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Legal Sidebar

# Congressional Court Watcher: Circuit Splits from October 2026

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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 nonuniform application of federal law among similarly situated litigants.

This Legal Sidebar discusses circuit splits that emerged or widened following decisions from October 2026 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 includes only cases where an appellate court's controlling opinion recognizes a split among the circuits on a key legal issue resolved in the opinion. This Sidebar refers to each U.S. Court of Appeals by its number or descriptor (e.g., "D.C. Circuit" for "U.S. Court of Appeals for the D.C. Circuit").

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.

- **Communications:** The First Circuit largely dismissed or denied claims raised in consolidated challenges by state and non-state petitioners to a 2024 Federal Communications Commission (FCC) rule regulating communications services provided by private entities to incarcerated individuals. (During litigation, the 2024 rule was superseded by a 2025 rule, and some of the nonstate petitioners' challenges to the 2024 rule were held in abeyance pending the court's consideration of challenges to the 2025 rule.) The court held, among other things, that it lacked statutory jurisdiction to consider the state governments' claim that statutory term limits for FCC commissioners rendered the commissioners insufficiently accountable to the President, in violation of the separation of powers, and thereby prevented the FCC from legally administering or enforcing the 2024 rule. Under 47 U.S.C. § 405(a), the court explained, it lacked

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jurisdiction to consider questions of law or fact that had not first been presented to the FCC, and the states had not presented this claim in the underlying agency proceedings. The court held that failure to raise a question of law or fact before the FCC was an absolute bar to judicial review under § 405(a). It rejected the states' argument—based on an opinion from the D.C. Circuit—that the statute contains an implicit futility exception, including when, as here, the states would have had to ask the FCC to determine whether the FCC was unconstitutionally insulated from presidential control (*In re MCP 191*).

- **Criminal Law & Procedure:** A divided Ninth Circuit affirmed a criminal conviction in a case involving 18 U.S.C. § 3292, which permits the suspension of the federal statute of limitations for a charged offense while the government seeks evidence of that offense located in a foreign country. Before an indictment is returned, the government may request suspension for "the offense" for which evidence is sought. The suspension of the statute of limitations ends when the foreign government takes "final action" on the evidentiary request, subject to statutory limits. Here, the federal government sought evidence from South Korea concerning bribery- and fraud-related conduct, but the district court's suspension order did not expressly identify 18 U.S.C. § 371, the conspiracy to commit a federal funds bribery offense of which the defendant was ultimately convicted. The majority held that a suspension order need not cite the specific offense if the facts and circumstances make clear, as they did here, that the order was intended to cover the offense. Addressing what constitutes "final action" for purposes of § 3292, the majority split with the Fifth Circuit, which considers the foreign government's subjective belief that it has completed its response. Relying on circuit precedent and aligning with the Eleventh Circuit, the majority instead concluded that the inquiry is an objective one: whether the foreign government has definitively responded to each item in the United States' request. Applying this standard, the majority held that the lower court did not err in its tolling of the statute of limitations (*United States v. So*).

  **Immigration:** The Sixth Circuit held that it lacked jurisdiction to review an alien's challenge to an administrative determination that he was ineligible for certain forms of protection from removal when he did not challenge the underlying removal order. After the petitioner unlawfully reentered the United States following removal, immigration authorities reinstated the order of removal. An immigration judge subsequently denied his applications for deferral of removal under the Convention Against Torture (CAT) and withholding of removal under 8 U.S.C. § 1231(b)(3)(A). The petitioner sought judicial review of those denials but did not challenge the reinstated removal order. The Sixth Circuit explained that, under 8 U.S.C. § 1252(a)(1), federal jurisdiction is generally limited to review of a "final order of removal." Because the petitioner challenged only his entitlement to protection and not the "final" reinstated removal order, the court concluded that it lacked jurisdiction because the immigration judge's decision denying protection is not a final order of removal. The court overruled a prior Sixth Circuit decision recognizing jurisdiction over standalone challenges to certain administrative denials of protection from removal, concluding that that decision conflicted with later Supreme Court decisions recognizing that claims for relief do not affect the finality of an earlier removal order. The court described its ruling as aligning with the Eighth, Ninth, and Eleventh Circuits but splitting from the Fourth and Seventh Circuits, which have permitted review of CAT or withholding-of-removal claims even when the underlying removal order was not directly challenged (*Castro-Fuentes v. Blanche*).
- **Immigration:** A divided Tenth Circuit panel allowed a mother and son's legal challenge to proceed against determinations by U.S. Citizenship and Immigration Services (USCIS) that resulted in the termination of the mother's refugee status. The mother had been

admitted to the United States as a refugee, and her son had been admitted as her minor dependent. USCIS later determined that she had been ineligible for refugee status because of her alleged involvement in the Rwandan genocide, and immigration authorities sought to remove the mother and son because of their improper admission into the United States. Under 8 U.S.C. § 1157(c)(4), immigration authorities "may" terminate an individual's refugee status if they "determine that the alien was not in fact a refugee … at the time of the alien's admission." The district court held that it lacked subject-matter jurisdiction over the petitioners' challenge because 8 U.S.C. § 1252(a)(2)(B)(ii) generally bars federal courts from reviewing decisions by immigration authorities that are discretionary in nature, which the district court understood to include a decision to terminate refugee status. The panel majority rejected that interpretation and, in so doing, described itself as splitting with decisions by the Fourth, Eighth, and Ninth Circuits. According to the majority, a decision to terminate refugee status under § 1157(c)(4) has two components: (1) a required determination that the individual was not a refugee at the time of admission and (2) a discretionary decision whether to terminate refugee status based on that determination. Because the petitioners challenged the first component, which the majority deemed nondiscretionary, the circuit court held that § 1252(a)(2)(B)(ii)'s jurisdictional bar did not apply. The decision reaffirms an earlier decision that was vacated by the circuit court for reconsideration in light of the Supreme Court's intervening decision in *Mullin v. Doe*, which the panel majority decided did not alter its legal conclusion (*Mukantagara v. Mullin*).

- **Indian Law:** The Tenth Circuit, sitting en banc, issued a decision interpreting the General Crimes Act (GCA), 18 U.S.C. § 1152, and overturning an earlier en banc decision. The GCA extends federal criminal laws applicable within the United States' special maritime and territorial jurisdiction to Indian country, subject to specified exceptions, including when both perpetrator and victim are members of Indian Tribes. The court was presented with two cases involving Indian victims where the defendants claimed the government had not proved that the defendants were not also Indians—in other words, that the defendants' non-Indian status was an element of the offense. The en banc court held that, if a defendant has raised the affirmative defense that the GCA does not apply because he or she is Indian, the defendant bears the burden of proving that affirmative defense by a preponderance of the evidence. The circuit court split with the Fifth and Ninth Circuits, which hold that the burden falls on the government to prove the defendant's non-Indian status (*United States v. Hebert*).

## Author Information

Michael John Garcia
Deputy Assistant Director/ALD

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