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Written Testimony

House Committee on the Judiciary

Hearing on
UNDUE INFLUENCE: “OPERATION HIGHER COURT” AND POLITICKING AT SCOTUS
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Chairman Nadler, Ranking Member Jordan, and Members of the Committee,

Thank you for this opportunity to testify at today’s hearing, “Undue Influence: ‘Operation Higher Court’ and Politicking at SCOTUS.” Unfortunately, today’s hearing is another in a concerted effort by Congressional Democrats and their media allies to undermine the legitimacy of the Supreme Court. As I testified in April at a Judiciary subcommittee hearing about Supreme Court ethics:

If confidence in the Court is lacking, it is not due to issues of ethics or recusals. Rather, confidence in the Court is undermined by the coordinated campaign by some Democrats and their allies in the corporate media to smear conservative Justices with the *goal* of delegitimizing the Court. Some liberals fear that the Court finally has a working originalist majority that may sweep away several liberal precedents that cannot stand up to more rigorous constitutional scrutiny. And in this effort, Democrats and the media are trying to threaten, intimidate, destroy, and remove any Justice who may constitute this conservative working majority.

Since then, the Supreme Court has issued several significant decisions that have used an originalist approach to applying the Constitution, including the *Bruen* decision, which strengthened Second Amendment rights consistent with the original meaning of the Constitution, and the *Dobbs* opinion, which overturned *Roe v. Wade* in finding that there was not a constitutional right to abortion.

Today the committee has convened a hearing to listen to allegations from a man, Mr. Rob Schenck, who built his career on deception and deceit—he admits to [telling](#) “a fair number of consequential lies.” As first reported in a November 19 *New York Times* story, Mr. Schenck claims that Justice Alito or his wife leaked the results and author of the *Hobby Lobby* decision to two of his allies three weeks before the decision was announced in 2014. There is no credible basis for this story, but it is consistent with a man who has an obsession with self-promotion and deception. A little background on this specific allegation is necessary.

Mr. Schenck's Allegation is Not Credible

According to Mr. Schenck, in 2000, he began his so-called “Operation Higher Court” project, which he claims was designed to lobby Justices to overturn *Roe v. Wade*. He claims he encouraged wealthy donors to his organization to contribute to the Supreme Court Historical Society in order to gain “access” to the Justices at various Court functions. He allegedly coached these donors on what to say to Justices to encourage them to vote a certain way.

Mr. Schenck claims that he was told by one of his donors (Gayle Wright) that she and her husband Donald would be dining with Justice Alito and his wife at the Justice’s home on June 3, 2014. Mr. Schenck claims that she offered to try to find out the status of the then-pending *Hobby Lobby* case. Mrs. Wright emailed him the next day to say she had information she wanted to share.

Mr. Schenck claims he was told in an ensuing call with Mrs. Wright that she learned the result of the then-pending *Hobby Lobby* decision and that Justice Alito would write the majority opinion. But there are no contemporaneous notes of this call. In Mr. Schenck’s letter to Chief Justice Roberts dated June 7, 2022 (but according to Mr. Schenck not sent until July 7th), he erroneously claims that Mrs. Wright’s email confirmed that she had indeed gotten this information about the case. But that is wrong. All she wrote is, “Rob, if you want some interesting news please call. No emails.” Mr. Schenck looks like he is playing fast and loose with the facts, particularly considering that *no one* else involved agrees with Mr. Schenck’s retelling.

Indeed, the other party to the call—Gayle Wright—vehemently disputed Schenck’s allegation. (Donald Wright passed away in 2020). According to a [CNN](#) story, “Wright vehemently denied Schenck’s claims in an interview with CNN on Saturday. ‘This whole thing is unbelievably misconstrued,’ she said, adding that Alito would never have discussed a specific case and she would never have asked about one. ‘Cases are never discussed, everybody knows that,’ she said.” She added that Schenck’s allegations are “patently not true.”

In responding to a question about the email she sent to Mr. Schenck, Mrs. Wright added that she might have wanted to share about her becoming ill at the dinner and Justice Alito himself driving her and her husband back to their hotel. To Mrs. Wright, this event could have felt like important news—that a Supreme Court Justice had driven her back to her hotel room. It’s a story most would tell for the rest of their lives. In her response, Mrs. Wright does not even appear to confirm that she and Mr. Schenck spoke.

In the [New York Times](#) story, Mrs. Wright stated, “Being a friend or having a friendly relationship with a justice, you know that they don’t ever tell you about cases. They aren’t allowed to,” Mrs. Wright said. “Nor would I ask. There has never been a time in all my years that a justice or a justice’s spouse told me anything about a decision.”

Justice Alito also denied the claim, issuing a statement that the “allegation that the Wrights were told the outcome of the decision in the *Hobby Lobby* case, or the authorship of the opinion of the Court, by me or my wife, is completely false.” Justice Alito added in another [statement](#): “My

wife and I became acquainted with the Wrights some years ago because of their strong support for the Supreme Court Historical Society, and since then, we have had a casual and purely social relationship. I never detected any effort on the part of the Wrights 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.”

So, what evidence do we have to support these far-fetched accusations? Some vague emails. The *Times* suggests that these emails show insider knowledge, but they prove nothing of the sort. The *Times* even has to admit that Schenck’s story has some “gaps.” In fact, any educated observer would suspect, given the composition of the Court and the questions asked at oral argument, that the Court would likely rule in Hobby Lobby’s favor to protect its religious freedoms as an employer.

Mr. Schenck’s cryptic comments to others at the time reveal a man who is boasting of some type of insider information where none exists. With denials from the actual participants to the call, we are left with the word of Mr. Schenck, who even a left-wing legal reporter described as an “[unreliable whistleblower](#).” But this wasn’t Mr. Schenck’s only delusion of grandeur.

Mr. Schenck Has a Record of Deception and Lies

When he explains “Operation Higher Court,” its despicable nature is only outdone by its absurdity. Back in 2018, Mr. Schenck claims in his book *Costly Grace* that his project’s goal was to “convert” Justices to a pro-life position:

Many similar organizations to ours were lobbying Congress or working with the White House on policy, so Paul and I decided our ultimate goal would be to inform the consciences of those in the judicial branch. There were no pro-life groups directly approaching the judges and justices who shaped abortion law simply by their precedent-setting decisions. We knew we were stuck with members of the federal bench—they were appointed for life—so why not convert them while in office?

Now, in peddling this story, Mr. Schenck told the *New York Times*, “his aim was not to change minds, but rather to stiffen the resolve of the court’s conservatives in taking uncompromising stances that could eventually lead to a reversal of *Roe*.” Mr. Schenck backpedals on his outlandish goal that he would “convert” Justices now that his story is facing much more scrutiny.

Mr. Schenck is well-established as an unreliable narrator of the truth. In fact, a federal judge found that his testimony under oath was not truthful in a court proceeding. In a hearing on a contempt of court violation against his identical twin brother, Paul Schenck, for blocking access to an abortion clinic, a judge found:

At the hearing, the Schencks insisted that they were not present at 1241 Main Street on December 29, 1990 as part of Project Rescue. Rather, they contend that

they were there only to evangelize and preach. *The Court finds, however, that their testimony in this regard is not credible.*

Joint Appendix at *127AA-128AA, *Schenck v. Pro-Choice Network of Western New York* (1996) (No. 95-1065), 1996 WL 33414127 (emphasis added).

First, the Court finds the Schencks' inability to recollect the incident to be totally incredible. The Court cannot believe that anybody would forget such an incident, especially after being shown a videotape of it. This was not a normal everyday occurrence, *even for the Schencks who testified that they are regularly involved in this type of activity.* It was something that anybody would remember, particularly after seeing the videotape.

Id. at *132AA (emphasis added).

Further, Mr. Schenck's entire "Operation Higher Court" was based on deception. He supposedly would send these "stealth missionaries" to Justices to say biblical phrases to strengthen the Justices' resolve to vote a certain way or write a strong opinion. To even describe this plan is to mock it—it almost has a somewhat *Manchurian Candidate* feel to it, where covert agents say certain code words to activate a Justice.

Aside from the pure dishonesty of encouraging people to covertly seek to persuade a Justice to vote a certain way and report back on various tidbits of information gathered in these discussions, does anyone actually believe that Justices Scalia, Thomas, or Alito needed any converting or bucking up on their views that *Roe v. Wade* was wrongly decided and needed to be overturned? Scalia and Thomas had already voted to strike *Roe* down in *Casey* in 1992, and Justice Alito had [written](#) in 1985 that the Constitution "does not protect a right to an abortion."

None of these men could be described as being faint of heart on these issues.

Mr. Schenck now attempts to disavow this ludicrous project in his desperate attempt to reinvent himself. He wants us to believe his story of this alleged leak, but he is someone who lies and deceives to further his own ends. And he is doing that here today. Mr. Schenck is not a credible witness. It is one thing to change your views on issues. It's another to lie in the service of those views. You don't get your credibility back just by changing sides.

Mr. Schenck is a con man, who preyed on the goodwill of well-intentioned people who cared about pro-life issues to get them to give him \$30 million to engage in a project that had zero impact on these three Justices or any other Justice in their votes or opinions.

Double Standards on "Politicking" at the Supreme Court

The Democrats and their allies on the Left have driven a narrative that it is unethical or troubling for Justices to have dinners or interactions with individuals who believe passionately in an issue or who are wealthy donors to organizations. But contrary to the Democrats' and their media allies' current representations, these types of interactions are consistent with the judicial ethics

code, have been going on since the inception of the Court, and the Democrats and their media allies have been perfectly fine when liberal Justices do this.

For example, Justice Ruth Bader Ginsburg [served](#) on the board of the National Organization of Women (NOW) during the 1970s and on NOW's advisory group for legal education, but she never recused from the many cases in which NOW's sister organization, NOW Legal Defense and Education Fund (NOW LDEF), filed a brief.

Justice Ginsburg also allowed NOW LDEF to name a lecture series after her, and she in fact gave [remarks](#) in 2004 at the Justice Ruth Bader Ginsburg Distinguished Lectures Series on Women and the Law. Her remarks were delivered just two weeks after she ruled in favor of a position advocated by NOW LDEF in an amicus brief. In addition to being pro-abortion, NOW LDEF, according to one [news report](#), “urged the high court to uphold affirmative action in University of Michigan cases, to endorse gay rights in a Texas sodomy case, and to preserve the Family Medical Leave Act in a Nevada case” in the year leading up to Justice Ginsburg's remarks. When asked about her speaking before a pro-abortion legal advocacy group, Ginsburg [replied](#): “I think and thought and still think it's a lovely thing. Let the lecture speak for itself.”

Ginsburg's closeness with this group also was demonstrated when she [donated](#) a signed copy of her *VMI* opinion (ordering VMI to admit women to the all-male school) to the NOW Political Action Committee to be auctioned at a NOW fundraiser in 1997. No other Justice in modern times has ever engaged in such conduct with a political and legal advocacy group, but there was very little concern expressed about this conduct, and certainly not by any Democrat or most of the liberal press.

I am not aware of a single Congressional Democrat raising concerns about her impartiality when she appeared before that advocacy group or helped raise funds for them. But Democrats and their media allies will weaponize allegations of impartiality against conservative Justices to undermine their integrity and the decisions they issue.

The Justices should not be sealed off from the outside world—that is neither good for the institution nor the law. Democrats, and in particular Senator Sheldon Whitehouse, and their media allies have criticized several Justices over the years for speaking at Federalist Society events, including the annual black-tie gala event. But liberal Justices, such as Justice Sonia Sotomayor, have [spoken](#) multiple times at the American Constitution Society, the liberal would-be counterpart to the Federalist Society. There is nothing wrong with this; in fact, the [Judicial Code of Ethics](#) expressly permits judges to “engage in extrajudicial activities, including law-related pursuits and . . . educational . . . activities, and may speak, write, lecture and teach on both law-related and nonlegal subjects.”

Justices having meals and other interactions with Mr. Schenck's so-called “stealth missionaries” also is not problematic. It's far-fetched to believe that the Justices had any idea that these individuals had any ulterior motive and were reporting back information to Mr. Schenck, assuming this is even true. The Justices were being nice people. The Justices often spend time with groups of students, or outside groups in conference rooms or in their chambers at the Court, or at gatherings outside the Court, and meet hundreds of people each year in

settings like this. It is a thrill for many Americans, both wealthy and of modest means, to meet and engage in conversations at meetings, receptions, or dinners with the Justices.

Some of these relationships developed into a friendship at some level. Here, the Wrights had donated to an institution that helped support the mission of the Supreme Court as an institution and developed a social relationship with the Alitos. What's wrong with the Alitos sharing a meal with them? The [relevant provision](#) of the Judicial Conference Gift Regulations permits judges to accept "ordinary social hospitality and appropriate gifts from relatives and friends."

The Judicial Conference Gift Regulations also [provide](#) that "[a] judicial officer or employee is not permitted to accept a gift from anyone who is seeking official action from or doing business with the court or other entity served by the judicial officer or employee, or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's or employee's official duties."

The Wrights did not fall into any of these categories. They owned a real estate business in Ohio, did not have any business before the Court, and there was no reason to believe they ever would. A passionate interest in pro-life issues or any other cause or financially supporting the Supreme Court Historical Society does not constitute an interest for gift purposes or recusal.

But one left-wing reporter, Dahlia Lithwick of *Slate*, [wrote](#), "The fact that some of the justices believe that 'casual' and 'social' relationships with lobbyists, activists, and interested parties who have business before the court are appropriate and acceptable is the problem, because it means they cannot be trusted to avoid such contacts." But these donors did *not* have business before the Court. They were not parties to any litigation. They may care passionately about an issue, but that is no reason for Justices to wall themselves off from such relationships. Most people have passionate beliefs. That hardly makes them anathema as dinner companions.

Does anyone seriously believe that these donors had any impact on the decisions or opinions of any of these Justices? Sure, it's troubling that Mr. Schenck appears to have been running a dishonest and useless grift, but he's the problem, not the Justices.

But the Democrats and their media allies are perfectly fine with Democrats accepting very luxurious hospitality from friends. President Biden and his family recently stayed at billionaire David Rubenstein's home in Nantucket. He did so last year too and did not disclose this on his financial disclosure form. President Obama and his family repeatedly stayed at a billionaire's estate on Martha's Vineyard during his Presidency and never listed his visit on his financial disclosure form. The law permits them to accept and not disclose these types of personal hospitality stays.

Are the Democrats and their allies worried that these Presidents are staying at billionaires' homes and meeting privately with their hosts, even though these individuals' companies undoubtedly have business before the executive branch? For the cynics out there, it's a lot easier for a President to dole out benefits to his hosts (setting up a key meeting, putting in a good word to his appointees about a rule) than it is for one of nine members of the Supreme Court to do anything to benefit a similarly situated person.

Ms. Lithwick also seems uninterested that NPR reporter Nina Totenberg, as set forth in her new book *Dinners with Ruth*, regularly “wined and dined” liberal Justice Ginsburg at her home on a weekly basis. Would anyone dispute that Ms. Totenberg has a professional interest in matters before the Court? In fact, her whole job is to cover the Justices, including Justice Ginsburg, and report on decisions. In Totenberg’s book, she writes that “[t]hroughout [Ginsburg’s] final years . . . [w]e shared so many small dinners together that Saturdays became ‘reserved for Ruth.’” Ruth Ginsburg never listed any of these dinners on her financial disclosure form. That is entirely permissible, but Lithwick and the rest of the liberal press complaining about conservative Justices accepting hospitality reeks of hypocrisy. Rules for thee, not for me.

There are many more interesting items in this book, including Totenberg disclosing that Justice Ginsburg attended a Woman’s National Democratic Club event where she was honored by this partisan group, and Totenberg emceed the event. I am certain that if Justice Amy Barrett were honored by the Woman’s National Republican Club, it would be front-page news with ethics professors discussing that the Court is broken. I have read a fair bit about Justice Ginsburg’s activities, and I am only learning now about this event in Ms. Totenberg’s new book, and after Justice Ginsburg has passed.

The Left’s further obsession with dark money or lack of transparency seems to end when a liberal Justice is involved. For example, according to [news reports](#), on the day of Justice Jackson’s investiture ceremony, the Library of Congress hosted a “massive event, featuring performances by several musicians and groups.” In response to a request from [Fox News](#), the Library issued a statement: “It is a private event and is privately funded.” I have no reason to believe there is anything inappropriate about the funding for this event, but it does appear that the liberal media and Democrats on this Committee are not interested in finding out whether any funders for this event have business before the Court.

There is a similar double standard when it comes to leaks. There have been previous leaks of Supreme Court and other lower court decisions, but I am unaware of Congress holding a hearing on any of those leaks. The leak of the *Dobbs* decision was despicable and whoever leaked it should be held accountable. The *Roe v. Wade* decision was [leaked by a clerk](#) who worked for a Justice who voted in favor of *Roe*, and an article was published with the leaked results before the decision was issued.

During the confirmation of Justice Thomas, the contents of *Lamprecht v. FCC*, a then-pending D.C. Circuit case regarding a gender-based set-aside program for FCC licenses, [were deliberately leaked](#) in an effort to derail his confirmation. That leak was a despicable act, yet there was no outrage by any Democrat at the time, or desire to investigate this clearly unethical and partisan act. In fact, Democrats and their allies in the press used it to further attack Thomas.

When Congressional Democrats raise the fact that the Court’s [public approval](#) is at its lowest point ever (40% approve, 58% disapprove), and therefore changes should be made to the Court, I recommend that Democrats look in the mirror. Congress’ public [approval](#) under Democrat control is at a lowly 21% and its disapproval rating is a stunning 75%. Perhaps some changes should be made to Congress before Congress starts meddling with the Court.

This hearing is just another attempt to undermine the Supreme Court now that it is no longer acting as a super legislature imposing progressive policies. This hearing has allowed a non-credible witness to make baseless and malicious allegations and smear the good name of an honorable Justice and his wife. These attacks on the Court must end.