

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (June 12–June 18, 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 five decisions in cases for which oral arguments were heard:

- **Civil Procedure:** The Court in an 8-1 decision held that [31 U.S.C. § 3730\(c\)\(2\)\(A\)](#) enables the United States to obtain dismissal of a qui tam action brought under the [False Claims Act \(FCA\)](#), even after the government initially declined to proceed with an FCA suit. (The FCA permits private parties in qui tam actions to bring claims on the government’s behalf against those who defraud the United States, and thereby recover a share of the proceeds of the action.) The Court also held that [Federal Rule of Civil Procedure 41\(a\)](#) sets the standard for district courts to review motions to dismiss under § 3730(c)(2)(A): a standard the government will almost always satisfy (*United States ex rel. Polansky v. Executive Health Resources, Inc.*).
- **Criminal Law & Procedure:** The Court unanimously held that a criminal sentence under [18 U.S.C. § 924\(j\)](#), which applies to drug traffickers or those who commit violent crimes and cause death by using or carrying a firearm, may run concurrently or

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consecutively with another sentence. The Court ruled that the consecutive-sentence mandate under 18 U.S.C. § 924(c)(1)(D)(ii) does not apply to sentences under § 924(j) (*Lora v. United States*).

- **Criminal Law & Procedure:** A unanimous Court held that if a criminal defendant is improperly tried before a jury drawn from the wrong district, the government is constitutionally permitted to seek retrial in the appropriate venue (*Smith v. United States*).
- **Indian Law:** In an 8-1 judgment, the Court resolved a circuit split and held that Congress unequivocally abrogated tribal sovereign immunity in the Bankruptcy Code (*Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*).
- **Indian Law:** In consolidated cases, the Court, in a 7-2 decision, rejected constitutional challenges to provisions of the Indian Child Welfare Act (ICWA) that regulate child custody proceedings involving Indian children and establish a preference for placing those children with Indian families or institutions ahead of unrelated non-Indians or non-Indian institutions. The Court held the ICWA provisions were a valid exercise of Congress's power under the Indian Commerce Clause and did not "commandeer" state courts and officials to implement federal Indian policy in violation of the Tenth Amendment. The Court declined to reach plaintiffs' claims that ICWA violated constitutional equal protection and non-delegation principles, concluding that plaintiffs lacked standing to bring such claims (*Haaland v. Brackeen*; *Cherokee Nation v. Brackeen*; *Texas v. Haaland*; *Brackeen v. Haaland*).

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.

- **Administrative Law:** The Tenth Circuit held that plaintiffs were not entitled to a preliminary injunction prohibiting issuance of a coal-mining permit because neither the citizen-suit provision of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1270, nor the Administrative Procedure Act (APA), 5 U.S.C. § 702, allows challenging the Department of the Interior's issuance of a coal-mining permit as arbitrary and capricious. The court held that Section 1270 of the SMCRA only permitted suits to enforce non-discretionary duties, and the Department of the Interior had performed all non-discretionary duties imposed by the relevant sections of the statute. The court also held the APA was unavailable as a basis for suit because another provision of the SMCRA, 30 U.S.C. § 1264, provided an avenue for such a challenge (*Citizens for Constitutional Integrity v. United States*).
- **Bankruptcy:** The Fourth Circuit joined two other circuit courts in ruling that Chapter 13 debtors who earn more than the median income may deduct the actual costs of their mortgage payments when calculating their disposable income. Under Chapter 13, debtors may obtain a discharge so long as they pay their creditors a portion of their monthly income, a figure reached by applying the Bankruptcy Code's "means test." The means test allows debtors to reduce their monthly income for certain expenses, and the court held that mortgage payments constituted one of those expenses, i.e., monthly payments on account of secured debts. The court rejected the trustee's argument that debtors may only deduct "reasonable" amounts, explaining that Congress added the means test to the Bankruptcy Code with the intent of limiting bankruptcy courts' discretion to calculate debtors' expenses on a case-by-case basis (*Bledsoe, III v. Cook*).

- **Civil Procedure:** A divided Fifth Circuit reversed a district court's decision that dismissed Texas for improperly splitting its claims and dismissed Missouri for lack of standing in a suit challenging the Biden Administration's policy ending new border wall construction. The court remanded the case to the district court to consider the states' motion for a preliminary injunction in an expeditious manner (*State of Missouri v. Biden*).
- **Civil Rights:** The Ninth Circuit unanimously held that Title IX's prohibition against discrimination "on the basis of sex" in education programs that receive federal financial assistance includes a prohibition against discrimination based on sexual orientation, including perceived sexual orientation. The court applied the Supreme Court's reasoning in *Bostock v. Clayton County*, which interpreted similar language in Title VII. The Ninth Circuit joined the Fourth Circuit in extending *Bostock*'s analysis to Title IX (*Grabowski v. Arizona Board of Regents*).
- **Consumer Protection:** A divided Ninth Circuit affirmed the denial to enjoin Nevada Senate Bill 248 (S.B. 248), a law that requires debt collectors to provide written notification to debtors 60 days before taking any action to collect a medical debt. The court rejected plaintiffs' arguments that both the Fair Credit Reporting Act (FCRA) and the Fair Debt Collection Practices Act (FDCPA) preempted S.B. 248. The court held that the FCRA neither expressly nor impliedly preempts S.B. 248 because the state law does not interfere with the FCRA's provision on reporting requirements and it does not interfere with debt collectors' responsibilities to furnish fair and accurate information to reporting agencies. The court held that there was no FDCPA preemption because S.B. 248's 60-day notice provision does not constitute an attempt to collect a debt (*Aargon Agency, Inc. v. O'Laughlin*).
- **Criminal Law and Procedure:** The Third Circuit held that the crime of robbery under the Hobbs Act, 18 U.S.C. § 1951, does not contain a specific intent element present in common law definitions of robbery. The court had previously held that the Hobbs Act did import common law definitions of the elements of robbery, including that a defendant have the specific intent to steal and permanently deprive the owner of property. The court reconsidered that decision, determining that more recent Supreme Court precedent required a stricter textual analysis that was inconsistent with the Third Circuit's prior reasoning. Holding that Hobbs Act robbery is a general intent crime, the court resolved a circuit split and aligned itself with its sister circuits (*United States v. Stevens*).
- **Criminal Law and Procedure:** The Sixth Circuit held that defendants bear the burden of proving they are not a substantial risk to the public when the government seeks to revoke conditions of release following a verdict of not guilty by reason of insanity. After such a verdict, a defendant may be publicly released subject to various conditions. If those conditions are violated, the government may seek a return to custody under 18 U.S.C. § 4243(g) if the defendant's continued release would be a substantial risk to the public. The statute does not indicate which party bears the burden to prove the defendant is or is not a substantial risk, and the court found that the language, history, and structure of the statute placed the burden on the defendant (*United States v. Williams*).
- ***Criminal Law & Procedure:** The Seventh Circuit affirmed the conviction of a former mayor for, *inter alia*, federal bribery, in violation of 18 U.S.C. § 666(a)(1)(B). The former mayor argued that the statute applies only to bribes and not gratuities, which are rewards for actions the payee has already taken or is already committed to take. The court examined the statute's text, which does not mention gratuities, and found that the language on "influenced or rewarded" encompassed both bribes and gratuities. The

court was not persuaded by the holdings of other circuits that had found § 666 did not apply to gratuities (*United States v. Snyder*).

- ***Criminal Law & Procedure:** In a divided opinion, the Ninth Circuit held that in certain criminal sentencing scenarios, the government must prove underlying facts by clear and convincing evidence. In so holding, the court abided by circuit precedent and maintained its lone position in a circuit split regarding the government’s burden of proof in establishing a fact for a sentencing enhancement under the United States Sentencing Guidelines (USSG). Ninth Circuit precedent predates the Supreme Court’s decision in *United States v. Booker*, in which the Supreme Court held that the USSG are advisory, not mandatory. Here, the court held that it was bound by its precedent, although it acknowledged that the Ninth Circuit is the only circuit, post-*Booker*, to require a heightened showing for certain sentencing enhancements scenarios (*United States v. Lucas*).
- **Education:** The Third Circuit reversed a decision that a student’s adult cousin, with whom the student resides, does not qualify as the student’s parent for purposes of the Individuals with Disabilities Education Act (IDEA). The court examined the IDEA’s four disjunctive definitions of “parent” and determined that the cousin satisfied the third definition, an individual acting in the place of a natural parent with whom the child lives. The court declined to consider Department of Education regulations defining “parent” and held that the IDEA’s text indicates “an unambiguous congressional intent to qualify multiple persons as parents” under the statute (*Q.T. v. Pottsgrove Sch. Dist.*).
- **Environment:** The D.C. Circuit held that the National Marine Fisheries Service may not give the “benefit of the doubt” to an endangered species by relying upon worst-case scenarios or pessimistic assumptions when preparing a biological opinion required by 16 U.S.C. § 1536(b)(3)(A) of the Endangered Species Act (ESA). The court held that the ESA and its accompanying regulations require the Service to determine whether licensing a federal fishery is “likely” to jeopardize a protected species, and therefore directed the district court to vacate the Service’s opinion that certain lobster and crab fisheries licensed by the Service kill an unsustainable number of North American right whales (*Maine Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*).
- **First Amendment:** A divided Fifth Circuit held that an injured police officer’s negligence claim, alleging a Black Lives Matter protest organizer knew or should have known violence would likely ensue, does not violate the First Amendment. The Fifth Circuit ultimately renewed its prior holding allowing the officer’s negligence claim to go forward (*Doe v. Mckesson*).
- **Labor & Employment:** The D.C. Circuit reversed its precedent and held that 5 U.S.C. § 7703(b)(2), which provides for a 30-day filing deadline to seek judicial review of certain decisions of the Merit Systems Protection Board, is a nonjurisdictional rule. The court, citing the case law in several other circuit courts and the Supreme Court’s decision in *Irwin v. Dep’t of Veterans Affs.* regarding the filing deadline of a cause of action listed in § 7703(b)(2), held that the statute of limitations lacks a “clear statement” that Congress intended to limit the district court’s jurisdiction through the 30-day deadline (*Robinson v. DHS Off. of Inspector Gen.*).
- **Military Law:** The Fifth Circuit vacated and remanded the district court’s denial of Governor Abbott’s motion to enjoin a Department of Defense (DOD) policy permitting the punishment of members of the Texas National Guard for noncompliance with the DOD military vaccine order prior to its repeal. The court held that the President of the United States lacks authority to punish members of state militias who have not been

called into federal service, rejecting the government's argument that [certain provisions in Title 32](#) permit DOD to ensure that state National Guards enforce its policies. The court disagreed that these statutes are permissible exercises of Congress's power to provide for the discipline of the militia under the [Organizing Clause](#), stating those statutes are instead exercises of Congress's power to govern the militia while it is in federal service under the [Calling Forth Clause](#). Accordingly, the court held that under the Militia Clauses of the Constitution, until a state National Guard is federalized, the states retain exclusive authority to punish or otherwise govern them (*Abbott v. Biden*).

- **Property:** The Federal Circuit affirmed in part the Court of Federal Claims' judgment that Army Corps of Engineers' (Corps) policies to restore the Missouri River, resulting in frequent and severe flooding to neighboring farms, amounted to permanent, physical takings under the [Fifth Amendment](#). After the trial court determined that intermittent flooding between 2007 and 2014 was a taking and awarded damages, both parties appealed, with the plaintiffs challenging the court's denial of crop damages and its finding that the Corps did not causally contribute to a 2011 flooding. The Federal Circuit agreed with the plaintiffs and remanded proceedings, affirming in part and vacating in part the trial court decision (*Ideker Farms, Inc. v. United States*).
- **Torts:** The Fifth Circuit held that the federal Longshore and Harbor Workers Compensation Act (LHWCA), [33 U.S.C. § 905](#), did not preempt Louisiana state tort law claims by maritime workers who declined to pursue LHWCA remedies. The court acknowledged that although the language of the LHWCA suggested it was the exclusive remedy available to injured maritime workers, [Supreme Court precedent](#) established a zone of concurrent jurisdiction for certain maritime claims and foreclosed express preemption of state law. The court also declined to find [conflict preemption](#), or preemption that occurs when complying with both federal law and state law is impossible or state law creates an unacceptable obstacle to Congress's objectives. The court noted that some incongruity is inherent in any system of concurrent jurisdiction, and "ordinary incongruities or minor annoyances" do not give rise to such preemption (*Barrosse v. Huntington Ingalls, Inc.*).
- **Veterans:** Sitting en banc, the Federal Circuit held that [38 U.S.C. § 5110](#), which provides the effective date for Veterans Affairs (VA) benefits, was unconstitutional as applied to a veteran (the claimant) who could not seek benefits for decades because he was sworn to secrecy under penalty of court-martial with regard to the service-related activities that caused his injuries. The claimant suffered injuries from participating in a secret Army program from 1969 to 1971 under which he was experimentally subjected to chemical warfare substances. He could not apply for benefits until 2006, when the government released him from an oath of secrecy he had signed with respect to the program. The VA awarded the claimant benefits, but only as of the date it received the claim, per § 5510's "default rule," which was in 2006. The Federal Circuit ultimately awarded the claimant benefits on due process grounds, starting at the time he would have filed for benefits absent the secrecy oath. The court reasoned that the government, via the oath to secrecy, violated the claimant's fundamental right of access to the exclusive adjudicatory forum for vindicating his right to disability benefits (*Taylor v. McDonough*).

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