



KEEP OUR REPUBLIC

The Democratic Process Does Not Include “A War” on Judges

Tensions between political factions and branches of government are part of a functioning democracy. Robust debate about the issues underlying those tensions is welcome and healthy. Demonizing public servants with whom one disagrees, or urging “a war” against them, is not.

The recent remarks of Todd Blanche, the second highest-ranking official of the United States Department of Justice, characterizing the current legal environment as one in which “a war” against “rogue” judges is appropriate, are deeply troubling. To use an overworked but in this case appropriate metaphor, it is pouring oil on the fire. As retired federal judges including an almost equal number of appointees of Presidents from both major parties, we write to express our respectful but strong objection to these and similar remarks by others.

In the past year, federal judges have been the target of an unprecedented number of threats based on rulings that have been the subject of harsh criticism by senior public officials. The United States Marshals Service and other law enforcement agencies have determined that many of these threats have posed a credible danger to the judges, their loved ones, and their court staff.

Our Founders created a legislative branch (Congress) to make laws and an executive branch (the President and those who implement the President’s policies) to be bold and energetic in executing the laws. The Founders also created a co-equal, independent judiciary to be a check on the power of the other branches. The courts exist not only to resolve individual disputes but to ensure that the other two branches do not exceed their constitutional prerogatives. This design intentionally and inevitably keeps the three branches in tension with each another, the goal being to prevent any one branch from usurping or denying the constitutional authority of another. In constitutional terms, this is what is meant by the separation of powers.

District courts – where cases are first heard – are required to apply the law as it has been previously interpreted. They cannot change the law. When a President seeks to implement significant changes in policy, as has happened before in our nation’s history and is happening now, district courts may be required to declare some



KEEP OUR REPUBLIC

presidential actions unlawful based on the current state of the law. That does not make the judges who do this “rogue,” “activist,” or “radical”; quite the opposite, it means that they are acting in accordance with their constitutional role as judges.

If a President or the President’s supporters do not like a district court ruling, they can appeal the ruling to a higher court. The Courts of Appeals and the Supreme Court then can perform their function of determining whether the district court correctly applied the law, and, in some instances, whether the precedents upon which the district court relied should be revisited.

This deliberative and cautious process is precisely what the Founders envisioned. Each branch is separate from the others, the branches checking and balancing each other to ensure that no branch is disrespectful of the role of the others. As Justice Gorsuch has noted, “when the separation of powers is ignored, those who suffer first may be the unpopular and the least among us – immigrants ... small business ... and criminal defendants ... but they are not likely to be the last.”

The constitutional process that the Founders created did not envision “a war” between the branches or any other kind of “war.” And they would know. They fought a real war, intended, among other things, to endow our nation with an independent judiciary instead of one beholden to a king. As a lawyer, Mr. Blanche took an oath to uphold the Constitution. All of us have a duty to be faithful to that oath.