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.