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Michigan Chapter

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Special Press Release

"The Attack on the Federal Judiciary Continues Under Cover of a Spending Bill"

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On May 22nd, the House passed a spending bill which is now before the Senate for consideration. ABOTA-MI takes no position on the bill generally as the enactment of legislation is a matter for politicians and their constituents to assess. However, there is one component of the bill that merits our direct attention and requires our comment—and that is the provision that would indiscriminately limit the Federal courts' ability to enforce its orders.

For well over 100 years, the U.S. Supreme Court has recognized that our federal courts have inherent authority to enforce their orders, including injunctions and TROs, through contempt proceedings. On May 22nd, the House passed a spending bill which would erode this authority. The Bill includes a provision that "no court of the United States may use appropriated funds to enforce a contempt citation for failure to comply with an injunction or temporary restraining order if no security was given when the injunction or order was issued."

"Security" refers to the bond provision in Rule 65(c) of the Federal Rules of Civil Procedure – a provision that requires federal courts to direct those seeking injunctions or TROs to post a money bond "*in an amount that the court considers proper*" to cover costs and damages in the event the challenge is unsuccessful. This rule applies to cases challenging the constitutionality of executive branch actions, among many others.

It is widely accepted that federal courts have *discretion* in determining the amount of any monetary bond under Rule 65(c)—including whether to require any bond at all-- depending on the extent of potential injury to the party enjoined and the ability of the party pursuing the action to afford the bond, for the purpose of "*effecting justice* between the parties." [1]

The House Bill proposes to strip the courts of that discretion. Under the Bill, in the absence of security, federal courts are effectively prohibited from enforcing contempt citations for violations

[1] *Div. No. 1, Detroit, Bhd. Of Locomotive Eng'rs v. Consol. Rail Corp.*, 844 F.2d 1218, 1227 n.15 (6th Cir. 1988)).

of injunctions or TROs, including those orders that direct the executive branch to correct or terminate actions found unconstitutional. The House proposal is not simply prospective but would apply retroactively to "make most existing injunctions—including those in place in antitrust cases, police reform cases, school desegregation cases, and others—unenforceable." [2]

Stripping the judiciary of discretion in the implementation of Rule 65(c) and limiting the courts' enforcement powers as a result "serves no purpose but to weaken the power of the federal courts."[3] ABOTA-MI speaks out against this legislative proposal in the Chapter's continuing efforts to stand up against persistent and unwarranted attacks on the federal judiciary.

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[2] https://www.abajournal.com/news/article/proposal-to-limit-courts-contempt-power-part-of-spending-bill-is-terrible-idea-chemerinsky-says