

# GUIDING THROUGH CHANGE

Understanding Policy Shifts in the Trump Administration



UNDERSTANDING  
POLICY SHIFTS  
IN THE TRUMP  
ADMINISTRATION

K&L GATES

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## Universal No More: Impact of the Supreme Court's Injunction Decision on President Trump's Executive Orders

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# The Universal Injunction

# Universal Injunctions

- Injunctions order a party to do or not do something.
  - Routinely limited to granting relief to the specific parties involved in the lawsuit.
- “Universal” or “nationwide” injunctions extend the relief of the injunction to everyone.
- Lower federal courts have been increasingly issuing universal injunctions against executive policies of both parties.

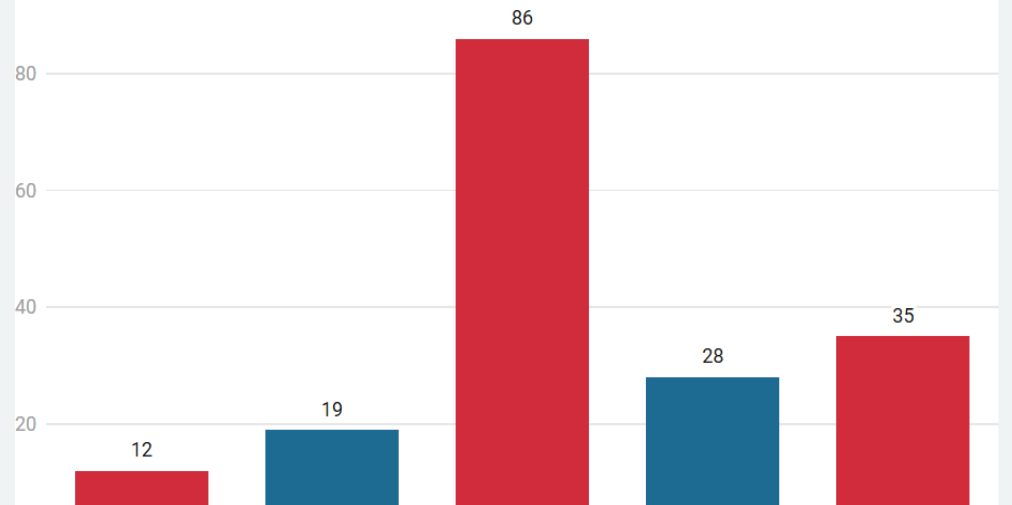


# A Longstanding Issue

- Universal injunctions have been issued against both Democratic and Republic presidents, but the vast majority have been in the modern era.
- 96% of the injunctions since 1963 were issued in the last 4 administrations, not even counting this year!

## Courts v. Presidents

Every president since George W. Bush has seen their policies temporarily or permanently halted by universal injunctions, but none has faced as many court-erected roadblocks as President Donald Trump.



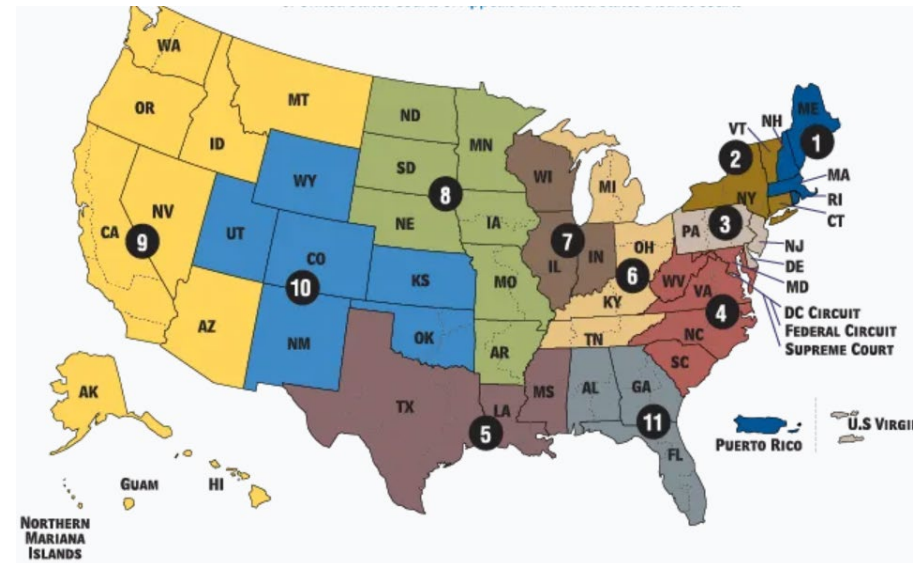
Source: *Justices Face Busy Summer After Nixing Universal Injunctions*, [Katie Buehler](#), Law360

# Growing Objections

- Policy concerns
  - Forum shopping – single district judge
  - Judges monopolize the process
  - Separation of powers
- Proponents argue that some universal injunctions may be needed to prevent a patchwork of inequality in extreme circumstances.
- Legal issue
  - Source and scope of the court's equitable authority?

*Trump v. CASA Inc.*

- Jan 20 - President Trump issues EO on birthright citizenship.
- EO is immediately challenged by individuals, states, and associations.
- Universal preliminary injunction issued by three federal district courts.
- Government requests *partial* stay of preliminary injunction pending appeal.
  - District courts denied government's request.
  - First, Fourth, and Ninth Circuits deny government's request.



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# SCOTUS Takes the Case

- Procedural posture matters: government files an emergency appeal.
  - Seeks partial stay, only challenging lower court authority to issue universal injunction.
  - Government does not seek review of merits of the EO.
- The Supreme Court rules 6-3 that lower federal courts lacked statutory authority to enjoin executive branch policies as to non-parties.



# SCOTUS Majority (per J. Barrett)

- Holds: universal injunction here would (likely) exceed the equitable authority that Congress gave federal courts under the Judiciary Act of 1789.
- Under the Judiciary Act, equitable remedies are limited to what courts of equity had at the Founding – complete relief to the *parties*.
- Court did not reach Article III limitations or other statutory bases for remedies (like the APA, FRCP 23—class actions).



# SCOTUS Concurrences

- Concurrence by Justice Thomas (joined by J. Gorsuch): emphasizes that Article III requires that injunctions should be tailored
- Concurrence by Justice Alito (joined by J. Thomas): emphasizes limitations of standing and class-certification
- Concurrence by Justice Kavanaugh: emphasizes that the Supreme Court remains open for business to resolve interim status for *major* new laws or executive actions



# SCOTUS Dissents

- Dissent by Justice Sotomayor (joined by J. Kagan and J. Jackson): argues that the government has not satisfied stay requirements – what is its irreparable harm? Also argues that universal injunctions have historic roots in “bills of peace” practice
- Dissent by Justice Jackson: argues that the power of the federal judiciary is broader and would require action to stop Executive lawlessness.





# Takeaways

- Universal injunctions are not an available remedy under courts' equitable authority.
- But Court did not decide:
  - merits of birthright citizenship
  - what “complete relief” looks like
    - States – they are essentially asking for a nationwide injunction to get complete relief, given their claimed financial and administrative burdens
  - viability of the APA’s “set aside” remedy
    - The APA’s “set aside” remedy could now apply to vacate in full any *agency’s* implementation (as opposed to *presidential action*)
  - availability of class actions

# Short Term Impacts on Executive Orders and Related Cases Including in the DEI and ESG Areas

# What Happens to Existing Universal Injunctions

- Typically where there has been a change in law making an injunction no longer consistent with law, the parties would seek to have the injunction modified or set aside before acting contrary to an injunction
- The district court would assess what is necessary to provide “complete relief” to the party or parties who obtained the injunction, but would now not go beyond this boundary to equitable powers
- The district court would determine both which parties or entities the injunction would not apply to, as well as the geographic scope of the injunction, whether complete relief requires a broader application
- The Trump Administration may seek to set aside nationwide injunctions on an expedited basis arguing they are no longer compatible with law while frustrating Executive Branch priorities
- The Trump Administration could conceivably take the position that universal injunctions are no longer applicable beyond the specific parties to the case, but it remains to be seen how the courts will respond to that

# What Happens Going Forward – Short Term

- District courts no longer have authority to issue universal injunctions under the Judiciary Act of 1789
- Congress could seek to change that, expanding equitable power generally, but that is unlikely
- Congress has granted broad power under the Administrative Procedure Act to set aside agency action
- Congress has allowed for relief to many similarly situated parties as a class action under Rule 23 of the Federal Rules of Civil Procedure
  - Class certification is required to provide broad class relief, however, requiring all of the class action prerequisites to be present:
    - Numerosity, Commonality, Typicality, Adequacy
- Complete relief in certain instances may require exercise of broad equitable power
- Supreme Court also retains power to issue nationwide relief



# DEI Cases

- Three pending federal cases in Maryland, Illinois, and Massachusetts, all have sought universal relief
- Illinois case includes a nationwide injunction as to the U.S. Department of Labor that goes beyond Chicago Women in Trades as to all parties and all DOL contracts
- Injunctions have been denied in the other two cases (a universal injunction was initially granted in the Maryland case but was then vacated by the Fourth Circuit, that is now on appeal)
- EO 14173 is multifaceted and was unlikely to be fully enjoined anyhow because of deference to prosecutorial discretion
- However, as to the antidiscrimination certifications, there were efforts to obtain universal injunctions, and they had met with some success
- For contractors and grant recipients, it is now much less likely that the litigation will relieve them from having to certify unless they are a party to an action or part of a class seeking relief.

# ESG and Environmental Cases

- President Trump has issued several ESG and environmental-related Executive Orders, including as follows:
  - EO 14260 – seeking to block or hinder state ESG regulations
  - EOs promoting coal industry and revoking Biden-era clean energy EO
- Department of Labor asked Fifth Circuit for pause in *Utah v. Walsh*, where district court had upheld Biden-era regulations allowing consideration of ESG factors (case was filed by 26 Republican Attorneys General along with others)
  - Department of Labor will likely rescind rulemaking and replace with something similar to prior Trump-era rule; this would be an example of a policy that would still be subject to nationwide challenge under the APA
- *Woonasquatucket River Watershed Council v. USDA* is a pending Rhode Island federal case where district court has issued a nationwide injunction requiring Inflation Reduction Act clean energy funding to continue; important to keep following this case



# Other Cases to Watch

- Asylum and refugee-related cases
- Research funding/foreign aid cases
- Cases relating to gender identity
- Termination of federal employee cases
- Elimination of department or agency cases
- Title VI enforcement EOs
- Rescission of federal regulation cases
- EOs focused on specific parties

# Long Term Impacts on Executive Orders, Checks & Balances, and Separation of Powers



## Long Term Impacts

APA	More legal challenges will be framed as APA actions seeking to set aside agency action based on Executive Orders
Class Actions	More cases will be brought as class actions under Rule 23(b)(2) seeking class wide injunctive relief; this has already started
More Lawsuits	More cases will likely be brought by interested parties needing immediate relief in multiple jurisdictions
Percolation	There is more likely to be conflicting Circuit decisions leading to the Supreme Court exercising its nationwide uniformity of law function



# What Happens Going Forward – Long Term, Part 1

- Executive Orders may no longer be able to be enjoined nationally or universally where the Executive Order applies to many individuals and entities, particularly where the EO applies in different ways based on various circumstances
- In contrast, Executive Orders focused on one party or a limited group of individuals or entities that are similarly situated, are more likely to be subject to being fully enjoined
- Further, Executive Orders directing agency consideration or action may need to wait until agency acts before an APA action can be brought seeking to set aside agency action since the President is not subject to the APA but agencies are
- Challenging application of an EO may require a party to focus only on relief to that party, leading to areas where the EO continues to apply to many but not those who have injunction
- The phenomenon where parties seeking to enjoin an EO need only win injunctive relief in one jurisdiction to get relief even if the government wins in multiple other jurisdictions is likely over



# What Happens Going Forward – Long Term, Part 2

- Executive Branch power will increase comparatively as it is more difficult to check the President now, as Executive Orders are easy to issue compared to any corresponding check (Congressional override or universal injunction)
- But it may not expand as much as reported in the press, as agencies who implement EOs and Presidential directives are still subject to being set aside under the APA, and countervailing forces are weakening administrative power as indicted through the *Loper Bright*, *Corner Post*, *Jarkesy*, and *Cargill* decisions
- This will allow the Executive Branch to issue numerous EOs at the beginning of an administration and hit the ground running without courts being able to block nationwide policies at their inception; many EOs are likely here to stay with each future Presidency
- The Supreme Court will likely assume more authority at the expense of district and circuit courts to review and potentially check Presidential actions
- Congress could change this set up by expanding equitable powers, requiring challenges to EOs to be brought in a specific court (such as the DDC or the DC Circuit)
- Rule 23 may need to be updated to specifically address injunctions issued in class actions relating to Executive Branch actions

Questions?



# Contact Information

# Thank you!



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