

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (August 21, 2023–August 27, 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

No Supreme Court opinions or grants of certiorari were issued last week. The Supreme Court’s next term is scheduled to begin October 2, 2023.

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.

- ***Civil Liability:** The Second Circuit, disagreeing with the approaches of several other circuits, held that the civil-action provision of the [Racketeer Influenced and Corrupt Organizations Act \(RICO\)](#) does not bar a suit for damages simply because those damages flow from a personal injury. The plaintiff consumed a hemp-derived product that was marketed as free from tetrahydrocannabinol (THC), then lost his job following a positive drug test for THC. The plaintiff sued the product’s marketers under RICO for damages,

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including lost wages. The district court had granted summary judgment for the defendants on the grounds that RICO only permits recovery for injury “to business or property.” The Second Circuit reversed, holding that lost earnings resulting from a personal injury are potentially recoverable (*Horn v. Medical Marijuana, Inc.*).

- **Criminal Law & Procedure:** The Second Circuit affirmed a conviction under the federal kidnapping statute, 18 U.S.C. § 1201. The defendant, who was also convicted of extortion, argued that he did not “hold[] for ransom or reward or otherwise any person” as prohibited by the statute because, first, the duration of his detention of the victim was too short to constitute kidnapping and, second, because the detention was merely incidental to the extortion. The court rejected both arguments, holding that, when a defendant is charged with kidnapping along with another defense, he or she “holds” a person in violation of the kidnapping statute if the time the defendant held the victim is appreciably longer than the time required to commit the other charged offense (*United States v. Krivoi*).
- **Criminal Law & Procedure:** The Third Circuit ordered the acquittal of a criminal defendant convicted of assaulting two private security contractors at a federal building. The defendant was convicted under 18 U.S.C. § 111, which (by cross-reference to 18 U.S.C. § 1114) applies when the victim is an “officer or employee” of the United States” or is assisting an officer or employee in the performance of his or her duties. The court concluded that § 111 did not apply because the plain meaning of “officer” did not cover private contractors; the victims had not been designated as officers by the United States; and the government had not proffered sufficient evidence at trial that the contractors were assisting a specific officer or employer in the performance of official duties, rather than merely the federal agency occupying the building, when the contractors were assaulted (*United States v. Washington*).
- **Energy:** The Fifth Circuit vacated a license issued by the Nuclear Regulatory Commission (NRC) to a private entity to operate a temporary, away-from-reactor storage facility for spent nuclear fuel. Noting its disagreement with the D.C. Circuit, the panel held that the *Atomic Energy Act* did not confer authority upon the NRC to license private, away-from-reactor storage facilities. The panel also held that the license contravened the policy expressed in the *Nuclear Waste Policy Act*. The panel read that statute as limiting the location of the temporary storage of spent nuclear fuel to federal facilities and private, at-the-reactor storage facilities, pending the completion of a permanent storage facility at Yucca Mountain (*Texas v. NRC*).
- **Energy:** The Tenth Circuit affirmed a lower court’s decision upholding regulations issued by the Department of the Interior (DOI) in 2016 that govern the calculation of royalties for oil and natural gas produced on federal lands. The panel agreed that DOI had not acted arbitrarily and capriciously under the Administrative Procedure Act, deciding that it had examined relevant data and adequately explained the basis for its disputed valuation methods (*Am. Petroleum Inst. v. DOI*).
- **Intellectual Property:** Vacating a district court’s grant of summary judgment, the Eleventh Circuit held that a nonexclusive trademark licensee may bring a claim for unfair competition under the *Lanham Act* when the licensing agreement is silent on the right to sue. The court distinguished circuit precedent from 2019, which held that a trademark licensee could not sue under the Lanham Act when the licensor explicitly reserved enforcement rights in the licensing agreement (*D.H. Pace Company, Inc. v. OGD Equipment Co., LLC*).

- **International Law:** A divided Fourth Circuit held that the balance of equities supported a preliminary injunction blocking a Lithuanian citizen's extradition under the [U.S.-Lithuania extradition treaty](#). The majority concluded that the treaty's unambiguous requirement that Lithuania support an extradition request with an indictment or comparable legal instrument initiating criminal charges was not satisfied by documents that reflected the petitioner was under criminal investigation, but which did not initiate criminal proceedings (*Vitkus v. Blinken*).
- **International Law:** Reversing a lower court, the Second Circuit held that a Lebanese bank sued for aiding a militant group was entitled to immunity under the [Foreign Sovereign Immunities Act \(FSIA\)](#) after Lebanon's central bank acquired the bank's assets. The court held that immunity under the FSIA may attach to a defendant that was not an instrumentality of a foreign sovereign when a suit was filed, but that becomes an instrumentality during the litigation (*Bartlett v. Baasiri*).
- **Procurement:** The Federal Circuit reversed an Armed Services Board of Contract Appeals decision dismissing a military contractor's claim under the [Contract Disputes Act \(CDA\)](#) for lack of jurisdiction. The court decided the contractor failed to meet a [requirement](#) to state a precise dollar amount sought as relief, or "sum certain," for each distinct claim. The court held that a clear statement from Congress is needed to show that a procedural requirement like the sum-certain requirement is meant to be jurisdictional. The court further held that the sum-certain requirement lacks the required clear statement because it arises from regulation rather than statute. The court concluded, therefore, that the sum-certain requirement is not jurisdictional and can be waived (*ECC Int'l Constructors, LLC v. Sec'y of Army*).
- **Separation of Powers:** A divided panel of the Sixth Circuit held that Congress's delegation of authority to the Occupational Safety and Health Administration (OSHA) to set workplace safety standards is constitutional and does not violate the nondelegation doctrine. The court reasoned that the Occupational Safety and Health Act, which directs OSHA to set "reasonably necessary or appropriate" workplace safety standards, [29 U.S.C. § 652](#), provides an intelligible principle to which OSHA must conform. The court joined the Seventh Circuit and the D.C. Circuit in rejecting a challenge to OSHA on nondelegation grounds (*Allstates Refractory Contractors v. Su*).
- **Separation of Powers:** The Ninth Circuit held that the appointment and removal of immigration judges and members of the Board of Immigration Appeals by the Attorney General satisfied Article II of the Constitution. The court held that such persons were "inferior officers," and that Congress could therefore permissibly vest the power to appoint them to the Attorney General under the [Appointments Clause](#). The court also ruled that the removal process for these officers complied with Article II, as they could be freely dismissed by the Attorney General, who remained accountable to the President (*Duenas v. Garland*).
- **Torts:** The Second Circuit held that the Hazardous Materials Transportation Act of 1975 (HMTA) expressly preempted a plaintiff's products liability and failure to warn claims. The plaintiff sued a company that produced an air tank used by the plaintiff's employer that exploded and injured him. The [HMTA expressly preempts state laws](#) that are (1) "about" certain subjects related to the transportation of hazardous materials in commerce, including the "marking" of a "container . . . that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce" and (2) "not substantively the same as a provision" of the HMTA or implementing regulations. The panel held both preemption requirements were satisfied here, as the plaintiff's claims

were encompassed by the HMTA’s provisions “about” the “marking” of the “container,” and the plaintiff’s tort law claims swept more broadly than federal law by requiring a less culpable mental state for liability (*Buono v. Tyco Fire Products, LP*).

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