AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

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

**Wolf v. Cook County, Illinois, 140 S.Ct. 681** (2020)

*Cook County, Illinois was one of the numerous government units and non-governmental organizations that objected to a decision by the Department of Homeland Security (DHS) to change the definition of “public charge” under immigration law. The new rule allowed the DHS to declare an alien inadmissible who had received almost any public benefit for a short period of time. Cook County responded by filing a lawsuit against the Acting Secretary of Homeland Security, who at the time the case reached the Supreme Court was Chad Wolf. The local district court issued a preliminary injunction prohibiting the DHS from implementing the public charge rule in Illinois on the ground that the SHS had unreasonably interpreted federal law when making the public charge rule. The Court of Appeals for the Seventh Circuit refused to stay that injunction when considering the merits of the case. Wolf appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 5-4 vote vacated the preliminary injunction while the appeal was still pending before the seventh circuit. Justice Sonya Sotomayor’s dissent insisted that no reason existed for the Supreme Court to become involved in the case until the Seventh Circuit made a decision. Sotomayor noted an important distinction between* Wolf *and* Department of Homeland Security v. New York *(2020)*. *In* New York*, the district court had enjoined implementation of the public charge rule throughout the nation. In* Wolf*, the district court’s injunction was limited to Illinois. The cases are different in another respect. In* New York*, Justice Neil Gorsuch wrote an opinion defending the Supreme Court’s decision to vacate the stay, but no dissenter defended the stay. In* Wolf, *the dissenters issued an opinion, but not the justices in the majority. Compare the opinions in* New York *and* Wolf*. Do the two justices talk past each other. Does Gorsuch’s opinion explain why the conservatives on the court also intervened before the circuit court had ruled to vacate an injunction limited to one state. Does Sotomayor’s opinion explain why the liberals on the court objected the Supreme Court vacated a nationwide injunction before the expected circuit court decision? How would you have ruled on this cases and why?*

The application for stay presented to JUSTICE KAVANAUGH and by him referred to the Court is granted.

Justice [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=If4ae13d03c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=If4ae13d03c5f11eaadfea82903531a62), Justice [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=If4ae13d03c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=If4ae13d03c5f11eaadfea82903531a62), and Justice [Kagan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=If4ae13d03c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=If4ae13d03c5f11eaadfea82903531a62) would deny the application.

Justice [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=If4ae13d03c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=If4ae13d03c5f11eaadfea82903531a62), dissenting from the grant of stay.

Today's decision follows a now-familiar pattern. The Government seeks emergency relief from this Court, asking it to grant a stay where two lower courts have not. The Government insists—even though review in a court of appeals is imminent—that it will suffer irreparable harm if this Court does not grant a stay. And the Court yields.

But this application is perhaps even more concerning than past ones. Just weeks ago, this Court granted a stay of a different decision involving the same administrative rule at issue here, after the Government professed urgency because of the form of relief granted in the prior case—a nationwide injunction. The Government now uses that stay—of a nationwide injunction—to insist that it is entitled to one here. But the injunction in this case is limited to one State, Illinois. The Government cannot state with precision any of the supposed harm that would come from the Illinois-specific injunction, and the Court of Appeals for the Seventh Circuit has scheduled oral argument for next week. The Government's professed harm, therefore, boils down to an inability to enforce its immigration goals, possibly in only the immediate term, in one of 50 States. It is hard to say what is more troubling: that the Government would seek this extraordinary relief seemingly as a matter of course, or that the Court would grant it.

. . . .

Several lawsuits followed, one of which reached this Court last month. See Application for Stay of Injunctions in *Department of Homeland Security* v. *New York* (2020) (New York cases). The Government in no small part insisted that it was entitled to a stay because of the scope of relief awarded below: The District Court in the New York cases imposed a nationwide injunction that “rendered effectively academic” the Government's successful litigation on the public-charge rule elsewhere.  The Government's unquestionable focus was the scope of that injunction: Its stay application used the word “nationwide” 34 times.

Over the dissent of four Justices, this Court granted the Government's application for a stay.  Two Justices concurred in the grant of the stay, emphasizing—as the Government did—the “equitable and constitutional questions raised by the rise of nationwide injunctions.”  No Member of the Court discussed the application's merit apart from its challenges to the injunction's nationwide scope.

In the meantime, other courts considered the public-charge rule, and one—the District Court in this case—ruled much more narrowly. The District Court concluded that the plaintiffs in the case before it were entitled to a preliminary injunction, based on self-described “dry and arguably bloodless” legal analysis.  But it did not award nationwide relief as the New York court had: It merely prevented the Government from enforcing the public-charge rule in Illinois, where the “ ‘nearly 100 nonprofit organizations and social and health service providers’ ” represented by one of the plaintiffs were located.

. . . . One might wonder what the trouble is with granting a stay in this case. After all, by granting a stay in the New York cases, the Court effectively has already allowed the Government to enforce the public-charge rule elsewhere—why not Illinois too? But—even putting aside the dissent of four Justices in the New York cases and the plaintiffs' weighty arguments on the merits—the Court should not forget the burden the Government must carry to obtain a stay. To warrant this “ ‘extraordinary’ ” relief, it is not enough for a party to point to an important legal issue, or even one that is likely to obtain the assent of five Justices on the merits (which is far from certain here). Instead, to justify upending the normal rules of appellate procedure, a party must also show a likelihood of irreparable harm.  And “[b]ecause this matter is pending before the Court of Appeals, and because the Court of Appeals denied” the Government's motion for a stay, the Government now bears “an especially heavy burden.”

The Government has not made that showing here. Its public-charge rule is set to go into effect in 49 of 50 States next week. The Seventh Circuit is set to consider the Illinois-specific injunction next week as well, with a decision to follow shortly thereafter. And the Government is unable to articulate how many cases—if any—this narrow injunction would affect in the meantime. In sum, the Government's only claimed hardship is that it must enforce an existing interpretation of an immigration rule in one State—just as it has done for the past 20 years—while an updated version of the rule takes effect in the remaining 49. The Government has not quantified or explained any burdens that would arise from this state of the world. Indeed, until this Court granted relief in the New York cases, the Government itself did not consider this Illinois-specific harm serious enough to warrant asking this Court for relief.

These facts—all of which undermine the Government's assertion of irreparable harm—show two things, one about the Government's conduct and one about this Court's own. First, the Government has come to treat “th[e] exceptional mechanism” of stay relief “as a new normal.”  Claiming one emergency after another, the Government has recently sought stays in an unprecedented number of cases, demanding immediate attention and consuming limited Court resources in each. And with each successive application, of course, its cries of urgency ring increasingly hollow. Indeed, its behavior relating to the public-charge rule in particular shows how much its own definition of irreparable harm has shifted. Having first sought a stay in the New York cases based, in large part, on the purported harm created by a nationwide injunction, it now disclaims that rationale and insists that the harm is its temporary inability to enforce its goals in one State.

Second, this Court is partly to blame for the breakdown in the appellate process. That is because the Court—in this case, the New York cases, and many others—has been all too quick to grant the Government's “reflexiv[e]” requests.  But make no mistake: Such a shift in the Court's own behavior comes at a cost.

Stay applications force the Court to consider important statutory and constitutional questions that have not been ventilated fully in the lower courts, on abbreviated timetables and without oral argument. They upend the normal appellate process, putting a thumb on the scale in favor of the party that won a stay. (Here, the Government touts that in granting a stay in the New York cases, this Court “necessarily concluded that if the court of appeals were to uphold the preliminary injunctio[n], the Court likely would grant a petition for a writ of certiorari” and that “there was a fair prospect the Court would rule in favor of the government.”) They demand extensive time and resources when the Court's intervention may well be unnecessary—particularly when, as here, a court of appeals is poised to decide the issue for itself.

Perhaps most troublingly, the Court's recent behavior on stay applications has benefited one litigant over all others. This Court often permits executions—where the risk of irreparable harm is the loss of life—to proceed, justifying many of those decisions on purported failures “to raise any potentially meritorious claims in a timely manner.”  Yet the Court's concerns over quick decisions wither when prodded by the Government in far less compelling circumstances—where the Government itself chose to wait to seek relief, and where its claimed harm is continuation of a 20-year status quo in one State. I fear that this disparity in treatment erodes the fair and balanced decisionmaking process that this Court must strive to protect.