

## **Repairing our Democracy and Restoring the Constitution: Priorities for the 117<sup>th</sup> Congress**

The U.S. Constitution has taken a beating under the Trump Administration. Never in the document's 230+ years of operation has an Administration damaged its protections, values, and meaning in such a catastrophic and wholesale way. The Constitution, amended over time to match our nation's march of progress toward greater equality and inclusion, is the foundation of American society. The 117<sup>th</sup> Congress and the Biden Administration must prioritize restoring our constitutional values and working to make real its promises of meaningful freedom, equality, justice, and opportunity for all in this country.

We at the Constitutional Accountability Center occupy a unique position to help Congress renew the country's constitutional commitment and are most eager to do so. To that end, we humbly suggest policy initiatives we believe the new Congress should prioritize to help restore the preeminence of and public faith in the U.S. Constitution, including confirming Biden appointees who have demonstrated a fidelity to the text, history, and values of the Constitution; repairing our democracy; restoring the rule of law; reforming policing; and expanding the federal judiciary.

### **1. Confirm Nominees Who Will Restore the True Meaning of the Constitution**

We are faced with the task of repairing real damage done to our constitutional democracy and ensuring that people across this country see once again a government committed to ensuring that our constitutional values of equality and justice are a lived reality for all. Therefore, it is more important than ever that we have political appointees in the Executive Branch and judicial nominees who embrace the protections and guarantees of the Constitution and restore the public's faith in a government that is committed to the rule of law and our national charter. It is critically important for the entire government to recommit in a very public way to these ideals and values. Therefore, we ask Congress to prioritize holding confirmation hearings for the following positions: current and expected vacancies in the federal judiciary, Attorney General of the United States, Solicitor General of the United States, the Assistant Attorney General in charge of the Office of Legal Counsel, and the Assistant Attorney General for the Office of Legal Policy.

Each of these positions requires candidates who will rise above partisan politics and, with independent fortitude and objectivity, enforce the Constitution and rule of law fairly, even if that means standing up to the President himself. Each nominee must have demonstrated a fidelity to the text, history, and values of the whole Constitution, including the transformative Amendments passed thanks to the revolutionary movements of Reconstruction, suffrage, and civil rights. And with a conservative judiciary and 6-3 conservative majority on the Supreme Court, it will be critical to have a Solicitor General who can craft arguments that will convince self-proclaimed originalists. We ask that you only confirm nominees with these attributes.

### **2. Policy Priorities for the First Year of the 117<sup>th</sup> Congress**

There is so much to correct after four years of President Trump's administration. We understand that fighting COVID-19 and bolstering the economy must be the top priorities of the 117<sup>th</sup> Congress on day one. But there

are other critical areas of law that must begin to be righted during the first half of the new Congress. CAC asks that Congress prioritize (1) repairing our democracy, (2) restoring the rule of law, (3) reforming policing and law enforcement, and (4) expanding the federal judiciary.

#### **a. Repairing Our Democracy**

A top priority for the 117<sup>th</sup> Congress must be repairing our democracy. The Trump Administration has done much to destroy our cultural norms and traditions concerning, and faith in, the democratic process. As a candidate, he called on foreign powers to [intercede](#) on his behalf. He tried to taint the 2020 [census](#)—the cornerstone of our democracy—and [apportionment](#) process with unconstitutional, xenophobic measures; he called into question the [validity](#) of mail-in ballots; he rushed the appointment of a Supreme Court justice so that she would be on the Court in time to “[look at the ballots](#)”; and more. And while President Trump has done much to harm our democracy, he is not the only person with a hand in this. State governors, state attorneys general, and the Supreme Court have all contributed to the weakened state of our democracy. Therefore, CAC recommends that Congress take the following measures:

- Enact one-time postponements of statutory deadlines for delivery of apportionment and redistricting data codified in 13 USC § 141
- Establish D.C. statehood
- Ensure our elections are free from corruption and foreign influence
- Write a new coverage formula for the Voting Rights Act’s preclearance requirement
- Pass campaign finance reform
- Mandate automatic voter registration
- Limit state voter purges
- Set aside state voter ID laws
- Make Election Day a federal holiday
- Mandate early voting and/or voting-by-mail without excuse
- Mandate that state officials cannot simultaneously oversee an election and run for office

#### **b. Restoring the Rule of Law**

In addition to repairing our democracy, the Biden-Harris Administration and this Congress must prioritize restoring the rule of law. Time and again, Donald Trump acted as though he and the Executive Branch were above the law. He [directed](#) members of the Executive branch to disregard lawful congressional subpoenas; he [flouted](#) the plain language of the Constitution by accepting foreign emoluments without having first obtained the consent of Congress; he [interfered](#) with ongoing federal investigations; he [circumvented](#) the Senate’s constitutional duty to give its advice and consent to certain Executive appointments; and so much more. The rule of law means complying with the law, full stop. But his administration demonstrated that there are gaps in enforcement mechanisms, and it is up to Congress to address those gaps to ensure America is not subjected to authoritarian rule again. Therefore, we suggest the following measures:

- Deter abuse of pardon power
- Strengthen enforcement of the domestic emoluments prohibition and restrictions on acceptance of foreign emoluments
- Strengthen subpoena enforcement
- Renew subpoenas issued by the 116<sup>th</sup> House of Representatives for President Trump’s financial records and taxes, as well as Don McGahn’s testimony, and continue efforts to enforce those subpoenas in court
- Renew the 116<sup>th</sup> House’s application for the Mueller Report grand jury redactions and other underlying materials, if necessary, and continue the litigation to obtain those materials

- Strengthen protections for whistleblowers and Inspectors General
- Strengthen Hatch Act enforcement and penalties
- Increase accountability for acting officials and ensure they do not extend their tenure unlawfully
- Eliminate foreign interference in elections

### **c. Reforming Policing and Law Enforcement**

It is critical that Congress respond to the ongoing state sanctioned violence against Black people across the country. Reforms are needed on a range of policing issues, including use of force, police accountability, racial profiling, militarization, data collection, and training. CAC supports the reintroduction of the Ending Qualified Immunity Act, which would eliminate the judge-made doctrine of qualified immunity. CAC also supports the reintroduction of the Abolition Amendment, which would close the slavery loophole of the Thirteenth Amendment. We encourage committees of jurisdiction to hold hearings on these important pieces of legislation.

In June, attempting to respond to the civil rights community's [demands](#), the U.S. House of Representatives passed the George Floyd Justice in Policing Act of 2020 (JPA). While the JPA takes important steps toward achieving meaningful change in policing, it falls short of addressing the priorities identified by the civil rights community. CAC urges Congress to strengthen the JPA in accordance with the [requests](#) made by the civil rights community, and in particular, to hold bad actors accountable by ending qualified immunity for all state and local actors—not just police—and codifying a cause of action when federal actors deprive individuals of their civil and constitutional rights.

### **d. Expanding the Federal Judiciary**

And finally, expanding the federal judiciary must be a priority for the 117<sup>th</sup> Congress. Congress has not provided a significant increase in the number of federal judgeships since [1990](#), but that does not mean that the demands placed on our judicial system have remained the same. In March 2019, the Judicial Conference of the United States [recommended](#) the creation of five new permanent appellate judgeships, 65 new permanent district court judgeships, and the conversion of eight district court judgeships from temporary to permanent status. According to prior research and congressional testimony by the Judicial Conference, this recommendation likely [understates](#) the actual need. Expanding the lower courts could make the judiciary run at peak efficiency. Justice delayed is justice denied, and the government owes it to its people to dispense justice fairly and swiftly. Therefore, we strongly encourage Congress to establish new judgeships in accordance with the needs of the federal judiciary.

## **About the Constitutional Accountability Center**

The Constitutional Accountability Center (CAC) is a non-profit think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests. We are sometimes referred to as "progressive originalists" because we employ a text-and-history methodology often associated with conservatives, but in service of important progressive goals. CAC believes that America's Constitution is, in its most vital respects, a progressive document, written by revolutionaries and amended by We the People who prevailed in the most tumultuous social upheavals of our Nation's history. The Reconstruction Republicans after the Civil War (our nation's Second Founding), the Progressives and the suffragists in the early 20th century, and the civil rights and student movements in the 1950s and 1960s all successfully amended our Constitution to extend its rights and protections to more Americans. The amended Constitution reflects our country's march of progress, writing into our national charter promises of greater equality and inclusion.

CAC's unique perspective is critical to preserving progressive laws and values at a time when the judiciary is overwhelmingly conservative. Our arguments, rooted in originalist and textualist interpretation, often resonate with conservative judges and justices, convincing them to reach progressive outcomes.

During the Trump years, CAC was at the forefront of constitutional battles, fighting to preserve the Constitution and the rule of law and representing the interests of members of Congress. When the Trump Administration decided not to defend the ACA in court, CAC became co-counsel with the House General Counsel's office and Don Verrilli's team at Munger, Tolles & Olson, [representing](#) the U.S. House of Representatives in *Texas v. California*. We also worked with the House General Counsel's office to [author](#) several *amicus* briefs regarding the ACA on behalf of the House, including in cases challenging the Trump Administration's effort to undermine the law and its decision to withdraw [certain nondiscrimination provisions](#) in health care from LGBTQ+ people. We were counsel of record in *Blumenthal, Nadler, et al. v. Trump*, in which over 200 members of Congress sought to hold Trump accountable for [violating](#) the Foreign Emoluments Clause of the Constitution. We filed numerous *amicus* [briefs](#) on behalf of members of Congress, presenting arguments rooted in the text, history, and values of the Constitution in cases related to the census and apportionment, changes made to the United States Postal Service, asylum protections, and more. We published [scholarship](#) and filed [amicus briefs](#) in support of the exercise of congressional oversight. We explained how several of Trump's Attorney General and federal judicial [nominees](#) demonstrated that they do not understand that our Constitution as amended protects the fundamental rights of all persons, including people of color, women, and LGBTQ+ people. We also expressed concern that these nominees could not be counted on to serve as an independent check on the Trump Administration's authoritarian tendencies. We also explained that his judicial nominees would be a rubber-stamp for the U.S. Chamber of Commerce and other big business interests. In fact, for almost 15 years, CAC has [monitored](#) the Roberts Court's treatment of corporate interests by tracking the success rate of the U.S. Chamber of Commerce, which regularly files friend-of-the-court briefs to advance its "pro-business [agenda](#)."

CAC occupies a unique position to help Congress renew the country's constitutional commitment to equality, justice, and the rule of law, and are most eager to do so. Please be in touch to discuss how we can work together to make more real the promises and protections of the U.S. Constitution.