

Congress of the United States
Washington, DC 20510

November 16, 2021

Presidential Commission on the Supreme Court of the United States
The White House
1600 Pennsylvania Ave. NW
Washington, D.C. 20500

Dear Commissioners:

We wrote to you earlier this year to emphasize that the issues your Commission is tasked to consider cannot be addressed without grappling with pressing judicial ethics concerns, including the role of secretive special-interest influence in and around the Court. We write again now out of concern that the Commission has not sufficiently considered or investigated these issues, and to urge you to do so before the release of your final report. As currently drafted, this report is a disappointment to anyone who had hoped for a clear-eyed effort to address the Supreme Court's deep troubles.

Our earlier letter described how, by its own words, the last administration “insourced”¹ its judicial selection process to a single, anonymously funded outside group, the Federalist Society. It detailed how enormous anonymous donations to the group coincided with its new role of “pick[ing]” the former president’s judges,² and how groups affiliated with the Federalist Society also ran multi-million-dollar, anonymously funded political ad campaigns to support confirmation of the selected nominees. We outlined how these same forces appear to be behind judicial lobbying campaigns conducted through arrays of *amicus curiae* briefs, also fueled by massive anonymous donations, often with common donors behind multiple briefs.³ Had another country set up a secretly funded private organization as its selection vehicle, we would find that troubling. And we described a disturbing pattern of over 80 partisan 5-4 Supreme Court decisions, each benefiting an easily identified Republican donor interest, where, more often than not, the Court’s decision was unmoored from the jurisprudential principles—textualism,

¹ Don McGahn, Federalist Society National Lawyers’ Convention, (Nov. 16, 2017), <https://www.c-span.org/video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcghahn> (“Our opponents of judicial nominees frequently claim the president has outsourced his selection of judges. That is completely false. I have been a member of the Federalist Society since law school. Still am. So, frankly, it seems like it’s been insourced.”).

² Donald Trump, Breitbart News Interview (June 13, 2016).

³ See also Sheldon Whitehouse, A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency, Yale L.J. (Oct. 24, 2021).

originalism, constitutional avoidance, and judicial restraint, for example—that the right-wing justices purport to follow. The inability to see the connections because of dark-money secrecy impedes a full understanding of what is going on, and that’s just not right.

The Commission’s draft report acknowledges in passing that “confirmation battles of recent years have given rise to multi-million dollar lobbying campaigns” to support and oppose particular nominations. But the Commission has failed to probe *why* such sums are being spent to control the Court’s composition, or to ask *who* might be spending this money and—most important—what interests they may have before the Court. The Commission has also failed to consider whether these investments have actually shaped the substance and outcomes of the Court’s decision-making, as they were no doubt intended to do.

Instead, the draft report seems to attribute the rise of multi-million dollar judicial confirmation campaigns—and the politicization of the Supreme Court generally—merely to “escalating partisanship.” This view that “both sides” are equally to blame for the politicization of the Court, and the implicit assumption that members of the Court are themselves insulated and apart from this politicization, is an unproven proposition.

The draft report warns that “the belief that the judiciary is independent can be undermined if judges are perceived to be ‘playing on the team’ of one party or another.” Likewise it posits that “[e]ven if we accept the fact that the Justices’ judgments have political implications and ideological motivations, [the] close identification of Justices with political party could undermine the perception of judicial independence, which is important to the acceptance and compliance with the Court’s decisions.” We offer a different proposition: that in the face of overwhelming evidence that the Court has been captured by partisan donor interests, it is wrong to perpetuate the fiction that it has not been. By grounding its draft report foremost in the concern that the public must *perceive* the Court to be legitimate and independent, the Commission fails to consider the very real and much more dangerous possibility that it might not be. Indeed, the Commission explicitly declined to “take a position on whether the Court’s independence is at risk or whether it has become too anti-democratic.”

The pattern of Republican-appointed justices continuing to execute the political agenda of the donors who installed them to power has persisted. In the months since this Commission was formed, Republican Justices have made it easier for these donors to hide their dark-money spending,⁴ dealt another potentially catastrophic blow to labor rights,⁵ dramatically weakened yet another key provision of the Voting Rights Act,⁶ rewritten the law on religious liberty to adopt a “most favored nation” theory,⁷ invalidated eviction moratoria intended to prevent landlords from evicting tenants amidst the COVID-19 pandemic,⁸ and at least temporarily nullified the constitutional right to an abortion in Texas.⁹ All of these rulings have been decided along partisan lines, with no Democratic appointee joining the majority.

⁴ *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021).

⁵ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

⁶ *Brnovich v. DNC*, 141 S. Ct. 2321 (2021).

⁷ *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam).

⁸ *Alabama Assn. of Realtors v. Dep’t of Health and Human Servs.*, 141 S. Ct. 2485 (2021) (per curiam); *Chrysafis v. Marks*, 141 S. Ct. 2482 (2021) (per curiam).

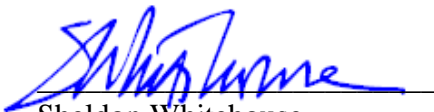
⁹ *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494 (2021).

In the short time remaining to complete your vital work, the Commission must reckon with the prospect that the Court's independence—not just the perception thereof—has been compromised. There is a long and unfortunate history of “regulatory capture” in administrative agencies, and no barrier to those techniques being applied to a court. This proposition should at least be acknowledged, and you should address, for example:

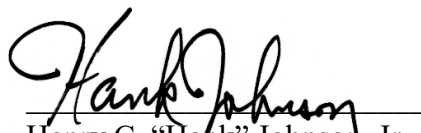
- (a) that the last three Supreme Court vacancies were filled through the efforts of a private organization (the Federalist Society) receiving enormous contemporaneous, anonymous donations;
- (b) that anonymous individual checks as large as \$17 million funded Supreme Court confirmation battle advertising, with no way to know what business those donors had before the Court;
- (c) that orchestrated flotillas of anonymously funded right-wing *amici* appear regularly before the Court, and achieve virtually perfect success with the Republican appointees;
- (d) that a peculiar fast lane has emerged that rushes politically loaded cases to the Supreme Court through deliberate trial and appellate court losses;
- (e) that intensely political partisan decisions have hinged on findings of fact that were not an appellate court's ordinary province, that were not supported by a factual record, and that ultimately were demonstrably false;
- (f) that capture by special interests is not limited to administrative agencies but can infect courts as well;
- (g) that as much as \$400 million in anonymized money has been spent through an array of coordinated groups seemingly designed to capture the Supreme Court, a sum not usually spent without motive; and
- (h) that, in civil cases decided by a 5-4 partisan Supreme Court majority during the Roberts era in which there was an evident Republican donor interest, the donor interest win record was an astonishing 80-0.

These unpleasant facts do not disappear just because we may wish them to. The American people are counting on this Commission. Please do your duty.

Sincerely,



Sheldon Whitehouse
United States Senator



Henry C. “Hank” Johnson, Jr.
Member of Congress



Richard Blumenthal
United States Senator



Mazie K. Hirono
United States Senator