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Simple solution to end dispute over national injunction rulings

As practicing lawyers we are on the front lines of justice. We must speak out when the Rule of Law is threatened. And, we should strive to do so without becoming partisan in ways that threaten our survival as a nation of laws.

In recent years there has been much controversy over the issuance of nationwide injunctions in cases where a plaintiff(s) challenges the actions of the executive branch, typically on "hot button" issues where the executive branch took unilateral action instead of waiting for an act of Congress and where public opinion is inflamed.

In *Texas v. United States,* 86 F. Supp. 3d 591 (S.D. Tex.), aff'd, 809 F.3d 134 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271 (2016) (mem.), a single federal judge enjoined aspects of the Obama administration's Deferred Action for Childhood Arrivals, or DACA, program; while in *Washington v. Trump,* No. C17-0141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), the incoming Trump administration was enjoined by a single federal judge from implementing its travel ban to restrict immigration from certain countries.

As these examples illustrate, nationwide injunctions have been used against presidents of both parties and they are increasing in frequency. In a recent opinion piece published in the Wall Street Journal, titled "End Nationwide Injunctions," Attorney General William Barr reported that "during the eight years of the Obama administration, 20 nationwide injunctions were issued while [as of Sept. 5, 2019] the Trump administration [had] already faced nearly 40."

As the U.S. 7th Circuit Court of Appeals has observed, "support for or opposition to nationwide injunctions [likely varies] with the nature of the controversial issue at stake and the identity of the persons in power." *City of Chicago v. Sessions,* 888 F.3d 272, 288 (7th Cir. 2018), reh'g en banc granted in part, opinion vacated in part, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), vacated, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018). The 7th Circuit further observed that:

"Courts must be cognizant of the potential for forum shopping by plaintiffs. Commentators have documented this phenomenon over the past decades, which transcends administrations and political parties. For instance, under the Obama administration, such injunctions stymied many of the [p]resident's policies, with five nationwide injunctions issued by Texas district courts in just over a year. See [Samuel L.] Bray, "Multiple Chancellors," 131 Harvard Law Review at 458–59 and cases cited therein.

BALANCE OF POWERS

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At that time, then-Sen. and [later] Attorney General Jeff Sessions characterized the upholding of one such nationwide preliminary injunction as "a victory for the American people and for the rule of law." News Release, Sen. Jeff Sessions III, June 23, 2016. Now, many who advocated for broad injunctions in those Obama era cases are opposing them. Id., 888 F.3d at 288.

Political fights between the legislative and executive branches are baked into our system of government and are subject to resolution in the next election. Wisely, the federal courts have held that "[the] political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the [e]xecutive [b]ranch." *Japan Whaling Association v. American Cetacean Society,* 478 U.S. 221, 230, 106 S. Ct. 2860, 2866, 92 L. Ed. 2d 166 (1986).

However, the increasingly aggressive actions by presidents of both parties that become impatient with Congress must remain subject to judicial review under the Administrative Procedure Act and the Constitution and, to its credit, the federal judiciary does not shy away from its responsibilities when nationwide injunctions are sought.

But this brings us right back to the problem of forum-shopping. As "early" as 2012, The New York Times observed that the media frequently identifies the "partisan affiliations" of the judge[s] when reporting on the outcome of a case. See "'Politicians in Robes'? Not Exactly, But…"

Do any of us doubt that

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public confidence in the integrity of the judicial branch is undermined by partisan vitriol in hot-button cases where, with good reason as the 7th Circuit has warned, the public suspects that shrewd, zealous lawyers, driven by partisanship, are gaming the system?

Fortunately, there is a solution hiding in plain sight — and one that would not, as the Trump administration has dangerously proposed, simply abolish nationwide injunctions and leaving the executive branch answerable to no one.

In 1910, Congress created three-judge district courts following the Supreme Court's decision in Ex Parte Young, 28 S.Ct. 441 (1908), in which a single federal judge had enjoined the enforcement of an unconstitutional state law. As another commentator has observed:

"By moving such cases to three-judge district courts, Congress sought to achieve several things: To limit the power of a single district judge to enjoin enforcement of state (and later federal) laws; to make it more difficult for plaintiffs to obtain such injunctions; to ensure that any injunction is more authoritative, better reasoned and more likely correct because multiple judges, many from outside the local area, were involved in the deliberation and decision; and to ensure that such injunctions receive expeditious and final Supreme Court review."

The same commentator adds that "[p]rior to 1976, three-judge courts heard all actions seeking to enjoin enforcement of state and federal laws as unconstitutional" (Id.) — but as amended in 1976 and codified at 28 U.S.C. Section 2284, three-judge district courts are convened only when "otherwise required by act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."

I today propose Congress revisit 28 U.S.C. Section 2284 and authorize three-judge district courts whenever a litigant is requesting nationwide injunctive relief against the enforcement of an executive branch action or an act of Congress. Furthermore, I would respectfully submit that the three district judges be drawn from three different circuits, giving the three-judge court a broader geographical footprint and eliminating the practice of forum shopping by filing in a perceived friendly district.

As a starting point, I suggest the formation of a "Judicial Panel on Nationwide Injunctions" similar in concept to the existing Judicial Panel on MultiDistrict Litigation, to create the mechanism for random selection of three-judge panels regardless of where a case might be filed.

Whether there would be intermediate appellate review or direct appeal to the Supreme Court is an important detail to be considered.

There is no pride of authorship here. I am hoping this concept can be debated, expanded and made workable. The overriding goal is to allow the judiciary to fulfill its responsibility for judicial review that is both valid and vital with enhanced public confidence that each case is decided fairly.

More than ever, we must redouble our commitment to the Rule of Law.

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