

# Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (June 20–June 26, 2022), Part 2

June 27, 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.

Some of the 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 during the week of June 20 to June 26, 2022, 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 nonuniform application of the law among the circuits.

- **Agriculture:** The D.C. Circuit held that a 2015 rule by the Animal and Plant Health Inspection Service violated the Food, Agriculture, Conservation, and Trade Act of 1990 insofar as the rule provided for the collection of user fees to fund a reserve balance for agricultural quarantine and inspection services. The court, while upholding other aspects of the rule from challenge, held this aspect unlawful because the [1990 Act](#) only

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authorized a reserve charge until 2002 (*Air Transportation Ass'n of America, Inc. v. Dep't of Agriculture*).

- **Criminal Law & Procedure:** A divided Fifth Circuit reversed a criminal defendant's convictions under [42 U.S.C. § 1320a7b\(b\)\(2\)\(A\)](#) for making illegal kickback payments to TRICARE health program beneficiaries to induce them to seek certain medical services as part of a scheme to defraud TRICARE of millions of dollars. The majority held that this provision applies to someone who pays another to refer a third party to a health care provider; it does not apply to payments made to induce self-referrals. The majority held that the particular provision did not cover the defendant's alleged conduct, but the court affirmed the defendant's convictions for other activities related to the scheme to defraud TRICARE (*United States v. Cooper*).
- **Energy:** The D.C. Circuit held that the [National Gas Act](#), which sets forth a certification process for the building of natural-gas pipelines and a process for challenging a certificate order, deprives district courts of jurisdiction to invalidate pipeline certificates. Such jurisdiction was conferred exclusively on the circuit court by statute (*Bohon v. Fed. Energy Regulatory Commission*).
- **Firearms:** The en banc Fifth Circuit agreed to rehear a case originally decided by a three-judge circuit panel, which had rejected a challenge to a Bureau of Alcohol, Tobacco, Firearms, and Explosives' [2018 rule](#) prohibiting bump-stock type devices. Such devices enable a shooter of a semiautomatic firearm to start a continuous firing cycle with a single pull of the trigger. In agreeing to rehear the case, the court vacated the three-judge panel decision (*Cargill v. Garland*).
- **Labor & Employment:** The Eleventh Circuit held that a provision in the 2017 National Defense Authorization Act (NDAA), [41 U.S.C. § 4712](#), provided whistleblower retaliation protections to federal grantees in addition to contractors and thus applied to the plaintiff on account of her employment with an entity that received a federal grant. Still, the panel affirmed the district court's dismissal of plaintiff's claim because she failed to demonstrate a reasonable belief that her disclosure evidenced wrongdoing by her employer, rather than a mere difference of opinion (*Fuerst v. Housing Authority of City of Atlanta, GA*).
- **Labor & Employment:** The Eleventh Circuit held that a power plant's purposeful release into the outside air of excess ammonia from its power-generating process was not an "uncontrolled" release of gas subject to the Occupational Safety and Health Administration's (OSHA's) [Hazardous Waste Operations and Emergency Response standard](#). Disagreeing with OSHA's broader reading, the court held that an "uncontrolled" release governed by the standard does not apply to any release of gas, but only a release with a level or intensity not limited or otherwise regulated (*U.S. Dep't of Labor v. Tampa Electric Co.*).
- **Separation of Powers:** A divided Second Circuit panel rejected a criminal defendant's arguments that his prosecution by federal court-appointed special prosecutors violated the Appointments Clause. The court agreed that special prosecutors are inferior, non-presidentially appointed officers covered by the Clause. On the merits of the criminal defendant's constitutional challenge, the majority rejected the argument that the special prosecutors were not properly supervised by a presidentially appointed principal officer, concluding that the Attorney General exercised such authority. The defendant also argued that the district court's appointment of the special prosecutors pursuant to [Federal Rule of Criminal Procedure 42 \(a\)\(2\)](#) did not satisfy the Appointments Clause's requirement that "Congress ... by law" vest the appointment of inferior officers to the courts, the President,

- or heads of agencies. Because this argument was only raised on appeal, the majority applied a forgiving standard of review and held that the district court had not committed plain error, given directly applicable Supreme Court precedent (*United States v. Donziger*).
- **Speech:** A divided Eighth Circuit, sitting en banc, upheld against First Amendment challenge an Arkansas law that requires state contractors to certify that they will not “boycott” Israel. Reversing the ruling of a three-judge circuit panel, the en banc court agreed with the district court’s decision not to enjoin preliminarily the law from being enforced while the plaintiffs’ legal challenge proceeded. Interpreting the statute narrowly, the en banc majority held that the “boycott” provision covered only unexpressive commercial conduct by the contractors, not protected speech. The majority also ruled that the certification requirement did not unconstitutionally compel speech, because the disclosure was incidental to the regulation of unexpressive conduct (*Arkansas Times LP v. Waldrip*).

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