March 15, 2022

The Honorable Richard Durbin
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member, Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Chairman Durbin, Ranking Member Grassley, and members of the Senate Judiciary Committee:

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.

As defenders of the Constitution and the rule of law, CAC has a vested interest in nominations to the federal courts; and there are no nominations more important than those to the Supreme Court, one of the most powerful arbiters of constitutional liberties and protections. The American people are entitled to Supreme Court justices who will not only safeguard the whole Constitution, but also treat each litigant fairly and with dignity, and serve as an impartial, independent check on the President and Congress.

It is with these considerations in mind that CAC reviewed the record of Judge Ketanji Brown Jackson, President Joseph Biden's nominee to the Supreme Court. Judge Jackson's judicial record shows that she is an exceptional jurist, whose many well-reasoned opinions, authored during her tenure as a judge on the District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit, reflect her deep commitment to enforcing the Constitution's text, structure, history, and values.

Judge Jackson has authored hundreds of opinions on many important issues of law. In this letter, we focus on five areas in which Judge Jackson has written significant constitutional rulings: (1) separation-of-powers and rule of law; (2) freedom of speech; (3) police violence and police abuse of power; (4) equal protection; and (5) criminal justice. These rulings show that she is a superb, fair-minded jurist. She should be confirmed to be an Associate Justice on the Supreme Court of the United States.

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A. ***Separation of Powers and Rule of Law***

Judge Jackson's most notable, high-profile decision to date was in 2019 in a case called *Committee on the Judiciary, U.S. House of Representatives v. McGahn*.[1] In that case, she authored a comprehensive and scholarly decision rejecting the argument that senior-level White House aides are immune from duly authorized congressional subpoenas issued pursuant to Congress's oversight authority. Because under the Constitution, "no one is above the law," she reasoned, "however busy or essential a presidential aide might be, and whatever their proximity to sensitive domestic and national-security projects, the President does not have the power to excuse him or her from taking an action that the law requires."[2]

She wrote that "DOJ's conceptual claim to unreviewable absolute testimonial immunity on separation-of-powers grounds—essentially, that the Constitution's scheme countenances unassailable Executive branch authority—is baseless, and as such, cannot be sustained."[3] On the contrary, she wrote, "it is a core tenet of this Nation's founding that the powers of a monarch must be split between the branches of the government to prevent tyranny" and "it is the Judiciary's duty under the Constitution to interpret the law and to declare government overreaches unlawful."[4] She explained that "*the entire point* of segregating the powers of a monarch into the three different branches of government was to give each branch certain authority that the others did not possess" and that under the Constitution it is "the House of Representatives, which unquestionably possesses the constitutionally authorized power of inquiry and also the power of impeachment."[5] The Executive branch's claim of immunity could not, she wrote, be squared with "the venerated constitutional principles that animate the structure of our government and undergird our most vital democratic institutions."[6]

More recently, in another major separation of powers ruling, Judge Jackson joined Judge Patricia Millett's unanimous opinion for a panel of the D.C. Circuit in *Trump v. Thompson*,[7] which rejected former President Donald Trump's claim that executive privilege permitted him to block the release of presidential records relating to the January 6th attack on the United States Capitol to a congressional investigative committee. The panel opinion Judge Jackson joined relied heavily on the fact that the current President had determined that the need for the document outweighed any claim of executive privilege. "President Biden's careful and cabined assessment that the best interests of the Executive Branch and the Nation warrant disclosing the documents, by itself, carries immense weight in overcoming the former President's

[1] 415 F. Supp. 3d 148 (D.D.C. 2019). On appeal, the D.C. Circuit, sitting en banc, affirmed her conclusion that the House Committee of the Judiciary had standing to sue to seek enforcement of a congressional subpoena, noting that "constitutional structure and historical practice support judicial enforcement of congressional subpoenas when necessary." *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 761 (D.C. Cir. 2020) (en banc). Subsequently, a panel of the D.C. Circuit held the House Committee on the Judiciary lacked a cause of action to enforce its subpoena, *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020), but the entire D.C. Circuit vacated that decision and ordered the case to be reheard en banc. Subsequently, the case settled before oral argument.
[2] *Committee of the Judiciary,* 415 F. Supp. 3d at 215.
[3] *Id.* at 155.
[4] *Id.* at 154.
[5] *Id.* at 212.
[6] *Id.* at 215.
[7] 20 F.4th 10 (D.C. Cir. 2021).

assertion of privilege."[8] Indeed, "Article III courts are generally ill-equipped to superintend or second guess the expert judgment of the sitting President about the current needs of the Executive Branch and the best interests of the United States on matters of such gravity and so squarely within the President's Article II discretion."[9] Further, the panel found a truly compelling need for the presidential records at issue to assist Congress in protecting the Capitol from future attack and ensuring a peaceful transfer of power. "The very essence of the Article I power is legislating, and so there would seem to be few, if any, more imperative interests squarely within Congress's wheelhouse than ensuring the safe and uninterrupted conduct of its constitutionally assigned business."[10]

Bedrock separation-of-powers and rule-of-law principles also underlie Judge Jackson's many opinions adjudicating challenges to agency actions under the Administrative Procedure Act. She has written that "agencies have a duty to exercise their considerable discretion in a manner that conforms with the rule of law, which means that they cannot consider their decision-making to be constrained by some parts of a statute or agency regulation and not others."[11] Even "when an agency has the authority to make a final policy decision, procedural mandates that constrain its decision making processes operate as safeguards of individual liberty, and therefore, are entirely consistent with foundational democratic and constitutional norms."[12] And she has observed that "courts' firm rejection of arbitrary action by government officials finds its origin in the Due Process Clause of the U.S. Constitution."[13] She has stressed that "our constitutional system clearly contemplates that the judiciary will have the power to check the conduct of executive branch officials who violate the law."[14] In her lengthy administrative law jurisprudence, she has sometimes set aside agency action finding it arbitrary and capricious or contrary to law,[15] while in other cases, she has deferred to agency determinations, finding that the agency acted within the parameters set by Congress.[16]

Her jurisprudence has also dealt in some detail with a court's responsibility to remedy unlawful agency actions. Her opinions insist that where an agency has acted arbitrarily or otherwise contrary to law, a court must order full relief. Vacating an unlawful agency rule, she wrote, "is an entirely appropriate

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[8] *Id.* at 33.
[9] *Id.* at 35.
[10] *Id.*
[11] *Policy and Research, LLC v. United States Dep't of Health & Human Servs.,* 313 F. Supp. 3d 62, 72 (D.D.C. 2018).
[12] *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1, 9 (D.D.C. 2019), *rev'd sub nom*. *Make the Road New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020). Although the D.C Circuit reversed Judge Jackson's ruling on the ground that the expedited removal policy was not subject to APA review, her reasoning about how enforcement of the APA helps protect constitutional values remains a compelling and important part of her record.
[13] *Am. Fed'n of Labor and Cong. of Indus. Orgs v. NLRB*, 471 F. Supp. 3d 228, 238 (D.D.C. 2020).
[14] *Make the Road New York,* 405 F. Supp. at 71.
[15] *See Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 23 (D.D.C. 2020) (striking down agency action where agency asylum eligibility rule was "manifestly inconsistent with the two-stage asylum eligibility framework that the INA plainly establishes"); *Policy and Research LLC*, 313 F. Supp. 3d at 74-75 (finding shortening of federal grant project period "without explanation and in contravention of the regulations was an arbitrary and capricious act in violation of the APA"); *Depomed, Inc. v. United States Dep't of Health & Human Servs.*, 66 F. Supp. 3d 217, 233 (D.D.C. 2014) (refusing to apply *Chevron* deference because under the plain language of the statute "Congress did not give the FDA any discretionary authority" over drug exclusivity).
[16] *Otsuka Pharmaceutical Co., Ltd. v. Burwell*, 302 F. Supp. 3d 375, 409 (D.D.C. 2016) (finding the text of the statute and its implementing regulations are ambiguous and thus "permit the agency to select a reasonable resolution of the competing policy concerns"), *aff'd*, 869 F.3d 987 (D.C. Cir. 2017).

response when a plaintiff successfully establishes that the agency's conduct violates the law."[17] Thus, she has written, "where the legal claim at issue is the unlawfulness of an agency action of general applicability, it makes no sense whatsoever to insist that a district court limit its vacatur to address solely the impact of the unlawful agency action on the plaintiffs."[18] Accordingly, she has insisted that agencies may not demand "an entitlement to persist in . . . unlawful conduct despite a federal court's ruling declaring that conduct unlawful."[19] Given that the "historical legions of aggrieved plaintiffs . . . have rightfully turned to the federal courts for enforcement of federal statutes that constrain illegal and harmful government action," she has written, a court should not permit an agency "to press its prerogatives however it wants after being told specifically, by a federal court, that the law requires cessation of that behavior."[20] That, she reasoned, "conflicts with core constitutional norms."[21]

Judge Jackson has also decided a number of cases concerning challenges to government action under the non-delegation doctrine. She has observed that "separation-of-powers principles are the bedrock of many courts' analyses with respect to constitutional challenges to a federal statute that authorizes broad discretionary decision making by executive branch officials."[22] But her opinions make clear that such claims generally fail: "the circumstances under which the nondelegation doctrine applies to invalidate a statute are exceedingly limited."[23] Congress must provide an intelligible principle to channel agency discretion, but that establishes a very modest limit. Judge Jackson, has recognized that "'[o]nly the most extravagant delegations of authority, [such as] those providing no standards to constrain administrative discretion,' are to be 'condemned . . . as unconstitutional.'"[24] Applying that rule, she has repeatedly rejected nondelegation challenges.[25]

B. The First Amendment's Guarantee of Freedom of Speech

Judge Jackson's judicial record shows that she is a strong defender of the freedom of speech, having written opinions both vindicating the right to speak freely, as well as recognizing that in certain First Amendment contexts, the government has more leeway to regulate. Her opinions properly strike a balance between safeguarding speech and protecting important government interests, such as consumer protection.

In *Patterson v. United States*,[26] Judge Jackson vindicated the First Amendment rights of a speaker who uttered curses at a political rally. Anthony Michael Patterson was at an Occupy D.C. protest when he encountered some Tea Party demonstrators. Upon seeing them, Patterson said, "Ah, this fucking

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[17] *Kiakombua*, 498 F. Supp. at 34.
[18] *Id.* at 35.
[19] *Id.* at 36.
[20] *Make the Road New York,* 405 F. Supp. at 71.
[21] *Id.*
[22] *Center for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218, 245 (D.D.C. 2019).
[23] *Rothe Dev. Inc. v. Dep't of Def.,* 107 F. Supp. 3d 183, 212 (D.D.C. 2015).
[24] *Id.* (quoting *Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988))
[25] *Id.* (rejecting challenge because "the statute that Congress enacted" contains "specific definitions and a statement of purpose"); *Center for Biological Diversity*, 404 F. Supp. 3d at 245-49 (rejecting non-delegation challenge to waiver authority provided under Illegal Immigration Reform and Immigrant Responsibility Act).
[26] 999 F. Supp. 2d 300 (D.D.C. 2013).

bullshit." He was then stopped by U.S. Park Police and, following additional curses directed at the officers, arrested for disorderly conduct. Judge Jackson's opinion held that, under binding precedent, Patterson could bring a *Bivens* claim to vindicate his First Amendment rights and that the officers had violated Jackson's clearly established First and Fourth Amendment rights by arresting him in retaliation for protected speech and without probable cause to believe a crime had been committed. She concluded that the officers were not entitled to invoke the judicially created doctrine of qualified immunity to avoid liability for the unconstitutional arrest.

Judge Jackson called the First Amendment's guarantee of freedom of speech a "bedrock constitutional freedom" and observed that "[h]aving a constitutional right of free speech means that a person cannot be arrested and prosecuted in retaliation for engaging in protected speech," including speech that "use[s] profanity."[27] She recognized that "[i]n order [to] prevent criminal punishment for speech in violation of the First Amendment, statutes that permit the arrest of speakers generally take care to include an additional element: the speech must implicate a substantial likelihood of violence, provocation, or disruption."[28] In this case, she noted, the District of Columbia's disorderly conduct statute "codifies the First Amendment's requirement that mere offensive or disturbing speech is not enough to warrant an arrest."[29] As she explained, the D.C. statute specifically requires that offensive and provocative speech be directed to "someone *other* than a police officer" in order to "reduce the widespread practice of police officers using the disorderly conduct law to arrest individuals indiscriminately and without a legitimate basis."[30] Therefore, she concluded there was no arguable basis for Patterson's arrest. The profanity used by Patterson, she explained, is "best characterized as the same type of 'contempt of cop' expression that the disorderly conduct statute was carefully crafted to permit in light of the First Amendment."[31]

In practice, the judge-created doctrine of qualified immunity often offers government officials very broad protection from being sued. But Judge Jackson found that this was a case in which the officers had violated clearly established law and therefore could not invoke the defense of qualified immunity. Based on longstanding precedent, she explained, "a police officer is unquestionably on notice that arresting a speaker solely based on the content of his speech and without probable cause to believe that he has committed a crime is a violation of the First Amendment."[32]

In 2019, in *Brown v. Government of the District of Columbia*,[33] Judge Jackson refused to dismiss a First Amendment challenge to D.C.'s Panhandling Control Act brought by individuals who were arrested after asking for money in public places in violation of the Act. The government argued that the law was constitutional as a matter of law, but Judge Jackson disagreed. She found that "[p]laintiffs have plausibly *alleged* that the panhandling provisions at issue are content-based laws that restrict protected speech in public forums, and they maintain that the District had less restrictive, alternative means of achieving its stated objectives."[34] Judge Jackson found that the Panhandling Control Act could be plausibly described

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[27] *Id.* at 312.
[28] *Id.* at 313.
[29] *Id.* at 314.
[30] *Id.*
[31] *Id.* at 316.
[32] *Id.* at 317.
[33] 390 F. Supp. 3d 114 (D.D.C. 2019).
[34] *Id.* at 128.

as content-based because it “prohibits requests for immediate donations of money in various public areas and not any other speech,” requiring the court to apply strict scrutiny.[35] Accordingly, she refused to dismiss the complaint at the earliest stage of the case.

Judge Jackson’s record also shows that she understands that the freedom of speech guaranteed by the First Amendment is not absolute and that government, in certain contexts, may have broader leeway to regulate speech. In *American Meat Institute v. United States Department of Agriculture*,[36] Judge Jackson upheld the constitutionality of a Department of Agriculture regulation that mandated disclosure of country-of-origin information about meat products against a First Amendment challenge. She started from the premise that “compelled *commercial* speech . . . is subject to less exacting constitutional standards.”[37] Judge Jackson held that a lenient standard should apply where the government is simply seeking the disclosure of factual information about a commercial product—such as details “about where an animal was born, raised, and slaughtered”—in circumstances in which there is “a likelihood of consumer confusion” and a “likelihood of deception.”[38] In that setting, she concluded, a reasonableness standard akin to rational basis review applies.[39] Under that standard, Judge Jackson held that plaintiffs were not likely to succeed on the merits of their claim and were not entitled to preliminary injunctive relief. Judge Jackson’s ruling was affirmed by the entire D.C. Circuit, sitting en banc.

C. Police Violence and Abuse of Power

In *Patterson,* Judge Jackson held police officers accountable for violations of constitutional rights, reasoning that qualified immunity is not so sweeping that it immunizes police officers for flagrant violations of fundamental rights. In other cases, Judge Jackson has applied qualified immunity doctrine to dismiss lawsuits brought against the police. As a judge bound by precedent on qualified immunity, she has applied that precedent, even where the result prevented the enforcement of constitutional rights. Here, as elsewhere, her opinions are carefully reasoned and methodical, paying close attention to the relevant precedents applicable to the case at hand.

Perhaps the most noteworthy of her rulings in this area is *Kyle v. Bedlion,*[40] in which Judge Jackson dismissed an excessive force and false arrest suit against officers of D.C.’s police department in a case arising out of a noise complaint at a party. A confrontation ensued between the officers and Kyle’s boyfriend. During the altercation, Officer Bedlion pushed Kyle, who was standing between Bedlion and her boyfriend, into a barbecue grill, causing her to sustain burns, and ordered her to be arrested for assault on a police officer. Judge Jackson held that qualified immunity barred Kyle’s suit.

Judge Jackson held that Officer Bedlion had seized Kyle and therefore triggered the protections of the Fourth Amendment, noting that “there is no minimum time that a plaintiff's freedom of movement must be terminated in order to establish that a seizure has occurred.”[41] But she concluded that Kyle had not

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[35] *Id.* at 125.
[36] 968 F. Supp. 2d 38 (D.D.C. 2013), *aff’d*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).
[37] *Id.* at 47.
[38] *Id.* at 50, 51.
[39] *Id.* at 51.
[40] 177 F. Supp. 3d 380 (D.D.C. 2016).
[41] *Id.* at 391.

shown that Bedlion's use of force violated clearly established Fourth Amendment law. Judge Jackson pointed out that "Kyle fails to cite a single Fourth Amendment excessive-force case—from this jurisdiction or elsewhere—that plainly establishes the impermissibility of Bedlion's shove."[42] Moreover, she stressed, "the kind of officer conduct that the Supreme Court and the D.C. Circuit *has* found to violate the Fourth Amendment rights of seized individuals generally extends well beyond the single shove that Bedlion indisputably employed to seize Kyle under the circumstances presented here."[43] Accordingly, she concluded that "it cannot be said that the state of Fourth Amendment jurisprudence at the time would have given Bedlion clear notice that his shoving Kyle once to effect [her boyfriend's] arrest—albeit forcefully—constituted excessive force in violation of her Fourth Amendment rights."[44]

Judge Jackson also held that Kyle could not challenge her arrest as lacking in probable cause. She emphasized the "fuzzy parameters" of the assault on a police officer statute and pointed out that D.C.'s highest court has affirmed convictions in "circumstances that might reasonably resonate with an officer who was observing Kyle's conduct."[45] Judge Jackson found that "a reasonable officer easily could have interpreted the known facts related to Kyle's conduct to fit into th[e] category" of "active and oppositional conduct directed at the officer," even though Kyle did not touch Bedlion.[46] She concluded that "it is certainly not so abundantly clear from the case law that Kyle—who had admittedly interposed herself between the angry officer and her oppositional boyfriend—was *not* impeding Bedlion such that only a police officer who was 'plainly incompetent' could have thought otherwise."[47] Given the high bar established by Supreme Court precedent, Judge Jackson held that qualified immunity protected Bedlion.

D. ***The Constitutional Guarantee of the Equal Protection of the Laws***

Judge Jackson has decided a number of important cases concerning the constitutional guarantee of equal protection. One of her most notable rulings to date is *Rothe Development, Inc. v. Department of Defense*,[48] in which Judge Jackson rejected an equal protection challenge to the Small Business Act's grant of assistance and support to socially and economically disadvantaged small businesses.[49] The plaintiff argued that the statute classified based on race by creating a rebuttable presumption that Black Americans and other persons of color qualified as socially disadvantaged. Judge Jackson upheld the program against Rothe's facial challenge, concluding that the government may act, consistent with the equal protection guarantee, to remedy racial discrimination and its effects in federal contracting.

Judge Jackson accepted that the challenged provision triggered strict judicial scrutiny, but she concluded that the statute satisfied strict scrutiny and was therefore consistent with the constitutional guarantee of equal protection. First, she recognized that the federal government had a compelling interest in remedying racial discrimination and its effect on contracting and a "strong basis in evidence" for taking race-conscious remedial action, observing that the record showed that "minority-owned small businesses

[42] *Id.* at 393.
[43] *Id.* at 394.
[44] *Id.* at 395.
[45] *Id.* at 397.
[46] *Id.*
[47] *Id.* at 398.
[48] 107 F. Supp. 3d 183 (D.D.C. 2015).
[49] As noted earlier, Judge Jackson also rejected a nondelegation challenge to the statute.

have faced, and continue to face, significant disadvantages in government contracting that cannot be explained by nondiscriminatory factors."[50] Second, she stressed that challenged program satisfied "six dimensions of narrow tailoring."[51] As her opinion explained, Congress employed racial conscious remedial action after "alternative race-neutral remedies ha[d] proved unsuccessful"; the program was "appropriately flexible," and "neither over nor under-inclusive," because race was a relevant factor, but not determinative; the program contained temporal limits on participation; it established "numerically proportionate" goals, which could be met by businesses owned by people of color; and it did not impermissibly burden businesses not participating in the program.[52]

In *X.P. Vehicles, Inc. v. Department of Energy*,[53] Judge Jackson rejected an equal protection claim brought by an energy corporation, which claimed the denial of its loan application was infected by cronyism and political favoritism. Judge Jackson's opinion recognized that this type of equal protection claim—often called a "class of one" claim—requires a plaintiff to show both that it was treated worse than similarly situated parties and that the government did not have a rational basis for disadvantaging the plaintiff. Judge Jackson concluded that the plaintiffs could not satisfy this second requirement, pointing to the fact that the government had found fault with the company's application. Judge Jackson went on to reject the company's argument that the denial of the loan application could be held unconstitutional based on a showing that the government's stated reason was pretextual. Her opinion held that "a pretext allegation alone is not sufficient to undermine an otherwise rational basis for government conduct in the context of a "class of one" equal protection claim."[54] While other courts held that pretext could support an inference that the government's interest was not rational, Judge Jackson disagreed with these rulings, observing that "there is no indication that the Supreme Court intended a "class of one" equal protection claim to be a departure from more typical equal protection claims" and "[i]n traditional equal protection contexts, the subjective motivations of the government actor are not considered."[55]

E. Criminal Justice

Since early in her legal career, Judge Jackson has recognized that "the U.S. Constitution places formidable constraints on each state's ability to *punish* its citizens."[56] On the bench, Judge Jackson has a strong record of enforcing the guarantees of the Bill of Rights designed to safeguard the constitutional rights of persons accused of a crime.

In *United States v. Hillie*,[57] Judge Jackson dismissed the child pornography counts of a grand jury indictment against a defendant, concluding that the language of the indictment was too vague to comply with the constitutional guarantees contained in the Fifth and Sixth Amendments. The indictment merely tracked the broad language of the statute and did "not contain any facts that describe the conduct of

[50] *Id.* at 208.
[51] *Id.*
[52] *Id.* at 208, 209.
[53] 118 F. Supp. 3d 38 (D.D.C. 2015).
[54] *Id.* at 77.
[55] *Id.*
[56] Ketanji Brown, Note, *Prevention Versus Punishment: Towards a Principled Distinction in the Restraint of Released Sex Offenders,* 109 Harv. L. Rev. 1711, 1716 (1996).
[57] 227 F. Supp. 3d 57 (D.D.C. 2017).

Hillie's that the government believes constitutes criminal behavior."[58] This, she concluded, rendered the indictment facially defective and inconsistent with "basic constitutionally mandated principles."[59]

Judge Jackson stressed three constitutional flaws with the indictment. First, the indictment failed to provide fair notice to the defendant, which is explicitly required by the Sixth Amendment. "The indictment is barren of factual averments regarding the what, where, or how of Hillie's conduct, and thus, a non-clairvoyant reader cannot possibly ascertain the substance of the government's accusations from the face of the charging instrument."[60] Second, it transgressed the "Fifth Amendment's protections against abusive criminal charging practices; specifically, its guarantees that a criminal defendant can only be prosecuted for offenses that a grand jury has actually passed up on."[61] Without a "written charge that *includes* th[e] factual basis for the grand jury's probable cause finding," she wrote, it is impossible to "know with the requisite degree of certainty that the criminal charges that appear in the indictment are actually based on the information so presented [to the grand jury]."[62] Third, the factual omissions posed a risk that Hillie could be subject to double jeopardy. As she explained, "the allegations are insufficient to establish the boundaries of the charged conduct, and thus it is not at all clear that a future prosecution for conduct arising out of these same charges would be barred."[63] Because it was so difficult to understand the charges against Hillie, courts would be hard pressed to enforce the Double Jeopardy Clause's protections against prosecuting an individual a second time for the same offense.

The "bottom line," she concluded, is that a "criminal indictment" must be "drafted to provide adequate notice, to preserve the role of the grand jury, and to avoid the risk of double jeopardy—as the Constitution demands."[64] Because Hillie's indictment did not satisfy these minimum constitutional standards, she dismissed the child pornography charges against him.

In *United States v. Young,*[65] Judge Jackson rejected the government's effort to seek a forfeiture money judgment of $180,000, which is the amount of the estimated value of two kilograms of heroin that law enforcement officers seized from Young's home. The government insisted that it was entitled to seize the drugs and collect a separate forfeiture money judgment in the amount of the value of drugs. Judge Jackson held that "such a forfeiture order constitutes improper double counting that the criminal forfeiture statutes neither direct nor envision."[66]

Much of Judge Jackson's ruling rested on the fact that "there is no statutory or common-sense justification for the government's suggestion that it is authorized *both* to seize contraband drugs *and also* to obtain a money judgment for the amount that the defendant allegedly used to purchase those very same drugs."[67] She also emphasized that fundamental constitutional principles make "double counting . .

[58] *Id.* at 71.
[59] *Id.* at 72.
[60] *Id.*
[61] *Id.* at 70.
[62] *Id.* at 77.
[63] *Id.* at 79.
[64] *Id.* at 80.
[65] 330 F. Supp. 3d 424 (D.D.C. 2018).
[66] *Id.* at 426.
[67] *Id.* at 430.

. especially taboo in the context of criminal punishment."[68] "[S]entences that include double counting" implicate especially "grave[] concerns, because they raise the specter of an impermissible extension of the court's authority to sentence under our constitutional scheme."[69] She refused to interpret the federal criminal forfeiture to require such a "troublesome result."[70]

Conclusion

The Constitution and the American people require a Supreme Court that will respect the text, history, and values of the whole Constitution, and serves as an independent check on the elected branches of government. Judge Jackson's record shows that she passes this test of constitutional fidelity with flying colors. **The Constitutional Accountability Center supports Judge Jackson's nomination to be an Associate Justice on the Supreme Court of the United States, and urges you report her out of committee favorably.** We also look forward to her prompt consideration and confirmation by the full Senate.

If you have any questions or would like any additional information, please contact Praveen Fernandes, CAC's Vice President, at praveen@theusconstitution.org.

Sincerely,

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[68] *Id.* at 436.
[69] *Id.* at 437.
[70] *Id.*