JUSTICE NEWS

Attorney General William P. Barr Delivers Remarks to the American Law Institute on Nationwide Injunctions

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Thank you. I'm honored to address the American Law Institute this evening. Among this distinguished company, it is not possible to acknowledge all who merit it. However, I would like to mention a couple of my dinner companions. I want to thank David Levi, the President of ALI, for inviting me.

David and I were colleagues 30 years ago at the Department of Justice and have remained friends. When I was recently confirmed again as Attorney General I was delighted to hear that David's son, Will, had joined the AG's staff. The apple does not fall far from the tree. I am delighted Will agreed to stay on with me, and he is doing an outstanding job.

I also want to salute a man who I believe is a great American jurist, but also, in my opinion, one of the greatest AG's to ever hold the office – Mike Mukasey. I have placed his official portrait in my office to remind me of his example.

We are also joined by many prominent judges, practitioners, and law professors. Thank you for being here and for supporting the thoughtful study and administration of law.

In this town, there's a tendency to focus on the news of the day, as the past few weeks have reminded me. But the role of groups like ALI is to remind us of the bigger picture. So tonight, I want to take several steps back—to our Nation's Founding.

The central genius of the American Constitution lies in its use of structure to protect individual liberty. It does not rely solely, or even primarily, on grants of substantive rights. As Justice Scalia colorfully quipped, "Every banana republic has a bill of rights." His point—and mine—is that the bulwark against tyranny in America has always been our structure of government, most notably the Separation of Powers.

These days, clashes between Congress and the Executive steal the headlines. I know that all too well. But clashes between the Judiciary and the Political Branches are just as weighty.

While the Framers had concerns about an unelected Judiciary encroaching on the prerogatives of the Political Branches, Hamilton promised in Federalist 78 that the least democratic branch would also be the "least dangerous" branch because courts have "no influence over either the sword or the purse … neither force nor will, but merely judgment." Today, that assurance does not instill much confidence. We have seen over time an expansion of judicial willingness to review executive action. Then, combine that with the strategies of sophisticated public-interest lawyers and the aggressive practices of some courts, such as the novel and growing use of nationwide injunctions. The legal community and the broader public should be more concerned, particularly about this trend of nationwide injunctions.

Tonight, I wish to discuss some of the reasons why. Let me start with perhaps the most remarkable example: the ongoing litigation over the DACA (or Deferred Action for Childhood Arrivals) program.

You all know the basic backstory. It starts with the DREAM Act, which would provide legal status to certain ~~aliens~~ noncitizens who came to the United States as minors. Congress has never passed it, but one bill known as the American DREAM and Promise Act has garnered wide support and if passed into law, would create a permanent solution for "DREAMers", DED holders and TPS holders. ~~But i~~

In 2012, the Obama Administration announced the DACA program. DHS issued a policy memorandum that allowed certain noncitizens who entered the United States before the age of sixteen, are currently in school or graduated, and meet other policy requirements to request for a type of prosecutorial discretion known as "deferred action." ~~, under which DHS assumed a non-enforcement posture and extended~~ Pursuant to a regulation published in 1981 under the Ronald Reagan administration, those granted deferred action may apply for work authorization with USCIS if they can show economic necessity. *See* 8 C.F.R. 274.12(c)(14). ~~to those covered by the proposed DREAM Act~~. That policy was ~~controversial~~hugely successful and has allowed thousands of DACA holders to contribute to the U.S. economy and educational institutions. *See e.g.*, https://www.americanprogress.org/press/release/2018/08/15/454807/release-daca-recipients-growing-economic-educational-gains-stake-daca-faces-serious-threat-yet/ . It used prosecutorial discretion, a tool that has been part of the immigration system for decades. *See e.g.*, www.beyonddeportation.com The legal authority for prosecutorial discretion and deferred action in particular is well established. In section 103 of the Immigration and Nationality Act (INA), Congress delegated to DHS the authority to make prosecutorial discretion decisions. Various other sections of the INA also identify "deferred action" by name. ~~to implement an unenacted statute, and many~~ Some argued that it exceeded Executive authority, but scholars and government attorneys familiar with the INA, including more than 100 law professors intimately familiar with the content and contours of immigration law have defended the legal authority of DACA. *See e.g.*, https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/LawProfLetterDACAFinal

8.13.pdf -Years after DACA was implemented, sSeveral States, led by Texas, obtained a nationwide injunction against extended versions of thea never operational policy known as DAPA and extended version of DACA—which resulted in a 4-4 deadlock at an equally divided Supreme Court. affirmed. The Supreme Court never reached a decision on the merits of DAPA or DACA +, never reached a decision on the injunction, and perhaps most importantly, made no legal conclusions about DACA. To date, no court has found DACA to be unconstitutional and for good reason- DACA is supported by a rich legal history foundation. and they threatened to challenge DACA itself.

But in 2017, the Trump Administration announced that it would wind downend DACA. That decision was also controversial, and also legally flawed. though nNo one seriously contends that DACA is required by law, but courts have concluded that DACA cannot be terminated without an articulated reason. To uphold the rule of law, t Two district judges in California and New York have nevertheless issued nationwide injunctions against the rescission—that is, effectively requiring the government to reinstate DACA notwithstanding the President's contrary exercise of discretion. Two circuit courts of appeals have also concluded that the administration's end of DACA was arbitrary under administrative law. Appeals have been ongoing for nearly a year-and-a-half, but the injunctions remain in place.

This saga highlights a number of troubling consequences of the rise of nationwide injunctions and consequences of living in a country with "checks and balances.":

First, these nationwide injunctions have frustrated presidential policy for most of the President's term with no clear end in sight. We are more than halfway through the President's term, and the Administration has not been able to rescind the signature immigration initiative of the last Administration. E, even though the creation of DACAit resteds entirely on executive discretion, the act by the current administration to end DACA without a reason poses serious legal problems. The Justice Department has tried for more than a year to get the Supreme Court to review the lower-court decisions ordering us to continue to acceptkeep DACA requests from those who have ever held DACA in the past. We have gone to the Supreme Court before a decision was even made by the appellate courtsin place. But the Court has not granted any of those requests, and they languish on its Conference docket. Unless the Court acts quickly and decisively, we are unlikely to see a decision before mid-2020 at the earliest—that is, right before the next presidential election. It is hard to imagine a clearer example of the stakes of nationwide injunctions and the uncertainty 800,000 DACA recipients and their families face every day without compassion by the administration or a legislative solution.

Second, these injunctions have injected the courts into the political process. The first injunction from the Northern District of California came down on January 9, 2018, in the middle of high-profile legislative discussions. Hours earlier that same day, President Trump allowed cameras into the Cabinet Room to broadcast his negotiations with bipartisan leaders from both Houses of Congress over the DREAM Act, border security, and broader immigration reform. Of course, once a district judge forced the Executive

Branch to maintain DACA nationwide for the indefinite future, the President lost much of his leverage in negotiating with congressional leaders who wanted him to maintain DACA nationwide for the indefinite future. Unsurprisingly, those negotiations did not lead to a deal.

So, what have these nationwide injunction wrought? Dreamers remain in limbo, the political process has been pre-empted, and we have had over a year of bitter political division that included a government shutdown of unprecedented length. Meanwhile, the humanitarian crisis at our southern border persists, while legislative efforts remain frozen as both sides await the courts' word on DACA and other immigration issues.

Third and finally, these nationwide injunctions inspire unhealthy litigation tactics. Last May, Texas and others sued for a nationwide injunction against the DACA policy—in essence, to enjoin the government from complying with the other nationwide injunctions. These States were fighting fire with fire. For their Attorneys General as advocates, that is understandable. But if we consider how things ought to work, it is perverse. Rather than an orderly pattern of litigation in which the Government loses some cases and wins others, with issues percolating their way through the appellate courts, we have an inter-district battle fought with all-or-nothing injunctions.

Fortunately, Judge Hanen spared us the pain of dueling injunctions. Judge Hanen was also concerned about the significant delay by the plaintiffs in bringing a lawsuit and the significant hardship an end to DACA bring. "He noted the delay by the plaintiff states to bring a legal challenge to DACA and the consequential interests at stake. In his critique of this delay, Judge Hanen remarked "Here, the egg has been scrambled. To try to put it back int the shell with only a preliminary injunction record, and perhaps at great risk to many, does not make sense nor serve the best interests of this country." Unfortunately, however, the new *status quo* of a DACA policy supported only by injunction has persisted.

While the DACA case provides a stark example of the trend in nationwide injunctions, at this point, it is hardly an outlier. Since President Trump took office, federal district courts have issued 37 nationwide injunctions against the Executive Branch. That's more than one a month. By comparison, during President Obama's first two years, district courts issued two nationwide injunctions against the Executive Branch, both of which were vacated by the Ninth Circuit. And according to the Department's best estimates, courts issued only 27 nationwide injunctions in all of the 20th century.

Some say this proves that the Trump Administration is lawless. Not surprisingly, I disagree. And I would point out that the only case litigated on the merits in the Supreme Court—the so-called "travel ban" challenge—ended with President's policy being upheld. But my aim today is not to debate the merits of any particular policy; it is to discuss the improper use of nationwide injunctions against policies of all stripes. Specifically, aside from the particular oddities of the DACA case, I want to highlight five ways in which nationwide injunctions are inconsistent with our American legal system.

First, and most fundamentally, nationwide injunctions violate the Separation of Powers. Article III vests federal courts with "the judicial power" to decide "Cases" or "Controversies." As the Supreme Court has instructed, that means concrete disputes among individual parties. In the words of Chief Justice Marshall in *Marbury* v. *Madison*, "the province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion."[3]

Limiting judicial power to resolving concrete disputes between parties, rather than conducting general oversight of the Political Branches, ensures that courts do not usurp their policymaking functions. This limitation also grows out of the English system of equity, which limited relief in a given case to the parties before the court. As explained by the ALI's First Restatement of Judgments, published in 1942, the English equity system was a system of "personal justice." As Professor Samuel Bray wrote, this means that "an injunction would restrain the defendant's conduct vis-à-vis the plaintiff, not vis-à-vis the world."

This inherited tradition from the English courts is not just a matter of inertia; it is baked into the Article III's vesting of federal courts with "the judicial power" to resolve "cases" or controversies." As Justice Scalia succinctly put it, "[t]he judicial power as Americans have understood it (and their English ancestors before them) is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government or other private persons." Justice Frankfurter likewise described Article III as providing "merely the outlines of what were to [the Founding generation] the familiar operations of the English judicial system . . . ."

Consistent with that understanding, federal courts do not appear to have issued any nationwide injunctions during the first 175 years of the Republic. The first documented nationwide injunction issued in 1963 from the D.C. Circuit. The absence of nationwide injunctions does not reflect an unwillingness to issue injunctions against the government. Quite the contrary. In 1937, one of my predecessors—Attorney General Homer Cummings—reported that lower courts had issued thousands of injunctions against New Deal programs. But, in keeping with the unbroken English tradition and two centuries of American law, those injunctions bound the government only with respect to the parties to those cases. The government continued to enforce New Deal programs against others. For example, Cummings reported that courts issued more than 1,600 injunctions against a particular agricultural tax, but the government still collected it from more than 71,000 non-challengers. Even then, the subsequent Attorney General Robert Jackson described the Judiciary's reaction as "reckless, partisan, and irresponsible. We can only imagine what he would say today.

The novel approach taken by some district courts over the past few years reflects a departure not only from the historically settled limitations of Article III, but also from our traditional understanding of the role of courts. Courts issuing nationwide injunctions often describe themselves as "striking down" or "invalidating" a law. Although we have probably all used such terms as shorthand, the truth is that courts have no authority to "strike down" laws. In our system, they resolve only disputes between parties. As the

Supreme Court explained almost a century ago in *Massachusetts* v. *Mellon*, a court may enjoin "not the execution of the statute, but the acts of the official." As one commentator has explained, a court has no power to issue a "writ of erasure," striking a statute from the books.

This might sound like a semantic point, but it goes to the heart of the problem. Courts at the Founding understood their role as addressing only the rights of the parties before them. And if they disregarded a statute or executive policy in the name of "judicial review," it was only because they were bound to apply the higher law of the Constitution. But today, courts pass judgment on laws or executive actions bounded only by judicial doctrines of "deference." Assuming the role of gatekeeper, a judge acts as a one-man Council of Revision. That not only embraces a judicial role that the Framers rejected, but also diminishes the constitutional prerogatives of Congress and the Executive.

Second, nationwide injunctions inflate the role of individual district judges within the Judiciary. The Constitution empowers Congress to create lower federal courts, and in designing a system of 93 judicial districts and 12 regional circuits, Congress set clear geographic limits on lower-court jurisdiction. In our system, district-court rulings do not bind other judges, even other judges in the same district. This system has many virtues. It creates checks and balances within the judiciary itself and encourages what former D.C. Circuit Judge Harold Leventhal called "percolation"—the process by which many lower courts offer their views on a legal issue before higher courts resolve it. This process of percolation is not just a good idea; it is the very embodiment of our common-law tradition. In that great tradition, governing legal principles emerge from a scatter-shot of precedent that involves multiple cases, over many years, decided by multiple judges working through legal issues and refining their views.

When a nationwide injunction issues against the government, it short-circuits that process. Because such injunctions prevent enforcement against anyone anywhere, they overshadow related litigation in other courts. After all, even if the government prevails in every other case, a nationwide injunction still prevents all enforcement. It thus gives a single judge the unprecedented power to render irrelevant the decisions of every other jurisdiction in the country.

These are not hypothetical occurrences. In litigation over the President's policy on transgender military service, the government won a major victory in the D.C. Circuit. Yet because district courts in California and Washington had enjoined the policy nationwide, the D.C. Circuit's decision had no practical effect; the government could not implement the policy until the Supreme Court granted a stay. That is not the only example. The Ninth Circuit recently ordered briefing on whether a nationwide injunction from a Pennsylvania district court mooted the appeal of an injunction from within the Ninth Circuit. Giving a single district judge such outsized power is irreconcilable with the structure of our judicial system.

Nationwide injunctions not only allow district courts to wield unprecedented power, they also allow district courts to wield it asymmetrically. When a court denies a nationwide injunction, the decision does

not affect other cases. But when a court grants a nationwide injunction, it renders all other litigation on the issue largely irrelevant. Think about what that means for the Government. When Congress passes a statute or the President implements a policy that is challenged in multiple courts, the Government has to run the table—we must win every case. The challengers, however, must find only one district judge—out of an available 600—willing to enter a nationwide injunction. One judge can, in effect, cancel the policy with the stroke of the pen.

No official in the United States government can exercise that kind of nationwide power, with the sole exception of the President. And the Constitution subjects him to nationwide election, among other constitutional checks, as a prerequisite to wielding that power. Even the Chief Justice of the United States must convince at least four of his colleagues to bind the Federal Government nationwide.

Third, nationwide injunctions undermine public confidence in the Judiciary. When a single judge can freeze policies nationwide, it is not hard to predict what plaintiffs will do. In Professor Bray's memorable phrase, they "shop 'til the statute drops." Requests for nationwide injunctions thus flooded Texas district courts in the Obama Administration, while similar requests have landed in California and New York in the Trump Administration. I am not here to question any judge's motivation. But even assuming all good faith, the appearance of forum shopping is inescapable and damaging to the ideal of an impartial judiciary. The consequences will be far-reaching and could include politicizing the district-court confirmation process in ways similar to what we have seen for the Courts of Appeals and Supreme Court. We should not want that to happen.

Fourth, nationwide injunctions create unnecessary and unhelpful emergencies. When a nationwide injunction constrains a significant executive policy, the Justice Department has little choice but to seek emergency relief. No one benefits from emergency litigation—not the Government, not the plaintiffs, not the courts. But the alternative is for the Government to wait months or years for appeals to run their course before the Executive may implement its policy at all.

Finally, nationwide injunctions conflict with the litigation system that Congress chosen mechanisms for aggregate litigation. One of the few potential defenses of nationwide injunctions is that they promote uniformity. Of course we value uniformity in our legal system. But we already have ways to achieve it—usually, through review by the Supreme Court on a writ of certiorari after an issue has percolated through the lower courts. When the Supreme Court issues a nationwide ruling in that posture, we have more confidence in it due to the preceding efforts of the lower courts. Nationwide injunctions turn that process on its head. They treat the first case as if it will be the last.

Congress and the Federal Rules Committee have also designed mechanisms for aggregate litigation where appropriate, but none authorizes a nationwide injunction. Consider Federal Rule of Civil Procedure 23, which allows plaintiffs to bring a class action on behalf of unnamed parties, sometimes across the

nation. Still, they must meet a series of procedural and substantive requirements, including that class members share typical claims and that the named plaintiffs will adequately represent absent class members. The rules also provide in many cases for absent class members to receive notice of the action and the opportunity to opt out. Members of the class are also generally bound by the district court's judgment and precluded from relitigating in a different court. Nationwide injunctions do not work that way.

ALI bears some small measure of blame. The commentary of *The Principles of the Law of Aggregate Litigation*, published in 2010, states that "[l]itigation seeking prohibitory or declaratory relief against a generally applicable policy or practice is already aggregate litigation in practice, because the relief that would be given to an individual claimant is the same as the relief that would be given to an aggregation of such claimants." Not only is the comma before "because" a grammatical sin, but we all know that precision about procedure and the limitations of precedent matters. They should not be so easily elided.

* * *

To end where I began, I raise the problem of nationwide injunctions as a matter not of partisanship, but the rule of law. One can easily imagine a future Administration's policies—say, on climate change or employee rights—freezing under nationwide injunctions for years on end. Imagine, for example, if a new Administration were to abandon a "zero tolerance" policy on immigration offenses only to see a district court order it back in place. One could draw up countless other scenarios.

I do not want to see any of them. Nationwide injunctions undermine the democratic process, depart from history and tradition, violate constitutional principles, and impede sound judicial administration, all at the cost of public confidence in our institutions and particularly in our courts as apolitical decision-makers dispassionately applying objective law.

The Justice Department will continue to oppose nationwide injunctions, as we have across administrations of different ideological perspectives. I hope you will make your voices heard on this issue too. At a time of deep differences on so many legal and policy issues, this is one area where lawyers and citizens should agree.

Thank you for the invitation to speak tonight and for all you do for the legal profession.

Speaker:

Attorney General William Barr

Component(s):

Office of the Attorney General

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