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The Role and Impact of Nationwide Injunctions by District Courts

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My name is Hans A. von Spakovsky.¹ I appreciate the invitation to be here today to discuss the legal and policy implications of the imposition of nationwide injunctions by federal district courts. The views I express in this testimony are my own, and should not be construed as representing any official position of the Heritage Foundation or any other organization.

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I am a Senior Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation. Prior to joining The Heritage Foundation, I was a Commissioner on the United States Federal Election Commission for two years. Before that I spent four years at the United States Department of Justice as a career civil service lawyer in the Civil Rights Division, where I received three Meritorious Service Awards (2003, 2004, and 2005). I began my tenure at the Justice Department as a trial attorney in 2001, and was promoted to be Counsel to the Assistant Attorney General for Civil Rights, where I helped coordinate the enforcement of federal voting rights laws, including the Voting Rights Act and the National Voter Registration Act.²

The Problems with Nationwide or Global Injunctions

The issue is this: what is the legitimacy of an injunction issued by a federal district court, in a non-class action lawsuit, that allegedly has nationwide application to individuals who are not even parties to a suit, and that forbid the government from enforcing a statute, regulation or policy? The traditional American practice “was that an injunction would restrain the defendant’s conduct vis-à-vis the plaintiff, not vis-à-vis the world.”³ As explained in a recent article in the *New York University Law Review*, “nationwide injunctions are a recent and controversial phenomenon.”⁴

The U.S. Solicitor General pointed out in the Petition for Certiorari filed with the U.S. Supreme Court in *Trump v. International Refugee Assistance Project* that “[c]onstitutional and equitable principles require that injunctive relief be limited to redressing a plaintiff’s own cognizable injuries.”⁵ In that case, rather than providing injunctive relief to the individual plaintiffs who filed suit on behalf of themselves and/or their family members, lower courts enjoined enforcement of the executive order issued by President Donald Trump temporarily suspending the entry of certain aliens from terrorist safe havens in the Middle East and Africa “as to thousands of unidentified aliens abroad.”⁶ And they did so without meeting any of the requirements necessary to justify a nationwide injunction affecting nonparties.

Unfortunately, the Supreme Court did not seem to fully correct this problem or faithfully

² I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia. In Virginia, I served for three years as the Vice Chairman of the Fairfax County Electoral Board, which administers elections in the largest county in that state. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981. I am the coauthor of *Who’s Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk* (2012) and *Obama’s Enforcer – Eric Holder’s Justice Department* (2014).

³ Samuel L. Bray, “Multiple Chancellors: Reforming the National Injunction,” UCLA School of Law, Public Law Research Paper No. 16-54 (24 Mar. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2864175.

⁴ Getzel Berger, “Nationwide Injunctions Against the Federal Government: A Structural Approach,” 92 N.Y.U.L. Rev. 1068, 1070 (Oct. 2017).

⁵ Petition for Certiorari, *Trump v. International Refugee Assistance Project*, Case No. 16-1436 and 16-1540 (U.S. June 1, 2017), page 31. See also *Lewis v. Casey*, 518 U.S. 343 (1996); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); and *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994).

⁶ Petition for Certiorari, page 14.

apply its own precedent in its June 26, 2017, procedural order in *Trump v. International Refugee Assistance Project*. The Supreme Court granted the government a stay of the lower court global injunctions with respect to foreign nationals who lack any *bona fide* relationship with a person or entity in the U.S., but left the injunction in place with respect to the individual challengers “and those similarly situated.”⁷

The Supreme Court precedent that has not been completely followed by the federal courts is *U.S. v. Mendoza*.⁸ In *Mendoza*, a Filipino national and veteran of the battle for the Philippines during World War II petitioned for naturalization in 1978 under a statute that by its own terms had expired 32 years earlier.

The lower courts refused to allow the government to contest the case because of a prior decision against the government, *In re Naturalization of 68 Filipino War Veterans*, on the same issue by a different federal district court that the government did not appeal.⁹ The prior case involved 68 other Filipino veterans, and the Ninth Circuit Court of Appeals held that the government was “collaterally estopped from litigating the constitutional issue” because of the earlier decision.¹⁰

In a precedent setting decision, the Supreme Court held that the doctrine of collateral estoppel, which applies to private parties, does not apply to the federal government. As Justice William Rehnquist explained in the opinion for a unanimous court, under the doctrine of collateral estoppel, “once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.”¹¹ However, the Supreme Court has broadened that principle “by abandoning the requirement of mutuality of parties.”¹² Thus, the Ninth Circuit believed that the prior decision involving 68 Filipino veterans collaterally estopped the government from defending a similar claim by *Mendoza* in the new lawsuit. But that was not the case.

The Supreme Court held instead that the government is not in the same position as private litigants “both because of the geographic breadth of government litigation and also, most importantly, because of the nature of the issues the government litigates.”¹³ As Rehnquist said:

Government litigation frequently involves legal questions of substantial public importance; indeed, because the proscriptions of the United States Constitution are so generally directed

⁷ 582 U.S. ____ (2017), slip op. at 9 (June 26, 2017).

⁸ 464 U.S. 154 (1984).

⁹ 406 F.Supp. 931 (N.D.Cal. 1975). That case was not appealed because of a change in administrations; the newly appointed INS commissioner said that not appealing “would be in keeping with the policy of the [new] Administration.” Thus, as the Supreme Court says in *Mendoza*, “courts should be careful when they seek to apply expanding rules of collateral estoppel to government litigation” because “such policy choices are made by one Administration, and often reevaluated by another Administration.” 464 U.S. at 161.

¹⁰ 464 U.S. at 155.

¹¹ 464 U.S. at 158.

¹² 464 U.S. at 158. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

¹³ 464 U.S. at 159.

*at governmental action, many constitutional questions can arise only in the context of litigation to which the government is a party. Because of those facts the government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.*¹⁴

Thus, applying collateral estoppel to the government “would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.” Allowing “only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.”¹⁵ It is fundamentally unfair for a single federal trial court-level judge to block “nationwide a statute or executive policy for up to several years while litigation and appeals drag on.”¹⁶

The importance of this doctrine cannot be overemphasized. The Supreme Court said that the government “is not further bound in a case involving a litigant who was not a party to the earlier litigation.”¹⁷ Thus, under existing Supreme Court precedent, the government has the ability to continue to apply its regulations, policies, and executive orders to individuals – including aliens – who are not parties to specific lawsuits contesting the government’s actions, just as the government was not bound in the *Mendoza* case by the prior adverse decision in *In re Naturalization of 68 Filipino War Veterans*.

Despite the complex and important substantive consequences of issuing nationwide injunctions, many courts that have issued such injunctions seem to treat “injunctive scope as an afterthought, sometimes discussing it only in a short paragraph, sentence, or footnote.”¹⁸ Yet such nationwide injunctions can lead to forum shopping and conflicting decisions that are diametrically opposed. For example, at the very same time that a federal judge in Washington issued an opinion enjoining the original, unrevised executive order temporarily suspending entry of aliens from various terrorist safe havens in Africa and the Middle East, a federal judge in Massachusetts came to the exact opposite conclusion, finding no constitutional or statutory violations that warranted a restraining order.¹⁹

Nationwide injunctions obviously provide an incentive for “extreme forum shopping, rewarding plaintiffs who steer cases to specific circuits, specific districts, and even specific judges.”²⁰

¹⁴ 464 U.S. at 160

¹⁵ 464 U.S. at 160.

¹⁶ Andrew Kent, “Nationwide Injunctions and the Lower Federal Courts,” Lawfare (Feb. 3, 2017), <https://www.lawfareblog.com/nationwide-injunctions-and-lower-federal-courts>.

¹⁷ 464 U.S. at 162.

¹⁸ Berger, *supra* note 4, at 1071.

¹⁹ Hans von Spakovsky, “Trump’s Executive Order on Immigration Is Both Legal and Constitutional,” Daily Signal, Feb. 6, 2017, <http://dailysignal.com/2017/02/06/trumps-executive-order-on-immigration-is-both-legal-and-constitutional/>; *Washington v. Trump*, Case No. C17-0141 (W.D. WA Feb. 3, 2017), https://www.scribd.com/document/338370530/State-of-Washington-Et-Al-v-Trump-Et-Al#from_embed; *Louhghalam v. Trump*, Case No. 17-10154 (D. MA Feb. 3, 2017), https://www.scribd.com/document/338370735/Louhghalam-Et-Al-v-Trump-Et-Al#from_embed.

²⁰ Berger, *supra* note 4, at 1072.

While steering a lawsuit to a particular federal judge may not be possible in large federal districts with numerous federal judges, it may be possible in district court divisions where there may only be one judge or a very small number of judges. This may even be possible in larger federal districts courts: “two very liberal judges sitting in New York City...have been accused of using a local rule about ‘related’ cases to allow attorneys to steer particular litigation to themselves.”²¹

Forum shopping is made easier for individuals suing the federal government by the rules applying to venue. Under 28 U.S.C. §1391(b), venue for a plaintiff is generally where a defendant resides or the events occurred giving rise to the case of action. However, under §1391(e), venue in a case against the government is also proper where “the plaintiff resides if no real property is involved in the action.”²²

The type of forum shopping that can occur when a single district court can bind the entire nation endangers the perceived legitimacy and stability of the judicial branch established by Article III of the Constitution. It may raise serious questions in the minds of the public about the objectivity and partisanship of the judges chosen by plaintiffs because the judges are viewed as holding particular ideological and political views and opinions that will benefit the plaintiffs in their cases.

These types of overbroad and improper injunctions may also “freeze novel and difficult legal questions in conformance with the holding of single lower court, hindering dialogue among the circuits and stunting the development of the law.”²³ There is no *stare decisis* between the 13 federal circuits; a decision on a particular issue such as the constitutionality of a statute or executive order by the Fourth Circuit Court of Appeals does not bind the Ninth Circuit or any other federal appeals court. Congress instead specifically designed a system of federal district and appeals courts with limited geographical jurisdiction to allow “the percolation of legal questions through the different courts of appeals, allowing each circuit to reach its own conclusions pending resolution by the Supreme Court.”²⁴

When federal district courts issue nationwide injunctions, they are invading the jurisdiction and authority of other federal courts in other appellate circuits. While that may be necessary or appropriate when applied to the specific individual plaintiffs who are before that particular court, it is not appropriate for individuals who are not parties to the lawsuit and certainly not to unnamed, unknown individuals except under very limited, very narrow circumstances as determined by Congress and the Supreme Court.

Class Actions

It is true that there are occasions when a general, nationwide injunction may be appropriate

²¹ Kent, *supra* note 17.

²² For a discussion of the venue issue related to nationwide injunctions, see Kate Huddleston, “Nationwide Injunctions: Venue Considerations,” 127 Yale L.J. Forum 242 (August 3, 017).

²³ Berger, *supra* note 4, at 1071.

²⁴ Bray, *supra* note 3, at 3.

for all individuals affected by the government's action, even those who are not specific parties to a lawsuit against the government. But Congress has provided for that through Federal Rule of Civil Procedure 23, which outlines the requirements for a federal district court to certify a class action.²⁵ A class can only be certified if:

- 1) The class is so numerous that joinder of all members is impractical;
- 2) There are questions of law or fact common to the class;
- 3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- 4) The representative parties will fairly and adequately protect the interests of the class.

Federal courts issuing nationwide injunctions that prohibit the government from taking certain actions or enforcing a statute, regulation, rule or policy against individuals who are not parties to a lawsuit without following Rule 23 are, in essence, evading compliance with federal law. That raises not only substantive legal questions, but also serious ethical issues.

Administrative Procedure Act

Similarly, Congress has provided that a federal court can entirely set aside actions taken by the government and one of its agencies or "compel agency action" if it finds a violation of the Administrative Procedure Act (APA), which governs the issuance of federal regulations.²⁶ The APA requires, among other things, that the public be given notice and the opportunity to comment prior to the issuance of a regulation. Agency action also cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁷ Thus, while some have criticized the nationwide injunction issued by a Texas federal district court against President Barack Obama's Deferred Action for Parents of Americans program (DAPA), in fact, that injunction was properly issued in accordance with the authority given to federal courts under the APA.

The Fifth Circuit Court of Appeals upheld that injunction based on its finding that the challengers – 26 states led by Texas – were likely to succeed on the merits of their claim that the DAPA program was not exempt from the notice and comment requirements of the APA, as well as their substantive claim that DAPA violated the APA.²⁸

²⁵ Rule 23, Federal Rules of Civil Procedure, https://www.law.cornell.edu/rules/frcp/rule_23.

²⁶ 5 U.S.C. §706.

²⁷ *Id.*

²⁸ *Texas v. U.S.*, 809 F.3d 134 (5th Cir. 2015), *affirmed* 136 S.Ct. 2271 (2016). In answer to the government's contention that the nationwide scope of the injunction was an abuse of discretion, the Fifth Circuit pointed out that the Constitution requires a "uniform" rule of naturalization. Allowing the partial implementation of DAPA would detract from the integrated scheme of regulation created by Congress and "there is a substantial likelihood that a geographically-limited injunctions would be ineffective because DAPA beneficiaries would be free to move among states." 809 F.3d at 187-188.

However, even when a court properly finds a violation of the APA, the issuance of a nationwide injunction that applies to nonparties may still raise serious issues. You have one federal district court rendering a decision that may interfere with the jurisdiction of other courts in other circuits, as well as the other problems already mentioned such as forum shopping and potentially conflicting decisions by other courts.

Solutions to the Problem

We would not have a problem with improperly issued nationwide and global injunctions if federal courts followed the *Mendoza* precedent – that judgments against the government do not bind nonparties – or complied with Federal Rule of Civil Procedure 23 if a class of plaintiffs is justified, or followed the requirements of the Administrative Procedure Act.²⁹ But federal judges are routinely ignoring these requirements when issuing injunctions while the traditional “practices of restraint have broken down.”³⁰

Another potential way to prevent the conflicts that can arise from multiple lawsuits over the same issues and multiple, differing opinions issued by federal district court judges would be for Congress to require all lawsuits contesting the legality or constitutionality of an executive order signed by a president or a regulation promulgated by a federal agency to be filed in the District of Columbia federal district court. This could also help ensure an orderly, efficient litigation process

There is precedent for such a requirement. For example, Section 5 of the Voting Rights Act of 1965 required any lawsuits over the preclearance of changes in voting laws made by any state, county, or city located anywhere in the country to be filed in the U.S. District Court of the District of Columbia.³¹ Moreover, due to the importance of voting rights, federal law provides that such cases shall be heard by a three-judge panel, at least one of whom is a circuit judge.³² It would be hard to argue that cases involving government policies that affect the other rights of citizens are any less important.

Specifying a particular federal court for the filing of such lawsuits could eliminate forum shopping as well as the procedural chaos that can result from different federal courts in different parts of the country looking at the same issues and issuing conflicting opinions. On the other hand, it would impose the inconvenience of requiring plaintiffs and their counsel to come to the nation’s capital, an inconvenience that Congress considered inconsequential when it passed the Voting Rights Act.

This is a possible remedy that Congress should consider in order to determine if it would resolve the problems caused by multiple and duplicative litigation involving the government, and

²⁹ Federal Rule of Civil Procedure 65 (d)(2) also states that injunction orders may bind only the parties and their officers, agents, servants, employees, and attorneys; and other persons who are in active concert or participation with them.

³⁰ Bray, *supra* note 3, at 47.

³¹ 52 U.S.C. §10304(a).

³² *Id.* See also 28 U.S.C. §2284.

specifically actions taken by the president.

Another possible remedy is for either the Supreme Court or Congress to change the standard of review for nationwide injunctions that go beyond correcting the behavior of the government towards the individual, named plaintiffs in a case. The recognized standard of review by an appellate court of a preliminary injunction is normally whether the trial court abused its discretion.³³ Changing this to *de novo* review for cases that do not follow the *Mendoza* precedent would provide the appellate courts with more leeway to reverse improperly granted injunctions or injunctions that are too sweeping and too broad in their application. Of course, this may not remedy the problem if circuit judges do not also recognize the legal and equitable limitations and restraints that exist on the granting of such injunctions.

Thank you once again for affording me the opportunity to testify at this hearing. I look forward to your questions.

³³ See *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 (2008); *Sepulvado v. Jindal*, 729 F.3d 413 (5th Cir. 2013).
