
CONGRESSIONAL TESTIMONY

The Role and Impact of Nationwide Injunctions by District Courts

Testimony before Subcommittee on Courts, Intellectual Property, and the Internet

United States House of Representatives

November 30, 2017

Hans A. von Spakovsky
Senior Legal Fellow
Center for Legal and Judicial Studies
The Heritage Foundation

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.

¹The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work.

The Heritage Foundation is the most broadly supported think tank in the United States. During 2014, it had hundreds of thousands of individual, foundation, and corporate supporters representing every state in the U.S. Its 2014 income came from the following sources:

Individuals 75%
Foundations 12%
Corporations 3%
Program revenue and other income 10%

The top five corporate givers provided The Heritage Foundation with 2% of its 2014 income. The Heritage Foundation's books are audited annually by the national accounting firm of RSM US, LLP.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

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.
