Questions for the Record – Senator Grassley

"Rule by District Judge: The Challenges of Universal Injunctions"

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Tuesday, February 25, 2020

Questions for Mr. Panuccio

1. Would the Framers have viewed nationwide injunctions as consistent with, or contrary to, the proper role of a single federal judge?

   RESPONSE:

   The Framers would have viewed nationwide, non-party injunctions as contrary to the proper role of a single federal judge. As Professor Bray has explained in his scholarly work, and Justice Thomas has explained in a judicial opinion, nationwide injunctions were foreign to equity practice at the Founding. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 425–27 (2017); *Trump v. Hawaii*, 138 S. Ct. 2392, 2426–30 (2018) (Thomas, J., concurring).

2. What happens when there are conflicting nationwide injunctions? How should the government proceed in such a scenario?

   RESPONSE:

   Conflicting nationwide injunctions would put the federal government in the impossible position of disobeying a court order, and therefore risking contempt, by obeying another court order so as to avoid contempt. To even state the matter is to demonstrate its absurdity. The government's only option in such a scenario would be to seek expedited, emergency relief—likely from the Supreme Court.

3. Do nationwide injunctions encourage litigants to forum shop? If so, why should that kind of tactic be discouraged, and are there any other tactics or negative outcomes that are encouraged by nationwide injunctions?

RESPONSE:

Yes, nationwide, non-party injunctions encourage litigants to forum shop. That kind of tactic should be discouraged because (1) it undermines public confidence in the impartiality of the judiciary, (2) creates uneven workloads in the federal courts in high-profile cases, and (3) prevents percolation, in courts across the country, of important legal issues.

There are a variety of other negative outcomes encouraged by nationwide injunctions. I discuss these at greater length in my written testimony, but they include: (1) requiring expedited appeals, often on an incomplete record; (2) having the public perceive lone federal courts as national policymakers; (3) undermining the separation of powers and democratic legitimacy; (4) lack of judicial comity; and (5) the possibility of conflicting nationwide injunctions.

4. If Congress required three-judge district court panels before a nationwide injunction could be obtained, would that resolve some of the problems that have been identified with such injunctions? Why or why not?

RESPONSE:

No, a three-judge district court would not resolve the problems with nationwide, non-party injunctions because the trial court would still be litigating the rights of parties not properly before it. That would raise all of the same problems I outlined in my written testimony.

Jesse Panuccio
Partner
Boies Schiller Flexner LLP
Questions for the Record
Submitted March 3, 2020

QUESTIONS FROM SENATOR BOOKER

1. In your testimony, you stated that "the time has come" for the Supreme Court or Congress to restrict the role of lower courts and their discretion regarding universal (or non-party) injunctions. You also said that universal injunctions undermine the "norms, rules, and structures" of our legal system.

    a. What are the key legal authorities in determining whether Congress or the Supreme Court is the proper body to set any new rules regarding the use of universal injunctions?

RESPONSE:

Congress

Pursuant to Article III, Section 1 of the Constitution "[t]he judicial Power of the United States, shall be vested … in such inferior Courts as the Congress may from time to time establish." The Supreme Court has interpreted this language to mean that "[c]ourts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850)). From the Judiciary Act of 1789 onward, Congress has exercised its constitutional authority to establish, and set the jurisdictional limits of, inferior federal courts. *See, e.g.*, 28 U.S.C. §§ 81–132 (establishing judicial districts and district courts within them); *id.* §§ 1330–1369 (establishing jurisdiction of federal district courts). Accordingly, Congress may exercise its constitutional authority to clarify that inferior courts do not have jurisdiction to issue non-party injunctions.

Supreme Court

The Supreme Court has the authority to determine whether a lower court's exercise of jurisdiction over a party is consistent with the constitutional grant of power to hear "Cases" and "Controversies," *see, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–560 (1992) (quoting U.S. CONST. art. III, § 2), and with statutory grants of jurisdiction, *see, e.g.*, *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). *See also United States v. United Mine Workers of Am.*, 330 U.S. 258, 290-91 (1947) (the Court has jurisdiction to determine jurisdiction).

b. Would Congress's weighing in on the issue encroach on the role and authority of the Supreme Court? Please explain your answer.

RESPONSE:

No. Pursuant to Article III, Section 1 of the Constitution "[t]he judicial Power of the United States, shall be vested … in such inferior Courts as the Congress may from time to time establish." The Supreme Court has interpreted this language to mean that "[c]ourts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850)). From the Judiciary Act of 1789 onward, Congress has exercised its constitutional authority to establish, and set the jurisdictional limits of, inferior federal courts. *See, e.g.*, 28 U.S.C. §§ 81–132 (establishing judicial districts and district courts within them); *id.* §§ 1330–1369 (establishing jurisdiction of federal district courts). Accordingly, Congress may exercise its constitutional authority to clarify that inferior courts do not have jurisdiction to issue non-party injunctions.

2. In your testimony, you also stated that universal injunctions may afford relief to individuals who would not have had standing to seek an injunction in the first place.

   a. In your assessment, can universal injunctions also afford relief to individuals who would have standing but lack access to justice?

RESPONSE:

As I stated in my testimony, the better view is that the federal "judicial Power" conferred in Article III of the U.S. Constitution does not permit a federal district court to afford relief to parties not properly before it.

b. What considerations should Congress contemplate with regard to access to justice for non-party litigants unable to join lawsuits or class actions?

RESPONSE:

By definition, non-parties are not litigants. *See Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 718 (1838) ("Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit … to render a judgment or decree upon the rights of the litigant parties."). The question of whether individuals can appropriately access the federal justice system is an important one that Congress can address in a variety of ways, but not by circumventing the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In any event, the federal class action system is an opt-out regime, not an opt-in regime. Accordingly, if class treatment is appropriate, then class members have no barrier to joining the lawsuit—they are automatically joined as parties. Indeed, the primary drafter of the 1966 amendment to Federal Rule of Civil Procedure 23 suggested that access to justice was one of the reasons the committee chose an opt-out regime. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397–98 (1967) ("requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step").

3. Solicitor General AliKhan testified, "Nationwide injunctions may be necessary to grant compete relief to the plaintiffs in particular circumstances," and "there are myriad circumstances where awarding complete relief to a plaintiff requires action beyond the court's geographic boundaries or against third parties." For example, she continued, "Some rights are indivisible, in which case granting relief to one plaintiff necessarily affects third parties. Classic examples are desegregation and reapportionment cases." If universal injunctions were simply ended, how would courts be able to provide complete and appropriate relief in these kinds of cases?

RESPONSE:

A federal district court has the power to afford complete relief to a party properly before it, and in some circumstances that could mean affording *to that party* relief that extends beyond the geographic district of the court. If a party-plaintiff deems that injunctive relief is necessary for a class of individuals, then the plaintiff has available the class-action procedure. *See* FED. R. CIV. P. 23(b)(2) ("A class action may be maintained if Rule 23(a) is satisfied and if … the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.").