

WRITTEN TESTIMONY OF
HON. JEREMY FOGEL (RET.)
SENATE COMMITTEE ON THE JUDICIARY
MAY 2, 2023

Chair Durbin, Ranking Member Graham, and Honorable Committee Members:

My name is Jeremy Fogel. I am a retired judge of the United States District Court for the Northern District of California. I was a federal judge for twenty years, for the last seven of which I served as Director of the Federal Judicial Center (FJC). Prior to my federal judicial service, I was a judge in the California state court system for seventeen years. Currently, I serve as Executive Director of the Berkeley Judicial Institute at the University of California, Berkeley Law School. The Institute's mission is to build bridges between judges and academics and to promote an ethical, resilient and independent judiciary.

During my seven-year term at the FJC, I worked closely with the Judicial Conference of the United States and its committees. My primary responsibilities were overseeing the FJC's policy-related research and its educational curriculum for the judicial branch, including judicial education about ethical standards and financial reporting requirements. Our governing board was chaired by the Chief Justice of the United States. I also had frequent contact with the leadership of both circuit and district courts and built collegial relationships with hundreds of judges from all parts of the country.

Before being appointed as Director of the FJC, I served for seven years as a member of the Judicial Conference Committee on Financial Disclosure, during which time I acquired substantial knowledge about the Ethics in Government Act and its application to judicial officers, including the use of the Committee's redaction authority to protect the security of

filers and their families. I chaired the subcommittee that developed the original platform and procedures that enabled filers to submit their annual financial disclosure reports electronically and laid the groundwork for making the reports available online. As a state court judge in California, I chaired both the Judicial Ethics and the Discipline and Disability Committees of the California Judges Association and organized and led a confidential counseling program for judges facing potential disciplinary proceedings.

Before addressing the principal point of my testimony—what I see as a need for greater transparency in the way our Supreme Court engages with matters implicating judicial ethics—I want to be clear about why I am here today. I am not here to question or criticize the conduct of any Justice, nor is it my purpose to take sides in a political debate. I have spent more than forty years of my professional life avoiding partisanship, and I treasure my relationships with judges of a broad range of philosophical persuasions. I have great respect for the Court as an institution and for the Justices with whom I've had the privilege of interacting in the course of my judicial career. I'm especially grateful to Chief Justice Roberts for his wise counsel and steady support during my time at the FJC; from a personal standpoint, it is awkward being here. I have read the Chief's response to Chair Durbin's invitation to appear before this Committee and the attached statement signed by all nine members of the Court, and I do not doubt the sincerity with which the views in both of those documents have been expressed.

I am here because I believe that more is needed. For decades, the Court has been our most trusted governmental institution, far outpacing both the legislative and the executive branches in polls measuring public confidence. That status has eroded significantly; while only a decade ago more than two-thirds of Americans said that they had confidence in the Court,

almost the same number express the opposite opinion today. While some of that erosion likely has to do with controversy surrounding some of the Court's decisions, I think that there are other important factors at work, including a persistently hyper-partisan political environment, an increasingly contentious confirmation process, the near disappearance of civics curriculum from our schools, and the pervasiveness of social media as a source of misinformation and disinformation about the law, the judicial process and the judges and Justices to whom that process is entrusted.

In this fraught environment, I believe that the absence of a formal structure for defining and validating the ethical rules governing the conduct of Supreme Court justices is untenable. Too many Americans already think that the Justices decide cases based upon their political preferences and alliances rather than the law; lack of clarity about the Justices' ethical obligations only feeds that perception. Every other judicial officer in our country, whether state or federal and regardless of the type of court on which they serve, is guided by explicit ethical standards and is subject to at least some degree of oversight to assure their compliance. The same is true for virtually all officials in the legislative and executive branches.

While people familiar with the inner workings of the federal judiciary can read the Court's submission to this Committee and admire the care and nuance with which it has been crafted, I fear that for everyone else the processes and considerations that the submission details are a black box. How and when do the Justices consult the sources described, what weight do those sources receive, who if anyone not directly affiliated with the Court is available to offer detached, independent judgment and advice, and perhaps most importantly, what

procedures are in place to insure an appropriate degree of transparency, consistent with the principles of decisional independence and judicial security?

In both his recent submission and his 2011 year-end report, the Chief Justice has explained how the Supreme Court differs from other federal courts and why it would be inappropriate for it simply to adopt the identical Code of Conduct applicable to all other federal judges. I agree with him as to these points. But that doesn't mean that the Court should have no formal code at all, that it couldn't—or that it shouldn't—adopt a modified code that accounts for these differences. For example, given the significantly greater impact of recusals on a Court with only nine members and no ability to draw upon potential replacements, the relevant provisions of a modified code might identify and weigh factors for and against recusal differently. Because of its unique position in the judicial branch and the need to avoid a review procedure that might compromise its decisional independence or the security of its members, the Court could designate a panel of retired judges with deep experience and unquestioned integrity to provide it with confidential advice as to whether an act, omission or relationship raises an issue under the code.

The point is that a formal code of conduct would provide clearly stated, visible rules and procedures to which the Justices are expressly committed. Adoption of such an ethical framework wouldn't make controversies about the Court or its decisions disappear, but it would be a statement to the American people that their faith in the Court's adherence to core ethical principles matters. It also would reflect a recognition that given the outsized importance of their role, the Justices should, in the words of former judge and noted conservative Michael Luttig, be “bound by higher standards” than other judges. Having seen firsthand the impressive ability of

the Court and the Judicial Conference to develop rules of procedure that have made our federal courts a model for other legal systems both here and abroad, I have every confidence that such an effort would produce a carefully balanced framework of high quality and would represent a significant step forward.

Thank you for the honor of testifying before this Committee and for your consideration.