Hearing before the United States Senate Committee on the Judiciary

"Rule by District Judges II: Exploring Legislative Solutions to
the Bipartisan Problem of Universal Injunctions"

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Mr. Chairman, Ranking Member, and Members of the Committee: I am honored to have the chance to speak with you today.

The United States Constitution establishes a separation of powers. The Congress is supposed to make the law. The President is supposed to "faithfully execute" the law passed by Congress. And the federal courts apply the law and ensure that every government actor follows it.

Each branch is supposed to be checked—and sometimes checkmated—by the other branches. And each branch acts in its own distinctive mode. Congress passes general laws that apply to everyone, but it cannot decide particular cases. The executive branch administers the law and makes enforcement decisions, but the executive has no power to decide which laws to keep or jettison, and cannot deprive anyone of liberty or property without due process of law. The courts decide cases, but they cannot even lift a finger unless a litigant brings a case to them. To understand the separation of powers, we have to discern each branch's strength and also its weakness.

Article III of the Constitution grants to the federal courts "the judicial power." The Constitution does not define that phrase, but it did not need to. The judicial power was a known commodity, familiar to the Founders from their experience with English and colonial courts. It is the power for a court to act like a court. And the Constitution specifies the domain in which federal courts exercise this power: "The judicial power shall extend to" certain specified "cases . . . [and] controversies."

That constitutional vision for the judicial power is at the heart of a debate this country has been having for the last decade. Ten years ago, the state of Texas sued the United States to stop an Obama administration policy called "Deferred Action

for Parents of Americans and Lawful Permanent Residents," or DAPA. The federal district court granted a universal preliminary injunction, saying that the policy could not be applied to anyone. Since that case in 2015, the universal injunction has worked a fundamental change in the relationship of the federal courts to the political branches.

There is a robust debate about these injunctions, which are also called "national" or "nationwide" injunctions. I will not summarize that debate here, but what I will do is briefly answer four questions.

First, what is a universal injunction? An injunction is an order for someone to do something or not do something. Ordinarily, an injunction will order the defendant not to do something—like enforce a law—against the plaintiff. It's a remedy that operates between the parties. What makes *universal injunctions* different is not their geographic breadth, but rather that they give the fruits of victory to people who are not parties in the case or controversy before the court.

The universal injunction has a close cousin called "vacatur." It works like a universal injunction against an agency rule. There is a highly technical debate about whether a vacatur remedy is even authorized by the Administrative Procedure Act, as well as important debates about the proper scope of the rulemaking power of federal agencies. But I want to make a straightforward point focused on judicial remedies: vacatur presents the same basic problem as the universal injunction. No solution to the universal injunction will work unless it also stops vacatur.

Second, what is wrong with the universal injunction? The answer has a policy dimension and a constitutional dimension. As a matter of policy, the universal injunction has been a disaster for the decisionmaking of the federal courts.

The ordinary way the federal courts are supposed to work is that someone may challenge a law in one circuit, and whether the challenger wins or loses, the decision of the circuit court will be a precedent for that circuit. This is what Justice Kagan has called "the normal process." It allows multiple courts to consider a question, and to consider it deliberately—all before the Supreme Court may eventually be asked to resolve a disagreement among the lower courts. It does take a little longer. But it does not take thousands of suits; usually, it just takes a few circuit courts weighing in. This is how questions are supposed to be settled in the federal courts—deliberately, collectively, and with appellate precedent. This process also reduces the appearance of partisanship in the judiciary, because the decisionmaking tends to be distributed across judges who differ in terms of geography, generation, and ideology.

But universal injunctions—and lightning appeals from them straight to the Supreme Court—have accelerated judicial decisionmaking, leading to rushed and suboptimal decisions. The universal injunction reduces the likelihood of multiple circuit courts considering a legal question. It is an end-run around the legal provisions we have for representative suits: a universal injunction gives the remedy a class action might produce, but without the plaintiff having to meet any of the requirements of a class action, including due process protections for others. The universal injunction is inconsistent with basic principles about the precedential authority of a district court. It is inconsistent with rules about the issue-preclusive effect of a decision against the government. And the universal injunction has an asymmetric effect: 100 people can challenge a federal policy, and if the government wins 99 of the cases, it won't matter as long as 1 plaintiff wins and gets a universal injunction. So the government has to run the table.

These policy consequences are partly about the universal injunction and partly about how it interacts with negative developments on other fronts—extreme forum-shopping, heightened judicial polarization, broad state standing, and the dominance of the merits in the preliminary injunction analysis.

That's the policy dimension. There's also a constitutional dimension to the problem. The federal courts have the judicial power, and they exercise it in cases brought by parties. When a court gives a final judgment, that judgment binds the parties. When a court with jurisdiction gives an order, that order must be followed. No one is above the law. But judicial judgments and orders have this kind of authority in our legal system because of the principle that courts act as courts, deciding a case for the parties and giving remedies to the parties.

Once a federal court decides a case and gives a remedy to the parties, including those represented by the parties, there is nothing left for it to do as a court. There is no constitutional authority for the judge to go on and decide the cases of other people not before the court, or to give remedies to other people not before the court. That is why universal injunctions go beyond the exercise of "the judicial power."

Our constitutional tradition does include certain kinds of cases that are defined not so much by the parties as by some other traditional narrowing principle, such as a disputed *res* in an *in rem* action or an officer's ministerial duty in mandamus. But these grounds do not even come close to justifying the universal injunctions the courts are giving.

And I will concede that Congress has latitude to decide what counts as a "case." But there is no plausible argument that the entire public is represented in a case simply because a court gives a universal injunction.

The case, then, is the secret to a federal court's strength and weakness. The judicial power is awesome—but also limited. A court with the judicial power is like a huge semi, but it needs to stay in its lane.

Third, is the universal injunction a partisan problem? Emphatically no. Universal injunctions and vacatur are stopping almost every major initiative of the second Trump administration, just like they stopped almost every major initiative of the Biden administration, of the first Trump administration, and of the final part of the Obama administration. Think of the overtime regulations of the Obama administration. Think of the travel ban in the Trump administration. Think of the student loan forgiveness in the Biden administration. And now think of the temporary restraining order that required USAID funding to be paid to entities that were not parties to the case. Many other illustrations could be given.

The bottom line is that universal injunctions and vacatur have been a bipartisan scourge. I have argued for ending this bipartisan scourge across all four of these administrations. And problems with the universal injunction have been identified by many others, Democrats and Republicans, including both of the other speakers who are testifying today. These problems have been detailed by Justice Thomas and Justice Gorsuch, recognized by Justice Kagan, and challenged during the last administration by Solicitor General Prelogar.

At any particular moment, of course, there is a partisan valence to solving the problem of the universal injunction. But that partisan valence will not last. There are no permanent majorities.

Still, it may be tempting to see this entirely through the lens of partisan effects. Democrats will be understandably concerned about taking away a roadblock to action by the current administration. Republicans will be understandably concerned about taking away a roadblock to future administrations. My plea is that you would see this for the bipartisan problem that it is, and for the constitutional problem that it is, and not just see it through the lens of short-term advantage.

In the long term, the real loser from the universal injunction is our democracy. There can be no effective action by the federal government if every substantial initiative is stopped. The Republican or Democratic bias oscillates over time, but what does not change is the universal injunction's built-in bias against any effective

government action. Judges imposing a near-automatic block to whatever the political branches do is not how a democracy is supposed to work.

Finally, what should a legislative solution look like? Here I would like to simply a note a few principles for any effective legislation on this topic:

- *The legislative solution should rest on a precise understanding of the nature of the problem.* The problem is not about geographic breadth, but about remedies for non-parties. That means the bill should be laser-focused on relief for non-parties, not the geographic territory of the court.
- *The legislative solution should match the scope of the problem.* That means the bill should leave no doubt that it applies to temporary restraining orders and to vacatur under the Administrative Procedure Act.
- *The legislative solution should not accept the existence of universal injunctions and just try to trim their sails.* The bill should not purport to authorize universal injunctions as long as they are given by three judges, or as long as they are given by one specified court, or as long as state attorneys general want them. None of those provisions would address the constitutional dimension of the problem.
- *The legislative solution should prevent easy evasion by going to other courts.* That means the bill should carefully state that it applies not only to the courts of the United States but also to the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands. What would be the sense of forbidding universal injunctions by federal courts in the fifty states, but then allow them to be given as long as the plaintiffs go offshore?

Only one proposed bill fits these principles, and that is the Chairman's bill. 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.

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The last ten years have seen a fundamental transformation of the relationship between the judicial branch and the executive and legislative branches. It is past time to reset that relationship. The federal courts are and should be a bulwark against unconstitutional or illegal actions taken by other government actors. They should hold the President accountable, regardless of whether the President is a Republican or a Democrat. But the federal courts should perform that essential

function as courts do: by deciding particular cases, brought by particular parties, with remedies that control the relationship between these parties. The way one decision ripples out to other cases should not be through a trial court's injunction, but through appellate precedent. In a world without universal injunctions, federal courts will still provide a critical check on unlawful legislative or executive action—but with more precision, deliberation, and procedural consistency.

The Chairman's bill would reset the relationship of the three branches, putting it on a sounder constitutional footing. I encourage you, Democrats and Republicans, to respond to this bipartisan problem by giving the bill your full support.