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
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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

[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.