

# Congressional Court Watcher: Circuit Splits from January 2025

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The U.S. Courts of Appeals for the thirteen “circuits” issue thousands of precedential decisions each year. Because relatively few of these decisions are ultimately reviewed by the Supreme Court, the U.S. Courts of Appeals are often the [last word](#) on consequential legal questions. The federal appellate courts sometimes reach different conclusions on the same issue of federal law, causing a “[split](#)” among the circuits that leads to the non-uniform application of federal law among similarly situated litigants.

This Legal Sidebar discusses circuit splits that emerged or widened following decisions from the last month on matters relevant to Congress. The Sidebar does not address every circuit split that developed or widened during this period. Selected cases typically involve judicial disagreement over the interpretation or validity of federal statutes and regulations, or constitutional issues relevant to Congress’s lawmaking and oversight functions. The Sidebar only includes cases where an appellate court’s controlling opinion recognizes a split among the circuits on a key legal issue resolved in the opinion.

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.

- **Civil Procedure:** The Fourth Circuit affirmed a lower court’s approval of a Mexican bank’s application to conduct discovery on another Mexican bank’s American subsidiary in connection to ongoing Mexican civil proceedings. Under [28 U.S.C. § 1782\(a\)](#), a federal district court may compel a person within the district to give testimony or other evidence “for use in a proceeding in a foreign or international tribunal.” In deciding that the lower court had not abused its discretion in granting the application for discovery, the Fourth Circuit panel widened a circuit split over the appropriate standard for evaluating arguments that requested material is shielded from discovery under the laws of the foreign tribunal. The panel [joined those circuits](#) that have decided that a party asserting a foreign law privilege bears the burden of establishing that privilege, and the panel upheld the lower court’s decision that the American subsidiary had not met this burden. The panel declined to adopt the approach of the [First](#), [Seventh](#), and [Eleventh Circuits](#), which do not impose an evidentiary burden on the moving party to show that the privilege exists

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and instead leave it to the discretion of the reviewing court to determine whether a privilege applies based on available evidence (*In re Banco Mercantil del Norte, SA*).

- **Criminal Law & Procedure:** The Sixth Circuit affirmed a lower court's application of the U.S. Sentencing Guidelines' [career-offender sentencing enhancement](#) to a criminal defendant. A defendant qualifies for a sentencing enhancement under the Guidelines if the defendant "has at least two prior felony convictions of ... a controlled substance offense." Although the Guidelines do not define what constitutes a "controlled substance," the Sixth Circuit looked to the state and federal drug schedules in place at the time of a defendant's conviction. The panel held that even if the defendant's prior state marijuana offense would not be considered a "controlled substance" offense following changes to the state drug laws, the sentencing enhancement applied based on drug schedules in place at the time of the defendant's conviction. The court described its ruling as consistent with circuit caselaw and rejected the defendant's argument that an intervening [Supreme Court decision](#) cast doubt on circuit precedent. The court acknowledged disagreement with the [Fifth Circuit](#), which looks to whether a defendant's earlier convictions would qualify as controlled substance offenses at the time of the defendant's sentencing for his most recent offense (*United States v. Drake*).
- **Freedom of Information Act (FOIA):** The D.C. Circuit vacated a lower court's clawback order that blocked an organization from using or disseminating information about U.S. Park Police personnel that was inadvertently disclosed in response to the organization's FOIA request. The circuit panel held that the Park Police failed to satisfy its burden of showing that disclosure of personnel names would compromise a substantial privacy interest to support withholding such information under [FOIA Exemption 6](#) and the [FOIA Improvement Act](#). The panel further held that the lower court lacked the power to issue the clawback order because the order was not an exercise of the court's inherent authority to manage judicial proceedings. Instead, the panel characterized the order as an effort to fill a perceived gap in the FOIA statute, which had resulted in the government being unable to prevent the dissemination of certain information it had mistakenly disclosed. The panel observed disagreement with the [Tenth Circuit](#), which upheld a lower court's order instructing the return or destruction of documents inadvertently disclosed in response to a FOIA request (*Hum. Rts. Def. Ctr. v. U.S. Park Police*).
- **Health:** The Fourth Circuit rejected a suit challenging an advisory opinion by the Office of the Inspector General (OIG) for the Department of Health and Human Services. The advisory opinion had concluded that a proposed patient assistance program for Medicare beneficiaries by a charitable organization involving a group of drug manufacturers would violate the Anti-Kickback Statute. The OIG decided that the program, which would have subsidized Medicare Part D beneficiary co-pays for oncology drugs produced by participating drug manufacturers, would violate the [Anti-Kickback Statute's prohibition](#) against knowingly and willfully offering or paying "any remuneration (including any kickback, bribe, or rebate)" to "induce" the purchase a federally reimbursable health care product. The panel generally agreed with the IG that the program would violate the Anti-Kickback Statute's plain terms because it would encourage beneficiaries, through the offer of subsidies, to buy federally reimbursable health care goods. The panel decided that the statute used "induce" in its ordinary sense to refer to influencing another, and not in the narrower sense sometimes used in criminal statutes to cover the solicitation or facilitation of the commission of an *unlawful* act by another. The panel also decided that the program's subsidization of co-pays was a type of "remuneration" covered by the statute. The panel rejected the organization's argument that the statute was meant to apply only to corrupt payments like kickbacks and bribes. The panel emphasized that the

statute's text expressly covered "any remuneration," regardless of whether or not it was for corrupt purposes, and the panel acknowledged disagreement with the [Sixth Circuit](#), which had interpreted the term as having a narrower scope (*Pharm. Coal. for Patient Access v. United States*).

- **Tax:** The Eleventh Circuit issued a superseding opinion in a case [originally decided](#) in 2024. The panel reaffirmed its earlier ruling that fines assessed for failing to properly report foreign bank accounts (known as FBAR penalties) are subject to the Eighth Amendment's [Excessive Fines Clause](#), as FBAR penalties are largely punitive. The court decided that penalties levied on one of the defendant's accounts violated the Clause because those penalties were grossly disproportionate to the FBAR offense. The panel remanded with directions for the trial court to enter a judgment in a lower amount. The circuit panel noted its disagreement with the [First Circuit](#), which had concluded that the Excessive Fines Clause does not apply to FBAR penalties (*United States v. Schwarzbaum*).

## Author Information

Michael John Garcia  
Deputy Assistant Director/ALD

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