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OPINION | COMMENTARY

End Nationwide Injunctions

The Dreamers case shows how willful courts can ruin the chance for political compromise.

By William P. Barr

Sept. 5, 2019 6:37 pm ET

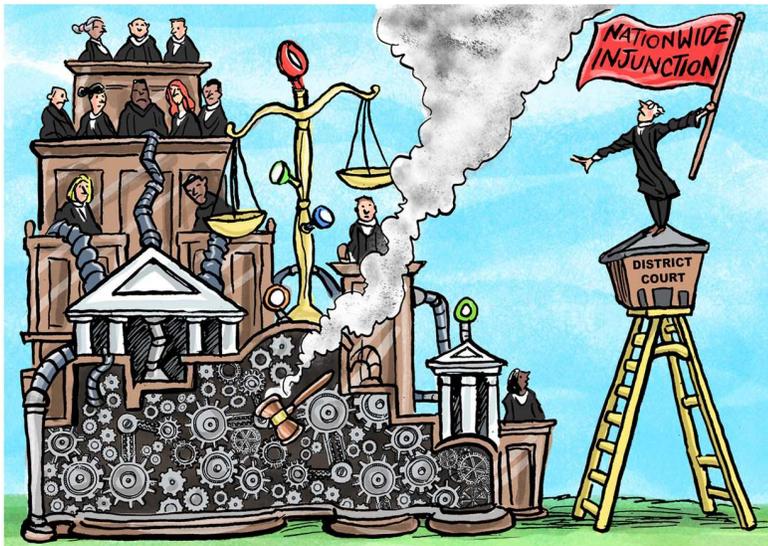


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When a federal court issues an order against enforcement of a government policy, the ruling traditionally applies only to the plaintiff in that case. Over the past several decades, however, some lower court federal judges have increasingly resorted to a procedural device—the “nationwide injunction”—to prevent the government from enforcing a policy against anyone in the country. Shrewd lawyers have learned to “shop” for a sympathetic judge willing to issue such an injunction. These days, virtually every significant congressional or presidential initiative is enjoined—often within hours—threatening our democratic system and undermining the rule of law.

During the eight years of the Obama administration, 20 nationwide injunctions were issued while the Trump administration has already faced nearly 40. Partisans who cheer this trend should realize that someday the shoe will be on the other foot. One can easily imagine the signature policies of a future Democratic administration—say, on climate change, immigration or health care—being stymied by courts for years on end.

The best example of the harm done by these nationwide injunctions is the current litigation over the Deferred Action for Childhood Arrivals program. In 2012, after Congress repeatedly failed to grant legal status to so-called Dreamers, the Obama administration declined to enforce the immigration laws against them. Five years later, the Trump administration announced it would restore enforcement of federal law, prompting Democrats to negotiate in search of a broad solution. Just as a compromise appeared near, a district court judge in San Francisco entered a nationwide injunction prohibiting the Trump administration from ending DACA, thus awarding the Democrats by judicial fiat what they had been seeking through a political compromise.

Far from solving the problem, the DACA injunction proved catastrophic. The program's recipients remain in legal limbo after nearly two years of bitter political division over immigration, including a government shutdown. A humanitarian crisis—including a surge of unaccompanied children—swells at the southern border, while legislative efforts remain frozen pending Supreme Court resolution of the DACA case.

Under Article III of the Constitution, courts are supposed to apply the law to the parties before them—not to thousands or millions of third parties. The Framers rejected the idea that the courts should act as a “council of revision” with sweeping authority to reach beyond concrete controversies and rule on the legality of actions taken by the political branches. Moreover, the power of federal courts to issue injunctions derives from English practice, which allowed courts to restrain a defendant to the extent necessary to protect the rights of the plaintiffs in the case. Nationwide injunctions are a modern invention with no basis in the Constitution or common law.

Nationwide injunctions are also inconsistent with the mechanism the law recognizes to provide relief to nonparties: a class action, in which class members are bound by the result, win or lose, unless they opt out. Nationwide injunctions, by contrast, create an unfair, one-way system in which the democratically accountable government must fend off case after case to put its policy into effect, while those challenging the policy need only find a single sympathetic judge.

Proponents of nationwide injunctions argue that they are necessary to ensure that the law is uniform throughout the country. But the federal judiciary wasn't made to produce instant legal uniformity. To the contrary, the system—in which local district courts are supervised by regional courts of appeal—was constructed to allow a diversity of initial rulings until a single, national rule could be decided by the Supreme Court.

This system has many virtues. It prevents a solitary, unelected, life-tenured judge from overriding the political branches and imposing on the nation potentially idiosyncratic or mistaken views of the law. A Supreme Court justice must convince at least four colleagues to

bind the federal government nationwide, whereas a district court judge issuing a nationwide injunction needn't convince anyone.

When the system works as it should, it encourages what one leading jurist has called “percolation”—the salutary process by which many lower federal courts offer competing and increasingly refined views on a legal issue before higher courts definitively resolve it. Allowing a single district court judge to issue a nationwide injunction against the government short-circuits this process. The first judge to issue an injunction effectively nullifies the decisions of all other courts that have already been issued—not only other courts’ decisions, but even those of higher appellate courts in other circuits.

For example, even though the U.S. Circuit Court of Appeals for the District of Columbia—often called the second-highest court in the land—vacated an injunction against the Trump administration’s policy on transgender military service, that decision had no practical effect. Two district judges had enjoined the policy nationwide. The Supreme Court’s intervention was necessary to fix this backward state of affairs.

By short-circuiting the process of percolation, nationwide injunctions cause critical policies to be litigated through a truncated, emergency process. When an important statute or policy is enjoined, the Justice Department must seek emergency relief from higher courts. The alternative is for the government to wait years for an appeals court to overturn the injunction before implementing a statute or policy. As a result, nationwide injunctions threaten to turn every case into an emergency for the executive and judicial branches.

Nationwide injunctions “are legally and historically dubious,” noted Justice Clarence Thomas, concurring in *Trump v. Hawaii* (2018). “If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so.” It is indeed well past time for our judiciary to re-examine a practice that embitters the political life of the nation, flouts constitutional principles, and stultifies sound judicial administration, all at the cost of public confidence in our institutions.

Mr. Barr is U.S. attorney general.