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IN FOCUS

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Lawsuits Against the Federal Government: Basic Federal Court Procedure and Timelines

Many federal laws and policy initiatives are challenged in court. In recent years, for instance, plaintiffs have brought cases challenging the Department of Homeland Security's rescission of the Deferred Action for Childhood Arrivals program, the Secretary of Commerce's decision to include a citizenship question on the 2020 Census, and the President's decision to expend certain funds to construct a "border wall." Because the defendant in these cases is the United States or an executive official, the cases generally proceed in federal court. By understanding the procedures governing federal court litigation, legislators can consider potential outcomes, estimate timelines, and appreciate the importance of a court's ruling at a particular stage. This In Focus reviews the most common procedures that govern civil suits against the federal government, tracing the path from federal district court to the Supreme Court.

The District Court: From Filing to Judgment

The first step in a typical civil case is filing the *complaint*—the document that lays out the plaintiff's case. The complaint must contain three main elements. It must (1) show that the court has jurisdiction, (2) set forth plausible allegations that the defendant has violated the law in some way, and (3) request relief that would remedy the plaintiff's harm. In many challenges to government action, the complaint asks the district court to enter an *injunction*—an order commanding the government either to do or refrain from doing some act.

Ordinarily, cases are filed in the lowest tier of the federal court system, known as the district court. Each of the 50 states (plus the District of Columbia and Puerto Rico) has at least one federal district court staffed by judges who may serve for life; some states contain as many as four judicial districts. Each district court is composed of several judges, one of whom is assigned to each case. When the events giving rise to a case are localized, the plaintiff generally must file in the local district. However, because federal policies often affect broad geographic areas, a plaintiff suing the federal government may be able to file in any of several districts. As a result, plaintiffs often seek to file in the district they believe will be most favorable for their claims. The plaintiff's choice may hinge on the perceived inclinations of the judges in a given district, the locations of the plaintiff and plaintiff's counsel, or other factors.

Once the plaintiff files the complaint and serves the lawsuit on the defendant, the usual next step is a response from the defendant. Most often, the defendant will file an *answer* to the complaint, responding to the plaintiff's claims and presenting defenses, or a *motion to dismiss*, asking the court to dispose of the case without trial because the complaint cannot succeed as a matter of law. The court may deny a motion to dismiss or may grant the motion with respect to the case as a whole or only as to certain claims.

If the court does not grant a motion to dismiss in full, the case proceeds to *discovery*, the process by which parties exchange evidence. Once the factual record is sufficiently developed, either party (or both) may file a *motion for summary judgment*, arguing that the other party cannot prevail in light of the applicable law and the undisputed facts. The district court judge may resolve legal questions at this stage but may not resolve factual disputes. As with a motion to dismiss, the court may grant summary judgment in full or in part; it may also grant summary judgment in favor of the plaintiff on some claims and in favor of the defendant on others. Claims that are not resolved through dismissal or summary judgment generally proceed to trial for resolution of any material factual questions. While jury trials are available in some federal civil cases, most cases against the federal government are tried without a jury, with the judge making the necessary factual findings.

Litigation is not known for its alacrity. According to the Administrative Office of the U.S. Courts (AO), civil cases in the U.S. district courts have a median length of 27 months from filing to trial, and close to 10% of cases have been pending for over three years. As an alternative to the cost and delay of litigation, the parties may settle the case at any time, and many cases end in settlement.

Motion for Preliminary Injunction

In many lawsuits challenging government action, the plaintiff files a motion for *preliminary injunction* (PI). A PI is a court order designed to protect a plaintiff before a full trial, often by temporarily preventing a challenged law or policy from going into effect. A motion for PI can be filed before the defendant files any pleadings (a plaintiff may even move for short-term relief via a *temporary restraining order* before the defendant receives notice of a suit). Plaintiffs seeking a PI must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm absent a PI; (3) the "balance of equities" tips in their favor—that is, denying a PI would harm the plaintiffs more than granting a PI would harm the defendant; and (4) an injunction is in the public interest.

Although a PI is, by definition, preliminary to the final resolution of the case, it is nonetheless important. Cases involving government action are often time-sensitive, and even a temporary halt to a challenged law or policy can be a substantial obstacle. In addition, as noted above, a plaintiff seeking a PI must demonstrate a likelihood of success on the merits. Thus, as a practical matter, the district court's

decision on the motion for PI may indicate how the court will ultimately resolve the case.

The Federal Court of Appeals

The second tier of the federal court system is the U.S. Courts of Appeals. The various judicial districts are divided geographically into 12 regional courts of appeals, known as "Circuits," plus the Federal Circuit, which handles only cases involving certain narrow subject matters, such as patent law. Circuits have varying numbers of judges—the largest, the Ninth Circuit, has over 40—but typically a panel of three judges is assigned to each appeal.

Generally, no party can file an appeal until the district court issues a final decision in the case as a whole. However, there are exceptions to that principle. Where a case involves legal issues of particular importance, the government may seek an early appeal to avoid discovery and a lengthy trial process. In addition, the losing party can immediately appeal an order either denying or granting a motion for PI. Either party that loses on an issue in district court may file an appeal, sometimes leading to *cross-appeals* where both parties appeal different aspects of the same decision. By statute, some cases, including many *petitions for review* challenging actions by federal agencies, begin in the court of appeals rather than the district court.

Similar to the motions phase in district court, parties before a Court of Appeals may file motions to dismiss and *motions for summary disposition* asking the appellate court to affirm or reverse the district court without full briefing and oral argument. If no such motions are granted, the parties file briefs explaining why the district court's decision should be affirmed or reversed. Generally, the parties may not present new evidence or arguments on appeal—the three-judge panel accepts the trial court's factual findings unless they are clearly erroneous and considers whether the trial court correctly applied the law to the facts. In most high-profile or difficult appeals, the case culminates in oral argument.

There is no clear timeline for a case to proceed from appeal to decision. In a case where the United States is a party, the appealing party must file its appeal within 60 days of the challenged district court order. Briefing the appeal and scheduling oral argument take time, and each of the circuits has different local rules and caseloads affecting the amount of time before argument. Local rules may accelerate the timeline in some circumstances, including for PI appeals. According to the AO, between September 2019 and September 2020, the median time from notice of appeal to decision by an appeals court was approximately nine months.

Petition for Rehearing or Rehearing *En Banc*

Once a three-judge panel issues a ruling, any losing party may file a petition for rehearing by the same panel or rehearing *en banc*. Rehearing *en banc* generally entails review of the panel's decision by all active judges in a circuit (due to its large size, the Ninth Circuit uses a partial-court *en banc* review process). A party seeking rehearing or rehearing *en banc* must file a petition, usually arguing that the panel's opinion is inconsistent with circuit or Supreme Court precedent. While circuits differ in their rules, a majority vote of active judges in the circuit is typically needed to grant a petition for rehearing *en banc*. Petitions for rehearing or rehearing *en banc* are rarely granted. For instance, in 2019, the Ninth Circuit granted 14 of 817 petitions for rehearing *en banc*. In a civil case involving the United States, parties generally have 45 days to petition for rehearing. The court's decision typically does not go into effect until seven days after that period expires, or until the court denies any rehearing petitions.

The Supreme Court

For the Supreme Court's purposes, the decision of the appellate court becomes final either after a panel decision of which no party seeks rehearing or after the appeals court resolves any petition for rehearing. At that time, the losing party may ask the Supreme Court to exercise its discretion to review the lower court decision through a *writ of certiorari*. The Court's rules provide that parties have 90 days from the lower court's final decision or denial of rehearing to file a certiorari petition. In extremely rare cases, a party can skip some of the foregoing steps to petition the Supreme Court directly, but typically only on limited issues that are both important and time-sensitive.

Four of the nine Supreme Court Justices must vote to grant certiorari for the Court to take up a case. The Supreme Court's rules state that the Court will grant certiorari only for "compelling reasons," and explain that a grant is more likely when the petition raises issues such as a split between circuit courts, a departure from previous Supreme Court case law, or an undecided question of federal law. The Court receives approximately 7,000-8,000 petitions annually and grants about 80. However, the Supreme Court is more likely to consider a challenge to an important federal government policy. For example, one commentator has estimated that the Court has granted 70% of discretionary petitions filed on behalf of the United States.

If the Court grants certiorari, the parties brief the case. At that point, it is common for interested outside parties to file *amicus briefs* expressing their views on the controversy. Amici can also participate in the lower courts, but the high-profile nature of Supreme Court review often draws additional participants. Finally, the Supreme Court usually conducts oral argument before issuing its decision.

Time frames at the Supreme Court can vary. According to the Court, it takes an average of approximately six weeks to act on a certiorari petition. Ordinarily, the Court grants petitions on a regular basis while it is in session (October-June). The Court typically schedules oral argument several months after a petition is granted and carries grants after January over for argument the following October. Writing an opinion also takes time; one commentator reports that for the October 2019 Term, the Court took an average of 112 days after oral argument to issue a decision. However, the Court can alter these time frames. For example, in the Census case mentioned above, the Court granted certiorari in February 2019 and decided the case in late June of that year. And the 2000 election case *Bush v. Gore* was briefed, argued, and decided within a few days.

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