



May 22, 2020

## Congress, the Judiciary, and Civil and Criminal Procedure

Two sets of authorities govern proceedings in federal court: *substantive laws* create certain legal rights or impose duties, while *procedural laws* control the way courts enforce those substantive rights or duties. While many are aware of Congress's role in enacting and the courts' role in interpreting substantive laws, casual observers may be less conscious of the procedural rules that apply in federal litigation. Nonetheless, the various procedures governing federal civil and criminal cases are important. Indeed, in some instances, a claim may succeed or fail based on a party's compliance with the required procedures.

Congress enjoys ample authority to establish and structure lower federal courts. And, as the Supreme Court has stated, "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts." However, recognizing that the courts themselves possess significant expertise in crafting such rules, Congress passed the Rules Enabling Act, codified at Sections 2071-2077 of Title 28 of the U.S. Code. The Rules Enabling Act grants the Supreme Court primary authority for creating and amending federal procedural rules, but also imposes congressional oversight of the rulemaking process. This In Focus summarizes the authorities that govern federal judicial procedure, outlines the rulemaking process under the Rules Enabling Act, and presents related considerations for Congress.

### Overview of Federal Procedural Rules

Procedural rules govern all aspects of federal litigation, from the initiation of a case, to factual discovery, to briefing and oral argument, to final judgment and any appeal. For instance, procedural rules impose standards for pleadings the parties file, grand jury proceedings and civil and criminal jury trials, and testimony and other evidentiary matters. Procedural rules aim to provide structure to litigation, limit cost and delay, and ensure that all appropriate parties can participate fully and fairly in judicial proceedings. As Federal Rule of Civil Procedure 1 explains, the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

Procedural rules may fall into one of two categories: *jurisdictional rules* and *claim-processing rules*. As the Supreme Court has explained, jurisdictional rules strictly limit "a court's adjudicatory authority"—that is, the power of the court to consider a given case. As an example, time limits to appeal or petition the Supreme Court to hear a case are often interpreted to be jurisdictional. Claim-processing rules, by contrast, "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." Judges possess

substantial discretion to modify claim-processing rules, but may not alter or waive jurisdictional rules. Those rules may only be changed by amending the relevant authority.

The Constitution, federal statutes, and procedural rules promulgated under the Rules Enabling Act each control aspects of federal judicial procedure, and multiple sources may govern related matters. For instance, with regard to criminal jury trials, the Sixth Amendment broadly protects the right of a criminal defendant to a jury trial. At the same time, various statutory provisions within Title 28 of the U.S. Code govern matters including juror qualifications and jury selection. Federal Rule of Criminal Procedure 23 imposes additional requirements related to the exact size of a jury and the process by which a defendant can waive the right to a jury trial.

The primary rules governing federal court procedures are those promulgated under the Rules Enabling Act. These rules can overlap in scope, so more than one set of rules may apply in a given proceeding. Specifically, the Federal Rules of Civil Procedure govern civil cases in the trial-level federal district courts. The Federal Rules of Criminal Procedure apply to criminal proceedings both in district court and on appeal. The Federal Rules of Appellate Procedure govern proceedings in the U.S. Courts of Appeals, including appeals from the district courts in civil, criminal, and bankruptcy cases; appeals from the Tax Court; and petitions for judicial review of agency action. The Federal Rules of Evidence govern evidentiary matters in all federal courts. Specialized Federal Rules of Bankruptcy Procedure apply in bankruptcy proceedings. The Supreme Court has also adopted specific rules for practice before the high court.

The Supreme Court has also recognized that courts have inherent authority to supervise judicial proceedings, as long as the exercise of such authority does not conflict with procedural rules or statutes. Thus, in addition to other procedural laws, many lower federal courts issue their own local rules of procedure. Moreover, individual judges or panels of judges have the authority to establish other procedures. Judges may modify or supplement procedural rules on a case-by-case basis, or may issue *standing orders* setting procedures that generally apply in their cases.

### The Rules Enabling Act

Congress enacted the Rules Enabling Act in 1934 to streamline federal judicial procedure. At that time, separate rules governed civil proceedings at law (*e.g.*, claims for money damages) and proceedings in equity (*e.g.*, claims for injunctive relief). Proceedings in equity were subject to the Federal Equity Rules, which applied nationwide. However, under a statute known as the Conformity Act, the

procedural rules of the state in which each federal court sat governed proceedings at law.

The Rules Enabling Act paved the way for the federal courts to dispense with the formal division between proceedings in law and equity and created a process where the courts could enact uniform rules for federal judicial proceedings. As currently codified, the Rules Enabling Act authorizes the Supreme Court to “prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.” Such procedural rules may not “abridge, enlarge or modify any substantive right.” The Rules Enabling Act requires the Supreme Court to transmit any proposed amendment to the rules to Congress no later than May 1 of the year in which such amendment is slated to take effect. Amendments take effect automatically unless Congress enacts legislation to reject, modify, or delay a proposed change. The Rules Enabling Act also empowers the Supreme Court to create its own procedural rules, but those rules need not be submitted to Congress before they take effect.

The Supreme Court adopted the first Federal Rules of Civil Procedure under the Rules Enabling Act in 1937, and Congress allowed those rules to take effect without modification in 1938. The rules abolished the procedural distinction between proceedings in law and in equity, with Federal Rule of Civil Procedure 2 providing: “There shall be one form of action to be known as ‘civil action.’” (Later amendments changed the wording, but not the substance, of that provision.) The Supreme Court later adopted the Federal Rules of Criminal Procedure in 1944 and the Federal Rules of Appellate Procedure in 1967.

In 1972, the Supreme Court first adopted the Federal Rules of Evidence. However, in the first and perhaps most notable exercise of its authority to oversee judicial rulemaking, Congress passed legislation blocking the rules from taking effect. In 1975, Congress instead enacted new Federal Rules of Evidence legislatively. The congressionally enacted rules were based on the rules adopted by the Supreme Court but contained significant modifications, particularly with respect to evidentiary privileges. The same legislation provided that any rules amendment “creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress.” Since that time, Congress has periodically exercised its authority to modify procedural rules that the Supreme Court adopted for the lower federal courts under the Rules Enabling Act.

While the Supreme Court is ultimately responsible for adopting new procedural rules and transmitting them to Congress, most amendments to the rules originate from standing committees of the Judicial Conference of the United States, the national policymaking body for the federal courts. The standing committees propose amendments, solicit public comments, and then submit the amendments to the Judicial Conference’s Committee on Rules of Practice and Procedure. Any amendments approved by that committee and the Judicial Conference are then transmitted to the Supreme Court for adoption.

## Considerations for Congress

Congress possesses substantial authority to dictate the procedures of the federal courts, and has the opportunity to

do so every May in response to the Supreme Court’s proposals. One issue that has attracted congressional attention in recent years is class actions under Federal Rule of Civil Procedure 23. Some commentators contend that class actions can economize litigation and encourage plaintiffs to pursue socially desirable lawsuits; others object that class actions may encourage costly, meritless, or abusive suits. Thus, some proposals seek to facilitate class actions by reducing obstacles plaintiffs may face under Rule 23, while others seek to limit the availability of class-based relief.

Another topic of debate has been the federal district courts’ increased issuance of *nationwide injunctions* (also known as national injunctions or universal injunctions). A nationwide injunction is defined not by its geographic scope but by the parties it affects: such an injunction prevents the federal government from enforcing a statute, regulation, or other policy against any person, including persons who are not parties to the suit. Opponents of nationwide injunctions, among other concerns, argue that a single district court should not have the power to halt a federal policy nationwide. They also assert that nationwide injunctions improperly usurp the role of Rule 23 class actions. Defenders of nationwide injunctions contend that such injunctions prevent harm and promote legal stability by blocking the implementation of illegal policies that are likely to be struck down. They also assert that such injunctions may be necessary to secure complete relief for the parties to a suit. No current federal procedural rule specifically addresses nationwide injunctions. However, proposals before the 116th Congress would allow direct appeal of nationwide injunctions to the Supreme Court or curtail the ability of federal district courts to issue such injunctions. While Congress could pass legislation related to nationwide injunctions, the Supreme Court may also weigh in on the issue. Several justices have recently discussed the practice in concurrence or dissent, and the Court is currently considering the propriety of one nationwide injunction in *Trump v. Pennsylvania*.

Another area of interest for recent Congresses has been Federal Rule of Civil Procedure 11, which allows courts to impose sanctions for filing frivolous or abusive pleadings. A proposal in the 115th Congress would have expanded the available sanctions to “improve attorney accountability.” Another proposal in the 114th Congress would have amended the U.S. Code to create a special motion to dismiss strategic lawsuits against public participation (SLAPPs)—often-frivolous lawsuits intended to deter speech on issues of public concern.

In the realm of criminal procedure, one area of recent concern is Federal Rule of Criminal Procedure 6(e), which prohibits the disclosure of federal grand jury matters, subject to certain exceptions. The federal appellate courts have split on whether courts possess “inherent authority” to authorize disclosure of grand jury materials when none of the textual Rule 6(e) exceptions applies. As with other procedural rules, Congress can resolve this ambiguity through legislation.

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