

**THE ROLE AND IMPACT OF NATIONWIDE
INJUNCTIONS BY DISTRICT COURTS**

HEARING

BEFORE THE
SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET
OF THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

NOVEMBER 30, 2017

Serial No. 115-48

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

WASHINGTON : 2018

32-475

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THE ROLE AND IMPACT OF NATIONWIDE INJUNCTIONS BY DISTRICT COURTS

THURSDAY, NOVEMBER 30, 2017

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE
INTERNET
COMMITTEE ON THE JUDICIARY
Washington, DC.

The subcommittee met, pursuant to call, at 2:00 p.m., in Room 2141, Rayburn House Office Building, Hon. Darrell Issa [chairman of the subcommittee] presiding.

Present: Representatives Issa, Goodlatte, Chabot, DeSantis, Gaetz, Biggs, Nadler, Johnson of Georgia, Lieu, and Schneider.

Staff Present: Joe Keeley, Chief Counsel; Carlee Tousman, Clerk; and Jason Everett, Minority Counsel.

Mr. ISSA. The subcommittee will come to order. The Subcommittee on the Courts, Intellectual Property and the Internet will please come to order. Without objection, the chair is authorized to declare a recess of the subcommittee at any time.

I would like to welcome our panel here today on the role and impact of nationwide injunctions by district courts. In order to observe the fact that members are still coming back from the vote, I am going to slightly modify, and we are going to do the oath before opening statements.

So, I would like to now welcome our panel and ask you to please rise to take the oath and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth? Thank you. Please be seated.

Let the record indicate that all witnesses answered in the affirmative. And as we wait for other members to arrive, I will introduce our panel.

Professor Samuel Bray is Professor of Law at UCLA School of Law, a fellow Californian for now. Professor Amanda Frost, Professor of Law at American University, Washington College School of Law.

Professor Michael Morley is an Associate Professor of Law at Dwayne O. Andreas School of Law at Barry University.

And my favorite, and returning guest for us, Hans von Spakovsky—I did not major in that but thank you—is the manager of Election Law Reform Initiative and Senior Legal Fellow at the

Institute for Constitutional Government and the Heritage Foundation.

Again, I want to thank you all for coming, and I will now recognize myself for an opening statement.

We are here today to hear from witnesses on an infrequent, but more frequent than in the past, problem of nationwide injunctions that deprive nonparties from having an input into the judicial process. Whether or not one agrees with the outcome of a particular case, nationwide injunctions clearly give, for a time, the power of the entire Supreme Court to make a law of the land in a case and effectively set a precedent or bar from similar cases.

No two judges are alike, and in most cases, most decisions by a district court judge affect only the parties withstanding in that case and are subject to a review that only covers the circuit, or a small portion of the United States. But in the case of nationwide bans or injunctions, we find ourselves with a specific case with specific characteristics being used to broadly bind the entire Nation.

If that were not bad enough, we have a bigger problem. And that is, at least in a few cases, we have multiple injunctions or decisions not to enjoin that conflict each other. What are we to do?

Are we to assume that one district judge in one circuit can overturn an injunction of another, since one has a nationwide injunction? And if the next rules that in a similar case, an injunction should not be granted, does one district judge undo another? I am sure our witnesses today will make it clear that that would not, and should not, happen.

It does not happen in ordinary cases, even in a situation in which, for example, the first circuit in Maine and the ninth circuit in California were to rule completely differently. They do not bind the rest of the Nation; only the Supreme Court can do that.

So, as we look at the problem today and this testimony, I hope we will all recognize this is a problem in need of a solution. One that should be narrowly crafted, solve the problem, and not deny the appropriate remedies of parties when they come before the court. And with that, we will stand in a short recess.

[The prepared statement of Mr. Issa follows:]

[Recess.]

Mr. ISSA. The subcommittee will come to order. It is now my pleasure to recognize the gentleman from New York for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, the nationwide injunctions are a sometimes imperfect but often essential equitable remedy in the Federal courts. When the Federal Government acts in violation of the Constitution or breaks the law on a national scale, a nationwide injunction may be the only logical and far remedy. That does not mean that the courts should not exercise caution and care when determining the proper scope of an injunction.

But to suggest that a nationwide injunction should be prohibited in every circumstance, as some people argue, seems like a gross overreaction to whatever perceived flaws this tool may have. Whenever a district court issues a nationwide injunction blocking a Federal Government policy, the quotes in the next day's newspapers are all too predictable.

Proponents of that policy will hail the decision as reasonable and necessary, while supporters of the policy will claim it was a vast overreach by a single activist Federal judge. When the party in power changes hands and the roles are reversed, those who once decried the use of nationwide injunctions will suddenly see the virtues of such a remedy. And those who supported their use previously, will now consider it a fatally flawed travesty of justice.

We should not examine the role and impact of nationwide injunctions through a partisan lens based on our preferred policy outcomes. We should instead focus on what factors the court should consider when determining appropriate scope and substance of an injunction in any given case.

Critics of nationwide injunctions typically raise four major objections. First, they argue them as a matter of principle. A single judge should not be able to bind the entire Nation with his or her decision. This is despite the fact that Article III of the Constitution invests Federal judges with the “judicial power of the United States,” with absolutely no restriction on the geographic reach of their decisions.

They also view the ability to seek a nationwide injunction as an invitation to plaintiffs to engage in forum shopping, a practice that is certainly not limited to the context of nationwide injunctions. Concerns have also been expressed about the potential for confusion if multiple courts issue conflicting orders with a nationwide impact. Fortunately, courts generally avoid this problem by placing a stay on the conflicting order, pending resolution by the appellate courts.

Finally, some scholars have noted that the legal system depends on issues percolating throughout the courts. The Supreme Court and other courts of appeal can benefit from studying the various opinions and analyses offered by lower court judges who have considered the question at hand. When a district court issues a nationwide injunction, it may short circuit this process and stunt the development of the law.

For certain types of cases, however, like immigration, it is simply not practical to apply the law differently in different parts of the country. For example, when President Trump ordered his unconstitutional Muslim travel ban, it would have made no sense if the courts had ruled that it should apply differently throughout the United States.

If people from the banned countries were permitted to enter the United States in California because of a limited injunction, but were prohibited from entering in Texas because the court upheld the ban there, where it had not ruled on it, an immigrant can always enter in California and then travel to Texas. A nationwide injunction was the only logical solution in that case.

Whatever legitimate concerns may be raised about nationwide injunctions, it is also important to note that they offer several benefits as well. In some instances, like many immigration and environmental cases where the impact of an order cannot be neatly cabined off, broad injunctions are often the only way—the only way—to ensure that the plaintiffs receive the complete relief that the courts require and that the plaintiffs legally deserve.

Nationwide injunction also provides uniformity in the law, and they ensure that similarly situated individuals will receive equal treatment under the law. This includes providing equal justice across geographic regions and treating plaintiffs and nonplaintiffs alike. Doing so also protects individuals who are unable to bear the cost of litigation from being disadvantaged in relation to those who can afford to seek injunctive relief.

This principle can be especially important in certain civil rights litigation in which it would be unfair for one person to have a fundamental constitutional right vindicated, while others who cannot bear the costs and burdens of litigation would continue to have their rights violated.

The court system itself also benefits from nationwide injunctions by avoiding a flood of duplicative litigation on the same issue over and over again. If courts could only issue injunctions with respect to the parties to a case, or if they were required to restrict the impact of their decisions through a particular geographic region, many other plaintiffs would no doubt rush to the courthouse to seek similar relief.

Nationwide injunctions are obviously not appropriate in all circumstances, and there are good reasons for courts to act cautiously before issuing such a broad remedy, but we should not completely dismantle this important tool and risk depriving Americans of the justice they deserve.

I look forward to examining these and other issues with our witnesses today, and I yield back the balance of my time.

[The prepared statement of Mr. Nadler follows:]

Mr. ISSA. I thank the gentleman for yielding back. We now go to our witnesses. I would commend all of you that we will be having votes and we are going to try to go through this in an expeditious fashion, so we would like to get to questions as soon as possible for our panel. With that, of course, observe the 5-minute rule as close as you can. Your entire statements will be placed in the record. Professor Bray, you are first.

STATEMENTS OF SAMUEL BRAY, PROFESSOR OF LAW, UCLA SCHOOL OF LAW; AMANDA FROST, PROFESSOR OF LAW, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW; MICHAEL MORLEY, ASSOCIATE PROFESSOR OF LAW, DWAYNE O. ANDREAS SCHOOL OF LAW, BARRY UNIVERSITY; AND HANS VON SPAKOVSKY, MANAGER, ELECTION LAW REFORM INITIATIVE AND SENIOR LEGAL FELLOW, INSTITUTE FOR CONSTITUTIONAL GOVERNMENT, THE HERITAGE FOUNDATION

STATEMENT OF SAMUEL BRAY

Mr. BRAY. I am honored to be invited to testify. My remarks will focus on the problems caused by the national injunction and possible solutions. The national injunction is a remedy that did not exist for the first 170 years of the Federal courts. 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 1970s, and it remained fairly obscure until less than 3 years ago.

At that point, it was weaponized by Republican state attorneys general to stop major Obama administration programs. Now, turn-about is fair play. In other words, whether you are Democrat or a Republican, sometime in the last 3 years your ox has been gored by the national injunction.

My hope is that this bipartisan pain offers an opportunity. We do not have to be distracted by the latest national injunction. We can take longer view. We can get the law right.

I want to start with a definitional point. What makes the national injunction distinctive is not its breadth. It is not about special extent or its being nationwide. That is a misconception—it is one reason I do not 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 to 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 is why we can call this remedy the national injunction. Or we can call it a universal injunction. The point is not about geographic scope. It is that courts are giving remedies to nonparties.

Now, what are the problems with the national injunction? I will list several. Some of these have been alluded to in Ranking Member Nadler's opening statement. First, rampant forum shopping. And this is not like ordinary forum shopping. It only takes a single win to control the Federal Government everywhere, so you can shop until the statute drops.

Second, there is 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. Third, there is the effect on decisionmaking by the Supreme Court. The justices typically wait to grant cert on a question until there is a circuit split. 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 Court of Appeals.

But national injunctions stop the percolation. They put us in a world where the Supreme Court has to decide cases faster, with less evidence, with fewer contrary opinions— a recipe for bad judicial decisionmaking.

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 is 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?

Finally, and most important, there is a fundamental constitutional problem. Article III gives the Federal courts the judicial power. That is a power to decide cases and controversies. A power to decide cases for particular parties. It is not a power to decide questions and give remedies for people who are not parties. That is why for 170 years there were no national injunctions from Fed-

eral courts, because the Federal courts recognized that giving remedies to nonparties would go beyond the judicial power.

So, what should be done about the national injunction? First, the Federal courts could repudiate it. They broke it, they should fix it. But so far, the Supreme Court has failed to act.

Second, the Advisory Committee on the Federal Rules of Civil Procedure could make a change. But the committee recently declined to do so. 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 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.”

Our system is designed to get to the right legal answer, but through precedent. It is slow, it is messy, not through the lightning strike of a single Federal judge deciding a question for the whole country.

[The prepared statement of Mr. Bray follows:]

Mr. ISSA. Thank you. Professor Frost.

STATEMENT OF AMANDA FROST

Ms. FROST. Thank you, Mr. Chairman, Ranking Member Mr. Nadler, and members of the subcommittee for holding a hearing on this important topic today. I am a Professor of Law at American University Washington College of Law where I teach and write in the fields of civil procedure, constitutional law, and immigration law.

As both Professor Bray and Professor Morley have stated in their written testimony, determining the proper scope of a national injunction is not a partisan issue. Over the last few years, we have seen national injunctions entered to put a stop to President Obama’s initiatives and programs, and we have seen in the last year national injunctions put in place to put a stop to President Trump’s initiatives and programs.

Nationwide injunctions come with both costs and benefits, and for that reason it is inappropriate for a Federal district court to enter a nationwide injunction without seriously considering those costs and benefits. But it would also be a mistake to take the nationwide injunction off the table as a remedy for a district court, at least in certain cases.

First and foremost, in some cases nationwide injunctions are essential to provide complete relief to the plaintiffs. And this is particularly true in immigration cases where it often would be impossible to give the plaintiff the relief they are requesting.

So, for example, the State of Texas sued, challenging President Obama’s initiative to grant deferred action to undocumented immigrants all over the United States, and they asked for a nationwide injunction. And their argument about why it needed to be nationwide was that if President Obama was allowed to give deferred action to all the undocumented immigrants living outside of Texas

then, of course, those individuals could move into Texas, causing Texas the very same injury it was trying to avoid.

Now, I disagree with some of Texas' legal arguments. But if you agree that they were injured by this initiative, then I think you have to agree, they needed a nationwide injunction to correct and remedy that injury.

Likewise, the States that have sued to enjoin President Trump's executive order, putting in place a travel ban against entry by certain foreign nationals, have argued that that ban injures them economically, injures their educational institutions and their employers by making it impossible for them to recruit and retain employees, students, and faculty.

Now, without a complete and total injunction of that travel ban, their injuries would not be remedied. Nor would it be possible to geographically restrict such an injunction because we can imagine what would happen. If you put an injunction in place for the travel ban as to only one State, of course the immigrants will come into that State and then travel elsewhere. And in fact, that is exactly what happened in the travel ban litigation.

Within a few days after President Trump issued the Executive order with the travel ban, a district court in Massachusetts enjoined the travel ban as to people flying into Logan Airport in Boston, Massachusetts. So, what happened is many immigrants who wanted to come to the United States who were affected by the ban changed their flights to fly into Boston, Massachusetts, and then travel to other States.

Nothing short of a nationwide ban was going to be effective in any way, shape, or form in that litigation. The same problems that I just described plaguing immigration also apply to cases involving environmental harm, such as air pollution or water pollution, and cases involving defective products or endangered animals. All of which the plaintiffs injury could not be relieved unless there was a nationwide injunction.

And finally, as Professor Morley has also written, such as rights at issue in redistricting and desegregation cases, required nationwide injunctions extending beyond the plaintiffs in order to give the plaintiffs complete relief.

Another important reason to allow for nationwide injunctions is that they protect rule-of-law values, such as ensuring the uniform and consistent interpretation of Federal law, which in turn ensures that similarly situated people are treated alike. This is a very important value in our legal system. I think it is what motivated the Supreme Court to partially uphold the nationwide injunction in the travel ban case. It just seems unfair and arbitrary to have a law apply to some but not all.

It is also particularly important in areas such as immigration to speak with one voice. I mentioned previously the geographically restricted injunction issued by a Massachusetts district court in the travel ban case. That created great confusion and chaos, not only among immigration officials in the United States, but among all the foreign citizens who had to reinterpret and apply that law, and other actors, such as airline personnel, who also play a role in enforcing our immigration laws. Anything short of a nationwide injunction was simply too disruptive in the immigration context.

So, that said, there certainly are serious costs in nationwide injunctions, and I commend my fellow panelists for raising this issue and hopefully encouraging district courts to think twice. My view is the district courts should consider carefully the scope of an injunction, should hold a hearing on the issue at which they gather evidence from the parties as well as interested third parties to the case about the costs and the benefits, before going ahead and issuing a nationwide injunction. But I do think it remains an appropriate remedy in appropriate cases.

Thank you for your time and I look forward to your questions. [The prepared statement of Ms. Frost follows:]

Mr. ISSA. Thank you. Professor Morley.

STATEMENT OF MICHAEL MORLEY

Mr. MORLEY. Good afternoon, Mr. Chairman, ranking member, and distinguished committee members. My name is Michael Morley, and I am an Associate Professor of law at—

Mr. ISSA. We cannot quite hear you. Pull the mic closer and turn it on, please.

Mr. MORLEY. Thank you. My name is Michael Morley and I am an Associate Professor of Law at Barry University School of Law. It is an honor to have the opportunity to speak with you today on the issue of nationwide injunctions.

Almost every injunction can have a nationwide impact in some respect. When an injunction prohibits a defendant from taking certain actions, that prohibition typically applies anywhere in the Nation, including places well outside the geographic jurisdiction of the issue in court.

Today, however, I will be using the term “nationwide injunction” to refer to court orders that purport to adjudicate and enforce the rights of people who are not necessarily before the court, who may very well be outside of the issue in the court’s jurisdiction.

Because any injunction may have effects far beyond a court’s jurisdiction, the key question in determining whether an order is a nationwide injunction of the sort we are speaking about today is whose rights is the court focused on enforcing. I would like to emphasize three main issues.

First, the question of what the propriety of nationwide injunction is bipartisan. Second, at least some of the reason that confusion exists over nationwide injunctions is due to the potentially misleading language courts sometimes use in discussing constitutional issues, as well as the uncertainty over the respective roles that different bodies of law play in constitutional cases.

Finally, when considering the issue of nationwide injunctions, it is critical to distinguish between class action and nonclass cases.

First, nationwide injunctions are a bipartisan issue. By issuing a nationwide injunction, a single district judge may completely prohibit a Federal statute, regulation, executive order, or administrative policy from being enforced against anyone anywhere in the Nation, or potentially even the world. It may grant relief to third-party nonlitigants. The plaintiffs themselves lack standing under Article III of the Constitution to pursue.

Over the past year, nationwide injunctions have been issued against several of President Trump’s initiatives, including the trav-

el ban, prohibition on transsexual service in the military, and restrictions on Federal funds to sanctuary cities.

As my colleagues have noted, however, only a year or two earlier, nationwide injunctions were issued against several of President Obama's initiatives, including not only deferred action for parents of aliens, but Department of Education guidance concerning transgender students' bathroom use, and even the Affordable Care Act itself.

Thus, nationwide injunctions may be levied against legal provisions enacted by either political party presenting concerns for both. It is truly an area in which both parties have a strong interest in applying objective, neutral principles.

Second, part of the confusion over nationwide injunctions stems at least in part from the language courts use to discuss constitutional cases. When a court, especially a district court, holds that a statute is facially unconstitutional, we often say that the court has struck down the statute, but that phrase is only a metaphor. The statute itself remains on the books. The court has simply decided that the Constitution precludes it from applying that statute in the case before it.

The question then becomes what are the other legal consequences of a district court's ruling that a legal provision is unconstitutional? The answer to that question does not come primarily from constitutional law but rather other bodies of law, such as civil procedure, Federal courts, and remedies, which usually counsel in favor of more narrow injunctive relief. The notion that a nationwide injunction is appropriate simply because a district court concludes that a law is facially unconstitutional is erroneous.

Finally, nationwide injunctions present very different issues in class action versus nonclass cases. It is generally undisputed that a court may grant relief to the parties before it. In a class action case brought under Federal Rule of Civil Procedure 23(b)(2), a court may grant injunctive relief to protect the rights of all plaintiff class members.

The main issue in such cases is not so much the scope of the injunction but rather the scope of the class. Courts should generally avoid certifying nationwide classes in constitutional under Rule 23(b)(2) precisely to avoid having to issue nationwide injunctions, completely nullifying a Federal legal provision across the country.

In nonclass cases in contrast, when a court issues a nationwide injunction it is enforcing the rights of third-party nonlitigants who are not before the court. The plaintiffs in nonclass cases generally lack Article III standing to seek such relief and such broad orders are unnecessary to resolve the case or controversy actually before the court. In nonclass cases, courts should generally issue only plaintiff-oriented injunctions, enforcing only the rights of the particular plaintiffs before them.

I have offered proposed statutory language to address these issues in my written statement. Thank you very much for your time and I would be happy to answer any questions.

[The prepared statement of Mr. Morley follows:]

Mr. ISSA. Thank you. Mr. von Spakovsky.

STATEMENT OF HANS VON SPAKOVSKY

Mr. VON SPAKOVSKY. Well, the legitimacy of an injunction issued by a Federal district court against the government in a nonclass action law suit has nationwide application to individuals who are not parties to a suit. That is the issue. Such injunctions are recent phenomena that violate Supreme Court precedent, *U.S. v. Mendoza*. In *Mendoza*, the lower courts refused to allow the government to contest the case because of a prior adverse decision on the same issue by a different Federal court against different plaintiffs.

The ninth circuit held that the government was collaterally estopped from relitigating the constitutional issue. But the Supreme Court held that the doctrine of collateral estoppel, which applies to private parties, does not apply to the government.

The government is not the same as private litigants because, as Chief Justice Rehnquist said, "Both because of the geographical breadth of government litigation and also, most importantly, because of the nature of the issues in government litigation." Thus, applying collateral estoppel of the government "would substantially thwart the development of important questions of law by freezing the first final decision issued on a particular legal issue." Allowing only one final adjudication would deprive the Supreme Court of the benefits it receives from permitting several courts of appeal to explore a different question before it grants certiorari.

Thus, the government is not further bound in a case involving a litigant who was not a party to the earlier litigation and has the ability to continue to apply its regulations, policies, and executive orders to individuals, including aliens, who are not parties to specific lawsuits contesting the government's actions. Nationwide injunctions obviously provide an incentive for extreme forum shopping, rewarding plaintiffs who steer cases to specific circuits, specific districts, and even specific judges.

While such forum shopping raises serious questions in the minds of the public about the objectivity and partisanship of the judges chosen by plaintiffs, because the judges are viewed as holding particular ideological and political views that will benefit the plaintiffs.

When Federal courts issue nationwide injunctions applying to nonparties, they are invading the authority of other Federal courts and other appellate circuits. Now while that may be appropriate when applied to the specific individuals who are before that particular court, it is not appropriate for individuals who are not parties of the lawsuits and certainly not to unnamed, unknown individuals, except under very limited and very narrow circumstances as determined by Congress and the Supreme Court.

There are occasions when a nationwide injunction may be appropriate for nonparties, but Congress has provided for that through Federal Rule of Civil Procedure 23, which outlines the requirements for a Federal court to certify a class action. Federal courts issuing nationwide injunctions without following rule 23 are evading compliance with Federal law.

Similarly, Congress has provided that a Federal court can set aside actions taken by the government if it finds a violation of the Administrative Procedure Act, the APA. Thus, while some have criticized the nationwide injunction issued by a Federal district

court and upheld by the fifth circuit against President Barack Obama's DAPA program, that injunction was only issued after the courts found a violation of the Administrative Procedure Act.

Now, solutions to the problem are such that, you know, we would not have this problem of improperly issued nationwide injunctions if Federal courts followed the Mendoza precedent with regard to judgments against the government that do not bind on parties or complied with Federal rule 23, if a class of plaintiffs is justified, or followed the requirements of the Administrative Procedure Act. The Federal judges are routinely ignoring these requirements when issuing injunctions.

Now, one potential way to prevent the conflicts that can arise from multiple differing opinions issued by different Federal judges would be for Congress to require all the lawsuits contesting the legality or constitutionality of an executive order signed by the President, or a regulation promulgated by a Federal agency to be filed in the District of Columbia Federal District Court. This is a precedent that has been followed by Congress by section 5 of the Voting Rights Act which required such lawsuits to be filed in the District of Columbia.

Another potential solution is to de novo review of cases that do not follow the Mendoza precedent. Of course, this would remedy the problem if circuit judges do not follow the legal and equitable limitations that already exists on granting such injunctions. I will be happy to answer questions from the other members of the committee.

Mr. ISSA. Thank you. I recognize myself for the first round of questioning. Oh, I am terribly sorry, I tried to overdo it. We now recognize the chairman of the full committee, the gentleman from Virginia, Mr. Goodlatte, for his opening statement.

Chairman GOODLATTE. Well, thank you very much, Mr. Chairman. I appreciate you holding this hearing, I appreciate your forbearance in letting me give this statement. Well, this issue is a very important one and I appreciate the witnesses' testimony today.

We are here to explore the propriety of allowing a single district court to issue a nationwide injunction with respect to congressional and executive actions. With George W. Bush and Donald Trump as President, national injunctions against the administration's policies tended to be issued by Federal district court judges in the ninth circuit, including California and Washington State.

When Barack Obama was President, national injunctions against the administration's policies tended to be issued by Federal judges in the fifth circuit, including Texas. This situation poses many problems for us all to consider.

Among them, if a plaintiff brings an individual action seeking a national injunction and the Federal district court upholds the Federal policy challenge, then the decision has no effect on other potential plaintiffs. However, if one Federal district court judge invalidates a Federal policy and issues a national injunction, the injunction stops the Federal policy with respect to everyone nationwide.

To paraphrase what one law professor has written, "shop 'til the Federal policy drops." Also, when a single Federal district court

judge issues a national injunction, it would seem to greatly interfere with a more optimal decisionmaking process within the Federal court system and even affect the Supreme Court's resolution of the issue.

When a Federal district court stops a Federal policy everywhere, there might be no opportunity for other Federal judges to express their views, leaving the Supreme Court to potentially hear the appeal without the benefit of hearing differing views on the subject, including different analyses of both the law and the facts among both other Federal district court judges and other circuits as well. It leaves the Supreme Court to decide major questions of Federal policy more quickly with fewer facts and without the advice of competing views among the lower courts.

National injunctions issued by Federal district courts result in a uniform policy to be sure, but at the cost, at least, of some of the problems I have briefly mentioned. National uniformity is not a prime imperative in our system of lower Federal courts divided into circuits, a system that broadly tolerates disuniformity in the law pending review by the Supreme Court. Indeed, the only way to avoid disuniformity in the Federal courts would be to have only one, but that is not our system.

The situation created by the acquiescence to national injunctions does not seem to have prevailed at all in the first century and a half, or more, of American history and when the prospect was raised in the past, it seems to have been decisively rejected during that period. Congress knows how to concentrate judicial review in a small set of courts, and it has done so on several occasions, pursuant to federal legislation enacted by the dually representatives of the people.

Yet the prevailing acquiescence to the issuing of national injunctions by lower courts is not the result of any nationally considered policy, and certainly not one enacted by Congress and signed into law by the President.

So, I would conclude that with a question to the distinguished panel gathered here today. Since disuniformity is an inherent part of our Federal judicial system, what is the best way to achieve uniformity? Is it through the current acquiescence with national injunctions, where the first court to invalidate a congressional or executive action has its decision applied nationwide, despite the potential of preexisting, conflicting decisions? Or is it through either the unanimous opinions of the lower courts or through the disagreement of the lower courts preceding an analysis by the Supreme Court?

I thank all of our witnesses for participating in today's hearing, and I look forward to posing that question to each of you at a little later in the process. Thank you, Mr. Chairman.

[The prepared statement of Chairman Goodlatte follows:]

Mr. ISSA. Thank you. I was planning on letting them answer that one, Mr. Chairman. We will let you think about it. I will now recognize myself for a round of questioning. You know, the chairman made some extremely good points, and I will try to add on to those in my questioning.

Professor Frost, I gave you a heads-up initially that you seem to be the most in the middle of some of the decisions here. So, let me

pose first one question of, in a case in which you have a party. For example, in an antitrust case, and the party is doing something to a particular individual and then brings it. Obviously, the court, one, goes to an appropriate venue, often not the plaintiff's but the defendant's. Correct?

Ms. FROST. I am sorry. Could you repeat the—

Mr. ISSA. I mean, the defendant in an antitrust case has to be in a place in which the court can determine they have a nexus to it? Okay?

Ms. FROST. Yes. Yes, for starters.

Mr. ISSA. So, you first have to go where the defendant is—

Ms. FROST. Yes.

Mr. ISSA [continuing]. In some measurable way. Secondly, if you plead an antitrust activity, it only affects that particular activity as to that individual, and of course, you will enjoin the company in the entirety but you are enjoining a particular activity. Correct?

Ms. FROST. Yes. I need to know more about the case, but yes, you are enjoining the party from acting.

Mr. ISSA. So using the example—and I think we all understand the elephant in the room are these last few years on both sides of the aisle these decisions—in the case, for example, of a proposed immigrant. If they were coming in, let's say, on a green card, if they were returning on a visa, are the particulars in that case identical in any way to, let's say, somebody coming from a country where you cannot verify their origin? Particulars are different, are they not?

Ms. FROST. Those acts differ.

Mr. ISSA. So, in several of these cases on both sides, there was not a harmony of the cases but, in fact, a determination that the order was inherently unconstitutional for all that could be affected by, both before the court and not before the court. Correct?

Ms. FROST. Are you talking about in the travel ban litigation, or—

Mr. ISSA. Yes.

Ms. FROST. Yes, and I will also say that was the same type of ruling that the Texas District Court issued in the case challenge where Texas challenged the DAPA.

Mr. ISSA. So, Professor Bray, using that example—because I want to stay on it for a second—ultimately did the President not have a follow-on order that was a lesser included part of his original order?

Mr. BRAY. Yes, that is my—

Mr. ISSA. Was it considered to be unconstitutional when it was a lesser included?

Mr. BRAY. Well, that was the subject of further litigation and there were more national injunctions against the revised order.

Mr. ISSA. Right. But at the end of the day a lesser included part of the order was constitutional. In other words, the President's order, at worst, was overly broad as to the individuals. Correct?

Mr. BRAY. I think that partly depends on the theory of the particular challenge. So, I—

Mr. ISSA. Let me move on, because I am going to run out of time and I want to get one or two more things in fairly quickly. Is it reasonable to say that this problem, to the extent that there is, is

not the problem of a nationwide injunction but the process of agreeing to a nationwide injunction and ensuring that, in this case, the United States Government, the President and his or her administration has a process which is fair and equitable for the outcome?

I will do it this way—professor, and I will go right down the aisle—do you all agree that there is at least one case in which somewhere in the Federal court system there should be a nationwide injunction granted?

Mr. BRAY. I do not—

Mr. ISSA. Okay. Well, let's—

Mr. BRAY. Because I think it goes beyond the Article III power of the Federal courts—

Mr. ISSA. Let's say the D.C. Circuit.

Mr. BRAY. Even in the D.C. Circuit. The injunction should bind the parties and that is all the courts have constitutional powers.

Mr. ISSA. Let me go through this for second because I want to be fair that I think there is a balanced question here that as we try to resolve it we want to get to. Professor Frost—and I apologize to the others, I am not probably going to get to you—but Professor Frost, are there not examples in the D.C. Circuit in which regulatory decisions are routinely struck down there and that they effectively eliminate the enjoined the regulation and strike it down?

Ms. FROST. Certainly.

Mr. ISSA. Are those not nationwide?

Ms. FROST. Yes. They operate nationwide in the sense that they are going to stop that policy wherever it would have been implemented in the Nation.

Mr. ISSA. So, inherently, we do, with some regularity, have nationwide injunctions, but we do not call them nationwide injunctions. Is that correct?

Ms. FROST. I think the definitional issue is really important here to think, especially if you are going to legislate this area, you should be very careful about—

Mr. ISSA. So, one of the—and that is why I asked to process and I will close with this—from a process standpoint, the ambiguity is a party who has a right to be, let's just say in Hawaii or Washington, and the United States of America, which is inherently here in Washington, D.C., and finding a way to find a process in which the individual is not denied their right potentially to seek redress where they are.

And I will not use immigration as one, but let's just say that, and the inherent right of the Federal Government to have a process for a determination of what it should or should not be able to do on a national basis. Is that a fair statement of the problem, not necessarily the solution?

Mr. BRAY. I think we can think about it as a process problem with the issue being how do we get from A to B, with A as legal dispute and controversy, and B as some sense of uniformity. And the traditional way to do that is through precedent and not through national injunctions—

Mr. ISSA. And we are going to get to that in my second round. Does anyone disagree with that basic concept, that this is at least a part of what we should explore here today? With that, I recognize the ranking member of the committee for his questions.

Mr. NADLER. Thank you, Mr. Chairman. Professor Frost, Professor Bray argues in his testimony and in his answers that nationwide injunctions are unconstitutional, period. Do you agree with that assessment? And are you aware of any cases in which the constitutionality of a nationwide injunction has been challenged?

Ms. FROST. No, I do not agree with that statement. First, because I think that we need to separate out a district court's power to hear a case and that does turn on connection between the defendant and the territory in which the district court presides. So, there is a limit on the district courts. They cannot hear every case. They have to hear a case in which there is a jurisdictional connection.

But that is not the same as what kind of remedy can they issue, and I argue they have the power to issue a remedy to provide complete relief to the plaintiff, and that is what the Supreme Court has said in *Madison*. It is also what the Supreme Court implicitly said when it partially upheld the nationwide injunction against the travel ban, just this past year. Because, of course, it kept that nationwide injunction in place as it applied to people beyond the plaintiffs.

Mr. NADLER. So, you would say the Supreme Court, in that decision, in effect upheld the constitutionality of nationwide injunctions?

Ms. FROST. Yes.

Mr. NADLER. Thank you. Professor Bray, would you comment on that?

Mr. BRAY. I do not think the procedural posture in that case, which is a motion for a stay of a preliminary injunction, is a decision on the merits by the U.S. Supreme Court on this question. There have actually been—the closest thing to a decision on the nationwide injunction is *Frothingham v. Mellon* in the 1920s and it said it would be beyond the judicial power under Article III. And that is consistent with the traditional practice.

Mr. NADLER. And by upholding the injunction in the travel ban case, the Supreme Court was not implicitly modifying that?

Mr. BRAY. I think when the court is deciding whether or not to grant a stay, it is considering a variety of prudential considerations without reaching that particular question of whether the national injunction is appropriate. That question—

Mr. NADLER. Wait, wait, wait. Of course, it is using a variety of prudential considerations. But if it were unconstitutional, it could not get to those prudential considerations, could it?

Mr. BRAY. Well, I think they should not have. They should not have waited. But on that particular posture, it is not a decision on the merits of the national injunction.

Mr. NADLER. Even by implication?

Mr. BRAY. By implication from the posture that the court deciding it.

Mr. NADLER. Okay. All right. Professor Frost, again, when a court issues a nationwide injunction it spares other similarly situated individuals from having to file suit individually and relitigate the same issues obviously. What impact do you think a ban on nationwide injunctions would have on the efficiency of the courts and on their limited resources?

Ms. FROST. Yeah, judicial economy and the inefficiency of requiring relitigation is yet another benefit of nationwide injunctions. I also, as I have said, think there are costs. So, I do not think that would outweigh some of the cost. It depends on the case. I think the most compelling reason to allow for a nationwide injunction is that in cases where you cannot give complete relief to the plaintiffs without it. And as I gave examples in immigration cases, the case by Texas against the Obama administration policies and the travel ban litigation are perfect examples.

Mr. NADLER. Let me ask Professor Bray. In those cases, how would you give relief without a nationwide injunction?

Mr. BRAY. I think you could give complete relief in each case without a national injunction. So, for example, when the State of Washington is suing because of the strongest case for standing it had was on the harm to State universities because students and faculty could not travel to Washington. So, the injunction could require the admission to the United States of students and faculty to Washington State universities. And that puts the onus on the administration to deal with the logistical problems of that and that is completely appropriate.

Mr. NADLER. Okay. And then, California would have to sue separately to prevent the damage to the University of California by students who could not come there?

Mr. BRAY. So, the parade of horribles winds up having very few floats in it because California might sue, and Washington might sue, and then you get a decision—

Mr. NADLER. Could you just answer my question?

Mr. BRAY [continuing]. From the ninth circuit and it would be set for the ninth circuit.

Mr. NADLER. So, in other words, okay—you would have a different lawsuit in every circuit. Professor Frost, can you comment on that?

Ms. Frost. Yeah, and I think it is inefficient to do it that way.

Mr. NADLER. Inefficient?

Ms. FROST. But I also do not agree with Professor Bray that it would resolve the harm for the State of Washington because the arguments made by these States was it is a problem for their economies, for their universities, for their residents to have a whole, at that point—

Mr. NADLER. Okay.

Ms. FROST [continuing]. I think seven different countries, nationals, were banned from coming to the United States. That is going to dissuade people from applying to be students—

Mr. NADLER. All right. Let me ask you one final quick question because my time is running out. You recommend, professor, in your testimony that before issuing a nationwide injunction a court should only hear specifically on that question with testimony from the affected parties. I was struck by that testimony. What are some of the factors you think a court should consider when examining that question?

Ms. FROST. When courts consider this question, they should look at the costs, which Professor Bray and Professor Morley discussed in their articles, and the benefits, which are, as I said, complete relief for the plaintiffs as well the need for uniformity in the interpre-

tation and application of the law, and that like cases be treated alike, which is also an important principle in our legal system. So, they should weigh those costs and those benefits.

Mr. NADLER. Thank you. My time has expired.

Mr. ISSA. Thank you, and I would just like to continue on that line with the chairmen of the cull committee, Mr. Goodlatte.

Chairman GOODLATTE. Well, thank you, Mr. Chairman. I would love to dive into the details of both the Texas DAPA injunction and the series of decisions by a few district court judges, primarily one in Hawaii, with regard to the injunction of seven countries. I am mystified by why he allowed it to go forward in this most recent action, for Venezuela and one other country, but not for five others; I mean, just totally mystified me.

But I think it is more important to take the concern that people have, no matter what their political perspective is, on how one single district court judge gets to make this decision which can last under the current process for many months or a year or more, depending upon the type of case it is.

So, I want to go back to my question, which is what is the best way to solve that problem? Is it to let this continue on? Or is it to have some method of achieving uniformity by requiring unanimous opinions through the lower courts? Or if there is disagreement in the lower courts, that having to happen and then go to the Supreme Court before the injunction can be imposed.

So, let me start with Mr. von Spakovsky. Your testimony suggests either designating a specific court to hear such constitutional challenges. Obviously in this day and age, where as I noted everything injunctions—not everything, but most things—affecting decisions by the Obama administration came out of one circuit, the fifth circuit.

Most things that came out affecting the Trump administration, and before that the Bush administration—not all, because there are some here in the eastern part of the country—but came out of the ninth circuit. Designating one circuit to do that is going to place a lot of power in one place. You also suggested changing the standard of review by circuit courts when hearing appeals. Do you have a preference on those two suggestions?

Mr. VON SPAKOVSKY. I think there is a little bit of a misnomer going on here, and Professor Bray talked about this. Look, the problem is not so much nationwide injunction. Part of the problem here is the courts issuing injunctions that are too broad.

For example, Professor Frost keeps comparing the decision about DAPA with the travel orders, but in the DAPA case what the court actually found was a violation of the APA. That is not something that was asserted in the lawsuits against the travel orders. And there is a difference there.

Look, Congress itself has passed this APA statute saying that when an agency is acting in issuing a policy or regulation, you have given the courts the authority.

Chairman GOODLATTE. I get this, and I agree with your assessment, but I want to get to how you prevent district court judges that have a wide array of “shop ’til the Federal law drops.” How do you avoid that?

Mr. VON SPAKOVSKY. Okay, in that case, I mean, there are problems with giving one particular court, like the D.C. Circuit, jurisdiction over something, for example, that you think that an agency is doing, because then it brings up the politics, or the fights over who is going to sit in that circuit. On the other hand, and I think it was Professor Bray who suggested that you change the standard of review.

So that, for example—and this is something that I have recommended—if a Federal district court goes beyond the Mendoza precedent, if it extends its injunction beyond the people who are actually the plaintiffs in a case, the named plaintiffs, and goes beyond that, if you change that standard of review from abuse of discretion to de novo review, then you are going to give the appellate court more authority to strike down when a district court goes too far.

Of course, that is not going to do you any good if you have circuit court judges who are not paying any attention to that. And if you want to see a good example of circuit judges not paying attention to these restriction on them, look at the ninth circuit panel in the case of—

Chairman GOODLATTE. Let me interrupt you here.

Mr. VON SPAKOVSKY. Yeah.

Chairman GOODLATTE. Again, I love listening to what you have to say, but I want to give the other three witnesses a chance to respond to that one question because that is the only thing I am going to get to ask. Professor Morley?

Mr. MORLEY. Thank you. In terms of uniformity, the Federal judicial system is fundamentally structured not to promote immediate uniformity. Most of the consequences of a court's ruling does not come necessarily from an injunction. It comes from the stare decisis effect. By having 12 different geographic circuits—

Chairman GOODLATTE. What is the solution? I share your concern. What is the solution?

Mr. MORLEY. Well, that is exactly my point. As long as you are working against the backdrop of a system where even circuit court rulings are only binding within their circuits, it would be inconsistent with that to say, nevertheless, we should allow single district judges or single circuit courts to allow their injunctions to apply.

Chairman GOODLATTE. How about just legislate a change in the standard of review?

Mr. MORLEY. Certainly, I would support moving to a de novo standard of review for injunctions that purport to enforce the rights of third-party nonlitigants. Going further and enacting statutory language prohibiting courts from adopting injunctions that enforce the rights of third-party nonlitigants would be even greater protection.

And this goes back to the definitional question. Everyone agrees. A court should enforce the rights of the parties before it. In some cases, that might require relief that is broader, that might look like a nationwide injunction, but that is not the problem. The problem is where courts are saying, "I am not focusing on enforcing this plaintiff's rights. I want to enforce everyone's rights, including third-party nonlitigants."

Chairman GOODLATTE. Got it. Let me go on to Professor Frost and then Professor Bray briefly.

Ms. FROST. So, you are concerned about the power of a single district judge, and I would just point out that, of course, that judge's decision is immediately appealable to a circuit court, to an unbound circuit court, and to the U.S. Supreme Court. So, I do not think it leaves the decision in the hands of a single district judge.

Chairman GOODLATTE. It takes a long time to get there.

Ms. FROST. Not in certain litigations. We have seen it with the travel ban litigation, among others.

Mr. BRAY. It can take a while and because the standard of review in the Court of Appeals, and for the Supreme Court, is abuse of discretion, you get some insulation. I am concerned about this problem about if there is a way, to do any kind of half measure, and I do not think there is.

I do not think anybody has come up with a test that is not malleable and subjective, that is going to depend a lot on the judges own preferences to decide whether a national injunction is appropriate. Especially since the things that would go into the balance are very incommensurable.

Like the concern for all people being treated alike under the same rule, like, that is going to be present in every case and could justify a national injunction in every case, if you accept that way of thinking about our system. As opposed to slowly, through precedent, getting uniformity.

So, I do not think there is any way to give a Federal district judge power to issue national injunctions sometimes and not other times that will actually be logical and coherent.

So, I would say a strict prohibition: "a court of the United States shall not enjoin the enforcement of a statute or regulation as against a nonparty."

Chairman GOODLATTE. Thank you.

Mr. BRAY. Thank you, Mr. Chairman.

Mr. ISSA. Thank you, Mr. Chairman. We now go to the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON of Georgia. Thank you. Should not the decision as to whether or not to issue a nationwide injunction be made on a case-by-case basis, Professor Bray?

Mr. BRAY. I think it is an excellent question and equitable decisions from the courts of equity and equitable remedies, including the injunction, do take into account then specifics of the case.

Mr. JOHNSON of Georgia. And cannot a nationwide injunction, or a case where a nationwide injunction is sought, not be handled in that same way? Theoretically?

Mr. BRAY. I think it cannot be and the reason is that the argument for a national injunction does not really come down to national injunctions in some cases. It is present in every case. And the arguments against the national injunctions, the ones I consider most potent, are also not only present in some cases. They are present in every case. So, what you have—

Mr. JOHNSON of Georgia. It largely has to do with its effect on people who are not parties to the case. Correct?

Mr. BRAY. Yes, and also—

Mr. JOHNSON of Georgia. Is it not correct, however, that under rule 24, Federal Rule of Civil Procedure, a nonparty has a right to intervene in a case that they are not a party to that they contend affects them?

Mr. BRAY. Yes, there are traditional devices for bringing in nonparties. Intervention and class actions are ways of doing that.

Mr. JOHNSON of Georgia. You can even intervene under rule 24 as a class action under rule 23?

Mr. BRAY. I am not sure offhand the answer to that question.

Mr. JOHNSON of Georgia. What would you say to that, Professor Frost?

Ms. FROST. My understanding of intervention is that it would not be a method of certifying a class. You would have to go through the rule 23 requirements to certify a class—

Mr. JOHNSON of Georgia. But certainly an individual who is a representative of a class could file based on the individuality of the interest that he or she is asserting that is affected by the nationwide ban? Correct?

Ms. FROST. Certainly, you could try to get a class action involved or started up in litigation involving a nationwide injunction.

Mr. JOHNSON of Georgia. Professor Bray, you contend that the development of the national injunction is, to use your words, “an accidental development.” Do you mean that the careful and deliberate evolution of case law and precedent and authority based on previous decisions was an accident in development of the national injunction?

Mr. BRAY. I think it was an accident because it did not happen through careful and deliberate development of this idea. There was—

Mr. JOHNSON of Georgia. Was it a sudden decision?

Mr. BRAY. One of the key decisions in the early 1970s, the one that seemed to get the national injunctions started involved a concession by the government defendant that the government defendant should not have made, and so the court did not really consider the question closely. And so, the court said, “Well, it does not really matter whether a class is certified or not.” It had all the hallmarks of sloppy reasoning, not careful reasoning.

Mr. JOHNSON of Georgia. Was that case appealed?

Mr. BRAY. It was.

Mr. JOHNSON of Georgia. And was it appealed to the U.S. Supreme Court?

Mr. BRAY. Either cert was denied or there was no petition for certiorari, but there was not a Supreme Court decision.

Mr. JOHNSON of Georgia. And so, has there been a Supreme Court decision on the constitutionality of the national injunction? I believe you indicated that there had been some discussion about it in a previous decision that occurred what year?

Mr. BRAY. I think the *Frothingham v. Mellon* decision from the 1920s is inconsistent with the national injunction and rejects it—

Mr. JOHNSON of Georgia. Well, I tell you, a lot has changed since 1920, and the evolution of the case law has somewhat kept up with it. And is this issue something that can become right at some point for a decision by the U.S. Supreme Court?

Mr. BRAY. It certainly can be, and in fact—

Mr. JOHNSON of Georgia. And should we not wait for that to happen as opposed to the legislative branch putting its heavy finger and thumb and entire hand and body on the scales of justice in the development of our case law?

Mr. BRAY. Well, the Constitution binds and demarcates the authority of all three branches, it also binds the court, and it gives to this House the authority to develop rules for the jurisdiction of the Federal court. So, it is fully within the House's constitutional powers.

Mr. JOHNSON of Georgia. I would like to ask Professor von Spakovsky—

Mr. ISSA. Without objection, the gentleman will have 15 additional seconds.

Mr. JOHNSON of Georgia. Thank you. I would like to ask Professor von Spakovsky what, under Article I, section 8, power gives the legislative branch the authority to legislate in this area?

Mr. VON SPAKOVSKY. Well, Congressman, there would not be any Federal district court unless you all said there were.

Mr. JOHNSON of Georgia. Well, I know that. And so—

Mr. VON SPAKOVSKY. And so, that gives you—

Mr. JOHNSON of Georgia. Enumerated powers.

Mr. VON SPAKOVSKY. Yeah, that is right.

Mr. JOHNSON of Georgia. Courts in the theory to the U.S. Supreme Court, but what other enumerated power under Article I, section 8, gives Congress the authority to legislate in this specific area?

Mr. VON SPAKOVSKY. Oh, I think the very fact that the lower courts would not exist unless you all said they exist gives you a great deal of authority over shaping what they can do. I mean, part of the problem here is, again, I am going to go back to one of the key Supreme Court precedents here, on this U.S. v. Mendoza.

Look, in that case, the Supreme Court said that a decision in a case in the Federal courts is not going to apply to nonparties to the case. And yet, here you have all these Federal courts around the country extending these injunctions to nonparties in the case. And part of the problem here, and why I agree with Professor Bray that Congress has got to do something about this, is—the Supreme Court is not—

Mr. JOHNSON of Georgia. It just seems like—

Mr. VON SPAKOVSKY [continuing]. Is not enforcing the discipline of that—

Mr. JOHNSON of Georgia. It seems like it has gotten to the point where we are deciding our case law based on who is in the executive branch. And with that, I will yield back.

Mr. ISSA. I thank the gentleman. We now go to the gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman. This has been a very interesting discussion here this afternoon, I think. And I have to say starting off, I think, Professor Bray, I think you have got a reasonably good idea as far as maybe the way to handle this.

The challenge is passing anything substantial which can make it through the Senate. We can get things passed in this Committee, sometimes they are bipartisan, sometimes they are not. We can get things through the floor, but the Senate has different rules over

there and they can—we need 60 votes to get anything done. And one side or the other thinks because if something passes it is going to adversely impact them politically and they could run against the other side and say, “They were a do-nothing Congress.”

It is hard to get anything done in the Senate under the current rules, except during a process called reconciliation where you do not need 60 votes. And that is why we at least have a chance of getting the tax bill that already passed through the House through the Senate. But I have already gone way off from where I had intended to go, and I only get 5 minutes.

So, I agree with a lot of what I have heard from colleagues, and I agree with—although there are some things that obviously you all differ on. But we have 500? 600? And there are vacancies now, but how many federal district court judges do we have right now? Is it 550? Or anybody know approximately what that number is?

Ms. FROST. Approximately 650—680, I think.

Mr. CHABOT. Six-hundred-and-fifty, 680?

Ms. FROST. I think it is 680.

Mr. CHABOT. Six-hundred-and-eighty? Okay. It just seems that there is something inherently wrong when you can forum shop under the existing things, which is basically, especially in the last 3 years, been happening. You know, Republicans go to the fifth circuit out of Texas where they consider they are going to get more conservative judges and agree with them when they were up against Obama, and now Democrats, the Liberals, go out to the West Coast, the ninth circuit, because they think they are going to get more for a variety of reasons opinion.

And you can literally stop something that the dually-elected President of the United States has determined with his powers to do. Sometimes, you know, Congress has passed legislation so that sometimes it is an executive order that he is acting on.

But it just seems wrong. They could have gone to any other judge, got a completely different opinion, and as the chairman said, it can be in effect for months because of that one unelected judge. Or it could be as long as a year sometimes. And these are pretty impactful things whether you are talking about DACA or you are talking about a type of travel ban. Although, you know, that term—some people disagree with the term there.

But this is something really wrong with our government when that can happen. With one person acting in that way, and you have sort of gone to that person because you have got a really good idea which direction they are going to go. I do not think the American people are served under that process and I think we have a responsibility to change it. I would love to hear a comment, maybe I will start with you, Professor Bray.

Mr. BRAY. I agree. I cannot speak to the political realities, though I do hope that the fact that both sides have been on the receiving end of national injunctions will give everyone incentive to see their potential danger.

And also, the potential infringement on the prerogatives of Congress because it is statutes that are passed by Congress that can be knocked out by a single judge instead of the more orderly process through precedent. So, I would hope there would be some sense

of Congress as a body of this is the importance of this and not just each party.

Mr. CHABOT. And I guess—and I have only got 1 minute and 10 seconds, now 9, now 8 seconds left here—so, I will really just ask this. You had mentioned for 170 years this did not happen. You know, it has only happened for 50, and it has really only happened for the last 3 years. How did we, as a Nation, get by without doing this for that period of time?

It reminds me a little bit of the, you know, the Florida Department of Education. I am a former schoolteacher. We did not have a Federal Department of Education until the 1970s. How in the heck did we educate our kids prior to that? You know, we do things, and there are a lot of people who disagree that suddenly the education system is better since now we have a Federal Department of Education. I am getting a little off track here again.

But we did not do this for a long time and now we are doing it. Let me ask you, Mr. von Spakovsky, how did we get by with it and is there any lesson here and how should we change this?

Mr. VON SPAKOVSKY. Look, I think part of the problem is, and I do not want to be too critical about this. But look, Congress, you have delegated too much of your authority to the executive branch and to executive branch agencies. And unfortunately, too many of the statutes that you have passed are so broadly worded that you are giving a lot authority to these agencies to interpret the law, come up with their own regulations, and that is why we end up in court so often.

You know, there are so many lawsuits filed against Federal agencies over the regulations issue and that is because Congress is delegating too much authority to these agencies. You need to pull that power back into Congress, and that is part of the problem.

Mr. CHABOT. I completely agree with you, and I am, unfortunately, out of time. Thank you very much.

Mr. ISSA. We now go back to the chairman of the full committee for a second round.

Chairman GOODLATTE. Well, thank you, Mr. Chairman. I want to pursue another line in my question. I do not disagree with Professor Bray and Mr. von Spakovsky that asserting the limitation of the jurisdiction of the courts would be a good solution, but I am not sure that that is very easy to do.

I accept your criticism, but when I try to get something like that all the way through the House and then through the United States Senate, I realize great limitations on our power. And you are right, the horse is out of the barn on a lot of things.

And it might be easier to do something more modest. It might get some bipartisan support. What if, for example—because this has affected, you know, initiatives on, you know, from both a conservative and a liberal perspective—what if you were to raise the standard for issuing the injunction in the first place? To require that an injunction that is broad in its scope has to be a three-judge panel, still immediately appealable but still having that lengthy time that elapses?

But before the injunction can ever be issued, three judges all have to agree on the same, you know, wherever you go, three judges are pulled together under a random selection system, like

our Federal courts are supposed to use. And three judges would all have to agree before an injunction can be issued as opposed to one individual making this decision.

I mean, we do not recognize that anywhere else through this whole process, whether it is congressional action or action by the higher courts that require at least some kind of majority opinion.

I would say, for this initial stop of a President's clear authority, or a congressional clear authority, to say, "Oh, no. That cannot be stopped," would take more than one individual district court judge. We will start with you, Professor Bray. I know you like your alternate better, but short of that, what else would you suggest?

Mr. BRAY. So, I would be wary of anything that would seem to put Congress' imprimatur on courts granting injunctions that go beyond the parties. So, if you set up three-judge court just for those injunctions? One problem you will run into is that those, I think they will be on the judicial power.

Another problem is that the injunction is drafted at the end, logically, of the decision, whether on the decision on the unlikelihood of the merits for preliminary injunction or at the end for a permanent injunction. And so, you might not know until you get started.

I think there are ways you can think about raising standards for injunctions that might indirectly affect this question. So, one of those is injunction bonds. It used to be the case that injunction bonds were more generally required for preliminary injunctions. That has largely fallen into desuetude over the last several decades.

If there actually were injunction bonds, then that would give plaintiffs an incentive to only ask for injunctions that protected them because they would not want to pay for an injunction if they wound up being wrong and that was broader.

So, that might be an indirect approach, but I would be wary of seeming to give this power to the courts that I do not think they constitutionally have.

Chairman GOODLATTE. But they have it unless somebody tells them they do not, right now. And, you know, I brought this up with the Chief Justice and with the Judicial Conference of the United States and said, "This is something that you can address more easily than the Congress can address." And it has only been about 6 weeks since I did that, so I think there is maybe some hope there is something.

But I have not seen a recognition on the part of the courts that this is an abuse of power that they should, from the top down, undertake to restrain because right now they are just letting it happen. Professor Frost.

Ms. FROST. Yes, sir. I just want to say, in some ways, I think this hearing, while great to have this conversation, is a little premature in part because—and I want to give them credit—Professor Morley and Professor Bray have changed the way that some courts are now approaching this. They are now citing their articles and saying we need to be a little more careful. They are not taking up the position Professor Bray takes, and I hope they do not because we disagree that they should never have a nationwide injunction.

But they are saying look at those concerns that Professor Bray and Professor Morley raised in their articles. We are going to look

at those and think about them and think about this more seriously, rather than just, you know, issue a decision ordering a nationwide injunction without any thought.

So, I think the district courts are beginning to think about a little more seriously than they did in the past. And there is a conversation starting now around this—

Chairman GOODLATTE. But would you say we are premature because you would also say that they would be premature in coming and testifying if we had thought of this and raised this first. So, I do not think it hurts for anybody to raise this subject—

Ms. FROST. I am sorry, I did not mean to suggest it was premature to have the hearing. It might be premature to legislate because of the fact that I think courts are beginning to look at this and question themselves. I do not think the hearing is premature but to—

Chairman GOODLATTE. I disagree with you on that.

Ms. FROST. Yeah. And you mention three-judge panels. So, of course, that was tried and then abandoned in another context because it was so onerous and difficult to maintain. And I will also point out you can get a very quick appeal to an appellate court, which is a court of three judges. So, you can get three judges looking at this very quickly if you want to.

Chairman GOODLATTE. Mr. Morley.

Mr. MORLEY. I agree with Professor Frost's comment. The Federal law used to require three-judge panels for injunctions in constitutional cases. And simply because that was such an overload on what has now become an even more burdened judicial system, I think that requiring three-judge panels would make things even worse for the Judiciary.

It also does not solve the Article III issue, that Federal courts do not have Article III jurisdiction to grant relief to third-party non-litigants, that the plaintiffs do not even have standing to enforce their rights.

I have tried to include proposed language in the statutory proposal in my written statement by preceding the prohibition on nationwide injunctions with "unless otherwise required by the U.S. Constitution or some other provision of applicable law."

So, if the court, whether it is the district court—ultimately, the Supreme Court—if the court were to conclude that for equal protection reason or for other reasons in a particular case only enforcing some peoples' rights would be constitutionally problematic, which I think is a very under-examined and difficult issue in itself.

But if a court were to conclude that anything less than a nationwide injunction would be unconstitutional, including that proviso, including that qualification, would give it the flexibility in that rare extreme case then to do what it believes the Constitution requires, subject, of course, to further appellate review.

So, I think with that qualification, unless otherwise required by the Constitution or other applicable law, nationwide injunctions will be prohibited. And of course, there is a little bit more detailed language in the proposal. I think that might be able to get more support rather than a flat unqualified ban.

Chairman GOODLATTE. Mr. von Spakovsky.

Mr. VON SPAKOVSKY. Look, I do not think I really have anything to add to that other than to say that, look, requiring a three-judge panel to be able to issue this kind of injunction is going to raise the burden on the judges. Because the whole problem we have got right now is, going back to what we have said before, is you have got Federal judges who are ignoring Supreme Court precedent and you do not have the Supreme Court imposing discipline on them for doing that.

Chairman GOODLATTE. I do not disagree, but I think raising the burden would be a good thing in terms of making it less likely they will precipitously issue an injunction without all of the facts being developed and all of the parties being heard. And all the law being considered, and whether or not they have the authority to do what they are doing. So, thank you, Mr. Chairman. I appreciate this very much.

Mr. ISSA. Thank you. Okay, I think I am going to be the closer here, and I want to just go through a couple of things. There was a question earlier and, you know, one of the weakest things we can do but most profound is to read a couple of words from the Constitution. And so, I will rely on that.

In Article III, section 1, a portion of the paragraph says, “Judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may ordain.” But in section 2 of the same Article III, I think something that, when that question was asked earlier, is probably appropriate. It says, “All cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have mentioned, the Supreme Court shall have appellate jurisdiction, both in law and in fact, with such exceptions, and under such regulations as the Congress shall make.”

And I think what is important there is obviously—and it has been done—we have the right to limit the Supreme Court in what they hear. So, would it not be reasonable to say that inferior courts, we have the same right, and then ultimately, the question of nationwide injunctions is within the power of Congress? It is only a decision for us to make.

Mr. BRAY. I think that is correct, and I would also add that the necessary and proper clause, in its horizontal aspect, passing laws for the carrying into effect the powers of other departments (in this case, the Judiciary) is another ground of authority for Congress.

Mr. ISSA. So, let me go through a hypothetical because I want a bunch of them but there is one that has bothered me since this began. In a case, any case, in which you have a plaintiff and in which the United States of America is ultimately the defendant, you have two sets of remedies to be considered.

And I know that the case in Texas is an interesting one. The first case is the plaintiff’s need to have a remedy; and so, the judge grants a remedy for that, and we can argue whether the remedy has to be that broad.

But let’s assume for a moment that the remedy cannot be a nationwide injunction. It can only be a remedy for that individual or entity, such as you can come to Washington State schools. Then the question is, is it a separate question for the judge and for all the courts of the question of should this apply to bind the Federal Gov-

ernment from executing such actions in any other case substantially similar?

Is that clearly a separate question in most cases? In other words, the unconstitutional question? Would you all agree that that second question is normally definably different in that it is a question of implementing against parties not there in which the circumstances could be different? Is that a fair assessment? So, let me ask a question for which I will more than just acquiescence that you heard me say it.

If we were to make a two-part test, would we not be creating a situation in which the judge deals with the plaintiff and the remedy that is narrowly focused on what can be done and needs to be done, and then if, and only if, the moving party, the plaintiff, asks for and the judge agrees that further limitation of the actions of the United States Government is needed, makes a decision, and then we, in Congress, determine a process of the courts?

And I am stopping it there because I do not know that today is the day—and I would like all of your input—whether today is the day to say, “Okay, we go to the D.C. Courts, we go to a three-judge panel, all of the other potential remedies.”

But is it not reasonable to say there is two decisions and if a party asks for the broader decision, if the judge agrees that it would be appealable to the broader decision, then you go to a process that clearly is beyond the scope—because we will have limited it—beyond the scope of that particular judge? Your comments?

Mr. BRAY. I think you are right that it is two separate inquiries, but I do not think a new process is needed for that separate inquiry. That is the doctrine of precedent. That already exists. So, injunctions are remedies to protect the parties, precedent is how one case ripples out to other cases. That is the way it has worked throughout most of U.S. history and there is no reason it cannot continue to work that way.

Mr. ISSA. Professor.

Ms. FROST. So, I guess I want to first say that I am not sure it is always these two separate issues, so to go—

Mr. ISSA. No, and I agree that the case of if somebody comes in to the country, it could be broader in the sense that they will come, if you are talking about, for example, if you were on the other side of the issue and said you were letting somebody in and they are going to have a criminal effect or a welfare effect, and so on. The State could say that it still affects me.

But the reason I am asking this question, and I want to somewhat limit the discussion, so we can close out appropriately, is one of the questions that I am debating here is: do we do legislation, which Professor Bray does not believe we should? And if we do legislation, the real question is, if there is a recognition that there are others—if you will, a whole class—there is a process?

But if there is a potential recognition that the government, let's say the EPA for a moment, has clearly done something that they should not do. You have to have standing in order to bring that case, that question of constitutionality or authority. And if you cannot use this case to pivot to it, then the question for the court is they cannot act *sua sponte*, they have to have a case before them.

So, that is why I am asking, can the case before them trigger the ultimate question, that in some cases was decided, which is notwithstanding a party present, we want to bind the executive branch from action over everyone?

And I do want to ask it and would like further study, and I know there is some reading material already available. I have looked at some of it. Because I think that is a question before this committee is, does the process truly envision the question of striking down the constitutionality in the fastest possible and yet fair system? Not as to the original plaintiff, but as to the question of whether the actions of the executive branch, for example, exceed that which Congress authorized? Which ultimately, as you know, we have had a vexing time with here. Briefly.

Ms. FROST. Yes. So, I agree there might be cases in which the complete remedy to the plaintiff is available without affecting others. And in those cases, that should be taken into account by a judge and should be a reason to hesitate, I would say, to issue a nationwide injunction.

I do, though, urge you to look at my written testimony where I cite a case from the sixth circuit where the sixth circuit has 18 States suing to strike down a regulation where the EPA was trying to broaden its authority, expand the scope of its operations.

And that court said I am going to issue a nationwide injunction, not one limited to the 18 states, because it seems impossible to administer, would create disuniformity and confusion to say the EPA can regulate certain types of things outside of these 18 States but not within them. And that is another example of where I think the need for uniformity may have suggested that the cost-benefit analysis favored a nationwide injunction in that case.

Mr. ISSA. Any other final closing questions or statements?

Mr. MORLEY. Mr. Chairman, I totally agree with you that those are two separate questions, but courts should not reach that second question. If a plaintiff wants to seek relief for third parties other than itself, or him or herself, there is a class action mechanism for that. So, it is almost a non sequitur for a plaintiff to bring a nonclass case and then a court at the end to be deciding whether or not it should grant class-wide relief. The Supreme Court has repeatedly held—

Mr. ISSA. Even in a class action case you are not essentially striking down the underlying regulation or action as to parties not in class.

Mr. MORLEY. Exactly. You would be providing the relief to the plaintiff class, which might be defined broadly as anyone adversely affected by that regulation. So, it might be equivalent to striking it down for everyone, depending on the class definition. But again, that is within the context of rule 23.

If I could read you two sentences that the Supreme Court has issued. In *Doran v. Salem Inn*, the Supreme Court held, “Neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular Federal plaintiffs.” So, the Supreme Court expressly said there that injunction relief should be limited to plaintiffs.

And then Justice Scalia, in a concurring opinion in *Salazar v. Buono* from 2010. He said, “A plaintiff cannot sidestep Article III’s

requirements by combining a request for injunctive relief for which he has standing with a request for injunctive relief for which he lacks standing.”

So, the simple fact that the plaintiff might be entitled to an injunction and might have Article III standing for himself does not allow courts to go on and ask that second question.

So I would join with Professor Bray’s advocacy against having courts ask that second question and, if necessary, pass legislation to prevent them from doing so.

Mr. ISSA. Good.

Mr. NADLER. Professor Morley, if the Supreme Court said that, why do we have this problem now? Why do we still have these nationwide injunctions?

Mr. MORLEY. In part, because most of the nationwide injunctions have not yet been fully litigated on the merits before the Supreme Court. It might very well that in several years the Court will have an opportunity to directly and squarely address the merits and several years from now the Court might issue a ruling reaffirming these cases and enjoining nationwide injunctions.

Mr. NADLER. So basically because since that case, or since we started getting these nationwide injunctions, they have not gone onto the Supreme Court is what you are saying?

Mr. MORLEY. We have seen requests for emergency relief, we have seen requests in the context of interim relief, but a full final ruling on the merits—

Mr. NADLER. Okay. Could Professor Frost comment on that?

Ms. FROST. Well, I mean, he was quoting from a Supreme Court case that seems to support that position. I mean, I can quote from *Califano v. Yamasaki* where the Court said, “Consistent with principles of equity jurisprudence, the scope of injunctive relief is dictated by the extent of the violation established, not by the extent of the plaintiff class.” That was a case about a class action, but the principle here is the remedy goes beyond the class, and they have said that.

Mr. NADLER. Thank you.

Mr. ISSA. I guess I will close with one final question for the record, and I would love to have your follow-up answers. It is clear that the administrations of both parties’ overreach. My distinguished colleague found out that apparently that goes back to the 1700s and a king no longer named in the United States. That is not unusual. That, in fact, one in power seeks power and interprets the broadest possible interpretation of their power.

And the cases that we have talked about here today, by both parties’ Presidents, represent a belief by the executive branch that they have authority broader than at least some Federal judges believe they have. And that is a fair statement.

As a result, the real question I leave you with today and would ask you to give me your input and we may have a follow-up hearing is relieving one of the actual overreach of the President, or any portion of his administration, beyond the scope of one plaintiff should be a reasonable goal that Congress should have.

One should not assume that once there is a potential recognition that there are multiple errors, you should not have to litigate, and litigate, and litigate all the way to the Supreme Court if the underlying question is: is that regulation wrong or overly broad?

Since Congress could give itself standing and the court might debate that, even after we give it to ourselves, the question would be how do we, within the structure of the Constitution, draw a statute that provides to some party, whether it is Congress, or a damaged individual, or any citizen of the United States, the ability to contest the underlying principle of the overreach?

And I will give you the example. If you find, for example, in this Committee's jurisdiction a patent that claims that it invented sunshine, you can go to the PTO and you can seek redress, even if you are not a party, and say it is just overly broad, obvious, and so on. We have done that.

We do not have the equivalent in the case of a regulation that may broadly injure everyone, but you cannot get standing; and it is vexing for this committee. It is vexing for Members of Congress on both sides. And so, since we have a difference of opinion on some part of it, the resolution would be finding a way, with or without an individual, to figure out how to roll back decisions.

And we have been talking about executive orders up until now, but obviously we have been talking around the questions of a preponderance of regulations interpretations guidance that often nobody in the White House even knows exists until it comes to their attention well into the lawsuit.

Mr. BRAY. I think there should be legislation prohibiting national injunctions, step one. And I think you have got your finger on what is, for me, the strongest argument for the national injunction. But there is a kind of disarmament of the courts when the executive goes beyond the authority the executive is supposed to constitutionally have.

Maybe then we want a lot of courts to go beyond the constitutional authority they have under Article III with the judicial power. Kind of equilibrium adjustment. I do not buy it, though. I think it is two wrongs make a right, and I think that is a separate issue that Congress should take up in separate legislation about the power of the administrative agencies.

I would add two final points on this. One is there have been cases of executive overreach before, including in some of the cases in the New Deal that were struck down, and some of the statutes that were struck down, and the system of deciding one case at a time worked.

The last point I would make is that our system does not get at the principle all by itself. It only gets there through cases. There is some imperfection to this. It is not as clean. It is not as neat. It is not as crisp. But it is part of the human fallibility of a system with lots of judges, with State and Federal courts, that there is going to be some messiness, and this is the best we have come up with and it is a second-best world, and it works pretty well.

Mr. ISSA. Well, I want to thank you all for this today. We will go no further on commenting on 680 Federal judges and their individual powers for today, but please feel free—we will hold the record open for 5 days—but accept beyond that any input you have

for the committee on a bipartisan basis. With that, we stand adjourned.

[Whereupon, at 3:35 p.m., the subcommittee was adjourned.]

