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IN FOCUS

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

In Alexis De Tocqueville's classic 1835 work, *Democracy in America*, the author observed how important judicial procedures were to the United States political fabric: "There is virtually no political question in the United States that does not sooner or later resolve itself into a judicial question." This quote resonates today as the courts continue to be the center of a number of closely watched matters. In recent years, plaintiffs have brought cases challenging, for instance, the President's proclamation restricting the entry of certain non-U.S. nationals into the United States, the Secretary of Commerce's decision to include a citizenship question on the 2020 Census, and the President's decision to expend certain funds for constructing a "border wall." Because the defendant in these cases is invariably the United States or an executive official, they generally proceed in federal courts. Understanding the common procedures governing the federal courts allows legislative branch observers to plan for 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 such cases, tracing the path from federal district court to the Supreme Court.

The District Court—from Complaint to Preliminary Injunction

From Filing to Judgment

The first step in a typical civil case is filing the complaint—the document that sets forth the plaintiff's case. The complaint must contain three main elements. First, the complaint must show that the court has jurisdiction. Second, the complaint must set forth plausible allegations that the defendant has violated the law in some way. Finally, the complaint must contain a demand for relief that would remedy the plaintiff's harm. In many cases seeking to halt allegedly unlawful government action, the plaintiff's complaint will contain a request that the district court enter an injunction—that is, 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 life-tenured judges; some states have as many as four districts. Each district court is composed of several judges, one of whom is assigned to each case. Where the events giving rise to the case are localized, generally, the plaintiff must file in the local district. However, in many suits against the federal government, the plaintiff can file in multiple districts. As a result, plaintiffs often seek to file in the most favorable jurisdiction 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 complaint is filed and the government receives notice of the action, the case follows ordinary procedures. One exception arises if a third party seeks to participate in the case through a "motion to intervene"—if granted, that party could participate to the full extent as any other party. Barring an intervention (which could occur at any time), the typical next step is a response from the defendant, such as a motion to dismiss or an answer to the complaint. Assuming the court denies a motion to dismiss, the parties proceed to discovery (the process by which parties exchange evidence). The parties may settle the case at any time, and many cases end in settlement. Absent settlement, the judge may resolve the case based on a motion if the evidence is indisputable or the case may proceed to trial to resolve any factual disputes. Litigation is not known for its alacrity; according to the Administrative Office of the U.S. Courts, civil cases across the United States have a median length of 27 months from filing to trial, and about 16% of cases have been pending for over three years.

Motion for Preliminary Injunction

In many lawsuits challenging government action, the plaintiff may elect to file a motion for preliminary injunction (PI). A PI is a court order designed to protect a plaintiff *before* a full trial on the merits. An injunction can protect a plaintiff by preventing a law or policy from going into effect. The motion for PI can be filed even before the defendant files any pleadings (a motion for a PI may even be preceded by a motion for a temporary restraining order, before the defendant is even served). A plaintiff seeking a PI must establish that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest.

Although a PI is, by definition, preliminary to the final determination of the case, it nonetheless is important. Cases involving government action are often time-sensitive, and even a temporary halt can be a substantial obstacle. In addition, as noted above, the first PI factor requires the plaintiff to demonstrate a likelihood of success. Thus, as a practical (though not formal) 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—from Appeal to Petition for Rehearing *En Banc*

Appeal at the Federal Court of Appeals

The second tier of the federal court system is the U.S. Courts of Appeals. The various district courts are divided geographically into 12 regional courts of appeals, known as "Circuits," as well as the "Federal Circuit," which handles only cases involving certain narrow subject matters, such as patent law. Each circuit has a number of judges—the largest, the Ninth Circuit, has over 40—but typically only three judges are initially assigned to any given appeal. Either party that loses below on an issue may file an appeal, sometimes leading to "cross-appeals" where both parties appeal a different aspect of the same decision.

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 this principle. Where a case involves an issue of particular importance, the government may seek an early appeal to avoid discovery and a lengthy trial process. Moreover, with respect to a motion for a PI, the losing party can appeal a district court's order either denying or granting the motion.

After the appeal is filed, barring any motions filed before the Court of Appeals, 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 at this time—the three-judge panel is simply tasked with determining whether the lower court erred in applying the law to the facts. In most high-profile or difficult cases, 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 after the order being challenged is entered. Briefing the appeal and scheduling oral argument also 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 respects, particularly for PI appeals. According to the official statistics of the Ninth Circuit, the nation's largest federal appellate court, the median time from notice of appeal to decision was approximately 12 months in 2018.

Petition for Rehearing and Rehearing *En Banc*

Once a three-judge panel issues a ruling, any party who loses has the option of filing a petition for rehearing by the same panel or rehearing *en banc*. Rehearing *en banc* generally entails the panel's decision being reconsidered by all active judges in a circuit (The Ninth Circuit uses a partial-court *en banc* 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 petition for rehearing *en banc* is generally circulated to all of the active judges on the circuit, and a majority vote of active judges in the circuit is typically needed to grant the petition.

Petitions for rehearing *en banc* are rarely granted; in 2018, the Ninth Circuit granted only eight out of 955 petitions.

The federal rules of appellate procedure provide that in a civil case involving the United States, parties have 45 days to petition for rehearing, and a decision does not go into effect until that period (+7 days) expires or the petition is denied.

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 lower 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 petition. In extremely rare cases, a party can skip some of the previous steps to petition the Supreme Court directly, but typically only on limited issues that are both important and time-sensitive.

Four of the nine Justices must vote to grant certiorari for the Supreme Court to take up review. The Court's rules state that a writ will be granted only for "compelling reasons," and explains that a grant is more likely when the petition concerns, among other things, a split between circuit courts, a departure from previous Supreme Court case law, or an undecided issue of federal law. The Court receives approximately 8,000 petitions annually and grants approximately 70-80. The Supreme Court is more likely to grant 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 the petition, 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. Although amicus can also participate in the lower courts, 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 can take approximately six weeks to act on a petition. Ordinarily, the Court grants petitions on a regular basis while it is in session (October-June). Oral argument is typically scheduled months after a petition is granted, and grants after January are typically carried over for argument the following October. Writing the opinion also takes time; on average, for the October 2018 Term, the Court took 97 days from the argument to issue a decision.

However, the Court can alter these time frames. For example, in the Census case noted above, the petition was granted in February but the case was decided by the end of June. Similarly, in the 2000 election case, *Bush v. Gore*, the case was briefed, argued, and decided within a few days, suggesting the Court can act quickly if needed.

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