
JUDICIAL OVERREACH OR A NECESSARY CHECK ON EXECUTIVE POWER? THE IMPLICATIONS OF *TRUMP V. HAWAI'I* AND THE RESULTING PUSH AGAINST NATIONWIDE INJUNCTIONS

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INTRODUCTION

Over the past three years, President Donald Trump has issued several executive orders that led people to turn to the courts for injunctive relief.¹ The current administration's immigration policies, especially, have been the source of a number of such cases.² The primary example stemmed from Executive Order 13,769, which suspended the ability of millions of people from "countries of particular concern" to enter the United States.³ Hundreds filed suit in opposition of this executive order;⁴ however, only one needed to be successful in order to prevent implementation of the policy on a nationwide scale. This is because the injunctions that the courts issued not only applied to the named plaintiffs, but to everyone.⁵ In *Washington v.*

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1. Avalon Zoppo et al., *Here's the Full List of Donald Trump's Executive Orders*, NBC NEWS (Oct. 17, 2017, 8:58 AM), <https://www.nbcnews.com/politics/white-house/here-s-full-list-donald-trump-s-executive-orders-n720796> [<https://perma.cc/Y7B7-C7EX>].

2. See, e.g., Lydia Wheeler, *Immigrant Groups Sue Trump Administration Over Travel Ban*, THE HILL (July 30, 2018, 2:11 PM), <https://thehill.com/regulation/399528-immigrant-groups-sue-trump-administration-over-travel-ban> [<https://perma.cc/938W-XL38>].

3. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017).

4. Wheeler, *supra* note 2.

5. Howard M. Wasserman, "Nationwide" Injunctions are Really "Universal" Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 338 (2018) ("[Universal injunctions] prohibit enforcement of the challenged laws, regulations, and policies not only against the named

Trump, the plaintiffs successfully obtained a nationwide injunction against Executive Order 13,769.⁶

The Trump administration responded by issuing new iterations of the “Muslim ban,” the policy’s colloquial name.⁷ In September 2017, President Trump issued Proclamation 9645, resuspending the entry of the nationals of eight countries into the country.⁸ In June 2018, the Supreme Court examined the validity of the order in *Trump v. Hawai’i*.⁹

While this was happening, the House Judiciary Committee identified the issue of nationwide injunctions as one that it hoped to deal with in the upcoming term.¹⁰ The Committee found that nationwide injunctions are problematic and introduced the Injunctive Authority Clarification Act of 2018 on September 7, 2018, which would prohibit such injunctions.¹¹ The House Judiciary Committee approved the bill on September 13, 2018,¹² but the bill failed to move to the next stage of the legislative process, avoiding a vote by the full House of Representatives.¹³

First, this Note will explain the constitutionality and legal scope of the executive order as a political tool of the president. It will then discuss the rise of nationwide injunctions and the judicial system’s changing attitudes toward such injunctions as a viable judicial tool. Next, it will explain the series of executive orders passed by President Donald Trump—which together constituted the Muslim ban—and the nationwide injunctions issued

plaintiffs, but against all persons everywhere who might be subject to enforcement of those laws.”).

6. *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at *2 (W.D. Wash. Feb. 3, 2017) (granting temporary restraining order against implementation of January 2017 Executive Order, “Protecting the Nation from Foreign Terrorist Entry into the United States” (citation omitted)).

7. See *Timeline of the Muslim Ban*, AM. CIV. LIBERTIES UNION: WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> [<https://perma.cc/CW8U-HCZZ>].

8. Donald J. Trump, *Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, WHITE HOUSE (Sept. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats> [<https://perma.cc/7M26-VF23>] [hereinafter Trump, *Presidential Proclamation*].

9. *Trump v. Hawai’i*, 138 S. Ct. 2392, 2399–2402 (2018).

10. Press Release, House Judiciary Comm., Goodlatte Statement at Oversight Hearing on Department of Justice Programs (June 8, 2017), <https://republicans-judiciary.house.gov/press-release/goodlatte-statement-oversight-hearing-department-justice-programs> [<https://perma.cc/NWD4-Z9XZ>] [hereinafter Press Release, *Goodlatte Statement on Programs*].

11. Injunctive Authority Clarification Act, H.R. 6730, 115th Cong. (as introduced in House, Sept. 7, 2018).

12. See Press Release, House Judiciary Comm., House Judiciary Committee Approves Bill on Nationwide Injunctions (Sept. 13, 2018), <https://republicans-judiciary.house.gov/press-release/house-judiciary-committee-approves-bill-on-nationwide-injunctions> [<https://perma.cc/R3L9-TM2C>] [hereinafter Press Release, *Nationwide Injunctions*].

13. Injunctive Authority Clarification Act, H.R. 6730, 115th Cong. (as ordered to be reported by H. Comm. on the Judiciary, Sept. 13, 2018).

by district courts in response to these orders, culminating in the *Trump v. Hawai'i* Supreme Court decision. Finally, it will discuss the legislation for which *Trump v. Hawai'i* paved the way: The Injunctive Authority Clarification Act of 2018, which sought to prohibit courts from issuing nationwide injunctions.

Ultimately, this Note will argue that *Trump v. Hawai'i* was decided correctly, but that the consequences of the decision as they relate to expanding executive power and the case's procedural history have serious implications for the future of judicial lawmaking. This Note will critically analyze arguments on both sides of the issue of whether nationwide injunctions should be prohibited. Additionally, this Note argues that while nationwide injunctions have positive effects, those effects are outweighed by the incentives they create for forum shopping and the judicial territorial clashes they create that undermine judicial decisionmaking. Finally, this Note argues that prohibiting nationwide injunctions entirely, as the Injunctive Authority Clarification Act would have done, is not the proper solution. Instead, nationwide injunctions should be limited in some way, such as allowing only district- or circuit-wide injunctions.

I. BACKGROUND

A. THE CONSTITUTIONALITY AND SCOPE OF EXECUTIVE ORDERS

Article II of the United States Constitution vests the power to execute the laws of the nation in the office of the President.¹⁴ From the obligation to faithfully execute the laws¹⁵ arose the legitimacy of the executive order, “a type of written instruction that presidents use to work their will through the executive branch of government.”¹⁶ Executive orders direct the executive branch how to implement laws, and they “may have the force and effect of law only if the presidential action is based on power vested in the President by the U.S. Constitution or delegated to the President by Congress.”¹⁷ However, the power to issue executive orders is not explicit in the Constitution; therefore, presidential “authority for the execution and implementation of these written instruments stems from implied constitutional and statutory authority.”¹⁸

14. U.S. CONST. art. II, § 1.

15. U.S. CONST. art. II, § 3.

16. *Heritage Explains: Executive Orders*, HERITAGE FOUND., <https://www.heritage.org/political-process/heritage-explains/executive-orders> [<https://perma.cc/J4XG-RXTM>].

17. VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION I (2014).

18. *Id.*

Although the president has Article II authority to issue executive orders directing the executive branch on how it should implement the laws, this authority is limited: executive orders may be reviewed by the courts,¹⁹ revoked or modified by future presidents,²⁰ and repealed or defunded by Congress.²¹ This Note will focus on the implications of the judiciary being able to limit executive orders through the use of nationwide injunctions.

B. THE RISE OF NATIONWIDE INJUNCTIONS

Once a court holds that an executive order or other piece of legislation is invalid, the court determines what the appropriate remedy should be.²² One option a court has is to issue a nationwide injunction, which “controls the federal defendant’s conduct against everyone, not just against the plaintiff.”²³ An argument exists that the descriptor “nationwide” to describe injunctions of this sort is improper²⁴ because the term implies that the most relevant characteristic of the injunction is that it applies everywhere in the country; however, the most significant and controversial part of nationwide injunctions is not that they apply everywhere, but instead that “they regulate the defendant’s conduct as to everyone in the country—even if they were not party to the suit.”²⁵ Howard Wasserman prefers to call them “universal” injunctions, since “they prohibit government officials from enforcing the

19. Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring), set out a tripartite scheme that courts use to this day to determine the constitutionality of a presidential action. At the height of presidential power, where he or she is acting with direct or implied authority from Congress, the Court applies rational basis review. At the lowest “ebb” of presidential power, where he or she is acting contrary to Congress’s express wishes, the Court applies strict scrutiny. At the “twilight” zone of presidential power, where it is unclear which branch should act, the Court applies intermediate scrutiny. See NCC Staff, *Executive Orders 101: What Are They and How Do Presidents Use Them?*, CONST. DAILY (Jan. 23, 2017), <https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them> [https://perma.cc/J2S6-5SK8]; see also CHU & GARVEY, *supra* note 17, at 5.

20. CHU & GARVEY, *supra* note 17, at 7–9 (referring to Executive Order 13497, which revoked Executive Orders 13528 and 13422 and “instructed the Director of OMB and the heads of executive departments and agencies to rescind orders, rules, guidelines, and policies that implemented President Bush’s executive orders”).

21. *Id.* at 9–10. Congress may revoke an executive order “by removing the underlying authority upon which the action is predicated,” although “such legislation could run counter to the President’s interests and therefore may require a congressional override of a presidential veto.” *Id.* at 9. Congress can withhold funding for executive orders by either “denying salaries and expenses for an office established by an executive order, or by directly denying funds to implement a particular section of an order.” *Id.* at 10 (footnote omitted).

22. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 424 (2017).

23. *Id.* at 425.

24. See *id.* at 425 (referring to such injunctions as “national injunctions”); see also Wasserman, *supra* note 5, at 339; Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1076 (2017).

25. Berger, *supra* note 24, at 1076 n. 37 (referencing Bray’s term, “national injunction”).

challenged laws, regulations, and policies against the *universe* of persons who might be subject to enforcement, regardless of whether they were parties to the lawsuit producing the injunction.”²⁶ Ultimately, nationwide injunctions, by any name, refer to the scope of who could be protected from the federal action at issue, not where in the world those people will be protected.²⁷

The first example of a court accepting and implementing a nationwide injunction as a viable remedy was in *Wirtz v. Baldor Electric Co.* in 1963.²⁸ Rather than citing any precedent exemplifying and justifying the use of a nationwide injunction, the D.C. Circuit court in *Wirtz* offered four reasons that it would allow such an injunction: consistency, fairness, statutory language, and constitutionality.²⁹ Courts today continue to invoke these fundamental reasons when arguing in support of a nationwide injunction.³⁰ After *Wirtz*, national injunctions slowly became a tool that more courts utilized, though they were not immediately popular.³¹ At some point, however, a change in mindset occurred, and judges began to think of injunctions as an offensive measure, a means to challenge the validity of a statute.³²

Contemporarily, courts “strike down” statutes; “instead of seeing courts as preventing or remedying a specific wrong to a person and only incidentally determining the constitutionality of a law, now many see courts as determining the constitutionality of a law and only incidentally preventing or remedying a specific wrong to a person.”³³ This newer mindset about the role of courts in examining issues strengthens the basis for nationwide injunctions.³⁴ Striking down a statute as facially unconstitutional means that the court likely should not apply the statute to anyone; thus, the equitable remedy would be a nationwide injunction.³⁵

26. Wasserman, *supra* note 5, at 338 (emphasis added).

27. *See id.*

28. Bray, *supra* note 22, at 437.

29. *See Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 534 (D.C. Cir. 1963).

30. Bray, *supra* note 22, at 438–39.

31. *Id.* at 444–50. After *Wirtz*, judges viewed injunctions a defensive measure against the enforcement of an action by a public official, such that an injunction would require “not merely that the plaintiff is injured . . . , but that there is a threat of enforcement against him, and it is the threatened enforcement that the injunction is meant to prevent.” *Id.* at 450. Consequently, nationwide injunctions would be illogical under this type of “antisuit injunction” mindset, since “the injunction should protect *this* plaintiff from *that* enforcement action.” *Id.*

32. *See* Bray, *supra* note 22, at 449–50 (pointing to the adoption of the federal Declaratory Judgment Act in 1934 as a moment that broadened federal thinking and helped develop the idea that statutes could be challenged facially, meaning they would be stricken down as written).

33. *Id.* at 451 (footnote omitted).

34. *Id.* at 452.

35. *Id.*

C. EXECUTIVE ORDER 13,780 AND PROCLAMATION 9645: “THE MUSLIM BAN”

On January 27, 2017, President Donald Trump issued Executive Order 13,769, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States,” immediately suspending the ability of millions of people from “countries of particular concern” to enter the United States.³⁶ Primarily, the executive order required the executive branch to suspend the entry of all refugees for 120 days while it implemented a new system that would tighten the vetting process, prohibit nationals from seven majority-Muslim countries from entering the country for ninety days, and cease the flow of refugees from Syria “until further notice.”³⁷ The Muslim ban left hundreds stranded in their travels and “led to the cancellation of 60,000 valid visas.”³⁸ Over the next few days, protests occurred, attorneys flooded airports across the country to give free legal help to travelers detained under the executive order, and the ACLU, amongst other organizations, filed suit challenging the executive order.³⁹

Less than one month later, in *Washington v. Trump*, the plaintiffs were successful in preventing the implementation of Executive Order 13,769, as the court issued a temporary restraining order against the implementation of the policy.⁴⁰ The temporary restraining order was against the Executive Order “on a nationwide basis,” invalidating the order across the country.⁴¹ In response, the Trump administration issued new, slightly modified iterations of the Muslim ban.⁴² Executive Order 13,780 revoked Executive Order 13,769 and effectively replaced it.⁴³

36. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017).

37. *What is the Muslim Ban?*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/tools-and-strategies/what-is-the-muslim-ban> [<https://perma.cc/P7YE-UWHN>]. It impacted nationals from Syria, Iran, Sudan, Libya, Somalia, Yemen, and Iran.

38. Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 49 (2017).

39. See Miriam Jordan & Alejandro Lazo, *Airports Clear Out, But Confusion Over Travel Ban Lingers*, WALL ST. J., <https://www.wsj.com/articles/airports-clear-out-but-confusion-over-travel-ban-lingers-1485837752> [<https://perma.cc/L2UH-W2KH>], see also *ACLU and Other Groups Challenge Trump Immigration Ban After Refugees Detained at Airports Following Executive Order*, ACLU, <https://www.aclu.org/blog/national-security/discriminatory-profiling/aclu-and-other-groups-challenge-trump-immigration> [<https://perma.cc/R3WX-NNPE>].

40. *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at *2 (W.D. Wash. Feb. 3, 2017) (granting temporary restraining order against implementation of January 2017 Executive Order, “Protecting the Nation from Foreign Terrorist Entry into the United States” (citation omitted)).

41. *Id.* at *8.

42. See *Timeline of the Muslim Ban*, *supra* note 7.

43. See generally Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (removing Iraq from the list of countries, creating an exception for people who already have visas and green cards, and removing the Syria-specific ban on refugees and references to an individual’s status as being part of a religious minority).

However, on March 15, 2017, in *Hawai'i v. Trump*, a district court in Hawai'i granted an injunction in the form of a temporary restraining order before the new executive order took effect.⁴⁴ Specifically, the order “clarifie[d] and narrow[ed] the scope of Executive action regarding immigration, extinguishe[d] the need for emergent consideration, and eliminate[d] the potential constitutional concerns identified by the Ninth Circuit.”⁴⁵ For their part, the plaintiffs asserted claims on both constitutional and statutory grounds, contending that the legal violations the executive order posed would cause them irreparable injury.⁴⁶ The court agreed, granting the temporary restraining order.⁴⁷ Citing *Klein v. City of San Clemente*,⁴⁸ the Court held that because a violation of the Establishment Clause qualifies as a First Amendment violation and the plaintiffs were held likely to succeed on the merits of the claim, the requirement that the plaintiffs suffer irreparable injury without a temporary restraining order was satisfied.⁴⁹

Thus, on September 24, 2017, President Trump issued the third version of the Executive Order restricting travel in the form of Proclamation 9645.⁵⁰ The Proclamation suspended the ability of the nationals of eight countries—six of which were majority-Muslim countries—to enter the United States.⁵¹ Like the previous executive order, this proclamation included exemptions, including lawful permanent residents of the United States, and a system for case-by-case waivers.⁵² This Proclamation is what the Supreme Court examined in *Trump v. Hawai'i*.⁵³

44. *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1122–23 (D. Haw. 2017). The court discussed the changes from Executive Order 13,780 to Executive Order 13,769 and how the court would analyze the request for a temporary restraining order under the context that President Trump issued this new executive order to deal with the issues the court in *Washington v. Trump* identified. *Hawai'i v.* , 241 F. Supp. 3d at 1123–26, 1128–39

45. *Id.* at 1125–26 (citation omitted).

46. *See id.* at 1128.

47. *See id.* at 1134 (holding that a “reasonable, objective observer—enlightened by the specific historical context, contemporaneous public statements, and specific sequence of events leading to its issuance—would conclude that the Executive Order was issued with a purpose to disfavor a particular religion” and therefore, the plaintiffs were likely to succeed on the merits of their claim that the order violated the Establishment Clause of the Constitution).

48. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

49. *Hawai'i*, 241 F. Supp. 3d at 1139.

50. *Timeline of the Muslim Ban*, *supra* note 7.

51. *Trump, Presidential Proclamation*, *supra* note 8. The justification for the countries selected to be restricted were those whose information sharing and managing systems were deemed by the President to be inadequate under the recommendation of the Department of Homeland Security and after a period of diplomatic efforts to encourage improvement of said systems.

52. *Id.*

53. *Trump v. Hawai'i*, 138 S. Ct. 2392, 2399 (2018).

D. TRUMP V. HAWAII

On June 26, 2018, the Supreme Court held that the President was within the scope of his executive power when issuing Proclamation No. 9645, and the proclamation did not violate the Immigration and Nationality Act (“INA”) or the Establishment Clause.⁵⁴ First, the Court held that § 1182(f) of the INA granted the President broad discretion to suspend the entry of aliens into the United States;⁵⁵ therefore, the Proclamation did not exceed the power granted to the President under § 1182(f).⁵⁶ Second, the Court rejected the plaintiff’s argument that the Proclamation violated § 1152(a)(1)(A), which prohibits discrimination in the allocation of immigrant visas based on nationality and other traits.⁵⁷

Next, the Court held that the Plaintiffs did not demonstrate a likelihood of success on their claim that the Proclamation violated the Establishment Clause.⁵⁸ Because the admission and exclusion of nationals is “a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control,” the Court reviewed the Proclamation under rational basis review.⁵⁹ However, the Court took the review a step further, looking “behind the face of the Proclamation to the extent of applying rational basis review” to determine whether the policy “is plausibly related to the Government’s stated objective.”⁶⁰ Thus, the Court upheld the policy because it determined that it was possible to reasonably understand that the policy was based on the valid justification of national

54. *Id.* at 2400–02.

55. *Id.* at 2408–10. The Court identified that the *sole* requirement for the President to restrict alien entry is that the President find “that the entry of the covered aliens ‘would be detrimental to the interests of the United States.’” *Id.* at 2408 (quoting 8 U.S.C. § 1182(f)). To address plaintiffs’ argument that the President’s justification for the Proclamation were discriminatory, the Court cited to *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), noting that “[w]hether the President’s chosen method’ of addressing perceived risks is justified from a policy perspective is ‘irrelevant to the scope of his [§ 1182(f)] authority.’” *Trump*, 138 S. Ct. at 2409 (second alteration in original) (quoting *Sale*, 509 U.S. at 187–88).

56. *Id.* at 2409–10.

57. *Id.* at 2413–15. The Court rejected plaintiffs’ argument because it “ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA,” *id.* at 2414, because § 1152(a)(1)(A) does not limit the President’s delegated authority under § 1182(f) because Congress could have written § 1152(a)(1)(A) in such a way that it would constrain the President’s power to determine who may enter the country, but it did not. And because based on the history of § 1152(a)(1)(A), the section “has never been treated as a constraint on the criteria for admissibility in § 1182,” and “Presidents have repeatedly exercised their authority to suspend entry on the basis of nationality.” *Id.* at 2415. The Court then pointed to examples from the Reagan and Carter administrations to further its point. *Id.*

58. *Id.* at 2417–23. The primary evidence introduced by the plaintiffs consisted of the President’s statements about Muslims during his campaign and since he assumed office, and they argued that national security concerns and vetting protocols were mere justifications to mask the true purpose of the Proclamation, to discriminate against Muslims. *Id.* at 2417–18.

59. *Id.* at 2418 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

60. *Id.* at 2420 (referencing *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

security and a desire to improve vetting processes, rather than the unconstitutional justification of discrimination against Muslims.⁶¹ Thus, although the plaintiffs sought for the Court to further analyze the effectiveness of the Proclamation, the Court held that it “cannot substitute its own assessment for the Executive’s predictive judgments on such matters.”⁶²

E. THE INJUNCTIVE AUTHORITY CLARIFICATION ACT

On September 7, 2018, the House Judiciary Committee drafted the Injunctive Authority Clarification Act of 2018.⁶³ The goal was to preempt the problematic situation where “opponents of government action can seek a preliminary injunction and lose in 93 of the 94 judicial districts, win one injunction in the 94th, and through that injunction obtain a stay of government action nationwide despite it being upheld everywhere else.”⁶⁴ Therefore, the Act sought to prohibit nationwide injunctions by limiting the effects of an injunction to only parties listed in the case.⁶⁵

Beginning in June 2017, the House Judiciary Committee committed to addressing the issue of nationwide injunctions.⁶⁶ In November 2017, the Subcommittee on Courts, Intellectual Property and the Internet held a hearing to discuss “The Role and Impact of Nationwide Injunctions by District Courts.”⁶⁷ This hearing culminated in the proposal of the Injunctive Authority Clarification Act of 2018, which would prohibit any court from issuing “an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority, unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure.”⁶⁸ It was ordered to be reported to the

61. *Id.* at 2420–21. It further noted that the entry restrictions against Muslim-majority nations were “limited to countries that were previously designated by Congress or prior administrations as posing national security risks.” *Id.* at 2421.

62. *Id.* at 2421 (citing *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), and *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010)).

63. Press Release, House Judiciary Comm., Goodlatte Introduces the Injunctive Authority Clarification Act of 2018 (Sept. 10, 2018), <https://republicans-judiciary.house.gov/press-release/goodlatte-introduces-the-injunctive-authority-clarification-act-of-2018> [<https://perma.cc/BF73-DS7B>] [hereinafter Press Release, *Goodlatte Introduces Act*].

64. Press Release, *Nationwide Injunctions*, *supra* note 12.

65. Injunctive Authority Clarification Act, H.R. 6730, 115th Cong. (as introduced in House, Sept. 7, 2018).

66. Press Release, *Goodlatte Statement on Programs*, *supra* note 10.

67. See generally *The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the H. Comm. on the Judiciary*, 115th Cong. (2017), <https://republicans-judiciary.house.gov/hearing/role-impact-nationwide-injunctions-district-courts> [<https://perma.cc/MT9K-P22R>]. The Subcommittee heard from leading scholars on nationwide injunction. Each speaker presented on the consequences of nationwide injunctions, both positive and negative, although only one speaker affirmatively argued in favor of nationwide injunctions.

68. Injunctive Authority Clarification Act, H.R. 6730, 115th Cong. (as introduced in House, Sept.

House of Representatives, but it failed to move to the next stage of the legislative process, a vote by the full House of Representatives.⁶⁹

II. ARGUMENT

A. IMPLICATIONS OF *TRUMP V. HAWAI'I*

The Supreme Court in *Trump v. Hawai'i* gave deference to executive action, despite the lower courts' lack of hesitation in granting injunctions against the Muslim ban orders. Because Congress gave the President the exclusive right to regulate who enters the United States and for how long in the INA, and because the Court determined that Congress had vested that right broadly rather than narrowly, the Supreme Court reviewed the President's actions under rational basis review.⁷⁰ Thus, the President needed only some rational, constitutional basis for the policy in order for the policy to be upheld. Consequently, deciding to apply rational basis review allowed for an expansion of presidential power and upheld a policy that seems to exemplify executive aggrandizement, although the Court could have restricted presidential power by finding that Congress delegated more narrow authority to the President under the INA.

There are benefits to restricting executive power as the Court declined to do in *Trump v. Hawai'i* (interestingly, the Court retained the right to make such restrictions in future cases). First, executive aggrandizement circumvents and almost flaunts the checks and balances system on which the United States government was founded. The ability of each branch to check the power of the other branch is essential to maintaining a federal democratic system. The Framers of the Constitution were especially concerned with maintaining a check on executive power because they feared that by vesting the executive power in a single person, the President, that person could aggrandize power and become a monarch or dictator.⁷¹ Thus, generally speaking, both Congress and the judiciary were structured to be able to prevent the executive from accumulating too much power. That being said, the development of the administrative state has already pushed the Office of the President far beyond the scope of powers it was originally intended to have under the Constitution. Between executive orders, which essentially allow the President to legislate by directing the executive branch to interpret and implement laws, and offices under the President that facilitate unilateral

7, 2018).

69. Injunctive Authority Clarification Act, H.R. 6730, 115th Cong. (as ordered to be reported by H. Comm. on the Judiciary, Sept. 13, 2018).

70. *Trump v. Hawai'i*, 138 S. Ct. 2392, 2420 (2018).

71. See THE FEDERALIST NO. 69 (Alexander Hamilton) (highlighting the differences between the President and a monarch to address the primary concern of the anti-federalists).

bureaucratic control by the President, such as the White House Office of Presidential Personnel and the Office of Management and Budget, the President has significantly more power than other branches of government.⁷² Although the legislative branch was designed to have more authority, deadlock has reduced that authority as increasing polarization in the United States has made it appear useless in the eyes of the public, confirmed by its shutting down three times the past five years.⁷³

One could argue that there is no point in trying to prevent further executive aggrandizement; however, allowing more executive power could further derail the system and lead the United States down a more treacherous path toward despotism and demagoguery.⁷⁴ Additionally, maintaining a precedent that allows the President such broad discretion under rational basis review could result in the courts being unable to stop unconstitutional executive action before irreparable harm is done. The requirements to qualify for a preliminary injunction inherently limit injunctions to applying solely in instances where the court is seeking to prevent irreparable harm.⁷⁵ Allowing an expansion of executive power that would be above or outside the scope of what the courts can protect with preliminary injunctions would be to, at least temporarily, eliminate the only check on presidential power that can be immediately implemented. Outside of the preliminary injunction, the judicial branch must wait until a case has been fully litigated before granting a permanent injunction. Congress must either go through the entire legislative process to override presidential action, likely necessitating a two-thirds majority to override a presidential veto or the case must be so serious that the House of Representatives brings impeachment charges against the President. None of these options offer the same level of immediate relief that

72. Scott C. James, Assoc. Professor, UCLA, Lecture: The Administrative Presidency—Political Appointees and the Problem of Bureaucratic Discretion (Mar. 14, 2017).

73. Jennifer Earl, *A Look Back at Every Government Shutdown in US History*, FOX NEWS (Jan. 28, 2019) <https://www.foxnews.com/politics/a-look-back-at-every-government-shutdown-in-us-history> [<https://perma.cc/9WGF-EPKW>].

74. In fact, many would argue that the United States has already reached the point of demagoguery. See Michael Gerson, *Are Republicans Abetting a Demagogue—or Something Worse?*, WASH. POST (May 24, 2018, 2:14 PM), https://www.washingtonpost.com/opinions/is-donald-trump-an-instinctual-demagogue-or-an-instinctual-authoritarian/2018/05/24/cc62c342-5f8b-11e8-9ee3-49d6d4814c4c_story.html [<https://perma.cc/WYK5-MLVL>] (identifying President Trump as a demagogue); see also Bob Bauer, *The Demagogue as President: Speech, Action, and the Big Parade*, LAWFARE (Feb. 9, 2018, 7:00 AM), <https://www.lawfareblog.com/demagogue-president-speech-action-and-big-parade> [<https://perma.cc/D92X-3QAL>]; Ross Douthat, *The Taming of a Demagogue*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/opinion/trump-republicans-vote-democrat.html> [<https://perma.cc/LNB8-ZYJ3>]; Christopher Woolf, *Is Trump an Autocrat, a Demagogue, or Anything Like That? We Looked at Definitions*, PUB. RADIO INT'L (May 11, 2017, 5:15 PM), <https://www.pri.org/stories/2017-05-11/trump-autocrat-demagogue-or-anything-we-looked-definitions> [<https://perma.cc/B62M-FGAF>] (identifying Trump as authoritarian).

75. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

a court can offer through a preliminary injunction. Ultimately, several valid policy considerations suggest that the Supreme Court should not give such deference to executive action that it allows for further executive aggrandizement.

Alternatively, there are benefits to expanding executive power as the Court opted to do with its decision in *Trump v. Hawai'i*. For one, Congress is deadlocked and has become continually less efficient due to polarization. Thus, prioritizing efficiency suggests that concentrating more power in the executive branch, which does not face as much partisanship in its implementation of policy as Congress does, would allow for more effectual adoption of federal policy. Also, executive orders are within the scope of the powers vested to the president under the Constitution; therefore, courts should give such orders deference when considering their constitutionality and application in the context of preliminary injunctions. When the president is acting with the authority of the Constitution and of Congress, as was the situation in *Trump v. Hawai'i*, it is valid for him to have the most discretion and receive a rational basis review. The purpose of judicial review is not for judges to make independent, politicized determinations of whether they agree with the executive action, but to make impartial decisions about the validity of the executive action with reference to the Constitution and current laws. Similarly, despite the changes that have increased executive authority through the reorganization of the executive branch into the administrative state, the checks and balances system is likely strong enough to prevent executive aggrandizement from leading to despotism. While this might seem idealistic, the United States has the oldest written constitution still in use today.⁷⁶ From 1789, through two World Wars, the Great Depression, the Cold War, and more, the structural integrity of the U.S. government has remained intact, suggesting that the system is capable of enduring more than modern skeptics might assume. Because power is separated amongst the branches and each branch can exert checks on the others, it seems that allowing deference to executive action is not something that would cause the entire system to crumble.

Finally, allowing executive orders to expand presidential authority allows the President to secure the first-mover advantage in the struggle over policy. Federal policy has two avenues through which it can be implemented: the President, or Congress. Whichever institution acts first retains certain

76. Sean Gorman, Goodlatte Says US Has the Oldest Working National Constitution, POLITIFACT (Sept. 22, 2014), <https://www.politifact.com/factchecks/2014/sep/22/bob-goodlatte/goodlatte-says-us-has-oldest-working-national-cons> [<https://perma.cc/H5FJ-DQFS>] (confirming that the U.S. Constitution is the oldest written national constitution still in use today based on figures from Tom Ginsburg's research with the Comparative Constitutions Project).

advantages, such as framing the major issues of a policy, establishing its timeline, and being able to proactively determine the policy's finished product.⁷⁷ Alternatively, second-movers must be defensive and reactive to the first-mover's policy and strategy decisions. When Congress has first-mover status, presidents must accept that legislation may never emerge from the Congressional process, that it may emerge in a form that is significantly different from the president's expectations, and that it may emerge in a condition that is unacceptable, forcing the president to veto his own idea.⁷⁸ On the other hand, when the president has the first-mover advantage, Congress becomes the second-mover and all the features of the dual-channel, three-stage, veto system work to the president's advantage.⁷⁹ Between 1973 and 1997, there were over 1,000 executive orders issued, and Congress only made thirty-seven attempts to countermand an executive order; notably, only three of these attempts were ultimately successful.⁸⁰ Thus, it might be beneficial from a policy perspective that the Court in *Trump v. Hawai'i* allowed the president to retain the first-mover advantage, because that allows for more policy to be effectively implemented in the future.

As a whole, the Supreme Court likely decided *Trump v. Hawai'i* correctly based on precedent and the specific language of the INA, regardless of its effect on executive power. However, executive aggrandizement is an overall negative phenomenon because the president is able to obtain all of the positive effects of legislating through executive order and maintain the first-mover advantage. Because concerns exist about the state of despotism in the United States and the presidency has continued to accumulate power through the administrative state, the safest option to preserve separation of powers is to restrict executive power and prevent further executive aggrandizement.

Aside from the impact that *Trump v. Hawai'i*'s decision had on executive power, the case's procedural history has significant implications for the future of litigation against government policy. The case demonstrated that obtaining a nationwide injunction is an extremely efficient way for plaintiffs suing the government to reach the Supreme Court. Thus, it is possible, if not probable, that future litigants may seek nationwide injunctions as their remedies if they hope to have a law or policy declared unconstitutional by the Supreme Court, regardless of whether or not a

77. Scott C. James, Assoc. Professor, UCLA, Lecture: Unilateral Policy Instruments and the Congress-Optional Presidency: Executive Orders (Mar. 2, 2017).

78. *Id.*

79. *Id.*

80. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 165-66 (1999).

nationwide injunction is an appropriate remedy. This Note will discuss the positive and negative consequences of nationwide injunctions further in the following section, but *Trump v. Hawai'i* illuminated an extremely efficient path to the Supreme Court.

B. CONSEQUENCES OF NATIONWIDE INJUNCTIONS

Because nationwide injunctions have the ability to impact anyone in the country who would be subject to enforcement of a law or executive order, regardless of whether they are a party to the case, they are an exceptionally powerful tool at the court's disposal. Due to their unique ability to put a stop to executive action faster than any other check on presidential power, nationwide injunctions have received praise and criticism from across the political spectrum, depending on who holds power. Thus, the ability of district courts to enact nationwide preliminary injunctions have both positive and negative consequences.

Preliminary nationwide injunctions yield several positive results. First, they can prevent irreparable harm across the country for all people who face the danger of having an unconstitutional policy enforced against them but who might not be a party before the court. Also, nationwide injunctions increase efficiency. When people all over the United States would sue over the same issue, as they did with President Trump's travel ban executive orders, it saves both time and money to allow one court to respond on behalf of them all. Similarly, such a process allows for nationwide uniformity of application, which is desirable in the law because all those who are similarly situated should have the same outcome under the law. Furthermore, nationwide injunctions allow for complete relief to plaintiffs because they ensure that the plaintiffs will not be negatively impacted by an unlawful policy directly or indirectly.⁸¹ This is especially true in the case of institutional plaintiffs, for whom a plaintiff-specific injunction would not provide complete relief because they interact with others who may be burdened by the administrative law from which the institutional plaintiff should have injunctive relief.⁸² Finally, nationwide injunctions can be a useful tool to combat the imperial presidency and prevent further executive aggrandizement, as discussed above, especially as Congress becomes too deadlocked to advance much policy.

On the other hand, nationwide preliminary injunctions also yield several negative consequences. First, allowing nationwide injunctions incentivizes forum shopping, which undermines judicial decisionmaking.

81. Berger, *supra* note at 24, at 1084.

82. *Id.* at 1084–85.

One judge upholding a challenged law has no effect on other potential plaintiffs, which incentivizes other plaintiffs to, as Samuel Bray phrases it, “shop ‘til the statute drops,”⁸³ since if one district judge invalidates the law, the injunction controls the defendant’s actions with respect to everyone. Thus, one judge can undermine the opinions of all others by invalidating a law that has been upheld elsewhere through the use of a nationwide injunction. This makes litigation unpredictable. Additionally, nationwide injunctions undermine the need for Federal Rules of Civil Procedure Rule 23(b)(2), which allows for injunctive relief while maintaining certain due process protections, because nationwide injunctions can allow plaintiffs to get the same relief in an individual suit as they would as part of a class action.⁸⁴ However, the requirements to obtain class action status are not always easily met because of heightened commonality requirements,⁸⁵ so it could be necessary to preserve the nationwide injunction when many people would be unconstitutionally affected by a law or policy but do not have the time or immediate ability obtain class certification.

At the same time, allowing for preliminary nationwide injunctions increases the possibility of conflicting injunctions and territorial clashes between courts. As stated, one court may rule a law or policy valid, only to be “overruled” by a court in a different district issuing a nationwide injunction. President Trump’s executive order instituting the travel ban exemplifies this problem.⁸⁶ As Representative Goodlatte put it in his introduction of the Injunctive Authority Clarification Act, “opponents of government action can seek a preliminary injunction and lose in 93 of the 94 judicial districts, win one injunction in the 94th, and through that injunction obtain a stay of government action nationwide despite it being upheld everywhere else.”⁸⁷ Such a system seems inherently illogical, even if uniformity in the law is desirable. Also, nationwide preliminary injunctions prematurely freeze the law: short-term differences in lower courts allow for issues of law to percolate through various judges, which means “a difficult legal question is more likely to be answered correctly . . . than if it is answered finally by the first panel to consider it.”⁸⁸ Thus, there is value to reducing the number of nationwide injunctions for purposes of having a

83. Bray, *supra* note 22, at 460.

84. *Id.* at 464–65.

85. Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 58–59 (2017).

86. Compare *Louhghalam v. Trump*, 230 F. Supp. 3d 26 (D. Mass. 2017) (refusing to enact an injunction against the travel ban), with *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017) (granting a temporary preliminary injunction against the travel ban).

87. Press Release, *Goodlatte Introduces Act*, *supra* note 63.

88. Berger, *supra* note 24, at 1086 (citing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 163 (1985)).

complete analysis of the law by multiple judges.

Ultimately, while nationwide injunctions allow for uniformity in the law, increase efficiency, and can be a tool to combat the imperial presidency, their implications for incentivizing forum shopping and creating territorial clashes where district judges have the power to overrule one another undermines judicial decisionmaking. Therefore, injunctions should generally be limited to the parties before the court, and nationwide injunctions should be used sparingly and only in circumstances in which a policy would certainly cause irreparable harm to all those impacted by it.

C. IMPLICATIONS OF ELIMINATING NATIONWIDE INJUNCTIONS ENTIRELY

While the Injunctive Authority Clarification Act may have died on the floor, there is nothing preventing Congress from proposing a bill in the future that prohibits nationwide injunctions. Such a bill would have the potential to dramatically alter the current abilities that courts have with regard to the scope of nationwide injunctions. The judiciary has used nationwide injunctions to halt policy implemented by both ends of the political spectrum. As such, it is curious that judges who have been appointed, rather than elected, and who possess life tenure have the ability to alter and eliminate policy so completely. Judges are not accountable to the people, yet they have the ability to strike down policy created by government officers who are accountable to the people through elections. Thus, there are strong arguments that prohibiting nationwide injunctions would be a positive restriction on judicial power.

First, courts have become too powerful, even without nationwide injunctions. The United States allows the Supreme Court, and even lower courts, to decide controversial issues that the government has been unable to pass legislatively due to congressional deadlock, thereby creating law while circumventing the legislative process. An early example is in *Brown v. Board of Education*⁸⁹: Congress was unable or unwilling to pass legislation eliminating school segregation, so people turned to the courts to remedy the injustice. By declaring school segregation unconstitutional, the Supreme Court effectively acted as a legislative body.⁹⁰ Examples of such legislation by the courts have continued through today—*Reed v. Reed* extended 14th Amendment equal protection rights to women,⁹¹ *Roe v. Wade* restricted states' ability to legislate against abortion,⁹² and *Obergefell v. Hodges*

89. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

90. *See id.* at 495.

91. *See Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

92. *See Roe v. Wade*, 410 U.S. 113, 164–66 (1973).

legalized gay marriage,⁹³ to name a few. As the courts gained power unchecked by the other branches, “using the power of judicial review, a new policy would be imposed simply by redefining it as a constitutional right.”⁹⁴ Judges are not accountable to democracy, and they were not appointed to legislate: they were appointed to rule on the law.

Furthermore, the minority party at any given time should not be able to bypass the legislative process by finding a sympathetic judge who will grant a nationwide injunction. Logically, it makes no sense for courts to be able to enact a nationwide injunction when other courts may rule on—and in many cases, have ruled on—the same law differently. The fact that such territorial clashes happen implies that the law applies to different plaintiffs differently; therefore, no single court should assume that because a law should not apply to the parties before it, the law necessarily should not apply to everyone. Class action lawsuits already exist as a solution for parties who are similarly situated to be able to sue in one legal action to reduce total cost on each plaintiff and to increase efficiency. Thus, prohibiting nationwide injunctions would be a positive step toward reigning courts back toward their original purpose: considering the facts of the plaintiffs before the court and ruling on the law as it applies only to those plaintiffs.

However, in the face of congressional deadlock, nationwide injunctions may be one of the only effective tools available to combat executive aggrandizement. Eliminating nationwide injunctions would make it more difficult to take immediate action to stop an executive order once it has been issued. Also, when a court issues a nationwide injunction, it is not usually because the court finds that the law should not be enforced against the particular plaintiffs; it is because the court finds the law itself to be unconstitutional. Ever since *Marbury v. Madison*, courts have retained the ability to invalidate laws based on their unconstitutionality. Nationwide injunctions merely extend that power. Furthermore, while judges might not be accountable in the same way that the president or legislators are, that is intentional. Judges have life tenure so that they are not swayed by the passions of the people. They purportedly apply the law rationally and as they believe the Constitution directs, not how they think voters want them to interpret it so that they can be reelected. Thus, judges are in a unique position to be more trustworthy in their decisions.

Also, eliminating the judiciary’s ability to issue nationwide injunctions would reduce efficiency. When hundreds or thousands of people across the

93. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015).

94. Kim R. Holmes, *Has the Supreme Court Become Too Powerful?*, HERITAGE FOUND. (Feb. 25, 2016), <https://www.heritage.org/crime-and-justice/commentary/has-the-supreme-court-become-too-powerful> [https://perma.cc/W4E4-X23M].

country need to file suit against a policy would not have the time or ability to join together in a class action lawsuit, like in response to President Trump's Executive Order restricting entry on several majority-Muslim countries, it is more economically and temporally efficient to allow one court to respond on behalf of them all. Additionally, eliminating nationwide injunctions as a tool for the court increases the risk of a lack of uniformity in a law's application, as some districts allow the law or policy and others do not. Uniformity of application is important because all people should be treated equally before the law, regardless of where in the country they live.

Ultimately, eliminating nationwide injunctions would probably be more harmful than it would be beneficial. Nationwide injunctions are an extremely useful tool against executive aggrandizement and an efficient method for protecting individual rights in the face of congressional deadlock. That being said, there are significant drawbacks to allowing nationwide injunctions, so they should be used in moderation and should be limited in some way, rather than be completely abolished.

D. OTHER POSSIBLE SOLUTIONS

Since nationwide injunctions have serious drawbacks but are too useful to be abolished completely, they should be limited. One solution is only allowing district- or circuit-wide injunctions. This would reduce inefficiency because the injunction could cover more than just the parties before the court, without being so overarching as to cover the entire country, where plaintiffs may be affected differently. It would also reduce forum shopping, as the maximum area the injunction could cover would either be the district or the circuit. Circuit-wide injunctions could reduce territorial clashes, as circuits could give deference to one another and rule the same way. This, in turn, would make litigation less unpredictable than if judges could invalidate the decisions of other judges by granting an injunction against a law that those judges had upheld. Additionally, if there were clashes between circuits after the issuance or denial of a circuit-wide injunction, that could increase the likelihood that the case reached the Supreme Court, even if it did not involve an executive order. Both district- and circuit-wide injunctions would increase efficiency, since fewer affected people would need to file suit. Thus, geographically limited injunctions would reduce the drawbacks of judicial overreach associated with nationwide injunctions, while still allowing for some of the primary benefits of nationwide injunctions. Also, in the context of actions like President Trump's executive orders restricting travel, a more limited injunction such as a district- or circuit-wide injunction would still effectively make the policy toothless, since travelers from prohibited countries could fly into a state that had passed an injunction against the

policy and then would be free to travel elsewhere within the United States. Thus, limiting nationwide injunctions to a smaller geographic scale would not fundamentally change what courts are able to do with regard to checking executive power.

Another possible solution to limit nationwide injunctions is prohibiting nationwide injunctions at the preliminary phase, only allowing them after the case has been decided on the merits. This type of a solution would retain the cost efficiency and uniformity benefits that nationwide injunctions offer, since the injunction would still apply nationally. Also, a judge's decision to grant an injunction would be based on substantially more information if granted once the case has been decided on the merits than if it were granted as a preliminary injunction. However, this solution likely does not sufficiently address the concerns about judicial overreach.

CONCLUSION

Ultimately, both *Trump v. Hawai'i* and the possibility that Congress may pass a bill like the Injunctive Authority Act of 2018 have significant implications on the roles and relationship between the executive and judicial branches. The Supreme Court likely decided *Trump v. Hawai'i* correctly based on precedent and the specific language of the INA, regardless of its effect on executive power. However, the Court's decision expands the scope of presidential authority. Executive aggrandizement is problematic because the president can obtain the positive effects of legislating through executive order while maintaining the first-mover advantage compared to Congress, which may be a slippery slope. The case is also relevant for the impact that its procedural history may have on future litigants—those suing the government may see the effective trajectory from nationwide injunction to an appearance before the Supreme Court and seek such an injunction as their remedy, regardless of whether such an injunction is appropriate.

In considering whether nationwide injunctions are ever an appropriate remedy, this Note contemplated both the positive and negative consequences that such injunctions have in terms of efficiency, effects on plaintiffs' behavior, and the impact on judicial decisionmaking. As a whole, nationwide injunctions are a useful tool that should be used in extreme moderation because of their negative consequences. One possible solution to the problem of nationwide injunctions is limiting the geographic scope of injunctions to the district or circuit involved. Alternatively, it may be more efficient to prohibit nationwide injunctions at the preliminary phase, only allowing nationwide injunctions after the case has been decided on the merits, thereby retaining the cost efficiency and uniformity benefits that such injunctions offer while also requiring judges to base their decisions on substantially more

facts.

Finally, a law such as the Injunctive Authority Clarification Act of 2018 would have serious ramifications. Because it would prohibit all nationwide injunctions, it would effectively eliminate concerns regarding judicial overreach and judicial legislating that critics of nationwide injunctions commonly voice, and it would minimize forum shopping and the problem of one district judge invalidating the decisions of other district judges by overturning a law or policy other judges had upheld. However, eliminating nationwide injunctions would reduce temporal and economic efficiency in situations where many people across the country are similarly affected by an issue to which they need an immediate solution. Furthermore, eliminating nationwide injunctions expands the chances that the law will not be applied consistently.

Thus, nationwide injunctions empower judicial overreach, which was a driving factor behind the Injunctive Authority Clarification Act. However, they are too useful as a check against executive aggrandizement to justify eliminating nationwide injunctions completely. Instead, nationwide injunctions should be limited in some way, such as geographically restricted to district- or circuit-wide injunctions.