



STATE OF FLORIDA

ASHLEY MOODY
ATTORNEY GENERAL

April 22, 2021

The Honorable Joseph R. Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

The Honorable Nancy Pelosi
Speaker of the House
United States House of Representatives
Washington, D.C. 20515

The Honorable Chuck Schumer
Majority Leader
United State Senate
Washington, D.C. 20510

The Honorable Kevin McCarthy
Minority Leader
United States House of Representatives
Washington, D.C. 20515

The Honorable Mitch McConnell
Minority Leader
United State Senate
Washington, D.C. 20510

Dear Mr. President and Congressional Leaders:

As the chief legal officers of our States, we write to you regarding our serious concerns about recent reports indicating this Congress's intent to pack the Supreme Court by passing H.R. 2584. Indeed, given the filing of the bill six days after the President announced his Executive Order regarding the Supreme Court, it is clear that the Commission on the Supreme Court is nothing but a coordinated attempt to justify a naked political power grab by the leaders of Congress and the President. We believe that such actions will seriously undermine our constitutional system, the public's confidence in our courts, and the rule of law. We oppose passage of such a measure.

Alexander Hamilton commented in the Federalist Papers that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." *The Federalist Papers*, No. 78. He reasoned that judicial independence was essential because

“[w]ithout this, all the reservations of particular rights or privileges would amount to nothing.” *Id.* And, he added that more than rights and privileges would be threatened if judicial independence did not exist in the newly created Republic, but that “there [would be] no liberty if the power of judging be not separated from the legislative and executive powers.” *Id.* He feared “the encroachments and oppressions of the representative body” and “the effects of those ill humors, which the arts of designing men. . . sometimes disseminate among the people themselves and [which] . . . occasion . . . serious oppressions of the minor party in the community.” *Id.*

The Framers created a strict separation of the judicial power from the other branches of government because the colonists had been subjected to judicial abuses by the Crown. King George III “made Judges dependent on his Will alone....” The Declaration of Independence, ¶ 11. The judicial branch and the judicial power created by Article III was to prevent the new Federal government from repeating those abuses. By appointing judges for life with good behavior and restricting the ability of the other branches to remove them or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered independently and not to curry favor with Congress or the President.

From the beginning of our Republic until the present, there has been a robust history of judicial independence. Our system of checks and balances is not easy—politics and the desire to accomplish strongly held objectives by the party in power has always led to tension between the Supreme Court and the other branches. As William Howard Taft, then Chief Justice and once a President said:

[T]he Court’s duty to ignore the acts of Congress or of the State Legislatures, if out of line with the fundamental law of the Nation, inevitably throws it as an obstruction across the path of the then majority who have enacted the invalid legislation. The stronger the majority, and the more intense its partisan feeling, the less likely is it to regard constitutional limitations upon its power, and the more likely is it to enact laws of questionable validity. It is convincing evidence of the sound sense of the American People in the long run and their love of civil liberty and its constitutional guaranties, that, in spite of hostility thus frequently engendered, the Court has lived with its powers unimpaired until the present day.

Taft, William H., *Dedication of Memorial to Chief Justice Salmon Portland Chase*, Vol. 9, No. 6 American Bar Association Journal 347, 352 (June 1923) (viewed on <https://www.jstor.org/stable/pdf/25711295.pdf>).

Except for one failed attempt, Presidents and Congress have respected the independence of the judiciary and the Supreme Court as the bulwark protecting Americans’ liberty. When President Franklin Delano Roosevelt attempted to pack the Court, the Senate recognized the importance of an independent judiciary and the harm that such an action would cause. The Senate Judiciary Committee stated in its adverse report that:

It is essential to the continuance of our constitutional democracy that the judiciary be completely independent of both the executive and legislative branches of the Government, and we assert that independent courts are the last safeguard of the citizen, where his rights, reserved to him by the express and implied provisions of the Constitution, come in conflict with the power of governmental agencies. . . .

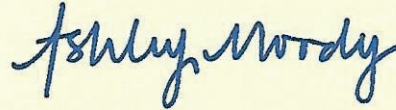
If interference with the judgment of an independent judiciary is to be countenanced in any degree, then it is permitted and sanctioned in all degrees. There is no constituted power to say where the degree ends or begins, and the political administration of the hour may apply the essential "concepts of justice" by equipping the courts with one strain of "new blood," while the political administration of another day may use a different light and a different blood test. Thus would influence run riot. Thus perpetuity, independence, and stability belonging to the judicial arm of the Government and relied on by lawyers and laity, are lost. Thus is confidence extinguished.

Senate Committee on the Judiciary, Reorganization of the Federal Judiciary, S. Rep. 75-711, at 15-16 (1937).

If the views of our Framers and forefathers do not dissuade you from the harm that your undertaking will cause, you have undoubtedly heard the recent words of Justices Ginsburg and Breyer, who both unequivocally condemned schemes to pack the Supreme Court. We have, from time to time, wholeheartedly disagreed with many of Justice Ginsburg's and Justice Breyer's opinions, as well as their approach to the law. But we accept that their approaches reflect only an honest disagreement in legal philosophy, not political will, and we have never suggested that Congress should use its political prowess to intimidate them into reaching one outcome or another. Their view – like that set out in the historical sources quoted above – that a court-packing endeavor will undermine the Court, its stability, and its legitimacy, should be persuasive to you.

We understand that some members of Congress are upset regarding what they view as the politicization of the Supreme Court. Ironically, many of those same members—including two of the addressees of this letter—led partisan attacks during the confirmation hearings of Judge Bork, Justice Thomas, and Justice Kavanaugh, among many others. Each of those fights and changes has weakened the independence of the judiciary and put at risk all Americans' liberty. The Justices of the Supreme Court have repeatedly shown their independence, despite their differences and the labels some have put on them. When elected officials do not like the outcome in a case, that is not a sign of the politicization of the Court, but of the system working. After all, the whims of elected officials are the very thing against which the Court is there to protect the people.

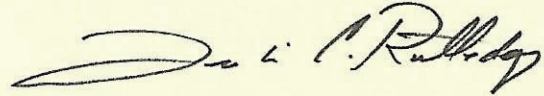
Sincerely,



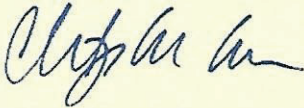
Ashley Moody
Attorney General for Florida



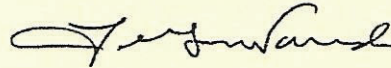
Steve Marshall
Attorney General for Alabama



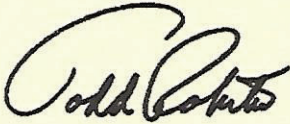
Leslie C. Rutledge
Attorney General for Arkansas



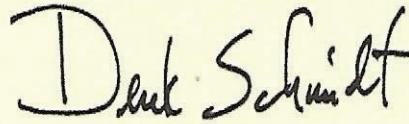
Christopher M. Carr
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Lawrence G. Wasden
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Todd Rokita
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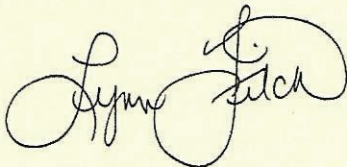
Derek Schmidt
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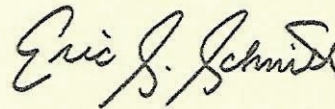
Daniel Cameron
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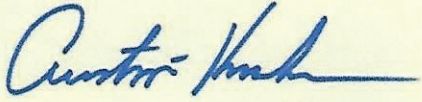
Jeff Landry
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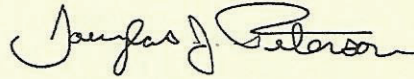
Lynn Fitch
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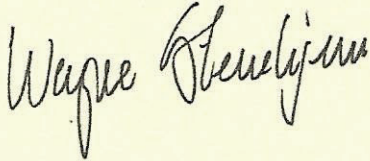
Eric S. Schmitt
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Austin Knudsen
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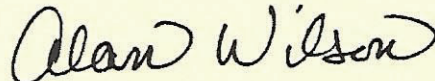
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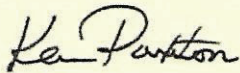
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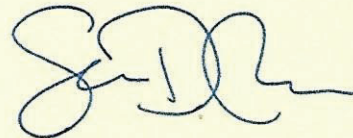
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Alan Wilson
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Patrick Morrisey
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