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Hearing before the United States Senate Committee on the Judiciary
"Rule by District Judge: The Challenges of Universal Injunctions"

February 25, 2020

Statement of Professor Samuel L. Bray

Mr. Chairman, Ranking Member, and Members of the Committee: I am honored to have the chance to speak with you today.

I. Introduction

There's a script we've all become familiar with. A president issues an order, or an agency promulgates a rule. And then what happens? Those who oppose the order or rule will pick a friendly district court and bring a challenge. From that friendly district court, the challengers will seek an injunction that shuts down the order or rule—not just with respect to the parties, but shuts it down for everyone in the country. That kind of injunction is popularly called a "nationwide injunction," or a "national injunction" or "universal injunction."

I want to make three brief points about this script: it is new, it is bad policy, and it cannot be squared with role of the federal courts under our Constitution.[1]

[1] For a fuller argument, see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017). There is now a large literature on national injunctions, both pro and con. Citations to that literature are appended to this statement.

II. Novelty

First, this "national injunction script," as I just called it, is new. In my view, the first national injunction was given in 1963. Some scholars think there were two before that, but those are contestable cases, and they don't support the national injunction as we have it today.[2]

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[2] In one case, *Journal of Commerce & Commercial Bulletin v. Burleson*, 229 U.S. 600 (1913), the Court granted a temporary restraining order protecting the entire newspaper industry from the enforcement of a law. The plaintiffs did not request a national injunction in their complaint. But plaintiffs' counsel, also representing the newspaper trade association, negotiated a contractual arrangement with the Attorney General not to enforce the law until after the test case could be resolved. When the successor of the Attorney General did attempt to enforce the law, the Supreme Court, without opinion, granted a temporary restraining order to prevent its enforcement against any newspaper. Since this TRO was based in a contract, and no broader than that contract, it does not support today's national injunctions.

In the other case, *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), the court of appeals did grant an injunction that ran beyond the plaintiffs, prohibiting the Department of Labor from applying a wage rule throughout the nation's steel-producing region. But the Supreme Court reversed that injunction with manifest unhappiness at its extreme breadth:

> "We must, therefore, decide whether a Federal court, upon complaint of individual iron and steel manufacturers, may restrain the Secretary and officials who do the Government's purchasing from carrying out an administrative wage determination by the Secretary, not merely as applied to parties before the Court, but as to all other manufacturers in this entire nation-wide industry. . . .
>
> "In our judgment the action of the Court of Appeals for the District of Columbia goes beyond any controversy that might have existed between the complaining companies and the Government officials. The benefits of its injunction, and of that ordered by it, were not limited to the potential bidders in the 'locality', however construed, in which the respondents do business. All Government officials with duties to perform under the Public Contracts Act have been restrained from applying the wage determination of the Secretary to bidders throughout the Nation who were not parties to any proceeding, who were not before the court and who had sought no relief."

Id. at 117, 123. Nor is it even clear that the injunction in *Perkins* should be considered a national injunction, because its entire scope was meant to protect the plaintiff. (The plaintiff requested a broader injunction that included its competitors, not from altruism, but so that its own contracts would not be voidable—because of its unfair advantage over competitors—if its legal victory were to be subsequently reversed on appeal.) *Journal of Commerce* and *Perkins* are the only instances of national injunctions before the 1960s that are pointed to by national injunction supporters.

The view best supported by the evidence, I think, is that in the first 170 years of the republic there were no national injunctions. And that's because the national injunction was simply inconceivable. Challengers brought thousands of successful suits against New Deal statutes, but there were no national injunctions. They were so inconceivable that apparently no one even thought to ask for one.

But we live in a different world now. Now a national injunction seems to follow the announcement of a new executive policy like night follows day. This state of affairs is *very* recent.

The big surge in the national injunction came in the last two years of President Obama's service as president. That's when every major initiative of the Obama administration—from the DAPA immigration policy to Department of Labor overtime rules affecting millions of workers, from a Department of Education policy on transgender rights to an HHS antidiscrimination rule—was stopped by national injunctions coming out of federal district courts in Texas. And now there have been dozens of national injunctions against the Trump administration (but not from Texas). For the last five years, essentially every major executive action has been shut down by national injunctions.

Just to show you how recent this development is—back in President Obama's first term, when the Republican state attorneys general sued to challenge the

individual mandate in the Affordable Care Act, they did not even ask for a national injunction. Now it would be legal malpractice for state AGs not to.

It's worth pausing here to say something about how the system used to work before national injunctions. There would still be decisions for the whole country by the Supreme Court—think of *Brown v. Board of Education*. But the way one case rippled out to other cases was through precedent. Getting to the right answer might be a little slower, but the idea was that some deliberation was good for judicial decisionmaking. As carpenters say, "Measure twice, cut once." The national injunction—and again, for both political parties, no matter whose ox is being gored—is the very opposite of that deliberative approach.

And before national injunctions there was group litigation. There's a long history of this in equity, called the bill of peace and the representative suit. And we still have that in our law today—it's the class action. But in a class action, there are procedural requirements to make sure this plaintiff is a good representative for the class. And—this is critical—in a class action, the whole class wins or loses together. But with a national injunction there's an asymmetry. If the plaintiff wins, the government program is shut down everywhere. But if the plaintiff loses, some other plaintiff can find another court and get a national injunction. The government has to win every case; to use a colloquial expression, the government

has to run the table. But the challengers—again whether Republican or Democrat—can shop 'till the rule drops.

My first point, then, is that the national injunction is new. This is not how it worked for most of our history.

III. Policy

The next point I want to make is that this is bad policy. I will do this briefly, noting four policy problems with the national injunction.

One is forum-shopping. Of course litigants always try to bring suits in an advantageous forum. But the difference here is that so much rides on this—the incentives are so high-powered—because one judge is going to make a decision for the entire country.

A second policy problem is conflicting injunctions. We could face a situation in which one judge issue a national injunction requiring the government to do x, while another judge issues a national injunction forbidding the government to do x. Twice in the last several years this has almost happened. At some point our luck is going to run out. But if each judge will stay in his or her own lane—just deciding the case for the parties—the risk of conflicting injunctions would be almost non-existent.

A third policy problem is the bad effect on judicial decisionmaking. Almost all of these national injunctions—against President Obama and against President

Trump—have been preliminary injunctions. So no trial, almost no record, no decision on the merits, and usually no time to wait for a circuit split with reasoned opinions from appellate judges around the country. Instead, rushed decisionmaking all the way up the line. This is not good for judicial craft—and again, that point has nothing to do with who is president or what the issue is.

A fourth policy problem is that the national injunction is an end-run around a lot of established rules and doctrines. For example, it's an end-run around the rules we have for class actions. It's an effort to get a class remedy without submitting to the requirements of a class action. It's also an end-run around the preclusion rules for the federal government that were recognized in *United States v. Mendoza*.[3] And it's also an end-run around rules about the power of district judges. I have great respect for the judges in our federal district courts, but in our system their decisions do not have precedential effect. A federal district court opinion has no binding precedential effect even in the same district court. And yet with national injunctions, if a district judge uses the "injunction" label, he or she can control how the federal government acts toward everyone in the country.

[3] 464 U.S. 154 (1984).

IV. Judicial role

My last main point is that this national injunction script—today an executive action, tomorrow a national injunction—is inconsistent with the constitutional role of the federal courts. The Constitution gives those courts "the judicial power," a power to decide "cases" and "controversies." The legislative power of the Senate and House is general—you have the power to decide a question for everyone. And, in one sense, through the doctrine of precedent, the Supreme Court can do that, too. But that is a kind of collateral consequence of a judicial decision by the Supreme Court. It is not the ordinary way the judicial power operates. That power, under Article III of the Constitution, is about the resolution of this case for these parties.

That's why remedies are given for the plaintiff. A court awards damages for the plaintiff, and for a class represented by the plaintiff—not for other people who could bring their own cases. And the same for injunctions. Under traditional equity practice, a court uses an injunction to protect the plaintiff and those represented by the plaintiff, not other people who could bring their own cases.

The Supreme Court reaffirmed this principle about the judicial power just two terms ago in its unanimous decision in *Gill v. Whitford*.[4] As the Court said, "[t]he Court's constitutionally prescribed role is to vindicate the individual rights of the

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[4] 138 S. Ct. 1916 (2018).

people appearing before it."[5] The Court made this point emphatically: "A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."[6]

Therefore, once a court has decided the case for the plaintiff, and given a remedy that makes the plaintiff whole, there is nothing left to do. Whatever else a court may want to do—reaching out and deciding other cases and giving remedies for other people—is not a proper exercise of the judicial power.

V. The way forward

Before concluding, let me offer a quick sketch of where we can go from here. I don't think the national injunction is a story with a villain. State attorneys general—Republicans and Democrats alike—have been seeking and obtaining this remedy because the lower courts have allowed it. The lower courts have backed into this practice, almost accidentally, focusing on the fact that a rule or order seems lacking in legal or constitutional foundation, and then, wrapped up in that, they have not wanted this illegal or unconstitutional action to be allowed anywhere. That was the logic of the national injunctions against the Obama administration, and the logic of those against the Trump administration.

But if we allow this practice to continue, we will have fundamentally reset for future generations the relationship of the courts to the political branches. Not just

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[5] *Id.* at 1933.
[6] *Id.* at 1934.

the executive branch. From now on, whenever Congress enacts a major statute, it can expect an almost immediate challenge, brought in a carefully selected federal district court, with a single judge issuing a national injunction that prohibits the enforcement of the statute. And then the Supreme Court will decide that challenge with almost no record and no circuit split. We are rapidly moving to a world in which no major executive or legislative action will take effect until the Supreme Court has signed off. And that means accelerating pressure on the Court to decide quickly—which is one reason we've seen a rapid rise in emergency actions by the Supreme Court at precisely the same time as the rapid rise in national injunctions by district courts. The status quo is unsustainable.

My hope is that the Supreme Court will end the national injunction. Or that Congress will. The justices have the constitutional power and duty to ensure that the lower courts follow the Constitution. You also have that constitutional power and duty.

Appendix

For recent literature on the phenomenon of the national injunction, see, e.g., Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. Rev. 1068 (2017); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017); Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 Cardozo L. Rev. 2017 (2015); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 Geo. Mason L. Rev. (forthcoming 2020); Zachary D. Clopton, *National Injunctions and Preclusion*, 118 Mich. L. Rev. 1 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065 (2018); David Hausman & Spencer E. Amdur, Response, *Nationwide Injunctions and Nationwide Harm*, 131 Harv. L. Rev. F. 49 (2017); Suzette Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 Harv. L. Rev. F. 56 (2017); Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 Harv. J. L. & Pub. Pol'y 487 (2016); Michael T. Morley, *Nationwide Injunctions, Rule 23 (B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615 (2017); Zayne Siddique, *Nationwide Injunctions*, 117 Colum. L. Rev. 2095 (2017); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 Ala. L. Rev. 1 (2019); Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions,"* Colo. L. Rev. (forthcoming 2020); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920 (2020); Alan M. Trammel, *Demystifying Nationwide Injunctions*, 98 Texas L. Rev. 67 (2019); Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 Lewis & Clark L. Rev. 335 (2018); Howard M. Wasserman, *Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Litigation*, 23 Lewis & Clark L. Rev. 1077 (2020).