Hearing before the U.S. House of Representatives
Subcommittee on Courts, Intellectual Property, and the Internet
"The Role and Impact of Nationwide Injunctions by District Courts"

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I am honored to be invited to testify. My remarks will focus on the problems caused by the national injunction, and the possible solutions.

I. Introduction

The national injunction is a remedy that didn't exist for the first 170 years of the federal courts.[1] No change in legal authority made it possible—no amendment, no statute, no big case. It was an accidental development starting in the 1960s and 70s, and it remained fairly obscure until less than three years ago. At that point it was weaponized by Republican state attorneys general to stop major Obama administration programs. Now turnabout is fair play.

In other words, whether you are a Democrat or a Republican, sometime in the last three years your ox has been gored by the national injunction. My hope is that

[1] Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 424-445 (forthcoming 2017).

this bipartisan pain offers an opportunity. We don't have to be distracted by the latest national injunction. We can take a longer view. We can get the law right.

II. Defining the National Injunction

I want to start with a definitional point. What makes the national injunction distinctive isn't its breadth—it's not about spatial extent or being "nationwide." That's a misconception. It's one reason I don't call it a "nationwide injunction."

What makes this remedy novel and dangerous is that a court is controlling how the government defendant acts toward people who are not parties in the case. Instead of letting each person bring his or her own case, or instead of letting a class of plaintiffs bring their own case, this remedy lets one plaintiff sue and get an injunction on behalf of everyone.

These are suits against the national government. That's why we can call this remedy the "national injunction." Or we could call it a "universal injunction." The point is that courts are giving remedies to non-parties.

III. Problems

Now what are the problems with the national injunction? I'll list several.[2]

[2] For further discussion, see *id.* at 457-465, 471-472.

A. Forum-shopping

First, rampant forum-shopping. It's no surprise plaintiffs went to Texas to stop the Obama administration. It's no surprise plaintiffs are going to more liberal jurisdictions to stop the Trump administration. And with a national injunction, it only takes a single win to control the federal government everywhere. So you shop 'til the statute drops.

B. Conflicting injunctions

Second, there's a risk of directly conflicting injunctions, with two district judges trying to move the entire country in opposite directions. We have avoided that so far, but there was a close call near the end of the Obama administration.[3]

C. Worse decisionmaking

Third, there's the effect on decisionmaking by the Supreme Court. The justices typically wait to grant cert on a question until there's a circuit split. That way they can hear from different judges, in different parts of the country. Judge Leventhal, formerly of the D.C. Circuit, used a metaphor that reminds me of making coffee—the justices want an issue to "percolate" through the courts of appeals. But national injunctions stop the percolation. They put us in a world where the

[3] *Id.* at 463 & n.273.

Supreme Court has to decide cases faster, with less evidence, with fewer contrary opinions—a recipe for bad judicial decisionmaking.

D. Inconsistent with district judge's lack of authority to make precedent

Fourth, the national injunction creates massive anomalies about the scope of litigation. A decision by a federal district judge doesn't count as precedent, not even in that judge's own district court. So why should one district judge be able to control the federal government everywhere?

E. End run around the class action

Next, the national injunction is an end run around class action requirements. Plaintiffs can bring a class action for injunctive relief, but only if they meet certain requirements that are meant to ensure effective representation and fairness to everyone in the class. But there's a problem: Why does that class action even exist if plaintiffs can get the same remedy, without meeting any of the class requirements, by seeking a national injunction?

F. It is unconstitutional

Finally, and most important, there's a fundamental constitutional problem. Article III gives the federal courts the "judicial Power." That's a power to decide cases and controversies, a power to decide cases for particular parties. It's not a

power to decide questions and give remedies for people who aren't parties. That is why for 170 years there were no national injunctions from federal courts. Because the federal courts recognized that giving remedies to non-parties would go beyond the "judicial Power."[4]

IV. Solutions

So what should be done about the national injunction?

A. Case

First, the federal courts could repudiate it. They broke it, they should fix it. But the Supreme Court has had several chances to limit the national injunction in the past decade, and so far it has failed to act.

B. Rule

Second, the advisory committee on the Federal Rules of Civil Procedure could make a change. But the committee recently refused to do so.

C. Statute

Third, there could be a statute. Starting with the Judiciary Act of 1789, Congress has not hesitated to define the jurisdiction of the federal judiciary. Indeed, the

[4] *See id.* at 430-433 (discussing *Frothingham v. Mellon*, 262 U.S. 447 (1923)).

Constitution itself explicitly gives this power to Congress. The need for Congress to exercise it is acute. I urge the drafting of legislation that would restore the traditional practice of injunctions protecting only the parties.

The core language could be a simple prohibition. The following sentence would suffice: "A court of the United States shall not enjoin the enforcement of a statute or regulation as against a nonparty." There would then need to be some cleaning-up provisions. One provision might clarify that the statute does not alter the rules for class actions. And a couple terms could be defined—"statute or regulation" and "enjoin"— to avoid any possible misunderstanding.

But the key operative language would be a straightforward prohibition that restores the practice that served the federal courts well for most of our nation's history.

D. No half measures

I want to stress one final point. If this subcommittee were to consider legislation, it is particularly important not to try to distinguish "good" national injunctions from "bad" ones. All national injunctions should be prohibited.

One reason is the Constitution. As already discussed, Article III gives the federal courts the "judicial Power"—authority to remedy the wrongs of parties, not the wrongs suffered by non-parties. Congress should not try to give unconstitutional power to the courts.

Another reason is practical. There is no good way to distinguish national injunctions with positive effects. Each standard that has been suggested would prove malleable and subjective, with the result that judges could give national injunctions whenever they wanted to. In other words, the status quo.

V. Conclusion

Our system *is* designed to get to the right legal answer. But through precedent. It's slow, it's messy. We get the right answer through a lot of judges considering a question over time—not through the lightning strike of a single federal judge deciding a question for the whole country. The national injunction is not how the federal courts are supposed to work. Congress should act.