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First, We'll Neuter All the Judges

A. Benjamin Spencer
spencer@wm.edu

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First, we'll neuter all the judges

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A. Benjamin Spencer, opinion contributor

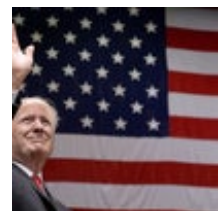
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The push to vilify “nationwide” injunctions is a threat to our system of checks and balances.

Much attention has been focused on the growth of executive power in the wake of President Trump’s acquittal in the recently concluded Senate impeachment trial. However, a nascent threat to the idea of constrained executive authority looms from another, less visible quarter: There is a movement afoot to eliminate the ability of federal courts to issue “nationwide” injunctions to block potentially unlawful actions by the federal government.



At the end of January, the Supreme Court put on hold a preliminary injunction issued by a lower federal court that prevented the Department of Homeland Security from implementing its rule barring non-U.S. citizens from admission to this country if they are determined to be “likely at any time to become a public charge.” In plain English, those are people the department concludes are likely to become primarily dependent on the government for subsistence.

Little noticed in this order was an opinion signed by Supreme Court Justices Neil Gorsuch and Clarence Thomas criticizing preliminary injunctions of the kind at issue in this case, labelling them “nationwide,” “universal,” or “cosmic” injunctions.



As a law professor and scholar who studies the power of federal courts, I’m troubled by this. The case they’re making is that federal courts only have the power to order the government to cease the challenged action with respect to the party who brings the suit, not with respect to everyone in the country.



Gorsuch and Thomas argue that, “Injunctions like these ... raise serious questions about the scope of courts’ equitable powers under Article III” because “they direct how the defendant must act toward persons who are not parties to the case.”

This sentiment is in line with a flurry of commentary and scholarship in recent years decrying federal court injunctions against the federal government that block the implementation of some announced rule or practice found to be a violation of the law or the Constitution.

This view is both mistaken and a threat to the limits placed on our form of government.

Our federal courts have authority over “cases” and “controversies” under Article III of the U.S. Constitution and statutes that confer jurisdiction on the lower federal courts. A dispute between a party who faces a threat of legal injury and a federal agency presents a concrete, adversarial dispute of the kind that fits within those limits.

In a public law dispute — which challenges federal governmental action as a violation of some federal law or the Constitution — federal courts may prohibit the government from undertaking the challenged action if the action is deemed to be unlawful.

Clearly, if a federal court has determined that the governmental action would be unlawful, the government should not be permitted to undertake that action at all, not just with respect to the plaintiff in a particular case.

The justices’ claim is also dangerous. Ours is a government of limited powers that must conform its behavior to the strictures of the Constitution. Each branch of government was designed to check the other in this regard.

The federal judiciary may — pursuant to its Article III authority to entertain “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made” — adjudicate cases in which executive branch waywardness is alleged, and use their equitable powers to put a stop to it once proven.

Claiming that federal courts do not have this authority, or seeking to cabin it through legislatively- or judicially-imposed rules, is a call for the federal courts to abdicate this judicial check on the executive branch. That would permit unlawful governmental conduct to persist unrestrained unless each citizen — one by one — comes to court to seek an injunction that would apply to them alone.

In an era when the power of the executive is being expanded in varied and disconcerting ways, this effort to denigrate and eliminate the “nationwide” injunction should be seen for what it is: an attempt by those who favor a more powerful executive to get the federal courts out of the way. None of the justices should want that to happen.

Benjamin Spencer is the Bennett Boskey Visiting Professor of Law at Harvard Law School and the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia School of Law. Follow him on Twitter [@PROFSPENCER](https://twitter.com/PROFSPENCER).