Questions for the Record
Josh Blackman
Hearing on "The Supposedly 'Least Dangerous Branch': District Judges v. Trump"
Submitted: June 27, 2025

Questions from Senator Lee

Question 1
A universal injunction undermines the separation of powers. The judicial power of a court is limited to the parties before it. The universal injunction, however, allows a single judge to single-handedly bind everyone in the executive branch and every person in the world. And all of this is done outside the confines of Rule 23 and class certification. The Supreme Court's ruling today in *Trump v. CASA, Inc.* reaffirms this principle.

Question 2
There is an intrinsic benefit to a three-judge panel: there must be consensus. Single district court judges, acting alone, have no one to check their views. But with a three-judge panel, there is a need to persuade at least one member before action is taken. Moreover, decisions from three-judge panels are appealed directly to the Supreme Court's mandatory jurisdiction. This appeal process would ensure a timely review of pressing issues.

Question 3
I think the Supreme Court's current docket is underwhelmed. Several decades ago, the Court would decide as many as two-hundred cases of the year. Now, we are down to less than sixty signed decisions. Each Justice only has to write five or six majority opinions per year. This light caseload leads to the Justices writing opinions that are too long, as well as lengthy concurrences and dissents that contribute little to the law.

I do think increasing mandatory appeals from three-judge panels and approving "Certificates of Division" would burden the current Court. The solution, I think, is for the Justices to work year-round.I don't have much sympathy for complaints from the Justices about being overworked. Most district court judges decide hundreds of cases each year, on their own, with far less staff and resources.

Thinking long-term, efforts to impose term limits on the Justices are not necessary. If the work load continues to increase, Justices will self-select, and leave the bench when they cannot keep up with the work load. Attrition works.

Question 4

I think there is a robust scholarly debate on whether Article III permits universal injunctions. The Supreme Court declined to resolve this issue today in *CASA*. At this point, I am not entirely sure which side is right. But I do know that Congress, which has plenary power over the jurisdiction of the lower courts, can settle this matter. Congress should consider legislation that is prospective, and goes into effect in 2029. This sort of reform has to be passed behind the veil of ignorance, when it is not clear who will benefit and who will be harmed.

Questions From Senator Whitehouse

I have voluntarily testified before Congress several times over the years. I have undertaken these responsibilities because I firmly believe in public service. Our government works best when it hears from the widest range of viewpoints, and I am honored to appear before the legislature to share my perspective. Indeed, these sorts of hearings work best when members from one side push and probe witnesses from the other side.

Last month, I was invited to testify at a hearing titled, "The Supposedly 'Least Dangerous Branch': District Judges v. Trump." The theme of the hearing was how district courts were issuing universal injunctions against the Trump Administration, and what Congress could do about that problem. My prepared testimony addressed that theme, and offered (what I hoped would be) bipartisan proposals that Congress could consider to address some of the trends from the past decade.[1] Universal injunctions are a bipartisan problem that warrant a bipartisan solution. Today, the Supreme Court decided *CASA v. Trump*, and Congress now has a fresh space to act.

After the hearing, Senator Whitehouse submitted more than forty questions for the record, many of which were not germane to the topic of the hearing. I consulted with the majority staff, and was advised that witnesses are under no obligation to respond to QFRs. I have decided to answer those questions that are germane to the topic of the hearing.

Question 1: (a)-(j)

During the hearing, Senator Whitehouse asked about a donation to South Texas College of Law Houston. I replied that any questions should be directed to the College.

Question 2

(a) Simply ruling against the executive branch is not the basis for a judicial impeachment.
(b) No.
(c) No. I have performed research on the original meaning of the term "Insurrection" in Section 3 of the Fourteenth Amendment.[2] Barely a year ago, there was an attempt to remove President Trump from the ballot based on the charges of insurrection. I would not use the term "insurrection" in contexts where it does not apply.
(d) No.

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[1] Josh Blackman, *Bilateral Judicial Reform*, 1 Texas A&M Journal of Law & Civil Governance 59 (2024).
[2] Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. 350 (2024).

Question 3 (a)-(d)
These questions are not germane to the topic of the hearing.

Question 4 (a)-(b)
These questions are not germane to the topic of the hearing.

Question 5 (a)-(c)
Forum shopping is rational. It is no surprise that progressive litigants and Democratic Attorneys General file suits in forums they deem favorable, and conservative litigants and Republican Attorney Generals file suits in forums they deem favorable. Outside of extremely unusual circumstances, I do not think federal judges exhibit the type of bias that would trigger recusals or disqualification under the canons of ethics. But I do think judicial philosophy matters, and some judges will be more or less receptive to certain types of legal arguments. For example, in the Ninth Circuit, there is a virtually unbroken series of rulings against Second Amendment claims. A litigant bringing a Second Amendment challenge to a federal gun control law would be well advised not to file in the Ninth Circuit. Thankfully, the overwhelming majority of litigation is not ideological. More than 90% of panel decisions on the courts of appeals are unanimous. But for high-profile strategic litigation, the choice of forum does matter.

Question 6 (a)-(b)
These questions are not germane to the topic of the hearing. I will let my writings speak for themselves.

Question 7 (a)-(f)
These questions are not germane to the topic of the hearing. I will let my writings speak for themselves.

Question 8 (a)-(e)
These questions are not germane to the topic of the hearing. I will let my press statements speak for themselves.

Question 9
This question is not germane to the topic of the hearing.

Question 10
I have doubts about the constitutionality of some of the actions taken towards certain law firms.

Question 11
There is a numerator and denominator problem here. I think it is true that the Trump Administration has issued a large number of executive actions during the first few months. But I

also think that federal district courts have enjoined a substantial portion of those actions. The Supreme Court's ruling today in *CASA* would suggest that many of these universal injunctions were improper.

Question 12
See answer to Question #11 above.

Question 13
It has long been known that marking a case as "related" allows litigants to steer cases towards judges they deem favorable. Conservative and progressive groups take advantage of this tactic. Congress should take a look at the "related" cases doctrine, and consider whether it allows judges to keep cases that are not really germane.