AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Constitutional Authority and Judicial Power/Constitutional Litigation

**Barr v. East Bay Sanctuary Covenant, 140 S.Ct. 3** (2020)

*The East Bay Sanctuary Covenant provides legal and other services to immigrants and persons seeking asylum in the United States. In the summer of 2019, immediately after the Trump Administration adopted a rule forbidding any person seeking asylum from entering the United States though the southern border unless they had first sought asylum in Mexico or another country, East Bay filed a lawsuit asking federal courts to issue an injunction forbidding the national government from implementing that rule. The local federal district judge agreed to issue a preliminary injunction. William Barr, the attorney general appealed that case to the Court of Appeals of the Ninth Circuit, which refused to stay the preliminary injunction while considering the issue. Barr, while the issue was still pending before the Ninth Circuit, asked the Supreme Court to grant the stay*

*Barr’s request that the Supreme Court vacate an injunction issued by a lower federal court while the matter was still pending before the lower federal courts was part of a change in executive and judicial practice. Federal efforts to stay lower federal court orders while lawsuits were pending in the lower federal courts, were not unheard of before Donald Trump took office. What was new was the frequency with which such efforts were made. One study found that while Bush II and Obama officials filed eight applications for stays in sixteen years, the Trump Administration filed twenty-one applications in three years.[[1]](#footnote-1)*

*The Supreme Court by a 7-2 vote granted the stay. Justice Sotomayor objected to the decision to grant the stay. She insisted that the district court decision on the merits was probably correct and that the government had not met the standards for issuing a stay while a matter was pending in the lower federal courts. Why does Sotomayor think the district court was probably right on the merits? Is her argument correct? Under what circumstances does Sotomayor think the Supreme Court should stay an injunction issued by a lower federal court while a matter is still pending before the lower federal court? Is that standard correct. What explains the increased tendency for the Trump Administration to request the Supreme Court stay injunctions while matters are still pending before the lower federal courts?*

The application for stay presented to Justice KAGAN and by her referred to the Court is granted.

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I2d65ebe0548811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=I2d65ebe0548811e9adfea82903531a62), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I2d65ebe0548811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=I2d65ebe0548811e9adfea82903531a62) joins, dissenting from grant of stay.

Once again the Executive Branch has issued a rule that seeks to upend longstanding practices regarding refugees who seek shelter from persecution. Although this Nation has long kept its doors open to refugees—and although the stakes for asylum seekers could not be higher—the Government implemented its rule without first providing the public notice and inviting the public input generally required by law. After several organizations representing immigrants sued to stop the rule from going into effect, a federal district court found that the organizations were likely to prevail and preliminarily enjoined the rule nationwide. A federal appeals court narrowed the injunction to run only circuit-wide, but denied the Government's motion for a complete stay.

Now the Government asks this Court to intervene and to stay the preliminary decisions below. This is an extraordinary request. Unfortunately, the Court acquiesces. Because I do not believe the Government has met its weighty burden for such relief, I would deny the stay.

. . . .

The District Court found that the rule was likely unlawful for at least three reasons. First, the court found it probable that the rule was inconsistent with the asylum statute. [Section 1158](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1158&originatingDoc=I2d65ebe0548811e9adfea82903531a62&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) generally provides that *any* noncitizen “physically present in the United States or who arrives in the United States ... may apply for asylum.”  And unlike the rule, the District Court explained, the statute provides narrow, carefully calibrated exceptions to asylum eligibility. As relevant here, Congress restricted asylum based on the possibility that a person could safely resettle in a third country. The rule, by contrast, does not consider whether refugees were safe or resettled in Mexico—just whether they traveled through it. That blunt approach, according to the District Court, rewrote the statute.

Second, the District Court found that the challengers would likely prevail because the Government skirted typical rulemaking procedures.  The District Court noted “serious questions” about the rule's validity because the Government effected a sea change in immigration law without first providing advance notice and opportunity for public comment.  The District Court found the Government's purported justifications unpersuasive at the preliminary-injunction stage.

Last, the District Court found the explanation for the rule so poorly reasoned that the Government's action was likely arbitrary and capricious. On this score, the District Court addressed the Government's principal justifications for the rule: that failing to seek asylum while fleeing through more than one country “raises questions about the validity and urgency” of the asylum seeker's claim, and that Mexico, the last port of entry before the United States, offers a feasible alternative for persons seeking protection from persecution. The District Court examined the evidence in the administrative record and explained why it flatly refuted the Government's assumptions.  A “mountain of evidence points one way,” the District Court observed, yet the Government “went the other—*with no explanation*.” .

After the District Court issued the injunction, the Ninth Circuit declined the Government's request for a complete stay, reasoning that the Government did not make the required “ ‘strong showing’ ” that it would likely succeed on the merits of each issue.  Narrowing the injunction to the Circuit's borders, the Ninth Circuit expedited the appeal and permitted the District Court to consider whether additional facts would warrant a broader injunction.

The lower courts' decisions warrant respect. A stay pending appeal is “extraordinary” relief.  Given the District Court's thorough analysis, and the serious questions that court raised, I do not believe the Government has carried its “especially heavy” burden.  The rule here may be, as the District Court concluded, in significant tension with the asylum statute. It may also be arbitrary and capricious for failing to engage with the record evidence contradicting its conclusions. It is especially concerning, moreover, that the rule the Government promulgated topples decades of settled asylum practices and affects some of the most vulnerable people in the Western Hemisphere—without affording the public a chance to weigh in.

Setting aside the merits, the unusual history of this case also counsels against our intervention. This lawsuit has been proceeding on three tracks: In this Court, the parties have litigated the Government's stay request. In the Ninth Circuit, the parties are briefing the Government's appeal. And in the District Court, the parties recently participated in an evidentiary hearing to supplement the record. Indeed, just two days ago the District Court reinstated a nationwide injunction based on new facts. Notably, the Government moved to stay the newest order in both the District Court and the Ninth Circuit. (Neither court has resolved that request, though the Ninth Circuit granted an administrative stay to allow further deliberation.) This Court has not considered the new evidence, nor does it pause for the lower courts to resolve the Government's pending motions. By granting a stay, the Court simultaneously lags behind and jumps ahead of the courts below. And in doing so, the Court sidesteps the ordinary judicial process to allow the Government to implement a rule that bypassed the ordinary rulemaking process. I fear that the Court's precipitous action today risks undermining the interbranch governmental processes that encourage deliberation, public participation, and transparency.

In sum, granting a stay pending appeal should be an “extraordinary” act.  Unfortunately, it appears the Government has treated this exceptional mechanism as a new normal. Historically, the Government has made this kind of request rarely; now it does so reflexively. I regret that my colleagues have not exercised the same restraint here. I respectfully dissent.

1. See Stephen I. Vladeck, “The Solicitor General and the Shadow Docket, 133 *Harvard Law Review* 123 (2019). [↑](#footnote-ref-1)