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Justice for All? Understanding Nationwide Injunctions

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Through nationwide injunctions, a single judge deciding the outcome of one lawsuit can effectively enact policy changes that impact the entire U.S. population. As the Congressional Research Service (CRS) explains, a nationwide injunction "prevents the government from implementing a challenged law, regulation, or other policy *with respect to all persons and entities*, whether or not such persons or entities are parties participating in the litigation."[1] Examples include Judge Kathryn Kimball Mizelle's decision to block the Centers for Disease Control and Prevention's (CDC) mask requirement on public transportation and Judge James Robart's decision to block President Donald Trump's first Muslim ban.

Nationwide injunctions have become more frequent in recent years—and, in some cases, can offer critical protections to people that government policies may harm. This explainer will discuss the nature of nationwide injunctions, recent examples, and their potential implications for American democracy.

What is a Nationwide Injunction?

Despite the effects nationwide injunctions have for the entire country, the practice is not limited to the nation's highest court: federal judges at all levels—not just Supreme Court justices—have issued nationwide injunctions. Scholars, lawmakers, and other stakeholders have debated whether nationwide injunctions are constitutional. That debate is beyond the scope of this explainer. However, as CRS points out, no current law explicitly *disallows* nationwide injunctions, and questions around the constitutionality of the practice have not precluded judges from using it:

[1] For the purposes of this explainer, the term "nationwide injunction" shall refer to court actions that have the effect of preventing the government from implementing a policy with respect to all persons and entities, *including* situations wherein the court vacates the policy entirely—technically, a "vacatur" rather than an injunction. According to Professor Mila Sohoni of the University of San Diego School of Law, "vacatur leaves no rule (or provision) in place to enforce against anyone." Thus, in accordance with its focus on the outcomes of these actions as they relate to the implementation—or lack thereof—of federal policies, this explainer does not distinguish between an injunction and a vacatur.

> *Currently, no statute, procedural rule, or Supreme Court decision expressly authorizes nationwide injunctions or limits their availability. Courts at all levels of the federal judiciary, from the trial level district courts to the Supreme Court, have issued nationwide injunctions since at least the middle of the 20th century.*

Arguments For and Against Nationwide Injunctions

Legal scholars have presented various arguments for and against nationwide injunctions. Proponents of nationwide injunctions contend that they are necessary to ensure policies that a court deems unconstitutional or beyond the government's authority are not implemented anywhere. Proponents also claim they are needed to protect parties that are injured by a policy but may not have the resources to sue the government. Accordingly, Professor Amanda Frost of American University's Washington College of Law calls nationwide injunctions "essential to keep the government in line." She explains, "if the government knew the only relief would be to the handful of plaintiffs that actually managed to get to court, then the government would be much freer to violate all of our rights."

Critics of nationwide injunctions argue that it is inappropriate for a court to provide remedies to parties not involved in the case at hand—that is, to parties who have *not* sued the government to stop the policy in question. In some cases, however, it may not be possible to provide complete relief to the party that *has* sued the government without stopping the policy in question nationwide. CRS offers instructive examples:

> *For instance, some courts have held that in desegregation cases, a court order requiring a segregated facility to admit a single plaintiff does not fully resolve the issues presented or provide the plaintiff with the full benefit of attending an integrated facility. Similarly, relief in successful challenges to electoral districts cannot be limited to the parties to the case: as one commentator notes, "[a] state cannot have one set of congressional or legislative districts for individual plaintiffs in a case and a different set for everyone else."*

Thus, nationwide injunctions can be necessary *even if* one believes that courts should only provide remedies to those party to a case, since—in some circumstances—it is not possible for a court to offer complete relief to the party suing the government *without* issuing a nationwide injunction.

Nationwide Injunctions in the 21st Century

Nationwide injunctions have become increasingly common during the last three presidential administrations and have implicated Presidents Obama, Trump and Biden's administrations' policies. Samuel Bray, a Notre Dame law professor, pointed out during a 2017 congressional hearing that the practice "remained fairly obscure until less than three years ago. At that point, it was weaponized by Republican state attorneys general to stop major Obama administration programs. Now, turnabout is fair play. In other words, whether you are Democrat or a Republican, sometime in the last three years your ox has been gored by the national injunction."

While stakeholders agree that nationwide injunctions have been issued more frequently in recent years, there is a shortage of data on the practice. A September 2021 analysis from CRS cites Department of Justice data from February 2020, which found that there were 12 nationwide injunctions issued during President George W. Bush's administration, 19 during President Barack Obama's, and 55 during President Donald Trump's up until that point.

In addition to halting policies enacted by both parties, nationwide injunctions have frequently involved, according to CRS, "high-stakes political issues and litigants that split along partisan political lines." Below is a partial list of high-profile nationwide injunctions that blocked policies during the Obama, Trump, and Biden administrations:

Administration:	Policy Blocked:	Injunction Issued By:
Obama	Protections for trans students	Judge Reed O'Connor of the United States District Court for the Northern District of Texas
Trump	First Muslim ban	Judge James Robart of the United States District Court for the Western District of Washington
Biden	Mask requirement for public transportation	Judge Kathryn Kimball Mizelle of the United States District Court for the Middle District of Florida

The Trump Administration made no secret of its disdain for nationwide injunctions that blocked the President's policy priorities. *Time* reported in 2019, "members of the Trump administration have made it a mission at the highest levels of the White House and the Justice Department to put an end to nationwide injunctions," in what *Time* called "attempt to renegotiate of the balance of power between Trump's White

House and the other branches of government that check the executive." The Republican majorities in the House and Senate also took issue with nationwide injunctions during the Trump Administration, holding hearings on the subject in 2017 and 2020. However, no legislation limiting or banning the use of nationwide injunctions advanced to the President's desk.

Conclusion: The Future of Nationwide Injunctions and Their Implications for American Democracy

Nationwide injunctions have mired both parties' policy priorities, and there are ample reasons to believe judges will continue to issue them. Moreover, a number of stakeholders suggest that nationwide injunctions will remain common as more policies emerge from the executive branch rather than from the legislative branch. During the aforementioned 2020 hearing, former Department of Justice official Jesse Panuccio argued that one way to reduce the number of nationwide injunctions was "for Congress to reassert its atrophied policymaking muscle." Another witness, University of Michigan's Professor Nicholas Bagley, also pointed out "Congress's lack of ability to address some very urgent problems that the American public has very strong views about." Senators on both sides of the aisle echoed similar concerns during the hearing.[2]

There are limits, however, to the argument that a more "assertive" Congress would necessarily lead to fewer nationwide injunctions. Due to the Senate's current divided makeup in which Democrats and Republicans each control 50 seats, coupled with the filibuster functionally requiring 60 votes for all major legislation, neither party's recent majority in Congress allowed them to advance many of their major legislative priorities outside of the reconciliation process. Reconciliation allows the Senate to pass certain bills with a simple majority vote.[3] Since Senate rules limit the policies that can be enacted via reconciliation, as long as the filibuster remains in place, Congress's ability to respond promptly to the public's concerns will remain limited. This puts the onus on federal agencies to use their authority to solve the country's most pressing problems, creating openings for opponents of certain executive actions to challenge the executive's authority in court—which, in turn, gives judges more opportunities to issue nationwide injunctions.

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[2] Senator Richard Blumenthal (D-CT) noted, "I think that the executive has become so powerful, and Congress has become so pliant that the courts are the only source of redress these days in light of the sort of paralysis in the legislative branch to deal with many of these issues." Senator John Cornyn (R-TX) even suggested that "accountability" for elected officials was "undermined by courts making essentially policy decisions broadly for the nation." Senator Cornyn explained that when courts issue such rulings, "we don't have to make hard decisions...we aren't held accountable at the next election for the vote."

[3] For more information regarding the reconciliation process in the Senate, see the Congressional Progressive Caucus Center's explainer, *Overcoming the Filibuster Through Budget Reconciliation*.

It is important to note that *less* executive action would not necessarily solve this problem and could have negative consequences for the American people. First, judges have invalidated laws as well as executive actions: Judge Reed O'Connor, for example, declared that the Affordable Care Act (ACA) was invalid in 2018, even though the ACA was ultimately upheld. This indicates a risk that judges may halt policies enacted through the legislative branch. Second, a functioning executive branch is essential to American democracy and the separation of powers and necessary in the event of an emergency that requires a quick response. For example, immediately after taking office, President Biden issued an executive order that allowed the government to accelerate the production of newly-approved COVID-19 vaccines, speeding the delivery of lifesaving vaccines to millions of Americans. The public benefits from the executive branch's ability to act nimbly in emergencies like the COVID-19 pandemic.

There is an additional, even simpler argument for why judges will likely continue issuing nationwide injunctions: because they can. Again, as Notre Dame Professor Samuel Bray pointed out, nationwide injunctions were "weaponized by Republican state attorneys general to stop major Obama administration programs." This opened a proverbial Pandora's box, setting the stage for others to use the courts to thwart their opponents' policies regardless of whether they believed those policies to be legally dubious or simply objectionable from a policy perspective. Thus, judges are likely to continue finding themselves in a position to create policy for the entire country via nationwide injunctions. While some judicial rulings may serve to protect the public from legitimate executive overreach, others may strike down popular policies for spurious reasons. This, in turn, threatens to breed cynicism amongst Americans and dilute their trust in the government.

Finally, the frequency and significance of nationwide injunctions have made clear the tremendous importance of judicial appointments beyond just the Supreme Court. The examples in this explainer show that decisions made by district court judges, particularly, have had a huge impact on people's lives. Data suggests that recent administrations have understood these judges' importance. President Trump saw more district court judges confirmed in his first term than any of his predecessors in the 21st century, while President Joe Biden has had more district court judges confirmed than his two most recent predecessors did at this point in their presidencies (as of October 1, 2022). The Senate's makeup—and, accordingly, its willingness to consider presidents' judicial nominations—has a significant impact on these success rates. Nonetheless, these figures indicate that district court appointments have been a high priority for the two most recent administrations.

President:	District Court confirmations (total):	District Court confirmations in the first term:
Clinton	305	170
G.W. Bush	261	170
Obama	268	143
Trump	174	174
Biden	58 (*as of Oct. 1, 2022*)	58 (*as of Oct. 1, 2022*)

Sources: "Judgeship Appointments By President," USCourts.gov; "President Obama's First-Term U.S. Circuit and District Court Nominations: An Analysis and Comparison with Presidents Since Reagan," Congressional Research Service; "Federal judicial appointments by president," Ballotpedia.

Nationwide injunctions issued by lower courts may continue to block legislation's implementation and embroil administrations' policies. If this happens, presidents from both sides of the aisle may work to appoint federal judges and ensure their confirmation with even greater urgency. Similarly, if the American people see popular policies struck down with increasing frequency, judicial appointments may become more important in American politics.

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