

With Fear for Our Democracy, I Dissent: Restoring Public Trust in the Separation of Powers

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In fear of an autocracy, the Founding Fathers established three branches of government to ensure that the power to govern would never be concentrated in a singular branch of government. Governmental authority was divided among the executive, legislative, and judicial branches, where each branch was assigned distinct powers and responsibilities. The framers relied heavily on Montesquieu's *The Spirit of the Laws* (1748), where Montesquieu advocated that successful governments divide powers into three systems—one possessing power to make laws, one who engaged with foreign entities, and one who interpreted the laws.<sup>1</sup> For James Madison, who penned Federalist 51, “In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.”<sup>2</sup> Significantly, Madison could not have predicted, despite his attention to the threat of factions, that the rapid polarization of political parties would lead to extensive halts in passing legislation, attempts to strengthen certain branches over another, and political parties disrupting the balance when all three branches work in connection to achieve a common goal. Neither could he have predicted the impact of the executive, as Madison acknowledged the permanent weakness of the executive in Federalist 51.

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<sup>1</sup> “6.5 Primary Source: Montesquieu, the Spirit of the Laws (1748).” *National Constitution Center – Constitutioncenter.Org*, [constitutioncenter.org/education/classroom-resource-library/classroom/6.5-primary-source-montesquieu-the-spirit-of-the-laws#:~:text=%E2%80%94Montesquieu%20divides%20power%20in%20three,and%20interpret\)%20the%20nation's%20laws](https://constitutioncenter.org/education/classroom-resource-library/classroom/6.5-primary-source-montesquieu-the-spirit-of-the-laws#:~:text=%E2%80%94Montesquieu%20divides%20power%20in%20three,and%20interpret)%20the%20nation's%20laws). Accessed 9 Sept. 2024.

<sup>2</sup> “Research Guides: Federalist Papers: Primary Documents in American History: Federalist Nos. 51-60.” *Federalist Nos. 51-60 - Federalist Papers: Primary Documents in American History - Research Guides at Library of Congress*, [guides.loc.gov/federalist-papers/text-51-60](https://guides.loc.gov/federalist-papers/text-51-60). Accessed 9 Sept. 2024.

Madison's greatest proposed security measures sought to prove that "ambition must counteract ambition," yet recent court rulings, an insurrection attempt against the Capitol, and growing concerns for the state of democracy prove an imbalance in political ambition. In a 6-3 historic decision, the Supreme Court ruled in favor of presidential immunity for certain criminal prosecutions. Regarding the decision, Chief Justice John Roberts wrote, "The president is not above the law... But Congress may not criminalize the president's conduct in carrying out the responsibilities of the executive branch under the Constitution."<sup>3</sup> Shortly following the decision, Former President Donald Trump resorted to posting on social media, "BIG WIN FOR OUR CONSTITUTION AND DEMOCRACY. PROUD TO BE AN AMERICAN."<sup>4</sup> Comparatively, Democratic representatives responded with shock, that this decision was an ultimate blow to the principles of democracy. For Eric Holder, Jr. this decision severely wounded our democracy and similarly, Justice Ketanji Brown Jackson expressed that the majority was responsible for "planting the seeds of absolute power" which could only "invite anarchy."<sup>5</sup> Dangerously, the newly established principle for presidential immunity is not an isolated instance of growing encroachment on democracy, as demonstrated by several incidents leading up to the 2024 election. For those in attendance at Turning Point Action's "Belief Summit," Christian voters were assured by Trump that they'd never have to vote again after this election.<sup>6</sup> As the campaigns continue to grow momentum, especially with the introduction of Vice President

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<sup>3</sup> Fritze, John, et al. "Takeaways from the Supreme Court's Historic Decision Granting Donald Trump Immunity | CNN Politics." *CNN*, Cable News Network, 1 July 2024, [www.cnn.com/2024/07/01/politics/takeaways-trump-immunity-scotus/index.html](http://www.cnn.com/2024/07/01/politics/takeaways-trump-immunity-scotus/index.html).

<sup>4</sup> Callahan, Molly. "BU Law Expert Says Supreme Court's Immunity Decision Is 'Constitutional Embarrassment.'" *Boston University*, 1 July 2024, [www.bu.edu/articles/2024/supreme-court-grants-trump-broad-immunity-from-prosecution/](http://www.bu.edu/articles/2024/supreme-court-grants-trump-broad-immunity-from-prosecution/).

<sup>5</sup> Totenberg, Nina. "Supreme Court Says Trump Has Absolute Immunity for Core Acts Only." *NPR*, NPR, 1 July 2024, [www.npr.org/2024/07/01/nx-s1-5002157/supreme-court-trump-immunity](http://www.npr.org/2024/07/01/nx-s1-5002157/supreme-court-trump-immunity).

<sup>6</sup> McCammon, Sarah, and Juliana Kim. "Trump Tells Christian Voters They 'won't Have to Vote Anymore' If He's Elected." *NPR*, NPR, 27 July 2024, [www.npr.org/2024/07/27/nx-s1-5054272/trump-christian-wont-vote-anymore-speech](http://www.npr.org/2024/07/27/nx-s1-5054272/trump-christian-wont-vote-anymore-speech).

Kamala Harris as the Democratic candidate, larger and larger guarantees of election validity, changes to the Supreme Court, adjustments in Federal agencies, restructuring of the Supreme Court, and ethical codes of conduct for Justices are promised. As evidenced by the party platforms and the recent rulings from the Supreme Court, both parties are targeting one key point on the ballot: democracy itself. By thoroughly examining the Republican and Democratic party platforms, campaign strategies, and the intentions of both presidential candidates regarding the future of the federal government, we can begin to assess how to proactively establish safeguards around the separation of powers and prevent an abuse of judicial or executive powers. As a formidable warning about the state of the union with Trump's newfound immunity looming over the rhetoric surrounding the 2024 election, Justice Sonia Sotomayor confidently penned, "With fear for our democracy, I dissent."

### **The Campaign of The Trump Administration**

Before Trump took office in 2016, his campaign promoted a novel character, an "anti-politician," as coined by *NPR*, in which voters were assured they could rely on Trump to never disappoint the "regular people" with greed or self-absorbed desires for re-election.<sup>7</sup> After securing the presidency in 2016, Trump presented an "ominous acceptance speech during the Republican National Convention that concluded with a "pledge" to his loyal voters: "I am your voice."<sup>8</sup> Now seeking re-election in 2024, the "anti-politician" depiction carries with it a more significant weight—the promise of prosecution of political opponents as retribution for his indictments, the complete overhaul of federal agencies, firmer security of a conservative majority

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<sup>7</sup> McCammon, Sarah. "Donald Trump Has Brought on Countless Controversies in an Unlikely Campaign." *NPR*, NPR, 5 Nov. 2016, [www.npr.org/2016/11/05/500782887/donald-trumps-road-to-election-day](http://www.npr.org/2016/11/05/500782887/donald-trumps-road-to-election-day).

<sup>8</sup> McCammon, Sarah. "Donald Trump Has Brought on Countless Controversies in an Unlikely Campaign." *NPR*, NPR, 5 Nov. 2016, [www.npr.org/2016/11/05/500782887/donald-trumps-road-to-election-day](http://www.npr.org/2016/11/05/500782887/donald-trumps-road-to-election-day).

within the Supreme Court and U.S. Court of Appeals, and an expansion of the powers delegated to the executive branch.

Reminiscent of his 2016 campaign pledge to “Drain the Swamp,” Trump vowed anew to “cast out the corrupt political class” if he wins and to “cut the fat out of our government for the first time, meaningfully, in 60 years.”<sup>9</sup> Trump’s vision for how to approach this begins with independent agencies, where the Federal Communications Commission and the Federal Trade Commission will be designated under the direct authority of the President.<sup>10</sup> In addition, Trump specifically identifies the “sick political class who hates our country” as including the civil servants employed by the federal government, the State Department, the defense bureaucracy, and the intelligence services in Agenda 47, and vows that if he wins, they will be subject to a complete overhaul of federal agency restructuring.<sup>11</sup> Further, Agenda 47 asserts a proposal for reinstating his 2020 Executive Order, referred to as Schedule F, on day one of his presidency, whereas the delegation of terminating employees involved in policy-determining, policymaking, or policy-advocating positions has been reassigned to the President for review.<sup>12</sup> Consequently, the threshold for terminating employees rests in Trump’s assertion that “the departments and agencies that have been weaponized will be completely overhauled so that faceless bureaucrats will never again be able to target and persecute conservatives, Christians, or the left’s political

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<sup>9</sup> Goldberg, Michael, et al. “Trump Threatens Long Prison Sentences for Those Who ‘cheat’ in the Election If He Wins.” *PBS*, Public Broadcasting Service, 8 Sept. 2024, [www.pbs.org/newshour/politics/trump-threatens-long-prison-sentences-for-those-who-cheat-in-the-election-if-he-wins](http://www.pbs.org/newshour/politics/trump-threatens-long-prison-sentences-for-those-who-cheat-in-the-election-if-he-wins).

<sup>10</sup> Swan, Jonathan, et al. “Trump and Allies Forge Plans to Increase Presidential Power in 2025.” *The New York Times*, The New York Times, 17 July 2023, [www.nytimes.com/2023/07/17/us/politics/trump-plans-2025.html](http://www.nytimes.com/2023/07/17/us/politics/trump-plans-2025.html).

<sup>11</sup> Trump, Donald J. “Agenda47: President Trump’s Plan to Dismantle the Deep State and Return Power to the American People: Donald J. Trump for President 2024.” *Agenda47 | Donald J. Trump*, 21 Mar. 2023, [www.donaldjtrump.com/agenda47/agenda47-president-trumps-plan-to-dismantle-the-deep-state-and-return-power-to-the-american-people](http://www.donaldjtrump.com/agenda47/agenda47-president-trumps-plan-to-dismantle-the-deep-state-and-return-power-to-the-american-people).

<sup>12</sup> Trump, Donald J. “Agenda47: Preventing World War III: Donald J. Trump for President 2024.” *Agenda47 | Donald J. Trump*, 16 Mar. 2023, [www.donaldjtrump.com/agenda47/agenda47-preventing-world-war-iii](http://www.donaldjtrump.com/agenda47/agenda47-preventing-world-war-iii).

enemies,” which conveys a lesser emphasis on examination of employees meeting administrative standards than it does a political agenda to target civil servants who have not or choose not to align with Trump’s own agendas.<sup>13</sup> Yet even the mere threat of complete reconfiguration of the federal government, with an emphasis on the power of the executive, impacts the public’s perceptions of institutional security, as he begins to sow the seeds of distrust in public institutions and undermine the authority of law, something he notably accomplished with previous testaments to the unreliability of elections. As Neil S. Siegel, a law professor at Duke University, explains, the public’s perception of prosecutions for political reasons being abnormal is “essential to sustaining the rule of law, which is the antithesis of the rule of powerful individuals who weaponize the coercive power of federal criminal law.<sup>14</sup>” As for his justification of how he can plausibly dismantle independent agencies or eliminate employment protections, Trump states, “I have an Article II, where I have the right to do whatever I want as president.<sup>15</sup>” As part of these efforts to reshape the federal agencies and regulate employment standards, Trump announced on his campaign trail the need for a new ‘Government Efficiency

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<sup>13</sup> Ortega, Bob, et al. “What Trump’s War on the ‘deep State’ Could Mean: ‘An Army of Suck-Ups’ | CNN Politics.” *CNN*, Cable News Network, 27 Apr. 2024, [www.cnn.com/2024/04/27/politics/trump-federal-workers-2nd-term-invs/index.html](http://www.cnn.com/2024/04/27/politics/trump-federal-workers-2nd-term-invs/index.html).

<sup>14</sup> Liptak, Adam. “Trump’s Vows to Prosecute Rivals Put Rule of Law on the Ballot.” *The New York Times*, The New York Times, 5 June 2024, [www.nytimes.com/2024/06/05/us/trump-retribution-justice.html](http://www.nytimes.com/2024/06/05/us/trump-retribution-justice.html).

<sup>15</sup> Brice-Saddler, Michael. “While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him ‘the Right to Do Whatever I Want.’” *Washington Post*, 23 July 2019, [www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/](http://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/).

<sup>16</sup> Benen, Steve. “Trump: Constitution Gives Me ‘the Right to Do Whatever I Want.’” *MSNBC*, NBCUniversal News Group, 24 July 2019, [www.msnbc.com/rachel-maddow-show/trump-constitution-gives-me-the-right-do-whatever-i-want-msna1256166](http://www.msnbc.com/rachel-maddow-show/trump-constitution-gives-me-the-right-do-whatever-i-want-msna1256166).

Commission,” overseen by Elon Musk, who will be evaluating financial and performance audits of the entire federal government as quality assurance.<sup>17</sup>

His commitment to “draining the swamp,” is not an isolated effort, however, as Trump emphasizes that adjusting the Supreme Court is crucial to his second term. At the National Rifle Association’s annual meeting in May, Trump informed the crowd, “We like people in their 30s so they’re there for 50 years or 40 years.<sup>18</sup>” Similarly, Mitch McConnell echoed affirmations about how essential it is to secure the Supreme Court. While the age of those nominated to the Supreme Court is crucial to understanding a long-term Conservative majority, the secondary consideration is the opportunity to appoint. In McConnell’s own words, “You know what my top priority is. I’ve made it very clear. It’s the judiciary... We intend to keep confirming as many as we possibly can for as long as we’re in a position to do it.<sup>19</sup>” Significantly, these concerns are written into the Republican National Convention’s platform, as the following:

“We commit to upholding the Constitution of the United States, appointing judges who respect the rule of law, and defending the Rights of all Americans to Life, Liberty, and the Pursuit of Happiness. We will maintain the Supreme Court as it was always meant to be, at 9 Justices. We will not allow the Democrat Party to increase this number, as they

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<sup>17</sup> Cooper, Jonathan J. “Trump Says He’d Create a Government Efficiency Commission Led by Elon Musk.” *AP News*, AP News, 5 Sept. 2024, [apnews.com/article/donald-trump-elon-musk-government-efficiency-commission-e831ed5dc2f6a56999e1a70bb0a4eae](https://apnews.com/article/donald-trump-elon-musk-government-efficiency-commission-e831ed5dc2f6a56999e1a70bb0a4eae).

<sup>18</sup> Seger, Andrew, and Phil Mattingly. “Trump Transformed the Federal Judiciary. He Could Push the Courts Further Right in a Second Term | CNN Politics.” *CNN*, Cable News Network, 13 July 2024, [www.cnn.com/2024/07/13/politics/donald-trump-judiciary-courts/index.html](https://www.cnn.com/2024/07/13/politics/donald-trump-judiciary-courts/index.html).

<sup>19</sup> Seger, Andrew, and Phil Mattingly. “Trump Transformed the Federal Judiciary. He Could Push the Courts Further Right in a Second Term | CNN Politics.” *CNN*, Cable News Network, 13 July 2024, [www.cnn.com/2024/07/13/politics/donald-trump-judiciary-courts/index.html](https://www.cnn.com/2024/07/13/politics/donald-trump-judiciary-courts/index.html).

would like to do, by 4, 6, 8, 10, and even 12 Justices. We will block them at every turn.<sup>20</sup>”

Their specific attention to maintaining the number of Justices appointed reflects their intention to maintain the conservative majority and there’s ample reason why. In accordance with a Republican-controlled Senate, Trump accomplished several points for conservatives, including the overturning of *Roe v. Wade*, the EPA losing regulatory power in *West Virginia v. EPA*, and the overturning of affirmative action in education in *Harvard and SFFA v. UNC*.<sup>21</sup>

### **The Campaign of The Harris Administration**

“In the end, they’re not after me, they’re after you,” former President Donald J. Trump assured supporters at the evangelical Faith & Freedom Coalition in Washington in June. He described his suffering as “wounds all over,” which referred to his indictment on several charges including business charge fraud, possessing classified documents, and state and federal indictments concerning election interference.<sup>22</sup> Describing his indictments as vehicles in which he was facing prosecution for political beliefs, he promised that his wounds were accepted on their behalf, as a martyr would do, declaring, “I just happen to be, very proudly, standing in their way.”<sup>23</sup> However, the metaphorical image of President Trump as a martyr, due to his consistent portrayals of himself as the victim of media cycles, took a new meaning on July 13<sup>th</sup>, 2024, when

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<sup>20</sup> “The 2024 Republican Platform.” *43rd Republican National Convention*, 2024, prod-static.gop.com/media/RNC2024-Platform.pdf?\_gl=1\*hwuzn7\*\_gcl\_au\*NTQ5MTA0MDEuMTcyMTc4MjIzOA..&\_ga=2.16036406.1618909981.1721782239-768956651.1721782239.

<sup>21</sup> Seger, Andrew, and Phil Mattingly. “Trump Transformed the Federal Judiciary. He Could Push the Courts Further Right in a Second Term | CNN Politics.” *CNN*, Cable News Network, 13 July 2024, [www.cnn.com/2024/07/13/politics/donald-trump-judiciary-courts/index.html](http://www.cnn.com/2024/07/13/politics/donald-trump-judiciary-courts/index.html).

<sup>22</sup> Cameron, Chris. “After Conviction, Trump Presents Himself as a Martyr to the Christian Right.” *The New York Times*, The New York Times, 22 June 2024, [www.nytimes.com/2024/06/22/us/politics/trump-faith-and-freedom-evangelical-martyr.html](http://www.nytimes.com/2024/06/22/us/politics/trump-faith-and-freedom-evangelical-martyr.html).

<sup>23</sup> Cameron, Chris. “After Conviction, Trump Presents Himself as a Martyr to the Christian Right.” *The New York Times*, The New York Times, 22 June 2024, [www.nytimes.com/2024/06/22/us/politics/trump-faith-and-freedom-evangelical-martyr.html](http://www.nytimes.com/2024/06/22/us/politics/trump-faith-and-freedom-evangelical-martyr.html).



President Trump faced an assassination attempt at a rally in Pennsylvania. Despite his steady recovery and the controversies surrounding the Secret Service's reaction to the assassination, the portrait had already been painted—immediately, the parallels to historical traditions in the Romantic period, in which figures were depicted as victorious, bloodied heroes surrendering to a violent fate in the name of their country, were drawn.<sup>24</sup> The imagery evoked comparisons to Eugène Delacroix's "Liberty Leading the People" (1830) or John Singleton Copley's "Death of Major Peirson" (1782—84), a history painting of a victorious general dying beneath the British flag.<sup>25</sup> Democratic representatives called upon President Biden to consider that the election had become "a moral question about the future of our country" according to Colorado Senator Michael Bennet. In agreement, Rep. Mikie Sherrill, D-N.J., emphasized that the Supreme Court's recent ruling in *Trump v. United States* provided the President of the United States "inordinate power" and posed a threat too extreme to stay silent. Prior to President Biden's announcement that he would be rescinding his bid for a second term in the 2024 election, Democratic representatives expressed concern about President Biden's capacity to compete against the appeal of President Trump's energy, rhetoric, and newly acquired status as a "martyr."

Upon President Biden announcing his decision to rescind his bid for re-election, the Democratic Party opted for a new image, promoting Kamala Harris and her running mate, Governor Tim Walz, who elicited strong responses from voters and politicians alike. The

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<sup>24</sup> Farago, Jason. "The Photographs That Made Trump an Incarnation of Defiance." *The New York Times*, The New York Times, 14 July 2024, [www.nytimes.com/2024/07/14/arts/design/trump-photo-raised-fist.html](https://www.nytimes.com/2024/07/14/arts/design/trump-photo-raised-fist.html).

<sup>25</sup> Farago, Jason. "The Photographs That Made Trump an Incarnation of Defiance." *The New York Times*, The New York Times, 14 July 2024, [www.nytimes.com/2024/07/14/arts/design/trump-photo-raised-fist.html](https://www.nytimes.com/2024/07/14/arts/design/trump-photo-raised-fist.html).

Democratic National Convention witnessed several speakers pledge their commitment to protecting democracy, emboldened by Harris' assertion, "I love my country with all my heart." Pennsylvania Governor Josh Shapiro assured the crowd, "We are the party of real freedom. We cherish our democracy we love this country." Angela Alsobrooks, a candidate seeking to represent Maryland in the United States Senate, echoed, "We as a country are not going back." Each declaration was met with swift chants from the crowd, which soon became the image of the Harris-Walz campaign, "We are not going back."<sup>26</sup> The affirmations of American ideals, largely encompassed in the idea that protecting civil liberties and the state of democracy is the ultimate display of patriotism or devotion for one's country, soon galvanized the Democratic Party to consider their use of rhetoric against President Trump, a known entertainer with an ability to invigorate voters with his own violent and vitriolic employment of language. A new term emerged from the Democratic Party to describe the Republican ticket: "weird." Coined by Tim Walz to encompass the Republican Party's and Trump's attempts to thwart democracy, it became a success at capturing the abnormality of the Trump administration's ambitions for the White House. Jennifer Mercieca, a historian at Texas A&M University, qualifies the value of this word, explaining, "The opposite of normalizing authoritarianism is to make it weird, to call it out and to sort of mock it... To say, 'Hey, that's a weird thing you're doing, calling your opposition enemies instead of saying that they're good people who have different policy preferences."<sup>27</sup>" Walz's timely employment of the word reflects a larger trend in the party, that voters are concerned about the state of democracy if Trump is elected to the White House for a second

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<sup>26</sup> Littleton, Cynthia. "Democrats Seek to Reshape the Party's Image as Young, Snarky, Patriotic and Reverent of Civil Rights Heroes." *Variety*, Variety, 24 Aug. 2024, [variety.com/2024/tv/news/dnc-kamala-harris-makeover-patriotic-snarky-1236116334/](https://variety.com/2024/tv/news/dnc-kamala-harris-makeover-patriotic-snarky-1236116334/).

<sup>27</sup> Amiri, Farnoush. "How Tim Walz Became Beloved by Young Voters with a Message That the GOP Is 'Weird.'" *AP News*, AP News, 7 Aug. 2024, [apnews.com/article/kamala-walz-vp-weird-trump-gen-z-f9d718890c3ca907f42dba5934075382](https://apnews.com/article/kamala-walz-vp-weird-trump-gen-z-f9d718890c3ca907f42dba5934075382).

term. According to an AP-NORC poll, eighty-seven percent think electing Trump will weaken democracy.<sup>28</sup>

As the Democratic Party swiftly adjusted to endorse Harris and Walz’s nomination and adopt their successful attempt at reframing the Trump Administration’s threat to democracy, the Democratic National Convention updated their party platform to reflect those values, in which they outlined two crucial objectives. First, the platform details the construction of a federal ethics commission to enforce and introduce federal ethics laws, which would include rules around personal financial disclosures for Executive Branch officials, and require disclosure regarding campaign finance, financial disclosure, and lobbying disclosure.<sup>29</sup> Second, the platform acknowledges the declining legitimacy and trust in the courts and proposes structural reforms that would increase transparency to the public about their affairs and hold them responsible.<sup>30</sup> This is in tandem with the Supreme Court’s adoption of a Code of Conduct following several incidents. Harris’ website identifies the goal of imposing term limits and a code of ethics to bind judges to remain accountable and ethical in their decisions, but in addition, supports a federal reconsideration of the *Trump v. United States* decision. With the newly nominated Walz and

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<sup>28</sup> Potts, Monica. “<https://abcnews.go.com/538/Americans-Democracy-Peril-2024-Election/Story?id=106803471>.” *ABC News*, ABC News Network, abcnews.go.com/538/americans-democracy-peril-2024-election/story?id=106803471. Accessed 9 Sept. 2024.

<sup>29</sup> “DNC Releases 2024 Party Platform Draft, Outlining Historic Record and Bold Agenda for President Biden and Vice President Harris to Finish the Job.” *Democrats*, 13 July 2024, democrats.org/news/dnc-releases-2024-party-platform-draft-outlining-historic-record-and-bold-agenda-for-president-biden-and-vice-president-harris-to-finish-the-job/.

<sup>30</sup> “DNC Releases 2024 Party Platform Draft, Outlining Historic Record and Bold Agenda for President Biden and Vice President Harris to Finish the Job.” *Democrats*, 13 July 2024, democrats.org/news/dnc-releases-2024-party-platform-draft-outlining-historic-record-and-bold-agenda-for-president-biden-and-vice-president-harris-to-finish-the-job/.

Harris to the Democratic ticket, anticipation grows for the presidential debate occurring in early September and additional specificity to the legislation proposed in the Harris-Walz platforms.

### **A History of Boundaries and Expansions in the Executive and Judiciary**

Although Trump is not the first to seek opportunities to expand presidential power and the Biden-Harris Administration and Harris-Walz tickets are not the first candidates to advocate for an expansion of the Supreme Court, the surrounding context of recent Supreme Court rulings such as *Trump v. United States*, rapidly increasing presence of political violence between parties, and increasingly demeaning rhetoric used by politicians to emphasize an “us versus them” mentality makes the sudden attention to the separation of powers unprecedented.

In 1937, President Franklin D. Roosevelt proposed to expand the Supreme Court through a piece of legislation, the Judicial Reform Bill of 1937, in order to gain favor for his New Deal. Between 1895 to 1915, the Supreme Court fundamentally struck down six proposals, including the first peacetime federal income tax in 1895, applications of antitrust law to manufacturing in 1895, state labor laws limiting workers’ hours in 1905, laws restricting employers from eliminating union membership in 1908 and 1915, further narrowed an interpretation of pro-union legislation in 1922, and a federal minimum wage law for women in 1923.<sup>31</sup> However, these were not the primarily decisions that catalyzed President Roosevelt’s intent to pack the courts. Several New Deal proposals were struck down, as only two of ten proposed were approved, but largely their opposition was composed of four conservative Justices: Van Devanter, McReynolds, Sutherland, and Butler, who later were entitled “the Four Horsemen of the

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<sup>31</sup> Witt, John Fabian. “When FDR Took on the Supreme Court.” *The Nation*, 27 June 2023, [www.thenation.com/article/politics/court-packing-supreme-court-roosevelt/](https://www.thenation.com/article/politics/court-packing-supreme-court-roosevelt/).

Apocalypse.” The first decision occurred on January 7th, 1935, when the Supreme Court struck down a section of the National Industrial Recovery Act in *Panama Refining Company v. Ryan* that would have provided the president the power to regulate the oil industry through prohibiting interstate trade and shipment of oil that was stored or produced illegally. Further, the Supreme Court’s decisions in *Humphrey’s Executor v. United States*, *Railroad Retirement Board v. Alton Railroad Co.*, *A.L.A Schechter Poultry Corp v. United States*, *Louisville Bank v. Radford*, *Hopkins Savings Association v. Cleary*, *United States v. Butler*, *Carter v. Carter Coal Co.*, and *Ashton v. Cameron* all were decisions made by the Supreme Court, each with the Four Horsemen involved, which ruled parts of Roosevelt’s New Deal as unconstitutional.

On March 9, 1937, Roosevelt utilized his favored method of communicating to the public, his fireside chats, to justify and provide an explanation regarding his proposal, explaining that, “This plan of mine is not attacking of the court; it seeks to restore the court to its rightful and historic place in our system of constitutional government and to have it resume its high task of building anew on the Constitution ‘a system of living law.’ The court itself can best undo what the court has done.<sup>32</sup>” As part of this proposal, Roosevelt envisioned legislation that would allow him, or any future president, to appoint a justice for every sitting justice over the age of 70 years old. To Roosevelt’s benefit, two sitting justices were already liberal and his new legislation would allow him to appoint six more justices.<sup>33</sup> Within a five week time span, the proposed legislation died in the Senate and in June of 1937, the Judiciary Committee sent a report with a negative recommendation to the full Senate. The report specified that was “an invasion of judicial power such as has never before been attempted in this country” and that it was “essential

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<sup>32</sup> “How FDR Lost His Brief War on the Supreme Court.” *National Constitution Center – Constitutioncenter.Org*, 5 Feb. 2024, [constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2](https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2).

<sup>33</sup> “How FDR Lost His Brief War on the Supreme Court.” *National Constitution Center – Constitutioncenter.Org*, 5 Feb. 2024, [constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2](https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2).

to the continuance of our constitutional democracy that the judiciary be completely independent of both the executive and legislative branches of the government.<sup>34</sup>”

Following Rutgers University’s definition of “court-packing,” in which “court packing” can “describe changes to the size of the Supreme Court” and involves “any effort to manipulate the Court’s membership for partisan ends,” Roosevelt’s attempt to expand the Supreme Court is an exemplary example.<sup>35</sup> Rutgers University expands upon this definition, in which they classify the Barrett appointment as another instance of court-packing.<sup>36</sup> Before discussing Barrett’s confirmation to the Supreme Court, it’s imperative to discuss the surrounding circumstances of why the Democratic Party discouraged the Republicans from pushing the selection through when it was nearing Election Day. In early 2016, following the death of Justice Antonin Scalia, Merrick Garland was nominated to fill the vacancy by then-President Barack Obama. Previously, Garland had served as the chief judge on the U.S. Court of Appeals for the District of Columbia Circuit, which made him a suitable selection, if not the best suited for the vacancy. However, Senate Majority Leader Mitch McConnell blocked the appointment for months, arguing that the Supreme Court Justice nomination belonged to the next President, who had not been elected yet. McConnell explicitly stated “Of course the American people should have a say in the court’s direction. It is a president’s constitutional right to nominate a Supreme Court justice, and it is the Senate’s constitutional right to act as a check on the president and withhold its consent.” Consequently, McConnell’s outright refusal to even hold a vote on Garland’s appointment had

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<sup>34</sup> “How FDR Lost His Brief War on the Supreme Court.” *National Constitution Center – Constitutioncenter.Org*, 5 Feb. 2024, [constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2](https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2).

<sup>35</sup> “What Is Court Packing?” *Rutgers University*, 27 Oct. 2020, [www.rutgers.edu/news/what-court-packing](https://www.rutgers.edu/news/what-court-packing).

<sup>36</sup> “What Is Court Packing?” *Rutgers University*, 27 Oct. 2020, [www.rutgers.edu/news/what-court-packing](https://www.rutgers.edu/news/what-court-packing).

two outcomes. First, as NPR explains, it blocked a nomination from a Democratic president.<sup>37</sup> Second, the vacancy became a key issue for voters in the 2016 election, which encouraged conservatives to vote for then-candidate Donald Trump who would, in his presidency, be able to make an appointment. In October 2020, following Justice Ruth Bader Ginsburg's death, then-President Trump nominated Amy Coney Barrett to fill the vacancy. In a 52-48 vote, the Senate voted to confirm Barrett a week before Election Day. Regarding this decision, Majority Leader McConnell explained, "The Senate is doing the right thing. We're moving this nomination forward, and, colleagues, by tomorrow night we'll have a new member of the United States Supreme Court."<sup>38</sup> For Senate Minority Leader, Chuck Schumer, these efforts were a "glaring hypocrisy" and that it "will exist forever with this Republican majority and with this Republican leader."<sup>39</sup>

### **Protecting the Separation of Powers and Larger Solutions**

To respond to the growing concerns about public institutions and the impending threat to democracy, there must be a reconsideration of how we respond to corruption, abuse of power, or threats of political vengeance. Therefore, the best-suited non-partisan solution to resolve several abuses of power throughout the government, those denounced by both the Republican and Democratic candidates, must be legislation involving the Supreme Court introducing an

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<sup>37</sup> Elving, Ron. "What Happened with Merrick Garland in 2016 and Why It Matters Now." *NPR*, NPR, 29 June 2018, [www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now](http://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now).

<sup>38</sup> Sprunt, Barbara. "Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath." *NPR*, NPR, 27 Oct. 2020, [www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court](http://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court).

<sup>39</sup> Sprunt, Barbara. "Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath." *NPR*, NPR, 27 Oct. 2020, [www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court](http://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court).

enforceable code of ethics and a prevailing effort to invest in public institutions to restore the trust of the people.

The approach to countering the abuse of the Supreme Court, both to and by the Court, is by far the most difficult to enact, wherein the approach would require a constitutional amendment. But first, the need for amending the Constitution to adjust the standards we hold the Supreme Court to goes beyond the dangers of Trump's reliance on adjusting them to his will. Instead, it is the consequence of the reflected views of the constituency. In 2023, the Pew Research Center surveyed Americans on their public opinion of the Supreme Court and found that only 44 percent of Americans perceived the court as favorable, which marked the first time since 1987 that the majority of Americans surveyed were disapproving.<sup>40</sup> This follows the introduction of Biden's proposal for court reforms, which specifically acknowledged failings of the Supreme Court in several instances from 2023. Justice Clarence Thomas was criticized in early 2023 for accepting gifts from Harlan Crow, a Republican donor, and failing to disclose them in his required filings. Further concerns were raised in relation to his refusal to recuse himself amidst a case that involved his wife, Virginia Thomas, in which she had sent texts to former White House Chief of Staff, Mark Meadows, encouraging him to aid in overturning the 2020 election results.<sup>41</sup> Following these events, Justice Elena Kagan publicly endorsed a code of

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<sup>40</sup> Beaumont, Hilary. "How Much Will the US Supreme Court Shape the 2024 Presidential Election?" *Al Jazeera*, Al Jazeera, 23 Jan. 2024, [www.aljazeera.com/news/2024/1/18/how-much-will-the-us-supreme-court-shape-the-2024-presidential-election](http://www.aljazeera.com/news/2024/1/18/how-much-will-the-us-supreme-court-shape-the-2024-presidential-election).

<sup>41</sup> Gersh, Annie, and Nina Totenberg. "The Supreme Court Adopts First-Ever Code of Ethics." *NPR*, NPR, 13 Nov. 2023, [www.npr.org/2023/11/13/1212708142/supreme-court-ethics-code%E2%80%AF](http://www.npr.org/2023/11/13/1212708142/supreme-court-ethics-code%E2%80%AF).



ethics with the addition that a mechanism to enforce the code was essential.<sup>42</sup> However, no means of enforcing the code of conduct have been established. Therefore, we can follow Chief Justice John Marshall's outlook for how to treat these serious issues. For Chief Justice Marshall, it was imperative that "We must never forget that it is a constitution we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."<sup>43</sup> Where we can enact this amendment is based upon previous court rulings, such as *Northern Pipeline Construction Company v. Marathon Pipe Line Company* (1982) and *United States v. Hatter* (2001), in which Justice William Brennan and Justice Stephen Breyer provided interpretations of Article III, arguing what was meant by the "good behaviour" clause. Specifically, Justice Brennan argues that "the 'good behaviour' clause guarantees that Art[icle] III judges shall enjoy life tenure, subject only to removal by impeachment" and Justice Breyer points to the clause as "the practical equivalent of life tenure."<sup>44</sup>

If legislation suggesting some sort of substantial enforcement for the Ethical Code of Conduct were to pass through the Senate, ideally the process would require two-thirds of the House and the Senate. This super-majority vote is essential, as this legislation would greatly diminish the efforts made by Majority Leader McConnell in consecutive conservative appointments to the Supreme Court and further frustrate candidate Trump's plans to introduce a

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<sup>42</sup> Gersh, Annie, and Nina Totenberg. "The Supreme Court Adopts First-Ever Code of Ethics." *NPR*, NPR, 13 Nov. 2023, [www.npr.org/2023/11/13/1212708142/supreme-court-ethics-code%E2%80%AF](http://www.npr.org/2023/11/13/1212708142/supreme-court-ethics-code%E2%80%AF).

Madhani, Aamer, and Colleen Long. "Biden Decries 'extremism' on Supreme Court, Details Plan for Term Limits, Ethics Code for Justices." *AP News*, AP News, 30 July 2024, [apnews.com/article/supreme-court-reform-biden-harris-trump-ffd48f3a2023aeca841bb53c2147ef03%E2%80%AF](https://apnews.com/article/supreme-court-reform-biden-harris-trump-ffd48f3a2023aeca841bb53c2147ef03%E2%80%AF).

<sup>43</sup> "The Court and Constitutional Interpretation." *Home - Supreme Court of the United States*, [www.supremecourt.gov/about/constitutional.aspx](http://www.supremecourt.gov/about/constitutional.aspx). Accessed 9 Sept. 2024.

<sup>44</sup> "Can Congress Enact Supreme Court Term Limits without a Constitutional Amendment?" *National Constitution Center - Constitutioncenter.Org*, [constitutioncenter.org/blog/can-congress-enact-supreme-court-term-limits-without-a-constitutional-amendment](https://constitutioncenter.org/blog/can-congress-enact-supreme-court-term-limits-without-a-constitutional-amendment). Accessed 9 Sept. 2024.

Government Efficiency Commission. If there were the opportunity to veto, the super-majority vote would diminish the risk of the President or Supreme Court growing involved, which would successfully diminish the risk of self-serving.<sup>45</sup> Significantly, the potential for the introduction of legislation detailing an enforcement code, whether that specifies impeachment or a lighter punishment such as a fine, is great. New York Democrat, Joe Morelle, asserted his intention to propose a constitutional amendment, explaining, “I will introduce a constitutional amendment to reverse SCOTUS’ harmful decision and ensure that no president is above the law. This amendment will do what SCOTUS failed to.”<sup>46</sup> With the Democratic Party signaling the need for legislation, the majority of the public expressing declining confidence in the Supreme Court, and vast criticisms of sitting Justices for not prioritizing the security of democracy, the call to action is apparent.

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<sup>45</sup> “Can Congress Enact Supreme Court Term Limits without a Constitutional Amendment?” *National Constitution Center – Constitutioncenter.Org*, [constitutioncenter.org/blog/can-congress-enact-supreme-court-term-limits-without-a-constitutional-amendment](https://constitutioncenter.org/blog/can-congress-enact-supreme-court-term-limits-without-a-constitutional-amendment). Accessed 9 Sept. 2024.

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