Questions for the Record – Senator Grassley

"Rule by District Judge: The Challenges of Universal Injunctions" – Tuesday, February 25, 2020

Questions for Prof. Bray

1. Would the Framers have viewed nationwide injunctions as consistent with, or contrary to, the proper role of a single federal judge? *Professor Bray: We do not have direct statements from the Framers about the nationwide injunction, but that is almost certainly because it would have been inconcievable to them. They rejected a Council of Revision. And Alexander Hamilton's argument that the judicial branch was the least dangerous seems to have relied in part on the idea that the the judicial power would be exercised only in respect to particular cases (e.g., from Federalist 78: "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter").*

2. What happens when there are conflicting nationwide injunctions? How should the government proceed in such a scenario? *Professor Bray: The government would likely seek a stay of one or both conflicting injunctions, with immediate appeals from any denials, quickly reaching the Supreme Court, which might have to decide a major constitutional question without adequate time and percolation. In the meantime, if the injunctions were truly conflicting, government officers would necessarily expose themselves to contempt sanctions no matter what course of action or inaction they chose.*

3. Do nationwide injunctions encourage litigants to forum shop? If so, why should that kind of tactic be discouraged, and are there any other tactics or negative outcomes that are encouraged by nationwide injunctions? *Professor Bray: Yes, nationwide injunctions heighten the incentives of litigants to forum-shop. There are of course always incentives to choose an advantageous forum for litigation. But these incentives are dramatically increased because of the broad venue rules for suits against the federal government, combined with the very high stakes when the remedy will control the federal government's conduct toward the entire country. The nationwide injunction also encourages litigants and courts to avoid hard, but important, questions about the representational adequacy of the plaintiffs and about the careful definition of their own injuries.*

4. If Congress required three-judge district court panels before a nationwide injunction could be obtained, would that resolve some of the problems that have been identified with such injunctions? Why or why not? *Professor Bray: Requiring a three-judge district court panel might slow the rapid spread of the nationwide injunction. But it would not address any of the fundamental problems of this relatively novel remedy: it would not address the exercise of power by courts that transcends the case or controversy presented by the parties, and it would not address the deleterious effect on judicial decisionmaking (from reduced percolation and emergency appeals). Legislation that would allow national injunctions by three-judge courts would, at best, pull the top of the weed. It needs to be pulled up by the roots.*

Senate Judiciary Committee Hearing
"Rule by District Judge: The Challenges of Universal Injunctions"
Questions for the Record
for Prof. Samuel Bray
University of Notre Dame Law School

Questions Submitted March 3, 2020
Answers Submitted March 18, 2020

QUESTIONS FROM SENATOR WHITEHOUSE

1. During the hearing, I asked you a hypothetical about how, in the absence of a universal injunction, the Rhode Island Attorney General could protect people in our state against a new EPA rule that would allow upwind emissions sources in other states to pollute the air downwind in Rhode Island. You conceded that Rhode Island would be entitled to enjoin the rule in multiple states if that was necessary to give Rhode Island complete relief. Specifically, you said that, if emissions sources in 15 or 20 states were causing the harm, then the Rhode Island Attorney General could get an injunction against the new rule in those states.
    a. What if there were emissions sources in all 49 other states that would cause harm to Rhode Island? Would Rhode Island be entitled to an injunction against the rule in each of those states? *Professor Bray: I would want to distinguish two situations. In the first situation, there is substantial harm to Rhode Island from the emissions allowed by the rule from power plants in every one of the other 49 states. In that case, if Rhode Island sued and prevailed (or was likely to prevail on the merits and met the other requirements for a preliminary injunction), it would be permissible for the court to enjoin the greater emissions allowed by the rule, not only in Rhode Island but in each of the other states. I would consider this an application of the well-established law on injunctions to prevent nuisances. In the second situation, there is substantial harm to Rhode Island from the increased emissions in a few neighboring or nearby states, but there is only slight or minimal harm from increased emissions in, say, New Mexico and Hawaii. In that instance, an injunction that prevented increased emissions everywhere would be inappropriate, because it would be a disproportionate response to the injury suffered by the state plaintiff. In my view the cases where states have sought and obtained national injunctions are more like the latter—the national injunction is vastly disproportionate to the claim of injury by the state. These cases include Texas v. United States (challenging President Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents program) and Trump v. Pennsylvania (challenging President Trump's exemptions to the contraception mandate under the Affordable Care Act).*
    b. How would this be different from a universal injunction? *Professor Bray: A universal or national injunction is typically given not to protect the plaintiff(s),*

but to protect other persons. So one difference between that and the hypothesized injunction is that the latter is being given to protect the plaintiff state (i.e., its entire scope is explicable as being plaintiff protective). Nevertheless, as noted above, in the cases in which states seek national injunctions (in contrast to the hypothet ical) the allegedly plaintiff-protective scope is more a matter of form than substance. What Texas really wanted in Texas v. United States was not saving a small amount of money on drivers' licenses; what Pennsylvania really wanted in Trump v. Pennsylvania was not saving a small amount of money on health care expenditures. I would encourage consideration of the substance of the relief requested, and the mismatch between that substance and the actual injuries that are being alleged by state plaintiffs who seek national injunctions.

Samuel L. Bray
Professor of Law
Notre Dame Law School
Questions for the Record
Submitted March 3, 2020

Answers Submitted
March 18, 2020

QUESTIONS FROM SENATOR BOOKER

1. You concluded your testimony by saying: "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."

    a. What are the key legal authorities in determining whether Congress or the Supreme Court is the proper body to set any new rules regarding the use of universal injunctions? *Professor Bray: The supreme legal authority on this question is the U.S. Constitution, and especially Article III. Its grant of the judicial power to the U.S. Supreme Court (and lower courts as Congress sees fit to establish them), in conjunction with the judicial oath, requires the justices of the Supreme Court to consider for themselves whether their actions, and the actions of the lower courts they supervise, are consistent with the Constitution. Yet Congress is also a proper body to codify principles about the proper exercise of the judicial power. Article III, Section 1 gives Congress the authority to establish the lower federal courts, and if Congress may make and unmake them, it also has the power to draw their bounds (consonant with the rest of the Constitution). Article III, Section 2 gives Congress the authority to make "regulations" for the appellate jurisdiction of the Supreme Court. And the Necessary and Proper Clause of Article I, Section 8, authorizes Congress to enact laws for the carrying into execution of the constitutional powers of other departments of the national government, including the Judiciary.*

    b. Would Congress's weighing in on the issue encroach on the role and authority of the Supreme Court? Please explain your answer. *Professor Bray: Given the Constitution's explicit grants of authority to Congress to establish the lower federal courts, to regulate the appellate jurisdiction of the Supreme Court, and to enact laws for carrying into execution the judicial power, I do not think Congress's weighing in would encroach on the role and authority of the Supreme Court. To be sure, one could imagine congressional actions that would fundamentally alter the separation of powers established by the Constitution. But no such fundamental alteration would be produced by legislation to address the relatively novel remedy of the national injunction. Moreover, historical practice supports the conclusion that Congress has the authority to codify a principle of plaintiff-protective injunctions, for Congress has not infrequently regulated the use of injunctions by federal courts (not least when such injunctions were used to hobble labor unions in the first half of the twentieth century).*

c. Are there any circumstances, or categories of cases, in which you think a universal injunction could be warranted? *Professor Bray: No.*

d. If Congress were to legislate on this issue, would you support any legislative solutions short of simply putting an "end" to universal injunctions—such as a panel of judges or a lottery system, as suggested by Professor Sohoni? *Professor Bray: Legislation along those lines would help with the forum-shopping problem, but it would not address the deeper problems (in my view) with the national injunction. It would not address the exercise of power beyond the case or controversy presented to the court. Nor would it address the policy problem that the national injunction reduces percolation and encourages rushed decisionmaking and emergency appeals.*

2. As Solicitor General AliKhan testified, in cases where class action suits are unavailable or impracticable, universal injunctions can provide relief to individuals who have been harmed or would be harmed by a specific policy or regulation. How should Congress weigh this consideration in evaluating the role of universal injunctions in cases affecting individuals who would otherwise lack access to justice? *Professor Bray: Access to justice is critical in any society that aims, as ours should, for equal dignity of all persons under law. I do think it is important to ensure that the courts are open to challenges to government action, not only by individuals but also by groups (and by individuals on behalf of groups who cannot litigate on their own behalf). Nevertheless, our litigation system—based on the adjudication of specific cases, brought by plaintiffs who have already been injured or will imminently be injured—is fundamentally reactive. We could design a fundamentally proactive litigation system, but it would have a different set of virtues and a different set of vices than the one we have. For the one we have, one of the vices is that there will be injuries that are never remedied, as well as injuries that are remedied too late. This is not a counsel of complacency—we should not be satisfied with that state of affairs—but I am counseling realism about the nature of the legal system we have.*

3. Solicitor General AliKhan also testified, "Nationwide injunctions may be necessary to grant compete relief to the plaintiffs in particular circumstances," and "there are myriad circumstances where awarding complete relief to a plaintiff requires action beyond the court's geographic boundaries or against third parties." For example, she continued, "Some rights are indivisible, in which case granting relief to one plaintiff necessarily affects third parties. Classic examples are desegregation and reapportionment cases." If universal injunctions were simply ended, how would courts be able to provide complete and appropriate relief in these kinds of cases? *Professor Bray: These are exactly the sorts of cases for which class actions are so useful. Indeed, the "civil rights class action" as it has been called was the central judicial device for achieving desegregation. I do recognize that relief for an individual plaintiff can also have ancillary effects for non-parties, and there is nothing objectionable about that. So in principle we could say there are "indivisible rights," but the category has proved slippery and expansive enough that I do not know that it retains much shape in the scholarly literature. Finally, I should note that there is no reason for an injunction to be confined to the geographic boundaries of the court. As was established as early as the 1740s, a court of equity is not limited by territorial boundaries, and it can even reach around the world to protect the plaintiff from harm by the defendant. This is why it is commonplace in private law for injunctions to go beyond the geographic jurisdiction of the federal court. For example, an injunction against trademark*

infringement is not limited to the territory of the federal district court, but often operates throughout the United States—but it protects only the plaintiff (not non-parties) against the defendant's trademark infringement.