

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (May 8–May 14, 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.

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Decisions of the Supreme Court

Last week, the Supreme Court issued opinions in five cases:

- **Commerce:** The Supreme Court ruled that a California law, which bans the sale of whole pork meat from animals confined in a manner inconsistent with state standards (even if those animals were held outside of California), did not violate the “dormant” Commerce Clause in light of its out-of-state effects. While that central holding carried a majority of the Court, the Justices fractured over how to apply the balancing test set forth in [Pike v. Bruce Church, Inc.](#) to assess when a state regulation unconstitutionally discriminates against out-of-state products ([Nat’l Pork Producers Council v. Ross](#)).
- **Criminal Law & Procedure:** In a 9-0 ruling, the Court reversed a conviction under the federal wire-fraud statute, [18 U.S.C. § 1343](#). The Court rejected the “right to control” theory of fraud, which treats the deprivation of complete and accurate information bearing on an economic decision as a type of property fraud ([Ciminelli v. United States](#)).

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- **Criminal Law & Procedure:** The Court reversed the “honest-services” fraud conspiracy conviction of a former aide to a New York governor, when the defendant, while on a hiatus from government service, was alleged to have accepted payments from a real-estate development company to informally influence state policy. The Court concluded that the jury instructions in the defendant’s trial, describing when a private citizen owes a fiduciary duty to provide honest services to the public, were impermissibly vague (*Percoco v. United States*).
- **Immigration:** The Court held that a provision in a federal immigration law, 8 U.S.C. § 1252(d)(1), did not bar judicial review of petitioner's claim that the Board of Immigration Appeals engaged in impermissible fact-finding, where the petitioner failed to first raise that claim in a motion to the Board. Seven Justices held that § 1252(d)(1) is not jurisdictional, meaning that a court does not need to definitively decide whether its exhaustion requirements were satisfied before considering the petitioner’s claims. The Court also unanimously held that a petitioner need not seek discretionary forms of administrative review, like reconsideration of an unfavorable Board determination, to satisfy § 1252(d)(1)’s exhaustion requirement (*Santos-Zacaria v. Garland*).
- **Territories:** In an 8-1 decision, the Court held that the *Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA)* did not abrogate any sovereign immunity that the Financial Oversight and Management Board of Puerto Rico (Board) might have. Assuming without deciding that Puerto Rico was shielded from suit in federal court under the Eleventh Amendment, the Court held that PROMESA did not clearly state a congressional intent to abrogate any such immunity. The Court remanded the case for further proceedings below (*Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*).

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.

- **Criminal Law & Procedure:** The First Circuit vacated the mail and wire-fraud convictions of two defendants who submitted payments to universities to secure the admission of their children as athletic recruits as part of the “Varsity Blues” admissions scandal. The court held that both theories supporting the convictions under 18 U.S.C. §§ 1341, 1343, and 1346 were flawed. First, the court rejected the government’s theory that the defendants had deprived the universities of honest services, based on Supreme Court precedent limiting honest services fraud to the context of bribes and kickbacks. Second, the court rejected the government’s property fraud theory that the defendants had deprived the universities of admissions slots. Leaving open the possibility that admissions slots could be property under the fraud statutes, the court found no basis in the record to conclude that was the case here. Although the court held that the defendants’ activities could potentially constitute bribery for purposes of the federal programs bribery statute, 18 U.S.C. § 666, the court reversed those convictions on other grounds (*United States v. Abdelaziz*).
- **Criminal Law & Procedure:** The Second Circuit held that the drug quantity element of a statutory provision requiring life imprisonment for certain offenders convicted of engaging in a “continuing criminal enterprise” requires that the quantity be involved in a single narcotics offense, rather than aggregated from across a series of violations. Under 21 U.S.C. § 848, a person engages in a continuing criminal enterprise if they commit a

felony narcotics offense and that violation is part of a continuing series of violations in which the person plays a management role and obtains substantial income or resources. The statute further provides that a principal leader of an enterprise “shall be imprisoned for life” if the felony narcotics offense involved a certain amount of drugs or if the enterprise generated certain gross receipts from illegal drugs. The Second Circuit held that the district court erred, though harmlessly, by instructing the jury that the drug quantity element could be aggregated from the continuing series of violations. The Second Circuit panel divided on a separate issue, with the majority affirming the defendant’s convictions (*United States v. Montague*).

- **Criminal Law & Procedure:** The Eighth Circuit affirmed a defendant’s convictions for intentionally damaging religious property because of its religious character (18 U.S.C. § 247(a)(1)), obstructing by force the free exercise of religious beliefs (18 U.S.C. § 247(a)(2)), conspiracy to commit the aforementioned offenses, and carrying or using a destructive device during or in relation to a crime of violence (18 U.S.C. § 924(c)(1)). Like other circuits, the court reasoned that § 247(a) is a legitimate exercise of Congress’s power under the Commerce Clause to punish those who use channels and instrumentalities of interstate commerce to commit crimes. The court also decided that § 247(a)(2) was a predicate violent crime for a § 924(c)(1) conviction (*United States v. Hari*).
- **Criminal Law & Procedure:** The Eighth Circuit held that a person who receives a sentencing enhancement under U.S.S.G. § 2D1.1(b)(1), for possessing a dangerous weapon in connection with a drug offense, is ineligible for a reduced sentence under 18 U.S.C. § 3553(f). Section 3553(f) and the corresponding Guideline, U.S.S.G. § 5C1.2, offer a “safety-valve” for a district court to disregard an applicable statutory minimum if “less knowledgeable and less culpable offenders ... give full and truthful information about their offenses before sentencing.” The appellate panel concluded that the district court did not clearly err in denying safety-valve relief, and it rejected arguments based on the Second, Fifth, and Sixth Amendments (*United States v. Voelz*).
- **Environmental Law:** A divided D.C. Circuit panel vacated the Environmental Protection Agency’s (EPA’s) withdrawal of a prior final determination to regulate perchlorate in drinking water, holding that the EPA lacked statutory authority to withdraw the determination. The *Safe Drinking Water Act* provides that if the EPA determines that a contaminant meets certain criteria for regulation, it “shall” publish a maximum contaminant level goal and related regulation within a certain period. The EPA issued a final determination to regulate perchlorate in 2011, but in 2020 announced that it had reevaluated the application of the statutory criteria and was withdrawing its final determination. The circuit panel majority held that the text of the Act does not permit such withdrawal and that the EPA does not possess inherent authority independent of the statute to withdraw a final determination (*Natural Resources Defense Council v. Regan*).
- **Environmental Law:** The Eighth Circuit held that regulations governing farmers’ requests for reviews of wetland certifications under the *Swampbuster Act* were not inconsistent with the governing statute. The Act generally provides that certain farm-related benefits are not available to farmers who convert wetlands or produce crops on converted wetlands, and it provides that a prior wetland certification remains in effect until a person affected by the certification requests review. Implementing regulations establish procedural requirements for making an effective review request. The circuit court rejected petitioner’s argument that the review regulations impermissibly narrowed the right to seek review of a certification under the Swampbuster Act, applying the

Chevron framework and deferring to the agency's reasonable interpretation of statutory language that the court found ambiguous (*Foster v. U.S. Dep't of Agric.*).

- **Federal Courts:** The Federal Circuit held that the U.S. Court of Federal Claims erred in treating the statutory standing provision in the *Tucker Act* as jurisdictional. The *Tucker Act* gives the Court of Federal Claims jurisdiction over actions by “an interested party” objecting to the award of a contract by a federal agency. The court applied the Supreme Court’s decision in *Lexmark International, Inc. v. Static Control Components, Inc.* for the premise that statutory standing issues do not implicate a court’s subject-matter jurisdiction. Thus, the court reasoned, the Court of Federal Claims should not have addressed the statutory standing issue de novo (*CACI, Inc.-Federal v. United States*).
- **Food & Drug:** A divided Ninth Circuit held that plaintiffs’ state-law claims against Wal-Mart and another company for an allegedly mislabeled dietary supplement were preempted because the state requirements were not identical with applicable federal regulations implementing provisions of the *Federal Food, Drug, and Cosmetic Act* (*Hollins v. WalMart, Inc.*).
- **Immigration:** The D.C. Circuit affirmed the dismissal of the habeas corpus claim of an alien removed from the United States through the expedited removal process, because his petition was filed after he was released from government custody. Under 8 U.S.C. § 1252(e)(2), an alien may only seek judicial review of an expedited removal order through habeas corpus proceedings, and the D.C. Circuit understood the federal habeas statute, 28 U.S.C. § 2241, to require a person to be in government custody at the time of filing a habeas petition (*I.M. v. U.S. Customs and Border Prot.*).
- **Immigration:** A divided Third Circuit held that an alien who had fraudulently entered the United States under the *Visa Waiver Program (VWP)*, who was granted asylum and allowed to remain in the United States, and who later lawfully departed and reentered the United States, was no longer subject to the VWP’s restrictions on relief from removal when he committed a deportable offense years later. Persons who enter the United States through the VWP waive the right to challenge their removal except on the basis of asylum eligibility. The circuit panel majority held that the petitioner’s later departure and reentry to the United States meant that, if the government sought to terminate his asylum and order him removed, it would need to do so in a standard, non-VWP proceeding where he could pursue adjustment of status and other avenues of relief (*Kosh Ishmael v. U.S. Attorney Gen.*).
- **National Security:** The D.C. Circuit held that federal sovereign immunity barred victims of state-sponsored terrorism from attaching cargo seized by the United States from Iran. The United States seized oil cargo allegedly belonging to Iran and initiated civil forfeiture proceedings, selling the cargo with court permission. The victims, who had obtained money judgments against Iran under an exception to the *Foreign Sovereign Immunities Act*, sought to execute their judgments by attaching the proceeds of the sale. The D.C. Circuit held that federal sovereign immunity barred the attachment because the United States possessed the funds. The court rejected the victims’ argument that a “notwithstanding any other provision of law” clause in the *Terrorism Risk Insurance Act of 2002* provided a sufficiently clear waiver of that immunity (*Greenbaum v. Islamic Republic of Iran*).

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