

YOU AND ME BOTH WITH HILLARY CLINTON: THE COURTS WITH DAHLIA LITHWICK AND SHERRILYN IFILL

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HILLARY RODHAM CLINTON: I'm Hillary Clinton, and this is *You and Me Both*. Today we're talking about our nation's courts and that's part of our ongoing look at the state of our democracy on this season of the podcast.

On February 25th, President Biden announced his pick to replace retiring Supreme Court Justice Stephen Breyer, who'd been appointed by my husband. Justice Breyer leaves the court at the end of this term in June. I was delighted that the president nominated Judge Ketanji Brown Jackson. She's a highly respected jurist with impeccable credentials. We'll learn more about her as the confirmation process begins, with hearings set for later in March. Before we get to all that, though, I think it's important to take a moment to celebrate the fact that Judge Jackson will be the first African-American woman ever to serve on the highest court in our land. And I'll take every chance I can get to celebrate some good news coming from the Supreme Court, because let's face it, lately it's been in short supply.

If any of us thought our judiciary would protect us from assault on our democracy, so much of which we've witnessed over the past five years, it's not a guarantee at all that our Supreme Court will stand up against the powerful forces attempting to undermine our democracy. Later, we'll hear from Sherrilyn Ifill, the outgoing president of the NAACP Legal Defense and Educational Fund, known as LDF. Sherrilyn will share her views on President Biden's historic nomination and our nation's larger fight for civil and human rights. But first, I'm speaking with Dahlia Lithwick.

If anyone knows about the Supreme Court, it's Dahlia. She's been reporting on the court for the online magazine *Slate* since 1999. She's also the host of *Amicus*, *Slate's* podcast about the law and the Supreme Court. You may have seen her on Rachel Maddow or CNN or *The Daily Show* because she's a popular guest who is so good at cutting through all of the legal mumbo jumbo to explain what's actually going on at the Court and why it matters to everybody. And she's just finished writing a book that I think is terrific. It's called *Lady Justice: Women, The Law and The Battle to Save America*, and it's due out this fall.

Hello!

DAHLIA LITHWICK: Well, this is thrilling.

HRC: So let me first welcome you to the podcast, Dahlia. It's such a treat for me to have this chance to talk with you, someone who I really appreciate because of your in-depth and very smart analysis of what's happening in the law, what's happening in the courts, particularly the

Supreme Court. Let me start, though, not at the beginning, exactly, but to acquaint our listeners with your background. How did you end up covering the law? Have you always been interested in legal cases, court cases and the like?

LITHWICK: Well, so first of all, Secretary Clinton, this is just a huge, enormous honor and privilege. So thank you for having me. I think that the short, and it's going to sound gratuitous and pandering answer, is Children's Defense Fund, which you are familiar with, and I was of a cohort, I think in people who graduated in between 1989 and '92, all heard Marian Wright Edelman give their commencement speech. And all of us, like lemmings, decided we wanted to do what she did. And so even though my undergraduate was entirely in literature, I didn't think of myself as a lawyer at all, I got it in my head that I needed to go to law school and become a children's advocacy lawyer. I was terrible at law school. I dropped out after my 1L year. I wrote a fiery note to the dean, saying, this is a soulless corporate place and you are monsters. Worked at Children's Defense Fund, at which point they said, "Please go back to law school, you're no use to us." So I had to beg my way back in. First rule of lawyering, don't put it in writing to the dean. And so then I just really was enchanted with the possibility that law could change the world for people. And then when *Slate* magazine was being invented in 1999, I was lucky enough to cover for the Microsoft trial for them and then the Supreme Court. And so I think it was a little bit of a sideways thing, but I think it's always, as is the case for so many people, in hindsight, it makes perfect sense.

HRC: I love that story because of course, it resonates with me on so many levels, being someone else who was immediately enamored of Marian Wright Edelman when I met her in my first year of law school all those years ago and had the great privilege of working for her at the Children's Defense Fund. And she had a way of really making the law seem like it was a tool for justice. So you and I have a lot of, you know, common experiences which may then lead us to have some common apprehensions and common views [laughs] about what's happening in our world!

And so let's look at the big picture. You know, one of the long term strategies of those who want to turn the clock back on the progress that has been made in civil rights, and human rights, and women's rights, and reining in unaccountable corporate power and so much else is this takeover of the courts something that has been a goal for a very long time, aided and abetted by those who don't like the changes that we've seen in our country in the last 20 to 30 years. And we see the Supreme Court as really in the center of these anti-democratic battles, so let's get into that. This is an important session for the Supreme Court. In the next few months, we expect the court to be ruling on everything from reproductive rights to environmental protections to gun safety measures. What are some of the biggest issues that you're following? And then we'll go into a couple of them specifically.

LITHWICK: I've been covering the court for 20 years, a little more, and this will without a doubt be the most singularly important term of my career. It already is. We are one year and

change into a six-three Republican supermajority. And the court, which I naively thought going into the 2022 election would pump the brakes a little, I thought, they don't want to reverse Roe in June, going into the 2022 election, they don't want to open the floodgates to open carry, concealed carry everywhere, going into the 2022 election, those are wildly unpopular positions if you look at the polls. I was wrong. I thought break pumping was going to be the order of the day in no small part because I thought Chief Justice John Roberts was in charge of the court. He's not. This is a six-three supermajority in which, to the extent that he peels off and votes with the Liberals, he's still on the losing side.

So we are looking at a world that is unrecognizable from the court of even one year ago. And I'm not sure we've integrated that into how we think about the court, and I'm not sure the, what I would call – Professor Leah Litman has called it the #YOLO, you only live once, wing of the court which is Clarence Thomas and Samuel Alito and Neil Gorsuch, they're doing the opposite of pumping the brakes. They are all in. They are all in for, as you noted, expanding gun rights. They are all in for, I think, doing away with reproductive freedom, and I think this may be the term we see that. They are all in for dismantling the administrative state, pretty much kneecapping agencies that set the policies that we all live under, which yes, does impact environmental law in a significant way. They are all in for a really radical project of expanding religious liberty and what that means. And every one of those issues is on the docket, every one. So I guess this is a long way of saying most of the terms that I've covered, we'd have a big affirmative action case. Maybe we'd have a big affirmative action case and an abortion case. But to have everything, every hot button case, is extraordinary. And so I guess maybe the flip of your question is what *isn't* the court deciding this term? I think this is going to happen at record lightning speeds in an election year and the court's sense of its own immunity from any consequences in an election year is one of the things that is most terrifying and chilling to me right now.

HRC: Well, if you think about it, as you rightly said, so many of the positions that they are promoting and intend to put into decisions either by reversing past precedent like Roe v. Wade or expanding what I view as questionable precedent, such as in gun rights under the Second Amendment, and so much else is an agenda that is very popular with the far-right of the Republican Party in our country, and that is who they are serving. Remember, you know, some people say, is this the Roberts court? Is this the Trump court? I think it's the Federalist Society court. And the Federalist Society has had a very clear agenda for as long as they've been around (and I have obviously followed them closely) to reverse. And it's a reversal of advances that they view as undermining the kind of America that they want to see– a return to a patriarchy, a return to keeping people who have opposing views in their place. And that's what we're now watching.

So let's start with reproductive rights. This may be an unfair question, Dahlia, but where do you think the court will land? It's got two major cases, one coming out of Texas, which we've heard a

lot about, one coming out of Mississippi, which we haven't heard as much about. What do you think is likely the outcome here?

LITHWICK: That Texas case, that's SB 8, which is the law that the court allowed to go into effect at the beginning of September, which means 10% of the people of childbearing age in this country have not been able to have an abortion in Texas. That is extraordinary. The court simply allowed the state of Texas to nullify *Roe v. Wade*, and it was done through this tricky scheme, this enforcement mechanism, where they just put this eight week abortion ban into effect. Usually, if you want to stop an eight-week or 12-week or 15-week ban, there's somebody to sue, some state actor to sue. But in Texas, they cleverly said no state actor is allowed to enforce this ban. This ban will be enforced by what I think you and I could only call vigilantes. Anybody can report the Uber driver, the religious counselor, the cousin who drives you to an appointment, and there's no state action and nobody to sue. So there was nobody for abortion-

HRC: But let me just stop you for a second. There is state action. The vigilante gets \$10,000.

LITHWICK: Yes, the vigilante gets \$10,000.

HRC: As far as I understand, that's state money.

LITHWICK: Amazingly, this issue of who can be sued is the question, the only question, that the Supreme Court weighed in on. They weighed in on it, you may recall, on the shadow docket, which means that they handed down a secret order in the middle of the night, unsigned, unreasoned, simply one paragraph saying Texas can go ahead and do this. That happened in September. Partly in response to massive public blowback—and this goes to, I think, the court listens when the public is furious—they moved it to the merits docket. They actually heard these arguments and then they came back with the same answer: This is perfectly fine. The only people who can be sued, the only state actors, as you say, who are implicated in the scheme are a handful of licensing officials. The providers can go ahead and sue them because they have the power to shut down clinics. That suit, by the way, has gone to the 5th Circuit Court of Appeals, one of the most conservative federal appellate courts, and the 5th Circuit has somehow sent that to the Texas Supreme Court for more findings. And I think it's just worth comparing for one little second, when there were COVID restrictions last year that kept people, for instance, from praying, the court made decisions overnight. Here we have the opposite. This can take years as far as the court's concerned. There's no urgency here. So that's Texas.

And then, as you said, the second case is *Dobbs*. This is a Mississippi 15-week ban. Again, it's explicitly unconstitutional; viability, which is the benchmark that has been agreed upon by the courts for decades, is set at 24 weeks. Mississippi simply stuck an arrow into the heart of that, said, we're going to go with the 15-week ban. Go ahead and sue us. And that was argued this fall at the Supreme Court. And at that argument—we don't have an answer, we may not get an answer in *Dobbs* until June—it became manifestly clear that that six-three supermajority is not just

prepared to chip away at Roe v. Wade, which is what we used to say. They're prepared to overturn it outright.

HRC: Yeah, that's what I think, too. That's exactly what I think. I think it's gone. And I think in overturning it, the only hope that one can have is that they will somehow overturn it based on Dobbs and not SB 8 Texas, because this precedent for vigilantism is just so frightening for the rule of law, for anything that we believe represents order and due process. But when Roe is overturned, or so totally eviscerated that it basically doesn't exist anymore, what do you expect to see at the state level?

LITHWICK: Well, so this is also grim news. Twenty-six states already are threatening to outlaw abortion altogether if Roe is overturned. I'm a little bit worried about what comes after that. And there's two pieces of that that are worth thinking through. One is the precedent that gave us Roe v. Wade. When the court ridicules that and they have ridiculed it, the majority, what they don't, I think, fully appreciate is that it's not just abortion. It is, as you know, the right to contraception in Griswold between married people and that bucket of privacy, family integrity, autonomy, bodily autonomy, all the stuff that gave us-

HRC: Well there's also sodomy laws, gay marriage-

LITHWICK: Exactly.

HRC: It's it's the whole structure that was built on substantive due process, but also a right to privacy is the foundation for so much of what we have seen in the past 30 years develop as, you know, rights that women and men can claim. And it's hard to know how radical this Supreme Court is. I think a couple of members truly are radical, and I wouldn't put it past Thomas and Alito to, you know, go after gay marriage, go after contraception. [Laughs.] I wouldn't put it past them at all, because they're true believers. Now what I can't figure out is, are they true believers for religious reasons? Are they true believers for, you know, a broader right wing agenda that they believe is where the country should go back to? This is not clear to me, but the fact is they are true believers.

LITHWICK: Yes, and I think in some sense we can talk about how wildly pro-business anti-worker this majority is. We can talk about religious liberty and abortion or opposition to LGBTQ rights. We can talk about voting. It almost doesn't matter. You know, whether it's a business imperative or, you know, kind of hot button culture question, the fact is they're all in for all of them.

HRC: Yes they are.

LITHWICK: And it may shift. And I think, you know, here's where I say the thing that always makes people's hearts stop, which is: Brett Kavanaugh is now the median justice on the court.

HRC: Yeah, that's that's terrifying. [Laughs.]

LITHWICK: He is one of the most conservative jurists.

HRC: Yeah, but he's an opportunistic conservative. He he's somebody who, you know, decided out of Yale Law School and being a country club Republican that he was, you know, going to go whichever way the wind was blowing to try, you know, to become a federal judge and the strongest wind was coming from the right. So there he is. But I don't want to run out of time before we get to another terrifying issue. I hope that our our listeners are not listening to this before they go to bed. That's all I can say. [Laughs.]

We're taking a quick break. Stay with us.

<ad break>

HRC: Look, the issue of gun control is on the docket. Can you explain the case in front of the court right now because this is crazy, Dahlia. I thought the Heller decision, which is the decision that blew open the Second Amendment, turning it from a well-regulated militia amendment to an individual right, no matter where, who, or how, I thought that was so phony. But nevertheless, it was decided and became precedent. Now they just can't find enough reasons to let people who are eager to get a hold of guns get them.

LITHWICK: Yeah, this this is another place where the Supreme Court took baby steps because they could afford to take baby steps. And once the Supreme Court in Heller, as you say, out of whole cloth, invented this individual right to bear arms in the home to protect yourself—and there is ample history that shows that that was just a completely wrongheaded, very optimistic reading-

HRC: It was made up. It was results oriented. Absolutely.

LITHWICK: And then we waited and we waited, and the court kept getting gun cases that wanted to expand that right. And because Anthony Kennedy for so many years, as you know, was the swing vote, they could never get enough justices to agree that they should expand Heller. The minute Amy Coney Barrett is seated on the court, the court was like, You know what? We're all in. Let's do it. We've got the votes now. This is a seemingly trivial, it's a New York licensing regulation, but it opens the floodgates. If the court were to say that this licensing regulation that says you essentially need to show some cause for being able to carry your gun out of your home, at oral argument, it was a truly on skates on stilts performance of the love of guns trumps all. The idea that we heard from the conservative wing of the court that somehow we are all hobbled when the state doesn't let us carry guns on the subway, Sam Alito wants.

HRC: I just, I mean, I find it so- what are they talking about?!

LITHWICK: It goes to, just to finish the answer, it certainly appears after oral arguments that the court is going to absolutely allow for massive amounts of carrying of arms everywhere, again wildly in violation of all polling numbers which say that nobody wants people to be able to carry everywhere and anywhere. We witness the results of that every single day in this country. But I think that it goes to something you said about vigilantism. I think that two things happened in that argument that were, for me, gobsmacking and didn't get enough attention. One, as I suggested, was Justice Alito feeling unbelievable empathy and compassion for the poor office worker in Manhattan who has to travel by subway at night and doesn't have a gun. And the idea that his life is better if he can shoot people on the subway. And the idea twinned with that, that the licensing officials in New York are somehow part of a nefarious plot that-

HRC: "The Deep State."

LITHWICK: "The Deep State!"

HRC: They're part of "the Deep State," whatever that means.

LITHWICK: And that they willy nilly give guns to some people, but not others. It's very reminiscent of how Justice Gorsuch was talking about the Governor of New York and her really nefarious plot to get people vaccinated. And so I think that there's a real thread here that if, at the risk of making all the people who are listening at night need another melatonin, I think the thread to pull on is that they have evinced such mistrust of government itself that the cops can't keep you safe, that the governors of the states want to shut down your church services and COVID, all of that. And so I think I just want folks to sort of try to pull these strands together because it sounds so wonky and doctrinal, but deep, deeply embedded in this is a mistrust of state actors and a notion that we are all just out to protect ourselves. And I find that so absolutely terrifying.

HRC: I find this all reminiscent of a kind of Wild West dream that somehow, you know, we're going back to when men were men, and women were their helpmates and the strong guy with the gun protected everybody. And, you know, the government was messing in your life. They were trying to, you know, take your land and give it to settlers instead of letting you keep your cattle on it. I mean this is the mindset. Sadly, we are running out of time because I could literally talk to you for hours, as you could tell, Dahlia, but let me ask you this. What could just an everyday citizen do about any of this?

LITHWICK: I think there are two things, and one of them seems fanciful, but I'm going to say it anyway. After SB 8 was allowed to go into law and I would talk to women's groups who really, I think, couldn't believe how quickly the world had changed under their feet, one of the things that I started to tell them was my sort of Yellowstone Park theory of the Supreme Court, which is essentially when you go camping at some of the national parks the rangers tell you that if you meet a bear, you have to be larger than you are, which violates all laws of time and space and physics. But what I think it means is you just have to just appear huge. And I do think that being

larger than you are does have some effects on the court, that one of the reasons the court thinks it can get away with changing religious liberty rules on the shadow docket or taking away abortion for 10 percent of the childbearing population on the shadow docket, is because they think we don't care. And I think that bear theory, which is "Oh hell no!" is why the court agreed to hear SB8 on the merits docket. I think they pull back sometimes, and I think that 38 percent, 42 percent approval rating that they started this term with, the lowest since polling began on the court, that matters, and I think that we have to be big. The other thing is, and this is, I know, a whole other podcast, but it's just democracy reform. It's the incredibly boring work of filibuster reform. We have a malapportioned Senate that doesn't represent millions of people. We have an electoral college, you know, better than anyone, doesn't represent millions of people. We have a system of democracy set up to take power away from majorities and give them to minorities. And, and this is the part that is in my lane, we have a Supreme Court that consistently blesses that. The court itself is putting a thumb on the scale of minority rule.

HRC: Certain minority—let's be clear, you say minority rule, we're not talking about people of minority races or ethnicities or religions or points of view. We're talking about a hardcore right wing minority.

LITHWICK: Correction accepted, enthusiastically seconded. And I think we have, on our side, not organized around the courts.

HRC: We're still kind of asleep. I mean, we're still not paying attention. But let me end on a hopeful note, Dahlia, because I always try to circle back to that. Is there any good news in terms of, you know, legal decisions or actions that you can point to?

LITHWICK: So my book is, in some sense, an answer to the millions of women whose hearts just broke when Ruth Bader Ginsburg died and who just felt, you know, who is our gladiator for women in the law? And they're right, but they're so wrong because there are so many women, thousands, who are running around making democracy work. And I actually think women are spectacularly well-suited for this legal work, as you know. There is something about, this is going to hurt your heart, but, the threat of "lock her up" that is really salient for women because we understand in a way that I think a lot of people don't that we live on the knife edge that law gave us rights and law wants to, as you said, turn back the clock and turn us into chattel. And so the women who have organized whether it's Stacey Abrams, whether it's Vanita Gupta, Becca Heller at the airports the day after the travel ban, Robbie Kaplan and Karen Dunn fighting the Charlottesville Nazis, I could go on. These women, I got to tell you, they rock my world. And they don't give up! And so I guess I just end- It's interesting. My New Year's podcast on *Amicus* was with Sherrilyn Ifill, who is, I'm sure for you too-

HRC: I'm going to talk to her, too.

LITHWICK: a north star. And she reminded me that if you are Black or brown or a woman, if you are poor, if you are disabled, this was always your America. There's a story we like to tell, but it was always standing in line to vote. It was always having your voter ID rejected. It was always having to travel to some clinic hundreds of miles away. And so now I guess we all live there. All of us.

HRC: Yes, right. And we have to, you know, not only support those on the front lines doing this work, as you rightly point out, but the many millions and millions of women whose voices and names we may not know, but who deserve our, you know, support in every way we can politically and legally. Well, Dahlia, I cannot thank you enough for talking with me. You and I are in vigorous agreement about what's going on in the world and I think also in vigorous agreement that we can't give up. We can't walk away, no matter how tired we are.

LITHWICK: And maybe I could just say, I think for really a lot of us, we might not have gone to law school if we hadn't seen what you were doing, we might not be doing the work of protecting children if we hadn't seen what you were doing, fighting about health care, seeing what you were doing. And I think we have to just recognize the amazing, awesome power all around us, and just not give up.

HRC: To read and hear more from Dahlia, go to Slate.com, where you'll find her frequent court reports and her podcast *Amicus*. We'll be back right after this quick break.

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HRC: Even before Dahlia namechecked Sherrilyn Ifill at the end of our conversation, I knew I wanted to hear from her for this episode. For nearly a decade, Sherrilyn served as the president and director-counsel of the NAACP Legal Defense and Educational Fund, called LDF. Before that, she was a law professor for many years at the University of Maryland, and I have to say I envy the students who had the privilege of studying with her because she can make a clear and compelling case for just about anything. Last year, Sherrilyn was named one of *Time's* 100 most influential people of the year. And around that time, she announced she would be leaving her position at the LDF this spring. I am so delighted to welcome to the podcast Sherrilyn Ifill. Hey, Sherrilyn!

SHERRILYN IFILL : Hi, how are you?

HRC: I'm excellent. I'm so happy to see you. Let me start with one of the big pieces of news. There's so much news happening. It's hard to keep track of it all. But you know, obviously, with Justice Breyer announcing he's retiring from the Supreme Court at the end of the term, on February 25th, President Biden announced that he would nominate Judge Ketanji Brown Jackson. So I wanted to ask, do you know her? What do you think of this pick?

IFILL: Well, thank you so much, first of all, Secretary Clinton, for having me on the show. I'm absolutely thrilled. And yes, this has been a really interesting period. Obviously, President Biden had pledged that he would nominate a Black woman for an available seat on the Supreme Court. And I have to say, you know, I'm a political watcher and a court watcher and had prepared myself for the announcement. But I think, like particularly many other black women, I was just deeply moved in the moment of the announcement, you know, watching Judge Jackson and to see her standing before the first Black woman vice president. And it was it was a powerful moment. I know her record. I don't know her personally. I feel very comfortable saying her, her record is extremely moderate. So I have been endlessly amused by the claims that she is some radical left nominee. I mean, obviously I'm a civil rights lawyer. I like my judges to the left. [Laughs.] But she certainly, obviously has all of the qualifications and is well experienced and prepared.

HRC: Well, that certainly is my perception from having read everything I could about her. And you know, let me point out that you are in a unique position to not only evaluate a Supreme Court nominee, but really the state of our justice system and in particular, the Supreme Court. You know, I'd be curious, who or how did you become so dedicated to defending our democracy to trying to make it work for everybody? Does that come from your upbringing, your family and I have to mention your cousin was the wonderful Gwen Ifill, who educated us, entertained and informed us, I had the privilege of being interviewed and meeting with her numerous times. Did something happen in the kind of extended Ifill family that really equipped you to be a warrior for justice and democracy?

IFILL: Well, you know, Secretary Clinton, we we were raised, I call service the family business, and we were raised with a very intense kind of gaze on the world around us and certainly were raised with a very political lens. We came from very a very humble background, both of our dads, they're brothers, were brothers, and were immigrants. And, you know, I think they had some of the immigrant's sense of possibility in this country and really love for the possibilities of this country. We grew up watching the news every night. There were three newspapers in my home, you know, at all times. And that was fun for us. I mean, I've I've watched every presidential convention since 1972. I was a quiet little girl at the time, [laughter] but I remember it and we would be excited when it was coming. It wasn't like, "Oh my God, get the kids to the convention." We loved it! And you know, my father kept a narration going at all times, particularly watching the news, you know, kind of critiquing what they were saying. He was very into, you know, racial equality and issues of inequality. He worked as a social worker up in Harlem. And so we just had that lens. And I really wanted to have some role. I imagined, you know, that I could do something in, particularly in civil rights, because I'd seen so many documentaries and it seemed such an exciting and noble work. And then, you know, I will say, like many young Black girls, it certainly was true for me. The Watergate hearings were were really, really powerful. Now I don't want you to think that some eight year old girl was like, "Oh

yay, the Watergate hearings," No. [Laughter.] You know, it was the only thing on TV and in those days you didn't have 500 channels.

HRC: That's right.

IFILL: So I remember- I have many sisters, but my two sisters who were at home with us and we would have been watching what we call the stories or the soaps in those days—I was too young for that, too—but in any case, they weren't on because the Watergate hearings were wall to wall on every channel. So there was nothing else to watch, so we ended up watching it. And that was where I had the opportunity to see Barbara Jordan.

HRC: Right.

IFILL: And I had never really seen anyone quite like her. You know, a Black woman with that measure of power in that kind of sphere where she was exercising it. And most important for me was the power of her voice and a certain moral authority that you just could not deny. And I loved it. And so that's been my commitment my entire life, and I'm endlessly committed to the possibilities of this country. You know, I'm in the unique position of many Black people who see the deep flaws of this democracy, the deep, deep flaws, and yet who are committed to working to make it better. And I think the moment we're in now, Secretary Clinton, is a really powerful and important one. It's the time where I think so much that people like me have seen and been talking about for decades is being exposed to the larger public, the deep fissures of inequality, the ongoing embrace of white supremacy. All of these things didn't just spring from nowhere, and they didn't, they weren't ushered in by former President Trump. They have been there and we have not tended to them and confronted them forthrightly and recognized how threatening they are to the integrity of our democracy.

HRC: I could not agree more with you, Sherrilyn, and I just want to build off of your story. It's not enough to say you've been standing up for social justice, you've been standing up for civil rights and voting rights. You've been standing up for America. That's how I view your work. So talk to me and our our listeners about how, as someone on the front lines, as a litigator, a law professor, as the head and director of the NAACP Legal Defense Fund for the last now nearly, I guess, 10 years, you see where we are when it comes to social justice and the courts and in particular voting rights.

IFILL: I think, Secretary Clinton, you hit the nail on the head, which is one of the challenges we have faced, which I think is kind of coming home to roost at this moment is that the work that I've devoted my life to has largely been seen by the mainstream political realm and by certainly by the mainstream media as a kind of a sideshow—I don't I don't mean that as a in a derogatory way, but but not part of the center of conversations about American democracy, about American politics and so forth, it's kind of "there's the black vote over here. There's this thing that maybe happens in the south," and it's been treated as something collateral to the central story about this

country. And this has been endlessly frustrating for me. One of the things I was determined to do when I took over the leadership of the Legal Defense Fund in 2013 was to center the work of civil rights in the conversation about American democracy. And I remember I did the commencement address at my my alma mater, NYU Law School, and I said that civil rights work is “democracy maintenance work.” Do not let anyone tell you that this work is somehow off to the side. We are the ones who have the courage to look without rose colored glasses at the flaws in our democracy. And how do you, how do you diagnose the health of your democracy? You look at how it works or doesn't work in the lives of those who are at the margins and those who are at the bottom. It doesn't matter whether democracy is working for people who have every advantage, right? I mean, it matters, but it doesn't tell you whether the democracy is healthy or not. You have to look in the difficult places. You have to look at how democracy works in the lives of the people that I represent. And that will tell you whether it's healthy or not and will reveal to you what the flaws are. And to the extent you think that those flaws, you know, it's like it's like your house. This is how the analogy I've always used is about the foundations of your house. Obviously, if there are huge cracks in the foundation, it matters, and you may even see it and be alerted to it very quickly. And you will immediately bring in the emergency crews. But what about the small cracks that accumulate and produce fundamental structural failure? That's what we see. We're the early warning system, so voter suppression didn't just start happening a few years ago. I joined LDF as a young lawyer in 1988 as a voting rights litigator. So how is it I was able to never have a dearth of work, you know, fighting to protect the right of Black people to vote in the south, doing cases in Texas, in Arkansas, in Louisiana and so on and so forth. How is that possible? So it is the failure to recognize that this has been a deep flaw that now has encompassed the entire country. And as I have been saying, what America has to wake up and understand is that what is workshopped on those who are most marginalized ultimately will come for the entire Republic.

HRC: Exactly. That's such an important point, Sherrilyn. I mean, when you were talking about the foundation, the image that popped into my head is now we have literally people around the foundation of your house with sledgehammers. They are beating, in every way they can imagine, the foundation of our democracy. And I was in the Senate when we voted 98 to nothing-

IFILL: Yes.

HRC: -to reauthorize the Voting Rights Act. It was then signed into law by President George W. Bush. We had no idea when we did that on a bipartisan basis that the Supreme Court under John Roberts would decide "forget the Congress, forget the evidence and the facts. We don't need some of this enforcement stuff anymore." Can you explain the impact that dismantling the underlying protections by the Supreme Court had on your work and the, in effect, green light it gave to state and local officials across the country?

IFILL: Well, I love that you said green light because as I remember just a day after the decision, I think it was the Secretary of State of Florida said "We're free and clear now." And two hours after the decision, the Texas Attorney General, you know, and the Texas officials indicated their plan to pass a voter ID law that they had been unable to get pre-cleared under Section five several years earlier-

HRC: And pre-clearance means that under the law that was passed in 1965, if there had been a history of racial discrimination or ethnic or some other kind of discrimination, but principally-

IFILL: Language minorities, language minorities and racial.

HRC: -principally racial that states had to say, "OK, we want to do this," and the Justice Department could say, "wait a minute, that violates the law," right?

IFILL: Yeah. And let's take that back to why we needed this structure, right? So. And remember, the Voting Rights Act has many different components. The part we're talking about is the part under Section 5. And it is the reason why the Voting Rights Act has been described as the most consequential and successful civil rights statute of the big three civil rights statutes, you know, passed in the in the 1960s, because it is the only one that came up with a mechanism for getting at discrimination before it happened.

HRC: Exactly.

IFILL: So the jurisdictions that were covered by this formula, jurisdictions with this history of discrimination, if they wanted to make a voting change, would have to submit it to a federal authority in order to get that change pre-cleared. And what those federal authorities would do would be to evaluate and assess whether the planned and the proposed change had a negative effect on voting rights or the voting strength of the Black community or the Latino community as it or Asian-American community as you would have it. And that evaluation would happen with input from the community, LDF and other organizations would weigh in. Then they would either preclear it, Department of Justice, which is allow it to go forward, or they might ask for additional information or they might object to the change. So that was the infrastructure that had been in place since 1965, when John Roberts and the majority of the Supreme Court in 2013 decided to strike down that pre-clearance formula, essentially on the theory that things had changed, that we should no longer be branding the South with this label as though they were somehow more, that the southern states are more racist in some way than states in the North. (In fact, that was kind of the question that John Roberts continuously asked, "Do you believe, Counsel, that the South is more racist than the North?") Of course, the pre-clearance formula didn't just cover the south-

HRC: Right.

IFILL: -It covered the southern states. It covered most of the, all the states of the old Confederacy. But it also covered three boroughs in New York City. It covered counties in California and New Hampshire and other places as well. When they lifted that, it's important to know what that majority did. They not only supplanted their judgment for the 98 senators and the 393 House members that had reauthorized the Act in 2006, which is enough of a power grab to be alarming. And I say power grab quite literally, because when you read the 14th and 15th Amendment, the enforcement clauses of those amendments give to *Congress* the power to ensure that the protections of the 14th Amendment, which guarantees equal protection of laws and the 15th Amendment to the Constitution, which protects against a voting discrimination based on race, Congress is empowered to ensure their guarantees. So they supplanted not only the judgment of the 98 senators and the 393 House members in 2006, but every Congress that reauthorized it and the Congress in 1965 who recognized the importance of the pre-clearance formula. They said in the Senate report that accompanied the act they wanted to get at voting discrimination that was happening in the moment, but they also said it was designed to get at, and I'm quoting now, "ingenious methods that might be adopted in the future."

HRC: Yes.

IFILL: Which means that the Congress understood that the efforts of white supremacists to suppress the votes of black people was not going to go away, that it was likely to do what racism always does. It shapeshifts and it emerges differently. In 1965, voter ID wasn't the issue. Even these, the racist segregationists in 1964 hadn't thought of what Georgia has now thought of, which is that you can't provide water to someone standing in line.

HRC: Unbelievable.

IFILL: Right? These are "the ingenious methods," however, that they anticipated would be created in the future, and they created an infrastructure in the statute to ensure that Black voters were protected against what they suspected and knew would be the future methods of voter suppression. So that's what happened in 2013, and it is why, after 2013, we saw this profusion of voter suppression laws happening not only throughout the South, but also in places that had never been covered by Section 5, right?

HRC: That's right.

IFILL: People said "Hey, hey, now we can do this too, right?".

HRC: Yep.

IFILL: Because the pre-clearance structure actually sent a message to the entire country-

HRC: Right.

IFILL: -about what practices were discriminatory and what practices were not. So removing it actually ended up metastasizing voter suppression into something that now encompasses the whole country and can be utilized in order to suppress the votes of racial minorities, elderly, students, disabled people, any pocket of voters that you think may be contrary to your ability to exercise power. And right now it is the Republicans who are at the state and local level using these tactics to enact restrictive laws that LDF is litigating in multiple courts in Florida and Georgia and Texas. But it is an uphill battle. So it's a very emboldened and, in my view, reckless Supreme Court, and it is taking advantage of the political deadlock that has made Congress not able to correct this decision. And the court knows it can take advantage of that because nothing's going to happen.

HRC: We'll be right back.

<ad break>

HRC: Let's really unpack this, Sherrilyn, because the people that were put on the court under Bush and Trump were very clear about their job. They were on a mission, weren't they? And their mission is to side with those partisan, ideological, religious, corporate financial interests that have a very different view of our country. And I feel very strongly that it will sadly get worse despite the best efforts of the LDF and others who are standing in the breach.

IFILL: Well, I can't cosign that because we continue to litigate before the court. You know, we've got cert petitions pending and cases on the docket for next year. But what I can say that I think is important is that the court also has to function in a way that serves democracy. Core and critical, as you know, around the world to any truly functioning and healthy democracy is the rule of law, a functioning justice system. And one of the things that is most disturbing to me and, you know that I'm actually thinking about quite a bit as I leave LDF, is the ways in which we have to be honest about what are the flaws in our justice system and how important they are. Once again, these are the cracks that have to be examined and that have to be fixed. And the Supreme Court is not, does not sit outside of our need to evaluate and review the strength of our democratic structures. They don't sit above and on top of our democracy. They are part of our democracy. It's one of the reasons, Secretary Clinton, why I joined President Biden's Supreme Court commission, which was a difficult decision to take. I knew how the commission had been described and framed, and as I said, we litigate before the court and people have, you know, concerns about whether the commission was designed to address court packing and so forth. Ultimately, I decided to do it and I was the only person on the commission, you know, who leads an organization that litigates before the court—most of the folks were, you know, academics of some kind—because I wanted to make sure that our voice was heard. I wanted to be part of that conversation. And I say this because it's not just the Supreme Court, it's our profession in general and those who are the leaders of our profession who actually often lack this lens of understanding the kind of litigation that we do at the Legal Defense Fund, the kind of people that

we represent and how these academic discussions about aspects of even Supreme Court practice actually affect real people. So I do think there's work to do, and it's and the Supreme Court's got to be part of that work. We have a right to ask questions about recusal practice on the Supreme Court. We have a right to demand a deep financial disclosure. We have the right to ask these questions because the Supreme Court is a critical aspect of our democratic infrastructure. Just as we have the right to ask that Congress members not trade stocks or whatever are the ways in which we want to address it in the Legislature and whatever are the ways we want to address the executive and what kinds of ways in which we want to hold the president accountable. That's all part of the democratic infrastructure. And our job as citizens is to push and to demand that changes be made that strengthen those elements of our infrastructure. And anyone who thinks they are above it, whether it's President Trump or whether it's the Supreme Court or whether it is the Senate, they're missing the concept. You know? [Laughs.]

HRC: That's right.

IFILL: They are, they were either appointed and confirmed or elected to serve democracy.

HRC: Well, I could not agree more with you. And I think that's an incredibly powerful description about why everybody should care about open debate and argument about what matters and how best to come together to make our democracy work. And I know you're writing a book now, Sherrilyn, about how our nation's embrace of white supremacy has impacted our courts and, of course, beyond our courts, our country. And I want you to explain why you're writing this book at this time and how just as with your legal work, this is for everybody. This is not just for Black Americans or brown Americans or Asian Americans. This is for everybody. And talking about white supremacy should not be seen as an attack on white people so much as a wake up call about what's at stake in this fight we are engaged in to preserve our democracy for everybody.

IFILL: OK, so let me see if I can really do this succinctly, because that's a whole show that, you know, you just described.

HRC: A couple of shows! [Laughs.]

IFILL: Yes, and it's really, really, really important for people to understand there are so many allies in this work. You know, the head of the Legal Defense Fund for many years was Jack Greenberg. We have always had incredible allies in the white community, in the Latino community, the Asian-American community who have worked with us. And honestly, it is only when we all are working together that we are going to be able to strengthen this democracy. So I am not having a conversation again that is a niche conversation for one group of people. Let me give you an example. After the video was released of the murder of George Floyd, we saw the largest civil rights demonstrations this country has ever seen. People came out of their homes in the midst of a global pandemic because they were moved by what they saw. These were

multiracial marches in all 50 states of people saying, This cannot be the country that I am associated with. We cannot allow an officer of the state to kneel on this man's neck for nine minutes and feel himself so emboldened, feel so much that he will have impunity, that his hands are in his pocket and he's staring at the camera. It was a powerful moment. Incredibly powerful. It was more than a moment it was, it was months of protest. We shouldn't lose sight of how powerful that was. I can tell you that those who are arrayed in opposition to justice and equality have not lost sight of it. What they saw that day is part of what undergirds the current movement that you're seeing around the country right now, Secretary Clinton, that they are framing as an anti critical race theory movement, but that when you read the statutes that are being enacted in state after state and introduced in state after state, they are outlawing the teaching of material that they say will cause "discomfort," this is these are the actual words in the statute, "guilt or anguish on account of race or sex." Why do I say this is a response? Because they saw the power of empathy.

HRC: Mm hmm.

IFILL: They saw the power of white people seeing something that is unconscionable, the same thing that white people who were watching *Judgment at Nuremberg* on CBS in 1965 felt when there was breaking news and it was the images from the Edmund Pettus Bridge. That these moments in which what wakes up in all of us is our shared humanity is incredibly dangerous. And so what they don't want is to have their children learning about the truth of the history of racism and white supremacy, of the struggle for justice in this country, of what has happened in terms of gender inequality, of LGBTQ inequality because they don't want in their children the awakening of that empathy. And I am sure, Secretary Clinton, that you and all of the listeners who are listening today can remember moments as young children when that empathy was woken up in us that have forever shaped us as human beings. I was speaking last night about being in the sixth grade and reading *The Diary of Anne Frank*-

HRC: Exactly.

IFILL: -in which I can tell you I felt guilt, I felt anguish, I felt discomfort, not because I had done anything but as a human being, seeing what could happen to other human beings and connecting with this girl who was the same age as me. So what they're trying to shut down is that feeling, because that's the power. And I would never bother to just write a book cataloging grievances, right?

HRC: Right.

IFILL: What I am writing about is how white supremacy is so sticky, you can attach anything to it that undermines us. Russia could interfere and conduct a disinformation campaign in the 2016 election because of the ongoing existence of racism and racial discrimination. They could exploit those divisions, as they did if you read the Mueller report, by targeting particular populations and

voters to produce the result that they wanted. They were able to exploit it because of the existing weakness of racism and white supremacy in this country. And that's what we have to understand. I wrote a piece several years ago in the, in the *Washington Post*, in which I described racism as a “national security vulnerability.”

HRC: Amen. Amen!

IFILL: It is, it is.

HRC: It is absolutely that.

IFILL: Because it is such a part of us, it is such a part of this country's foundation and it lies around so conveniently and can be picked up and attached to almost anything. The problem is that we have considered racism this issue of kind of personal worthiness or not, whether you are a good person, whether you have racism in your heart, and so on and so forth. That's not what I'm talking about. I'm talking about the structural and ongoing reality of white supremacy and its deployment by those who seek power, by those who are greedy, by those who want to divide us and to help us understand that unless we are able to confront this with some courage, it will continue to be a national security vulnerability that others outside the country can use, but it will also exploit us internally. And we have to be courageous enough to confront it. Black people confront it every day, and I'm asking all of us who care, I'm not writing this book for Tucker Carlson, I'm assuming I'm talking to people who care about democracy and justice, right?

HRC: Yes.

IFILL: To share with them this thing that people are so afraid to talk about, but that in fact, has this inordinate and disproportionate power to ultimately destroy us.

HRC: Whoa, Sherrilyn, hurry up and write the book will ya? [Laughs.] I mean, your description of the effort to literally deny, undermine, eliminate empathy really strikes a chord with me. I cannot thank you enough, and I just wish you the very best as you get on to the next chapter of your extraordinary life of service. Thank you, Sherrilyn.

IFILL: Thank you so much. It was an honor.

HRC: Keep an eye on Sherrilyn, I know she's going to keep making an essential contribution to protecting, explaining and strengthening our democracy.

Now, before we go, I want to let you know we've got plans for a future episode where I answer questions again from listeners. And look, whether it's about the courts or politics or maybe writing a political thriller or comedy, I don't care. I'm excited for you to send us your questions. Write to youandmebothpod@gmail.com. And who knows, I might just read your question on the show.

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