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THE SUPPOSEDLY "LEAST DANGEROUS BRANCH": DISTRICT JUDGES V. TRUMP JOINT SUBCOMMITTEE HEARING

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT, AGENCY ACTION, AND FEDERAL RIGHTS

AND THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

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THE SUPPOSEDLY "LEAST DANGEROUS BRANCH": DISTRICT JUDGES V. TRUMP

TUESDAY, JUNE 3, 2025

UNITED STATES SENATE,
SUBCOMMITTEE ON FEDERAL COURTS, OVERSIGHT,
AGENCY ACTION, AND FEDERAL RIGHTS, JOINT WITH THE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittees met, pursuant to notice, at 2:36 p.m., in Room 226, Dirksen Senate Office Building, Hon. Ted Cruz, Chair of the Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights, and Hon. Eric Schmitt, Chair of the Subcommittee on The Constitution, presiding.

Present: Senators Cruz, Schmitt [presiding], Whitehouse, Welch, Hawley, Kennedy, Blackburn, Blumenthal, Hirono, Booker, and Schiff.

Also present: Senator Durbin.

OPENING STATEMENT OF HON. TED CRUZ, A U.S. SENATOR FROM THE STATE OF TEXAS

Chair CRUZ. Good afternoon. I hereby call to order this hearing on "The Supposedly 'Least Dangerous Branch': *District Judges v. Donald J. Trump*." This hearing is a joint undertaking by the Subcommittee on The Constitution and the Subcommittee on Federal Courts because our country is facing a constitutional crisis, a full-blown judicial assault on the separation of powers that strikes at the very foundation of the republic.

What we are witnessing is the rise of judicial lawfare from the bench. One unelected district judge sitting in a courtroom in San Francisco or Boston or Baltimore can now issue a nationwide injunction that ties the hands of the President of the United States for all 330 million Americans. That is not law; that is judicial tyranny.

President Donald Trump was elected by over 77 million Americans with a constitutional mandate to govern. These district judges, they were not elected. They were appointed by one individual and confirmed not to legislate, not to govern, but to apply the law. And yet, far too many of them have abandoned that role. They've have stepped off the bench and into the political arena, issuing sweeping edicts that impose their policy preferences on 340 million Americans.

Let's walk through just a few of the most egregious recent examples. Economic policy: In New York City, the Court of International Trade struck down all of President Trump's tariffs under IEEPA, declaring that they exceeded executive authority. It was not judging; it was judges replacing the President's judgment on declaring a national emergency. And, of course, that ruling was almost immediately stayed by the court of appeals.

Deportation policy: In Baltimore, the chief judge for the District Court of Maryland issued an order preventing the removal of illegal aliens detained anywhere in the country, granting 2 days of automatic protection to anyone who files a habeas petition in Maryland, all without a hearing or legal findings. This single Maryland judge dictated national deportation policy and then tried to claw back the damage by amending the order. As Chairman of the Subcommittee on Federal Courts, I am investigating this overreach, and I have sent a letter to the Judicial Conference of the United States.

But the judges did not stop there. In D.C., a judge blocked the Federal Government from requiring proof of citizenship to vote, overriding election integrity laws across all 50 States.

In Boston, a judge weighed in on birthright citizenship, deciding a question of nationwide consequence for millions of illegal aliens, despite the plaintiffs being solely one pregnant mother and two nonprofit organizations. That is absurd. That is policymaking and legislating. That is not adjudication.

In Boston, a different judge blocked a Department of Energy rate cap, handcuffing efforts to lower taxpayer costs for energy research.

In Rhode Island, a judge ordered the Federal Government to immediately disburse tens of millions of dollars under the Inflation Reduction Act and other programs. The Department of Energy alone was forced to release $50 million by judicial fiat.

In San Francisco, a judge mandated that the Office of Personnel Management rehire all terminated Federal workers and restricted future firings, effectively turning the judiciary into an H.R. department.

Yet another Maryland judge halted orders intending to stop funding for institutions mutilating minors through so-called gender transitions. These deeply consequential decisions were blocked, not by voters, not by Congress, but in each instance by one unelected judge.

And it doesn't stop there. Since President Trump returned to office in January, there have been over 40 universal injunctions issued against the Federal Government. That is in 4 months. Thirty-five of those 40 came from the same 5 judicial districts. Let's put this into context. In the first 150 years of the republic, zero nationwide injunctions were issued. Zero. That is for 150 years. In the entirety of the 20th century, 27 nationwide injunctions were issued. That is over 100 years [points at poster].

[Poster is displayed.]

Under Presidents Bush, Obama, and Biden combined, 32 nationwide injunctions. Under President Trump's first term, 4 years, 64 nationwide injunctions, and now in just 4 months, we are already over 40. In 4 months, the Trump administration has seen more nationwide injunctions than the entirety of the 20th century and

more nationwide injunctions than Presidents George W. Bush, Barack Obama, and Joe Biden combined. This is not normal. This is not justice. This is an orchestrated campaign of judicial obstruction.

[Poster is displayed.]

Joe Biden, when he was President, nominated to the bench radicals. I have said only slightly tongue-in-cheek that Joe Biden did something I used to think was impossible. He made me miss Barack Obama. But by comparison, the Biden judicial nominees were far more extreme and radical than they were under Obama. They sought out radicals who would implement policymaking from the bench, and they are doing precisely that. That is not democracy, and that is not our Constitution.

This hearing is to highlight the effects of this judicial tyranny, of single judges deciding they know better when it comes to policy than do the voters of America. We need to defend democracy.

And with that, I recognize Senator Whitehouse.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you, Senator Cruz.

When I Chaired the Subcommittee on Federal Courts, we held hearings on the influence on our judiciary of dark money from the fossil fuel industry and from creepy billionaires. My Republican colleagues weren't interested in helping solve that problem, but those hearings were based on facts. Years of financial disclosures showed a secret billionaire gifts program for amenable Supreme Court justices. Written evidence suggested a justice may have failed to pay taxes on a $270,000 loan that was forgiven, and that false statements were made about a yacht. A mountain of evidence revealed President Trump outsourced to billionaires and their dark money fixer, Leonard Leo, the selection of his judges and Supreme Court justices, which President Trump admitted just last week. Apparently, Leo also, and I am quoting Trump here, "openly brags" about controlling the judges his creepy billionaires got appointed.

This hearing will be different. A lot of hypocrisy about nationwide injunctions against the Trump administration after Republican colleagues cheered the nationwide injunctions that courts issued against the Biden administration. Indeed, some colleagues filed lawsuits asking for nationwide injunctions against the Biden administration, but now they are shocked, shocked that there are nationwide injunctions.

Here are some facts everyone should bear in mind during this hearing. Fact number one, Donald Trump's administration is engaged in unprecedented lawlessness, period. In less than 5 months, President Trump has issued almost as many Executive orders as President Biden did during 4 years in office. Many are flat out on their face illegal, as any first-year law student could tell you.

Trump tried to end 14th Amendment birth rights citizenship. He tried to punish law firms' First Amendment rights to associate with his perceived political enemies. His fossil fuel minion at OMB, Russ Vought, withheld millions of dollars that Congress had appropriated under Article I. More than 20 years ago, originalist icon Scalia wrote about how illegal that is.

The madcap pace and roughshod lawlessness of Trump's executive actions mean district judges across the country are striking them down, not because of judicial obstruction, because he is breaking the law. Hearings like this prop up a narrative that bad courts are stopping dear leader Donald Trump because some cabal of Democratic judges is out to get him. Wrong. The reality is much simpler. He is breaking the law and doing it a lot, and judges are doing their job.

It is not just me saying that. Trump-appointed judges from across the country have struck down his illegal actions, holding, for instance, that Trump can't punish the AP for its reporting, that his misuse of the Alien Enemies Act is illegal, and that the administration can't withhold billions of appropriated public health funds. Trump judges, hardly a liberal conspiracy.

As it tries to prop up Trump's illegal orders, the MAGA Justice Department is fast destroying its reputation with judges who've have said about DOJ arguments, "bad faith," "shoddy," "an admitted lack of any evidence whatsoever," "deliberate evasion," shocking not only to judges but to the intuitive sense of liberty that Americans far removed from courthouses still hold dear. And the prospect of contempt findings looms.

Fact number two, failing in court, Donald Trump and his allies attack judges and their families. Trump has called judges who ruled against him communists, USA-hating, and monsters. A Republican in Congress put up a wanted poster with judges' faces outside his office. Elon Musk and Laura Loomer have used X to fire up the right wing's flying monkeys about judges, even adding photos of family members in a seemingly coordinated campaign to harass and intimidate.

A test is coming of MAGA Attorney General Bondi. Will she let the Marshals Service investigate these threats and their orchestration? There is plenty of predication to look into conspiracy, aiding and abetting, or RICO enterprise liability. Will she let them?

Which brings me to fact number three. In a 6-week period from March through April, 162 judges received threats to themselves or family members of harassment or violence, 162. A pattern was evident. Many had ruled against Trump and then were targeted. The latest tactic is a campaign to send pizzas to judges or family members' homes using the name of the murdered son of a Federal judge. It is not clear yet who is behind that campaign, but it is not hard to figure out the message. Stop ruling against Trump or else.

These attacks have gotten so bad that the Chief Justice issued a statement and the Judicial Conference formed a Judicial Security and Independence Task Force. Now I would like to see some sign that the threats are being duly investigated. To the extent that this hearing encourages that animus further, it is deeply regrettable.

Chair CRUZ. I thank Senator Whitehouse and now recognize Chairman Schmitt.

OPENING STATEMENT OF HON. ERIC SCHMITT, A U.S. SENATOR FROM THE STATE OF MISSOURI

Chair SCHMITT. Thank you. Thank you, Senator Cruz. As Chairman of the Subcommittee of the Constitution, I am glad that we have convened this hearing.

Universal injunctions effectively didn't happen for the first 200 years of our Constitution, yet they become a fixture in our legal system in the last 20, especially when Donald Trump occupies the White House. The courts can play an important role in reining in an executive branch that is out of control. This is especially important when reining in actions by unelected, unaccountable bureaucrats who act outside of the scope of their congressionally authorized authority.

But what happens when Article III has no limits? As listed in the hearing's title, Alexander Hamilton called the Judiciary the "least dangerous branch" in Federalist 78. And historically, in Federalist 78, historicals was responding to the Anti-Federalist Brutus, who was raising the alarm bell over the seemingly unchecked power of Article III to subvert the will of the people and the rights of citizens.

Hamilton responded that judges will be forced to behave because nothing guarantees that their orders are enacted. Judges can't raise an army. They can't collect taxes or duties. As Hamilton said, the Judiciary must ultimately depend on the aid of the Executive branch to enforce its judgments. To date, the Trump administration has followed every court order, enforced every judgment. It is no one's desire to put Hamilton's theory into practice.

That is why this hearing is so important. We are not a juristocracy. We do not want the Judiciary to subjugate itself. We want to keep it from subjugating others. I agree with Hamilton that there is no liberty if the power of judging is not separated from the legislative and Executive powers. But this runs both ways. There can be no Democratic accountability, no Republican government with an overly activist judiciary that allows over 600 judges to wield limitless power.

One particularly troubling example, district court judges have not been assigned cases randomly or transparently. In March, Chief Justice Boasberg, right here in D.C., has found himself into four major Trump cases, a statistical impossibility. Boasberg took over the Alien Enemies Act and ordered planes to be turned around in the dead of night, despite not being the emergency judge on duty that night. It seems clear that, as chief judge, he has play and he wants to be able to grab cases for himself.

I have had firsthand experience with this non-random case assignment in our Federal appellate court system. When I was attorney general in Missouri, I often found myself litigating in the Eighth Circuit, a circuit of unique makeup. Of the 11 judges in the circuit, 10 had been appointed by Republicans. Yet, the one Democrat appointee, Judge Jane Kelly, found herself hearing nearly every political sensitive case in the circuit. Time after time, case after case, miracle after miracle, for the Democrats, Judge Kelly would be there for nearly every politically sensitive case.

This was not due to the good luck of Judge Kelly. The circuit clerk's office, which assigned cases to appellate panels, was filled with her former clerks and ideological compatriots. In practice, they set the nationwide policy by rigging case assignment.

Another issue is the universal injunction is a judicially created remedy while Congress set up a procedure for group relief under Rule 23. As Solicitor General John Sauer recently argued compel-

lingly, the proper avenue for group relief is under Rule 23 class actions. Rule 23 was designed to ensure a structured and fair approach to broad legal challenges. I am hopeful that the Supreme Court will curb injunctions to restore proper judicial limits and respect the separation of powers. A district court or district judge blocking deportations is as absurd as directing military strategy. This is activism, not judgment, not the rule of law, and it undermines the voters' mandate to secure our borders.

Enough is enough. We must act here in the Senate to fix these issues. Article I isn't alone in this. The Judicial Conference and the Supreme Court must get their houses in order as well. Does our Constitution establish a judiciary that resolves cases or sets policy? In this Committee, do we confirm judges to take the bench or to take the podium? The Founders clearly intended the former. It is time for a reset.

The American people elected President Trump to secure our border and restore our Nation. I look forward to the testimony of the professors, and I urge this Committee to advance reforms that uphold the separation of powers.

Chair CRUZ. Thank you. I now recognize Ranking Member Welch.

OPENING STATEMENT OF HON. PETER WELCH, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator WELCH. Thank you very much.

You know, the concrete issues of a universal injunction or forum shopping are things that we can address, but there is a context that we are all operating in, and this is where I disagree with my colleagues, particularly Senator Cruz and his recitation of what he saw as a judicial rampage. This moment we are in in our country is testing whether the separation of powers, three co-equal branches of government, shall endure. That is really the question.

We have seen an abdication of constitutional responsibility by the Congress. It is appalling. Ceding to a President the ability to impound funds, something that was declared unconstitutional in the Nixon doctrine; ceding to the President tariff authority, which in the Constitution belongs to the policymakers in Congress, just two examples of Congress ceding its constitutional authority. That's done willingly by my colleagues in the House and some in the Senate. We should reassert our authority.

But the second leg of that, the transfer of authority to the Executive, is the rampant attack on the judiciary. And Senator Cruz gave some examples of what he thought was judicial overreach. Each one of those examples, as I see it, was the judges doing their job. They disagreed. And when they disagreed, it was asserted by the President and by the Attorney General that they were monsters, they were renegades, they were out of control. It was an ad hominem attack because judges were doing their jobs.

And I will say we can deal with the forum shopping, which is something the private bar gets involved in. We can deal with universal injunctions. But the all-out assault on judges because they make decisions, which is the job they have to do. And the decision is, has a President exceeded his authority? The decision is, has the

Congress passed a law that deviates from constitutional requirements?

Those are so profoundly important to keep that separation of powers and to keep the competition between the three branches so that we don't have absolute power vested in a single person, and that is the Chief Executive.

So when Senator Cruz, you talk about a judge making this decision about keeping somebody here, it is called due process. I am for due process. When we talk about judges striking down under the international trade agreement, whether the President has authority to set these tariffs, and it is a three-judge decision, one appointed by Trump, one appointed by Obama, one appointed by Reagan, and they say the President didn't have authority, I would say that is the judges doing their jobs.

But what is most profoundly important for the well-being of our country is that the Congress reassert its authority to pass laws to restrict the Executive or to empower the Executive, but not to cede our authority to the Executive ever. And it is our responsibility to do every single thing we can to validate the legitimate exercise of the decisionmaking authority of the judiciary.

I look forward to this hearing and the testimony of the witnesses. Thank you.

Chair CRUZ. Thank you. I would make two brief observations. Number one, it is interesting, as our Democrat colleagues defend these nationwide injunctions, that neither of them made any reference to the fact that the number of nationwide injunctions issued in the first 4 months is greater than the entire 20th century and is greater than all of the nationwide injunctions issued against Bush, Obama, and Biden combined, nor did they address the disturbing fact that of the 40 universal injunctions that have been issued in the last 4 months, 35 of them came from the same five judicial districts.

There is a reason for this. Blue State attorneys general and radical leftist groups are seeking out affirmatively radical judges who they know will impose their own policy preferences. If it were simply, as our Democrat colleagues said, judges following the law, then you wouldn't have to keep going to the same radical judges over and over and over again because judges across the board should do that. But the litigants know exactly who the zealots are that are on the bench, and that is who they are seeking out.

I will also point out that the discussion about the urgency of protecting the safety of judges, listen, I agree. We should protect the safety of every Federal judge, but it is interesting because my Democrat colleagues were utterly silent during 4 years of the Biden administration when you had violent mobs outside the homes of Supreme Court justices, unhappy with the Supreme Court's ruling in *Dobbs*, and the Biden Justice Department refused to enforce Federal law and protect the justices. And my Democrat colleagues were perfectly happy with Supreme Court justices being threatened if they disliked the rulings that were coming from the Supreme Court justices.

Unlike my colleagues, I believe we should protect judges. Regardless of whether I agree with them or not, we should protect their safety. And every time you hear a Democrat Senator talk about

protecting judges from acts of violence, you ought to ask them, why did they not have a word to say about the Biden Justice Department allowing mobs to threaten the families and children of Supreme Court justices night after night after night while Biden's attorney general refused to follow the law?

And with that, I will recognize the Ranking Member of the Full Committee, Senator Durbin.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you, Senator Cruz.

They asked Winston Churchill after World War II how he thought history would treat him and his conduct of the war. He said, "I am not worried about it because I plan on writing that history," which he did.

Today, we see an example of revisionist history from the Chairman, the statement he just made about concern over the safety of Federal judges. I cannot remember a single instance of what he just described, not one, when there were protests and demonstrations before the homes of judges, regardless of who appointed them, Republican or Democrat. Our feeling was they were all entitled to a guarantee of safety to the best of our ability. And that is what I did as Chairman of this Committee, and I believe I spoke for the Democrats in that approach.

The title of this hearing says a lot in full, "The Supposedly 'Least Dangerous Branch': *District Judges v. Trump*." The idea being pushed by my Republican colleagues is not only that the judicial branch and district judges are dangerous, but they are dangerous for the plain and simple reason that some judges have had the audacity to rule against President Trump. When the Chairman from Texas starts talking about the number of times they have been ruling by the court, I have three words for him, flood the zone, flood the zone.

When Steve Bannon was asked, what is the policy, what is the strategy of the new Trump administration? We are going to flood the zone, and they did. More Executive orders issued by this President in the beginning of his Presidency than any President in history, leading to more court challenges than any President in history. It seems pretty logical to me.

By framing the hearing as they have, my Republican colleagues have shown their hand. This hearing is not really about policy or legal issues. Instead, it is about challenging the authority and legitimacy of the judiciary. They are showing their undying loyalty to their leader, the President.

This hearing is merely the latest episode in an ongoing effort by President Trump and his allies to undermine the judiciary and intimidate judges who dare to rule against them. In March, the President demanded the impeachment of a Federal judge simply because he ruled against his administration, calling him quote, and I quote—I want you to hear these words—"a radical left lunatic, a troublemaker, and agitator." In May, President Trump referred to judges who ruled against his administration as "communist radical left judges." Two days ago, the President posted, "If the courts somehow rule against us on tariffs, which is not expected, that

would allow other countries to hold our Nation hostage with their anti-American tariffs that they would use against us. That would mean the economic ruination of the United States of America."

These statements that I have just read are not normal. It is difficult to imagine either President Bush, President Obama, or President Biden using such unhinged, bombastic, and childish language or calling for the impeachment of a judge simply because that judge ruled against his administration. The reason it is difficult is because Obama, Biden never did anything like this. But imagine if they had and how Congressional Republicans would have responded. They would have shouted about it from the rooftops, posted furiously on social media, and the only person they would have considered impeaching would have been the President himself.

But because this President is a Republican, because the President and his allies go after anyone who dares to speak up, because fear of political retribution is now at the core of this MAGA world, my Republican colleagues have been silent as the President has made the statements he has about judges. Instead of rushing to defend the judiciary and our system of government, they are rushing to defend the President.

While my colleagues on the other side may try to make it appear as though decisions of district courts against the President are somehow dangerous, in reality, it is the attacks on the judiciary itself that are dangerous to both the rule of law and to the actual judges themselves. I could go through chapter and verse of Federal judges who have been intimidated physically. In fact, deaths have occurred in the Northern District of Illinois. One of my judges, she is now retired, lost her husband and her mother to a litigant who attacked her at her home. It is serious.

I don't think it is a mere coincidence this spike in violence against judges coincided with increasingly harsh rhetoric against the same judges and the President's personal call for the impeachment of a Federal judge on March 18. Some judges and family members have received threats in the form of hundreds of anonymous pizza deliveries to their home. Pizza deliveries? These deliveries are an effort to demonstrate that those seeking to intimidate a targeted judge know exactly where those judges live.

Nearly a month ago, I sent a letter—a month ago, a letter to the Attorney General Bondi and FBI Director Patel asking them to investigate this effort with the pizza deliveries and other threats against Federal judges and to provide information on steps they are taking to protect those judges and their families. I did not designate just Democratic-appointed judges or Republican-appointed judges, but all judges. Showing the priorities of this administration, I am sorry to say, I have yet to receive a response from either the attorney general or the director of the FBI.

In the meantime, I ask my Republican colleagues to join me. Let us recognize that violence begets violence. Threats of violence, whether from the right or left of the political spectrum, are never, never acceptable. People are welcome to debate the merits of any particular judicial decision, but we cannot condone personal attacks and threats against judges who rule against this administration, and we can't allow partisan politics or the latest outrage from the

President to undermine the judicial branch in our constitutional order. I yield.

Senator BOOKER. Mr. Chairman, would you indulge me for a moment?

Chair CRUZ. We indulge you every moment.

Senator BOOKER. I appreciate that act of generosity.

It is just something you said that I think is actually dangerous and should be addressed, and you are welcome. But when Judge Daniel Anderl was killed in New Jersey, the Republican colleagues in the Senate, their outpouring of support, their outpouring of concern, their willing to work together on a bipartisan bill was extraordinary. It shows the truth of this institution that, despite some of the fiery rhetoric that you were sowing, we are really working in bipartisanship.

Cornyn and Coons, after the incidents you are talking about, got together and actually passed a bill to better protect our Supreme Court justices, many of whom are friends of ours. You know, Gorsuch and I disagree on a lot of stuff. I knew his wife before he did. We studied together at Oxford. This implication that there was silence when there were threats on their people's houses is absolutely absurd. I remember the rhetoric and the comments, the concern from Coons. I actually distinctly remember you, Chairman, more than once condemning those attacks on Republican-appointed jurists.

To say things like that feeds just the partisanship in this institution and feeds the fiery rhetoric, and it is just plain not true. It is just plain not true. And I think you know that, but we can pull from the record from my colleagues in real time, literally days afterwards, condemning it.

There is a lot of substantive things to say here, but to think that the lack of humanity when people's homes are being threatened was not in existence, I think that is unfair and really concerns me that you would say that in the way that you did.

Chair CRUZ. Well, I thank my colleague from New Jersey.

I will note, as John Adams observed, that facts are stubborn things. And it is existing Federal law, 18 USC Section 1507, that makes it a crime to protest at a judge's home. And the law provides, "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than 1 year, or both." That is Federal criminal law.

Night after night after night, angry mobs were outside the Supreme Court justices' homes. And in the entire course of it, the Biden Justice Department prosecuted nobody. We had the attorney general sitting at that table and multiple Republican Senators asked him, why are you not enforcing the law? What they are doing is a crime. And my friend from New Jersey said, "It is a lie to say we, the Democrats, condone this." I would challenge, my

friend, find a single Democrat Senator on this Committee holding the Attorney General to account for not enforcing this law. I was here at those hearings, and I do not recall a single Democrat Senator saying to the Attorney General, you should arrest these people who are violating the law, you should protect the judges.

I agree that there was general language against violence, but not a single Democrat Senator that I ever saw in this Committee was willing to hold Attorney General Merrick Garland to account for flagrantly disregarding the Federal criminal law because the Biden administration agreed with the protesters and I think wanted those justices harassed at their home.

Senator BOOKER. Mr. Chairman, I really appreciate that you have now shifted the accusation you made earlier. Your accusation was that we were silent in the face of protests at Supreme Court justices' homes. Again, we joined together in a bipartisan way, not only to condemn that, but to pass legislation to extend round-the-clock security protection, literally days. It was introduced May 5, passed the Senate in a bipartisan fashion on May 9. So if you are saying that we didn't criticize Merrick Garland——

Chair CRUZ. Did the Biden DOJ arrest a single person under this law?

Senator BOOKER. Sir, you are now changing——

Chair CRUZ. No, that is what I said.

Senator BOOKER [continuing]. The accusation that you made——

Chair CRUZ. That is what I said.

Senator BOOKER. Again, I will pull the record.

Chair CRUZ. Did the Biden DOJ arrest even one?

Senator BOOKER. Again——

Chair CRUZ. The answer is no.

Senator BOOKER. My point to you is the accusation that the Democrats on this Committee do not care about the safety——

Chair CRUZ. All right. So let me ask you this——

Senator BOOKER [continuing]. Of Federal judges——

Chair CRUZ. Should the Biden DOJ——

Senator BOOKER. I did not interrupt you, sir. I would appreciate if you let me finish. I am sick and tired of hearing the kind of heated partisan rhetoric, which is one of the reasons why we have such divisions in this country. The attacks we see from the President of the United States of America trolling and dragging judges through is what we should be talking about that puts people in danger.

I am simply taking issue with the claim that you made at the top that people on the Democratic side of the aisle do not care about the safety and the security of judges and said nothing. You said we were silent after people's houses were protested. That is a patent lie, sir. We were not silent. We took action. We joined in a bipartisan way to protect those judges, as was done in a bipartisan way to protect a New Jersey judge after their horrific attack at their home.

So I see you now trying to shift the debate to whether we talk to an Attorney General. I am simply taking issue with this accusation that somehow we Democrats are so bad because we don't call out threats to our judicial colleagues. And that is wrong. You could change the argument now that you want, but what you said was patently not true and was, in fact, a patent lie.

Chair CRUZ. So I do enjoy the fact that my colleague from New Jersey raises his voice and says it is a patent lie and says he is doing so in defense of lowering the rhetoric. There is some irony to doing those two together.

I'll point out that in the entire course of those remarks, Senator Booker did not dispute the central point I made, which is the Biden Justice Department arrested zero people, prosecuted zero people for violating the criminal law, and every Democrat Senator on this Committee was silent about it. And this was an ongoing pattern for months.

And I would note also that the Senator from New Jersey clutched his pearls about language threatening judges, and yet I do not recall a single Democrat Senator of this Committee saying a word when Chuck Schumer went to the steps of the Supreme Court and threatened the safety of the Supreme Court justices by name, Gorsuch and Kavanaugh, and he said, "You have unleashed the whirlwind, and you will pay the price." And not a single Democrat Senator had a word to say about this. And so their outrage is selective.

And I will give my colleague from New Jersey a chance to just answer a simple yes-no question. Should the Biden Justice Department have enforced the criminal law against protesting at a justice's home, yes or no?

Senator BOOKER. So the rank hypocrisy of Chuck Schumer apologizing the next day and you holding that standard for him and not for your President, who you actually rightfully described when you were running against him in a primary, I would love to run those tapes of how you perfectly talked about the danger of our President and his rhetoric. But now you are failing—in fact blind to the very things you are accusing Chuck Schumer of. I don't think Donald Trump would know an apology if it hit him in the head. Never has said apologizing. So again, you are very, very—sir, very, very deep into the waters of hypocrisy in your criticisms of Chuck Schumer.

Chair CRUZ. So let the record reflect that Spartacus did not answer the question and did not tell us whether the criminal law should be enforced because he knows the answer is yes, and he knows that the Biden Department of Justice was being wildly political and partisan in refusing to enforce the law because they disagreed with the Supreme Court justices' rulings.

I have and also in addition to Senator Durbin, who has given his opening statement, I have a written opening statement from Chairman Grassley. Without objection, that written statement is entered into the record.

[The information appears as a submission for the record.]

Chair CRUZ. And I will now briefly introduce our distinguished witnesses. We have three.

Our first witness is Professor Josh Blackman, who holds the Centennial Chair of Constitutional Law at South Texas College of Law in my hometown of Houston, Texas, where he has been teaching since 2012. And although Professor Blackman was born and grew up in Staten Island, he got to Texas as fast as he could. And both of his daughters are proud native-born Texans, and I commend you for that.

He is one of the country's leading voices on constitutional law. He has testified before Congress. He is a frequent voice in The New York Times, The Wall Street Journal, The Washington Post. He, in 2024, was named the Jurist of the Year from the Texas Review of Law and Politics, an award that is near and dear to my heart since in a previous year I received the same award. And he is a senior editor of The Heritage Guide to the Constitution, Third Edition, and he has authored three books, including An Introduction to Constitutional Law, which became a top five bestseller on Amazon.

Our second witness is Professor Kate Shaw. Professor Shaw is a constitutional law scholar and professor of law at the University of Pennsylvania Carey School of Law. She joined the Penn Carey Law faculty in January 2024 from the Benjamin N. Cardozo School of Law, where she also served as codirector of the Floersheimer Center for Constitutional Democracy. Her scholarship focuses on Executive power, the law of democracy, the Supreme Court, and reproductive rights. She has also taught courses on administrative law and legislation, as well as a seminar on the U.S. Supreme Court.

Before entering academia, Professor Shaw served in the Obama White House Counsel's Office and clerked for U.S. Supreme Court Justice John Paul Stevens and Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit. Her academic writing has appeared in the Harvard Law Review, Columbia Law Review, Georgetown Law Journal, and other journals. She is married to Chris Hayes, a political commentator and host on MSNBC.

And our third witness Chairman Schmitt will introduce. And if you can start the testimony, I have got to run to the floor and vote, and then I will be back.

Chair SCHMITT. Okay. The third witness is Joel Alicea, and he is the inaugural St. Robert Bellarmine professor of law director of the Law School Center for the Constitution and the Catholic Intellectual Tradition. He has also served as a visiting professor at Duke Law School and Notre Dame Law School.

Prior to joining the Catholic Law faculty, Professor Alicea practiced law for several years at the law firm of Cooper and Kirk, where he specialized in constitutional litigation. He previously served as a law clerk for Justice Samuel Alito on the U.S. Supreme Court and for Judge Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit.

Professor Alicea's scholarship has focused on constitutional theory, civil procedure, and constitutional law. He has been involved in the ongoing discussion on nationwide injunctions and the scope of the judicial power, both in the academy and in working with the Trump administration.

And at this point, before you guys give your opening statements, it is the tradition of this Committee to be sworn in, so if you would please stand and raise your right hand.

[Witnesses are sworn in.]

Chair SCHMITT. Thank you. Professor Blackman, we will start with you.

STATEMENT OF JOSH BLACKMAN, PROFESSOR OF LAW AND CENTENNIAL CHAIR OF CONSTITUTIONAL LAW, SOUTH TEXAS COLLEGE OF LAW, HOUSTON, TEXAS

Professor BLACKMAN. Thank you. Chairman Cruz, Chairman Schmitt, Ranking Member Whitehouse, Ranking Member Welch, thank you so much for inviting me to testify. My name is Josh Blackman, and I am the centennial chair of constitutional law at the South Texas College of Law, Houston.

The topic of today's hearing is very timely, "The Supposedly 'Least Dangerous Branch': *District Judges v. Trump*." It is often repeated that we have three coequal branches of government, but this isn't true. In Federalist 78, Hamilton described the judiciary as the least dangerous branch. Unlike Congress, which has the power of the purse, and the President has the power of the sword, the courts have mere judgment, yet it has been deeply ingrained in our consciousness that the courts' foundational role is to balance the powers of the elected branches.

Indeed, Chief Justice Roberts recently boasted that the courts "check the excesses" of Congress and the Executive, but the Chief Justice is incorrect. Indeed, Vice President Vance recently explained that Roberts expressed a "profoundly wrong" sentiment. Or more local to me, Judge Ho in Houston aptly observed, "It is not the role of the judiciary to check the excesses of the other branches any more than it is the judiciary's role to check the excesses of any other American citizen."

The question is, who will check the excesses of the Executive? At least with regard to the lower courts, you all, Congress. The Constitution refers to the Federal district courts as inferior courts, yet far too many lower court judges seem to have a superiority complex. We are witnessing a never-ending onslaught of universal injunctions that make it nearly impossible for the executive branch to function.

So what can be done? We can't look to the courts to check themselves. The long history of judicial supremacy teaches that judges of all stripes, conservative and progressive, seek to defend and entrench their own institution. The answer to any sustainable reform must come from the legislature. To paraphrase Madison in Federalist 51, legislative ambition must counteract judicial ambition.

Yet regrettably, most debates about judicial reform get bogged down in politics. When there is a Republican President, Democrats love the universal injunction. When there is a Democratic President, Republicans love the universal injunction. It is predictable.

Proposals that help only one side of the aisle have a slim chance of enactment. The Federal courts cannot be reformed through unilateral disarmament. Any reform must be bilateral.

I published an article called "Bilateral Judicial Reform" in the Texas A&M Journal of Law and Civil Governance. This was in 2024, before the election. And I got 10 ideas to fix the courts that might appeal to people on both sides of this aisle. I will talk about three of them in my limited time today.

Number one, cases seeking a temporary restraining order can be decided by a single judge, but can only give relief to the named parties and are limited to 7 days. No longer can a single judge issue

a universal TRO that lasts nearly a month without any appellate review.

Second, cases seeking preliminary injunction or equivalent relief against Federal government and State governments are referred to the en banc court, which appoints a randomly drawn three-judge panel with two circuit judges and one district court judge. There is some value in having a multi-member body consider an issue rather than a lone district court judge deciding difficult questions. And rather than having two district and one circuit, I prefer two circuit, one district because these cases tend to focus more on law than on facts.

The third proposal focuses on the appellate process. Chief Justice Roberts recently stated that the appropriate response to disagreement with a judge is the normal—he said, "the normal appellate review process." As things stand now, the Supreme Court has a completely unpredictable and, indeed, arbitrary approach to emergency applications. We may all agree upon that. Congress can make the appellate review process of the Supreme Court "normal" again.

Under my proposal, injunctions of statutes against Federal Government and State governments are automatically stayed. The stay is automatic. It is not discretionary. And if a three-judge panel submits what I call a certificate of division—that is, two judges go one way, another judge goes the other way—the case is appealed to the Supreme Court's mandatory jurisdiction. They can't deny cert. And oral argument is decided on an emergency docket timeline, which Congress would then set.

I think these three measures would have bipartisan appeal, which I hope they do, and would go a long way to addressing the never-ending fights between the President and the judiciary.

Thank you so much, and I welcome all of your questions.

[The prepared statement of Professor Blackman appears as a submission for the record.]

Chair SCHMITT. Thank you. Professor Shaw.

STATEMENT OF KATE SHAW, PROFESSOR OF LAW, UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL, PHILADELPHIA, PENNSYLVANIA

Professor SHAW. Good afternoon, Chairs, Ranking Members, distinguished Members of the Subcommittees. Thank you for the invitation to testify today.

I understand that the purpose of today's hearing is to discuss recent judicial rulings against the Trump administration and to situate those rulings in historical and institutional context. There is no question that the Trump administration has been on a losing streak in Federal court. According to the most recent data compiled by Professor Steve Vladeck, district courts have ruled against the administration in 97 cases to date. That is a large number, but it is a number that is best understood in context.

First, it has to be viewed in the context of the unprecedented volume of executive action we have seen from this administration. As of May 24, the second Trump administration had issued 157 Executive orders. By comparison, the Biden administration issued 162, nearly the same number, over the course of 4 years. The first

Trump administration issued 220 over 4 years. It is not surprising that this much more executive action than previous administrations has drawn more challenges.

The second thing to understand is that these rulings have come from judges who sit in district courts across the country and who were appointed by Presidents of both parties. Twenty-five district courts in 10 circuits, and 73 judges appointed by seven Presidents have ruled against this administration.

That leads me to my third point. These are not about policy disagreements. The reason there has been such wide and cross ideological consensus over the impermissibility of the administration's actions is because the actions have been plainly unlawful, and that has been clear to jurists of all stripes. Again and again, the administration has acted in violation of both the constitutionally required process for lawmaking—one that gives Congress primacy—and the rights the Constitution commands government to respect.

To be sure, some of these preliminary rulings against the government will be, and some have been, reversed or stayed on appeal. But it is telling that there are so many lower court losses that the administration has not even bothered to challenge. That is true in the birthright citizenship case currently pending in the Supreme Court in which the lower courts have unanimously ruled against the administration. But the administration has not challenged those rulings on the merits. Instead, it has asked the court to use the case as an opportunity to restrict lower courts' ability to provide nationwide relief and to do that in a context in which the administration is not even defending the lawfulness of its own Executive order.

Rather than focus on the appellate process or on remedying the legal defects that have been revealed by litigation, this administration and many supporters have suggested that the problem is district judges. The separation of powers is dynamic, it is not static, and there is definitely room for debate about the proper scope of both Presidential and judicial power. At different moments in our history, different institutions and actors have sought to significantly increase their authority, sometimes in ways that could not be squared with the basic design of a constitution committed to limits on any single entity's power.

At this moment, the entity engaging in overreach is the executive branch. This administration has been marked by a breathtaking degree of Presidential unilateralism that is flatly inconsistent with statutes, the Constitution, and over two centuries of practice. For that reason, it would be profoundly misguided to seek now to curtail courts' authority by eliminating or seriously limiting their ability to issue nationwide injunctions.

It is true that the use of such injunctions has increased in recent decades, and it is true that injunctions can be abused. But at this moment, courts are the only branch of government doing meaningful work to check the Executive, protecting basic constitutional values, congressional prerogatives, and our liberty which the separation of powers is designed to safeguard.

If Congress does wish to wade into defending the separation of powers, I would suggest a couple of options. First, it could give the President some of the authorities he has tried to assert. If Congress

agrees that the Federal Government should not protect Americans from abusive financial products and services, it can pass legislation doing away with the Consumer Financial Protection Bureau. If it wants to give DOGE access to Americans' sensitive personal information, it can repeal or amend the Privacy Act. If it wants the President to be able to impose sweeping tariffs based on his determinations of trade deficits, it can grant that statutory authority. As far as I know, it hasn't done any of that.

Second, it could turn its attention to judicial security. Threats to the physical safety of Federal judges have spiked in the last 4 months and so have threats to judicial independence. There is a pending proposal that would move the U.S. Marshals Service from the executive branch to the judiciary in order to ensure that marshals are able to focus effectively on protecting Federal judges and executing Federal court orders. That would both comport with the original structure of the Marshals Service and would align the security practices of the judicial branch with those of Congress, right, each branch protected by its own security apparatus, not subject to direct control by another branch.

The Federal courts are an important part of our constitutional scheme, and at their best, they can serve both to make rights meaningful and to enforce and facilitate core commitments to popular sovereignty and self-rule. They have not always done that, and again, a healthy democracy allows debates about the proper scope of judicial authority.

But many attacks on the judiciary do not appear to be animated by a desire for good-faith debates about the limits of constitutional authority. They seem instead of a piece with other efforts to neutralize any actor or institution that would seek to limit this President's power.

Thank you again for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Professor Shaw appears as a submission for the record.]

Chair SCHMITT. Thank you, Professor Shaw.

Professor Alicea.

STATEMENT OF J. JOEL ALICEA, ST. ROBERT BELLARMINE PROFESSOR OF LAW, DIRECTOR, CENTER FOR THE CONSTITUTION AND THE CATHOLIC INTELLECTUAL TRADITION, THE CATHOLIC UNIVERSITY OF AMERICA, COLUMBUS SCHOOL OF LAW, WASHINGTON, DC

Professor ALICEA. Mr. Chairman, Ranking Member, Members of the Subcommittee, thank you for the invitation to testify today. It is an honor to speak with you.

While the topic of today's hearing touches on many issues, my understanding is that I have been invited to address the practice of universal injunctions in particular, and that will be the focus of my testimony.

An injunction is an order from a court directing an entity like a government official or a government agency to do something or refrain from doing something. Courts have been issuing injunctions for centuries, and when injunctions only grant relief to a party to the case, they are generally not controversial.

What makes universal injunctions controversial is that they purport to give relief to entities that were never made parties to the case. In the birthright citizenship cases now before the court, for example, a district court judge in Seattle issued an injunction forbidding the enforcement or implementation of the President's Executive order on a nationwide basis. That means that the Executive order cannot be enforced against anyone, even though the only parties challenging the order were four States and two individuals.

Now, universal injunctions are damaging to our political and legal system for many reasons. The effect of a universal injunction is that the policies of the elected President are subject to what is effectively a veto by unelected district court judges. Because it only takes a single judge to issue a universal injunction, the President's opponents only have to win one lawsuit to stop the President, whereas the President has to win every single lawsuit if he wants to implement his challenged policies.

Because they place unelected district court judges in charge of national policy, universal injunctions are a problem for Presidents of both parties. This is not a partisan issue. But universal injunctions have been used at an astonishing rate against President Trump in particular, which is why the issue has become so prominent over the last few months. For example, during the month of February alone, more universal injunctions were issued against President Trump's policies than in the first 3 years of the Biden administration.

The result has been an atmosphere of continuous emergency throughout the first few months of President Trump's second term. It seems as if every time the President issues a new policy, it is almost immediately followed by a district court issuing a universal injunction.

Since the President cannot allow a single judge to dictate national policy, the administration has had to seek emergency intervention by a court of appeals, and whichever party loses in the court of appeals then seeks emergency intervention by the Supreme Court. The court has therefore been inundated with almost nonstop emergency litigation, partly because of the practice of universal injunctions. The seemingly unending stream of emergency petitions has forced the court to make quick decisions on controversial and contested legal questions, often without the benefit of oral argument, adequate briefing, or different views expressed by the lower courts.

This is not how our constitutional system was designed to work. Article III, Section 1 of the Constitution vests the judicial power of the United States in the Federal courts. As understood at the founding, the core meaning of the judicial power was the authority to resolve disputes between parties according to law. This party-centric understanding of judicial power explains why Article III, Section 2 of the Constitution extends the judicial power only to cases or controversies, that is, disputes between parties. And that is why the Supreme Court has repeatedly held that parties do not have standing to seek relief beyond what is necessary to remedy the alleged harm to the plaintiff.

Prior to 1789, injunctions were understood to be limited. An injunction could only provide whatever relief was necessary to re-

dress a plaintiff's asserted injury. The same understanding of injunctions prevailed until the mid–20th century. Universal injunctions, it bears emphasizing, are a 20th century development, and the routine use against government action only began within the last decade. Thus, Federal courts lack the power to grant equitable remedies that extend beyond what is necessary to address the plaintiff's alleged harm, which is precisely what universal injunctions purport to do.

The American people never gave judges the power to issue universal injunctions. Judges have seized that power for themselves, and only quite recently in our history. District court judges are thus exercising power for which they have no constitutional warrant.

While universal injunctions have damaged the Presidency and the Supreme Court, they have done the most damage to democratic governance by illegitimately thwarting the will of the people's elected representatives. As Justice Elena Kagan once observed, "It just can't be right that one district judge can stop a nationwide policy in its tracks and leave it stopped for the years that it takes to go through the normal process."

Courts play a vital role in our constitutional system. They resolve disputes between parties according to law, and in the process of doing so, they say what the law is, as Chief Justice John Marshall said in *Marbury v. Madison*. None of that is at issue in the controversy over universal injunctions. What is at issue is whether courts can step beyond their limited role of resolving legal disagreements between parties and instead resolve policy disagreements for the whole Nation. The answer to that question should be obvious. No.

[The prepared statement of Professor Alicea appears as a submission for the record.]

Chair CRUZ. Thank you to each of the witnesses for your testimony.

Professor Blackman, prior to 1963, had any Federal court issued a nationwide injunction blocking Federal law or executive policy?

Professor BLACKMAN. I am not aware of any.

Chair CRUZ. Would you agree that from the founding through the 20th century, the Federal judiciary consistently understood its powers to be limited to the parties before the court?

Professor BLACKMAN. Yes.

Chair CRUZ. And would you agree that the widespread use of universal or nationwide injunctions, especially against Presidential actions, is a recent development emerging in the last decade?

Professor BLACKMAN. Yes.

Chair CRUZ. That is important history because what we are seeing now is not normal, and we have over two centuries of history when this didn't happen. It is instead a novel and dangerous concentration of judicial power. When a single district judge issues a nationwide injunction, are they acting as a constitutional judge or as a de facto national policymaker?

Professor BLACKMAN. It is effectively a veto on the executive branch.

Chair CRUZ. We have seen district judges block President Trump's policies on immigration, energy, birthright citizenship, and

even federal hiring and firing, all prior to any appellate review, all without any input from Congress, all from one single judge.

Let me offer an analogy. Suppose the Federal Government approves a plan to cut down trees in a national forest to make way for a pipeline. One person who occasionally camps in that forest files a lawsuit. The judge not only grants relief to that individual, but certifies a putative class action on behalf of all campers nationwide and issues an order blocking any tree cutting in any forest used by any member of the putative class across all 50 States. Professor Blackman, is that consistent with the Constitution's design for judicial relief?

Professor BLACKMAN. No, it is not.

Chair CRUZ. Or is that rather a recipe for nationwide paralysis based on a single courtroom?

Professor BLACKMAN. Yes.

Chair CRUZ. Would you also agree that the proper constitutional remedy is to address the plaintiff's actual injury, not to give one judge the power to halt activity unrelated to the case at hand?

Professor BLACKMAN. Article III requires that.

Chair CRUZ. And how does Article III require that?

Professor BLACKMAN. Article III speaks of cases and controversies. Specific people have specific injuries. You cannot grant relief to broad classes who don't have an asserted injury before the court.

Chair CRUZ. And if broader relief is truly necessary, wouldn't that be better handled by class certification by the appellate courts or by Congress, not a lone district judge rewriting national policy?

Professor BLACKMAN. Absolutely.

Chair CRUZ. Can you explain how this pattern of nationwide relief not only intrudes on the President's Article II powers but also undermines Congress' own lawmaking authority?

Professor BLACKMAN. What ends up happening is you file many lawsuits in many districts seeking parallel relief, and it only takes one judge to grant the universal injunction. And once a judge grants the injunction, it is off to the races. Unless the ruling stayed, the executive branch must immediately halt what it is doing. And this has really changed the way the executive branch and the courts have operated, as you said, over the past decade. And I think the time is ripe to actually address this issue and figure a way to stop this sort of insanity. We can't leave it to the Supreme Court to figure everything out.

Chair CRUZ. And Professor Blackman, your testimony outlines structural reforms that Congress could enact to restore balance. Can you explain how requiring a three-judge panel drawn from both district and circuit judges would deter judicial overreach and restore legitimacy to preliminary relief?

Professor BLACKMAN. Well, this is how Congress ran things for much of the 20th century. They stopped in the 1960's and 1970's. The benefit of a three-judge panel is you have diverse voices. In fact, even on this dais, you don't always agree with each other. When you talk to each other, you find perhaps the closer truth. A single judge acting by himself or herself can often be like a god. There is no limitation of what they can do. But the benefit is, if you have two circuit and one district, you are basically bypassing this next-level review. Have the initial panel of three judges and

have managed review by the Supreme Court. We need to cut out this race to the court of appeals, this race to the Supreme Court. Let's compress the process and get through it quickly enough so these issues of national significance resolve fairly.

Chair CRUZ. And by the way, if the characterization of these nationwide injunctions by my Democrat colleagues was accurate, if this was simply a result of, in their view, Trump's repeated lawless activities, one would assume a three-judge panel would find the same ruling on the merits as a particular lone district judge. Is that correct?

Professor BLACKMAN. In theory, but if drawn randomly, I think it is less likely. Random draws of three-judge panels would be a very good change to see how things would work out.

Chair CRUZ. Well, and much like Sherlock Holmes and the lesson he derived from the "dog that did not bark," in this case, when we hear our Democrat colleagues talking about this is simply enforcing the law, the dog that isn't barking is why do they keep going to the same handful of radical judges in bright blue districts, and why will every Democrat on this panel oppose any effort to require a three-judge panel for a nationwide injunction? And the answer is they know fully well that a fair panel would reject the vast majority of these claims. And at the end of the day, I think too many Democrat members of this body want to frustrate the will of the voters who reelected President Trump and elected a Republican Senate and a Republican House, and they are perfectly happy for lone judges to impose their own policy preferences rather than respect the Democratic will of the voters.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you. It strikes me that what we have here is a team that has taken the field and engaged in unprecedented numbers of fouls and unprecedentedly flagrant fouls. And when the refs blow the whistle on the unprecedented number of fouls, the partisans of the team committing the fouls call out the referees for the unprecedented number of whistles that they blow.

To try to level set this, let me ask, if you can do a yes or no answer, let's try to go right down the panel, yes or no. Is it appropriate to call judges USA-hating monsters who want our country to go to hell?

Professor BLACKMAN. No.

Senator WHITEHOUSE. No.

Professor SHAW. No, Senator.

Professor ALICEA. In general, no, Senator.

Senator WHITEHOUSE. And is it appropriate to call judges lunatics who do not care even a little bit and could very well lead to the destruction of our country?

Professor BLACKMAN. I don't think so.

Professor SHAW. No.

Professor ALICEA. No.

Senator WHITEHOUSE. And is it appropriate to post pictures of judges' children with the intent to incite harassment and threats?

Professor BLACKMAN. No.

Professor SHAW. No.

Professor ALICEA. No.

Senator WHITEHOUSE. Okay, good. We are off to a level set. I will take that.

Professor Alicea, when you were installed in your chair, the announcement was that the chair was made possible through the generosity of Leonard Leo, trustee of both the Marble Freedom Trust and Catholic University. Is that accurate? Is that who funded your chair?

Professor ALICEA. My understanding is that Leonard Leo, through the Marble Freedom Trust, directed funds that funded the chair. I think that is accurate.

Senator WHITEHOUSE. And with respect to your chair, Mr. Blackman, $1 million was given to fund it through an anonymizing organization called DonorsTrust, which has been called the ATM of the far right. Do you know who was behind that DonorsTrust laundered donation?

Professor BLACKMAN. I appreciate the question, Senator. I would direct all these to my college to answer.

Senator WHITEHOUSE. I am sorry, first of all, your mic is not on.

Professor BLACKMAN. No, I appreciate the question, Senator. I would direct all these questions about this to my college. Thank you.

Senator WHITEHOUSE. My question is actually to you, and it is whether you know. Do you know who was behind that?

Professor BLACKMAN. I appreciate the question. Anonymous gifts are as they are, and I appreciate all those questions directed to my college.

Senator WHITEHOUSE. Your college can't answer what you know. This is a question to you about what you know. This is a Josh Blackman question.

Professor BLACKMAN. Thank you, Senator.

Senator WHITEHOUSE. Do you know who funded your chair?

Professor BLACKMAN. I have answered the question.

Senator WHITEHOUSE. Yes or no?

Professor BLACKMAN. Thank you, Senator.

Senator WHITEHOUSE. You can't say this. Do you realize that if you were an expert witness in a judicial proceeding, I would be entitled to know who was funding you because it goes to bias and conflict, correct? That is basic sort of hornbook trial practice, right?

Professor BLACKMAN. Fair enough, Senator. I——

Senator WHITEHOUSE. I am right about that. You will agree.

Professor BLACKMAN. We were invited to testify about nationwide injunctions and the like. This is not something I was prepared to testify about, so that is my answer for today.

Senator WHITEHOUSE. Okay. Well, at least we know who funded Professor Alicea, and you won't even answer what you know.

Let me turn to Professor Shaw. Let's just say that this activity today is designed to whip up more animus against courts and that it adds to the atmosphere of threats that the court is now experiencing. I think we are up to, is it 162 threats to judges, which is pretty impressive. And a lot of this has the appearance, at least to me, of looking like it was orchestrated, looking like it was instigated, looking like there are folks behind it.

[Poster is displayed.]

So, presumably, the Marshals Service should be not just protecting the judges and their family members, but also investigating the sources of the threats. Can you tell us what some warning signs would be that the Marshals Service has been directed, perhaps by the Attorney General or perhaps by some other senior official in the Department of Justice, to not do proper investigations and particularly not look into orchestration or any effort to gin up these threats?

Professor SHAW. Senator, I have no information. It strikes me that a non-response to your queries or queries from other Members of Congress to the Marshals Service or to the Department of Justice are concerning. There should be an active dialog between the branches about something as serious as the security of the third branch.

And I guess I would just echo what Senator Booker was saying earlier. I mean, there have been two relatively recent periods when bipartisan legislation was passed to improve judicial security after the tragic murder of Judge Salas' son and also after the attempted attack on Justice Kavanaugh. Judicial security measures on a bipartisan basis quickly passed Congress, and I would hope that this is a moment in which broad agreement could be reached that it is necessary to do something similar.

Senator WHITEHOUSE. And if it appeared that those were part of a larger plan or conspiracy, it would be appropriate for law enforcement to look into the question of whether there was a larger plan or conspiracy, correct?

Professor SHAW. Absolutely.

Senator WHITEHOUSE. Thank you.

Chair CRUZ. I would note that Senator Whitehouse asked two of the three witnesses about private donations given to their respective law schools but somehow omitted Professor Shaw. And I guess I would ask of Professor Shaw, are you aware of what's been publicly reported in disclosures that your employer, the University of Pennsylvania, from 2013 to 2019 received from communist China $67,618,610? Have you seen those public reports?

Professor SHAW. I am sorry, Senator, I have not.

Chair CRUZ. Well, they are publicly reported and $67 million from communist China. If we are going to just clarify the record, let's clarify the record across the board.

Professor SHAW. If I may——

Senator WHITEHOUSE. The record——

Professor SHAW [continuing]. I actually don't hold an endowed chair, so I—there was no—I don't have an endowed chair personally, so I don't think I was being singled out for any reason but that I don't——

Chair CRUZ. But you do work for Penn?

Professor SHAW [continuing]. Have one. I do work for Penn, yes.

Chair CRUZ. Chairman Schmitt.

Chair SCHMITT. Thank you. I suppose to further the analogy that Senator Whitehouse gave of reffing a game, I don't think anybody has a problem on this side of the aisle with a ref calling balls and strikes or calling a foul. The problem is, what if the ref's daughter hired the coach? What if the ref has money on the game? What if people start to question the legitimacy of the ref in the game? We

all know what happens. People don't watch it anymore. Vegas takes the game off the board.

So it gets to sort of this question of, as I referenced in my opening statement with Hamilton, the reason why it is supposed to be, you know, the least dangerous branch is it relies on the other two branches for enforcement. And the Article III branch should be very well aware that if they lose legitimacy, they are cooked. And that is why we are having the hearing, because people are questioning—how does Judge Boasberg—and I would actually ask you, Professor Blackman. I will pose this as a question. How in the world does Judge Boasberg get a case when he is not the emergency assignment judge, he is on vacation in the middle of the night? How can that happen?

Professor BLACKMAN. I don't know. And perhaps even more significant, if you read the transcript of the case, he basically told the plaintiffs to change their case. They brought it one way, he said, no, here, plead it this way. Okay, good. Now, I am going to certify class and issue a ruling and go tell the plaintiffs—he basically litigated the case on behalf of the parties. This wasn't merely a passive bystander. He was an active participant.

Chair SCHMITT. It is a statistic impossibility. And I want to sort of—I referenced what had been going on in the Eighth Circuit. Ten of the 11 appellate judges in the Eighth Circuit appointed by Republicans. Amazingly, Judge Kelly ends up on all the politically sensitive cases on a panel. It is not possible, except for the clerks there in that office or the people that work for the clerk's office are populated by her former clerks. So these are the kinds of things that this isn't just a new phenomenon. This is a concern about activism on the bench that has existed for a long time. It is just now on steroids.

So you talked briefly, and I mentioned it too, sort of Rule 23 as a more viable option for this, limiting the orders of the parties, the rulings of the parties before the court as a case in controversy. Those are ways to address this. Are there any other structural suggestions that you have? And I also want to pose this to Professor Alicea as well.

Professor BLACKMAN. Sure. I think one urgent need is to think about automatic stays. When you have district judges granting universal injunctions and they don't stay their rulings, there is this frantic race to the court of appeals and to the Supreme Court. And the executive branch is not capable of actually changing policy on the fly, and that gives rise to these attempted contempt proceedings. I would think about if a universal injunction is granted or a nationwide class is granted, stay their ruling for 24 hours, 48 hours, some limited period to at least take an appeal to the appellate court and don't let the judge who just ruled against you decide whether an appeal should be taken. I think the automatic stay would go a long way to addressing these issues.

Chair SCHMITT. Professor Alicea?

Professor ALICEA. I think beyond Rule 23 and the enforcement of Rule 23, it is important to address the scope of injunctions not just through the non-APA route but also through the administrative procedure route under Section 706. So I think that to the extent that we are going to really address the problem overall, you can't

just address universal injunctions that are done outside of the context of administrative action, but also through the process that the APA sets up for challenging agency action.

Chair SCHMITT. Thank you. Professor Blackman, you recently wrote an article in May of this year where you state the District of Maryland's standing order, that judge that automatically blocked deportations upon filing a habeas petition without merit review, is pretty clearly designed to thwart the Trump administration's immigration policies. Could you explain that?

Professor BLACKMAN. Yes, this is unusual. So the District Court of Maryland issued what is called a standing order, which is basically an order that applies in all cases. And it says, by virtue of filing a habeas petition, a grant of stay is automatically issued.

The Supreme Court has said there is a four-factor balancing act to decide whether a stay must be granted. This is automatic. And if you actually read this seriously, it is a permanent handcuff on the President's authority to deport people.

The judge actually walked it back about a week ago. They sort of modified it. Maybe the Judicial Conference just got wind of this. But I think there is still an attempt to limit the Executive power in ways that have not been done before.

Chair SCHMITT. And it was issued to the government, I think it was writ large, right? I mean——

Professor BLACKMAN. Yes.

Chair SCHMITT [continuing]. This is very unusual.

Professor BLACKMAN. Right. It wasn't notice given in each case. It was by virtue of posting on a website. This rule applies universally. There is actually a rule that says any ordinance you put on each ECF docket, it can't be done globally.

Chair SCHMITT. And I think one of the points of this hearing, the Supreme Court has a case in front of it where it has an opportunity to rein this in. And I think the Chief Justice is very keen to understand the perception of the court. It seems to be a good opportunity, I think, probably for the Supreme Court to finally weigh in here. Thank you.

Chair SCHMITT. Senator Welch.

Senator WELCH. Just a couple of points I want to make. Number one, the effort to get universal injunctions has been pursued by litigants, including some of the attorneys general who serve on this Committee. I know you did as attorney general, sought several universal injunctions.

Chair SCHMITT. Since you referenced it——

Senator WELCH. Yes.

Chair SCHMITT [continuing]. The vast censorship enterprise of the Biden administration that a court declared was perhaps the biggest offense to the First Amendment in the history of the country where there were named parties that were specifically enjoined, you mean that case? Yes.

Senator WELCH. I do. My point here is that if there is an opportunity out there for a litigant, whether it is a lawyer trying to get the judge that he or she thinks is going to be the most favorable or an Attorney General trying to get the most relief for something that he or she believes in, they will do it. So it is up to us if we

think that process should be adjusted to change it. But it is not a Republican-Democratic deal. I mean, it is what litigants do.

The second thing is, Professor Blackman, you mentioned how some of these universal injunctions inhibit the authority of the Executive, right? What is the problem with that? I mean, what is so great about the Executive having unlimited authority?

Professor BLACKMAN. Well, I will take the Alien Enemies Act particularly. This is a statute that has been around for 200 years. It has been enforced in various times. And historically, it has been a very deferential statute. The courts haven't scrutinized when it should be enforced, and they haven't told plaintiffs to turn around. So I think we are seeing not only aggressive use of the universal injunction but also intrusions upon the Executive authority.

Senator WELCH. All right. So I get that. And let me just be clear. I disagree with you. And I disagree with the Executive invoking what I regard as a very discredited law and using it to deny due process. So I am on the side of pushing back against executive authority, so I don't see that as a big problem.

Professor Shaw, one of the things people here are talking about is the class action. And here is my question with it, and I want you to address this. I had a small-town law firm, and I would have people who walk in, and every once in a while, they had a hopeless case that we would take, and we would get them relief. And if I had to do that in a four-person law firm and certify a class action, I couldn't have taken that case.

So this so-called remedy of using the class action means that those Vermonters or those folks in Washington State or wherever who go into a lawyer's office to seek relief, and that lawyer's willing to take the case, what are the burdens on that law firm if they have to certify it as a class?

Professor SHAW. Yes. I mean, it seems to me that—let's take maybe the birthright citizenship example—arguments that challenges can be maintained against this Executive order, but they have to be done doing the class action—using the class action device, I'm not sure if those are being made in good faith. Rule 23 of the Federal Rules of Civil Procedure has relatively demanding requirements. The Supreme Court has ratcheted up those requirements in a series of cases in the 2010's. The plaintiffs have to be similarly situated in terms of their injury and the kinds of relief that they are seeking.

And I—you know, the Solicitor General in the Supreme Court a couple of weeks ago didn't disclaim the likelihood that they would be back before the Supreme Court saying, well, you shouldn't even be able to certify a class with respect to this Executive order. So it feels to me like a little bit of a "heads we win, tails you lose." You can try a class action, and we will marshal different kinds of arguments against you doing that.

But it is not as though it is very easy to satisfy the requirements of Rule 23. And I think that shifting from these injunctions to a pure Rule 23-based regime would disadvantage those unable to secure representation to who don't satisfy the requirements of class membership and would mean no relief from government unlawful conduct.

Senator WELCH. Yes. You know, and that is one of the things that is so important, hopefully, to all of us is access to the courts for an everyday person in Missouri, Texas, or whatever. So you get some lawyers who are just willing to do it because it is a neighbor, it is a friend, it is a class they believe in. I want them to be able to act and bring that case to court and not have to go through the incredible expense.

On the question of universal injunctions, I mean, are there some suggestions you have or forum shopping that you have that would expedite or address what you perceive to be some legitimate problems that aren't siding with the partisan divide on this question?

Professor SHAW. Thank you for that question, Senator. I do think that that single-judge divisions, which allow plaintiffs to, with absolute certainty, ensure that they will receive a particular judge when they file in a particular division of a district, are an enormous problem, right? That forum shopping is not exclusive to these single-judge divisions, but it is the most serious kind of forum shopping.

And I should say, as of I think right now, none of the orders against the Trump administration have issued from judges who sit in single-judge divisions, unlike some of the orders issued against the Biden administration. But I do think that the Judicial Conference has already endorsed a proposal that would essentially eliminate these single-judge divisions. I think that is something that we should all be able to get behind.

Senator WELCH. Well, you know, I would be willing to work with my colleagues on some of these practical questions and practical answers where we strip out whether we agree or disagree with the particular decision that has been made by the court. Thank you. Thank you all.

Chair CRUZ. Professor Shaw, you said Congress had set high standards in Rule 23 for certifying class actions. Why would we have set high standards for class actions?

Professor SHAW. So to Rule—I don't think I said that, sir, just that the Rule 23 standards are relatively demanding that the court has ratcheted up the difficulty of satisfying them.

Chair CRUZ. But why would we set demanding standards for class actions?

Professor SHAW. I'm not sure I'm—you know, the Rules Committee produces the rules, so I am not quite sure——

Chair CRUZ. But Congress adopts them.

Professor SHAW. Yes. Yes. So, I mean, you tell me, sir.

Chair CRUZ. Well, there is a reason we have high standards for class actions because it should be difficult to certify a nationwide class. And what we are seeing is single judges ignoring the Federal rules of civil procedure, ignoring the rules Congress has set out for class certification and saying, I am just going to issue an injunction to the whole damn country, and it doesn't matter if it meets even the bare thresholds of the Federal rules.

Senator KENNEDY. Would any of you advise a client to defy a Federal court order?

Professor BLACKMAN. No.

Senator KENNEDY. None of you would? How about you, Professor?

Professor SHAW. I mean, under most circumstances, we follow the government, and private parties follow court orders. I suppose it's not—I would not rule out ever the possibility that a sufficiently egregious order, there should be some consideration of whether there is a way——

Senator KENNEDY. So in some cases——

Professor SHAW [continuing]. I think it's a qualified answer, yes.

Senator KENNEDY. In some cases, you would?

Professor SHAW. In an extremely narrow band of cases, I think it would be considered, yes.

Senator KENNEDY. Okay. Do any of you think that nationwide or universal injunctions are not being abused?

Professor SHAW. I'm not sure what the—if I may, Senator, I'm not sure what the time horizon of the question is. I don't think that—there could be good-faith disagreements about the correctness of some of them, but I have not seen——

Senator KENNEDY. I understand——

Professor SHAW [continuing]. In the last 4 months, abuse, no.

Senator KENNEDY. I have read your stuff, and I have read your writings. I don't want to get bogged down with this, but I have little respect for your opinion because I have read your stuff. When someone is in the White House that you agree with and someone gets a universal injunction against him, you don't like universal injunctions. You called them judges acting like they are politicians in robes and judges looking like crass political actors.

But now that President Trump's in the White House, who you dislike, you think that universal injunctions taste like pumpkin pie. So I have to discount what you say because I think you act on your political beliefs, and I worry that that is what you are teaching your kids. So I will leave you out of that.

Do you think nationwide injunctions are being abused?

Professor ALICEA. Certainly, Senator, I think that is——

Senator KENNEDY. They are being abused by both sides, aren't they?

Professor ALICEA. Yes, Senator.

Senator KENNEDY. Both Republicans and Democrats are forum shopping, aren't they?

[Points at witness.]

Professor BLACKMAN. Certainly.

Senator KENNEDY. Professor, do you disagree with that?

Professor BLACKMAN. I think both sides are abusing them. I agree.

Senator KENNEDY. Okay. Both sides. There are no clean hands here.

Now, your suggestion is that when a Federal judge issues a nationwide injunction, there should be an automatic stay and an expedited right of appeal. Is that right?

Professor BLACKMAN. Yes, sir.

Senator KENNEDY. Do you disagree with that?

Professor ALICEA. I haven't given enough thought to have a position on it, Senator.

[Points at witness.]

Senator KENNEDY. I suspect, Professor, your answer will be it depends on who is President.

Professor SHAW. No, Senator.

Senator KENNEDY. Let me ask you about this. What if we had a rule—I was reading an article the other day—I am not suggesting it, I just want your opinions—that said if a President, any President, issues an Executive order, let's say, that clearly violates settled Supreme Court precedent, that a Federal judge can't issue a nationwide injunction. For example, for example, if a President issued an order that said no one in America has right to counsel any longer, included but not limited to in a felony case, having the government pay for your lawyer if you can't afford it. That clearly violates settled *Gideon v. Wainwright*. In that case, a judge has no authority—or does have authority to issue a nationwide injunction. But in a case where the law is unclear, a judge should refrain from that. Now, obviously, we would have to trust our judges, but we are supposed to be able to trust them anyway. What do you think about that?

Professor ALICEA. I don't agree with that, Senator, because I think universal injunctions transgress the limitations under Article III even if the underlying merits are clear.

Senator KENNEDY. I happen to agree with you. I don't think there is any basis under Article III, under Supreme Court precedent, under the English common law for nationwide injunctions. I think politicians have helped judges, and many judges are politicians, to just make it up. And many of them are like Professor Shaw here. If they like the President, they are against nationwide injunctions. If they don't like the President, they are for them.

Professor, let me ask you this while I have you. On April 22, 2024, you said there are some members of the Supreme Court that are evil. Which justices were you talking about?

Professor SHAW. I will take it your word, Senator. I don't recall using that word but——

Senator KENNEDY. All right. Here is what you said. You were talking about the majority opinion in *Muldrow v. City of St. Louis*. You said, "Justice Kagan, I mean, will she be able to control the opinion's future distortion by her evil colleagues? Probably not." Who were you talking about?

Professor SHAW. Sir, I am very skeptical. There's a—if it was a transcription, it was probably a transcription error. I do not think I said evil.

Senator KENNEDY. No, you said it. Why don't you own up to it? You call some members of the Supreme Court evil. Now, which ones do you think are evil?

Professor SHAW. I would have to refresh my recollection. I have been very critical——

Senator KENNEDY. You are embarrassed——

Professor SHAW [continuing]. Of some members of the Supreme Court.

Senator KENNEDY [continuing]. That you made that statement, aren't you?

Professor SHAW. I—I'm——

Senator KENNEDY. You are an officer of the court.

Professor SHAW. Senator, it doesn't sound like something that I would say.

Senator KENNEDY. You know what I am embarrassed at? That you are teaching our kids.

Professor SHAW. I don't refer to Supreme Court justices as evil——

Senator KENNEDY. You did right here——

Professor SHAW [continuing]. In the classroom, sir.

Senator KENNEDY [continuing]. On your podcast April 22, 2024——

Professor SHAW. Okay. Well——

Senator KENNEDY [continuing]. Big as Dallas. And you are an officer of the court, and you are here advising us to be respectful of Federal judges. And you say they are evil members of the U.S. Supreme Court. Gag me with a spoon. You are part the problem in all of this.

Chair CRUZ. Thank you, Senator Kennedy.

Senator DURBIN.

Senator DURBIN. So I am going to give the panel members an opportunity to respond to a question posed by Justice Sotomayor during the oral arguments on the birthright citizenship bill. And she said, imagine a new—I am paraphrasing. Imagine a new President takes office and decides, because of the epidemic of gun violence in our country, to issue an Executive order announcing that he will deploy the military to seize the guns of every gun owner across the country. That Executive order would be swiftly challenged in a Federal district court or more likely in several district courts. Should a district court be allowed to issue a nationwide injunction to at least temporarily prevent the enforcement of that Executive order? I would like each of you to respond. Professor Blackman?

Professor BLACKMAN. I actually addressed that point in a blog post. We actually have history of someone in this country disarming everyone. His name was General Gage, and that was not fought with Rule 23.

Senator DURBIN. So your answer?

Professor BLACKMAN. I don't—if the President can't take everyone's gun in this country, I don't think the remedy would be in the courts.

Senator DURBIN. Professor Shaw?

Professor SHAW. Yes. I mean, I think that whatever the constitutional right is, whether, you know, it's a Second Amendment, a First Amendment, a due process right, if a President tries to do something that is in clear violation of settled law, whether we like the law or not, that—an injunction is an appropriate remedy.

Senator DURBIN. Professor Alicea?

Professor ALICEA. No, Senator. I have written in support of the Second Amendment in many fora, but I don't think that a judge could issue a universal injunction under those circumstances. Of course, the challengers could seek certification under Rule 23 and then try to pursue class-wide relief.

Senator DURBIN. So do you think it is reasonable to expect every single person affected by an Executive order like the one I described to seek relief through Rule 23 or to file their own lawsuit to seek relief?

Professor ALICEA. I don't think that would be necessary, Senator. If you had one person who sought class certification successfully,

that would be sufficient. But even if you had failures to class certification, once you get to the Supreme Court and the Supreme Court issues a binding decision, that precedent would bind all the lower courts. So it's not a question of whether you get to a uniform rule. It's just a question of when you get to a uniform rule and by what route. But those limitations on the route matter under Article III.

Senator DURBIN. There has been a lot said during the course of this hearing about the possibility or likelihood that judges are being selected for this process to review the decisions of the Trump administration on a political basis. Professor Shaw, I noted—I am not sure you read this into the record, but you said the—according to a recent analysis by Professor Bonica, the Trump administration has lost 80.4 percent of the time before district judges appointed by Democratic Presidents, 80.4 Democrats, 72.2 before district judges appointed by Republican Presidents. Who is Professor Bonica?

Professor SHAW. He is a political scientist at Stanford. And yes, so that is my written statement. And I think it does suggest that this is—it cannot be reasonably just attributed to policy antipathy. This is about a pretty broad consensus about the lawlessness of many of the administration's actions. And I think both Democratic and Republican appointees have seen that.

Senator DURBIN. That is my impression as well. This is not a stacked deck, a statistical impossibility. It is a fact. This President has issued more orders with more controversy than any President in recent memory.

I have only been to Amarillo once when I was a younger person. I am sure it is a lovely city, but it turns out that the Amarillo division of the Northern District of Texas has gotten quite a bit of publicity. It turns out that people been filing lawsuits there because there is only one judge who sits in that division, Judge Matthew Kacsmaryk, who I remember appearing before the Committee. Litigants knew Judge Kacsmaryk would be assigned to the cases and viewed him as favorable to their arguments.

So the argument that is being made that venues shopping, forum shopping is on one side of the table, it is clearly on both sides of the table. And Judge Kacsmaryk is pretty well known for the way he rules. Professor Shaw, do you have any observation on that?

Professor SHAW. Yes. I mean, as I said in response to Senator Welch, I actually think that those single-judge divisions, like the one in Amarillo, Texas, where Judge Kacsmaryk sits, are a genuine problem. But none of the injunctions against the Trump administration have issued from judges who sit in those single member districts, so I am not even sure it's fair to say that that's a problem we are seeing now and we saw previously. We actually aren't seeing it now, but I do think that, regardless of who the President is, these single-judge divisions are a problem that Congress would be well served to address.

Senator DURBIN. Thank you very much. Thank you, Chairman.

Chair CRUZ. Thank you. Senator Hawley.

Senator HAWLEY. Thank you very much, Mr. Chairman—Mr. Chairman. It is great to have this hearing. Thanks for calling it.

Thanks to all of our witnesses for being here. Professor Shaw, nice to see you again.

Let me just start with you, if I could, Professor Shaw. You talked about the fact that there have been lots of rulings against the Trump administration. That is absolutely statistically true. I disagree with almost all of them. In fact, I think all of them. But the issue of this hearing really isn't the rulings, is it? It is the remedies. Would you agree? And those are distinct things. You may think that the ruling is quite correct, but that is actually not what we are talking about here today. We could have a hearing on that. Maybe we should. But we are talking today about the remedy.

And the question is, is a remedy that binds parties who are not before the court, is that an appropriate thing? I mean, aren't you concerned about judges binding nonparties in their remedies? You may love the ruling, but even if you do, don't you think it is a little bit anomalous for courts to be going out there and binding parties who are not before them? I mean, is that something we want to encourage?

Professor SHAW. Senator, I think that judges have been issuing rulings that impact nonparties since *Marbury v. Madison*, right, so——

Senator HAWLEY. So you are not concerned about it?

Professor SHAW. I'm not. I absolutely think that they can be abused, and they have been——

Senator HAWLEY. Well, now, wait a minute.

Professor SHAW [continuing]. Abused.

Senator HAWLEY. Wait a minute. Wait a minute. Wait a minute. You were very concerned about it just a couple of years ago. You said in response to a nationwide injunction on the Biden FDA's mifepristone rules, "This injunction is a travesty for principles of democracy, notions of judicial impartiality, and the rule of law."

Professor SHAW. I think I've been consistent today. That was issued by Judge Kacsmaryk in a single-judge division.

Senator HAWLEY. Wait a minute. Wait a minute.

Professor SHAW. They're a problem. Those are a problem.

Senator HAWLEY. You are taking issue with him personally—wait.

Professor SHAW. No, no, no.

Senator HAWLEY. So your testimony is if it is issued by Judge Kacsmaryk, it is bad?

Professor SHAW. No, sir.

Senator HAWLEY. It is personal?

Professor SHAW. That is not my testimony. I said——

Senator HAWLEY. So is the problem with the injunction? You were criticizing the universal injunction here.

Professor SHAW. Issued by a judge in a single-judge division. I've been very clear today——

Senator HAWLEY. Ah, so——

Professor SHAW [continuing]. That those are a problem.

Senator HAWLEY [continuing]. Issued by a Republican judge in a Republican division, then it is bad.

Professor SHAW. No, Senator.

Senator HAWLEY. Otherwise, it is fine.

Professor SHAW. No, Senator. I think that single-judge divisions are a problem.

Senator HAWLEY. What is the principle difference? I am looking for a principle. I understand you hate the President. I understand you love all of these rulings against him. You and I both know that is not a principle. You are a lawyer. What is the principle that divides when issuing a nationwide injunction is okay and when it is not? When the Biden administration was subject to nationwide injunctions, you said that they were travesties for the principle of democracy. You didn't say the referral to Judge Kacsmaryk was a travesty. You said his injunction was a travesty for principles of democracy.

Professor SHAW. So——

Senator HAWLEY. In other words, the translation is you just didn't like the outcome. Is that right?

Professor SHAW. No, Senator. Look, we're talking about—I don't think Article III precludes this form of relief. So we are talking about prudential considerations.

Senator HAWLEY. Prudential meaning political?

Professor SHAW. No.

Senator HAWLEY. Then give me——

Professor SHAW. No.

Senator HAWLEY. So far, I have yet to hear it. You have been questioned by multiple Senators. I have yet to hear a principle other than the fact when you like the ruling, you think it is great to apply it nationally, including nonparties. When you don't like the ruling, it is a travesty for the principles of democracy, notions of judicial impartiality, and the rule of law.

Professor SHAW. Look, Senator, I'll say I think I am self-aware enough to know that my view of the underlying legal question, I am sure, colors my perception of the remedy, and I think that we should all acknowledge that. And yet I do think that there——

Senator HAWLEY. Then why shouldn't we stop nationwide injunctions for everybody?

Professor SHAW. I think there is——

Senator HAWLEY. That is what we are talking about today.

Professor SHAW. Because I am not willing to leave without relief nonparties who are injured——

Senator HAWLEY. No, you are not willing to leave without the ability to bind President Trump.

Professor SHAW. No, I think that——

Senator HAWLEY. Right? I mean——

Professor SHAW. I believe——

Senator HAWLEY [continuing]. When it is Biden, it is okay.

Professor SHAW. No.

Senator HAWLEY. When it is Biden, oh, it is a travesty. But when it is Trump in office, it is a no-holds-barred, whatever it takes, right?

Professor SHAW. I believe in a powerful——

Senator HAWLEY. It is just like that book that——

Professor SHAW. No.

Senator HAWLEY. What was it that President Biden's staff said? We have got to do undemocratic, unconstitutional things to save democracy.

Professor SHAW. I believe——

Senator HAWLEY. Why isn't this the same thing?

Professor SHAW. I believe in a powerful President. I do believe in Presidential power. But power and constraint are not at fundamental odds——

Senator HAWLEY. What is the principle? What is the principle, the legal principle. You have referenced prudence. You have referenced the judges you don't like. What is the principle of when an injunction biding nonparties, which was never done in this country before the 1960's—and let's see the chart—the Trump chart, which was done really only once Trump came into office for the first time. You don't think this is a little bit anomalous? You don't think that is a little bit strange? Do you——

[Poster is displayed.]

Professor SHAW. A very plausible explanation——

Senator HAWLEY [continuing]. Think this is good for the rule of law?

Professor SHAW [continuing]. Senator, you have to consider is that he is engaged in much more lawless activity than other Presidents, right? That——

Senator HAWLEY. You don't think——

Professor SHAW. You must—can see that is——

Senator HAWLEY. This was never used——

Professor SHAW [continuing]. A possibility.

Senator HAWLEY [continuing]. Before the 1960's, and suddenly Democrat judges decide, we love the——

Professor SHAW. No.

Senator HAWLEY [continuing]. Nationwide injunction. And then when Biden comes to office, no, no——

Professor SHAW. It's Republican appointees as well, Senator. And the 1960's is where some scholars begin—sort of locate the beginning of this——

Senator HAWLEY. Can you identify one——

Professor SHAW [continuing]. But others——

Senator HAWLEY [continuing]. Before then?

Professor SHAW. Mila Sohoni, who's another scholar of universal injunctions, suggests 1913 is actually the first.

Senator HAWLEY. Oh, okay. So——

Professor SHAW. There were others in the 1920's.

Senator HAWLEY. The republic endured for 150 years before——

Professor SHAW. So——

Senator HAWLEY [continuing]. There was a nationwide injunction.

Professor SHAW. Well, the Federal Government was doing a lot less until 100 years ago, so I'm—you know, there's many things that have changed in the last 100 or the last 50 years. This is——

Senator HAWLEY. So long as it is a Democrat President office, then we should have no nationwide injunctions. If it is a Republican President, then this is absolutely fine, warranted, and called for.

Professor SHAW. That is not——

Senator HAWLEY. How can our system of law survive on those principles, Professor?

Professor SHAW. I think a system in which there are——

Senator HAWLEY. Is that blind?

Professor SHAW [continuing]. No meaningful constraints on the President is a very dangerous system of law——

Senator HAWLEY. That is not what you thought——

Professor SHAW [continuing]. And I'm——

Senator HAWLEY [continuing]. When Joe Biden was President.

Professor SHAW. I think every President——

Senator HAWLEY. You said——

Professor SHAW [continuing]. Needs constrained and must be.

Senator HAWLEY. That is not what you said.

Professor SHAW. Absolutely.

Senator HAWLEY. You said it was a travesty for the principles of democracy, notions of judicial impartiality, and the rule of law. You also said——

Professor SHAW. The Supreme Court, Senator, agreed——

Senator HAWLEY [continuing]. When Joe Biden was President—wait a minute, wait a minute.

Professor SHAW [continuing]. 9–0 with me on that case——

Senator HAWLEY. You also said——

Professor SHAW [continuing]. To be clear.

Senator HAWLEY [continuing]. When Joe Biden was President, you said the idea that anyone would forum shop to get a judge who would issue a nationwide injunction was just "judges looking like politicians in robes." Again, it threatened the underlying legal system. People were just trying to get the result they wanted. It was a travesty for the rule of law. But you are fine with all of that if it is getting the result that you want.

Professor SHAW. Sir, the Supreme Court agreed unanimously with me in that case, right? There was no standing. The case should never have been allowed to proceed.

Senator HAWLEY. Wait, wait, wait. What case?

Professor SHAW. And the combination of parties without standing and the single——

Senator HAWLEY. No, no, no, no, no, no, no.

Professor SHAW [continuing]. Judge division——

Senator HAWLEY. No, no, they did not. They did not issue a ruling on the nationwide injunction. You——

Professor SHAW. No.

Senator HAWLEY [continuing]. Criticized the injunction nationwide. Listen——

Professor SHAW. Issued in a case where——

Senator HAWLEY [continuing]. We could go round and round on this.

Professor SHAW [continuing]. No one had standing.

Senator HAWLEY. Here is the thing. We have now gone 6 minutes, and Senator Kennedy had you for 6 or 7. You couldn't identify a single principled basis.

We all know the truth here, which is it is not just you. It is most of my colleagues over here on this side of the aisle, who I respect a great deal, and they were raising very principled objections to the nationwide injunction just 6 months ago, maybe 9 now. And you are probably right.

My point is, is that all that has changed in 9 months is the occupant of 1600 Pennsylvania Avenue. And I realize that my col-

leagues on this side of the aisle very much dislike that individual, and I realize that you think that the rulings that he has lost are fundamentally sound. We might grant all that. I disagree with all of that, but we can put that to one side.

The question we are talking about here is, should judges, single judges, district court judges, be able to bind nonparties who are not in front of them? And you used to say no. Now, you say yes. Let's be consistent. I would just suggest to you our system of government cannot survive if it is going to be politics all the way down.

Professor SHAW. Can——

Senator HAWLEY. Thank you, Mr. Chairman.

Professor SHAW. Can I briefly respond?

Senator HAWLEY. Sure.

Professor SHAW. I mean, you invoked democracy a couple of times there, Senator. Judges are part——

Senator HAWLEY. I quoted you.

Professor SHAW. Judges are part——

Senator HAWLEY. I quoted you for that.

Professor SHAW [continuing]. Of our system of democracy. Democracy is just—is not as simple as majority rule. Judges have always served something of a——

Senator HAWLEY. You would have it be as simple——

Professor SHAW [continuing]. Counter majoritarian function.

Senator HAWLEY [continuing]. As majority rule. When you get the majority you like, you are for the nationwide injunction. When you don't, you are not.

Chair SCHMITT. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

I am going to give you the opportunity that I often found absolutely precious when I was arguing before a panel of judges and couldn't get my answer out. I am going to give you some of my time to just say what you were going to say to Senator Hawley.

Professor SHAW. Thank you, Senator.

Senator BLUMENTHAL. I can't interrupt you.

Professor SHAW. Okay. Thank you. Thank you, Senator.

Senator KENNEDY. I will take some of your time.

Professor SHAW. You know, I started to say this.

Senator BLUMENTHAL. By the way, we are good friends, so it is not personal.

Professor SHAW. Well, maybe I will just finish what I started saying at the end, which is in a number of the questions today, there has been this embedded premise that there is something democratically troubling about judges issuing these nationwide injunctions constraining the democratically elected President. And I guess I would just say in response that, you know, we have a constitutional democracy. So we do—the people are sovereign and that's—you know, that sovereignty flows from the people. And we do choose our elected representatives, but obviously, we choose our Representatives in Congress, passes—Congress passes statutes, the President signs them. And many of the rulings we are talking about were predicated on executive branch violations of statutes that Congress passed. So the rulings in many ways are about protecting and reinforcing democracy.

And then finally, I'll say that, you know, courts are part of our democracy, right? They have served this rights-protecting and democracy-facilitating function from basically the beginning, whatever the original design of the constitution was. And it is not undemocratic or anomalous for courts to sometimes strike down acts of the President or of Congress when they conflict with the fundamental law, which is the Constitution, which in our system, courts have long had the primary role in enforcing.

Senator BLUMENTHAL. And in fact, just as a footnote to this conversation, Congress has an obligation to follow the Constitution too, correct?

Professor SHAW. Absolutely. The President does, Congress does, every official State and Federal takes an oath to uphold the Constitution, but where that oath is—does not appear to be fully honored by one or more other actors in government, sometimes courts do need to step into the breach. I think that is what we have been seeing.

Senator BLUMENTHAL. And I can't remember exactly what that chart said, but so far in the lawsuits have been—that have been brought, the administration or the President has lost, I would say a vast majority of times. Is that correct?

Professor SHAW. The vast majority, yes, Senator.

Senator BLUMENTHAL. And I want to ask a somewhat open-ended question because I have to confess, as attorney general of the State of Connecticut, I probably succeeded—I can't name in which cases—obtaining a nationwide injunction. Then-attorney general Schmitt sought more than——

Chair SCHMITT. You started it. Is that your admission?

[Laughter.]

Senator BLUMENTHAL. Sought more than a dozen nationwide injunctions against the Biden administration. Then-attorney general Moody also sought numerous nationwide injunctions. This is a tactic, and it is a well-founded one that attorneys general, litigants, and others have used again and again and again. And it shouldn't be a partisan issue. Nationwide injunctions shouldn't be a partisan issue. And when I say they did it, I am not being accusatory. I confess I did it. And I don't know about then-attorney general Whitehouse. He can speak for himself. But it should not be a partisan issue, should it?

Professor SHAW. I agree that it shouldn't be and that—but of course, yes, it has been. I mean, I think that despite the somewhat heated exchange I was just having with Senator Hawley, I do think that we don't want judges to be sort of driving the train of policymaking. And there are absolutely—there may be points and there may be contexts in which it does feel as though some fundamental change to the way judges consider nationwide injunctions, how much—there is some critique that the merits have become the entire analysis and that some—you know, there should be some prescriptions that are different about the kinds of harms that should be—the way harm should be evaluated or assessed. So I do think there are—again, back to the sort of prudential point, there are absolutely reforms that I think that there could be some——

Senator BLUMENTHAL. Just to take—and I apologize——

Professor SHAW. Yes, no, please.

Senator BLUMENTHAL [continuing]. For interrupting, but I am running out of time.

Professor SHAW. Yes, sorry.

Senator BLUMENTHAL. To take Senator Hawley's point about looking for a principle, a jurisprudential lodestar here, maybe we do need some refinement on a bipartisan basis to provide some guidelines to district court judges, some of whom come to work on their first day——

Professor SHAW. Right.

Senator BLUMENTHAL [continuing]. And are presented with litigation that determines whether or not kids get healthcare or whatever in parts of the country they have never visited in towns they don't even know how to pronounce.

Professor SHAW. Right. So—and whether that comes from a rule change, Supreme Court guidance, something legislative, I am not sure, but I think there could well be bipartisan consensus around clearer standards that guide judges asked to consider requests for nationwide injunctions.

Senator BLUMENTHAL. And that would probably increase the credibility of what courts do if they could point to standards that were not just personal preferences or whims or, you know, perhaps subconscious political leanings.

Professor SHAW. I agree with that, Senator.

Senator BLUMENTHAL. Thank you. Thanks, Mr. Chairman.

Chair CRUZ. Thank you. Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman.

Professor, I do want to come to you, and I want to return to the conversation about calling the Supreme Court justices evil. You host a podcast, correct?

Professor SHAW. Yes, Senator.

Senator BLACKBURN. And that is called Strict Scrutiny, correct?

Professor SHAW. Yes, Senator.

Senator BLACKBURN. Okay. You made those comments on your podcast. And Mr. Chairman, I would like to submit the recording of that podcast for the record.

Chair CRUZ. Without objection.

[The information appears as a submission for the record.]

Senator BLACKBURN. Thank you, Mr. Chairman.

In that podcast, you referenced, as Senator Kennedy said, to Justice Kagan an opinion, and you referred to the conservative justices as, and I am quoting you, "her evil colleagues." That is something you said on Strict Scrutiny in your podcast.

And you, in that same podcast, you made a reference to Justice Alito. Do you recall that?

Professor SHAW. I don't recall that. And we certainly do reference Justice Alito, so I believe that, but I don't recall——

Senator BLACKBURN. Well——

Professor SHAW [continuing]. Specifically what.

Senator BLACKBURN [continuing]. Your comment there was that he was an "abject misogynist." So since this is your podcast that you hosted and this was your opinion on that podcast, would you like to provide explanation about why you think conservative justices are evil and why you would think Justice Alito was a misogynist? Do you care to explain yourself?

Professor SHAW. I would have to look at the transcript, Senator. I think that the dismissive approach to sex equality arguments in the *Dobbs* case was deeply concerning. One paragraph in the opinion suggests that there is no sex equality problem with abortion restrictions or prohibitions. I think that is deeply wrong. And in the more colloquial sort of mode of a podcast conversation, that is probably what I intended to convey, that he discounted very serious sex equality concerns.

Senator BLACKBURN. But you were angry. You were angry, and you let your emotions get the best of you is basically what you are saying.

Professor SHAW. I don't think I'm saying that, Senator. I was having a conversation, and I am sure I was criticizing Justice Alito. We frequently do on my podcast.

Senator BLACKBURN. Okay. Would you call that lack of respect?

Professor SHAW. As—in the context of a podcast, I—we frequently—I will stipulate that we frequently demonstrate a lack of respect for writings of the Supreme Court justices, yes.

Senator BLACKBURN. Well, that is good to hear that from you, that you have that admission of guilt, so thank you for that.

I have got a question for the entire panel. There was discussion about Section 1507 and protesting outside of justices' residence. And I have got a bill, the Protecting Our Supreme Court Justices Act, and it would deter intimidation of Supreme Court justices. And in the exchange Senator Cruz had earlier, he referenced that purposeful intimidation.

This would change—it would increase the maximum term of imprisonment for violation of Section 1507 from 1 year to 5 years, and increasing the maximum jail time for a protester under 1507 is, I think, an effective way to deter this intimidation of our justices. So I would like to hear from each of you on this.

Professor Blackman, I am going to come to you first, and then just a very quick, short answer from each of you.

Professor BLACKMAN. Sure. I think it's a good idea. I think it should be enforced vigorously as well. We mentioned Judge Kacsmaryk before. He has had several death threats against him that resulted in plea bargains, so I think there's a serious problem that needs to be addressed with enforcement.

Senator BLACKBURN. Okay. Professor Shaw?

Professor SHAW. You know, I think that any law that also touches protected First Amendment conduct would need to be scrutinized carefully so I would need to take a look. I'm not prepared to take a position here.

Senator BLACKBURN. So you think violence outside of a justice's——

Professor SHAW. No, no, this is about protest outside of——

Senator BLACKBURN [continuing]. Intimidation.

Professor SHAW. Okay. So, violence, absolutely. I mean, if we're talking about increasing penalties for violence, I would absolutely support that——

Senator BLACKBURN. Okay.

Professor SHAW [continuing]. Yes.

Senator BLACKBURN. Great. Professor?

Professor ALICEA. I certainly think we need to carefully scrutinize the level of violence and the threats against Supreme Court justices and other judges, as we saw when there was a threat against Justice Kavanaugh's life, right, an attempted threat against him and his family, so it underscores the seriousness of the issue, and I think it's important for Congress to take a look at this.

Senator BLACKBURN. Thank you. Thank you, Mr. Chairman.

Chair CRUZ. Thank you. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. I kept hearing one of my colleagues accusing you, Professor Shaw, of disliking nationwide injunctions only when it is applied to Democratic Presidents. He tried so many times. That is not what you said. That is certainly not what I heard. What I heard you say was, in those instances where there is a single judge in a district, that can lead to forum shopping, judge shopping, which is exactly what happened in Amarillo, Texas. And you said that is something that Congress could address. I think that is a fair depiction of what you testified to. Is that correct?

Professor SHAW. Thank you, Senator. Yes, that was in my written testimony, and I think that I did——

Senator HIRONO. Well——

Professor SHAW [continuing]. Confirm it today.

Senator HIRONO [continuing]. So I had introduced a bill to Stop Judge Shopping Act, which would require suits seeking nationwide relief against the enforcement of Federal law to be filed in the D.C. District Court. And I explained at the time that I introduced the bill that this court, "hears the large majority of cases involving challenges to Federal agency action, and its judges are experts at deciding these cases impartially." That is one of the ways that we can address the issue of forum or judge shopping, which you did address once again today, correct?

Professor SHAW. Yes, Senator.

Senator HIRONO. Yes, I wish we could take that bill up.

So, you know, this attempt of my colleagues to continually attack the Democrats as somehow not wanting judges who decide cases based on objective facts, application of the law, as opposed to having some kind of ideological ax to grind is really more something that they have a problem with apparently than anything that we Democrats stand for.

Once again, Professor Shaw, there was a suggestion today that case assignments in D.C. is happening in a way that is statistically impossible. And I think this only serves to point out that maybe the person who made this allegation doesn't have enough awareness of statistics or hasn't read the rules in the way cases are assigned in D.C. Do you have any response to the allegation that someone is stacking the decks against the Trump administration in this court, the D.C. District Court?

Professor SHAW. Right, Senator. So I've heard both that critique that Judge Boasberg is getting a disproportionate share of the cases and also the kind of opposite critique that the motions panels in the D.C. Circuit have been more favorable to the Trump administration than random chance would produce. You know, statistically unlikely events do sometimes occur, and I think it very un-

likely that there is anything untoward resulting in the assignments either of the district court or the court of appeals level here in D.C.

Senator HIRONO. I have to thank you for pointing out how many cases. Yes, there have been over 200 cases filed to stop this President from, in my view, abusing his power and engaging in illegal acts. And frankly—and I think Mr. Blackman also suggested this, as did you, Ms. Shaw, that if we don't like this President to be sued, then we in Congress should enact laws that allows him to do whatever the hell he wants.

So why don't we let him ignore the appropriations of this Congress? Why don't we let him stop certain grants from being issued? Why don't we let him go after Harvard and any other school that he doesn't like? Why don't we let him go after law firms that take positions that he doesn't like? Why don't we let him do that if we don't want him to get sued? I think that is a rhetorical question, but certainly we could do that.

Thank you, Mr. Chairman.

Chair CRUZ. Thank you. Senator Schiff.

Senator SCHIFF. Thank you, Mr. Chairman.

Ms. Shaw, I wanted to ask you about some of the threats we are seeing on the judiciary, but let me preface it by quoting the President, who has called Federal judges who rule against him communists. He has called them lunatics. He has called them monsters. He has said that they hate the United States. Of course, he called for the impeachment of Judge Boasberg, said the court system is radicalized and incompetent. His advisor, Stephen Miller, has threatened to suspend the writ of habeas corpus if judges essentially don't fall in line. And as a result, we are seeing judges' lives threatened and their family members' lives threatened.

Let me start with a threshold question in terms of a President making these personal attacks on judges for ruling against him or against the policies of the administration. Have we any experience in our history with this? I mean, there have been Presidents, of course, who have been deeply disappointed in judges they have appointed. And of course, many of these judges ruling against Donald Trump are people appointed by Donald Trump. But have we ever seen a President make these kind of sustained and personal attacks on members of the judiciary?

Professor SHAW. Senator, look, I would say that, obviously, tension between—sometimes very heated tension between elected officials and judges, Presidents and judges who rule against them is nothing new. But I agree with you that there is something different about the tenor of the rhetoric that we are hearing today. And I think that some of the specific suggestions—and maybe I'll offer a couple of examples.

One, I do think that including family members of judges in the attacks on judges' rulings is something that, to my knowledge, we have not previously seen members of public office engage in. The proposals to impeach, right? So there's been rhetoric, but also actual resolutions introduced in the House to impeach Federal judges for the substance of their rulings is also something that I don't think we've seen. We've obviously impeached Federal judges before. That's a constitutional remedy for very serious misconduct, bribery, corruption. Obviously, if the judges engage in treason, bribery, and

other high crimes and misdemeanors, impeachment is the remedy. But we've never seriously entertained the possibility of impeaching judges for the substance of their rulings, and so I do think that those threats represent sort of a new escalation that is deeply concerning.

Senator SCHIFF. Well, I certainly agree. I tried one of those judicial impeachment cases of a judge named Porteus, and it was for bribery and other like serious offenses, certainly not for upholding the law or the Constitution or having a different view of the law or Constitution than a President.

In terms of the family members, it is not just the President's criticism, but at least while he was serving as a special employee, Elon Musk was pushing out these threats against members of Judge Boasberg's family, I think tweeting out or retweeting content identifying who the children are or where they work. And that is just amplifying the danger to these family members.

Tell us a little bit about this phenomenon now of people sending pizzas to judges and the implicit threat in that.

Professor SHAW. Well, I mean, I think it's—this is also something that I don't think we've seen before, right? There is clearly some kind of coordinated effort to seek to intimidate Federal judges and their families by sending pizzas, communicating the message that their residence, their addresses are known. And some of the pizzas bear the name of the murdered son of district judge Esther Salas from New Jersey. And the message there, I think, is a very clear one of very serious threat. And I think judges are taking that threat—and the marshals are as well from the reporting that we've seen—very seriously.

Senator SCHIFF. And last question, if you could help, Professor, put this in a broader context for us because this attack on judges and the judiciary isn't happening in isolation. We've seen the President now turn on Leonard Leo because these ultraconservative Federalist Society-approved judges are not proving right wing enough for the President. But this comes in the context of the administration also going after law firms. It seems very much a part of a concerted effort to attack the rule of law and using the law to defend people's rights. Tell us a little bit about the broader context.

Professor SHAW. I do think that attacks on judges and attacks on law firms are of a piece. They seem designed to seek to neutralize sources of countervailing authority and opposition to this administration. And if law firms can't take on unpopular causes because they are scared to run afoul of the President, and if judges are scared to rule against the President, then we really have lost any meaningful check on a President.

And as I said in my opening remarks, I think if the Constitution is committed to a single principle, it is limits on power, right, no absolute power. And I worry that we are on a path toward few, if any, meaningful limits on the President.

Senator SCHIFF. Thank you for your testimony today and for speaking truth to power.

Professor SHAW. Thank you.

Chair CRUZ. Thank you, Senator Schiff.

I will also note that when it comes to rhetoric against judges, that it was Democratic leader Chuck Schumer who stood on the steps of the Supreme Court and threatened the Justices by name. And one of many left-wing commentators who has amplified that message is a fellow named Ian Millhiser, who when the leak of the *Dobbs* opinion happened, he tweeted out, "The draft Roe opinion appears to be as bad as expected, but I am glad it leaked because this leak will foster anger and distrust within the irredeemable institution that is the Supreme Court of the United States."

And I guess he decided that rhetoric was not overheated enough because then he tweeted, "Seriously, shout out to whoever the hero was within the Supreme Court who said, F it"—although he did not abbreviate that—"let's burn this place down. That is the angry, unhinged language from the left that has been directed at the court when they dislike the decisions.

I want to thank each of the witnesses for joining us today. I want to thank Senator Schmitt for co-chairing this joint Subcommittee hearing. Written questions for the record can be submitted by Senators up till June 10 at 5 p.m., and the witnesses are asked to respond to any written questions for the record by 5 p.m. on June 17.

And with that, this hearing is adjourned.

[Whereupon, at 4:40 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

Hearing before the U.S. Senate Committee on the Judiciary

Subcommittee on Federal Court, Oversight, Agency Action and Federal Rights
Subcommittee on the Constitution

"The Supposedly 'Least Dangerous Branch': District Judges v. Trump"
Tuesday, June 3, 2025

STATEMENT OF CHAIRMAN GRASSLEY

As Chairman of the Judiciary Committee, I am pleased that two of its Subcommittees are holding a hearing on the pressing issue of judicial overreach and the separation of powers. One of the most dangerous practices of judicial activism that we've seen deployed against executive branch recently is that of universal injunctions.

I've been vocal in my opposition to universal injunctions. I view this issue as bipartisan, and I've spoken about it on the Senate floor multiple times. I've also spoken and written publicly about it in the news and on social media more than a dozen times now.

District judges exceed their Constitutional authority when they issue universal injunctions. Article III limits judicial power to Cases and Controversies. That means that judges are supposed to resolve disputes between the parties in front of them – **NOT** set nationwide policy. Judges are supposed to interpret and apply the law – **NOT** create it. Our system of checks-and-balances demands that we respect this constitutional limit.

The American People set the direction of national policy through elections. And the entire reason that the third branch of government is insulated from the electoral process – is because judges are supposed to stay out of politics.

But over the last decade, we've seen district judges deviate from their Constitutional swim-lane, and use universal injunctions to substitute their judgment for the American voters'. This problem is getting worse by the day. No matter how many of the hundreds of federal judges uphold a President's policies, a single district judge – **JUST ONE** – can overrule the rest by issuing a universal injunction. This must stop now.

I've undertaken a number of efforts to address the growing problem of universal injunctions. In April, I led a hearing in the Judiciary Committee to consider legislative solutions. I've also introduced the Judicial Relief Clarification Act with twenty-nine of my colleagues. As Professor Bray described it at the hearing: "This bill will take the universal injunction and bury it six feet under. No evasions, no circumventions, no substitutes. No outs for Republicans, no outs for Democrats."

My bill is the only one that takes a holistic approach to the problem. It puts an end to the non-party relief known as universal injunctions, and closes other statutory loopholes. I hope to gather bipartisan support for my bill. After all, Democrats, Republicans, law professors, and even Supreme Court Justices have complained about the harm caused by universal injunctions.

In 2022, Justice Elena Kagan correctly observed: **"It just can't be right that one district judge can stop a nationwide policy in its tracks and leave it stopped for the years it takes to go through the normal process."**

I agree with Justice Kagan. But I also recognize that political pressures have tempered some Democrats' desire to address this bipartisan problem. So, in the meantime, I'm drafting legislation that can pass through budget reconciliation to address this problem. Although these are not complete solutions like my Judicial Relief Clarification Act, they will mitigate the problem.

We need funding for the Justice Department to hire attorneys and challenge universal injunctions. We need reporting requirements for the courts to track universal injunctions and to ensure that courts follow the law and require bonds to protect taxpayers from unlawful injunctions. And we need judicial training programs regarding the absence of Constitutional authority for universal injunctions and the burdens they impose.

These legislative efforts return power to the American People. They respect the separation of powers. And they recognize that the power to set policies rests with voters.

I've been leading the fight to end universal injunctions, and I'll continue doing so. I welcome collaboration with my colleagues on both sides of the aisle on this important project.

Hearing before the United States Senate Committee on the Judiciary
Subcommittee on the Constitution and Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

"The Supposedly 'Least Dangerous Branch': District Judges v. Trump"

June 3, 2025

Testimony of Professor José Joel Alicea

Mr. Chairman, Ranking Member, and Members of the Subcommittees: Thank you for the invitation to testify today. It is an honor to speak with you.

While the topic of today's hearing touches on many issues, my understanding is that I have been invited to address the practice of universal injunctions, in particular, and that will be the focus of my testimony. An injunction is an order from a court directing an entity (like a government official or a government agency) to do something or refrain from doing something. Courts have been issuing injunctions for centuries, and when injunctions only grant relief to a party to the case, they are generally not controversial.

What makes universal injunctions controversial is that they purport to give relief to entities that were *never* made parties to the case. In the birthright citizenship cases now before the Supreme Court, for example, a district court judge in Seattle issued an injunction forbidding the "enforcement or implementation" of President Trump's executive order "on a nationwide basis." That means that the executive order cannot be enforced against *anyone*, even though the only parties challenging the order were four states and two individuals.

Of course, sometimes redressing a plaintiff's injury requires granting a form of relief that will incidentally benefit non-parties. We might call this indivisible relief. For example, if a plaintiff who lives along the bank of a river successfully obtains an injunction to stop a nearby factory from polluting the river, that injunction is necessary to redress the plaintiff's injury and will incidentally benefit all non-parties who live along the river. The nature of the plaintiff's injury demands a form of relief that cannot be divided between parties and non-parties. The arguments against universal injunctions do not take issue with indivisible relief.

What makes universal injunctions distinct is that they give relief to non-parties even though doing so *is not necessary* to provide relief to the plaintiff. To return to the birthright citizenship cases, an individual who obtains an injunction preventing the enforcement of President Trump's executive order as to the individual will be fully protected against his or her alleged injury. Assuming the plaintiff sued the federal defendants who enforce the executive order, that plaintiff will be treated as a citizen in all interactions with the federal government. There is no need to enjoin the Trump administration from enforcing its order against others to remedy the alleged injury to that specific individual.

But even if universal injunctions are not *necessary* to remedy the plaintiff's alleged injury, one might reasonably ask: what is the harm in granting a universal injunction? Universal injunctions are damaging to our political and legal system. The effect of a universal injunction is that the policies of the elected President (and, in some instances, of the elected Congress as well) are subject to what is effectively a veto by unelected district court judges. Because it only takes a single judge to issue a universal injunction, the President's opponents only have to win one lawsuit to stop the President, whereas the President has to win *every single lawsuit* if he wants to implement his challenged policies.

Because they place unelected district court judges in charge of national policy, universal injunctions are a problem for presidents of both parties. This is not a partisan issue. But universal injunctions have been used at an astonishing rate against President Trump, in particular, which is why the issue has become so prominent over the last few months. For example, during the month of February alone, more universal injunctions were issued against President Trump's policies than in the first three years of the Biden administration.

The result has been an atmosphere of continuous emergency throughout the first few months of President Trump's second term. It seems as if every time the Trump administration issues a new policy, it is almost immediately followed by a district court issuing a universal injunction. Since the President cannot allow a single judge to dictate national policy, the administration has had to seek emergency intervention by a court of appeals, and whichever party loses in the court of appeals seeks emergency intervention from the Supreme Court. The Court has, therefore, been inundated with almost-nonstop emergency litigation partly because of the practice of universal injunctions. The seemingly unending stream of emergency petitions has forced the Court to make quick decisions on controversial and contested legal questions, often without the benefit of oral argument, adequate briefing, or different views expressed in the lower courts.

This is not how our constitutional system is supposed to work. Article III, Section 1 of the Constitution vests "the judicial Power of the United States" in the federal courts. As understood at the Founding, the core meaning of the judicial power was the authority to resolve disputes between parties according to law. This party-centric understanding of judicial power explains why Article III, Section 2 describes the judicial power as "extend[ing]" only to "Cases" or "Controversies": that is, to disputes between parties. And that is why the Supreme Court has repeatedly held that parties do not have standing to seek relief beyond what is necessary to remedy their alleged harm. *See, e.g.*, *Gill v. Whitford*, 585 U.S. 48, 64–69 (2018); *Lewis v. Casey*, 518 U.S. 343, 357–360 (1996).

In vesting the federal courts with equitable authority under the Judiciary Act of 1789, the First Congress acted consistent with these background principles of party-centric adjudication. Prior to 1789, injunctions were understood to be limited: an injunction could only provide whatever relief was necessary to readdress a plaintiff's asserted injury. The same understanding of

injunctions prevailed until the twentieth century. Universal injunctions, it bears emphasizing, are a twentieth-century phenomenon, and their routine use against government action only began within the last decade. Thus, as a matter of both constitutional and statutory law, federal courts lack the power to grant equitable remedies that extend beyond what is necessary to redress a plaintiff's alleged harm—precisely what universal injunctions purport to do. The American people never gave judges the power to issue universal injunctions. Judges have seized it for themselves—and only quite recently in our history.

District court judges are thus exercising power for which they have no constitutional or statutory warrant. While universal injunctions have damaged the presidency and the Supreme Court, they have done the most damage to democratic governance by illegitimately thwarting the will of the people's elected representatives. As Justice Elena Kagan once observed: "It just can't be right that one district judge can stop a nationwide policy in its tracks and leave it stopped for the years that it takes to go through the normal process."

Courts play a vital role in our constitutional system. They resolve disputes between parties according to law, and in the process of doing so, they "say what the law is," in Chief Justice John Marshall's famous words in *Marbury v. Madison*. Presidents, no less than private parties, are required to follow judicial orders and judgments.

None of that is at issue in the controversy over universal injunctions. What is at issue is whether courts can step beyond their limited role of resolving legal disagreements between parties and instead resolve policy disagreements for the whole nation. The answer to that question should be obvious: no.

United States Senate
Committee on the Judiciary
Subcommittee on Federal Courts
Subcommittee on the Constitution
June 3, 2025

"The Supposedly 'Least Dangerous Branch': District Judges v. Trump"

Statement of Professor Josh Blackman
Centennial Chair of Constitutional Law
South Texas College of Law Houston

Written Statement of Professor Josh Blackman

Chairman Cruz and Chairman Schmitt, Ranking Member Whitehouse and Ranking Member Welch, thank you for inviting me to testify. My name is Josh Blackman, and I hold the Centennial Chair of Constitutional Law at the South Texas College of Law Houston. The topic of today's hearing is very timely: "The Supposedly 'Least Dangerous Branch': District Judges v. Trump."

It is often repeated that we have three, co-equal branches of government. But that simply isn't true. In Federalist No. 78, Alexander Hamilton described the judiciary as the "least dangerous branch." Unlike the Congress, which has the power of the "purse," and the President who wields the power of the "sword," the courts have "merely judgment." Yet, it has been deeply ingrained in our national consciousness that the courts' foundational role is to balance the power of the elected branches. Indeed, Chief Justice John Roberts boasted that the courts "check the excesses of Congress or the executive."

But the Chief Justice is incorrect.[1] Indeed, as Vice President J.D. Vance stated, Roberts expressed a "profoundly wrong sentiment."[2] Judge James C. Ho of the Fifth Circuit aptly observed "It is not the role of the judiciary to check the excesses of the other branches, any more than it's [the judiciary's] role to check the excesses of any other American citizen."[3]

Who will check the excesses of the judiciary? At least with regard to the lower courts, the answer is Congress. The Constitution refers to federal district courts as inferior courts. Yet, far too many lower court judges seem to have a superiority complex. We are witnessing a never-ending onslaught of

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[1] Josh Blackman, *President Trump Has to Obey the Constitution, But So Does Chief Justice Roberts*, Civitas Outlook (May 28, 2025), https://www.civitasinstitute.org/research/president-trump-has-to-obey-the-constitution-but-so-does-chief-justice-roberts.

[2] Ross Douthat, *JD Vance on His Faith and Trump's Most Controversial Policies*, N.Y. Times (May 21, 2025).

[3] A.A.R.P. v. Trump, No. 25-10534, 2025 WL 1452888, at *1 (5th Cir. May 20, 2025).

universal injunctions that make it nearly-impossible for the executive branch to govern.

What can be done? We cannot look to the courts to check themselves. The long history of judicial supremacy teaches that judges of all stripes, conservatives and progressives, seek to defend and entrench their own institution. The answer to any sustainable reform must come from the legislature. To paraphrase James Madison in Federalist No. 51, legislative ambition must counteract judicial ambition.

Yet, regrettably, most debates about judicial reform get bogged down in politics. When there is a Republican president, Democrats fall in love with universal injunctions. And when there is a Democratic president, Republicans fall in love with universal injunctions.

Proposals which only help one side of the aisle have slim chances of enactment. The federal courts cannot be reformed through unilateral disarmament. Rather, any federal judicial reform must be *bilateral*. In early 2024, before the presidential election, I wrote an article titled *Bilateral Judicial Reform* in the Texas A&M Journal of Law & Civil Governance.[4] I proposed ten ideas to fix the courts that I think might appeal to members on both sides of the aisle.

In my brief time today, I will focus on three of the proposals.

First, cases seeking a temporary restraining order can be decided by a single district court judge but can only yield relief to the named parties and are limited to no more than seven days in duration. No longer can a single district court judge issue a universal TRO that stands for nearly a month without any appellate review.

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[4] Josh Blackman, *Bilateral Judicial Reform*, 1 Texas A&M Journal of Law & Civil Governance (2024) 59, https://ssrn.com/abstract=4851730.

Second, cases seeking a preliminary injunction or equivalent relief against the federal government or a state government are referred to the en banc court, which appoints a randomly drawn three-judge panel with two circuit court judges and one district court judge. There is some value in having a multi-member body consider an issue, rather than a lone district court judge deciding difficult constitutional questions. And rather than having two district court judges, I would favor having two circuit judges, as these cases tend to focus on law more than facts.

The third proposal focuses on the appeal. Chief Justice Roberts recently stated that the "appropriate response to disagreement" with a judicial decision is the "normal appellate review process." As things stand now, the Supreme Court has a completely unpredictable, and indeed arbitrary approach to emergency applications. Congress can make the appellate review process normal again. Under my proposal, injunctions of statutes against the federal and state governments are *automatically* stayed, and if a three-judge panel submits a "certificate of division," the case is appealed to the Supreme Court's mandatory jurisdiction, with oral argument and decision based on emergency docket timeline.

I think these three measures would have bipartisan appeal, and would go a long way to addressing the never-ending fights between the President and the judiciary.

Thank you, and I welcome your questions.

Senate Committee on the Judiciary

Subcommittee on the Federal Courts, Oversight, Agency Action and Federal Rights

and

Subcommittee on the Constitution

Hearing: "The Supposedly 'Least Dangerous Branch': District Judges v. Trump"

Tuesday, June 3, 2025, 2:30 pm

Testimony of Kate Shaw
Professor of Law, University of Pennsylvania Carey Law School

Chairman Cruz, Ranking Member Whitehouse, Chairman Schmitt, Ranking Member Welch, and Distinguished Members of the Subcommittees:

Thank you for the invitation to testify today. My name is Kate Shaw, and I am a Professor of Law at the University of Pennsylvania Carey Law School, where I teach and write about Constitutional Law, among other topics. Before joining the Penn faculty last year, I spent a dozen years teaching at Cardozo Law School, in New York City; prior to entering law teaching I served as an attorney in the White House Counsel's Office.[1]

I understand that the purpose of today's hearing is to discuss recent judicial rulings against the Trump administration, and to situate those rulings in historical and institutional context.

There is no question that the Trump administration has been on a losing streak in the federal courts. According to the most recent data compiled by Professor Steve Vladeck, since the start of the administration, district courts have granted some sort of relief against the administration in 97 cases.[2] That relief has been issued in 25 district courts in 10 circuits, by 73 judges appointed by 7 presidents—every president since President Carter, including President Trump. The breadth of the judicial consensus has been striking. According to a recent analysis by Professor Adam Bonica, the Trump

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[1] In April 2025, I testified at a similar House hearing convened by two subcommittees of the House Judiciary Committee; my testimony for today's hearing draws heavily on that earlier testimony. *Judicial Overreach and Constitutional Limits on the Federal Courts*: Hearing Before the Subcomms. on Courts, Intellectual Property, Artificial Intelligence, and the Internet & the Constitution and Limited Government of the H. Comm. on the Judiciary. 119th Cong. (2025) (statement of Kate Shaw, Professor of Law, University of Pennsylvania Carey Law School).

[2] Steve Vladeck, *155. What District Court Critics Aren't Telling You*, ONE FIRST (June 2, 2025), https://www.stevevladeck.com/p/155-what-critics-of-district-courts.

administration has lost 80.4% of the time before district court judges appointed by Democratic presidents, and 72.2% of the time before district court judges appointed by Republican presidents.[3]

As this cross-ideological consensus suggests, the administration's track record in court does not reflect judicial overreach, and it cannot be attributed to antipathy toward the President's policy priorities. It reflects, instead, two things. The first is the unprecedented volume of executive action under this president.[4] To focus in the abstract on the number of invalidated actions ignores the raw number of actions taken by this administration. As of May 24, 2025, the second Trump administration had issued 157 executive orders.[5] By comparison, the Biden administration issued 162 executive orders over the course of four years[6]; the first Trump administration issued 220 executive orders in four years, and only 36 by this point in time in 2021.[7]

The second is the clear disregard for both statutes and the Constitution on display in the administration's actions. Again and again, the administration has acted in flagrant violation of both the constitutionally required process for lawmaking—one that gives Congress, this body, primacy—and the rights the Constitution commands government to respect.[8]

To be sure, some preliminary rulings against the government will be—and some have been—reversed or stayed on appeal. Last month, the administration prevailed in an important shadow-docket ruling in a pair of challenges brought by terminated members of the National Labor Relations Board and

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[3] Adam Bonica, *The 96% Rebellion: District Courts Mount Historic Resistance, But the Supreme Court Looms*, ON DATA AND DEMOCRACY (May 24, 2025), https://data4democracy.substack.com/p/the-96-rebellion-district-courts.

[4] Jack Goldsmith, *Problems with Universal Injunctions Against Trump's Program?*, EXECUTIVE FUNCTIONS (March 21, 2025), https://executivefunctions.substack.com/p/problems-with-universal-injunctions.

[5] *Executive Orders*, THE AMERICAN PRESIDENCY PROJECT (last updated May 24, 2025), https://www.presidency.ucsb.edu/statistics/data/executive-orders.

[6] *Id.*

[7] *Presidential Signing Statements by Donald J. Trump (1st Term)*, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/advanced-search?field-keywords=&field-keywords2=&field-keywords3=&from%5Bdate%5D=&to%5Bdate%5D=&person2=200301&category2%5B%5D=58&items_per_page=100. Aside from President Trump's first administration, the most executive orders any president has issued in a four-year period since 1981 is 213 during President Reagan's first term. At the current volume, this Trump administration is on track to outpace the first Trump and Reagan administrations' four-year totals within its first year. *See also* Prinz Magtulis, *How Trump Unleashed Executive Power*, REUTERS (May 7, 2025), https://www.reuters.com/graphics/USA-TRUMP/EXECUTIVE-ORDERS/gdpznealwpw/.

[8] Some of this may result from the administration's virtually limitless conception of executive power; some may be the byproduct of the apparent disregard for long-standing internal executive-branch processes for the legal review of executive action. *See* Bob Bauer and Jack Goldsmith, *The Trump Executive Orders as "Radical Constitutionalism"*, EXECUTIVE FUNCTIONS (Feb. 3, 2025), https://executivefunctions.substack.com/p/the-trump-executive-orders-as-radical (pointing to evidence that in this administration "OLC, and the Justice Department more generally, are being sidelined in the legal review process for at least some executive orders, and for presidential actions more generally.").

Merit Systems Protection Board.[9] In that case, the Court allowed the members' terminations to stand while litigation proceeded—a decision that functionally overruled *Humphrey's Executor v. United States*, which for nearly a century has granted Congress the authority to create independent agencies whose leaders enjoy a degree of independence from presidential control.[10] In a number of other recent cases, the Supreme Court also provided the administration relief, although almost invariably without reasoning or on purely procedural grounds.[11]

To those who are critical of the recent spate of lower-court rulings against the administration, these Supreme Court orders should provide a degree of comfort: the appellate process is working in the administration's favor. But the Supreme Court's interventions have to be viewed in the context of the full litigation landscape. And one striking fact about that landscape is the administration's failure even to appeal a number of merits rulings against it.[12] This has been especially conspicuous in the litigation challenging the executive order purporting to end birthright citizenship. The lower courts have unanimously ruled against that order, finding it to be "blatantly unconstitutional"[13] and noting that it "flouts the plain language of the Fourteenth Amendment to the United States Constitution, conflicts with binding Supreme Court precedent, and runs counter to our nation's 250-year history of citizenship by birth."[14] And yet the executive branch has not asked the Supreme Court to review those rulings on the merits; instead, it has challenged only the specific relief award by the courts in those cases—nationwide injunctions. In other words, the administration is asking the Supreme Court to inaugurate a fundamental shift in the power of the federal courts in a case in which it has not even challenged the lower courts' determination of the unlawfulness of its executive order.

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[9] Trump v. Wilcox, __ S. Ct. __, 2025 WL 1464804 (May 22, 2025).

[10] Kate Shaw, *Why Is this Supreme Court Handing Trump More and More Power?*, N.Y. TIMES (May 25, 2025), https://www.nytimes.com/2025/05/25/opinion/supreme-court-trump-power.html/

[11] *See* Trump v. J.G.G., 604 U.S. __ (2025); Dep't of Educ. v. California, 605 U.S. __ (2025); OPM v. AFGE, 605 U.S. __ (2025); Noem v. Doe, 605 U.S. __ (2025); Noem v. Nat'l TPS Alliance, 605 U.S. __ (2025); United States v. Shilling, 605 U.S. __ (2025).

[12] *Wilmer Cutler Pickering Hale and Dorr LLP v. Executive Office of the President*, No. 1:25-cv-01234 (D.D.C. May 27, 2025); *Perkins Coie LLP v. Dep't of Justice*, No. 1:25-cv-01235 (D.D.C. May 2, 2025); *Jenner & Block LLP v. Dep't of Justice*, No. 1:25-cv-01236 (D.D.C. May 23, 2025). The Trump administration has not yet appealed the rulings that striking down executive orders targeting these firms. *See also* D.B.U. v. Trump, 2025 WL 1304288, (D. Colo. May 6, 2025); G.F.F. v. Trump, 2025 WL 1301052, (S.D.N.Y. May 6, 2025). In *D.B.U.* and *G.F.F.*, the district courts in Colorado and New York respectively issued TROs halting the deportation of Venezuelan nationals. The administration has not yet appealed to either the Tenth or Second Circuit.

[13] Max Matza and Nadine Yousif, *Judge Blocks Trump's Plan to end U.S. Birthright Citizenship*, BBC (Jan. 23, 2025), https://www.bbc.com/news/articles/c3605g34jx5o. During proceedings in *State of Washington v. Trump*, Judge Coughenour used the phrase "blatantly unconstitutional" to describe the executive order.

[14] CASA, Inc. v. Trump, 763 F. Supp. 3d 723, 743 (D. Md. 2025).

But rather than focus on the appellate process, or on remedying the many legal defects that have been revealed by litigation, this administration and many of its supporters have suggested that the problem is district judges. And rather than use its constitutional authority to enact laws that would give the President the power to do some of the things he wishes to do, members of this body have instead directed their resources—both institutional and individual—to critiquing federal judges for discharging their obligations to interpret statutes passed by Congress, and to implement the Constitution's guarantees.

Much of the criticism directed at district judges in the last few months suggests that judicial rulings against the administration thwart the will of the people.[15] But democracy means more than just elections for president. It includes elections for membership in Congress, the branch closest to the people, and the entity whose authority many of the judicial decisions being criticized aim to protect. Democracy is also not limited to elections. Of course, regular elections are a core component of democracy;[16] but so are values like the ability to engage in speech and expression, and to associate and petition. Meaningful democracy also requires genuine political equality,[17] procedural fairness, and mechanisms for the protection of minorities.[18] And in our system, courts can be and frequently have been key guarantors of *those* aspects of democracy.

The separation of powers is dynamic, not static, and that's by design. But a healthy system of separated powers requires active response in the face of efforts at aggrandizement. Allowing one set of institutional actors, or one branch of government, to dramatically expand its power without meaningful challenge or pushback risks permanent damage to our constitutional scheme.

There is plenty of room for debate about the proper scope of both presidential and judicial power. At different moments in our history, different institutions and actors have sought to significantly increase their authority, sometimes in ways that could not be squared with the basic design of a Constitution committed to limits on any single entity's power. But at this moment, the entity engaging in overreach is indisputably the executive branch. This administration has been marked by a breathtaking degree of presidential unilateralism that is flatly inconsistent with statutes, the Constitution, and over two centuries of practice. That is true in general terms, and it is true as to specific actions. *That* is why President Trump has fared so badly in court; because so many of his actions have been clearly unlawful, and because that unlawfulness has been clear to jurists of all stripes.

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[15] *See* @realDonaldTrump, TRUTH SOCIAL (Mar. 18, 2025, 9:05 AM), https://truthsocial.com/@realDonaldTrump/posts/114183576937425149. ("This Radical Left Lunatic of a Judge, a troublemaker and agitator who was sadly appointed by Barack Hussein Obama, was not elected President - He didn't WIN the popular VOTE (by a lot!), he didn't WIN ALL SEVEN SWING STATES, he didn't WIN 2,750 to 525 Counties, HE DIDN'T WIN ANYTHING! I WON FOR MANY REASONS, IN AN OVERWHELMING MANDATE, BUT FIGHTING ILLEGAL IMMIGRATION MAY HAVE BEEN THE NUMBER ONE REASON FOR THIS HISTORIC VICTORY. I'm just doing what the VOTERS wanted me to do. This judge, like many of the Crooked Judges' I am forced to appear before, should be IMPEACHED!!!").

[16] Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 761 (2024).

[17] JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS 37 (2016).

[18] DANIELLE ALLEN, JUSTICE BY MEANS OF DEMOCRACY 68 (2023).

Tension between courts and elected officials is nothing new. And in general terms, when Congress thinks other actors are exceeding their authority, it is perfectly appropriate for it to respond. So in the remainder of this testimony, I'll discuss several of the steps Congress is considering, and other steps Congress *could* consider.

Reforming the Nationwide Injunction

Congress has considerable power to regulate the federal courts, potentially including restricting courts' ability to issue nationwide relief. But the current moment demands caution before pursuing any change that would curtail courts' ability to meaningfully review and remedy executive action that violates the law.

Recent years have seen pitched debates about the desirability and permissibility of nationwide or universal injunctions—that is, injunctions that order relief that reaches beyond the parties.[19] The Supreme Court is considering some of these arguments in the pending case involving the President's Executive Order purporting to end birthright citizenship.[20]

There is no question that there has been a substantial increase in the number of nationwide injunctions in recent decades. A compilation last year in the *Harvard Law Review* found that of the 127 nationwide injunctions issued between 1963 and 2023, 96 were issued between 2001 and 2023, with just over half (64) issued against the Trump administration.[21] These figures are likely the result of a number of background conditions: less congressional activity in this period, resulting in more unilateral executive action; the decline of the class action device, largely as a result of Supreme Court decisions;[22] and the ascent of states as plaintiffs in challenges to federal policy. And of course, these numbers have increased still further during the early months of the second Trump administration.

Both these trendlines and absolute numbers have been invoked as reasons for reforming or even eliminating lower courts' ability to issue nationwide injunctions. As I've already noted, the Trump administration's losses are properly understood as appropriate institutional responses to executive-branch lawlessness, not judicial overreach. In this environment, limiting or eliminating courts' ability to issue nationwide relief would effectively neutralize a key—and right now, the only genuinely

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[19] Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 943 (2020); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017). *Rule by District Judges: The Challenges of Universal Injunctions*: Hearing Before the S. Comm. on the Judiciary, 116th Cong. (2020). *Rule by District Judges II: Exploring Legislative Solutions to the Bipartisan Problem of Universal Injunctions*: Hearing Before the S. Comm. on the Judiciary, 119th Cong. (2025).

[20] Trump v. CASA, Inc., No. 24A884 (U.S. Mar. 13, 2025), https://www.supremecourt.gov/DocketPDF/24/24A884/352051/20250313135341225_Trump%20v.%20CASA%20Inc%20application.pdf. Transcript of Oral Argument in Trump v. CASA, Inc., (U.S. argued May 15, 2025), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24a884_c07d.pdf.

[21] *District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1705 (2024).

[22] *See, e.g.*, Walmart v. Dukes, 564 U.S. 338 (2011); Comcast Corp. v. Behrend, 569 U.S. 27 (2013).

functioning—formal check on executive-branch violations of both statutes and core constitutional provisions. Beyond that concern, relegating plaintiffs to individual litigation or the class-action device to assert rights that have been threatened by many of this administration's moves would be both deeply inefficient and place relief out of reach for many injured parties.

That is not to say that there is no need for reform of any aspect of the universal injunction. Single-judge divisions, for example, which allow plaintiffs to hand-pick judges, are clearly in need of reform.[23] In March 2024, the Judicial Conference issued a policy statement against "judge-shopping," endorsing random assignment through district-wide selection processes.[24] But to date not every district has adopted the Conference's recommendation. Congress should consider legislation to eliminate single-judge divisions, a reform that would prevent a practice that has resulted in the most troubling and legally dubious injunctions in recent years.[25]

In addition, some judges have abandoned adherence to traditional equitable tests in favor of rulings that focus exclusively on the merits[26]—and merits determinations often made under extreme time pressure and without full ventilation of either facts or law.

Notably, pending legislative proposals are not responsive to either of these legitimate concerns.

First, the proposed "Judicial Relief Clarification Act of 2025"[27] takes far too sweeping an approach to reform. It appears designed to eliminate judges' ability to grant any relief that reaches beyond the parties, whether in the context of universal injunctions or vacatur of agency rules. It would require courts to certify class actions, a requirement that would render it functionally impossible to meaningfully block executive lawlessness.

Second, language included in the House's reconciliation bill appears designed to curtail the power of federal courts by prohibiting courts from enforcing contempt citations for failure to comply with injunctions or temporary restraining orders, unless "security"—that is, some sort of bond—was given when the injunction or order was issued.[28] In other words, the bill would require anyone suing the

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[23] Stephen I. Vladeck, *Don't Let Republican 'Judge Shoppers' Thwart the Will of Voters*, N.Y. TIMES (Feb. 5, 2023), https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html.

[24] *See* News Release: Conference Acts to Promote Random Case Assignment, https://www.uscourts.gov/data-news/judiciary-news/2024/03/12/conference-acts-promote-random-case-assignment (March 12, 2024); Steve Vladeck, *The Judicial Conference Moves to Curb Judge-Shopping*, ONE FIRST (March 14, 2024), https://www.stevevladeck.com/p/bonus-70-the-judicial-conference.

[25] Steve Vladeck, *The Growing Abuse of Single-Judge Divisions*, ONE FIRST (March 13, 2023), https://www.stevevladeck.com/p/18-shopping-for-judges.

[26] Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. (forthcoming 2025).

[27] Judicial Relief Clarification Act of 2025, https://www.grassley.senate.gov/imo/media/doc/judicial_relief_clarification_act.pdf.

[28] A provision in the House's budget reconciliation bill provides that "No court of the United States may use appropriated funds to enforce a contempt citation for failure to comply with an injunction or temporary

government to put up a bond before a court could use its contempt power to enforce its judgments. This provision threatens the power of the judicial branch and would undermine the rule of law. It is also clearly designed to prevent courts from enforcing their judgments in many of the cases that have been successfully brought against the Trump administration, and in which judges have opted not to require the payment of a bond. The apparently retroactive application of the bill would render the judicial power essentially toothless in many of those cases.

Improving Judicial Security

Rather than pursue these misguided efforts, Congress should devote itself to the genuinely pressing need to enhance judicial security.

The last four months have seen a sharp and alarming increase in threats against federal judges. According to the U.S. Marshals Service, during the period between November 2024 and March 1, 2025, 80 individual federal judges were the recipients of threats. Over the month of March and the first two weeks of April, an additional 162 judges received such threats.[29] As of May 27, it appeared that roughly a *third* of the members of the federal judiciary had been the recipient of some sort of threat in 2025. In one particularly disturbing example, a number of judges who have ruled against the administration, or the family members of such judges, received pizza deliveries at their homes, either anonymously or bearing the name of Daniel Anderl, who was the son of New Jersey District Judge Esther Salas and who was murdered by a disgruntled litigant posing as a deliveryman.[30] The threat communicated by such deliveries *at the homes* of judges and their family members is unmistakable.

This is not the first time in recent years that federal judges have been threatened or worse. In June 2022, an armed man was apprehended outside of Justice Brett Kavanaugh's home and later pleaded guilty to plotting to kill Justice Kavanaugh.[31] Other attacks on judges and their families have been, tragically, successful—including the murder of the husband and mother of Judge Joan Lefkow of the Northern District of Illinois.[32] In recent years, bipartisan congressional majorities have passed legislation focused on improving judicial privacy and security.[33]

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restraining order if no security was given when the injunction or order was issued pursuant to Federal Rule of Civil Procedure 65(c)."

[29] Mattathias Schwartz, *Marshals' Data Shows Spike in Threats Against Federal Judges*, N.Y. TIMES (May 27, 2025), https://www.nytimes.com/2025/05/27/us/politics/federal-judges-threats.html.

[30] Josh Margolin, Aaron Katersky & Jack Date, *'Anti-feminist' Lawyer Identified as Shooter Who Killed Judge Esther Salas' Son then Self*, ABC NEWS (July 20, 2020), https://abcnews.go.com/US/federal-judges-son-shot-killed-husband-injured-attack/story?id=71871708.

[31] Michael Levenson, *Man Pleads Guilty to Trying to Assassinate Justice Kavanaugh*, N.Y. TIMES (April 8, 2025), https://www.nytimes.com/2025/04/08/us/kavanaugh-assassination-attempt-guilty.html

[32] *See* Joan Lefkow, *My Husband and Mother Were Killed by Someone with a Vendetta. Federal Protection is Essential*, CHI. TRIB. (Nov. 9, 2020), https://www.chicagotribune.com/2020/12/09/op-ed-judge-joan-lefkow-my-husband-and-mother-were-killed-by-someone-with-a-vendetta-federal-protection-is-essential/.

In this spirit, a current legislative proposal aims to shift oversight of the U.S. Marshals Service from the executive branch to the judiciary, intending to ensure that the Marshals Service is able to focus on its core responsibilities of protecting federal judges and executing federal court orders.[34] The Marshals Service's dual accountability to both the executive and judicial branches has long been viewed as a structural weakness,[35] and moving the Marshals back to the judicial branch would better align with the original mission of the Marshals, who were not directly answerable to the Attorney General until 1969.[36] It would also align the security practices of the judicial branch with those of Congress[37]—with each branch protected by its own security apparatus not subject to the direct control of another branch.

Statutory Authorization

President Trump's initiatives have failed in court for a variety of specific reasons, and in response to challenges grounded in a range of different legal theories. Some courts have identified constitutional defects with presidential directives; others have found that presidential action was beyond the scope of statutory authority.

Where the power the president has sought to exercise is in fatal tension with core constitutional principles, there is not much room for congressional response. But in a number of other cases, Congress could respond to judicial rulings concluding that the president lacked particular statutory authority by affirmatively granting the president some of the authorities he is asserting. If President Trump wishes to eliminate the federal agency designed to protect Americans from unfair, deceptive, or abusive practices, he can work with Congress to eliminate the Consumer Financial Protection Bureau. If he wants to grant non-government employees access to Americans' most sensitive personal information, he should work with Congress to repeal the Privacy Act or create a set of statutory exceptions to existing privacy laws. If he wants the authority to impose sweeping tariffs based on his

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[33] *See* Nate Raymond, *Judicial Security Bill Included in U.S. House-passed Defense Policy Bill*, REUTERS (Dec. 8, 2022), https://www.reuters.com/legal/government/judicial-security-measure-included-us-house-passed-defense-policy-bill-2022-12-08/; https://www.uscourts.gov/data-news/judiciary-news/2022/12/16/congress-passes-daniel-anderl-judicial-security-and-privacy-act; *Biden Signs Bill to Protect Supreme Court Justices Into Law*, AP (June 16, 2022), https://apnews.com/article/abortion-biden-us-supreme-court-brett-kavanaugh-government-and-politics-d2507dd3b67efd64e52c2feab91b0eeb.

[34] MARSHALS Act, S. 1873, 119th Congr. §2(b)(1)(A) (2025). https://www.booker.senate.gov/imo/media/doc/marshalsact.pdfv.

[35] U.S. Gov't Accountability Off., GGD-82-3, U.S. Marshal's Dilemma: Serving Two Branches of Government (1982), https://www.gao.gov/assets/ggd-82-3.pdf.

[36] *Id.* at ii.

[37] *See* 2 U.S. § 1966 ("Protection of Members of Congress, officers of Congress, and members of their families").

determinations of trade deficits, he should ask Congress for explicit statutory authority to do so. He has done none of those things.

Conclusion

The federal courts are an important part of our constitutional scheme, and at their best, they can serve both to make rights meaningful, and to enforce and facilitate core commitments to popular sovereignty and self-rule. They have not always worked in this way, and, once again, a healthy democracy should allow debates about the scope of the authority of courts, as well as of other government actors. Nothing in my testimony is meant to suggest that criticizing courts should be off-limits.

But the latest attacks on the judiciary do not appear to be animated by a desire for good faith debates about the limits of constitutional authority; instead, they appear of a piece with other efforts to neutralize *any* actor or institution that seeks to curtail this President's power.

Thank you again for the opportunity to testify today. I look forward to your questions.

THE CATHOLIC UNIVERSITY OF AMERICA

J. Joel Alicea
St. Robert Bellarmine Professor of Law

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June 19, 2025

Dear Senator Whitehouse:

I write in response to your questions for the record regarding my June 3, 2025 testimony before the Senate Judiciary Committee's Subcommittee on the Constitution and Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights.

1. **During your time with the Center for the Constitution and the Catholic Intellectual Tradition, has the Center:**

    a. **Paid for or otherwise provided any things of value—including transportation—to any member of the Supreme Court? If so, please describe such things, their approximate value, the date on which such thing was given, and the justice to whom it was provided.**

The Center for the Constitution and the Catholic Intellectual Tradition (CIT) promotes scholarship that explores the relevance of the Catholic intellectual tradition for American constitutionalism. Although CIT's primary focus is on theories of constitutional law, such as originalism, its ambit is broad and covers the relevance of the Catholic intellectual tradition for constitutional history, doctrine, and other fields of study. CIT carries out its mission through such activities as guest lectures, conferences, courses offered through the Columbus School of Law, a program on the Catholic intellectual tradition for young lawyers in the D.C. area, and a program of special events and offerings for students at The Catholic University of America (CUA).

CIT has completed three full years of programming since its founding under another name (the Project on Constitutional Originalism and the Catholic Intellectual Tradition). During that time, we have hosted four events featuring members of the Supreme Court:

September 27, 2022: Justice Samuel A. Alito, Jr., delivered the inaugural lecture for CIT.

September 21, 2023: Justice Amy Coney Barrett sat for an interview with Professor Kevin C. Walsh, who at the time served as co-director of CIT and now serves as a Senior Fellow.

December 1, 2023: Justice Samuel A. Alito, Jr., delivered the keynote address on the second day of CIT's "*Making Men Moral* 30th Anniversary Conference."

September 26, 2024: Justice Brett M. Kavanaugh sat for an interview with me.

At each of those events, CIT paid the cost (or, in the case of the December 1, 2023 dinner, contributed towards the cost) of a reception and dinner at which the respective justice was present. Food and refreshments were offered to the justices at the receptions and the dinners. These are the only things of value that CIT has provided to any member of the Supreme Court.

I am grateful to Justices Alito, Kavanaugh, and Barrett for being so generous with their time, especially in spending time with Catholic Law's students. The visits by these justices to CUA's campus were invaluable educational opportunities for our students and contributed significantly to furthering scholarly discourse.

2. **During the hearing, you said that it is "in general" not appropriate to call judges "USA-hating monsters who want our country to go to hell."**

    a. **In what specific circumstances would it be appropriate to call judges "USA-hating monsters who want our country to go to hell"?**

I cannot think of any circumstances in which it would be appropriate. I would note, however, that over the course of our nation's history judges have been criticized justly in harsh terms over their decisions.

    b. **Yes or No: Do you believe that a President's decision to call judges "USA-hating monsters who want our country to go to hell" makes judges and their families less safe?**

I condemn any statements by public officials that would make judges or their families less safe, and I certainly hope that the quoted statement does not do so.

3. **Some government officials have recently commented on federal judges and their decisions.**

    a. **Should federal judges or Supreme Court justices be impeached for ruling against the executive branch?**

No federal judge or Supreme Court justice should be impeached based on the mere fact of having ruled against the executive branch. I am unaware of anyone who holds the contrary view.

    b. **Do you think it is appropriate for Members of Congress to display "Wanted" posters with the names and faces of federal judges who rule against the executive branch?**

No.

    c. **Do you think it is appropriate to refer to federal judges who issue nationwide injunctions or similar relief as judicial insurrectionists?**

No.

d. Do you think, as President Trump has asserted, that federal judges who have ruled against the Trump Administration are doing so because of their hatred of him?

I do not know the motives of federal judges, and I will not speculate on them.

4. President Trump recently commented on Leonard Leo's role in the appointment of judges and justices during the first Trump Administration.

a. Yes or No: Do you agree with President Trump that Leonard Leo is a "sleazebag"?

No.

b. Yes or No: Do you agree with President Trump that Leonard Leo is a "bad person who, in his own way, probably hates America"?

No.

c. Yes or No: Do you agree with President Trump that Leonard Leo is a "backroom 'hustler'"?

No.

d. Yes or No: Have you heard Leonard Leo brag about controlling judges or justices? If yes, please describe what you've heard with specificity.

No.

5. Yes or No: Do you think that any of this Administration's actions have violated the law? If yes, which actions?

I was invited to testify about universal injunctions, not to analyze the legality of all of the Administration's actions. Each of those actions would require an extensive, individualized legal analysis. Because such an analysis would be outside the scope of what I was invited to testify about, I decline to provide it here.

6. Do you believe the large number of district court rulings against this Administration is in any part due to the large number of executive actions taken by this Administration?

The large number of executive actions taken by this Administration does not explain the unprecedented number of *universal injunctions* issued against this Administration, the subject about which I was invited to testify. Few, if any, Presidents in our history have used executive power more aggressively than FDR, yet there were *no* universal injunctions entered against FDR's policies. Presidents Biden and Obama were also quite aggressive in their use of executive power domestically, yet the number of universal injunctions entered against them pales in comparison to the number of universal injunctions issued over the last few months.

7. **Do you believe the large number of district court rulings against this Administration is in any part due to the unlawfulness of executive actions taken by this Administration?**

   Please see my response to Question 5 above.

8. **During the hearing, Senator Schmitt said the assignment of four of the D.C. District Court's over one hundred cases involving the Trump Administration to Judge James Boasberg was a "statistical impossibility." Senator Schmitt said that "as chief judge, [Judge Boasberg] has play and he wants to be able to grab cases for himself."**

   a. **Given that Judge Boasberg, as one of 25 participating judges in D.C. District Court, has been assigned just 4 of the more than 100 cases filed against the Administration in that Court, do you agree with Senator Schmitt that Judge Boasberg's assignments are a "statistical impossibility"?**

This question, too, is outside the scope of the issues on which I was invited to testify. In any event, I have not studied the case-assignment practices of the U.S. District Court for the District of Columbia or the facts surrounding the assignment of cases to Judge Boasberg. I cannot, therefore, assess any claims about those specific practices.

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Thank you for your questions. It was an honor to testify before the subcommittees.

Sincerely,

J. Joel Alicea
St. Robert Bellarmine Professor of Law
The Catholic University of America
Columbus School of Law

Questions for the Record
Josh Blackman
Hearing on "The Supposedly 'Least Dangerous Branch': District Judges v. Trump"
Submitted: June 27, 2025

Questions from Senator Lee

Question 1
A universal injunction undermines the separation of powers. The judicial power of a court is limited to the parties before it. The universal injunction, however, allows a single judge to single-handedly bind everyone in the executive branch and every person in the world. And all of this is done outside the confines of Rule 23 and class certification. The Supreme Court's ruling today in *Trump v. CASA, Inc.* reaffirms this principle.

Question 2
There is an intrinsic benefit to a three-judge panel: there must be consensus. Single district court judges, acting alone, have no one to check their views. But with a three-judge panel, there is a need to persuade at least one member before action is taken. Moreover, decisions from three-judge panels are appealed directly to the Supreme Court's mandatory jurisdiction. This appeal process would ensure a timely review of pressing issues.

Question 3
I think the Supreme Court's current docket is underwhelmed. Several decades ago, the Court would decide as many as two-hundred cases of the year. Now, we are down to less than sixty signed decisions. Each Justice only has to write five or six majority opinions per year. This light caseload leads to the Justices writing opinions that are too long, as well as lengthy concurrences and dissents that contribute little to the law.

I do think increasing mandatory appeals from three-judge panels and approving "Certificates of Division" would burden the current Court. The solution, I think, is for the Justices to work year-round.I don't have much sympathy for complaints from the Justices about being overworked. Most district court judges decide hundreds of cases each year, on their own, with far less staff and resources.

Thinking long-term, efforts to impose term limits on the Justices are not necessary. If the work load continues to increase, Justices will self-select, and leave the bench when they cannot keep up with the work load. Attrition works.

Question 4

I think there is a robust scholarly debate on whether Article III permits universal injunctions. The Supreme Court declined to resolve this issue today in *CASA*. At this point, I am not entirely sure which side is right. But I do know that Congress, which has plenary power over the jurisdiction of the lower courts, can settle this matter. Congress should consider legislation that is prospective, and goes into effect in 2029. This sort of reform has to be passed behind the veil of ignorance, when it is not clear who will benefit and who will be harmed.

Questions From Senator Whitehouse

I have voluntarily testified before Congress several times over the years. I have undertaken these responsibilities because I firmly believe in public service. Our government works best when it hears from the widest range of viewpoints, and I am honored to appear before the legislature to share my perspective. Indeed, these sorts of hearings work best when members from one side push and probe witnesses from the other side.

Last month, I was invited to testify at a hearing titled, "The Supposedly 'Least Dangerous Branch': District Judges v. Trump." The theme of the hearing was how district courts were issuing universal injunctions against the Trump Administration, and what Congress could do about that problem. My prepared testimony addressed that theme, and offered (what I hoped would be) bipartisan proposals that Congress could consider to address some of the trends from the past decade.[1] Universal injunctions are a bipartisan problem that warrant a bipartisan solution. Today, the Supreme Court decided *CASA v. Trump*, and Congress now has a fresh space to act.

After the hearing, Senator Whitehouse submitted more than forty questions for the record, many of which were not germane to the topic of the hearing. I consulted with the majority staff, and was advised that witnesses are under no obligation to respond to QFRs. I have decided to answer those questions that are germane to the topic of the hearing.

Question 1: (a)-(j)

During the hearing, Senator Whitehouse asked about a donation to South Texas College of Law Houston. I replied that any questions should be directed to the College.

Question 2

(a) Simply ruling against the executive branch is not the basis for a judicial impeachment.
(b) No.
(c) No. I have performed research on the original meaning of the term "Insurrection" in Section 3 of the Fourteenth Amendment.[2] Barely a year ago, there was an attempt to remove President Trump from the ballot based on the charges of insurrection. I would not use the term "insurrection" in contexts where it does not apply.
(d) No.

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[1] Josh Blackman, *Bilateral Judicial Reform*, 1 Texas A&M Journal of Law & Civil Governance 59 (2024).
[2] Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. 350 (2024).

Question 3 (a)-(d)
These questions are not germane to the topic of the hearing.

Question 4 (a)-(b)
These questions are not germane to the topic of the hearing.

Question 5 (a)-(c)
Forum shopping is rational. It is no surprise that progressive litigants and Democratic Attorneys General file suits in forums they deem favorable, and conservative litigants and Republican Attorney Generals file suits in forums they deem favorable. Outside of extremely unusual circumstances, I do not think federal judges exhibit the type of bias that would trigger recusals or disqualification under the canons of ethics. But I do think judicial philosophy matters, and some judges will be more or less receptive to certain types of legal arguments. For example, in the Ninth Circuit, there is a virtually unbroken series of rulings against Second Amendment claims. A litigant bringing a Second Amendment challenge to a federal gun control law would be well advised not to file in the Ninth Circuit. Thankfully, the overwhelming majority of litigation is not ideological. More than 90% of panel decisions on the courts of appeals are unanimous. But for high-profile strategic litigation, the choice of forum does matter.

Question 6 (a)-(b)
These questions are not germane to the topic of the hearing. I will let my writings speak for themselves.

Question 7 (a)-(f)
These questions are not germane to the topic of the hearing. I will let my writings speak for themselves.

Question 8 (a)-(e)
These questions are not germane to the topic of the hearing. I will let my press statements speak for themselves.

Question 9
This question is not germane to the topic of the hearing.

Question 10
I have doubts about the constitutionality of some of the actions taken towards certain law firms.

Question 11
There is a numerator and denominator problem here. I think it is true that the Trump Administration has issued a large number of executive actions during the first few months. But I

also think that federal district courts have enjoined a substantial portion of those actions. The Supreme Court's ruling today in *CASA* would suggest that many of these universal injunctions were improper.

Question 12
See answer to Question #11 above.

Question 13
It has long been known that marking a case as "related" allows litigants to steer cases towards judges they deem favorable. Conservative and progressive groups take advantage of this tactic. Congress should take a look at the "related" cases doctrine, and consider whether it allows judges to keep cases that are not really germane.

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Kate Shaw
Professor of Law

June 26, 2025

Hon. Charles E. Grassley
Chairman
Senate Committee on the Judiciary
Washington, DC 20510-6275

Re: Questions for the Record — June 3 Joint Sub-Committee Hearing

Dear Chairman Grassley:

Thank you for the invitation to testify at the June 3 hearing, "The Supposedly 'Least Dangerous Branch': District Judges v. Trump." Following the hearing, I received Questions for the Record from Senator Booker. Below please find my answers to those questions (along with copies of the questions themselves) for inclusion in the hearing record.

Questions for the Record for Professor Kate Shaw
Submitted June 10, 2025

1. The United States Constitution's system of checks and balances was designed to allow each branch to hold the others accountable, not to threaten or undermine them. President Trump and members of his Administration have publicly targeted judges and their families by name or called for their impeachment when they've ruled against his policies—i.e., when they've served as a check on the executive.

    a. Is this an unconstitutional overstep, violating the separation of powers?

The separation of powers is dynamic, not static, and a certain degree of friction between the branches is inevitable in a system in which each branch operates to check the power of the others. This means that criticism of judges, and even discussions of ways to limit judicial power through legislative mechanisms like jurisdiction-stripping or regulation of the power to issue nationwide injunctions, can

be both appropriate and constitutionally sound. So can criticism of some judicial conduct off the bench, in particular where that conduct raises serious concerns about ethics or impartiality.

But singling out individual judges based on the substance of their rulings, and extending such attacks to members of judges' families—in particular on social media platforms where such rhetoric can lead to threats of violence—is something entirely different. Such rhetoric appears designed to influence the outcome in individual cases outside of the judicial process, and to coerce or intimidate individual judges, rather than to check institutional power. And it seems likely that such attacks are related to the alarming increase in serious threats to federal judges in recent months.[1]

In addition, while impeachment is the constitutional mechanism for removing federal judges, the grounds for impeachment are limited to "Treason, Bribery, or other high Crimes and Misdemeanors."[2] Judicial impeachments have been relatively uncommon since the founding, with just 15 judicial impeachments and 8 convictions.[3] Each of these historical impeachments responded to serious judicial misconduct: manifest unfitness for the bench; corruption; bribery; waging war against the United States.[4]

By contrast, the current discussions of judicial impeachment, and the actual impeachment resolutions that have been introduced in the House, focus almost exclusively on the content of judicial rulings.[5] Under any plausible account of the role of impeachment in our constitutional order, pursuing impeachment against district judges merely for handing down rulings against the administration would be a gross abuse of the impeachment power.

b. What dangers does the delegitimization of the federal judiciary pose?

There is a fine line between healthy debates about the role and power of the federal courts in our constitutional order, and efforts to question the legitimacy of courts or the Supreme Court. Courts play an important but limited role in our constitutional scheme. At their best, they can serve both to make rights meaningful, and to facilitate commitments to popular sovereignty and self-rule. They have not always faithfully performed that role, and when they fall short, they can and should be criticized

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1 Mattathias Schwartz, *Marshals' Data Shows Spike in Threats Against Federal Judges*, N.Y. TIMES (May 27, 2025), https://www.nytimes.com/2025/05/27/us/politics/federal-judges-threats.html

2 Art. II § 4.

3 Federal Judicial Center, *Impeachments of Federal Judges*, https://www.fjc.gov/history/judges/impeachments-federal-judges.

4 *Id.*; *see also Judicial Overreach and Constitutional Limits on the Federal Courts*: Hearing Before the Subcomms. on Courts, Intellectual Property, Artificial Intelligence, and the Internet & the Constitution and Limited Government of the H. Comm. on the Judiciary. 119th Cong. (2025) (statement of Kate Shaw, Professor of Law, University of Pennsylvania Carey Law School). I also discuss some of these impeachments in *Impeachable Speech*, 70 EMORY L.J. 1 (2020).

5 *See, e.g.*, H.R. Res. 229, 119th Cong. (2025) ("Impeaching James E. Boasberg, United States District Court Chief Judge for the District of Columbia, for high crimes and misdemeanors").

like any other government actor. But efforts to delegitimize courts raise real questions about courts' ability to perform their rights-protecting and democracy-enhancing function effectively.

2. Where is the line between criticism of court rulings by executive branch officials and coercive intimidation that threatens an independent judiciary?

Again, this is a line that may be difficult to discern but important. Certainly public attacks on judges' family members should normally be off-limits; so should impeachment threats or efforts predicated on nothing beyond judicial rulings.

3. In your view, what are the risks of having the U.S. Marshals Service under the control of the executive branch, when their primary mission is to protect the federal judiciary and enforce court orders?

The current location of the U.S. Marshals Service, within the executive branch, means that the lower federal courts are the only governmental institution whose security apparatus is subject to the direct control of another branch.

For that reason, Congress should seriously consider the pending bill that would move control of the Marshals Service from the executive branch to the judiciary. Such a move would ensure that the Marshals Service is able to focus on its core responsibilities of protecting federal judges and executing federal court orders.[6] It would also respond to something that has long been viewed as a structural weakness: the Marshals Service's dual accountability to both the executive and judicial branches.[7]

Moving the Marshals back to the judicial branch would be consistent with the original mission of the Marshals, who were not directly answerable to the Attorney General until 1969.[8] It would also align the security practices of the judicial branch with those of Congress[9] and the executive—with each branch in control of its own security arm.

4. How can we ensure the separation of powers is respected when the executive is in control of protecting a coequal branch, particularly one it disagrees with?

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6 MARSHALS Act, S. 1873, 119th Cong. §2(b)(1)(A) (2025). https://www.booker.senate.gov/imo/media/doc/marshalsact.pdfv.

7 U.S. Gov't Accountability Off., GGD-82-3, U.S. Marshals' Dilemma: Serving Two Branches of Government (1982), https://www.gao.gov/assets/ggd-82-3.pdf.

8 *Id.* at ii.

9 *See* 2 U.S. § 1966 ("Protection of Members of Congress, officers of Congress, and members of their families").

Ideally, a security apparatus within the executive branch would faithfully discharge all of its duties, including duties to protect the courts, regardless of the executive's agreement or disagreement with courts' rulings. But this administration has unsettled many long-standing practices of good faith, accommodation, and mutual respect that have long undergirded the separation of powers. For that reason, relocation of the Marshals Service would be more consistent with the proper functioning of the separation of powers.

Thank you again for the opportunity to testify earlier this month.

Very truly yours,

Kate Shaw

A P P E N D I X

The following submissions are available at:

https://www.govinfo.gov/content/pkg/CHRG-119shrg61716/pdf/CHRG-119shrg61716-add1.pdf

Submitted by Chair Cruz:

Submitted by Senator Blackburn:

Submitted by Senator Whitehouse: