Statement by Russ Feingold, President of the American Constitution Society
Before the House Judiciary Committee
"Undue Influence: Operation Higher Court and Politicking at SCOTUS"
December 8, 2022

Thank you, Chairman Nadler, Ranking Member Jordan, and Members of the Committee for the opportunity to submit this comment about the urgent need for structural and non-structural Supreme Court reform to restore public confidence and legitimacy to our highest court. I am submitting this statement on behalf of the American Constitution Society, a 501(c)(3) non-profit, non-partisan organization.

One of the pillars of a democracy is a fair, impartial, and legitimate judiciary. This necessitates a judiciary that is bound by the rule of law, judicial norms, and ethics, and is not committed to a partisan agenda. Unfortunately, our highest federal court does not meet this threshold. The U.S. Supreme Court is in a legitimacy crisis, evident by plummeting public confidence in the face of the Right's packing of the Court and the resulting partisan lurch of the supermajority's decisions. Fortunately, there are remedies to this legitimacy crisis – structural and non-structural Supreme Court reform. This includes, but should not be limited to, creating a binding code of ethics for our highest court.

The Public Has Lost Confidence in Its Highest Court

The Supreme Court's decisions are not self-enforcing, nor does the Court employ a law enforcement or regulatory agency whose job is to go out and enforce the Court's decisions from sea to shining sea. Put simply, the Court must rely on public trust in and compliance with its decisions. This makes the Court's effectiveness, even legitimacy, dependent on the level of confidence the public has in the institution and its members.

In June of this year, only 25 percent of Americans expressed confidence in the Supreme Court according to Gallup. This is down 11 points from just last year. Moreover, this represents a "new low in Gallup's nearly 50-year trend." This poll was conducted before the most controversial decisions of the Court's last term were handed down, including *Dobbs v. Jackson Women's Health*. In a poll conducted after *Dobbs*, Pew Research found that the public rated the Supreme Court more negatively and as more "politically polarized" than "at any point in more than three decades of polling on the nation's highest court."

Public confidence is routinely less than fifty percent for the Executive and Congressional branches of government. However, these branches do not rely on public confidence for their legitimacy. They rely on elections and mandates provided by voters. (Voters, by the way, whose right to vote is being eroded by the one branch of government that is not subject to their will – the Supreme Court.) Neither of which are available to life-tenured Supreme Court justices. The

public's plummeting confidence in the Court is thus a much more existential problem than it would be for the elected branches.

Our shared goal as a nation should be to return to a situation wherein we have a credible, trusted, and legitimate Supreme Court that respects judicial norms, upholds ethical standards, and protects constitutional rights and democratic safeguards. To do this, we must reform the Court.

The Capturing of the Court

I served in the Senate for 18 years, during which time I had the privilege of casting a vote on the confirmation of six Supreme Court justices.[1] During my time, the confirmation of Supreme Court justices was routinely bipartisan. Even the more partisan confirmations adhered to established procedure and Senate norms.

Then, in 2012, the Right put in motion their decades' long project to capture the Supreme Court, and the Senate's established norms were cast aside for partisan gain. Senator Mitch McConnell and his party reduced the Supreme Court to eight justices for over a year so that they could fill Justice Scalia's seat with a justice who would be loyal to and would advance their ideological agenda. In an unprecedented move, they denied Merrick Garland, President Obama's Supreme Court nominee, so much as a confirmation hearing, let alone a vote. They got what they wanted when President Trump was elected in 2016 and filled the vacancy with the Right's chosen candidate. In explaining his refusal to even consider Garland, McConnell wrote in a *Washington Post* opinion piece:

> The American people have a particular opportunity now to make their voice heard in the selection of Scalia's successor as they participate in the process to select their next president — as they decide who they trust to both lead the country and nominate the next Supreme Court justice. How often does someone from Ashland, Ky., or Zearing, Iowa, get to have such impact? . . . We don't think the American people should be robbed of this unique opportunity.

Mind you, Justice Scalia passed away in February 2016, nine months before Election Day. Fast forward to 2020, Senator McConnell intentionally denied voters that same unique opportunity when Justice Ginsburg's death left a vacancy on the Court less than two months before Election Day. As voters cast ballots that would elect Joe Biden president and change the party in control of the Senate, Senator McConnell and his colleagues again gamed the confirmation process to capture another Supreme Court seat.

[1] I voted to confirm Justices Stephen Breyer, Ruth Bader Ginsburg, John Roberts, Sonia Sotomayor, and Elena Kagan, and I voted against the confirmation of Justice Samuel Alito.

Our highest court's current composition is the result of partisan capture and Court packing. In turn, the Supreme Court has lurched to the Right and is now abusing its power to issue increasingly partisan decisions that ignore or overturn established precedent, undermine and even deny constitutional rights, and that are exactly the types of decisions that Senator McConnell and his colleagues captured the Court to obtain. Low and behold, public confidence in the Court is tanking, and the Court is in the midst of a full-fledged legitimacy crisis.

A Greenlight for a Captured Court to Misbehave

There are only nine judges in this country who are not bound by a code of ethics. They are the most powerful judges in the country, sitting atop our highest court, to which all other federal courts are subservient. This Court claims the final word on the interpretation of our Constitution and the power to deny constitutional rights with the vote of just five of its members. This awesomely powerful court has no binding code of ethics, and the consequences are abundant.

Recent reporting by the *New York Times* details how permeable a Supreme Court with no binding code of ethics is to outside influence. Some may dismiss this reporting or claim that the actions documented in it were harmless or at least did not influence the outcomes of cases. This cavalier thinking ignores the Supreme Court's reliance on public confidence for its legitimacy. Public confidence reflects perception, and the perception of impropriety or corruption, or even uncertainty of its absence, is damaging.

A Campaign to "Exploit the Court's Permeability"

The *New York Times* (NYT) recently detailed an influence campaign carried out by Reverend Rob Schenck and his then organization, Faith and Action in the Nation's Capital, on members of the Supreme Court. As Schenck explained to the NYT, his job with Faith and Action was to "exploit the Court's permeability." A permeability that exists in part because of the absence of a binding code of ethics.

Schenck reportedly recruited donors with the financial means to invite justices to lavish meals, to use their vacation homes, and to attend private clubs. He worked with these donors to engage and build relationships with justices, granting them unique access during the deliberation of cases in which the donors had interests in the outcome. This access included what Schenck now describes as "political prayers" with select justices. All the while, Faith and Action filed amicus briefs in cases before the Supreme Court, including in *Gonzales v. Planned Parenthood*, which upheld the Partial-Birth Abortion Ban Act of 2003.

Peggy Nienaber, the executive director of Liberty Counsel's DC Ministry, the successor organization to Schenck's Faith and Action, has also claimed to have prayed with current Supreme Court justices. This too was while Liberty Counsel filed amicus briefs in Supreme

Court cases, including in *Dobbs v. Jackson Women's Health*. It's hard to overlook the fact that the *Dobbs* decision even referenced an amicus brief written by Liberty Counsel.

The damage done by these types of outside influence campaigns should not be measured only by specific case outcomes, however. As Schenck has explained, his goal was not necessarily to influence a justice's decision in a specific case. Rather, the goal was to make certain justices more emboldened and willing to make controversial decisions. This type of attitude shift could have much more significant and broader repercussions than swaying a justice on just one case. Repercussions like, hypothetically, emboldening justices to take away the federal constitutional right to abortion and to forecast the potential overturning of the right to contraception and same-sex marriage.

It is impossible to state for sure that the influence campaign by Schenck's organization and its successor, Liberty Counsel, influenced the outcome in *Dobbs v. Jackson Women's Health* or in any other case. But, the uncertainty alone is damaging and results in questions about whether justices are deciding cases based on law, precedent, and fact, or based on partisan agenda and outside influence.

Mr. Schenck has said his organization was "pushing the boundaries of appropriateness." It would be woefully naïve to think that he and his organization were the only ones doing such pushing. This is particularly the case given other engagements and relationships with justices that are well known.

Chief Justice Roberts was reportedly "standoffish" to Mr. Schenck. And for his part, Justice Alito has said "I never detected any effort on the part of [Faith and Action donors] to obtain confidential information or to influence anything that I did in either an official or private capacity, and I would have strongly objected if they had done so."

The public is left to take justices at their word in these situations. The same word that under oath swore allegiance to precedent only to obliterate it once given life tenure atop our highest court. If there were a time for voluntarily ethics, that time is long gone. Plummeting public confidence in the Court makes clear that relying on voluntary compliance is insufficient, particularly given the evidence that certain justices were not as "standoffish" as the Chief Justice.

A binding code of ethics could impose restrictions on judicial behavior and provide transparency to give the public faith that a campaign like Mr. Schenck's "Operation Higher Court" cannot be successfully waged in the future. For instance, if there were a code of ethics that forbade justices from socializing with individuals associated with cases before the Court, it would not matter if such an individual did or did not influence a justice, the mere proximity would be a violation.

Judicial Ethics Exist, Just Not for the Supreme Court

Besides the members of our highest court, every other federal judge in the country is bound by the Code of Conduct for U.S. Judges. While not legally binding, the Code of Conduct does have an enforcement mechanism as violations can result in sanction under the Judicial Conduct and Disability Act of 1980. This gives the Code "teeth."

The Code requires judges to "uphold the integrity and independence of the judiciary;" "avoid impropriety and the appearance of impropriety in all activities;" "perform the duties of the office fairly, impartially and diligently;" "engage [only] in extrajudicial activities that are consistent with the obligations of judicial office;" and, "refrain from political activity." Again, these restrictions do not apply to the nine most powerful judges in the country.

Chief Justice Roberts has noted that the Code of Conduct "does not adequately answer some of the ethical considerations unique to the Supreme Court." This is all the more reason to establish a binding code of ethics specific to the Supreme Court. Such a code could provide clarity on those "ethical considerations unique to the Supreme Court." A code written for the Supreme Court could also, like the Code of Conduct for U.S. Judges does, set out a procedure for justices to request advice on how to handle a specific situation. For other federal judges, such advice is provided in the form of advisory opinions by the Judicial Conference of the U.S. Committee on Codes of Conduct. This body has no jurisdiction over the Supreme Court, further underscoring the benefit of a code of ethics – and corresponding procedure – that is designed around and for the Supreme Court.

Minimum Requirements for a Supreme Court Code of Ethics

1. **Restrictions on justices accepting gifts, including travel, access to property and clubs, and other items of a value over $50.**

The justices are currently bound by statute not to accept gifts from parties "whose interests may be substantially affected" by a decision by the Court. However, we run into an enforcement problem here. Namely, there isn't any enforcement, and in recent years justices have accepted lavish gifts, including memberships, expensive trips, and contributions to pet causes. There need to be stricter guidelines and some method of accountability that give the public more faith in the justices' compliance than the current set-up provides.

This is one area where even Congress has stricter rules by forbidding Senators and Representatives from accepting gifts that are valued over $50. A similar restriction would serve the Supreme Court well, with an accompanying disclosure requirement of any gift offered and refused over $50.

2. Robust requirements for financial disclosure

A Supreme Court code of ethics should require justices to routinely and publicly disclose any and all stock held by themselves, their spouse, or their immediate family. Such disclosures should be readily available to the public, including online. This, in turn, should be accompanied by a requirement that a justice recuse themselves in any case that relates to a company in which that justice has any financial interest.

We have precedent for Supreme Court justices recusing themselves because of their stock holdings. Given the concern about recusals reducing the Court to eight, it is worth noting that such recusals could have been prevented if justices were required to divest from individual stocks upon confirmation and were forbidden from acquiring individual stock during their tenure. They could still invest, but in mutual funds, just like millions of Americans do with their retirement funds. This combination of divestment, thorough public disclosure, and transparent recusal would greatly improve public trust by reducing the existence and perception of justices participating in self-benefiting decisions.

3. Guidelines for recusals, including situations that require recusal of a justice.

Currently, a Supreme Court justice is statutorily supposed to recuse themselves from cases "in which his impartiality might reasonably be questioned." The problem here is that justices are left to independently decide whether to recuse in a case, and they are not required to provide any explanation whether they do or do not recuse. Public transparency demands, at a minimum, that a justice explain why they think they can be impartial in a case where there is an arguable conflict of interest. For instance, the public deserved an explanation for why a sitting justice opted not to recuse himself in a case in which his spouse had actively participated in underlying events.

In 2004, Justice Scalia went hunting with then Vice President Cheney, "just three weeks after the Supreme Court agreed to take up the vice president's appeal in lawsuits over his handling of the administration's energy task force." Justice Scalia provided a written explanation for his decision not to recuse in the case. While this at least provided some level of transparency, the Justice was allowed to single-handedly make the decision and without the obligation to consider or abide by binding ethics. Similarly, Justice Thomas was allowed to independently make the decision not to recuse in cases involving events in which his spouse was actively engaged, and he did so without any written explanation.

Recusals of Supreme Court justices are more consequential than on lower courts as a justice cannot be replaced. But rather than an argument against recusal, this argues for clarity and transparency around what warrants recusals. All justices should follow the same rules when it comes to recusals, and the process should be transparent. This would bolster public confidence in the event that a justice does or does not recuse in adherence to the code of conduct.

To Solve the Supreme Court's Legitimacy Crisis Also Requires Structural and Other Non-Structural Reforms

To fully redress the Right's capture of the Supreme Court and to restore the Court's legitimacy, there must be structural reform. This means expanding the Court to remove the impact of the Right's capture. Additionally, life tenure should be done away with in favor of term limits and regular, predictable turnover on the Court.

To prevent future gamesmanship, the Senate also should amend its rules or Congress should pass legislation that requires a minimum number of days for the Senate to advise on a Supreme Court nominee before holding a confirmation vote. This would prevent a nominee from being jammed through while voters are casting their ballots. There should similarly be a maximum number of days by which time a confirmation vote must be held. This is to prevent the hijacking of a Supreme Court vacancy and the intentional reduction in the number of justices on the Court for an extended period of time. Together, these would restore public confidence in the means by which individuals are elevated to our highest court.

In terms of non-structural reform, there needs to be a binding code of ethics. See above. In addition to that, there should be restrictions imposed on the Court's use of emergency decisions, nicknamed the "Shadow Docket" by William Baude, a conservative scholar at the University of Chicago Law School. Emergency petitions used to be reserved for just that, emergencies. Now, the Court routinely issues sweeping decisions using this mechanism, which prevents the justices from having to explain or even sign their names to the decision. These opaque decisions further undermine public confidence. At a minimum, emergency docket decisions should be signed and accompanied by at least a minimal explanation.

Conclusion – It Is Time for Congress to Check and Balance the Supreme Court

The Supreme Court's voluntary adoption of a binding code of ethics would be a powerful statement and a promise of reform from within. However, whispers of such internal reform have failed to bear fruit. Our federal government is designed to achieve checks and balances, with no branch more powerful than the other two. It is time for Congress to check the Supreme Court by enacting meaningful reform, including a binding code of ethics.