transaction, South Korea's purchase of F-35 fighter jets from Lockheed Martin was restricted by statute to friendly foreign nations and therefore was inherently a "sovereign activity" that did not fall into the FSIA's "commercial activity" exception (*Blenheim Capital Holdings Ltd v. Lockheed Martin Corp*).
- **Immigration:** Joining the Fifth, Ninth, and Tenth Circuits, the Fourth Circuit held that Federal Rule of Appellate Procedure 26(c) does not extend the filing deadline set out in the Immigration and Nationality Act, 8 U.S.C. § 1252(b)(1), for appeals of asylum decisions rendered by the Board of Immigration Appeals. Section 1252(b)(1) requires that a petition for judicial review of a final order of removal "must be filed not later than 30 days after the date of the final order of removal." Rule 26(c) of the Federal Rules of Appellate Procedure permits an additional three days to file an appeal when a notice giving rise to the appeal is transmitted by mail rather than electronically, but only where another statute fails to provide for a method of calculating time. The court found that, by its express terms, Section 1252(b)(1) calculates the time to file an appeal from "the date of the final order of removal," not the date of service, and Rule 26(c) therefore does not apply (*Santos-De Jimenez v. Garland*).
- **Immigration:** A divided Fourth Circuit reviewed and vacated the Board of Immigration Appeals' (BIA's) denial of an alien's motion for reconsideration of a prior removal order predicated on his criminal convictions. The Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(C)-(D), bars judicial review of factual challenges to a final order of removal against an alien removable by reason of having committed certain enumerated crimes. Among other issues, the panel majority determined that this prohibition does not prevent review of the BIA's refusal to reopen or reconsider a removal order based on collateral factual issues unrelated to the merits of the final removal order. Therefore, the majority held that it retained jurisdiction to review the BIA's factual determination that the alien had failed to exercise due diligence in filing his untimely motion to reconsider (*Williams v. Garland*).

- **Immigration:** A divided Fifth Circuit rejected a defendant's constitutional challenge to his conviction for illegally reentering the United States in violation of 8 U.S.C. § 1326. The defendant argued that Section 1326 violates the Fifth Amendment's equal protection principles because Congress enacted a 1929 predecessor statute out of racially discriminatory animus. Applying recent circuit precedent that constitutional defects caused by discriminatory animus can be cured by subsequent enactments untainted by animus, the majority held that the 1952 enactment of Section 1326 was the proper point of reference. The majority determined that the defendant failed to show that Congress enacted Section 1326 with a racially discriminatory motive and therefore affirmed his conviction. The court remanded for resentencing because of an unrelated issue (*United States v. Barcenas-Rumualdo*).
- **Intellectual Property:** The Ninth Circuit held that a provision of the Lanham Act governing procedures for service of process for trademark applicants in foreign countries, 15 U.S.C. § 1051(e), applies to service in court proceedings in addition to administrative proceedings. Section 1051(e) permits a trademark applicant not domiciled in the United States to designate someone eligible to receive process "in proceedings affecting the mark." If the applicant fails to designate a person eligible to receive process, Section 1051(e) permits service on the Director of the U.S. Patent and Trademark Office, who then transmits it to the applicant. In the first appellate opinion to address the issue, the court concluded that the phrase "proceedings affecting the mark" indicated Congress's intent for the procedures in Section 1051(e) to apply to court proceedings (*San Antonio Winery, Inc. v. Jiaxing Micarose Trade Co., Ltd.*).
- **Separation of Powers:** The Fifth Circuit held that the 2020 Horseracing Integrity and Safety Act (HISA) is facially unconstitutional because Congress impermissibly delegated government power to a private entity not accountable to the people. HISA established a private Horseracing Integrity and Safety Authority with the power to issue regulatory rules, subject to oversight by the Federal Trade Commission (FTC). The court determined that HISA violates the private non-delegation doctrine because HISA gives the FTC only limited review powers over Authority rules (*Nat'l Horseman's Benevolent & Protective Ass'n v. Black*).
- **Spending Clause:** A divided Sixth Circuit affirmed a district court's injunction barring enforcement of the Offset Provision of the American Rescue Plan Act of 2021 (ARPA) against Tennessee, but vacated the injunction as to Kentucky. The Offset Provision, 42 U.S.C. § 802(c)(2)(A), bars states from using ARPA stimulus funds to directly or indirectly offset a reduction in net tax revenue resulting from tax cuts. Kentucky and Tennessee filed suit after accepting ARPA funds, arguing that the provision is an impermissibly ambiguous, coercive, and commandeering condition on the funds. The Treasury Department then issued an implementing regulation adopting a limiting interpretation of the provision. The majority of the Sixth Circuit panel held that the Treasury regulation left Kentucky's challenge to the provision moot. Tennessee, however, argued that the provision burdened it with compliance costs even under the regulation. The panel unanimously reached the merits of Tennessee's claim and held that the Offset Provision is impermissibly vague under the Spending Clause (*Kentucky v. Yellen*). A separate Sixth Circuit panel vacated a similar injunction vis- à-vis Ohio on mootness grounds (*Ohio v. Yellen*).
- **Veterans**: The Federal Circuit held that 42 U.S.C. § 659 authorizes the Department of Veterans Affairs (VA) to withhold disability compensation for court-ordered alimony payments. The plaintiff argued that the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, restricts such withholding to non-disability retirement pay. The

Federal Circuit disagreed and determined that the statutes provide two parallel methods for enforcing alimony obligations, directed toward different departments and different sources of money, with Section 1408 authorizing a military department to deduct from disposable retirement pay and Section 659 authorizing the VA to garnish disability pay (*Rhone v. McDonough*).

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