



**CONSTITUTIONAL
ACCOUNTABILITY CENTER**

May 17, 2021

SUBMITTED VIA EMAIL TO info@pcscotus.gov

RE: First open public virtual meeting of the Presidential Commission on the Supreme Court of the United States, Docket No. 86 FR 23726

The Constitutional Accountability Center (CAC) is a public interest law firm, think tank, and action center dedicated to promoting the progressive promise of our Constitution’s text, history, and values. As the Presidential Commission on the Supreme Court of the United States begins its important work, CAC appreciates the opportunity to raise critical issues for the commissioners’ attention.

As a foundational matter, any modern examination of the role of the courts in our system of government—particularly the Supreme Court—must first take into account the voices of those people in America who have routinely and systematically experienced discrimination and oppression throughout our history, without sufficient recourse to and in our courts of law.

CAC scholarship explains, “When the Constitution was framed, the promise of access to the federal courts was at the heart of a new system of government accountable to the people. As John Marshall—soon to become our Nation’s greatest Chief Justice—observed, ‘[t]o what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.’”¹

Yet, Representative Barbara Jordan pointed out, in her immortal words, a nearly fatal problem with Chief Justice Marshall’s observation about the Constitution of his time. “‘We, the People,’” she said in 1974 to members of the House Judiciary Committee. “It’s a very eloquent beginning. But when that document was completed on the seventeenth of September in 1787, I was not included in that ‘We, the People.’ I felt somehow for many years that George Washington and Alexander Hamilton just left me out by mistake. But through the process of amendment, interpretation, and court decision, I have finally been included in ‘We, the People.’”²

¹ David Gans, *The Keystone of the Arch: The Text and History of Article III and the Constitution’s Promise of Access to Courts*, Constitutional Accountability Center 1 (Nov. 3, 2016), https://www.theusconstitution.org/think_tank/the-keystone-of-the-arch-the-text-and-history-of-article-iii-and-the-constitutions-promise-of-access-to-courts/ (quoting 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (Jonathan Elliot ed., 1836)).

² Statement of Barbara Charline Jordan to the House Judiciary Committee (July 17, 1974), available at <https://www.americanrhetoric.com/speeches/barbarajordanjudiciarystatement.htm> (quoting U.S. Const. pmb.).

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Jordan was, of course, absolutely correct that our amended Constitution—with critical additions ratified in the wake of the Civil War, the women's movement, the student movement, and the civil rights movement—finally included her and millions more under its protective umbrella. Our amended Constitution revolutionized a governing charter that once countenanced chattel slavery and prevented the federal government—and its courts—from enforcing basic rights and freedoms for Black people and women. Now, our Constitution promises equality for all persons, the right to vote free from discrimination, and the power of Congress to enforce these and other rights and freedoms by “appropriate legislation.”³

But far too often, America's federal courts have shut out—and continue to shut out—from their protection the very marginalized people that the framers of these critical amendments drafted their majestic language to protect. This Commission must focus on these people. It must take their voices and experiences fully into account. And it must ensure that they are comprehensively represented in any advice it ultimately provides to the President of the United States and the American people.

Turning to particular issues of the Commission's focus, no one can deny that the question of whether to expand the number of seats on the Supreme Court is an especially important one—and deservedly so.

As I have discussed elsewhere, no one can forget the stonewalling of then-Judge Merrick Garland's nomination to replace Justice Antonin Scalia, with nearly a year left in President Obama's term; the intensely controversial and rushed confirmation of Justice Brett Kavanaugh amid deeply troubling allegations of sexual assault; or the confirmation of Justice Amy Coney Barrett just days before the 2020 election ended—an appalling hypocrisy from lawmakers who took the opposite position about timing during the Garland nomination just four years earlier.⁴ These abuses jeopardized the integrity of the Supreme Court by staining it with extreme partisan politics. Deciding how best to restore that legitimacy has never been more important.

Issues of Supreme Court legitimacy and expansion, however, should not end the Commission's discussion. There are other—often overlooked—issues in our judiciary that demand your attention as well.

A key area of concern, for example, is the issue of Supreme Court ethics. While the elected branches—Congress and the presidency—are held to account by voters every few years, federal judges have lifetime appointments. And while lower court judges are governed by a code of ethical conduct, Supreme Court justices are not.⁵ That leaves justices to keep their own counsel in deciding whether to recuse themselves from a case where they might have a conflict of interest. At the same time, disclosure rules are not strong enough to identify every potential conflict of interest that might exist for a justice.

³ U.S. Const. amends. XII, XIV, XV, XIX, XXIII, XXIV, & XXVI.

⁴ Elizabeth Wydra, *There's More to Repairing Federal Courts Than Supreme Court Expansion*, The Hill (Feb. 10, 2021), <https://thehill.com/opinion/judiciary/538176-theres-more-to-repairing-federal-courts-than-supreme-court-expansion>.

⁵ *Code of Conduct for United States Judges*, UScourts.gov (last visited May 14, 2021), <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.

Such problems help make the Supreme Court the least accountable institution within our three branches of government, detracting from its image as a fair and neutral arbiter. This Commission should examine ways to bring clarity and transparency to the ethical standards governing Supreme Court justices and build the confidence of the American people in the ethical rigor of the High Court.

Another issue that few pay attention to, beyond close observers of the Supreme Court, is the “shadow docket.”⁶ The Court regularly hands down orders without the benefit of briefing or oral argument, and often without any explanation for their decisions, or even how the justices voted. Were these so-called procedural orders not, in fact, so substantive, this aspect of the Court’s practice might escape notice entirely. Yet for issues spanning voting rights⁷ to the death penalty,⁸ such orders can be incredibly consequential, even “rewriting the rules of our democracy,”⁹ but with virtually no transparency or accountability. This Commission should investigate the Court’s shadow docket and recommend ways it can be brought into the light.

There is no question that the issue of Supreme Court expansion is critically important to America’s future, but there is more to improving the third branch of government than that issue. Not only must this Commission take strides to center people in America still excluded from the protections of federal courts that our Constitution promises to them, but the Commission also must not forget issues of ethics and the administration of justice that, while essential to everyday Americans, all too often go overlooked.

Thank you for your work and please do not hesitate to ask if the Constitutional Accountability Center can be helpful in your efforts.

Sincerely,



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⁶ William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J. L. & Liberty 1 (2015).

⁷ David H. Gans, *How John Roberts Quietly Made It Harder to Vote*, Slate (Oct. 2, 2020), <https://slate.com/news-and-politics/2020/10/how-john-roberts-made-it-harder-to-vote.html>.

⁸ Steve Vladeck, *The Supreme Court’s Most Partisan Decisions Are Flying Under the Radar*, Slate (Aug. 11, 2020), <https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html>.

⁹ Gans, *supra* note 7.