GEORGETOWN LAW

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Hon. Charles E. Grassley
Chairman
Senate Committee on the Judiciary
Washington, DC 20510-6275

Re: Questions for the Record — April 2 Committee Hearing

Dear Chairman Grassley,

Thank you again for inviting me to testify at the Committee's April 2 hearing, "Rule by District Judges II: Exploring Legislative Solutions to the Bipartisan Problem of Universal Injunctions." I have received Questions for the Record submitted by four members of the Committee—Senator Whitehouse, Senator Booker, Senator Padilla, and Senator Blackburn. Please find below my answers to those questions (along with copies of the questions themselves) for inclusion in the hearing record.

I. Questions from Senator Whitehouse

1. Please explain the problems that might arise if temporary restraining orders were immediately appealable in all circumstances.

I see at least two distinct (but related) problems if temporary restraining orders (TROs) were to become immediately appealable in all circumstances. First, and foremost, appeals could (and likely would) *inhibit* the ability of district courts to move expeditiously in deciding whether or not to convert TROs into preliminary injunctions—both formally (insofar as they would, or at least might, divest the district courts of jurisdiction) and practically (since district courts may be unwilling to move as quickly if their appellate colleagues are going to weigh in on the relevant questions first). Second, immediate appeals would necessarily usurp the function and provenance of district judges—who are both better situated to move quickly and more experienced at moving quickly in cases requiring emergency relief. The whole point of TROs is to provide a temporary, time-limited stopgap *while* the ordinary judicial process is able to play out. Making them appealable in all (or even most) cases would fundamentally undermine that role.

2. Do you believe any problems might arise if:

    a. A court vacated a broadly applicable agency regulation only with respect to the parties to a case?

    b. A court declared a law facially unconstitutional but could not issue non-party relief?

    c. Class actions were the only means of securing non-party relief in emergency situations, such as in a challenge to an election law in the days prior to that election?

In all three of these contexts, it is not difficult to imagine contexts in which having relief limited in these respects would undermine—perhaps irreparably—constitutional rights held by others. In the first two scenarios, for instance, if courts were limited to barring enforcement only against the plaintiffs of a law or regulation that is unconstitutionally vague, the *same* unconstitutional law could continue to chill the behavior of non-parties—even if the government *never* sought to enforce it against them. And, of course, if the government *did* pursue enforcement, those individuals who were not parties to the first lawsuit would now have to bear the economic and other costs of defending themselves against enforcement of a law or regulation that courts have *already* struck down. The inefficiencies here are problematic enough; the larger issue is the extent to which it could (and almost certainly *would*) chill the enjoyment of constitutional rights by non-parties if courts were *never* able to provide relief against the government that extends to all potentially affected individuals.

Class actions *could* be the solution to that problem. But as I noted in my written testimony and in multiple colloquies during the hearing on April 2, they can't serve that role today both because of the ways in which the Supreme Court has made class certification more difficult *in general* and because of the especial difficulties of securing class certification on an emergency basis. To be clear, I think reforms to Rule 23, whether through judicial rulemaking or legislation, likely *could* obviate those concerns. But I vehemently disagree with those, like my friend and colleague (and fellow witness) Professor Bray, who suggest that class actions provide such an alternative *today*.

3. During the hearing, Senator Schmitt said, "It's statistically impossible for Judge Boasberg to be getting the cases he's getting" and that "the appellate bar . . . know[s]" something is "wrong" with random case assignment among district court judges.

    a. As a member of the appellate bar, do you agree with Senator Schmitt's statement that "[i]t's statistically impossible for Judge Boasberg to be getting the cases he's getting"?

b. As a member of the appellate bar, do you agree with Senator Schmitt's statement that there's "something wrong" with Judge Boasberg being assigned to major cases involving challenges to Trump administration actions?

As I suggested during the hearing, I strongly disagree with both of Senator Schmitt's statements. Much of the hysteria surrounding case assignment policies in the D.C. federal district court depends upon (1) online commentators who confused the U.S. District Court for the District of Columbia with the much larger District of Columbia Superior Court; and (2) a failure to appreciate how many of the lawsuits challenging Trump administration policies have been filed in that district court—such that it was inevitable that specific judges would be assigned to multiple cases.

And insofar as Senator Schmitt and the rest of the Committee *is* concerned about case assignment policies across the federal courts (including the refusal of the Northern District of Texas to conform to the Judicial Conference's March 2024 policy statement against "judge-shopping"), I would *welcome* uniform, nationwide reforms to case-assignment rules in suits seeking universal relief—something that is well within Congress's power to provide for, since district court control over case assignment rules is statutory. *See* 28 U.S.C. § 137.

4. Senate Judiciary Republicans have introduced multiple bills to restrict or eliminate district courts' authority to issue nationwide injunctions. The title of one of these bills is the "Restraining Judicial Insurrectionist Acts of 2025."

a. Do you believe that judges who issue nationwide injunctions or similar relief are "Judicial Insurrectionists"?

Whatever else might be said about universal relief, it seems wildly inappropriate (to say nothing of shamelessly hypocritical) for anyone to suggest that judges entering coercive relief against the federal government that the Supreme Court has not (yet) precluded are somehow seeking to resist or otherwise overthrow the U.S. government by force. We live in a constitutional republic in which federal courts have not only the *power*, but the *obligation* to strike down governmental actions they conclude to be unlawful—no matter how many people may have voted for the political actors who enacted and implemented them. If these rulings are wrong on the merits, let's have that conversation. If universal relief should be narrowed, let's have *that* conversation. But if the ruling would be legitimate if it were limited to the plaintiffs (because the government's action is likely to be held lawless), it seems to me escalating the rhetoric to a dangerous point to suggest that they are somehow "insurrectionist" because the relief runs to non-parties, as well.

b. Please name a "Judicial Insurrectionist."

Although I suspect this question is meant in jest, I can, in fact, think of one: One of the 15 federal judges to have been impeached by the House of Representatives (and one of the eight to have been convicted by the Senate) was Judge West Hughes Humphreys, appointed to the district court bench in Tennessee by President Franklin Pierce in 1853. Humphreys refused to resign his federal judicial commission during the Civil War—even as he accepted a commission (and served) as a judge in the Confederacy, where he issued rulings confiscating Union property; imprisoning a civilian Union sympathizer; and otherwise giving aid and comfort to the armed rebellion against the United States. Humphreys was a judicial insurrectionist. I can't think of a single federal judge today who comes close.

II. Questions from Senator Booker

1. During the hearing, you discussed the harms that everyday Americans would experience if judges were suddenly unable to grant relief to people not directly involved in lawsuits against the Administration. What are some of the worst harms that people would experience if the *Judicial Relief Clarification Act* were enacted?

I believe my second answer to Senator Whitehouse covers most of this question. But to take the birthright citizenship cases, for example, if federal judges could block the Trump administration's patently unlawful (and unconstitutional) effort to restrict birthright citizenship only on a plaintiff-by-plaintiff basis, then that would require every single pregnant individual whose future child would be subject to the policy to bring their own lawsuit seeking to get out from underneath it. And even if it was possible to bring class-wide suits, that would still require 94 *different* lawsuits challenging the policy—suits that would be expensive, repetitive, and wasteful, among lots of other things. And all of these concerns are exacerbated by the fact that, as opposed to what was true during prior administrations (of both parties), when plaintiff-specific lower court rulings might still induce the government to cease enforcement of a policy on a nationwide basis, we've already seen *this* administration seek to exploit district-by-district distinctions—as in the Alien Enemies Act litigation.

2. In their confirmation hearings, several high-ranking Department of Justice officials suggested there are circumstances under which people bound by federal court orders can ignore those orders.

   a. Should orders issued by a federal court always be followed?

At least as a matter of law, I believe that the answer is yes—even if the recipient of the order believes that he or she has a good faith argument that the court lacked the power to issue the order. Indeed, I think this question would've been more difficult in times past—when it was harder for the government to quickly obtain emergency relief from appellate courts. But given the widespread availability (indeed,

the normalization) of rapid, emergency relief from district court orders in cases in which the adverse party is governmental, it seems to me that what might have been defensible arguments for defiance as recently as a generation ago are unavailing today. We can all conjure extreme hypotheticals in which federal judges order government officials to take catastrophic and irreversible actions for which there's no time for such an appeal. But it seems worth emphasizing that hard cases make bad law; that this hypothetical never actually arises in the real world; and that the alternative rule would give someone *other* than the courts the ability to decide which cases do and don't fall into this (hitherto empty) set.

b. Are there circumstances under which, if a government official has a moral disagreement with a court order, they can ignore that order or should they recuse themselves?

As my above answer suggests, my own view is that *legally*, the answer is no. But the whole point of having moral objections is that there may sometimes be higher imperatives than following the law. If one runs a red light while transporting a gravely ill family member to the hospital, the defense of the infraction isn't that there's an "emergency exception" to the red-light law; it's that sometimes, the law isn't the most important thing. The problem comes, as Justice Robert Jackson wrote in his dissent in *Korematsu*, when we try to *rationalize* unlawful actions taken in the name of morality. The more we blur that line, the more we risk encouraging government officers to use pretextual claims of morality to justify lawlessness.

c. Is there such a thing as "rogue" judges whose orders should not be followed?

As Chief Justice Roberts recently put it, our legal system provides remedies for erroneous legal decisions—whether the errors are made in good faith or otherwise. So long as that remains the case, it seems to me that the answer to this question is "no." Until and unless there's some meaningful class of cases in which appeals are formally or functionally unavailable from orders restricting government action, there seems to me no good reason why non-compliance could ever be justified as a legal (rather than moral) argument.

3. During the hearing, Senators Whitehouse and Durbin discussed the worsening problem of threats to the safety of federal judges. In 2020, Judge Esther Salas of the United States District Court for the District of New Jersey was the target of an attack in which a person who had appeared before her in court went to her family home and fatally shot her son Daniel. A March 2025 New York Times article discussed serious threats made to federal judges appointed by both Republicans and Democrats, including bomb threats and anonymous calls to dispatch police SWAT teams to home addresses.[1]

[1] Mattathias Schwartz & Abbie VanSickle, *Judges Fear for Their Safety Amid a Wave of Threats*, NY TIMES (Mar. 19, 2025) https://www.nytimes.com/2025/03/19/us/trump-judges-threats.html.

a. What are the impacts on our legal system if judges continue to be threatened by parties appearing in cases over which they are presiding?

b. How does rhetoric by elected officials that delegitimizes the judiciary branch risk the likelihood of attacks?

In my view, there is a vital difference between criticizing judges and threatening judges. Judges should *not* be immune from criticisms—for their rulings; for their behavior on and off the bench; and otherwise. And the Constitution specifically provides a remedy, impeachment, for judges and justices who fail to live up to the requirement of "Good Behavior." But when the attacks turn to the kinds of threats that are not protected by the First Amendment, and to claims that have a tendency to incite others to violence or violent threats of their own, that crosses a critical line. It seems to me that this is where it is incumbent upon *all* of us—elected officials, law professors, etc.—to be especially thoughtful in how we shape and style our critiques. I, for one, have been quite harsh in my criticisms of the behavior of numerous federal courts in recent years, including the Supreme Court. But my critiques have been about the substance of their rulings or the patterns of their behavior. Resorting to ad hominem attacks against judges, especially without *any* evidence to support the charges, strikes me as unbecoming of any public figure—and, more than that, a threat to the very judicial independence for which many of these same figures so regularly advocate.

4. As you are aware, there are certain jurisdictions where a single judge presides over the division, allowing litigants to file and essentially pick the federal judge who will hear their case.

a. What are the implications for the legal system when litigants engage in this form of judge shopping?

b. In your opinion, which reforms should Congress consider to address this problem?

I've written about this topic in some detail elsewhere, and won't rehash all of it here. In a nutshell, though, my central concern is the *appearance* of impropriety created by the ability of individual litigants to steer nationwide cases into courts in which they are guaranteed to be assigned to *specific* judges—especially cases with no obvious connection to that specific localized venue. Forum shopping is inevitable in any legal system with relatively permissive venue and personal jurisdiction rules; judge shopping is not. That's not to indict the judges to whom cases *are* being shopped; it's to point out that the system depends upon public faith that cases are randomly assigned—not because that guarantees the "right" outcome, but because it increases public confidence in the idea that judges are neutral arbiters, and not hand-picked home-court referees.

As for potential reforms, we've already seen a lot of progress in the district courts—from entire districts that have precluded judge shopping in nationwide cases (like the District of Massachusetts) to judges in single-judge divisions who have created division-specific venue requirements for cases filed in their courthouses (like Judge Jeff Brown in the Galveston Division of the Southern District of Texas). But I would much prefer a uniform, nationwide rule—which would best come from Congress, via a reform to 28 U.S.C. § 137 (which delegates the case-assignment power to district courts). Those reforms can come in any number of flavors to be effective, but I would think, at a bare minimum, should provide that, at least in cases seeking relief beyond the plaintiffs, those cases must be randomly assigned among the entire district court bench (the same reform the Western District of Texas adopted for patent-related cases filed in Waco).

III. Questions from Senator Padilla

1. Immigration law is supposed to be carried out under a single, national framework. Given this and the immediacy of potential harm, why is it especially important for federal courts to have the authority to issue injunctions in immigration-related cases?

    a. Can you discuss the potential harm of limiting injunctions in these cases to just the plaintiffs before them or to just the court's geographic jurisdiction?

I believe my answers to Senators Whitehouse and Booker have already covered much of this territory. But even if we got to a point where it was possible to obtain *circuit-wide* injunctive relief against policies like the birthright citizenship executive order, you could still have three *different* rules for who is a citizen depending upon whether one is born in Texas, New Mexico, or Arizona—solely because those three adjacent border states fall into the jurisdiction of three different courts of appeals. That seems like an especially inefficient (if not manipulable) result when the underlying question ("who is entitled to birthright citizenship") turns in absolutely *no* respect on the specific state in which they are born.

IV. Questions from Senator Blackburn

1. You testified to the Committee that "we have a Justice Department engaged in highly partisan and ethically dubious behavior."

    a. Would you agree that President Biden's DOJ was "highly partisan" when it engaged in the political persecution of President Trump?

Given that I dispute the premise of the question (*that* President Biden's DOJ "engaged in the political persecution of [then-former] President Trump"), no, I would not agree. To the contrary, as soon as it became apparent that there might need to be a criminal investigation into (then-former) President Trump's activities, then-Attorney General Garland appointed a Special Counsel entirely to *separate* the political leadership of the Department of Justice from that investigation. That seems

to cut rather decisively against both the question itself and its premise.

b. Was the Biden administration's smearing of concerned parents as "domestic terrorists" a "highly partisan" behavior?

Again, I don't accept the premise of the question (*that* the Biden administration "smear[ed] . . . concerned parents as 'domestic terrorist'"). But even accepting that premise, no, I do not believe that using the "terrorist" label in *any* context is necessarily partisan, let alone "highly partisan." It is, in my experience, *wrong* far often than it is right. And its casual use (for instance, by senior officials within the Trump administration to refer to immigrants with no criminal record and no connection to foreign terrorist organizations) is, in my view, dangerous and demeaning (to say nothing of dehumanizing) rhetoric. But that's not the same thing as the "highly partisan" behavior to which your question refers.

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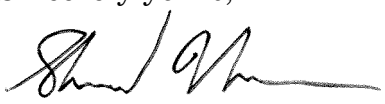
Thank you again for the invitation to testify, and for the opportunity to provide further information to the Committee. Please don't hesitate to let me know if I can provide any additional assistance to you and your colleagues.

Sincerely yours,



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