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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Mar. 13, 2023–Mar. 19, 2023)

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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 Supreme Court did not issue any opinions or any orders granting petitions for certiorari this week.

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 nonuniform application of the law among the circuits.

- **Administrative Law:** The First Circuit upheld a National Marine Fisheries Service (NMFS) rule establishing industry-funded monitoring programs for New England fisheries that place observers on private fishing vessels. The court, applying the *Chevron* framework, held that NMFS possesses the authority under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to require industry

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monitoring and rejected arguments that the legislative history and definitions in the MSA demonstrated that the agency lacks statutory authority to promulgate the rule. The court also rejected arguments that the rule is arbitrary and capricious in violation of the Administrative Procedure Act, that it violates the Regulatory Flexibility Act (which requires agencies to consider the effects of their actions on small businesses), and that it exceeded Congress's Commerce Clause power. Accordingly, the First Circuit joined the D.C. Circuit in upholding the rule (*Relentless, Inc. v. U.S. Dep't. of Commerce*).

- **Civil Service:** The D.C. Circuit held that the U.S. district court below lacked jurisdiction to hear challenges to certain Office of Personnel Management (OPM) interpretations of the Federal Employees' Retirement System (FERS) Act of 1986. The plaintiffs claimed that OPM guidance documents regarding the apportionment of an annuity supplement between federal retirees and their former spouses were arbitrary, capricious, and contrary to the FERS Act; that OPM could not promulgate this guidance without notice-and-comment rulemaking; and that OPM exceeded its statutory authority in applying the guidance to certain payments. The circuit court panel held that, under the FERS Act and the Civil Service Reform Act of 1978 , plaintiffs could pursue these claims only through an administrative proceeding before the Merit Systems Protection Board (*Fed. Law Enforcement Officers Ass'n v. Ahuja*).

- **Commerce:** The D.C. Circuit held that the Commerce Clause of the U.S. Constitution does not prohibit the District of Columbia from requiring contractors on certain D.C. government-funded projects to give hiring preferences to D.C. residents. The plaintiffs challenged the District of Columbia's First Source Employment Act, which imposes hiring and reporting requirements that vary based on the type of project and amount of government assistance. The circuit court panel held that, because the D.C. government acts as a "market participant" when it funds the relevant projects, the law fits a recognized exception to the "dormant" Commerce Clause doctrine, which prohibits certain kinds of regulatory discrimination against out-of-state economic interests. The panel also ruled that the plaintiffs, as corporations, did not have standing to assert alternative challenges to the D.C. law under the Privileges and Immunities Clause or the Fifth Amendment Due Process Clause (*Metro. Washington Chapter, Associated Builders & Contractors, Inc. v. District of Columbia*).

- **First Amendment (Speech):** The Ninth Circuit held that the First Amendment does not provide a public right of access to certain court orders issued under the All Writs Act (AWA), 28 U.S.C. § 1651. As relevant to this case, the AWA allows federal courts to order private parties to assist law enforcement in the execution of arrest warrants. Two U.S. district courts had denied a journalist's petitions to unseal such orders that the courts had issued to a travel-booking company. The circuit court panel affirmed, reasoning that although the First Amendment protects public scrutiny of government proceedings, it "is not an all-access pass to any court proceeding or court record." Applying the Supreme Court's "experience and logic" test for right-of-access cases, the panel found that AWA proceedings—like those involving grand juries and search warrants—are traditionally conducted outside of public view and that public disclosure could compromise criminal investigations. The court held that, so long as the investigation is ongoing and law

enforcement has not yet executed the arrest warrants that precipitated the orders, there is no public right of access to sealed AWA records (*Forbes Media LLC v. United States*).

- ***Health:** The Fifth Circuit held that a federal employee failed to state a claim against OPM for denying health insurance benefits for a treatment that she was no longer seeking. Under the Federal Employees Health Benefits Act (FEHBA), OPM is responsible for regulating health insurance plans for federal employees. In this case, an insurance company, on behalf of OPM, made an "advance benefit determination" denying coverage for a certain cancer treatment; the employee therefore chose a different, covered treatment that eliminated her cancer but allegedly caused severe side effects. Breaking with the Tenth Circuit, the court held that the employee's claim against OPM was not barred by sovereign immunity, reasoning that OPM regulations could not narrow 5 U.S.C. § 8912, which waives federal sovereign immunity for "a civil action or claim . . . founded on [FEHBA]." The court nevertheless found that the employee could not state a valid claim for benefits under OPM's regulations, which it held allow relief only to the extent an employee seeks coverage for medical bills that she actually did or could yet incur (*Gonzales v. Blue Cross Blue Shield Ass'n)*.

- **Immigration:** The Ninth Circuit held that an Order to Show Cause that initiated deportation proceedings prior to the passage of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) but failed to disclose the time and place of the deportation proceedings was sufficient to trigger IIRIRA's "stop-time rule," preventing an alien from counting time toward the requisite seven years of continuous presence in the United States to apply for a suspension of deportation. The stop-time rule imposed by IIRIRA, 8 U.S.C. § 1229b(d)(1), provides that an alien ceases to accrue physical presence in the United States upon service of a charging document in an immigration case. Joining every other circuit to consider the issue, the Ninth Circuit declined to extend the Supreme Court's decision in *Pereira v. Sessions*, which held that a Notice to Appear that fails to designate the time or place of removal proceedings does not trigger the stop-time rule. The court recognized that the transitional rules that accompanied IIRIRA requires the court to give the stop-time rule retroactive effect over immigration proceedings that were pending at the time IIRIRA was adopted. As a result, the alien in the present case did not accrue the requisite physical presence and was ineligible for suspension of deportation (*Gutierrez-Alm v. Garland*).

- **Intellectual Property:** The Federal Circuit held that an Administrative Procedure Act lawsuit against the U.S. Patent and Trademark Office (PTO) may proceed insofar as it claims PTO was required to use notice-and-comment rulemaking to promulgate guidance on whether to institute inter partes reviews (IPRs) challenging the validity of U.S. patents. The Leahy–Smith America Invents Act (AIA) gives the PTO director "final and nonappealable" discretion—which the director has delegated to the Patent Trial and Appeal Board (PTAB)—on whether to institute an IPR. In 2020, the director issued guidance known as the "*Fintiv* factors" that PTAB must consider in deciding whether to institute an IPR when there is pending litigation involving overlapping issues. The Federal Circuit held that, by giving the PTO director unreviewable discretion, the AIA precluded plaintiffs' claims that the *Fintiv* factors were arbitrary and capricious or contrary to law. Nonetheless, the panel remanded for the district court to hear plaintiffs'

claim that PTO was required to use notice-and-comment rulemaking to issue this guidance, holding that the AIA did not preclude this claim (*Apple Inc. v. Vidal*).

- **Labor & Employment:** The Third Circuit held that paid time off is not part of an employee's salary for the purposes of deductions prohibited by the Fair Labor Standards Act (FLSA) and its regulations. 29 C.F.R. § 541.602(a)(1) requires that a salaried employee "receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked," subject to exceptions provided in the regulation. Plaintiffs challenged an employer's use of a productivity points system by which the employer deducted accrued paid time off if employees failed to meet weekly productivity minimums. The court held that, while neither the FLSA nor its regulations defined "salary," the regulatory language suggested that salary is a fixed amount of compensation that an employee regularly receives, while paid time off is closer to a "fringe benefit" that may be deducted (*Higgins v. Bayada Home Health Care Inc.*).

- **Labor & Employment:** The Ninth Circuit reversed the dismissal of an equal protection challenge to a California law codifying the "ABC" test for determining if workers are classified as employees or independent contractors for the purposes of California wage laws. In an earlier case, *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, the Supreme Court of California adopted a test whereby workers are presumed to be employees, and may only be classified as independent contractors if the hiring entity demonstrates: (A) the worker is free from the control and direction of the hiring entity; (B) the worker performs work outside the usual course of the hiring entity's business; and (C) the worker is customarily engaged in an independently established occupation of the same nature. California later codified the ABC test outlined in *Dynamex* with exemptions for numerous industries, and plaintiffs challenged the law in part by claiming it unlawfully targeted gig economy companies in violation of the Equal Protection Clause. The Ninth Circuit reversed the district court's dismissal of the equal protection claim, holding that the plaintiffs plausibly alleged that the law unlawfully targeted companies engaged in app-based ride-hailing and delivery services and was motivated by animus. The Ninth Circuit also found that the district court correctly dismissed the plaintiffs' due process claims, Contract Clause claims, and Bill of Attainder claims (*Olson v. California*).

- **Separation of Powers:** The Eleventh Circuit held that a district court properly denied a motion filed by appointees of Nicolás Maduro to reopen a civil lawsuit on behalf of the Venezuelan national oil company, because the State Department has concluded that Maduro is not Venezuela's legitimate head of state. The district court had initially dismissed the lawsuit—which alleged that the defendants committed fraud, antitrust violations, and other misconduct—because it found that the plaintiff litigation trust lacked standing. In response, a board that Maduro appointed to control the oil company unsuccessfully moved to reopen the case and substitute itself as the plaintiff. Explaining that identification of the legitimate leadership of a foreign country is a nonjusticiable political question, the circuit court panel held that it was bound by the State Department's determination that the Maduro government is illegitimate and therefore affirmed the district court's decision (*PDVSA US Litigation Trust v. Lukoil Pan Americas LLC*).

- **Torts:** The First Circuit held the government was not shielded from judicial review in the case of an individual seeking damages under the Federal Tort Claims Act for false arrest and false imprisonment by federal immigration authorities. An individual alleged that the government unlawfully arrested and detained him by relying on a decades-old deportation warrant and by failing to adhere to regulatory procedures during its attempt to repatriate him. A district court granted the government's motion to dismiss for lack of subject-matter jurisdiction, holding that 8 U.S.C. § 1252(g) deprived the court of jurisdiction over claims "arising from" decisions or actions to execute removal orders, including, in the present case, the government's decision to arrest and return an individual to detention as part of a repatriation effort. The First Circuit reversed and remanded, holding that Section 1252(g)'s bar on judicial review did not preclude jurisdiction over allegations of illegal activity, such as relying on a decades-old deportation warrant and disregarding regulatory procedures, which are collateral to the government's prosecutorial discretion to execute a removal (*Kong v. United States*).

- **Trade:** The Federal Circuit held that the Department of Commerce (Commerce) and Court of International Trade (CIT) correctly determined that a duty that the President imposed on imported steel articles was a "United States import duty" under 19 U.S.C. § 1677a(c)(2)(A) when calculating the dumping margin for antidumping duties on carbon steel pipes. The plaintiff company imported steel pipes that were subject to decades-old antidumping duties, which provide relief to U.S. industries and workers that are materially injured or threatened with injury due to imports of like products sold in the U.S. market at less than fair value. In 2018, Presidential Proclamation 9705 imposed an additional duty on imported steel articles pursuant to the President's authority in 19 U.S.C. § 1862. In an administrative review, Commerce treated this new duty as a "United States import duty" under § 1677a(c)(2)(A), thus requiring plaintiffs to pay higher antidumping duties, which they challenged in the CIT. The Federal Circuit affirmed the decision of the CIT, holding that the context and plain meaning of Proclamation 9705 confirmed that, when applied to an article covered by current antidumping duties, the proclamation was meant to add to, rather than offset, the existing duties (*Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*).

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