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

United States Senate

Committee on the Judiciary

Responses to Questions for the Record

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Questions from Senator Booker

1. *In your testimony, you stated that Congress could create a panel of judges or a lottery system to decrease the potential for forum shopping for universal injunctive relief. You also stated that courts could require parties to expand their briefing with regard to remedies.*

   a. *Can you provide more detail about how using a panel of judges or a lottery system might work?*

Congress could require that cases seeking nationwide injunctive relief be heard and decided by three federal judges, rather than a single federal district court judge. Alternatively, Congress could lottery cases seeking nationwide injunctions to a randomly chosen court.[1]

Three-Judge Panels—On several occasions, Congress has required that a panel of three judges be convened in order to grant certain kinds of injunctive relief against state or federal officers. In 1910, Congress required that three-judge courts decide suits seeking injunctions against state laws alleged to be unconstitutional.[2] In 1937, Congress expanded on that system by routing suits seeking injunctions against federal laws to three-judge courts.[3] In the 1910s and 1930s, Congress had also tasked three-judge courts with reviewing actions of certain federal administrative agencies.[4] By the 1970s, Congress had mostly eliminated the provisions for three-judge courts for suits challenging state and federal laws, because of the

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[1] In my answer to Senator Booker's second question, I explain why defining the category "cases seeking nationwide injunctions" is a challenging task. *See infra* pp. 6-7. My answers to questions 1(a) and 1(b) bracket that threshold issue, but it should be kept in mind when evaluating the feasibility of these proposals.

[2] *See* Act of June 18, 1910, Pub. L. No. 61-218, ch. 309, § 17, 36 Stat. 539, 557 (codified in Judicial Code of 1911, ch. 231, § 266, 36 Stat. 1087, 1162–63).

[3] *See* Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752, codified at 28 U.S.C. § 380a (requiring applications for interlocutory and permanent injunctions to be "heard and determined" by three judges, but allowing a single judge to issue temporary restraining orders).

[4] *See, e.g.*, Urgent Deficiencies Act, Act of Oct. 22, 1913, ch. 32, 38 Stat. 208, 219, 220 (establishing "venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the [ICC]" and authorizing three-judge courts to issue "interlocutory injunction[s] suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, of any [ICC] order"); Communications Act of 1934, § 402(a), 48 Stat. 1064, 1093 (1934) (applying Urgent Deficiencies Act provisions "relating to the enforcing or setting aside of the orders of the [ICC]" to "suits to enforce, enjoin, set aside, annul, or suspend any order of the [Communications] Commission under this Act").

burdens imposed on the Supreme Court by the mandatory direct appeals that these statutes required. In federal administrative law, however, many challenges to agency rules or orders continue to be venued as an initial matter before a three-judge panel of a court of appeals. *See, e.g.*, 28 U.S.C §§ 2343, 2344. There is no mandatory direct appeal to the Supreme Court from those decisions.

Borrowing from these earlier examples, Congress could require the convening of a three-judge court (traditionally, two district court judges and one appellate court judge) to decide any suit seeking a nationwide injunction (preliminary or permanent) against the enforcement of a federal statute or a Presidential or executive-branch action not covered by the APA, when the suit is one that must be brought as an original matter in a federal district court. [5] As it did in 1937, Congress should consider including a provision that allows a single district court judge to issue a TRO until the point when the three-judge court can be convened.[6] Congress would also have to decide whether to provide for mandatory direct appeal to the Supreme Court.[7]

Whether to extend a three-judge requirement to some of the suits presently covered by the APA is an important question. Quite a few of the recent decisions resulting in nationwide injunctions have involved APA claims. If Congress wished to require three-judge courts in some APA cases—for example, suits in which a plaintiff seeks to stay a rule nationwide, and then to have the rule vacated entirely—then Congress would have to make conforming amendments to various provisions of law that presently authorize single district court judges to issue preliminary nationwide injunctions in such cases and that allow single district court judges to vacate agency action (including rules) universally at the merits stage.[8] It is important to remember here that the APA's language has been borrowed and cross-referenced across the U.S. Code, and that the APA acts as a gap-filler when other statutes are not explicit about the relief they authorize. As a result, any reforms to the APA's remedial provisions would have to be crafted carefully and circumspectly, ideally with the involvement and guidance of the Administrative Conference of the United States and the Advisory Committee on Civil Rules.

<u>A Lottery System</u>: Instead of a three-judge court provision, Congress could create a lottery system that would randomly allocate cases seeking nationwide injunctions to one of the country's federal judicial districts. [9] A lottery system might take as its inspiration the

[5] *See* Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem (proposing three-judge courts).

[6] *See supra* note 2.

[7] Judge Costa argues there should be mandatory direct appeal to the Supreme Court, as there was under the old three-judge district court regimes. But that arrangement may prove burdensome to the Court. Today, in many administrative law cases heard as an initial matter by three-judge appellate panels, there is no appeal as of right to the Court. In order to avoid overloading the Court's docket, Congress might choose to permit direct appeal to the Court, but to leave the Court with the discretion whether to take the appeal or not.

[8] *See* 5 U.S.C. §§ 703; 705; 706.

[9] *See* Adam White, *Congress Should Fix the Nationwide Injunction Problem with a Lottery*, YALE J. REG. NOTICE & COMMENT BLOG, Feb. 11, 2020.

system for dealing with the situation that arises when many litigants file petitions for review of certain agency rules or orders. When multiple petitions for review of certain agency actions are concurrently filed in various courts of appeals, they are consolidated for decision before a single court of appeals chosen by lottery.[10] Congress could extend that lottery system to suits seeking nationwide injunctions that are filed as an original matter in federal district courts.[11] In conjunction with this reform, and at the risk of losing some percolation, Congress could further consider amending 28 U.S.C. § 1404 to require district courts to transfer any subsequently filed nationwide injunction cases involving the same executive-branch action or federal law to the district court selected by the initial lottery.

A lottery system would reduce the incentive to file a suit seeking a nationwide injunction in a particular district perceived to have friendly judges. One downside to a nationwide lottery is the potential for enormous inconvenience to litigants: a plaintiff with limited resources who filed suit in Texas or Florida might find it very difficult to continue to litigate the case if the case were transferred to a district court in Maine or Alaska.

b. *If Congress wanted to ensure that universal injunctions would remain available while limiting their use, are there any other legislative solutions you would suggest?*

As I said in my written testimony, I do not have a particular reform proposal to advance. There are, however, other proposals out there that Congress may wish to consider. For example, Congress could lay venue for all cases seeking nationwide injunctions in a single designated district court, when those cases are suits that must be brought as an original matter in a federal district court. The most obvious candidate court is the United States District Court for the District of Columbia.[12] This court possesses deep expertise in administrative law and constitutional law.

One drawback to concentrating all nationwide injunction cases in a single district court is the concern that it would worsen the atmosphere of politicization surrounding the appointments of judges to that court. And some observers may object that it would be unorthodox to amplify the importance of the judges of a single district court relative to all the rest. Finally, concentrating review in a single district court would sacrifice percolation. Against these costs would be the benefit of having all such cases litigated in a single court that anyway hears many consequential suits and that is conveniently located for federal government litigators and for many members of the bar.

c. *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?*

Within their respective domains, both Congress and the Supreme Court may properly speak to this question. For example, the Court has set out doctrinal tests that govern whether and when injunctions should be issued,[13] and the Court certainly has the authority to construe

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[10] *See* 28 U.S.C §§ 2343, 2344; 28 U.S.C. § 2112.

[11] As Mr. White stresses, *supra* note 9, a key feature of the lottery would be to *not* limit the venues eligible to be chosen by the lottery to only those districts in which suits have actually been filed. *Id.*

[12] *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1105 (2018) (describing the Assigning Proper Placement of Executive Action Lawsuits Act, H.R. 2660, 115th Cong. (2017)).

[13] *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

those tests to impose more stringent requirements upon the issuance of universal injunctions. At the same time, when Congress has itself authorized a universal remedy—*e.g.*, the power to "stay the effective date" of an agency regulation universally, *see* 5 U.S.C. §§ 705, 551(13), or to hold a rule unlawful and vacate it universally, 5 U.S.C. § 706—the Court ought to defer to that legislative choice, not override it through "common-law-making" opinions.[14] With that said, and though I believe it would be incorrect for it to do so, [15] the Court could conceivably hold that universal injunctions are inconsistent with doctrines of Article III standing or with the traditions of equity. If the Court were to reach a constitutional holding on this subject, then that would curtail Congress's ability to legislate concerning such injunctions.

As the law currently stands, however, Congress retains broad leeway in this domain. Congress has the authority to create inferior federal courts and to specify their jurisdiction.[16] Congress has the authority to specify the kinds of equitable remedies that federal courts may give, including the kinds of injunctions they may give.[17] If Congress wished to legislate to "set new rules regarding the use of universal injunctions," there would be a wide range of options available to it, some of which are discussed above.[18] As it crafts any legislation, Congress should keep in mind that federal courts are unlikely to read a law as restricting or impinging upon their equitable power to issue injunctions unless the law is very clearly worded.[19]

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[14] *See Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., concurring) ("When this Court speaks about the rules governing judicial review of federal agency action, we are not (or shouldn't be) writing on a blank slate or exercising some common-law-making power. We are supposed to be applying the [APA].").

[15] *See* Brief for Professor Mila Sohoni as *Amica Curiae* Supporting Respondents, *Trump v. Pennsylvania*, 2020 WL 1877916.

[16] U.S. CONST. Art. III, § 1 ("The judicial power … shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."); U.S. CONST. Art. I, § 8 ("The Congress shall have power … To constitute tribunals inferior to the Supreme Court."); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

[17] *See Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 329 (1999) (noting that the Court "leaves any substantial expansion of past [equity] practice to Congress"); *Yakus v. United States*, 321 U.S. 414, 441–42 (1944) (upholding statutory restrictions on the issuance of injunctions in part because the statute did "only what a court of equity could have done, in the exercise of its discretion to protect the public interest," *id.* at 441, and because "[t]he legislative formulation of what would otherwise be a rule of judicial discretion [was] not a denial of due process or a usurpation of judicial functions," *id.* at 442).

[18] Whether there is a constitutional floor or minimum beneath which federal courts may not be "remedy stripped" by Congress is a fascinating question that has not received enough scholarly attention. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953) (stating that Congress has a "wide choice in the selection of remedies" and may deny a particular remedy when alternative remedies exist); Mila Sohoni, *The Lost History of the 'Universal' Injunction*, 133 HARV. L. REV. 920, 1008 (2020) (declining to argue that the historical record establishes that the universal injunction is a "constitutionally *obligatory* remedy").

[19] *See, e.g.*, *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.").

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

It would depend on what the legislation said, but (generally speaking) no. As the preceding answer reflects, Congress has wide leeway to structure the federal court system and to specify the kinds of remedies that federal courts may give. Congress must take care, however, to ensure that any legislation it enacts does not unduly infringe upon the federal courts' capacity to afford meaningful remedies and to protect individual rights.[20] Blanket legislation that prohibited the federal courts from ever issuing *any* kind of injunction that benefitted a non-plaintiff would undermine the ability of the federal courts to serve as a robust check on the legality of federal governmental action.[21] If courts cannot halt illegal government acts generally and are limited to providing relief only to plaintiffs who have the will and means to litigate to judgment, then many parties subject to illegal laws and regulations will not challenge them. Federal officers would then be free to carry on enforcing illegal laws and regulations. By the same token, because the federal government, like everyone else, acts in the shadow of the law, allowing injunctions that reach beyond the plaintiffs gives the federal government additional reason not to push the envelope of legality in enacting laws and taking regulatory action. All of the above holds true with respect to suits seeking injunctions against state and local officers. In short, the universal injunction is important both for securing robust checks and balances at the federal level, as well as for ensuring that states and local governments do not infringe the rights guaranteed to all citizens by federal law and the Constitution. While in principle it would not undermine the Supreme Court's role or authority for Congress to legislate in this domain, Congress should always proceed carefully when it is contemplating placing restrictions on federal courts' remedial powers, because of the possible consequences for separation of powers, federalism, and individual rights.

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

and

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

Through the use of the nationwide injunction, federal courts can shield those who lack the means or ability to sue from illegal government action. For litigants who do not have access to counsel, the time and resources to sue, or who are unable to sue for other personal or pragmatic reasons, nationwide injunctions serve as an important safeguard. The Rule 23 class action mechanism is not a satisfactory substitute: classes may not be certified in time to

[20] *See* Sohoni, *Lost History*, *supra* note 18, at 1007 ("[T]he authority to provide a meaningful remedy is important, both functionally and symbolically, for the federal courts' ability to pronounce robust constitutional or legal norms, to ensure adequate checks on government at both the state and federal level, and thus to secure the rule of law in a constitutional democracy.").

[21] *Id.* at 996-97 (critiquing the Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. § 2(a) (2018)).

prevent widespread, irreparable injury to potential class members, [22] and increasingly demanding hurdles to class treatment have compromised the usefulness of this device.[23]

2. *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?*

Many opponents of nationwide injunctions contend that reapportionment cases, desegregation cases, and other cases seeking to vindicate "indivisible" rights fall into a separate category from cases seeking injunctions against enforcement of laws and regulations against nonparties. These opponents further contend that the nationwide injunction could be eliminated from our law without impinging on the capacity of courts to award indivisible relief (including in desegregation and reapportionment cases).

It will likely be difficult, however, to craft clearly written legislation that would cleanly cleave apart these categories. It is not easy to crisply articulate the line between a case seeking a "nationwide" injunction, on the one hand, and a case seeking a "purely plaintiff protective" injunction or "indivisible" relief, on the other. In several prominent cases that we routinely speak of as involving nationwide injunctions, the plaintiffs have argued that nationwide injunctive relief is actually necessary solely to protect the plaintiffs (e.g., *Trump v. Pennsylvania*, *Trump v. Hawaii*, and *Texas v. United States*). In other cases, plaintiffs have sought equitable relief that can plausibly be characterized as having "nationwide" or "universal" effect, but that could also plausibly be characterized as having "indivisible" effect. (One example would be an APA facial challenge seeking to universally enjoin and/or vacate a rule that should have been promulgated with notice and comment but was not; a second example would be a suit seeking to enjoin the use of federal dollars for the building of a border wall.). Another complication arises when plaintiffs style their suits as nationwide class actions, but then seek preliminary injunctive relief shielding the "putative" class before the class has been certified. Should a nationwide preliminary injunction for absent members of a putative nationwide class be treated differently than an "ordinary" nationwide injunction?

The fact that these categories are not easy to delineate or to disaggregate will make it challenging for Congress to craft legislation targeted solely at the set of cases that are "really" cases seeking nationwide injunctions. This problem is a serious one, because "administrative simplicity" is very important in civil procedure.[24] The rules that route a given case to a particular court or through a particular procedure must be clear. Prolonged threshold

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[22] *See* Frost, *supra* note 12, at 1089, 1095-96; *see also* Amanda Frost, *The Hidden Constitutional Threat in Trump's Travel-Ban Lawsuit*, WASH. POST. (Apr. 24, 2018); Spencer E. Amdur & David Hausman, *Response, Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017); Suzette M. Malveaux, *Response, Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017).

[23] *See* Malveaux, *supra* note 22, at 59-60 ("With the class action device under siege, on the one hand, and the [nationwide] injunction under attack, on the other, litigants are caught in a Catch-22. … [T]he solution cannot be to rely on the shrinking class action as a substitute.").

[24] *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

litigation over *whether* a case does or doesn't belong in a particular court (such as the D.D.C.), or *whether* a case is or isn't governed by a particular procedural mechanism (such as a lottery rule or a three-judge requirement), will waste litigant resources and court time and could delay needed emergency relief.[25] If Congress does choose to draft legislation addressed to "suits seeking nationwide injunctions," Congress must be sure to be crystal-clear about which cases do and do not fall within that definition.

Questions from Senator Coons

1. *In practice, how often do federal district courts issue conflicting injunctions?*

As Professor Amanda Frost has noted, "[c]onflicting injunctions have yet to pose significant problems, … despite over fifty years of experience with nationwide injunctions."[26] Federal judges conscientiously avoid issuing conflicting injunctions, and they adjust injunctive scope where necessary in order to avoid or obviate conflicts.[27] In its recent Supreme Court brief on nationwide injunctions, the federal government did not identify a single instance in which it has been whipsawed between conflicting nationwide injunctions.[28] Whatever hypothetical "risk" might exist of conflicting injunctions,[29] the risk has yet to materialize into reality.[30]

2. *What is the practical effect of nationwide injunctions on parties and non-parties?*

A preliminary nationwide injunction bars a federal officer with nationwide authority from taking action against individuals who are not parties to a lawsuit while the lawsuit is pending.[31] A federal court will issue such an injunction if it finds that the law or regulation at issue is likely to be proved to be illegal. By barring enforcement of the likely illegal law or regulation, a nationwide preliminary injunction freezes the status quo across the board. This

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[25] *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) ("'Jurisdiction should be as self-regulated as breathing; … litigation over whether the case is in the right court is essentially a waste of time and resources.'" (quoting Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. CHI. L. REV. 1 (1968)).

[26] Frost, *supra* note 12, at 1106.

[27] *Id.*

[28] *See* Brief for the Petitioners, *Trump v. Pennsylvania*, 2020 WL 1190624 (March 2, 2020).

[29] *See DHS v. New York,* 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring).

[30] The claim has been made that the injunction in *DeOtte* v. *Azar*, 393 F. Supp. 3d 490, 512-14 (N.D. Tex. 2019) conflicted with the injunction in *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019). *See* Brief for Nicholas Bagley and Samuel L. Bray as *Amici Curiae* Supporting Petitioners, *Trump v. Pennsylvania*, 2020 WL 1433996, at *23-24. But that concern is misplaced. In *DeOtte*, the district court enjoined the application of the contraception mandate to a set of entities, 393 F. Supp. 3d at 513-15, whereas the district court in *Pennsylvania v. Trump* considered the validity of exemptions from that mandate. There is no conflict here: if a rule does not apply to a set of entities in the first place, whether those entities can be exempted from the rule is a moot point. If there were a conflict, it anyway would have nothing to do with the phenomenon of nationwide injunctions *per se*. The same situation could equally have arisen if the decree in *Pennsylvania v. Trump* (like the decree in *DeOtte*) was the product of a Rule 23 class action. *See* Brief for Professor Mila Sohoni as *Amica Curiae* Supporting Respondents, 2020 WL 1877916, at *18 n.12.

[31] *See* Frost, *supra* note 12, at 1071.

freezing of the status quo will persist until the suit can be decided on the merits. Without that freeze, regulated persons and entities would often suffer harms that a court would be unable to remedy down the road. For example, they might be deprived of food stamps,[32] they might be deported and separated from their families,[33] they might be barred from their chosen profession,[34] they might be unable to access contraception,[35] or they might incur large expenses that cannot be later recouped.[36] In addition, without broad-gauged preliminary injunctions, the application of federal law would disintegrate into an unruly patchwork, as many litigants would have no realistic option but to bring their own suits seeking identical plaintiff-protective relief. Because not all affected parties would realistically be able to sue, however, individuals and entities would be subjected to rules or penalties that their identically situated friends, business competitors, or neighbors would not be. That confusion and disarray would persist until the Supreme Court resolved the legal issue, which might take months or years.

A permanent nationwide injunction also prevents a federal officer with nationwide authority from taking action against individuals who are not parties to a lawsuit. When a federal court issues such an injunction, it has determined that the law or executive-branch action *is* unlawful, not merely that it is likely to be unlawful. As with a final decree in a successful nationwide class action, a permanent nationwide injunction against enforcement of a law or regulation means that the enjoined law or regulation will remain unenforceable permanently (unless the federal government can prevail on appeal). Again, such an injunction maintains the uniformity and even application of federal law, and it does so without incurring the costs and waste of scores of identical lawsuits involving the same legal question.

On the topic of the nationwide injunction's practical effects, it is worth emphasizing that these decrees do not cause the catastrophic consequences that some portrayals depict. The concern about conflicting injunctions was discussed above. Forum shopping would not disappear if the nationwide injunction were eliminated.[37] Nor, obviously, is the nationwide injunction the insuperable obstacle to federal lawmaking and regulation that it has been made out to be. Most federal statutes and executive-branch actions—including, for example, a recent slew of enormously consequential measures dealing with the coronavirus pandemic—are simply implemented, not enjoined.

Other detrimental consequences attributed to nationwide injunctions are also sometimes overstated. For example, the DOJ has emphasized that nationwide injunctions have an asymmetric quality: the DOJ has to win every case in order to be able to continue to enforce a law or policy, while plaintiffs need only win in one court to block the government from enforcing a law nationwide. But this asymmetry—what the DOJ calls the "running the table" problem—is both superficial and temporary. At the end of the day, whether injunctions are broad or narrow, the nation's system of appellate review will bring any important question that divides the circuits before the Supreme Court. To ultimately prevail,

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[32] *See District of Columbia v. US Dep't of Agric.*, 2020 WL 1236657, at *30 (D. D.C. March 13, 2020).
[33] *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D. N.Y. 2019).
[34] *Doe 2 v. Mattis*, 344 F. Supp. 3d 16, 24 (D. D.C. 2018).
[35] *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 835 (E.D. Pa. 2019).
[36] *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 655 (E.D. Pa. 2017).
[37] *See* Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L. J. F. 242, 252 (2017).

the DOJ does not have to "run the table." Rather, it has to win once and for all in the Supreme Court—just like everyone else.[38]

Finally, when thinking about the practical consequences of nationwide injunctions, it is important not to succumb to the impulse to exaggerate the power of individual district court judges.[39] Preliminary nationwide injunctions, like all injunctions, are immediately appealable, and they can be stayed pending appeal by the district courts that issue them, by the circuit courts, and by the Supreme Court. The DOJ receives extraordinary judicial solicitude when it seeks emergency relief from lower-court injunctions.[40] Ignoring these well-functioning safety valves, some have caricatured federal district court judges as behaving like "kings" or like one-man "Councils of Revision" when they issue nationwide injunctions.[41] But there are no kingdoms in which each decision of the "monarch" is, as a matter of course, subjected to at least one—and up to three—layers of appellate review.[42] The Council of Revision abjured by the Framers would not have had to stand by and watch powerlessly as its decisions were first placed on hold, and then ultimately rejected—as many a district court judge has recently had to do. Our legal system imposes ample checks on individual district court judges, and—notwithstanding decades of universal injunctions—it remains the case that only one court in our system has the power to pronounce the final word on questions of law on a nationwide basis: the Supreme Court.

3. *How can conflicting injunctions be resolved?*

As noted above, there appears to be very little real risk that federal courts will issue nationwide injunctions that actually conflict with each other, in the sense of requiring the federal government to both "do" and "not do" something at the same time.[43] Federal courts place great weight on comity. Should such a conflict emerge, the federal government would have several options: (a) request one of the district courts involved in creating the conflict to reconsider or stay the injunction that produced the conflict; (b) seek emergency relief from the court of appeals; and/or (c) seek emergency relief from the Supreme Court.

4. *Please respond to the assertion that nationwide injunctions can discourage the percolation of difficult legal questions across various federal district and appellate courts.*

Percolation does in fact occur notwithstanding the issuance of nationwide injunctions. Many judges weighed in on the Trump Administration's travel ban. Many weighed in on the

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[38] Moreover, the same dynamic could emerge if the DOJ won a slew of cases against various plaintiffs, but then the next court to rule on the question sided with the plaintiffs in a nationwide class action. *See Sullivan* v. *Zebley*, 493 U.S. 521 (1990) (affirming a decision by Third Circuit that granted relief to a nationwide class in a case involving regulations earlier deemed valid or held enforceable by *four* other circuits).

[39] *Contra, e.g.*, Testimony of Jesse Panuccio, "Every Judge a King, Every Court Supreme: The Problem of Non-Party Injunctions," *available at* https://www.judiciary.senate.gov/imo/media/doc/Panuccio%20Testimony.pdf.

[40] *See* Steven I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

[41] *See* Panuccio Testimony, *supra* note 39, at 11 (asserting that a district court judge issuing a nationwide injunction did "precisely what a Council of Revision would have done").

[42] Review in the court of appeals is as of right, and review is discretionary by the en banc court of appeals and the Supreme Court.

[43] *See supra* notes 26-30 and accompanying text.

imposition of spending conditions on "sanctuary cities." Many weighed in on the legality of exemptions to the ACA's contraceptive mandate. Solicitor General AliKhan's written testimony lays out a litany of cases that demonstrate that nationwide injunctions have not, in fact, prevented percolation.[44]

5. *In your view, what types of situations warrant issuance of a nationwide injunction?*

As I noted in my written testimony,[45] I do not have a specific legislative reform proposal to advance. I believe that this issue merits careful study, and that Congress should take the time to get its legislation right. I would urge that Congress consider the views of the Judicial Conference's Rules Committee and the Administrative Conference of the United States before drafting any legislative reforms concerning the issuance of nationwide injunctions. Congress should perhaps consider charging a committee to study this question, as it did when it created the Federal Courts Study Committee in 1988.

Question from Senator Klobuchar

1. *You testified that nationwide injunctions "avoid[] the distributive inequity of a regime in which only litigants with the wherewithal to sue can secure relief against unlawful statutes or executive branch action." Is it your view that eliminating courts' ability to issue these injunctions would make our system of justice less equitable, particularly for vulnerable groups?*

Yes. Many individuals affected by federal laws and policies do not have access to counsel. They do not have the time, resources, or knowhow to sue individually, nor do they have the ability to fulfill the demands of acting as a class representative. Potential plaintiffs may fear that becoming a known plaintiff to a lawsuit against the United States of America might draw upon them the ire of a powerful federal bureaucracy,[46] the disapproval of their employer, or the opprobrium of their families or communities.

The federal government used to "willingly refrain from imposing *on anyone* the rule that a federal court has found to be unlawful."[47] While that willingness has now apparently frayed, the values of uniformity and fairness remain of enduring importance. If laws and policies can never be enjoined except as to the actual plaintiffs, then a law or policy that has been deemed unlawful would remain lying around as a tool or a bargaining chip for the federal government to use against others. The result would be a regime in which the federal government could

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[44] *See* Testimony of Loren L. AliKhan, *available at* https://oag.dc.gov/release/testimony-role-nationwide-injunctions.

[45] *See* Testimony of Mila Sohoni, *available at* https://www.judiciary.senate.gov/imo/media/doc/Sohoni%20Testimony.pdf.

[46] *See, e.g.*, *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 70 (D.D.C. 2019) (noting that a plaintiff-protective injunction against a DHS policy would "create nearly insurmountable practical problems, because to claim their prize … the undocumented non-citizens who are members of Plaintiffs' organizations would first have to identify themselves to the government, which, of course, is the first step in a chain of events that might well lead to their deportation.").

[47] *Id.* at 66; *see also* ROSCOE POUND, ADMINISTRATIVE AGENCIES AND THE LAW 23 (1946) ("For a long time it was the practice of the law officers of the government, when individuals wished to challenge the constitutionality of legislation adverse to their interests, to cooperate in test suits.").

carry on applying laws and rules *already* held to be unlawful even by *many* district courts and courts of appeals to others who were not parties. And the federal government could continue to enforce those laws and rules, and continue to assert their validity, across district after district, in case after case, against person after person—right up until the last, wearied litigant had dragged himself across the finish line. Our law does not require that we live in such a bizarre and unjust world.

I am grateful to the Committee for giving me the opportunity to present my views on this important subject, and I hope my testimony and responses have been helpful. Thank you.