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"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

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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.