**Civics 101**

**Episode 8: Federal Courts**

[00:00:00] Who is the current speaker of the house?

[00:00:03] Don't even know. Will they rule in the president's favor when they send it to the Supreme Court.

[00:00:07] You can't refer to a senator directly by their name. Congressional redistricting. Executive Orders. the national security Council. Civics... civics... civics... 101!

**Virginia Prescott:** [00:00:18] I'm Virginia Prescott and this is Civics 101. The no-shame podcast refresher course on some basics you may have forgotten since middle school. When a trio of judges on a federal appeals court upheld a freeze on President Trump's immigration order, some people celebrated. The administration protested and at least a few people said: wait a minute. How do the federal courts work? Today on Civics 101, the structure and power of the federal courts.

[00:00:45] What they can do and how they do it and why it matters. Erin Corcoran is a professor at the University of New Hampshire School of Law. She serves on the New Hampshire Supreme Court's Access to Justice Commission. And thanks so much for coming in.

**Erin Corcoran:** [00:00:57] Thanks for having me Virginia.

**Virginia Prescott:** [00:00:58] So glad you're here-- because I need like the Constitution for kids version. Do you mind?

**Erin Corcoran:** [00:01:04] Sure.

**Virginia Prescott:** [00:01:04] OK.

**Erin Corcoran:** [00:01:05] So there's three main levels to the federal judiciary. The first is the district court level, which is the trial court level and there's 94 federal district courts in the United States. From there, there's what we refer to as an intermediate appellate level, which is comprised of 13 circuit court jurisdictions and 12 of those have geographical reach. So, for example, if you're in New Hampshire you would appeal to the First Circuit. And from there all of those circuits then you can appeal those decisions up to the U.S. Supreme Court.

**Virginia Prescott:** [00:01:38] All right. So I might even have to get more "Constitution for Kids." Trial court and an appeals court, or an appellate court. What's the difference there?

**Erin Corcoran:** [00:01:46] Sure. So trial courts hear, hear the questions of... for the first time and they're primarily concerned with working through the facts of the case trying to understand what the different issues are and developing, sort of, a timeline, a sequence of events, what happens. And then also, what kind of legal recourse the parties may have. If you don't like that decision, either party in the civil law context can ask for the appellate court to review the decision of the district court.

**Virginia Prescott:** [00:02:18] OK so the trial court would look like what we have in the vision of a trial, right, that we see on television.

**Erin Corcoran:** [00:02:23] Sure, you have lawyers on either side. Usually you have a jury. People are called up to testify. It's sort of what you see on Law and Order on TV. That's a trial court.

**Virginia Prescott:** [00:02:35] And if they're not happy, they say we're appealing this decision. It goes to the appellate court.

**Erin Corcoran:** [00:02:40] Right. And that has that appeal is less dramatic. Most of that work is done before they actually present the case to the court. And it's all done on with written briefs and then the court may have what's called an oral argument, an opportunity for each party to give an oral summation of their legal arguments to the appellate body.

**Virginia Prescott:** [00:03:01] I'm still not exactly clear on what their jurisdiction is. Their various and sundry different jurisdictions.

**Erin Corcoran:** [00:03:08] Sure. So the... a federal, a federal court is a court of limited jurisdiction and they basically have jurisdiction over constitutional questions and then other questions.

**Virginia Prescott:** [00:03:20] Can you give me an example.? What would be a constitutional.

**Erin Corcoran:** [00:03:22] Sure, first amendment. Did this law, does this law violate my first amendment rights? My right to freedom of speech, freedom of association. A federal district court would be the court that would hear that claim. They also can hear claims, what we refer to as federal question claims. This is sort of Congress saying if this question is about federal law whether or not an agency has the authority to do something. That would be another example of the kind of question that that court could hear.

**Virginia Prescott:** [00:03:52] How are federal judges appointed?

**Erin Corcoran:** [00:03:55] They are nominated by the President of the United States.

**Virginia Prescott:** [00:03:57] Every single one?

**Erin Corcoran:** [00:03:58] Every single one and confirmed by the Senate. And for federal judges and circuit court judges, the current rule in the Senate is they need to have 51 or more votes in favor of them.

**Virginia Prescott:** [00:04:10] Alright. So what is the difference between a district and circuit court in terms of power? Or hierarchy maybe is that a better way to ask?

**Erin Corcoran:** [00:04:18] Sure. I mean so the district court generally is looking at issues affecting the parties within their district. Although as we saw have seen in recent cases they do have the power to make decisions or issue orders that can affect the entire country. The circuit courts are only hearing appeals that are coming from district courts in their circuit. So for example if a New Hampshire judge's decision was appealed to the First Circuit and a California or Washington state judge's decision was appealed to the Ninth Circuit, the 9th and 1st Circuit could in theory have come up with different rules. And that would be what we refer to as a circuit split where there is there is disagreement among the circuits. And so the decision by the First Circuit would be what everyone living in the First Circuit would have to abide by and those in the Ninth Circuit would have to abide by the Ninth Circuit ruling.

**Virginia Prescott:** [00:05:14] And the Supreme Court loves a circuit splits. Have I got that right?

**Erin Corcoran:** [00:05:18] That's correct. That's one of the main one of the decision points in deciding which cases they're going to take on since they take on so few.

**Virginia Prescott:** [00:05:25] Is there any difference in this sort of sway or power of you know a larger circuit compared to another? The first circuit compared to the 9th, or the 11th versus the 5th?

**Erin Corcoran:** [00:05:35] There's definitely in some ways more sway with the D.C. Circuit Court of Appeals which is the circuit court of appeals that hears cases coming out of the District of Columbia, in part because many of the cases around the power that the federal government has is litigated in those courts.

**Virginia Prescott:** [00:05:51] So D.C. versus Heller for example that fed up to the Supreme Court.

**Erin Corcoran:** [00:05:54] Exactly. And the judges that sit on that circuit oftentimes are judges that are elevated to the Supreme Court. I think with respect to the different circuits because they are regionally based and geographically based, reflexively their opinions are can we'll be different sort of in part based on sort of what kind of cases come up through them. So for example as an immigration lawyer, when I practiced, we knew which circuit courts tended to have more favorable outcomes for non-citizens. Not always. But if you were sort of looking statistically you were much better off bringing a case for a non-citizen in the Ninth Circuit or the Second Circuit as opposed to the fifth or the fourth.

**Virginia Prescott:** [00:06:37] So you would try and get your case heard in particular places for particular outcomes.

**Erin Corcoran:** [00:06:41] Well I think it... in some ways you're limited by where you... You have to be within the jurisdiction of the federal district court to bring a case and then that determines where you go. But in counseling clients about whether or not it was in their interest to appeal a case or what the odds were of succeeding on the merits if they were to appeal the case. We certainly looked at you know geographically where, what court would be appearing before.

**Virginia Prescott:** [00:07:05] All right. So we haven't even talked about the Supreme Court necessarily yet. How do they feed up to the Supreme Court through the district or circuit court?

**Erin Corcoran:** [00:07:13] So once they've gone to the, through the circuit court level, a party can appeal and ask as a matter of discretion that the Supreme Court take on that case. That party would follow what would be known as a Petition for Certiorari to the Supreme Court. The Supreme Court votes on whether or not to hear that petition and then if they decide to hear that petition they will then schedule a briefing schedule and oral arguments for that. So they are only taking up a very small percentage of the cases that are asked, that asked for that review and they're looking for reasons such as either a novel area of the law that's never been decided before or as you mentioned a circuit split.

**Virginia Prescott:** [00:07:52] OK so what is the role of the federal court system in the checks and balances between Congress, judiciary and, executive?

**Erin Corcoran:** [00:08:01] Sure. So, generally speaking the courts don't like to get involved in actions that the president or Congress are taking usually because those are are often seen as political questions. So if you don't like what Congress is doing or you don't like what the president's doing, generally speaking the check is at the ballot box. You get to vote those people out of office at the next election. However, there are times in which either branch of government may be overstepping their constitutionally prescribed limits. And that is when the court has a vital role in checking that power to say: you, President, don't have that power under the Constitution. And we're going to stop you from doing that because it does violate the Constitution.

**Virginia Prescott:** [00:08:45] We have heard much about the temporary restraining order on, Trump's immigration executive order. It was first issued by a district court judge then later upheld by a three judge panel in the Ninth Circuit. It's a really complicated case and I don't think that we want to dig into it any more than it's already happened and it's bound to move quickly. But in order for this judge to initially issue a temporary restraining order, there was an actual case, like a trial, for that?

**Erin Corcoran:** [00:09:12] A temporary restraining order is a very modest measure. I like to think of it as the pause button on your VCR or... so you're, the trial starts. But before the trial really gets started you want to preserve the status quo. Right. So this executive order was new. New policy, lots of changes. Not sure if it's constitutional or not. And so the Washington attorney general was simply asking: can we just put that policy on hold for a short period of time until we figure out, sort of, if this is actually a good policy because we don't want to have to then go back in and undo everything that the policy did if in fact the policy is unconstitutional. So it's before you even get to trial. You're basically asking the judge: just hit the pause button. And you have to show in order to get a temporary restraining order that there is a success on the likelihood of the merits, and the other thing that you have to show is that there would be irreparable harm to the person who wants it. So in Brooklyn in the first TRO that was issued, one of the men that was coming was an interpreter for the U.S. military. He was on a special visa given to him by the military because they were afraid he would be harmed or killed because he was supporting the U.S. military. So to send him back, even if it ultimately we found out the executive order was unconstitutional, the harm that could have occurred to him before that ultimate decision or that trial decision came out.

**Virginia Prescott:** [00:10:35] So a case has to be brought to a court for a judge to issue a temporary restraining order.

**Erin Corcoran:** [00:10:41] Right. So you file a complaint, and in the complaint you allege all of the things you think that the other party has done wrong. Why you think this court is the proper court to hear the case and what you'd like the court to do for you. Once that complaint is filed you can also file a motion for a temporary restraining order.

**Virginia Prescott:** [00:10:59] So to continue the analogy, then the administration came and said press play.

**Erin Corcoran:** [00:11:03] Right.

**Virginia Prescott:** [00:11:04] And the three judge panel came in and said no. Keep the pause button.

**Erin Corcoran:** [00:11:07] Yes. Exactly.

**Virginia Prescott:** [00:11:08] And so now it goes possibly to the Supreme Court?

**Erin Corcoran:** [00:11:11] Correct.

**Virginia Prescott:** [00:11:13] What do you think is the most important thing that listeners-- citizens--should know or take away from the federal court system?

**Erin Corcoran:** [00:11:20] That the court's responsibility is to interpret what the law says. It's not to make new law. It's not to decide cases by what, whether a judge thinks something is morally right or wrong. You know oftentimes when I've talked with judges, they are confined and limited by the four corners of the statute and the four corners of the Constitution. And so sometimes they have to make decisions that they don't like but that's... they're upholding their oath to uphold the Constitution and to interpret the law. And I think sometimes people think that the courts have more power than that.

**Virginia Prescott:** [00:11:59] Erin Corcoran. She's a professor at the University of New Hampshire School of Law. She teaches classes on immigration law and administrative process. Thank you so much for walking me through.

**Erin Corcoran:** [00:12:08] Thank you Virginia.

**Virginia Prescott:** [00:12:09] Maybe creeping me through? OK. Class dismissed. This episode was produced by Taylor Quimby and edited by Maureen McMurray. Music in this episode came to us from Broke for Free. Call or text your questions at 202-798-6865. Just leave a voicemail with your name and where you're from and we will try to answer as many of your questions as we can. I'm Virginia Prescott. Civics 101 is a production of NHPR.