



# The Travel Ban Case and Nationwide Injunctions

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On Wednesday, April 25, 2018, the Supreme Court heard oral argument in the “travel ban” case, *Trump v. Hawaii*. While the case presents many significant issues, one that has received relatively less attention, but extends beyond the immigration context, is the cert [petition’s](#) third question: “Whether the global injunction [issued by the lower court] is impermissibly overbroad.” This question centers on the propriety of the “nationwide injunction,” (alternatively known as the “national” or “universal” injunction), which is an issue of rising importance throughout the law.

This Sidebar addresses when, if ever, a regional federal trial judge adjudicating a case involving the federal government can award nationwide [injunctive relief](#)—a court order that commands a party to take or refrain from taking some action throughout the country. In the context of a suit against the federal government, an injunction with this type of “universal” effect acts to effectively void the law or policy in question. When a plaintiff brings a facial challenge to a federal law or policy, courts in recent years have generally [held](#) that district courts have “considerable discretion in fashioning suitable relief,” including the power to provide for an injunction against enforcing the federal law or policy nationwide. Some courts and commentators have [begun to argue](#), however, that this approach has gone too far, and district courts should only have the power to enjoin the government’s conduct with respect to the parties before the court. Scholarly debate on this question has intensified in recent years as the “nationwide injunction” has become more common. The issue has become so significant that on March 10, 2018, Attorney General Jeff Sessions, in remarks to the Federalist Society’s National Student Symposium, [called](#) the nationwide injunction “a threat to our constitutional order.” This Sidebar briefly explores the nationwide injunction at issue in the travel ban case and surveys a handful of the scholarly and judicial arguments surrounding the nationwide injunction in general.

**Background of the Injunction in the Travel Ban Case.** The travel ban case has had a long and winding road to the Supreme Court, which is discussed in detail in this [CRS Sidebar](#). In its present incarnation, the travel ban case involves the legality of a proclamation [issued](#) by the President on September 24, 2017. The proclamation was intended to bar certain nationals of certain countries from entering the United States. Within weeks, following a lawsuit brought by the State of Hawaii on behalf of its University (among other parties), and a federal district court judge sitting in Hawaii [enjoined](#) most of the Proclamation globally. While the Supreme Court [stayed](#) the injunction pending an appeal, the Ninth Circuit, largely [affirmed](#) the district court’s order. The injunction, as [revised](#) by the Ninth Circuit, [fully](#)

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[enjoins](#) the United States from enforcing or implementing six provisions within the proclamation concerning entry restrictions on certain nationals of five countries “in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas” with respect to all persons who have a credible bona fide relationship with a person or entity in the United States.

The Department of Justice [argued](#) before the Ninth Circuit that the remedy should have been narrowly tailored and limited in application to the named plaintiffs. The Ninth Circuit [recognized](#) that, as a general matter, injunctive relief should be “tailored to remedy the specific harms shown by the plaintiffs.” However, the court concluded that a nationwide injunction, in this case, was “necessary to give Plaintiffs a full expression of their rights” because, in the immigration context, a uniform policy is necessary—the Constitution [states](#) that Congress can establish a *uniform* Rule of Naturalization—and, as a result, *any* application of the six provisions within the proclamation anywhere would harm the plaintiffs’ interests.

The government’s Supreme Court [brief](#) argues that the Ninth Circuit’s ruling “contravenes constitutional and equitable principles that require limiting injunctive relief to what is necessary to redress a plaintiff’s own cognizable injuries.” In particular, the government [argues](#) that Article III of the Constitution limits a court’s power to award [relief](#) to the plaintiff before the court; a court has no power to award relief to parties that are not before it. Further, the government argues that historical limitations on courts’ equitable powers [prevent](#) courts from creating injunctions that go beyond protecting the plaintiff, as such injunctions are “more burdensome to the defendant than necessary” to protect the party seeking judicial relief. Finally, the government [asserts](#) that, by upholding global injunctive relief, the Court would “disserve the orderly, evenhanded development of the law” by depriving any other court, apart from the initial court to rule for the plaintiff, from resolving an issue. In turn, the government contends that universal injunctions allow courts that rule for plaintiffs to necessarily override courts that would rule for the government, preventing the normal percolation of legal argumentation throughout the lower courts.

In [response](#), the respondents argue that the proclamation is “invalid and should be struck down on its face.” According to the respondents, whenever a plaintiff launches a successful facial challenge, the policy at issue should be enjoined in full to avoid needless duplicative litigation. A narrower injunction, the respondents argue, would lead to “dozens if not hundreds of additional suits seeking relief for the countless similarly situated parties throughout the United States.” Further, they [assert](#) that the need for a nationwide injunction is particularly acute because the State of Hawaii cannot identify in advance “precisely which foreign nationals may wish to join or visit” and “targeted relief cannot eliminate the profound deterrent effect” of the proclamation.

**The Rising Use of and Debate Surrounding Nationwide Injunctions.** The travel ban case is only the latest case to involve a nationwide injunction. According to [remarks](#) from the Attorney General, the Trump Administration has been subject to at least 22 nationwide injunctions in his first year in office. As one [scholar](#) has noted, these injunctions are on the rise, but this rise has not been limited to the Trump Administration or to the context of immigration law. Recent examples of cases involving nationwide injunctions (including some issued on a preliminary basis), include:

- In 2017, several [federal courts](#)’ blocking executive policies purporting to strip so-called “sanctuary jurisdictions” of federal funding;
- In 2017, the Western District of Washington’s [suspending](#) regulations that would have required immigration attorneys either to (1) appear and assume full representation of pro se parties in immigration cases or (2) refrain entirely from providing legal advice to those parties;
- In 2016, the Northern District of Texas’s preventing the enforcement of a “Dear Colleague” Letter from the Departments of Justice and Education, instructing schools to “immediately

allow students to use the bathrooms...of the student's choosing, or risk losing Title IX funding";

- In 2015, the Fifth Circuit's affirming of a preliminary [injunction](#) barring implementation of President Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA); and
- In 2015, the Sixth Circuit's issuing a [nationwide stay](#) of the EPA's Clean Water Rule, which identified and expanded the waters that are protected under the Clean Water Act.

Along with this rise in the issuance of nationwide injunctions, there has been a concomitant rise in the scholarly and judicial [debate](#) surrounding such injunctions. One recent [publication](#), by UCLA law professor Samuel L. Bray—which was [cited](#) in the government's Supreme Court brief in *Hawaii*—argues that courts should [never](#) award national injunctions because (1) historical evidence suggests that the “national injunction is a recent development in the history of equity,” (2) nationwide injunctions hinder the development of the law in multiple fora and create the risk of conflicting injunctions, (3) nationwide injunctions encourage “forum-shopping” (i.e., litigants picking and choosing the most favorable court to hear their claim); and (4) the case for nationwide injunctions is doctrinally incoherent (especially with respect to [Rule 23\(b\)\(2\)](#) of the Federal Rules of Civil Procedure, which implies that a nationwide injunction should only follow class certification). A recent edition of the Harvard Law Review contained several [published responses](#) by other commentators to Bray's article. While these responses generally do not rebut Bray's historical analysis, they argue that the nationwide injunction is nonetheless appropriate in certain circumstances involving particularly serious harms, and that discretion should be left with the trial court to determine the appropriate remedy. [Other scholars have](#), however, agreed with Bray that the use of nationwide injunctions should be curtailed.

The Supreme Court has yet to directly weigh in on this apparent controversy surrounding the use of nationwide injunctions, although it [denied](#) a request to wholly stay a nationwide injunction of an earlier iteration of the travel ban. The federal appellate courts, however, have begun to address this question with more frequency. Most recently, on April 19, 2018, the Seventh Circuit issued a divided [opinion](#) upholding a nationwide injunction involving the Justice Department's attempt to withhold funding to sanctuary jurisdictions. In that case, *City of Chicago v. Sessions*, the Seventh Circuit [upheld](#) a nationwide injunction prohibiting the enforcement of two conditions imposed on recipients of certain Justice Department grants, which would have required state and local authorities to aid certain federal immigration enforcement activities in order to maintain eligibility for the grants. The majority [argued](#) that a nationwide injunction was appropriate in this case because the issue would not vary from locality-to-locality and there was no need for duplicative litigation. A partial [dissent](#) in that case from Judge Manion agreed with the majority on the merits, but differed on whether the nationwide injunction was appropriate. Judge Manion asserted that the duplicative litigation the majority feared would actually be beneficial in this case because it was entirely possible for another circuit to look at the legal questions posed by the case and reach a different conclusion. By permitting the injunction, Judge Manion contended that the Seventh Circuit was effectively acting as the Supreme Court by deciding the issue for the whole country. According to the dissent, the nationwide injunction could undermine the development of the law by preventing multiple panels from weighing in on difficult issues. Instead, Judge Manion would have narrowed the injunction to protect only the plaintiff at issue in the case, the City of Chicago.

**Conclusion.** Notwithstanding the intense debate over the nationwide injunctive relief, the Supreme Court may not necessarily reach this issue in the travel ban case. In order for the Supreme Court to reach the issue of the scope of the injunction, the Court would have to decide both jurisdictional and merits questions in favor of the respondents. And, even if the Court reaches the question about the appropriate scope of relief, arguments about the constitutional necessity for uniformity with respect to immigration law may limit the broad applicability of any ruling. Nonetheless, at [oral argument](#), one Justice—Justice

Gorsuch—did signal some concern about the broader trend of issuing universal injunctions, noting in a question for the respondent’s attorney the “troubling rise of [the] nationwide injunction, cosmic injunction . . . not limited to relief for the parties at issue or even a class action.”

While it is unclear whether the Supreme Court will meaningfully opine on the issue of nationwide injunctions during the October 2017 term, the issue has already **garnered** some legislative attention. At least one bill has been introduced that would provide that “no United States district court shall issue any order providing for injunctive relief” that applies to parties apart from those before the court or within the district. Further, there are likely to be other cases in the pipeline to the Supreme Court—perhaps *City of Chicago v. Sessions* or another case from the litigation involving sanctuary jurisdictions—that could pick up the argument about the scope of injunctive relief from the travel ban case.

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