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Two New Procedural Wrinkles That May Disincentivize Challenges to New Federal Policies

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The first weeks of the Trump Administration have been defined by executive orders and new policies that were immediately challenged on constitutional or statutory grounds.

Recently, the US Environmental Protection Agency indicated its intent to "launch" the "biggest deregulatory action in U.S. History" under which it will undertake 33 separate actions impacting regulations ranging from emissions limits for power plants to internal calculations for the "social cost of carbon." Even preceding this effort, more than 100 legal challenges to other Trump Administration actions have been filed.

As these disputes move through the litigation process (including appeals and, for at least some cases, likely US Supreme Court review), district courts have issued numerous preliminary injunctions to pause or delay the effects of executive orders until litigation is complete. While some of the new efforts will be challenged in appellate courts due to venue provisions in statutes including the Clean Air Act or Clean Water Act, other challenges will proceed in district courts.

Litigating these challenges can be expensive for both sides, but two recent developments could make litigation costs — particularly in challenges lodged in district courts — higher for challengers. First, the Trump Administration issued a Memorandum titled "Ensuring the Enforcement of Federal Rule of Civil Procedure 65(c)," and subsequently a related Executive Order on the same subject, seeking to require challengers to post bond before seeking preliminary injunctions. Second, the Supreme Court recently decided *Lackey v. Stinnie*, which — separate and apart from the Memorandum — makes it harder for some challengers to recover attorneys' fees after a preliminary injunction is granted.

Below, we discuss these developments and how they might apply in the litigation context.

How to Challenge Executive Branch Actions

We have outlined some of the Trump Administration's initial actions: initial Executive Orders; initial environmental policies; initial efforts to pause government grants; and policies in the energy space. We have also addressed the new Administration's trade policies here and here.

Individuals and entities generally initiate a challenge to the legal basis for an executive order or other action by filing a complaint in a federal district court. Depending on what is at stake and whether the facts of the case require rapid resolution, the court may use briefings, hearings, or a trial to evaluate whether the order or action should be upheld, struck down, or modified. Parties that lose in district courts may appeal, and some disputes make their way to the Supreme Court, which has the final say on most constitutional issues.

Often, challengers ask for injunctive relief, which is a legal remedy in the form of a court order compelling a party to do, or not do, a particular thing. Injunctive relief is warranted when an award of a money judgment would be insufficient to resolve the harm. Injunctive relief can be temporary — a "preliminary injunction" — or permanent, requiring a party in perpetuity not to do a particular thing.

Courts will often use preliminary injunctions to temporarily preserve the "status quo" while litigation is ongoing. This means that a challenger may win a preliminary injunction, but ultimately lose the case (or have the case mooted if the government changes course on its own before a final judgment).

The White House Memorandum on Fed. R. Civ. P. 65(c)

On March 6, after district courts had issued numerous restraining orders and preliminary injunctions temporarily delaying or reversing executive orders, the Trump Administration issued a new memorandum titled "Ensuring the Enforcement of Federal Rule of Civil Procedure 65(c)," seeking to require plaintiffs to post a bond before requesting preliminary relief. (The White House fact sheet on the Memorandum is here.)

The memo asserts that the slate of lawsuits and preliminary injunctions constitutes an "anti-democratic takeover … orchestrated by forum shopping organizations that repeatedly bring meritless suits … without any repercussions when they fail." The memo argues that taxpayers are harmed when program cuts are enjoined and substantial government resources are spent "fighting frivolous suits instead of defending public safety."

In response to the issues it identifies, the memo invokes Federal Rule of Civil Procedure 65(c), which requires parties seeking a preliminary injunction to post security in an amount the court determines is sufficient to cover the costs and damages of the enjoined party if the enjoined party ultimately wins the case on the merits. The memo directs all federal department and agency heads to formally request security under Rule 65(c) in every case where plaintiffs seek a preliminary injunction against the government. It requires that the requests remind the court that Rule 65(c) is mandatory, reiterate that the government's requested bond amount is "based on a reasoned assessment," and demand that any party failing to comply with Rule 65(c) should lead to the "denial or dissolution of the requested injunctive relief."

But despite its strong language, the memo is largely just a reminder of an already existing procedural rule. Judges have discretion to determine the appropriate amount for any Rule 65(c) bond, and, in the context of challenges to executive actions, many courts have determined that amount is zero. Federal judges are presumably aware of Rule 65(c), and many of the judges enjoining the Trump

Administration already determined that Rule 65(c) did not require a bond in those cases. Two weeks before the memo, a federal district judge in Maryland granted a college diversity officer's request for a preliminary injunction against executive orders cancelling diversity, equity, and inclusion (DEI) grants and contracts, but set the Rule 65(c) bond at $0 because the plaintiff's constitutional rights were at issue and "a bond of the size Defendants appear to seek would essentially forestall Plaintiffs' access to judicial review."

Going forward, Rule 65(c) bonds will likely become a more actively contested issue and challengers to any executive action will need to provide arguments why they should not be required to pay.

Lackey v. Stinnie and Plaintiffs' Attorney Fees

Separately but relatedly, the challengers who have successfully obtained preliminary injunctions blocking Trump Administration executive actions may have a harder time recovering their attorneys' fees — after the recent Supreme Court decision in *Lackey v. Stinnie*, plaintiffs will need to see their cases through to final judgment before recovering legal fees.

42 U.S.C. § 1988 provides that civil rights plaintiffs may win reimbursement of their attorneys' fees if they are the "prevailing party." Historically, this fee-shifting mechanism has helped advocacy groups and law firms shoulder the substantial cost of civil rights lawsuits. For example the *Lackey* plaintiffs estimated that the federal appellate litigation in the case cost $800,000. In a procedurally similar case, the New York Civil Liberties Union was seeking $200,000 in attorneys' fees against two upstate New York counties.

The Supreme Court has addressed when exactly a plaintiff becomes a "prevailing party" (and thus eligible for reimbursement) on several occasions. In *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, the Court ruled that a party prevails only when it achieves a "judicially sanctioned changed in the legal relationship of the parties." 532 U.S. 598, 601 (2001). If a plaintiff files a lawsuit and the defendant voluntarily does what the plaintiff asked for, the plaintiff does not "prevail" for purposes of attorneys' fees. To prevail, the plaintiff must win a merits judgment from a court.

What if a plaintiff wins a preliminary injunction but loses a final merits judgment? That plaintiff also does not prevail, the Supreme Court has held, because the victory was only temporary, not enduring. *Sole v. Wyner*, 551 U.S. 74, 86 (2007). The *Sole* decision left open what happens when a plaintiff wins a preliminary injunction and then the defendant voluntarily provides the relief plaintiff was seeking.

That issue has now been resolved. Until last month, 11 federal appeals courts held that a plaintiff that wins a preliminary injunction can be a "prevailing party" under some circumstances. Not so, said the Supreme Court in *Lackey*. The Court held that a plaintiff "prevails" when it wins permanent, on-the-merits judicial relief that materially alters the legal relationship of the parties. A plaintiff that wins only a preliminary injunction, which would include several plaintiffs suing the Trump Administration at this juncture, is not yet entitled to reimbursement of its attorneys' fees. As a result, it's not yet clear whether plaintiffs challenging the Trump Administration's policies will receive attorneys' fees. It will depend on how they are ultimately resolved.

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