



July 20, 2021

Office of Government-wide Policy
General Services Administration

Attn: Dana Fowler
Designated Federal Officer

Re: Notice-PCSCOTUS-2021-01, Notification of Upcoming Public Virtual Meeting and Request for Public Comment

Dear Commissioners:

My name is Benjamin Todd Jealous, president of People For the American Way, a national organization dedicated to building a democratic society that implements the ideals of freedom, equality, and justice for all. I appreciate the opportunity to submit this written testimony and comments to the Commission and have also included [a link to a short summary video](#) that I hope you will review.

Throughout my career as a civil rights leader, including as president of the NAACP, the role of the Supreme Court has been a constant for me. I was inspired by key rulings that helped promote justice and equality, like the landmark decision in *Brown v Board of Education*. And since its very creation, People For the American Way has focused much of its attention on the Court and on the threats posed to it by the far right.

It should be beyond dispute that the Supreme Court serves the interests of justice, liberty, equality, and protecting democracy, not partisan politics. Unfortunately, the last few years have seen partisan politics seriously harm the Court and its dedication to these ideals, primarily as a result of actions in the U.S. Senate driven by corporate and ideological interests. Consequently, our democracy and the rights of too many of us have already been damaged, and more harm can be expected in the future. That is what compels the need for reform of the Supreme Court and the process of selecting justices. I will discuss below the problems that have brought us to this point, the results, and some solutions that can help restore the Court's commitment to equality, liberty, justice, and democracy.

How We Got Here

It has always been the case, and it is good for our democracy, that Presidents, Senators, and Americans consider the judicial philosophy and views of actual and potential Supreme Court nominees and take that carefully into account in their decision-making. But what we have seen since the unfortunate death of Justice Scalia in early 2016 goes far beyond that and has demonstrated blatant partisan action by Senate Republicans and former President Trump to stack the Supreme Court in a way far worse than anything we have previously seen.

Specifically, when Justice Scalia died in February 2016, there was still almost a full year left in President Obama's term. On a number of past occasions, including [ten times](#) during election years, the President has nominated and the Senate has confirmed justices to fill such important vacancies during the months after they arose, and before the next President took office.

This time was very different. Although President Obama promptly nominated the respected moderate Judge Merrick Garland to fill the vacancy, the Republican Senate refused to take any action whatsoever to process the nomination. They refused to meet with the nominee, to hold hearings, or to vote on the nomination in committee or on the floor. They did not even allow a vote on the propriety of this unprecedented delaying conduct.

In the meantime, candidate Trump strongly supported this action, and released a list of possible nominees that he bragged was put together by the pro-corporate and right-wing Federalist Society and Heritage Foundation. President Trump then promptly nominated Judge Neil Gorsuch from that list after the election. When Democrats attempted to use the filibuster to stop the nomination, as Republicans successfully did to stop President Johnson's nomination of Abe Fortas, Senate Republicans simply used the so-called "nuclear option" to eliminate the filibuster with respect to Supreme Court nominees. The Republican Senate then confirmed Gorsuch less than three months after his nomination.

The partisan court-packing continued after Justice Ginsburg's tragic death less than two months before the 2020 election. Then-President Trump nominated Amy Coney Barrett to fill Ginsburg's seat just days after her death. Reversing their stance from just four years earlier, claiming that it was now different somehow because the same party controlled the Senate and the presidency, and despite the outbreak of COVID-19, the Republican Senate rushed through Barrett's nomination in record time and confirmed her within a month of her nomination, only a week before election day. [Never before](#) in our nation's history has such a rushed process been used to fill a Court vacancy that occurred so shortly before a presidential election and after voting in that election was already underway.

Add to this the problems that have come up since these two Trump justices, along with Brett Kavanaugh, were confirmed. More than 80 ethics complaints were brought against Kavanaugh concerning conduct during his confirmation, such as contentions that he misled the Senate concerning his work in the White House and allegations that he committed sexual assault and harassment when he was in high school and college. All those charges were [dismissed](#) after his confirmation, however, because Supreme Court justices are not subject to any ethical requirements.

Another concern has been the Court's increasing use since Justice Gorsuch took his seat of its so-called "shadow docket" – decisions rendered without full briefing and argument based on motions for immediate action, usually decided without written opinions and often without even disclosing which justices voted which way. [Forty-one such rulings](#) were sought by the Trump Administration, concerning controversial subjects ranging from exemptions to COVID-19 rules to the death penalty, compared to only eight during the 16 years of the Bush and Obama Administrations. Not surprisingly given the addition of the three Trump justices, the Trump Administration won almost 70% of these

cases, demonstrating what Commission member William Baude has called “clear one-sidedness.” [In one such case](#), Justice Sotomayor cited the “unprecedented” number of so-called “emergencies” cited by the Trump Administration, noting that “with each successive application, of course, its cries of urgency ring increasingly hollow.” She further noted that the majority’s willingness to grant such requests “benefited one litigant over all others” (i.e., the Trump Administration). Moreover, on several Friday nights last February, the Court issued unsigned orders without controlling opinions granting special exemptions for religious purposes to restrictions on indoor gatherings to help combat COVID-19. As Justice Kagan [wrote](#) in dissent in one case, the majority “defies our caselaw, exceeds our judicial role, and risks worsening the pandemic.”

The Results

The decisions made possible by Trump’s justices have built on previous harmful rulings by the Roberts Court to cause even more damage to equality, freedom, justice, and democracy. People For the American Way has carefully analyzed the decisions rendered by all three Trump justices, as well as appellate court judges nominated by President Trump, in our *Confirmed Judges, Confirmed Fears* series. What is clear from that analysis is that the Trump justices and judges have harmed the rights of all Americans. Particularly devastating have been decisions that have dangerously compounded threats to our democracy itself.

Just take the Supreme Court’s most recent term, reviewed in People For’s report, [The Damage Caused by Trump-Appointed Justices: The Supreme Court’s 2020-21 Term](#). In decisions made possible by the Trump justices, the Court severely limited consumers’ ability to get relief from corporations for false credit reports, harmed immigrants’ rights, damages racial justice and fairness in our criminal justice system, and restricted Congress’ authority to protect the American people.

But the Court saved its worst decisions for last, magnifying the serious harm already done to our democracy in previous Court decisions. In the first of a last day double-header, the Court majority struck a body blow to democracy by further devastating the Voting Rights Act, which had already been seriously harmed by the Roberts’ Court decision decimating Section 5 of the Act in the *Shelby County* ruling. In the [Brnovich](#) case on July 1, not only did the majority overturn a decision that found that restrictions on voting violated Section 2 of the Voting Rights Act, but it also manufactured new “guideposts” for Section 2 cases that, as Justice Kagan put it in dissent, have “rewritten” and “damaged” Section 2. As she explained, the ruling completely “undermines” the law and the “right that it provides” to equal voting for minorities without discrimination. Instead of protecting the right to vote from restrictive state practices, Kagan continued, the majority’s interpretation of Section 2 now “stacks the deck against minority citizens’ voting rights.”

The court majority went even further in its 6-3 decision in the [Americans for Prosperity](#) case, which concerned a California law that requires nonprofits to report the identity of their major donors to the state. Instead of issuing a narrow ruling limited to the improper public disclosure of such information, the right-wing Court majority ruled that the reporting requirement on its face violated the First Amendment. As Justice Sotomayor explained in dissent, the decision marks all reporting and disclosure requirements “with a bull’s eye,” making it much easier to challenge laws that require

reporting and disclosure of political campaign contributions and expenditures. This ruling made even worse the Roberts' Court's *Citizens United* ruling, which stripped the government of the ability to limit big spending on elections but reaffirmed the legality of disclosure requirements.

Finally, it is well recognized, both in America and around the world, that unions and the vital civic participation of their workers are essential in promoting democracy. Trump justice Gorsuch had already done serious damage to unions by serving as the deciding vote to gut public sector unions in the *Janus* case that invalidated union agency fees designed to cover the benefit to all employees of union representation. But in a June decision that one expert called a “crushing blow to organized labor,” the 6-3 majority in the [Cedar Point](#) case went even further and struck down a 45 year-old California rule that allowed unions temporary access to farm property to organize workers. That rule came about in large part from the efforts of Cesar Chavez and Dolores Huerta to combat exploitation of farm workers. But the Court's ruling, which claimed that the rule was somehow an improper “taking” of corporate growers' property, threatens to undermine the rights of unions and others across the country.

As elections expert Richard Hasen [wrote](#), if you put the *Brnovich* and *Americans for Prosperity* decisions together, the majority is “making it easier for states to pass repressive voting laws” and “easier for undisclosed donors and big money to influence election outcomes.” His conclusion is inescapable: the Court majority “has shown itself hostile to American democracy” and has become one of its “major impediments.”

What We Should Do

It is all too clear that these developments have seriously undermined, if not eliminated, the current Supreme Court's ability to provide justice, liberty, and equality for all and have undermined our democracy. We and others are urging Congress to do what it can to counteract the harmful results of these decisions. In terms of the Court itself, the solution is not just to wait for future Supreme Court vacancies, but to enact structural reforms to the Supreme Court and the nominating process now. Consistent with the limitations on this Commission's responsibilities, we strongly suggest that the Commission study, report on, and favorably evaluate changes in the following areas:

- **Adding seats to the Supreme Court:** It is clear under our Constitution that Congress can change the number of seats on the Supreme Court by passing a law to that effect, as it has done in the past. Differing specific proposals have been made, including a House bill to add four seats to the Court to compensate for the Republican court-packing described above, and having the Court consist of 15 justices and hear most cases in panels of 5. It is important that this Commission study and evaluate these specific proposals, but it is clear that some such change is necessary. As [Take Back the Court's founding president Aaron Belkin and Syracuse University professor Thomas Keck](#) have explained in supporting the addition of seats to the Court in light of what we have seen over the past several years, there is clearly a “critical difference” between “constitutional hardball designed to tank democracy” and “hardball designed to strengthen it.” To strengthen and indeed to save our democracy, adding seats to the Court promptly is crucial.

- **Enacting term limits for Supreme Court justices:** A reform that has received significant support both from [progressives](#) and from [conservatives](#) like Mark Levin, former chief of staff to Attorney general Edwin Meese, is term limits for Supreme Court justices. For example, under a [bill](#) introduced in the House last year, new justices would serve on the high Court for 18 years, after which they would continue to serve for life, as required by the Constitution, but on lower federal courts. Over the long term, the result would be to ensure that each President nominates two justices in a four-year term, more clearly giving the American people input into the selection of justices and hopefully helping reduce the manipulation of vacancies and partisan rancor that we have seen over the last five years. We believe that a proposal like the one in the House bill is constitutional, but this Commission should study that issue, along with specific questions like whether the plan could apply to current justices and how it should be implemented.
- **Dealing with the “shadow docket;”** A House Judiciary Subcommittee has already held a hearing concerning the problems created by the increased use of the Supreme Court’s “shadow docket,” revealing [support for reform](#) from members of Congress as diverse as Democratic Representative Hank Johnson and Republican Representative Louie Gohmert. We believe that Congress has the authority to enact important reforms such as requiring full disclosure of which justices voted in what way in such cases, mandating a written explanation of such votes, and legislating a clearer and more precise standard for what constitutes “irreparable harm” or an “emergency” warranting relief in “shadow docket” cases without full briefing and consideration on the merits. We urge the Committee to carefully study and report on this issue.
- **Mandating ethical and other transparency standards for the Supreme Court:** Even before what happened with respect to Justice Kavanaugh, many scholars and others have maintained that Supreme Court justices should be subject to the same federal code of judicial ethics that applies to other lifetime federal judges. Senator Warren has included that and a number of other useful provisions in [legislation](#) that we support, including mandating that justices explain decisions whether to recuse themselves from hearing particular cases because of possible conflicts of interest, applying to the Court provisions that limit receipt of gifts by justices like free transportation and attendance at so-called educational seminars sponsored by advocacy groups, and providing that ethics complaints against judges do not disappear when they leave their current position, as happened with Justice Kavanaugh. We also strongly support [bipartisan legislation](#) to allow cameras in the Supreme Court during public proceedings, so that the American people can see and hear what the justices are doing when they do it. This Commission should carefully study and report on such proposals.
- **Combatting the problem of sexual harassment throughout the federal judiciary:** Although this Commission’s focus is on the Supreme Court, it is important to mention a serious problem that has only recently been widely recognized and affects the entire federal judiciary: the problem of sexual harassment of law clerks and others. It is important that the Commission study this issue and evaluate possible remedial steps, [including](#) setting up

appropriate complaint and enforcement measures and ensuring that federal equal employment protections apply to all federal judicial employees. As the nation's highest court, the Supreme Court should lead the way on this issue.

Conclusion

The problems caused by Republican court-packing and other conduct concerning the Supreme Court are serious indeed. They have been spurred by big money and by the far right and have already caused serious damage to this Supreme Court's ability to promote justice, liberty, and equality for all of us, and seriously threatened our democracy. Action by this Commission and by Congress and the President is crucial to address these troubling concerns. People For the American Way looks forward to working with this Commission, the entire Congress, and the President on these crucial issues.

Thank you very much.

Sincerely,

A handwritten signature in black ink that reads "Ben Jealous". The signature is written in a cursive, flowing style.

Benjamin Todd Jealous
President

Encl: Summary Video
<https://youtu.be/Z4B5cFiVFQk>