INSTITUTE FOR JUSTICE

October 4, 2021

Honorable Robert Dow, Jr.
Chair, Advisory Committee on Civil Rules
One Columbus Circle
Washington, D.C. 20544
Re: Rule 12(a)(4) Proposal

Dear Judge Dow:

The Department of Justice has proposed an amendment to Rule 12(a)(4) that would provide United States employees and officers an additional 46 days to file an answer after a Rule 12 motion has been denied or postponed. Any such amendment would serve neither justice nor efficiency.

The DOJ offers two justifications for its proposal: (1) it should not be required to file an answer while it considers whether to appeal; and (2) it has unique burdens on its time and resources requiring accommodation. Neither argument is persuasive.

First, the DOJ's proposal amounts to a request for a special advantage on top of its already existing special advantage. Due to a monumental exception to the final-judgment rule, government officials can immediately appeal non-final orders denying their assertion of immunity—twice (after the denial of both a motion to dismiss and motion for summary judgment). Seeking to exploit this unique advantage further, the DOJ proposes that it be exempted from its litigation duties (i.e., the simple task of filing an answer) while it decides whether to exercise a right afforded to no other litigant.

In response to concerns that such a change could prejudice plaintiffs' right to actively litigate their cases, the DOJ claims there's a solution: plaintiffs can simply file a motion to expedite if needed. In other words, the DOJ proposes that, instead of it filing a motion for an extension, the burden to request diligent litigation should be shifted to the plaintiff, who has alleged his constitutional rights have been violated by an agent of the U.S. Government. This burden-shifting maneuver would undermine equity and would only serve to further tip the scales in government-defendants' favor.

Despite its assertions otherwise, the DOJ needs no help in effectively litigating the only claims to which this amendment would apply—*Bivens* actions. The DOJ's own statistics demonstrate that it already wins 99% of these cases.[1] Providing the government with yet another thumb on the scale[2] risks

[1] *See* Michael W. Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U. Rich. L. Rev. 281, 297 (1980) (citing the DOJ's figures that only seven of "several thousand" *Bivens* suits have resulted in judgments against federal defendants); *cf.* Vaughn & Potter 1983, Ltd. v. United States, Civ. No. 91-F-1767, 1992 WL 235868, at *3 (D. Colo. July 29, 1992) (commenting that because of immunity and all the "procedural advantages afforded to defendants," "bringing a *Bivens* action is a Herculean task with little prospect of success").

[2] The right to an interlocutory appeal is not the only advantage the DOJ has in litigation. As the DOJ itself admits, many of the Federal Rules provide explicit favor to the government, *see* Appendix, each one providing the federal government an additional advantage. *See* Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 Mich. L. Rev. 1539, 1577–79 (2020).

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eviscerating the small chance of success constitutionally aggrieved plaintiffs do have.[3] If the DOJ truly needs more time as a member of the Solicitor General's office[4] mulls over its prospects on appeal, the more equitable approach is the one that already exists—moving for an extension like every other litigant. It is the DOJ that must adapt its internal operating procedures to the Federal Rules, not the other way around.

Second, the DOJ argues that its deadline to file an answer should be more than quadrupled due to the "practical reality" that the government needs "more time than private litigants"[5] because, as the Committee notes summarize, its "many competing responsibilities . . . impede the opportunities for a nimble response that are available to private lawyers." The DOJ, however, offers nothing to support this assertion. Because it can't. To the contrary, in the vast majority of cases, it is the government, not the private litigant, who has a "significant resource advantage."[6] Moreover, research shows that while the prospect of qualified immunity deters private lawyers from accepting cases, it plays a "minimal role" and is rarely the determining factor in *Bivens* cases.[7] In fact, most *Bivens* claims will be resolved—in the government's favor—without the court ever reaching the issue of qualified immunity.[8] It makes little sense, then, to revise the rules, risk prejudice to plaintiffs, and reward delays to litigation for a burden that does not in fact exist.[9]

Rule 12(a)(4), as it stands now, best reflects the goals of litigation: to achieve a "just, speedy, and inexpensive determination of *every* action and proceeding."[10] Any change to Rule 12's deadlines would accomplish the opposite. It would further entrench an unjust procedural double standard. It would unnecessarily increase delays to litigation. And it would be an inefficient response to an insignificant problem. The undersigned therefore respectfully request that the Committee reject any proposed changes to Rule 12(a)(4).

Sincerely,

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Daniel Rankin, Law & Liberty Fellow[**]

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[3] *See, e.g.*, *id.* at 1566–72 (explaining that more rules in favor of the government disincentivizes attorneys from bringing civil rights actions).

[4] Overinflating the burdens of determining whether to appeal a denial of immunity, the DOJ suggests that the Solicitor General himself must make the decision. The relevant regulation, however, assigns the task to the Office of the Solicitor General, clarifying that anyone under the Solicitor General's purview can—and almost certainly does—make the decision to appeal on the Solicitor General's behalf. *See* 28 C.F.R. §§ 0.20–0.21 (describing the general functions of the "Office of the Solicitor General").

[5] Letter from Joseph H. Hunt, Assistant Attorney General, Department of Justice, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (Feb. 26, 2020).

[6] Nicholas S. Zeppos, *Department of Justice Litigation: Externalizing Costs and Searching for Subsidies*, 61 Law & Contemp. Probs., 171, 183 (1998); *see also* Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 Fla. St. U. L. Rev. 391 (2000) (showing "major asymmetries between the costs and benefits of cases appealed by private litigants and the costs and benefits of cases appealed by government litigants").

[7] Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 Stan. L. Rev. 809, 843–45 (2010).

[8] *Id.* (outlining the ways in which *Bivens* claims are resolved).

[9] Tellingly, the DOJ declined to provide the requested statistics concerning how often it actually seeks an extension in *Bivens* cases. Perhaps this is because the rareness of the occasion undermines any argument for necessity.

[10] Fed. R. Civ. P. 1 (emphasis added).

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Appendix

Federal Rules Advantaging the Federal Government

Rule	Text
Fed. R. Civ. P. 12(a)(2) Time to Serve a Response Pleading	"United States and Its Agencies, Officers, or Employees Sued in an Official Capacity. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney." A regular defendant must serve an answer within 21 days. Fed. R. Civ. P. 12(a)(1).
Fed. R. Civ. P. 12(a)(3) Time to Serve a Response Pleading	"United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later." A regular defendant must serve an answer within 21 days. Fed. R. Civ. P. 12(a)(1).
Fed. R. Civ. P. 13(d) Rules on Counterclaims	"Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency." While normally a party may state a counterclaim, if the United States is a party, a counterclaim is not permitted.
Fed. R. Civ. P. 23(f) Class Action Appeals	"Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."
Fed. R. Civ. P. 24(b)(2) Intervention	"By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: a statute or executive order administered by the officer or agency; or any regulation, order, requirement, or agreement issued or made under the statute or executive order."
Fed. R. Civ. P. 26(a)(1)(B)(vi)–(vii) Disclosures	"The following proceedings are exempt from initial disclosure: an action by the United States to recover benefit payments; an action by the United States to collect on a student loan guaranteed by the United States . . . ."

Rule	Text
Fed. R. Civ. P. 37 (advisory committee notes)	"Since attorneys' fees cannot ordinarily be awarded against the United States (28 U.S.C. §2412), there is often no practical remedy for the misconduct of its officers and attorneys."
Fed. R. Civ. P. 39(c)(2) Nonjury Trials	"In an action not triable of right by a jury, the court, on motion or on its own: (2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial."
Fed. R. Civ. P. 45(b)(1) Subpoenas	"By Whom and How; Tendering Fees. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies."
Fed. R. Civ. P. 54(d)(1) Costs to Prevailing Parties	"Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law."
Fed. R. Civ. P. 62(e) Stays without Bonds	"Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government." A regular defendant must provide a bond or other security if it wishes to obtain a stay pending appeal. Fed. R. Civ. P. 62(b).
Fed. R. Civ. P. 65 (advisory note to Subdivision (c)).	"The last sentence continues the following and similar statutes which expressly except the United States or an officer or agency thereof from such security requirements . . . ." A regular defendant, if it seeks a preliminary injunction or temporary restraining order, must give security for a potentially erroneous order. Fed. R. Civ. P. 65(c).
Fed. R. Civ. P. G(4)(b)(v) Notice	"Actual Notice. A potential claimant who had actual notice of a forfeiture action may not oppose or seek relief from forfeiture because of the government's failure to send the required notice."
Fed. R. Civ. P. G(6)(a) Interrogatories without Leave	"The government may serve special interrogatories limited to the claimant's identity and relationship to the defendant property without the court's leave at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within 21 days after the motion is served."