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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (May 15–May 21, 2023), Part 2

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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.

This week's *Congressional Court Watcher* is divided into two parts because of the number of notable decisions issued over the past week. This Sidebar (Part 2) discusses activity by the U.S. courts of appeals from May 15 through May 21, 2023, while a companion Sidebar addresses Supreme Court decisions from that period.

Decisions of the U.S. Courts of Appeals

Topic headings marked with an asterisk (*) indicate cases where 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.

- ***Arbitration:** The First Circuit split with the Second Circuit after it considered the interplay between Puerto Rico law, a federal statute, and a U.S. treaty when affirming a district court's order to compel arbitration in an insurance dispute. The panel held that a provision in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards directing courts to channel covered disputes to arbitration was self-executing,

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meaning it was enforceable by U.S. courts without need of implementing legislation (*Green Enter., LLC v. Hiscox Syndicates Ltd. at Lloyd's of London*).

- **Civil Rights:** In a case under the Americans with Disabilities Act (ADA), the Eighth Circuit held that a railroad company may refuse to allow a worker to bring his Rottweiler service dog onto moving freight trains. The employee did not claim that the refusal limited his performance of essential work functions, but claimed that he was denied a "fringe benefit" and privilege of employment. The circuit court agreed that the ADA applied to employment discrimination in the provision of benefits, such as denying equal access to employee lounges and facilities. Even so, the court ruled that allowing a service dog at work so that an employee could have the same assistance provided by the service dog outside of work was not a cognizable benefit or privilege of employment under ADA-implementing regulations (*Hopman v. Union Pac. R.R.*).
- **Election Law:** The Fifth Circuit allowed state lawmakers to invoke legislative privilege to refuse to produce documents related to amendments to Texas voting laws, which the United States and other plaintiffs claimed were racially discriminatory. The court described the scope of the legislative privilege as broad, potentially including communications with third parties, such as lobbyists and advocacy groups, during the regular scope of legislative business. The court also suggested that exceptional circumstances, like a federal criminal prosecution, may overcome such claims of legislative privilege in other cases (*La Union Del Pueblo Entero v. Abbott*).
- **Energy:** The D.C. Circuit partially vacated a Pipeline and Hazardous Materials Safety Administration (PHMSA) rule requiring installation of remote-controlled or automatic shut-off valves in some new or replaced gas and liquid pipelines. The court held that the PHMSA did not exceed its statutory authority in issuing the rule. However, the court decided that the agency unlawfully failed to disclose the economic basis for applying the rule to "gathering" pipelines that collect raw gas and crude oil from wells, and that PHMSA failed to make a reasoned determination that regulating gathering pipelines was appropriate (*GPA Midstream Ass'n v. U.S. Dep't of Transp.*).
- **Environmental Law:** The Ninth Circuit affirmed in part and vacated in part lower court rulings on the Forest Service's decision to conduct treatments (including thinning and prescribed burns) on several thousand acres of national forest in Idaho to reduce risks of wildfire and disease. To satisfy the requirements of the National Environmental Policy Act (NEPA), the Forest Service invoked a categorical exclusion established in the Healthy Forests Restoration Act (HFRA). The categorical exclusion created in the HFRA is limited to "areas in the wildland-urban interface," which has a specific meaning under the HFRA. The Ninth Circuit affirmed the lower court's decision that the Forest Service had committed a clear error in judgment by relying on an alternate definition of "wildland-urban interface" contained in a community plan. However, the appellate court also found that the district court had not correctly interpreted the HFRA and thus vacated the lower court's preliminary injunction blocking implementation of the project (*All. for the Wild Rockies v. Petrick*).
- **Environmental Law:** The Ninth Circuit ruled that the U.S. Fish and Wildlife Service's (FWS's) designation of certain areas in southern Arizona as unoccupied critical habitat for jaguar under the Endangered Species Act (ESA) violated the ESA and Administrative Procedure Act. The ESA provides that areas occupied by a listed species at the time of listing may be designated as critical habitat, but that FWS did not have adequate evidence that the jaguar occupied the designated area. An area not occupied by the species may also be designated if it is "essential for the conservation of the species." The court

concluded that an area must be "indispensable," not merely beneficial, to the species' survival and recovery to qualify as "essential," and that FWS had failed to demonstrate that the designated areas were indispensable (*Ctr. for Biological Diversity v. FWS*).

- **Environmental Law:** The D.C. Circuit rejected a challenge to a decision by the Federal Energy Regulatory Commission (FERC) to authorize construction of liquefied natural gas facilities in the Alaska North Slope. Petitioners argued that FERC did not comply with NEPA and its implementing regulations when authorizing the construction. The court held that it lacked jurisdiction to consider some of these arguments, where petitioners had not first exhausted their administrative remedies and, for those claims where the court had jurisdiction, the plaintiffs' arguments failed on the merits (*Ctr. for Biological Diversity v. FERC*).
- **Immigration:** The Tenth Circuit held that a "zipper clause" in federal immigration law, 8 U.S.C. § 1252(b)(9), did not strip the district court of jurisdiction over a challenge by an alien to the United States Citizenship and Immigration Services' decision to terminate both her and her son's refugee status. Section 1252(b)(9) limits federal court review of issues "arising from any action taken or proceeding brought to remove an alien," except as part of the review of a final order of removal. The court held that neither § 1252(b)(9) nor its implementing regulations covered the termination of refugee status (*Mukantagara v. U.S. Dep't of Homeland Sec.*).
- **Immigration:** The Eleventh Circuit held that an immigration judge and the Board of Immigration Appeals misconstrued a provision of the Violence Against Women Act of 1994 that governed an alien petitioner's request for cancellation of removal. The provision, 8 U.S.C. § 1229b(b)(2)(A)(i), requires the petitioner to show that she "has been battered or subjected to extreme cruelty" by a spouse or parent. The court held that the administrative adjudicators erred by reading the term "extreme cruelty" to require proof of physical abuse, when mental or emotional abuse could also suffice. The panel remanded the case to the Board for further consideration (*Ruiz v. U.S. Att'y Gen.*).
- **Labor & Employment:** A divided Second Circuit allowed a class-action suit by former employees of a restaurant located within a casino to proceed under the Worker Adjustment and Retraining Notification Act (WARN Act) and corresponding state law. The majority held that a genuine issue of material act existed on whether the restaurant was an "operating unit" under the WARN Act and implementing regulations, in which case the employees would have been entitled to 60 days' notice before the closing of the restaurant. The majority concluded that whether an entity was an operating unit under the Act was a fact-specific determination, and that whether the restaurant could operate independently from the casino was not dispositive in deciding if it was operationally and organizationally distinct from the casino (*Roberts v. Genting New York LLC*).
- ***Labor & Employment:** The Sixth Circuit announced a rule on when a district court should facilitate notice to "similarly situated" current and former workers that might allow them to join a plaintiff's suit for unpaid wages under the Fair Labor Standards Act. The circuit court held that for a district court to facilitate notice, the plaintiff must show a strong likelihood that those employees are similarly situated. The court characterized this standard as more stringent than the standard adopted by many district courts, under which the plaintiff must first make only a modest factual showing that the employees are similarly situated. The panel also described the announced standard as less stringent than the standard endorsed by the Fifth Circuit, which requires a showing by a preponderance of evidence that others are similarly situated (*Clark v. A&L Homecare and Training, Ctr.*).

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- **Separation of Powers:** The Ninth Circuit held that a district court abused its discretion by disqualifying the whole U.S. Attorney's Office in the District of Arizona from prosecuting a case against multiple criminal defendants, when those defendants alleged that a single Assistant U.S. Attorney in that Office engaged in potential misconduct. The circuit court recognized that separation of powers considerations made the judicial disqualification of an entire U.S. Attorney's Office an extreme remedy that was available in extraordinary circumstances not arising here (*United States v.Williams*).
- **Tax:** The Ninth Circuit considered the scope of an Internal Revenue Code provision, 26 U.S.C. § 6324(a)(2), which makes certain persons liable for unpaid federal estate taxes. Section 6324(a) applies to a covered person who "*receives, or has on the date of the decedent's death*, property included in the gross estate." The issue before the court was whether "on the date of the decedent's death" modified only the immediately preceding verb "has" or also modified "receives"; that is, whether the provision applied to those who "receive" covered estate property at any time or only "on the date of the decedent's death." Agreeing with the United States, the majority held that the most natural reading of Section 6324(a)(2), given its structure and punctuation, is that persons who receive covered estate property, whether at the time of the decedent's death or any time after, are personally liable for unpaid estate taxes, subject to the statute of limitations (*United States v. Paulson*).

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