PROTECTING FEDERAL JUDICIARY EMPLOYEES FROM SEXUAL HARASSMENT, DISCRIMINATION, AND OTHER WORKPLACE MISCONDUCT

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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PROTECTING FEDERAL JUDICIARY EMPLOYEES FROM SEXUAL HARASSMENT, DISCRIMINATION, AND OTHER WORKPLACE MISCONDUCT

THURSDAY, FEBRUARY 13, 2020

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The subcommittee met, pursuant to call, at 8:42 a.m., in Room 2141, Rayburn House Office Building, Hon. Henry Johnson [chairman of the subcommittee] presiding.

Present: Representatives Johnson, Correa, Cohen, Bass, Jeffries, Swalwell, Stanton, Roby, Chabot, Jordan, Reschenthaler, and Cline.

Also Present: Representatives Jayapal and Scanlon.

Staff Present: Madeline Strasser, Chief Clerk; Jordan Dashow, Professional Staff Member; Anthony Valdez, Staff Assistant; John Williams, Parliamentarian; Jamie Simpson, Chief Counsel; Danielle Johnson, Counsel; Matt Robinson, Counsel; Rosalind Jackson, Professional Staff Member; Tom Stoll, Minority Counsel; and Andrea Woodard, Minority Professional Staff Member.

Mr. JOHNSON of Georgia. The subcommittee will come to order.

Without objection, the chair is authorized to declare recesses of the subcommittee at any time.

Welcome to this morning's hearing on Protecting Federal Judiciary Employees From Sexual Harassment, Discrimination, and Other Workplace Misconduct.

Before I begin, I ask unanimous consent that our Judiciary Committee colleagues, or colleague, the gentlelady from Washington, Ms. Jayapal, be permitted to sit at the dais for today's subcommittee hearing. Following the committee's practices, these members will be allowed to question the witnesses if they are yielded time by one of the members of the subcommittee.

I also ask unanimous consent that the following items be entered into the record: A letter to chairman, to myself, Chairman Johnson, and Ranking Member Roby from Jamey Santos, and a letter to the subcommittee from Sejal Singh on behalf of the People's Party Project.

MR. JOHNSON OF GEORGIA FOR THE RECORD

Jaime A. Santos

February 11, 2020

Honorable Henry C. Johnson
Chairman
Subcommittee on Courts, Intellectual Property, and the Internet
United States House of Representatives
Washington, DC 20515

Honorable Martha Roby
Ranking Member
Subcommittee on Courts, Intellectual Property, and the Internet
United States House of Representatives
Washington, DC 20515

Dear Chairman Johnson, Ranking Member Roby, and the Honorable Members of the Subcommittee on Courts, Intellectual Property, and the Internet,

I would like to thank the Chairman and the Ranking Member for holding this hearing on *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct*. As you may know, I, along with my colleagues from Law Clerks for Workplace Accountability, have been deeply involved in urging the federal judiciary to take action to study, prevent, and address harassment within the federal courts system for the last several years. We have also worked with numerous federal courts of appeals, federal district courts, and state court systems to improve their sexual harassment policies, training programs, and reporting procedures. Through that work, I have been inspired by some of the incredible members of state and federal judiciaries who are committed to ensuring a safe and respectful workplace for every employee, and it has been my honor to work collaboratively with these judiciaries to help them toward meeting that goal.

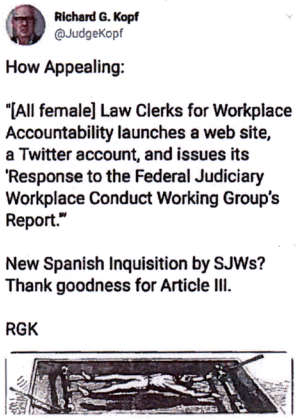
Nevertheless, it is my view that it remains just as important today as it was almost two years ago when I testified before the Senate Judiciary Committee that these issues continue to be a priority for state and federal judiciaries nationwide. Sexual harassment and abuses of power in workplaces did not begin just a few years ago, and it will take a sustained commitment on behalf of judiciaries and the legal profession generally to effectively address these issues in a meaningful way. What is needed is not merely policy change, it is cultural change, and cultural change takes time. But time alone will not bring transformation—that requires a demonstrated commitment to real change by those with the power to take action.

My colleague, Deeva Shah, will be presenting written and oral testimony on her own behalf and as a representative of Law Clerks for Workplace Accountability. I write this letter to provide one personal example that illustrates the need for continued attention to these issues.

After the Federal Judiciary Workplace Conduct Working Group issued its Report on June 1, 2018, and I testified before the Senate Judiciary Committee on June 13, 2018,[1] my

[1] https://www.judiciary.senate.gov/meetings/confronting-sexual-harassment-and-other-workplace-misconduct-in-the-federal-judiciary

colleagues and I were invited by the federal judiciary to submit comments to the Judicial Conference of the United States about the Working Group's report and recommendations. We did just that on July 20, 2018.[2] That same day in response to our submission (which, again was solicited by the judiciary), a sitting federal judge took to social media to attack my colleagues and I and our work—work that we were doing *collaboratively with the judiciary*. The judge suggested that the work of our "[a]ll female" group was akin to a "New Spanish Inquisition by SJWs"[3]; referred to us as "uninformed busybodies who should largely be ignored" and that "understand very little"; tweeted that we were "presumptuous" for having proposed reforms to begin with; and targeted me specifically in numerous tweets, saying, "Kozinski is brilliant & flawed. But true believers like Ms. Santos scare me."[4] I do not have screen shots of all of the judge's posts, as he later deleted his account, but here are a few:



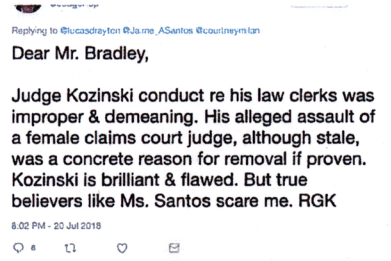
Richard G. Kopf
@JudgeKopf

How Appealing:

"[All female] Law Clerks for Workplace Accountability launches a web site, a Twitter account, and issues its 'Response to the Federal Judiciary Workplace Conduct Working Group's Report.'"

New Spanish Inquisition by SJWs? Thank goodness for Article III.

RGK



Replying to @lucasdrayton @Jaime_ASantos @courtneymilan

Dear Mr. Bradley,

Judge Kozinski conduct re his law clerks was improper & demeaning. His alleged assault of a female claims court judge, although stale, was a concrete reason for removal if proven. Kozinski is brilliant & flawed. But true believers like Ms. Santos scare me. RGK

8:02 PM - 20 Jul 2018

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[2] http://clerksforaccountability.org/response-to-working-group-report?v2

[3] "SJWs" stands for "social justice warriors," a derogatory term used to describe individuals who promote feminism and multiculturalism.

[4] *See* Roberta Kaplan & Rachel Tuchman, *Time's Up for Lawyers Too*, N.Y. L.J. (July 27, 2018, 8:58 AM), https://www.law.com/newyorklawjournal/2018/07/27/times-up-for-lawyers-too/; Andrew Strickler, *Kopf Twitter Flap Shows #MeToo Reform Must Be Inclusive*, LAW360 (July 25, 2018, 8:58 PM), https://www.law360.com/articles/1066968/kopf-twitter-flap-shows-metoo-reform-must-be-inclusive; Joe Patrice, *Outspoken Federal Judge Launches Amazingly Dumb Twitter Tirade*, ABOVE THE LAW (July 24, 2018, 12:20 PM), https://abovethelaw.com/2018/07/outspoken-federal-judge-launches-amazingly-dumb-twitter-tirade/; Max Mitchell, *Judge Who Stirred Controversy With Tweet Unlikely to Face Discipline, Experts Say*, LAW.COM (July 23, 2018, 5:31 AM), https://www.law.com/2018/07/23/judge-who-stirred-controversy-with-tweet-unlikely-to-face-discipline-experts-say/; Emily Nitcher, *Outspoken Nebraska Judge Draws Criticism for Tweets About Harassment*, OMAHA WORLD-HERALD (July 27, 2018), https://www.omaha.com/news/politics/outspoken-nebraska-judge-draws-criticism-for-tweets-about-harassment/article_d3819308-625e-5b77-941d-b42d587bc7f9.html.

That night, I emailed Jim Duff, the Director of the Administrative Office of the U.S. Courts, to let him know about the judge's actions, and I linked to one of the judge's tweets. Disappointingly, I never received a response email. Early the next week, I became aware that the Eighth Circuit knew about the judge's actions and were discussing them, but no one from the court ever reached out to me to discuss the incident or to solicit information about whether or how I was impacted (professionally or personally) by the judge's actions. I do not know whether any investigation ever took place—and that is by design. As my colleague Kendall Turner and I discussed in our testimony before the Judicial Conference,[5] the federal judiciary treats judicial misconduct complaints that are "identified" by a judge differently than judicial misconduct complaints that are "filed" by a complainant. "Filed" complaints are subject to a formal review and adjudication process, while "identified" complaints do not require any formal review process—to the contrary, beginning a formal review process is a last resort, to be used only where "there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible."[6] If the formal review process is not initiated, there does not appear to be any disclosure required about the potential misconduct identified, any requirement that the chief judge's decision be made public, or any requirement that the Judicial Council or the Judicial Conference receive any information about the potential misconduct.

One might reasonably ask why I did not file an official complaint. The answer to that is two-fold. First, the point of filing a complaint is to make the judiciary aware of misconduct. In this instance, I had already informed Mr. Duff about it, and I knew that the Eighth Circuit was also aware of it. Second, to be candid, I feared retaliation. As an appellate lawyer, I practice in most federal courts of appeals, and my firm practices in all of them. I had already been retaliated against by one judge within the Eighth Circuit for committing the transgression of working in partnership with the judiciary, and there seemed to me to be no upside to filing a formal complaint about an incident that the judiciary already knew about. Doing so could have adversely impacted my effectiveness as an advocate and my ability to generate business for my practice—something that is absolutely critical for a rising appellate attorney.

This was an isolated incident involving a single judge that I do not expect to see repeated. But I think it exemplifies the need for continued systemic change. The judiciary's failure to take any public action about this very public incident—indeed, to not even contact me about it—demonstrates that much work has yet to be done. If, even after the Working Group issued its Report, the judiciary did not properly handle an incident that involved a public advocate on these issues who had testified before the Senate just six weeks before, I can understand why there may be a lack of public confidence that meaningful reforms have actually been implemented effectively. And if, despite the judiciary's reassurances to our colleagues and me that there is uniform support among judges for reform, a sitting judge felt comfortable crudely attacking us in public, I can understand why there may be skepticism that judiciary employees can report harassment or misconduct without fear of retaliation.

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[5] http://clerksforaccountability.org/docs/2018-10-31-lcwa-written-testimony-jcus-hearing.pdf (pp. 8-9)
[6] Rules for Judicial-Conduct and Judicial-Disability Proceedings § 320, at p. 14 (Commentary on Rule 5), https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019_0.pdf.

To be clear, I think that key reforms have been developed, and I have interacted with countless judges who seem as committed to addressing this issue as I am. I applaud the many circuits, district courts, and state courts that have work proactively toward eradicating sexual harassment in the federal judiciary. But I don't think anyone should be taking a victory lap quite yet—in the federal judiciary or in the legal profession more generally. There is still much work to be done, and I hope to be able to continue doing that work collaboratively with state and federal judiciaries in the future.[7]

Respectfully,

Jaime A. Santos

[7] As my colleague, Ms. Shah, may testify, we have not been involved with the Federal Working Group since it issued its Report on June 1, 2018. Although the Chief Justice of the United States directed the Working Group to continue its work, my colleagues and I have not been invited back to meet with the Working Group since my Senate testimony. On several occasions, I have reached out to members of the Working Group to express our interest in continuing to remain engaged, and I continue to hope that we will have the opportunity to do so in the future.

To: Subcomittee on Courts, Intellectual Property, and the Internet
From: Sejal Singh on behalf of People's Parity Project
Date: February 12, 2020
Re: Hearing on Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct

PEOPLE'S PARITY PROJECT

Chairman Johnson, Ranking Member Roby, and members of this Subcommittee, thank you for the opportunity to submit written testimony today. The following testimony is respectfully submitted by the members of People's Parity Project (PPP). PPP is a national organization of law students organizing to end harassment and discrimination in the legal profession, including chapters at Harvard Law School, Yale Law School, NYU School of Law, Columbia Law School, Georgetown University Law Center, and the University of Michigan Law School. We represent current students across the country deeply concerned that they or their peers may face sexual or race-based harassment in clerkships, and committed to ensuring that the judiciary is an equitable, safe workplace.

Harassment is pervasive in American workplaces and the judiciary is no exception. In December 2017, a group of former clerks came forward to confirm the open secret that Ninth Circuit Judge Alex Kozinski subjected employees to sex-based harassment and other forms of abuse for years.[1] Although Kozinski's harassment was widely known—and sometimes even occurred in public, in front of multiple eyewitnesses—no one intervened. Since then, students, clerks and our partners have urged the Judiciary to bring the judiciary's procedures for reporting and responding to harassment and discrimination in line with basic best practices. The Judicial Conference committees on Codes of Conduct and Judicial Conduct and Disability has adopted some valuable improvements to the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

But the Judiciary has yet to adopt clear best practices to address barriers that judicial employees, particularly clerks, will face in reporting and resolving misconduct, provide resources and accommodations to clerks who come forward, or even to fully understand the scope of the problem.

We submit this testimony in order to ask this Committee to consider certain amendments to the Judicial Conduct and Disability Act. Sexual harassment is highly under-reported across the nation. According to a meta-analysis of studies on sexual harassment, less than a quarter of people who have been harassed at work file formal sexual harassment complaints with their employer, often because they fear retaliation, indifference, or organizational inaction.[2] But even in this context, the judiciary stands out: of 1,300 misconduct claims filed under the Judicial

[1] Matt Zapotesky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct,* WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.c0d92507a342.

[2] Lilila M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review, in Review* THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR, 469, 484 (Julian Barling & Cary L. Cooper, eds., 2008), https://lsa.umich.edu/psych/lilia-cortina-lab/Cortina&Berdahl.2008.pdf.

Conduct and Disability Act rules in 2016, not a single one was filed by law clerks.[3] We believe that the Judiciary's zero percent reporting rate highlights the inadequacies of the judiciary's limited system for reporting complaints, judicial clerks acute fear of retaliation should they come forward, and a lack of public trust that complaints of discrimination will be handled fairly and effectively. We respectfully urge you to consider the following suggestions:

- Conduct a national climate survey so that the judiciary can accurate measure the extent and nature of harassment within the institution.
- Establish a National Reporting Avenue that requires district and circuit courts to prove anonymized reports of both formal and informal claims to the Office of Judicial Integrity.
- Enhance accountability so that review of information is available outside the judiciary, including to potential clerks.

We believe that these three key changes would encourage reporting and foster a more equitable workplace for all going forward.

Conduct a Climate Survey:

In order to effectively address patterns of harassment and violence within the judiciary, the Judicial Conference should launch a climate survey—asking current and former law clerks to anonymously provide information about their experiences with harassment while working for the federal judiciary. Climate surveys are a widely recognized best practice for organizations seeking to address harassment and violence.[4] Climate surveys allow organizations to gather information about the extent and nature of harassment within a particular institution. Because harassment and violence do not look the same in every institution, climate surveys are essential to understanding the unique needs of an institution and to crafting a tailored response.

Effective climate surveys include questions assessing whether an employee has experienced or witnessed harassment; broadly, the form of such harassment; the role of the perpetrator vis a vis the victim; the employee's knowledge of reporting mechanisms, resources, and definitions of harassment; the cost and impact of harassment on victims; community attitudes towards harassment; and perceptions of the institution's ability to address harassment.

Climate surveys ensure that information gathering is systematic, transparent, and comprehensive, rather than reliant solely on informal methods such as individual outreach or haphazard anecdotes. Systematizing information gathering helps to minimize the effect of biases among those investigating and increases public confidence in the process. Because climate surveys are anonymous and non-identifying, those surveyed can honestly respond without fear of retaliation, providing more candid and thorough information on the scope and nature of the problem.

The Federal Judiciary Workplace Conduct Working Group ("Working Group") has already acknowledged that harassment and misconduct within the judiciary is "not limited to a few

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[3] FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 19 (2018), http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf.

[4] EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE, *supra* note 34 at 69.

isolated instances."[5] Though some informal, non-systematic information gathering has already been done, without a full and accurate picture of the prevalence and nature of sexual harassment, the judiciary will be unable to effectively combat it. The U.S. Equal Employment Opportunity Commission (EEOC) estimates that approximately 75 percent of workplace harassment incidents go unreported;[6] this figure may well be even higher within the judiciary, because of the immense power and prominence of judges, the strong norms of confidentiality, and the judiciary's historically opaque reporting process.[7] Because formal reports do not provide a complete picture of harassment and discrimination, the EEOC recommends that employers use anonymous climate surveys as a tool measuring the prevalence of harassment and other discriminatory behaviors and gathering other key data on attitudes and perceptions.[8]

In implementing a climate survey, the judiciary would be in line with many large institutions, including others within the federal government. Climate surveys have been widely implemented by educational institutions, including many of the same universities providing the greatest number of federal judicial clerks such as Yale, Harvard, and peer institutions.[9] Within the military, an institution that has been plagued by sexual harassment, assault, and underreporting, climate surveys are administered routinely.[10] Many of the same problems of secrecy, power, and the importance of reputation that are pervasive within universities and the military are also prevalent in the federal judiciary. Climate surveys work to counteract these dynamics by signaling that combatting harassment and assault is a priority among leadership and by ensuring participants' anonymity.

To achieve these benefits, however, a climate survey of current and former law clerks must be carefully constructed and implemented. The judiciary should commission an independent, expert provider to develop a standardized survey instrument designed to collect accurate, complete data about harassment and other workplace conditions. The climate survey should have verified participant access and comply with best practices identified by social science for measuring harassment and discrimination. Alumni should have the option of identifying the circuit within which the harassing conduct occurred, which would help the judiciary identify potential patterns of discrimination and provide targeted intervention where needed.

At this early stage of the efforts to address harassment and violence within the federal judiciary, a climate survey is a crucial step. A climate survey is an essential information-gathering tool, providing data on the extent and nature of harassment. Without specific knowledge of how,

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[5] *See* FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., *supra* note 3, at 56.
[6] EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE, *supra* note 34 at 9.
[7] Debra Cassens Weiss, *Revision to federal law clerk handbook addresses sex harassment complaints*, ABA JOURNAL, (Dec. 19, 2017, 11:56 AM), http://www.abajournal.com/news/article/revision_to_federal_law_clerk_handbook_addresses_sex_harassment_complaints.
[8] EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE, *supra* note 34 at 43.
[9] *See* OFFICE OF THE PROVOST, YALE REPORT ON THE AAU CAMPUS CLIMATE SURVEY (2015), https://provost.yale.edu/title-ix/yale-report-aau-campus-climate-survey.
[10] *See* ASS'N OF AM. UNIVS., AAU CLIMATE SURVEY ON ASSAULT AND SEXUAL MISCONDUCT (2015), https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015; *see, e.g.*, U.S. ARMY RESEARCH INST. FOR THE BEHAVIORAL AND SOC. SCIS., MILITARY COMMAND CLIMATE SURVEY, http://www.belvoir.army.mil/climate_survey/military_survey.asp.

when, and where harassment is taking place within the federal judiciary, solutions will be improperly tailored to the problem and, ultimately, ineffective.

Establishing a National Reporting Avenue

To encourage accurate reporting of workplace misconduct going forward, we strongly encourage the committees to create an alternative centralized, national reporting avenue for all judicial employees, housed in the newly created Office of Judicial Integrity.

A national reporting avenue would lower barriers to reporting harassment by alleviating actual and perceived conflicts of interest involved in reporting to a chief judge. While many judicial employees may feel comfortable reporting discriminatory conduct to a chief judge, many others may be uncomfortable doing so because they may work in close proximity to the chief judge (putting potential complainants at a heightened risk of retaliation) or because chief judges may have close ties to a potential subject judge. The office could be modeled after the Ninth Circuit's newly created office for a Director of Workplace Relations, who will oversee workplace issues, facilitate anti-discrimination training, and receive complaints.[11] Similar offices in each circuit could work in concert with a national reporting office, sharing information between branches to ensure consistent responses to harassment. Moreover, judicial employees may be more comfortable seeking advice and assistance regarding informal resolutions, accommodations, or reporting channels from a national office with a degree of separation from the circuit in which they work and the judge who would potentially be the subject of a complaint.

A national reporting avenue could also foster consistent responses to reports of discrimination, alleviating concerns that responses to sexual harassment will improperly vary from circuit to circuit. A centralized office could also create a standardized system to receive informal reports from a wide range of stakeholders, including judicial employees who experience discrimination, witnesses, and law schools. Because of the immense risk of retaliation, law clerks, like all employees, are more likely to informally report harassment or seek accommodations than to file a formal complaint. An independent, national office can track and aggregate informal reports, allowing the office to identify potential patterns and practices of discrimination in a given circuit or chamber and, where appropriate, to either identify a complaint or to informally intervene. For these reasons, we strongly urge the judiciary to create such a reporting channel.

Accountability Mechanisms

It is important that accountability mechanisms are in place so that clerks, other judicial employees, and other stakeholders know that reports of judicial misconduct will receive prompt and appropriate responses.[12] The judiciary must have mechanisms to promote transparency so that clerks can make safe and informed decisions when accepting a clerkship interview or offer.

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[11] *Id.* at 37.

[12] *See, e.g.*, KEY FINDINGS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2017), https://www.nsvrc.org/sites/default/files/publications_nsvrc_research-translation_key-findings-select-task-force-study-harassment-in-the-workplace.pdf (explaining that "the extent of non-reporting [of workplace sexual harassment] is striking" and tying high levels of non-reporting to fears of "organizational indifference or trivialization").

We recognize that judicial accountability mechanisms raise concerns regarding judicial independence; while we respect the gravity of these concerns, they are beyond the scope of this testimony. The hiring and treatment of clerks is an administrative function not entitled to absolute immunity.[13] The Supreme Court has recognized that the same privilege which protects adjudicatory decisions does not insulate members of the judiciary from suit by employees, for example.[14] Increasing accountability and transparency regarding the treatment of judicial clerks will not threaten judicial independence.

Overall, we are primarily concerned about limiting review of complaints to members of the judiciary. The power of inquiry is limited to the chief judge, raising concerns about conflicts of interest. The judiciary fosters close relationships among its members that may prevent the appropriate review of a misconduct allegation.

First, we suggest the creation of an independent, national body to receive and review complaints, such as an auditor general or ombudsman. The independent committee may either receive the initial complaint and carry out the initial inquiry into judicial misconduct or annually review the decisions of the special committee to determine whether allegations of misconduct received fair treatment. Independent review can help adjust for imbalances in power between parties, such as that between a judge and her clerks. We recommend, above, that this take the form of a national reporting channel, possibly housed in the newly created Office of Judicial Integrity.[15]

Second, broadened review mechanisms would also improve accountability in the complaint process. The JCUS should consider avenues for improving transparency such as providing annual reports to law schools, completing anonymous exit interviews with judicial clerks, and instituting a climate survey as described above. Such broad reforms will help transform the culture surrounding reports of judicial misconduct. Moreover, they will provide schools and clerkships applicants with the information they need to make decisions that ensure their safety as they apply for clerkships and become clerks.

The judiciary can better assure accountability among its members if they better support transparency, neutral review, and an improved balance of power. Without these accountability mechanisms, the JCUS risks failing its clerks and ingraining a culture of harassment and sexual misconduct.

We thank the Committees for their work on this critical issue and for the opportunity to present our recommendations.

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[13] *See Forrester v. White*, 484 U.S. 219, 229–30 (1988).
[14] *Id.*
[15] *See infra* at 11-12.

Mr. JOHNSON of Georgia. Without objection, I will now recognize myself for an opening statement.

Good morning and welcome to today's hearing on Protecting Federal Judiciary Employees From Sexual Harassment, Discrimination, and Other Workplace Misconduct. So that we can begin this hearing in earnest, I will submit my full opening remarks for the record and limit myself to just a few words here.

The more than 30,000 women and men who work for our Federal courts have a right to a workplace free from sexual harassment, discrimination, isolation, and retaliation. And yet, the laws that protect nearly every civilian employee in this country, public or private, from discrimination, harassment, and retaliation, those rules do not protect the employees of the judicial branch. Against this backdrop, the revelations in late 2017 of persistent unreported sexual harassment in certain judicial chambers took on a special urgency. The women who came forward warned that it would be a mistake to treat this as an isolated problem.

To the judiciary's credit, it took action. Chief Justice Roberts formed a working group to evaluate the judiciary's policies and procedures governing workplace misconduct. The questions I have and the overarching purpose of this hearing is whether the judiciary's efforts to create a safe, respectful, and diverse and inclusive workplace are actually working. I want to know what more Congress and the courts need to do.

To help us in this important task, I am grateful to have such an extraordinary panel of witnesses, and I thank you all for being here.

Ms. Warren, I especially want to thank you for coming forward. Your courage to be here today to testify publicly about both the harassment you suffered and how the system failed you when you tried to report that harassment is—that is a critical aspect of promoting meaningful and lasting change to how the judiciary responds to these issues.

Thanks to you, law clerks and other judiciary employees who may be in similar situations right now know that they are not alone, and if they want to share their concerns, I am here to listen.

I would also like to note that we invited representatives from the Judicial Conference to attend today's hearing, and I am disappointed that they chose not to be here. Their direct and continued engagement is critical for further progress on this issue, and it is my hope that they will send a representative to appear before the subcommittee in the near future to engage on this important issue.

Finally, I think it is fitting that this hearing happens to be on the same day as the House of Representatives voting on the passage of a bill to make possible ratification of the Equal Rights Amendment. It is a reminder that meaningful change is not easy, it does not happen overnight, but with commitment and dedication, it is achievable.

It is my hope that for the judiciary, we are taking one step further today with this hearing. In speaking for myself, my commitment to ensuring meaningful reform for the women and men who work at our Federal courts shall certainly not end with the final gavel today.

It is now my pleasure to recognize the ranking member of the subcommittee, the gentlewoman from Alabama, Mrs. Roby, for her opening statement.

Mrs. ROBY. Thank you, Chairman.

And good morning to our witnesses, and I just want to echo the chairman's words, and I thank you very much for your willingness to be here with us today.

No matter where you work, everyone should feel comfortable in their workplace. Absolutely no one should face sexual harassment, or inappropriate conduct. All employees should have a fostering work environment and, if not, they should have an efficient and effective mechanisms for correcting any problems.

In December of 2017, several women who had previously served as law clerks in the United States Court of Appeals for the Ninth Circuit stated that Judge Alex Kozinski had sexually harassed and had participated in other workplace misconduct. And shortly after those accusations surfaced, Judge Kozinski resigned.

Following media reports on the allegations lodged against Judge Kozinski and his subsequent retirement, Chief Justice Roberts directed that the Administrative Office of the U.S. Courts, also known as the AO, to establish the Federal Judiciary Workplace Conduct Working Group to investigate and establish new mechanisms to prevent inappropriate workplace conduct.

The working group issued a report in June of 2018, finding that inappropriate conduct in the Federal judiciary is, quote, "not pervasive but also," quote, "not limited to few isolated instances" and made recommendations for further action.

The working group made three recommendations: One, clarify the judiciary's codes and standards of workplace behavior to more aggressively prohibit all forms of harassment; two, improve reporting complaint procedures; and, three, add additional educational and training programs.

The Judicial Conference approved extensive revisions to the judicial codes and rules of conduct in March of 2019. The changes made include improvements to the code of conduct for U.S. judges, code of conduct for judicial employees, and the Judicial Conduct and Disability Act rules.

The changes highlighted the obligations of all court employees to act with civility, and avoid all forms of harassment and abuse, subject to having their conduct reviewed by the District Court, Circuit Court, or the Judicial Conference, and having action taken against them, should they cross the line.

The AO also established a new Office of Judicial Integrity, OJI, intended as a resource where employees can confidentially seek advice and guidance for filing a complaint under the relevant circuit employment dispute resolution plan, or anonymously report harassment.

On September 17, 2019, the Judicial Conference adopted a new model Employment Dispute Resolution Plan to simplify and expand the options available to employees to address mistreatment.

The Judicial Conference also made improvements to the codes and rules governing courthouse conduct by including provisions to better define misconduct. They also made clear that confidentiality

obligations of employees should never be an obstacle to reporting judicial misconduct or disability.

It is encouraging that Chief Justice Roberts impaneled this working group, and that there have been several reforms implemented. However, we must ensure that these changes are working as intended, and are protecting judicial employees. It is imperative, it is imperative, that we get this right.

When this hearing was originally envisioned, it was supposed to be an opportunity for us to hear about the recommendations that the Federal Judiciary Workplace Conduct Working Group, to hear from them and the steps that the judiciary has taken since the working group's report was issued in June of 2018.

The director of the AO, Jim Duff, had agreed to testify on the changes the judiciary has implemented from that working group's recommendations. However, just hours after this hearing was announced, there were members of this committee that sent a letter to Director Duff, regarding an order issued by the 10th circuit judicial counsel on September 30, 2019, and this order reprimanded District Judge Carlos Murguia for having engaged in serious judicial misconduct. This letter completely changed the focus of the hearing.

The AO communicated to this committee multiple times before the letter was sent that the order issued by the 10th Circuit is currently under review by the Judicial Conduct and Disability Committee and that they are legally unable to comment on that review.

Therefore, in a February 7th letter to this committee, Director Duff stated, quote, "The likely result, unfortunately, is that the Judge Murguia matter will now displace or overshadow any discussion of more general reforms we had planned to review with the committee," end quote. He also let the committee know he could no longer testify, stating, "I note that under existing rules and law, I could not discuss any issues involving the Judge Murguia matter in the hearing." He continued to say, "Furthermore, discussion of the Murguia matter at the hearing, express or implied, could raise due process concerns, might violate ethical and legal requirements for confidentiality, and could seriously compromise our procedures."

So I would ask unanimous consent that Director Duff's letter be entered into the record.

Let me be clear. No one should be sexually harassed or abused in the workplace, and employees of the judicial branch should be held to a very high standard. Every member of the judiciary should be protected from workplace misconduct.

Again, I just want to say to our witnesses, thank you so very much for being here today. I look forward to hearing your testimony about changes in the judiciary following the working group's findings and any suggestions that any of you may have for future improvements.

With this, I yield back.

Mr. JOHNSON of Georgia. Thank you.

I will now introduce our witnesses. Olivia Warren is a staff attorney at The Center For Death Penalty Litigation in Durham, North Carolina. She is a former law clerk to Judge Ketanji Brown Jackson of the United States District Court for the District of Columbia,

and the late Judge Steven Reinhardt of the United States Court of Appeals for the Ninth Circuit.

Ms. Warren is a 2017 cum laude graduate of Harvard University Law School. She received her B.F.A. in dance, magna cum laude from Marymount Manhattan College in 2011. Welcome, ma'am.

Next we have Ms. Deeva Shah, and Mr. Swalwell will introduce his constituent.

Mr. SWALWELL. I thank the chairman.

I thank each of you, but I want to acknowledge Ms. Deeva Shah is a trial attorney at Keker, Van Nest & Peters in San Francisco. Ms. Shaw earned her J.D. from the University of Michigan Law School. After law school, Ms. Shaw served as a judicial law clerk to Judge Raymond Fisher of the U.S. Court of Appeals for the Ninth Circuit, and to Judge Stephen Wilson of the U.S. District Court for the Central District of California. Ms. Shaw is a co-founder of Law Clerks For Workplace Accountability, whose mission is to ensure that the Federal judiciary provides a safe workplace environment, free of harassment for all employees.

And Ms. Shaw has recently moved to Castro Valley, California, which I told her is Rachel Maddow's hometown and we have all the expectations that you are going to do us proud in the East Bay. So welcome, Ms. Shaw.

Mr. JOHNSON of Georgia. Next we have Dahlia Lithwick. Dahlia Lithwick is a senior editor at Slate, and in that capacity, writes the Supreme Court dispatches and jurisprudence columns, and hosts the biweekly podcast, Amicus. Her work has appeared in numerous national publications, and she is the recipient of several prestigious awards for her work.

Ms. Lithwick has previously testified before Congress about access to justice in the era of the Roberts court. Ms. Lithwick earned her B.A. from Yale University, and her J.D. degree from Stanford University. Welcome.

And last but not least, Ms. Chai Feldblum. Ms. Feldblum is a partner and a director of Workplace Culture Consulting at the law firm of Morgan, Lewis & Bockius, LLP. Ms. Feldblum previously served as a commissioner of the Equal Employment Opportunity Commission from 2010 to 2019. Prior to her appointment to the EEOC in 2010, Ms. Feldblum was a noted scholar on employment discrimination law, who spent nearly two decades at Georgetown University Law Center. She helped draft the Americans with Disabilities Act of 1990 which bars discrimination against workers based on disabilities and medical issues, and State and Federal proposals to extend antidiscrimination protections to LGBT people. Welcome, Ms. Feldblum.

Before proceeding with testimony, I hereby remind the witnesses that all of your written and oral statements made to the subcommittee in connection with this hearing are subject to penalties of perjury pursuant to 18 U.S.C. Section 1001, which may result in the imposition of a fine or imprisonment of up to 5 years or both.

Please note that your written statements will be entered into the record in its entirety.

Ms. Warren, I ask you to summarize your testimony in 12 minutes. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you have

1 minute to conclude your testimony. When the light turns red, it signals that your 12 minutes have expired.

Ms. Shaw, Ms. Lithwick, and Ms. Feldblum, I ask that you summarize your testimony in 5 minutes.

Ms. Warren, you may begin.

STATEMENTS OF OLIVIA WARREN, DURHAM, NORTH CAROLINA; DEEVA SHAH, FOUNDER, LAW CLERKS FOR WORKPLACE ACCOUNTABILITY, KEKER, VAN NEST & PETERS LLP; DAHLIA LITHWICK, SENIOR LEGAL CORRESPONDENT, SLATE; AND CHAI FELDBLUM, PARTNER, MORGAN, LEWIS & BOCKIUS LLP.

STATEMENT OF OLIVIA WARREN

Ms. WARREN. Chairman Johnson, Ranking Member Roby, members of the subcommittee, good morning.

My name is Olivia Warren, and I appreciate the opportunity to testify at this subcommittee hearing on protecting Federal judiciary employees from sexual harassment.

As an attorney, I represent people who have been sentenced to death. Society has condemned and forgotten about the people who trust me with their stories and their lives. I begin here because I hope that it illustrates how opposed I am to the condemnation of any human being. I believe, in my core, that people are deeply complex, that most of us are doing the best we can most of the time, and that all people have the capacity to simultaneously make good and bad choices.

I saw Judge Stephen Reinhardt this way. He was a complicated man. This was known, understood, and accepted by those who loved him. I saw the good in him, a brilliant jurist and a courageous champion of causes he believed in. I saw the bad in him, a judge who demeaned his employees, a man who demeaned women, and a man who sexually harassed me.

I am not here today to condemn Judge Reinhardt. I am here to explain the sexual harassment that I experienced while working for him, and how I struggled to find the right way to report this misconduct. To those outside the profession, the prestige and status of a Federal judicial clerkship may be difficult to fathom. My own parents were momentarily disappointed that, after graduating from Harvard Law School, I decided to take a job as a clerk, which they equated with being an administrative assistant.

But as any law school dean will tell you, a Federal clerkship is considered the gateway to many of the most successful and prestigious legal careers, and anyone who wants to clerk and is privileged enough to have the opportunity to do so, is expected and advised to accept it without question.

That was the case for me. After my first semester, I was told by mentors at Harvard that I should prioritize landing a clerkship, and promised that they would help me in that effort. A Harvard faculty member who was a former Judge Reinhardt clerk, in fact, helped me get the job with the judge. Given my desire to become a public defender, and the judge's deep commitment to public interests, it seemed like the perfect fit. It was not.

On my first day, I was confronted with a drawing of a sine curve taped above the computer in my office to which two dots had been added by the judge so that the curves resembled breasts. The judge himself asked me whether or not the drawing was, quote, "accurate," with a look that indicated that the question was whether or not it resembled my own breasts.

This was only the beginning of what felt like an endless stream of comments about my physical appearance. It was, in fact, one of the few neutral comments the judge ever made about my body. Mainly, he suggested I was horrifically unattractive. He questioned whether my husband could possibly be real, given how unlikely it seemed to him that any man could ever be attracted to me. He speculated that if my husband, in fact, existed, he was doubtless a, quote, "wimp or gay."

On more than one occasion, the judge suggested with words and gestures that my husband likely did not have a penis, but that if he did, he certainly would not be able to sustain an erection while looking at me, making it clear that he did not believe my marriage had been consummated.

These kinds of comments were not rare. They occurred at least weekly through the first few months of my clerkship. Eventually, they became daily. The precipitating event for that change was the public allegations of sexual harassment against Judge Reinhardt's good friend, former Judge Alex Kozinski. Judge Reinhardt had already been obsessed with discussing and deriding the #Me Too Movement. He told me that women were liars who could not be trusted, and he surmised the allegations of sexual harassment that came out against people like Louis C.K. and Harvey Weinstein were made by women who had initially wanted it and then changed their minds.

Against this backdrop, the allegations about his friend, Judge Kozinski, lit a fire that consumed the chambers. The judge railed that he would never again hire female law clerks because women could not be trusted. He ruminated that judges were the real victims of these feminists.

I tried to humanize the public allegations by telling Judge Reinhardt about harassment I had personally experienced, my coworkers placing a bet behind my back as to whether I would sleep with my male supervisor, a man chasing me down a street in New York City while I screamed for help.

Judge Reinhardt became visibly enraged. He told me to stop talking, and then he explained to me that I have never been sexually harassed, because no man has ever been sexually attracted to me.

At the time, I did little to address this horrible situation beyond confiding in my husband and some close friends. I was scared, scared of offending the judge and alienating his powerful network of clerks, scared of ending my legal career before it had even begun, scared that the judge would exact revenge on me the same way he had threatened to exact revenge on Judge Kozinski's accusers.

It is these systemic conditions within the profession of law that render the problem of sexual harassment by the judiciary so intractable. The judge himself had life tenure, as well as the unflinching support of his colleagues, the same uncritical and unquestioning

support he offered Judge Kozinski. And the judge's former law clerks, legal luminaries in the field of public interest law, including law school faculty, politicians, and prominent members of the civil rights and criminal defense bars, were reflexively loyal and protective of the judge, despite the fact that some of the profane aspects of life in his chambers were fairly well-known.

My time in chambers with the judge ended abruptly with his death in March of 2018. Like Judge Reinhardt, I am a human with complexity. I have never wept as hard as I did at his memorial service. The juxtaposition of my anger and my grief and my shame was impossible to bear. The harassment had ceased, and the urgency of the need for redress had faded because of the judge's death. Yet, I knew the structures in place to protect law clerks were broken, and I feared that the allegations against Judge Kozinski were incorrectly understood to be an isolated incident limited to a single jurist.

I wanted to report what had happened to me to minimize the chance that something similar could happen to someone else in my position. I reached out first to my alma matter. I believed that Harvard Law School should care about the harmful experience of one of its students, and I hoped that my experience would lead the school to scrutinize potential clerkships more carefully.

It took a close friend and mentor of mine who is a tenured Harvard professor several weeks to get me a meeting with the administration including the dean. I told them much of what I have told you today. Nobody has communicated to me since that meeting what, if any, steps Harvard has taken to address the issues I raised.

I worked up the courage to report my harassment to what I expected would be a less friendly audience, the judiciary. I was nervous about revealing my or Judge Reinhardt's identity initially. So I provided the judicial integrity officer with a hypothetical version of my experience, and asked what the reporting obligations of the judicial integrity officer and other members of the judiciary who I could report to would be.

The officer wrote me a letter response, essentially answering none of my questions. I have provided that letter to the committee.

My primary concern was gaining an assurance that my information would be treated confidentially, but no one could give me a straight answer as to whether, and under what circumstances, it would remain confidential.

The officer referred me to the judges on the Committee on Codes of Conduct in the first instance. But surely, there must be some better system than one that requires abused clerks to report their abuse to the courts or the friends and the confidants of their abusers.

I am able to sit here today and tell you about my experience because of a combination of privilege and fortune. My fear of attacks on my credibility is lessened by my demographics and credentials. I am an Ivy League-educated white woman. My fear of retaliation is lessened because Judge Reinhardt is no longer on the bench. My fear of reputational damage is manageable because I am currently working in a job that I love, and I have the full support of my employer and colleagues. My courage is bolstered by the brave women

who have come forward before me, and I enjoy the support of incredible personal and professional networks.

But many people who suffer sexual harassment by members of the judiciary are not so lucky, and it is those people who are my real audience today. To them, I say: Know that what you are going through is not your fault. Know that your feelings of powerlessness are not irrational. And know that if the system feels stacked against you, it is because right now, it is.

Thank you.

[The statement of Ms. Warren follows:]

Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct

Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet

Testimony of Olivia Warren

Thursday, February 13, 2020

Thank you Chairman Johnson, Ranking Member Roby, and members of this Subcommittee for the opportunity to testify today. My name is Olivia Warren, and I am a former law clerk to Judge Ketanji Brown Jackson, of the United States District Court for the District of Columbia, and the late Judge Stephen Reinhardt, who sat on the United States Court of Appeals for the Ninth Circuit. I currently work as a Staff Attorney at the Center for Death Penalty Litigation in Durham, North Carolina.

I am here today to describe to you the harassment that I personally experienced while clerking for the late Judge Reinhardt in 2017 and 2018, as well as to detail my efforts to report this harassment. Those efforts included my attempts to utilize alternative avenues for reporting and advice that the judiciary implemented following the issuance of the Federal Judiciary Workplace Conduct Working Group Report on June 1, 2018. As I will explain, the frustrations and obstacles I encountered in those efforts led me to make the difficult decision to testify today.

At the outset, I would like to emphasize that it is not my intention to destroy Judge Reinhardt's legacy, to erase his significant contributions to the law, or to condemn him. I was drawn to the practice of law by an interest in indigent defense work, and, especially as a capital defense attorney, I believe it is essential to see the enormous capacity for both good and bad in all people. I view Judge Reinhardt no differently. Moreover, I am very proud of the cases we handled and the opinions that the judge authored during my clerkship.

However, the harassment that I experienced shaped my view of both the judiciary and the law more generally. The harm and pain that sexual harassment causes, and the aggravation of that harm when victims have no recourse and feel they cannot say or do anything about it, has long-term costs to the profession. I hope that my testimony today will result in law clerks (both current and former) and judiciary employees feeling less silenced and more capable of seeking accountability and redress for any harassment or other misconduct they may have suffered.

I. Background

Before delving into my experience clerking for Judge Reinhardt, I would like to first provide some background about who I am and why I became a lawyer. I went to law school to pursue a career in indigent defense: I wanted to serve poor people who are accused of crimes. While at Harvard Law School, I remained committed to pursuing a

career in public interest and participated in a range of internship and volunteer opportunities that provided further exposure to the breadth of work in indigent defense.

During my first year of law school, I was strongly encouraged by many of my mentors to pursue a clerkship with a federal judge. This advice was echoed by every available source at Harvard. Beyond my mentors, the faculty as a whole and nearly all of my first-year classmates talked about clerkships as if they were the be-all and end-all for high-performing law students. This is because clerkships are viewed as singular opportunities within the legal profession to develop close relationships with judges, to gain first-hand experience with the judicial system as a young lawyer, and, through the connections to judges' former clerks, to develop a robust professional network that can open professional doors and lead to further opportunities.

Several of my mentors at Harvard guided and supported my efforts to secure a clerkship. After I had sent out several clerkship applications, a close mentor at Harvard (who was a former clerk to Judge Reinhardt) reached out to me to gauge my interest in clerking for Judge Reinhardt. I had read some of the judge's opinions and knew his reputation as a "liberal lion," which aligned with my desire to pursue a career in indigent defense. I interviewed with Judge Reinhardt in early July 2015, after I had concluded my first year of law school. He offered me a clerkship on the spot and I readily accepted. I was thrilled to begin my career with someone who had inspired so many clerks to long

careers in public service, and I was eager to develop my nascent legal skills with such an esteemed jurist.

I started my clerkship with Judge Reinhardt in late May 2017, shortly after graduating from Harvard Law School; Judge Reinhardt died on March 29, 2018, and my tenure on the Ninth Circuit formally concluded on June 1, 2018. I then served as a law clerk for Judge Ketanji Brown Jackson of the United States District Court for the District of Columbia from August 2018 until August 2019. This past fall, in October of 2019, I began working at the Center for Death Penalty Litigation where I represent clients in capital proceedings as a Staff Attorney. I mention the professional experiences that post-date my clerkship for Judge Reinhardt because they have been critical steps in my journey to being willing to testify today.

II. Harassment During Clerkship With Judge Reinhardt

Before starting my clerkship, I received guidance, including from former Reinhardt clerks, that signaled the upcoming year would be challenging. For instance, I was told that the clerkship would be an "intense" year, and one former Reinhardt clerk cautioned me to brace myself for "your grandfather's sexism." Even while preparing for my interview, I had heard that the judge preferred women to wear skirts. My mentor at Harvard who had helped me secure the clerkship also spoke to me about the utmost importance of never letting the judge down and said something along the lines of not to blink first in the chambers environment, emphasizing that Judge Reinhardt liked to keep

things fun. None of this fully prepared me for the profane atmosphere I entered when I began my clerkship.

I spent my first two days in chambers training alongside the law clerk whom I was replacing. On the first morning, I met with the outgoing clerk to be briefed on Judge Reinhardt's current caseload. During this meeting, I found it difficult to focus because there was a peculiar drawing taped over the computer, something I had not seen since middle school algebra classes. The drawing depicted a sine chart, which resembles two hills drawn on an x-axis. However, in this sine chart, someone had added two round dots to the top of the curves such that the chart resembled a woman's breasts. The clerk noticed me staring at the drawing and explained that he had sketched the sine chart to explain a concept to Judge Reinhardt, and the judge himself had added the nipples. The clerk laughed the incident off as a funny story about the judge, but I remember feeling a range of conflicting emotions that included—among others— shock and trepidation for the year to come.

Two days later, Judge Reinhardt referenced the drawing when he came to my office to check in on me after my first official day as a law clerk. As he was leaving my office, he asked me if I had noticed the drawing and whether I liked it. In addition to emphasizing how proud he was of the nipples he had drawn on the chart and confirming that he and the clerk had made it, he asked me a question about whether or not it was

"accurate." Based on his tone and demeanor, I understood his question to be asking whether or not the drawing looked like my breasts.

I quickly learned how often the judge commented in detail on the appearance of women. During my first few weeks at the clerkship, Judge Reinhardt's chambers was in the midst of hiring new clerks for future terms. The Judge brought to my office photos that had been printed from the social media accounts of two female applicants who were scheduled to come to chambers for interviews. Judge Reinhardt instructed me to look at the photos and asked me to assess which candidate was more attractive and which candidate had nicer or longer legs. He then asked me which would add more "value" to chambers based on the photos.

Early in my clerkship, I also learned about a shelf in the judge's office where he kept pictures of some of his female "pretty" clerks, many of which included Judge Reinhardt in the photo as well. Judge Reinhardt made it clear that photographs of male law clerks would not be placed on the shelf and that the shelf was special. Judge Reinhardt discussed the appearance of women directly, but he also had a regular euphemism: he used "short" and "tall" as code for "unattractive" and "attractive," respectively, when referring to different women—including describing women of the same height, standing next to one another, as short and tall. Sometimes these comments were used to describe people outside of chambers, and sometimes they were used to describe us, his current and former law clerks. Judge Reinhardt only contemplated the

attractiveness of women through the male gaze, and at times he used homophobic slurs: for example, a gay female clerk was repeatedly referred to by the judge as a "dykester," which he found funny.

All of that provides the context within which I experienced direct sexual harassment. Judge Reinhardt routinely and frequently made disparaging statements about my physical appearance, my views about feminism and women's rights, and my relationship with my husband (including our sexual relationship). Often, these remarks included expressing surprise that I even had a husband because I was not a woman who any man would be attracted to. In that vein, Judge Reinhardt often speculated that my husband must be a "wimp," or possibly gay. Judge Reinhardt would use both words and gestures to suggest that my "wimp" husband must either lack a penis, or not be able to get an erection in my presence. He implied that my marriage had not been consummated. I was subjected on a weekly, and sometimes daily, basis to these types of comments about my husband, our relationship, and my being a woman who no man would marry—which he attributed both to my being a feminist and to my physical appearance, including my "short" stature. Judge Reinhardt made these comments to me when we were alone, and also in front of other members of chambers at times.

The atmosphere in chambers worsened in late 2017 with the start of the Me Too movement, which became Judge Reinhardt's favorite topic of conversation. He frequently discussed and always cast doubt upon credible allegations of sexual

harassment. The doubts he expressed were sometimes based on his assessment of the attractiveness of the accuser, and sometimes based on his general incredulity that men could be harassing women. For example, Judge Reinhardt told me that the allegations of sexual harassment that came out against people like Louis CK and Harvey Weinstein were made by women who had initially "wanted it," and then changed their minds. Regarding Louis CK, he repeatedly asked me to explain to him why a man would want to show a woman his penis or masturbate in front of her. When I could not satisfy these kinds of questions about the alleged choices of men, Judge Reinhardt often responded by telling me that women were liars who could not be trusted. Sometimes, he read me emails that he exchanged with his friends about the Me Too movement that cast doubt on women raising sexual harassment and misconduct allegations. When I engaged in these discussions with him and would try to explain that sexual harassment was indeed a pervasive problem, he regularly replied with the same playbook I described above—that I did not understand sexual harassment because I was not attractive, that I did not understand men because I was a feminist, and that my husband was not a real man.

Another turning point in chambers occurred on December 8, 2017, when the *Washington Post* publicly reported on allegations about Judge Alex Kozinski's conduct. I was alarmed by Judge Reinhardt's fury at these allegations against his close friend. I was also concerned that this would prompt other people to raise similar complaints about Judge Reinhardt, even while I was still a clerk in chambers. Shortly after the first media

report, the judge again told me that women were not to be trusted and that he did not ever want to be alone in a room with a female law clerk again; he suggested that he would not hire any more female clerks or other female employees for these reasons. After he had made that statement, he would sometimes suggest when he and I were alone that he needed protection because I might sexually assault him.

In the aftermath of the initial press reports about Judge Kozinski, reading news about the allegations and disparaging Judge Kozinski's accusers became a regular focal point of our lunches and broader discussions with the judge, which often tended towards the graphic and profane. For example, immediately after Dahlia Lithwick published her piece describing her own experience with Judge Kozinski, Judge Reinhardt made us all read it. When it was clear that he was done reading the piece, he began the conversation by saying, "No one has ever ogled Dahlia Lithwick." Judge Reinhardt also repeatedly told me that he intended to publicly confront one of the women who accused Judge Kozinski at an event at UC-Irvine, with the intention of humiliating or silencing her. I later learned that when he met the woman at the event, he pointedly and publicly insulted her intellect.

I tried different ways to push back during these conversations, to no avail. On one occasion, I told the judge that I was disappointed that someone with his intellect and imagination could not grasp the pervasive and harmful nature of sexual harassment. He

screamed at me that I was not as smart as I thought I was—that I was "just a stupid little girl."

On another occasion, a colleague and I were talking to Judge Reinhardt about a case in his office when the judge became distracted and began talking about how women lied about harassment. In an effort to appeal to his humanity, I tried to describe instances when I personally had been harassed and how those incidents had harmed me. The anecdotes I recounted included: learning on my last day of an internship after college that there had been a bet among colleagues in the office about whether I would sleep with my male supervisor; being chased down York Avenue by a stranger while screaming until a cab driver stopped to help me; and working as a paralegal at a law firm when an intoxicated associate came by my cubicle one night, placed his arms over it, and blocked my exit until I picked up the phone and told him that I would dial 911 if he did not leave. I explained to the judge that I had not reported these incidents, but that they had still hurt and frightened me, and affected the way I moved through the world. Judge Reinhardt became enraged. He yelled at me to stop speaking, and said that none of what I had just said was true. He explained to me that I had never been sexually harassed because no one had ever been sexually attracted to me. He said that to the extent that I believed I was sexually harassed, it was because men wanted to silence me and used harassment to do so—which, he added, was within their rights to free speech.

Towards the end of the clerkship, a member of the judge's family experienced some significant health setbacks, and I was therefore asked to work with Judge Reinhardt from his home on several occasions. Close to midnight on one of the nights that I was working with the judge from his home, and after we had completed our substantive work, he read aloud portions of an email from the Ninth Circuit about the working group it had created on workplace conduct, which included some proposed reforms and protections for law clerks. I remember the judge reading through each reform and explaining to me why it was unnecessary. In this discussion, he also said that *he* was the one who should be afraid of being alone in his home with *me*.

I have not attempted here to recount every instance of sexual harassment that I experienced or witnessed while clerking for Judge Reinhardt. Indeed, after December 8, 2017, there may have been a day in which I was not harassed (whether by reference to my physicality, my intellectual capacity, my feminism, my gender identity, or my sexuality), but I cannot remember one after searching my memory.

III. Attempts to Report Misconduct

During my clerkship for Judge Reinhardt, I confided in my husband throughout the year as to what was happening. Later on, particularly after the allegations about Judge Kozinski broke in December 2017, I also confided in a few close friends and mentors.

I would like to briefly recount today my efforts to formally report the harassment that I experienced while clerking for Judge Reinhardt, including through the Office of

Judicial Integrity ("OJI")—one of the new independent resources that was created specifically "for employees to report and receive advice about workplace misconduct."[1] These failed efforts are what bring me here today: I might have chosen to keep private the pain I endured as a result of Judge Reinhardt's sexual harassment, but I could not justify keeping silent about the inadequacy of the procedures available to law clerks today to redress such sexual harassment if they experience it. Although I attempted to report the harassment after my clerkship had ended and the harassment had thus ceased, my experiences in attempting to report Judge Reinhardt's conduct highlight the challenges that clerks and judiciary employees still face today if they want to report harassment or other judicial misconduct.

There are systemic barriers to reporting harassment and misconduct by judges that are unique to the legal profession, and uniquely formidable in the context of the relationship between law clerk and judge. The consequences of miscalculating the risk of possibly offending a judge are fraught with a peril that does not dissipate with time and can hang over one's entire professional career. For a law clerk, at the precipice of his or her legal career, alienating a federal judge can spell doom for their life in the law. And it is not only the judge him or herself from whom retribution is feared. Judges have

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[1] Status Report from the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States (Sept. 17, 2019) p. 1–2, *available at* https://www.uscourts.gov/sites/default/files/working_group_status_report_to_jcus_september_2019_0.pdf.

networks of former law clerks to whom the judge's reputation is inextricably intertwined with their own: these former clerks have made their name, in part, by reference to the reputation of the judge for whom they clerked. This group therefore has reasons both devoted and selfish to want to protect the judge's reputation at all costs.

Judge Reinhardt's clerks are dazzling, particularly to a young lawyer committed to public service. The Reinhardt clerks are legal luminaries in the field of public interest law whose accomplishments befit having clerked for a liberal lion: law school faculty, politicians, and prominent members of the civil rights and criminal defense bars. I was terrified of offending them; I still am. I draw attention to this fact because it is yet another barrier to reporting harassment for law clerks—the possibility of immediate retaliation by the judge is supplemented by the possibility of long-term retaliation by those devoted to protecting his reputation and remaining in his good graces.

I do not intend here to make a general statement about all Reinhardt clerks, or about all former law clerks. But this context is relevant to my specific story because one of the first people outside of my husband in whom I confided anything at all was a former Reinhardt clerk. I called him on the day the allegations about Judge Kozinski broke. I confided my fear that similar stories could be published about Judge Reinhardt. He denied knowledge about any misconduct by Judge Reinhardt, and asked whether the judge had ever done anything to me. I told him that Judge Reinhardt had said some "horrible" things to me, but that I was okay. Although we continued communications,

this person never discussed the call with me again, nor did he ever follow up to inquire what horrible things Judge Reinhardt had said to me.

My clerkship for Judge Reinhardt ended abruptly with his death on March 29, 2018. It is too painful to fully describe my emotions that day. I have never cried as hard I did at the judge's memorial service. The juxtaposition of my anger and my sadness and my shame was impossible to bear.

After I left the Ninth Circuit, I became concerned that similar harassment might be occurring in other chambers across the country. Although Judge Reinhardt was dead and I did not want to initiate a backward-looking investigation, I felt that people far more experienced than me might be able to implement structural changes that could protect future clerks. I also feared that the allegations against Judge Kozinski were incorrectly understood to be an isolated incident limited to one jurist. I wanted to report what had happen to me to minimize the chance that something similar could happen to someone else in my position.

My first attempt to formally report the harassment occurred on August 1, 2018, when I met with several members of the Harvard Law School administration, including the Dean. A friend and mentor who is a tenured Harvard Law faculty member helped arrange the meeting and encouraged me to communicate my concerns so that more accurate information and better support could be provided to current and future students. During the meeting, I described my experience clerking for Judge Reinhardt

and the harassment to which I was subjected. I also shared my view that I thought there was a risk this was happening with other clerkships. I emphasized that students rarely hear about negative clerkship experiences for many of the systemic reasons that I have explained, and described how misled I felt by the institutional push to clerk. Nobody has communicated to me since that meeting what, if any, steps Harvard has taken to address the issues I raised.

Afterwards, I spent extensive time reading and conferring with different lawyers about the implications of new reporting policies and rules that were implemented in 2019 following recommendations from the Federal Judiciary Workplace Conduct Working Group.[2] But these rules did not appear to provide a truly confidential option to report harassment or misconduct and it was unclear to me what would happen if I proceeded with reporting through any of the avenues offered. At the time, I knew that I did not want to report Judge Reinhardt's harassment to the judges or other judiciary officials on the Ninth Circuit because it was very clear how beloved Judge Reinhardt was and I could not trust that they would receive the information confidentially or with an open mind. I considered reporting the harassment to judges who I thought might be sensitive to such

[2] *Id.* 3–4 (describing different measures the Judicial Conference of the United States, the Administrative Office of the U.S. Courts, the Courts, and the Federal Judicial Center adopted, including: "approv[ing] revisions to the Codes of Conduct for United States Judges and Codes of Conduct for Judicial Employees, as well as the JC&D Rules in March 2019 to state expressly that sexual and other discriminatory harassment, abusive conduct, and retaliation are cognizable misconduct, as is the failure to report misconduct to the chief district or chief circuit judge"; and "appoint[ing] Jill Langley to head the newly-created OJI and that office began actively providing confidential advice and guidance since her January 2019 appointment.")

concerns and the need for confidentiality, and who I had heard had been helpful to others going through this process. However, I could not find a way to do so confidentially.

In December 2018, while I was clerking in the District of Columbia, I attended a meeting that the D.C. Circuit held to discuss new policies and reporting procedures. It became clear during that meeting that the new policies and procedures were not fully formed. In fact, the Judicial Integrity Officer began the meeting by incorrectly suggesting that Title VII applied to the judiciary. In addition, the Office presented no clear analysis of what would happen if a law clerk followed the reporting procedures or the circumstances under which confidentiality would be available.

Eventually, I worked up the courage to approach the OJI, with the help of an advocate in this area, to try to utilize the new systems that had been implemented. My first contact with the OJI was a phone call with both the advocate and Jill Langley, the Judicial Integrity Officer, during which I identified myself only as an anonymous law clerk. Following that call, I provided, through the advocate, several hypotheticals and asked for an opinion as to what would happen, based on the detailed hypothetical scenarios, if I reported these facts. The letter response that I received from Ms. Langley is appended to this testimony. In her response, Ms. Langley explained that she could not provide any specific answers to the hypothetical questions that were posed. She also suggested that I contact the "appropriate circuit representative on the Codes of Conduct Committee" if I wanted to raise a specific concern. Given this response, and the lack of

any meaningful guidance on what confidentiality would apply should I decide to disclose the misconduct, I did not contact the Ninth Circuit representative.

IV. Conclusion

As I conclude my testimony today, I would like to briefly touch on the significant impact of the sexual harassment that I experienced—professionally and personally. It should not be hard for the Subcommittee members to imagine the psychological impact that this conduct had on me. From a professional perspective, I will note that experiencing and worrying about the harassment consumed countless hours during my clerkship for Judge Reinhardt during which I could have been learning and working. After my clerkship, while I was trying to figure out if and how I could report the sexual harassment and what the consequences of reporting it would be, my efforts often consumed many hours a week, which detracted from other professional experiences that I have found deeply enriching and rewarding, such as clerking for Judge Jackson and working for the Center for Death Penalty Litigation. It also took countless hours of many other friends and mentors in the legal profession who spoke with and supported me. This is precious time that I and others in my network could have used for professional development, scholarship, or personal leisure activities and family.

Finally, the harassment that I suffered during my first legal job and the frustrations that I felt in attempting to navigate how to report that misconduct indelibly colored my view of the judiciary and its ability to comprehend and adjudicate harm. I do not believe

it is unreasonable to be concerned about the impact of this kind of harm on the pipeline to the legal profession: I worry that others who have similarly experienced harassment are leaving the profession or changing their goals in ways that deprive all of us of the valuable contributions they could have provided to the law had they not been harassed. I am particularly concerned that these harms may fall disproportionately on populations that are underrepresented in the upper echelons of our profession, including but not limited to women and people of color.

In closing, I hope that my testimony today helps law clerks and other judiciary employees who have similarly suffered sexual harassment or other misconduct while working in the judiciary to feel more able to speak about their experiences. I hope that it assists the judiciary in considering the barriers to reporting that exist, and in assessing the adequacy of the current mechanisms. Finally, it is also my hope that the members of this Subcommittee consider how they can help to spur further changes to ensure that victims of harassment and misconduct in the judiciary have real, viable paths forward in the future to report and address abusive conduct.

JAMES C. DUFF
Director

LEE ANN BENNETT
Deputy Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JILL B. LANGLEY
Judicial Integrity Officer

June 17, 2019

Ms. Jamie A. Santos
Goodwin Procter LLP
901 New York Avenue, NW
Washington, DC 20001

Dear Ms. Santos:

In April, you posed several hypothetical questions to me on behalf of an anonymous current federal law clerk. This law clerk asked about the reporting obligations, or discretionary reporting judgments, of the Judicial Integrity Officer, sitting federal judges and federal judicial employees, respectively, to disclose to others a confidential report from a law clerk that (1) that a former federal judge harassed the law clerk while a judge; (2) the same former judge knew about misconduct by other federal judges and failed to report that information, and/or actively dissuaded others from reporting that misconduct; (3) other judges and judicial employees knew about the former judge's harassment of the law clerk; and (4) the law clerk observed another judicial employee experience adverse treatment by current federal judges and current federal judicial employees designed to deter that employee from reporting misconduct, causing the law clerk to fear retaliation.

With respect to federal judges and judiciary employees, your questions implicate interpretations of the newly revised Codes of Conduct for Judges and for Judicial Employees, and the newly-revised Rule for Judicial-Conduct and Judicial-Disability Proceedings (JC&D Rules). These new provisions, such as Canon 3(B) of the Code of Conduct for Judges, Canon 3(C)(1) of the Code of Conduct for Judicial Employees, and JC&D Rule 4(a), have not yet been the subject of any formal interpretation. Moreover, providing interpretive guidance about the Codes of Conduct or JC&D Rules is not the function of the Office of Judicial Integrity, which is primarily to provide confidential guidance and advice to judicial employees about workplace conduct concerns and to direct them to the appropriate local court resource.

The judges on the Committee on Codes of Conduct are available, however, to answer ethics questions by federal judicial employees. Thus, I suggest the law clerk on whose behalf you have asked your questions contact the appropriate circuit representative on the Codes of Conduct Committee if she would like to raise a specific concern. The Committee members do not answer hypothetical questions involving interpretations of the Codes of Conduct but can be a valuable resource for addressing actual ethical conduct issues.

Similarly, I cannot answer your hypothetical question about the reporting obligations and judgments of the Office of Judicial Integrity, including myself, to report misconduct allegations. As you know, the facts matter, as does the ability to have an interactive discussion with the person who has experienced unwelcome workplace conduct. Appropriate disclosure based upon one set of facts and a particular confidentiality request, may differ for another set of facts and different confidentiality requests. Generally, however, any information shared with me will be confidential if requested by the employee. An assurance of confidentiality must yield when there is reliable information of wrongful conduct that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity of the judiciary. Additionally, with regard to a federal judge's conduct, I too may have an obligation to "take appropriate action" under Canon 3(C)(1) of the Code of Conduct for Judicial Employees. "Appropriate action" will depend on the specific facts and may, or may not, include reporting the alleged conduct to the relevant Chief Judge.

With that said, I do hope you'll also convey to the law clerk that I'd be glad to discuss her specific situation directly with her and based on that conversation, I'd be able to provide her with information about her options and resources for resolution.

Thank you for reaching out to me.

Sincerely,

Jill B. Langley
Judicial Integrity Officer

Mr. JOHNSON of Georgia. Thank you, Ms. Warren.
Next we will hear from Ms. Shah, 5 minutes.

STATEMENT OF DEEVA V. SHAH

Ms. SHAH. Thank you, Chairman Johnson, Ranking Member Roby, and distinguished members of the subcommittee for inviting me to testify.

My name is Deeva Shah, and I am a trial attorney at Keker, Van Nest & Peters in San Francisco.

For the past 2 years, I have been working with a group of current and former law clerks to urge the judiciary to take action and address harassment and other forms of abusive behavior in the Federal courts. During those 2 years, I had the opportunity, and the honor, to serve as a law clerk to two wonderful judges, Judge Raymond Fisher on the Ninth Circuit Court of Appeals, and Judge Stephen Wilson on the Central District of California. And like other law clerks, I began my clerkship with the belief that my judges would become my teachers, that they would challenge my preconceptions, and that they would turn into lifelong mentors for me. For me and for many other law clerks, those beliefs became reality because our clerkships were formative experiences that molded us as young lawyers.

Unfortunately, as you all have heard today, that is not the experience of all law clerks. Those who are lucky enough to be hired as law clerks are typically law students for whom judges are more role models than they are employers. Judges are titans of the profession, and for clerks who experience harassment in that workplace, the ideal of what a judge should be versus what a judge actually is like is devastating, personally and professionally. It is incredibly difficult to speak up against a life-tenured Federal judge who has the very real power to affect the rest of your career.

Although harassment and abuse within the judiciary are not the norm, these experiences aren't uncommon either. Law clerks from numerous Federal courts shared with our organization that they had felt demeaned, belittled, and humiliated during their clerkships. The one theme that united these experiences was that the law clerks did not feel comfortable reporting, either because the reporting procedures were unclear, their confidentiality could not be guaranteed, or, because the fear of retaliation was too high.

My written testimony details the ways in which the judiciary has attempted to address these concerns, and why we believe those steps have failed. Today, I want to highlight four changes that I believe are necessary to ensure accountability.

First, the fear of retaliation is most likely the largest barrier to reporting harassment. Although the judiciary now defines wrongful conduct to include retaliation, changing a definition is not enough. Simply prohibiting retaliation does not eradicate it in the same way that prohibiting harassment did not and has not prevented it.

The judiciary should explain how it will determine whether retaliation has occurred, what remedies are available to a victim of retaliation, and what disciplinary action may be taken against an offending judge.

Second, the judiciary needs to conduct a comprehensive retrospective review. Despite significant public allegations of inappro-

priate behavior by a judge, the judiciary has not solicited specific feedback on how that misconduct was able to continue for so long, whether clerks attempted to report that misconduct, and, if not, what barriers prevented those clerks from reporting that conduct. I continue to believe that such a review is necessary for a thorough understanding of why the system has failed.

Third, the Judicial Conduct and Disability Act currently allows a judge to resign or retire without further investigation of a complaint. After retirement, that judge still receives full benefits and pension, regardless of how extensive or well-founded these allegations may be. I recommend amendments to empower the judiciary to require investigations, and to take action, regardless of resignation.

Fourth, the judiciary should create a nationwide reporting system, instead of depending on individual district and circuit courts to deal with instances of misconduct. This would help clerks who fear retaliation within their own courts, or feel uncomfortable reporting to the colleagues of that very judge. A national reporting requirement would also prevent any plausible deniability about harassment at any level of the judiciary.

The Federal judiciary was my home for the last 2 years. It is still where I practice law every day. My two clerkships shaped me as a lawyer and as a person, and I hope that every law clerk can receive that experience. To the extent that they cannot, I encourage the judiciary and this committee to make the necessary changes to encourage reporting and ensure accountability.

Thank you.

[The statement of Ms. Shah follows:]

Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct

Hearing before the Subcommittee on Court, Intellectual Property, and the Internet

Thursday, February 13, 2020

Testimony of Deeva V. Shah
Law Clerk to Hon. Stephen V. Wilson (2017-2018)
Law Clerk to Hon. Raymond C. Fisher (2018-2019)

Thank you, Chairman Johnson, Ranking Member Roby, and distinguished members of this Subcommittee for inviting me to testify today. My name is Deeva Shah, and I am a former law clerk to Judge Raymond Fisher, who sits on the U.S. Court of Appeals for the Ninth Circuit, and to Judge Stephen Wilson, a Judge of the U.S. District Court for the Central District of California. I am a trial attorney at Keker, Van Nest & Peters LLP. I am here today with the support of the judges for whom I have clerked, my firm, and my friends and family.

I am a founding member of Law Clerks for Workplace Accountability, an organization dedicated to ensuring that the federal judiciary provides a safe workplace environment, free of harassment, for all employees, and assisting the judiciary in achieving that goal. For over two years, I, along with a group of current and former law clerks—including Jaime Santos, Kendall Turner, Claire Madill, and Olivia Weber—have urged the judiciary to take action to prevent and address workplace misconduct. We have worked collaboratively with the Federal Judiciary Workplace Conduct Working Group ("Working Group"), the Administrative Office of the United States Courts, and working groups formed by the multiple courts, including the Ninth Circuit and the D.C. Circuit. I personally have spoken at the National District Judges conference about these issues. Today, I look forward to discussing what I have learned over the past two years.

I applaud the judiciary's actions to address workplace misconduct to this point. The changes that have been implemented to date and the attention paid to this important issue is most welcome. However, I believe the judiciary has not done enough to encourage and facilitate reporting of misconduct and today, I propose five changes that are necessary to effect long-term change and encourage employees to report misconduct. I believe that:

1. Reporting procedures for misconduct allegations should clearly define what consequences will be imposed if allegations are substantiated, how whistleblowers will be protected from retaliation, and how the judiciary will work to address any harm to the victim.
2. The judiciary should solicit information about employees' past experiences with harassment and abusive behavior, rather than take an entirely forward-looking approach to studying this issue.
3. The Judicial Conduct and Disability Act should be amended to ensure that a judge cannot escape complaints or investigation by retiring or resigning.
4. The judiciary should create a national reporting system that requires district and circuit courts to provide anonymized reports of any formal or informal claims to the Office of Judicial Integrity. These anonymized reports should be made publicly available in aggregate.
5. Law clerks must have a seat at the decision-making table, not merely the option to offer input on an ad hoc basis.

I. Introduction

The day I accepted my offers to work as a clerk in the federal judiciary was one of the proudest days of my life. After years of dedication to pursuing my career in law, I felt like my hard work had paid off and I would proudly begin my career as a lawyer in a public service position.

Like me, those fortunate enough to be hired to work for federal judges are typically law students, for whom judges are more role models and idols than they are employers. Judicial chambers are unlike any other type of working environment. Judges are titans of the profession, people who have shaped the law and the profession as we know it. And like other law clerks, I began my clerkship with the belief that my judges would be teachers, would challenge my preconceptions, and become lifelong mentors. For me, and for many other law clerks, those beliefs became reality. Our clerkships were formative experiences that molded us as young lawyers. Unfortunately, that is not the case for all clerks. For those who experience harassment in the workplace, that ideal of what a judge *should* be and what they *can* be is devastating, personally and professionally. That power dynamic alone – with judges seeming larger-than-life - can make it feel near impossible to speak up against a life-tenured federal judge.

My colleagues and I began working on issues of harassment and misconduct within the federal judiciary in December 2017, when the Washington Post reported sexual harassment by a federal judge. We were concerned with the lack of clarity surrounding reporting procedures in the federal judiciary, a barrier exacerbated by the imbalance of power. We immediately drafted a letter offering modest suggestions to address workplace misconduct in the federal courts. We were uniquely positioned to offer guidance as current and former clerks, people who were likely to use--or not use--the reporting systems in place at the time. Over 850 former and current law clerks signed the letter.

Our suggestions included revising the Law Clerk Handbook and Judicial Codes of Conduct; improving training regarding harassment, confidentiality, and reporting procedures; developing a confidential national reporting system; and, forming a working group of judges, law clerks, and judiciary employees to study the way to address these issues.

In the months that followed, we spoke with dozens of law clerks and numerous judges. We received a mixed reception from the judiciary. Many judges, including the two for whom I clerked, were supportive of our efforts. Others opposed law clerk involvement in any reforms, including one judge going as far as to publicly call us the Spanish Inquisition on Twitter. Other judges dismissed outright the idea that there was a problem with harassment in the judiciary.

But our numerous conversations with law clerks suggested otherwise. Although harassment and abuse within the judiciary are not the rule, these experiences are also not uncommon. Law clerks

and externs from numerous federal courts shared with us that they had felt demeaned, belittled, or even humiliated during their clerkships or externships. People shared stories about being asked sexual questions unrelated to work, hearing their judges or other employees speak about female attorneys in objectifying terms, and being groped in public and in private. Almost every law clerk we spoke to knew of other clerks or employees who had been subjected to either harassment or abusive behavior in chambers. Although these experiences did not always involve abuse by judges, they involved mistreatment by staff or even other law clerks. The one theme that united these experiences was that the law clerks did not feel comfortable reporting these instances of misconduct, either because the reporting procedures were unclear, their confidentiality could not be guaranteed, or the fear of retaliation was too high.

When the Working Group was formed, we asked for a seat at the decision-making table. The Working Group declined our request, instead inviting us to speak with them on three separate occasions. During those meetings, we found the members of the Working Group were focused on the right issues: the power dynamics that create an initial hurdle to reporting, the lack of clear policies and procedures for reporting, the lack of transparency that undermines the public trust, and that abusive behaviors include misconduct outside of just sexual harassment. I want to acknowledge that the judiciary has moved more quickly than other institutions and has demonstrated a willingness to embrace change. Nevertheless, I do not believe the judiciary has adequately acknowledged its past failures, nor has it provided specific solutions to address the power dynamics and opaque procedures that form barriers to reporting.

We also know that workplace misconduct issues at federal institutions are not unique to the judiciary. Similar complaints from congressional staffers and workers regarding antiquated reporting policies could not ring more true than what we currently see in the judiciary. In 2018, through the staffers' actions and protest, many of you in this room successfully helped pass legislation reforms to the Congressional Accountability Act of 1995, improving the process to report allegations of sexual harassment and conduct. Many of these reforms are what bring me before you today – a need for better reporting policies in the judiciary.

II. The Judiciary's Current Changes Are A Step in the Right Direction

We have seen some encouraging signs of the judiciary's progress. These include revisions to the law clerk handbook and law clerk orientation program. The leadership has also changed its tone to reflect that ensuring a safe and respectful workplace is the responsibility of judges in each and every courthouse. Our group has had candid discussions with judges in various districts and circuits, and these conversations suggest that many judges are interested in a cultural change on this topic. These discussions are also crucial to ensure that women and people of color, who have long been underrepresented in clerkship hiring, do not face backlash for raising their concerns.

I appreciate the revisions to the code of conduct that clarify a judge's affirmative duty to promote civility and that prohibit harassment, bias, or prejudice. I acknowledge the changes to the Judicial Conduct and Disability Rules requiring judges to report or disclose misconduct. Nevertheless, although the judiciary has authorized systemic evaluations, I have not seen evidence of any such evaluations yet. As far as I am aware, there has been no investigation about the misconduct reported by the Washington Post in December of 2017, no interviews of potential victims, and no examination of how this behavior was able to continue for years. I find it difficult to have confidence that future evaluations will take place or be effective when one did not occur with respect to the misconduct revealed in 2017, despite the range of egregious misconduct that was reported.

The judiciary has also made some changes to its model Employment Dispute Resolution (EDR) plan. It has provided a clearer definition of "wrongful conduct" and provided some informal avenues for reporting. It has increased time to file formal claims (from 30 to 180 days) and worked to increase awareness of EDR rights and options. And I recognize that the new EDR plan allows employees to request interim relief while a claim is still pending. I fully support these changes. For law clerks, the early termination of a clerkship is a significant red flag on a resume. For other judiciary employees, the inability to continue working for their employer could put their livelihood at risk.

Finally, I commend the judiciary for creating the Office of Judicial Integrity to provide assistance regarding workplace conduct. I hope that a centralized office will ensure long-term change and accountability.

III. The Current System Is Not Sufficient to Effectuate Meaningful Change

Although the judiciary has taken some steps towards addressing misconduct, I believe that those steps have fallen short on delivering on their potential. It is unclear whether the Working Group intends to propose any further recommendations or whether the Judicial Conference plans to adopt any changes in the near future. The common refrain our organization hears from current clerks is that clerks still do not feel comfortable reporting abusive behavior or misconduct. More must be done to ensure meaningful change.

A. Reporting Procedures Should Clarify How Victims Will Be Protected

Although the judiciary has clarified its reporting procedures, the changes do not adequately explain what will happen after an employee invokes reporting avenues or how the judiciary will ensure that employees will not face retaliation.

As we have found, fear of retaliation is quite possibly the largest barrier to the reporting of harassment. No victim should have to live in fear. We appreciate that the judiciary has updated the Codes of Conduct and its Model EDR plan to note that misconduct includes retaliation. But aside from this policy change, the judiciary has failed to take significant action to actually protect employees from retaliation, to explain how it will determine whether retaliation has occurred, and, in instances where it learns of retaliation, what remedies are available for the victim and what disciplinary action may be taken against an offending judge or other employee. Simply prohibiting retaliation does not eradicate it, just as simply prohibiting harassment has not prevented it. The judiciary must develop concrete plans to address retaliation. Moreover, the Judicial Conduct and Disability Act should be amended to clarify what specific acts may constitute retaliation, what remedies are available, and how victims may take action in the face of such retaliation.

Separately, the judiciary should consider how it addresses the harms victims face as a result of misconduct. Harassment can be both personally and professionally damaging, and it is unclear whether the judiciary has engaged in enough fact-finding about employees' past experiences with harassment to determine what measures are necessary to address the harm from that harassment.[1] On a personal level, these measures may include counseling to address harm. On a professional level, clerks who report misconduct may face reputational harm and lose vital references and professional recommendations early on in their careers. The judiciary should consider methods of providing references for those who report misconduct and can no longer work with their employer.

B. The Judiciary Needs a Comprehensive, Retrospective Review

The Working Group and the Judicial Conference are both aware that the judiciary has failed to protect employees from harassment and abusive behaviors. That failure is ongoing. The Working Group was formed following public allegations of inappropriate behavior by a judge that spanned more than a decade. But the judiciary has not solicited feedback on how the misconduct was able to continue for so long, whether clerks attempted to report misconduct, and, if not, what barriers prevented them from doing so. I continue to believe that such a review is necessary for a thorough understanding of why the system failed. Such a review would also indicate that the judiciary actually encourages employees to report misconduct, instead of simply paying lip service to accountability.

Moreover, our efforts have been met with some hostility by members of the judiciary. We have been told repeatedly that significant reforms or cultural changes are not necessary because these problems are isolated. Although the Working Group has noted that "inappropriate conduct . . . is

[1] U.S. EEOC, *Select Task Force on the Study of Harassment in the Workplace* 19 (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

not limited to a few isolated incidents," some judges continue to assert that there is no problem. Several members of our group have been confronted by members of the judiciary who have criticized us for not acting as a reporting avenue--suggesting that it is unethical for us to not disclose the accounts told to us by law clerks, who have not reported their experience for fear of retaliation. And by failing to fully reckon with what happened in the case of a high-profile judge who resigned in 2017, the judiciary has failed to demonstrate the accountability that it asks the public to trust will take place going forward. If judges do not acknowledge a problem, they will not make efforts to support proposed solutions or identify why reporting procedures have been underutilized. A survey or review of past misconduct, especially egregious misconduct, would also help the Office of Judicial Integrity be more effective in its mission.

C. The Judicial Conduct and Disability Act Should Be Amended to Require Investigation After Resignation and Allow Removal of Benefits

Currently, the Judicial Conduct and Disability Rules state that a "chief judge may conclude a complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible as to the subject judge." In many cases before the Judicial Conduct and Disability Committee involving serious misconduct by a judge, the complaint has not been investigated because the accused judge has resigned or retired—with full benefits and pension and the ability to return to private practice. The Judicial Conduct and Disability Committee has stated that retirement makes further inquiry unnecessary.

I recommend amending the Judicial Conduct and Disability Act to require investigation even after the resignation of a judge, including institutional review and possible referral to the state bar if necessary. I also recommend amending the act to allow Judicial Counduct and Disability Committee to remove a judge's benefits—including a lifetime pension—based on the results of such an investication. Until now, the Judiciary has said that it lacks the power to remove those benefits without impeachment. I also recommend that the Act include specific procedures governing post-resignation review. Such institutional review should occur any time a judge resigns or retires pending an investigation, and if allegations are made against a judge who is deceased but served as a judge in the years before he passed away. Similarly, as the judiciary has previously acknowledged, "public confidence in the JC&D Act would benefit if the Judiciary . . . made decisions on those complaints more readily accessible." Any amendment to the Act should clarify that such decisions should be made public.

D. The Judiciary Should Create an Anonymized National Reporting System

To study and address misconduct effectively, the Judicial Conference and the Administrative Office of the U.S. Courts must receive more information about misconduct allegations in each circuit and district court. Although the judiciary has recognized this, it has yet to implement any

specific reporting requirement that would cover all formal and informal complaints. Although district judges are required to inform their circuit about reports of wrongful conduct and how those reports were addressed, there is still no requirement that each circuit report that information to any national body. The Office of Judicial Integrity should require anonymized reporting of all formal and informal complaints. This would allow the judiciary to effectively identify and address trends and patterns of harassment and other abusive behaviors.

In the past, members of the judiciary have told our organization that these issues either do not exist, or, if they do, the judiciary cannot act because the issues are not being reported. A national reporting requirement would prevent plausible deniability about harassment at any level of the judiciary and would also encourage reporting by showing the judiciary's commitment to addressing misconduct.

A national reporting system should also allow clerks to report directly, instead of requiring clerks to first report within their district or circuit court. Many clerks fear retaliation or feel uncomfortable reporting within their own district or circuit. Currently, clerks are often directed to report to their circuit or district's chief judge, who may be friends with the accused judge or may even be the harasser himself. A national reporting system would address many such concerns. Although the Office of Judicial Integrity does seem to act in an advisory capacity by providing advice and assistance with reporting, my understanding is that it does not function as an independent reporting system. I encourage the judiciary to consider creating a robust national system operating within the Office of Judicial integrity that would both report and investigate misconduct while functioning independently of any circuit or district.

E. Law Clerks Need a Seat at the Decision-Making Table

The judiciary did not start addressing issues of harassment of its own accord. Law clerks forced the judiciary to make progress by coming forward with their experience, by urging the judiciary to take action, and by repeatedly providing specific reform recommendations. Despite these efforts, the federal Working Group and every circuit's working group have excluded clerks and most staff from the decision-making table.

Clerks provide a necessary, critical perspective in this process. The judiciary cannot replicate that perspective by soliciting occasional input. My colleagues and I have attempted to provide recommendations for reform to the best of our abilities. But we do not have access to the documents and data these groups have collected or could collect. We can only comment or provide input at limited junctures instead of throughout the entire process.

By denying law clerks a seat at the table, the working groups have deprived themselves of a necessary perspective on the power dynamics and other barriers that make reporting difficult.

No matter how well-intentioned judges may be, they cannot be expected to see their own blind spots in addressing these concerns. Law clerks may understand better than anyone the need for specificity and accountability in the working groups' recommendations. The existing policies have been ineffective and continue to remain ineffective because judges and court executives write them without valuable guidance and input from the very people who will use the system.

During our meetings with the Working Group, we requested the judiciary consider exit interviews and asked what exactly the planned exit interview surveys would say, who would send them out, what form they would take, and when they would be sent out. We were told, however, that we did not need to worry about those details. But those very details will determine whether employees feel comfortable reporting harassment and understand that they have an established, trusted venue in which to do so. Without details in the Report's recommendations, courts are likely to continue to have disparate processes and policies for handling harassment, and employees are likely to continue to feel unsure about their rights and remedies.

Finally, providing law clerks a seat at the table would increase public confidence in the judiciary's ability to address these issues in an effective manner. As current reports have indicated, offering platitudes and generalized language does not encourage reporting or inspire confidence in the judiciary's efforts. Judges hire law clerks to assist them in resolving difficult cases. These law clerks frequently graduate at the top of their classes, distinguishing themselves from their peers at the most elite law schools. Many law clerks will go on to other clerkships. And the law clerks who have attempted to report or have faced barriers to reporting have invaluable insight to offer about ongoing changes and improvements that may be necessary. History is likely to repeat itself if stakeholders, such as law clerks, continue to be excluded from the decision-making table.

F. Other Recommendations

I ask this committee to also consider other issues that affect the reporting of misconduct within the judiciary.

Reporting Time Limit

The current time limit to report misconduct under the Model EDR plan is 180 days from the date of the alleged violation. I recommend that the time limit be extended to at least one year following the violation, *i.e.*, the term of a typical clerkship. Often, it is not until a term law clerk completes her clerkship that she has time to reflect on any potential misconduct and benefits from the physical separation that reduces the fear of immediate retaliation for reporting misconduct. A year-long reporting period can better accommodate these concerns and would

thus likely encourage a higher level of reporting, especially once a clerk can find a post-clerkship job.

The Role of Law Schools

Law schools play a critical role in the clerkship and judicial extern hiring process. Law professors are themselves often former clerks, and many law clerks are hired based on their professors' relationships with judges. Law clerks and externs often reach out to their law schools for support and advice when they face challenges in their clerkships, including abusive chambers practices. Law school career services offices also commonly collect feedback from clerks and externs about their experiences working in the judiciary. Thus, law schools collectively possess more valuable information about harassment and abusive behaviors in chambers than perhaps any other group. Despite this, they have historically played no role in reporting the misconduct of which they have become aware.

My colleagues and I have spoken with groups of law students who have encouraged their schools to take action to help prevent harassment and abusive behaviors in chambers from flourishing. Thus far, their requests have largely been rebuffed. Most law schools have not demonstrated a willingness to address these issues, likely because they fear that reporting credible instances of judicial misconduct would adversely affect their relationship with judges and their students' clerkship prospects. This must change.

Although the Office of Judicial Integrity encourages reporting from law schools, it is unclear how or whether law schools are reporting such conduct. Finding a real solution to the problem of harassment within the judiciary will require ongoing, sustained efforts from the judiciary and the law schools that send their students to judicial chambers.

IV. Conclusion

Although the judiciary has taken steps and made some welcomed changes to encourage reporting of misconduct, I believe those changes are not yet sufficient to effectuate actual change. It is our collective obligation to provide law clerks with a safe work environment and give them fair and transparent methods for reporting misconduct when it happens.

I applaud the Subcommittee for your attention to this important issue, and I ask you to consider these recommendations to ensure that these long-term, systemic problems are addressed through greater transparency and accountability. Thank you very much for your time.

Mr. JOHNSON of Georgia. Thank you.

I ask unanimous consent that our judiciary colleague, Mary Gay Scanlon, be allowed to sit on the dais for this hearing, and following the committee's practices, she be allowed to question the witnesses if she is yielded time by one of the members of the subcommittee.

Mrs. ROBY. And Chairman? I ask unanimous consent to enter Mr. Duff's letter into the record.

Mr. JOHNSON of Georgia. So ordered without objection.

Mrs. ROBY. Thank you.

[The information follows:]

MS. ROBY FOR THE RECORD

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D C. 20544

February 7, 2020

The Honorable Henry C. "Hank" Johnson, Jr.
Chairman
Subcommittee on Courts, Intellectual Property,
and the Internet
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Johnson:

Thank you for the invitation, conveyed through your staff, to testify at the Subcommittee's hearing entitled, "Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct," scheduled for February 13, 2020 at 8:30 a m

All federal Judiciary employees should be protected from all forms of workplace misconduct. This commitment is shared throughout the federal Judiciary. I welcome opportunities to highlight for you and Members of the Committee some of the steps the Judiciary has taken to improve workplace conduct within the Judiciary. Over the past 24 months we have·

1. Established the national level Federal Judiciary Workplace Conduct Working Group (Working Group)

2. Published a Working Group report to the Judicial Conference with more than thirty detailed recommendations to improve the Judiciary's policies and procedures.

3. Approved a significantly revised and simplified Model Employee Dispute Resolution Plan that clearly states that harassment, discrimination, abusive conduct, and retaliation are prohibited; provides several options for employees to report and seek redress for wrongful conduct, and ensures that Judiciary employees know the many resources available to them.

4. Revised the Code of Conduct for United States Judges and the Code of Conduct for Judicial Employees, as well as the Judicial Conduct and Disability Rules to state

expressly that sexual and other discriminatory harassment, abusive conduct, and retaliation are cognizable misconduct, as is the failure to report misconduct to the chief district or chief circuit judge.

5. Clarified the language in the Code of Conduct for Judicial Employees to make more explicit that confidentiality obligations do not prevent any employee – including law clerks – from revealing abuse or reporting misconduct by any person, including a judge.

6. Created the Office of Judicial Integrity and appointed the first judicial integrity officer. That office began actively providing confidential advice and guidance since her appointment.

7. Established circuit workplace conduct committees and created circuit directors of workplace relations (or similar positions) to provide circuit-wide guidance and oversight of workplace conduct matters.

8. Provided nation-wide training by the Federal Judicial Center on preventing harassment, workplace civility, and diversity and inclusion.

These actions, and other initiatives, are discussed more completely in the *Status Report from the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States*, dated September 17, 2019, which has previously been furnished to the Committee. We have more to do, and I appreciate that you also share our commitment to protecting employees of the Judiciary. I look forward to our continuing discussion with you on how the Judiciary is making progress in this area.

Based on my initial understanding of the focus of the hearing next week, I had planned to apprise the Subcommittee Members of the substantial progress the federal Judicial branch has made through the foregoing measures, discuss other ways to address workplace misconduct nationwide, and reiterate our demonstrated commitment to meaningful reforms.

Yesterday, however, I received the letter of February 6, 2020, signed by Chairman Nadler and other Members of the House Judiciary Committee regarding the order issued by the Tenth Circuit Judicial Council on September 30, 2019, reprimanding District Judge Carlos Murguia for having engaged in serious judicial misconduct. We expect to reply to that letter by the requested date of February 20, 2020. Although the letter purports to "avoid commenting on matters within the [Judicial Conduct and Disability] Committee's jurisdiction that may affect Judge Murguia's office," the letter nonetheless poses nine questions, eight of which relate to Judge Murguia's conduct and the ongoing misconduct proceeding. The letter has been posted on the Committee website and has already received widespread media coverage – including several articles that also mention Thursday's hearing, which was publicly announced on the same day. The likely

result, unfortunately, is that the Judge Murguia matter will now displace or overshadow any discussion of more general reforms we had planned to review with the Committee.

Even if Members refrain from reiterating the letter's questions, any comments the Judiciary might make about workplace conduct efforts generally will inevitably be interpreted, correctly or incorrectly, as bearing on the Judge Murguia matter. That complaint remains under review within the Judiciary. I note that under existing rules and law, I could not discuss any issues involving the Judge Murguia matter in the hearing. Furthermore, discussion of the Murguia matter at the hearing, express or implied, could raise due process concerns, might violate ethical and legal requirements for confidentiality, and could seriously compromise our procedures. In light of these concerns, it would be inappropriate for me or any other Judiciary witness to participate at the upcoming Subcommittee hearing next week while the complaint remains under review. I request that you first allow our process of reviewing the Murguia matter to run its course, after which time I would be pleased to attend a hearing.

I look forward to testifying at a future hearing on the steps we have taken to protect federal Judiciary employees in the workplace.

Sincerely,

James C. Duff
Director

cc: Honorable Jerrold Nadler
Honorable Doug Collins
Honorable Martha Roby

Mr. JOHNSON of Georgia. And also, so ordered without objection. Ms. Lithwick, you may begin.

STATEMENT OF DAHLIA H. LITHWICK

Ms. LITHWICK. Mr. Chairman, Ranking Member, members of the committee, I am honored to be invited to speak with you today on the issue of sexual harassment and misconduct in the Federal judiciary. I am here in my individual capacity. My views do not reflect those of my publication or any other entity, but I am here in several capacities.

As a former Ninth Circuit law clerk, as a journalist who covered the #Me Too stories in 2017, and who, in fact, was one of the people who came forward about the conduct of Judge Kozinski, I have covered other stories of harassment and abuse, both in the judiciary and in the law clerk pipeline that begins in law schools, as Ms. Warren has suggested, and I have spoken on this topic at the judicial college, at a multiple Federal circuit conferences.

In every such presentation, I am at pains to say this is not a sex problem or an abuse problem. It is a power problem, and this is fundamentally a problem of closed systems that rely, often reasonably, on secrecy and discretion on the part of every single member of a judicial chambers. But that same secrecy that protects the reputational and dignitary interests of the weakest branch of governments can also quickly become the kind of toxic and corrosive secrecy that allows abuse and harassment and bullying to go unaddressed and undetected.

At its worst, this is the very same secrecy that forces victims to report such conduct by way of journalism or committee hearing, which is emphatically not the best way to police misconduct. I want to say that one more time. Journalism and congressional oversight become necessary only when the judiciary fails to police itself. They are not the solution to the problem. They are a symptom of the problem.

The judge clerk experience can be one of the most important relationships in any young attorney's life. I say that without reservation. My clerkship at the Ninth Circuit made me the person I am today, and the legal thinker I am today. Judicial clerk families become vital job contacts. They become cherished wedding guests. They become lifelong boosters and fans.

But when it is cast in terms of family and secrecy and loyalty, abuse can also flourish in chambers as well, and most young law clerks persuaded that they are on the trajectory to bigger and better clerkships, or lucrative signing bonuses at firms are willing to endure almost any kind of abuse in the short-term.

And prestigious clerkships are now essential for highly competitive jobs as academics, Federal prosecutors, public defenders, and civil rights lawyers. For many, many first-generation lawyers without contacts in the profession, giving up a law clerkship and a network that can level the playing field is illogical. But there is a fundamental difference between a demanding, exacting judge, and a bullying or misogynist judge, and we do not have sufficient mechanisms to sort the difference yet.

The ethos of the judiciary has long been, Let other judges run their chambers, run their courtrooms as they please without com-

ment or interference from their colleagues, and this is why open secrets about inappropriate judicial behavior become well-known, and are never acted upon, not for decades, in some cases.

My reporting also suggests that abusive and inappropriate relationships can even begin with law school professors, as students feel pressured, even in their first weeks at school to form the kind of relationships to known feeder judges. As is the case in any situation in which one person appears to have all the power to make or break a legal career, that power can be abused. It can go unredressed over many years.

I understand there is temptation to say that law students and lawyers are adults, they enter into these asymmetric relationships with eyes wide open. My own experience is that in some of the cases I have reported on, the abuse can do horrific damage. Careers can be short-circuited. Trauma can be lasting. This abuse transcends race and gender in some cases, and it calls the integrity of the entire judicial branch into question.

I am aware of the fact that judges relay on blind reverence and mystification to preserve public legitimacy. That is the only power they have. But when secret keeping and abuse are eventually revealed, it is the judiciary and the integrity of the judiciary that suffers. And that is all the more reason to craft open, transparent, and fair policies to deal with complaints from clerks and other support staff that work around Article III courts.

The judiciary must be beyond reproach. Judicial misconduct should not be minimized or swept under the rugs in the hope that the public never learns. Right or wrong, the public is always going to find out. I am immensely grateful to the Chief Justice and the circuit courts who have begun the hard work of improving systems by which abuse, harassment, and bullying can be reported but there is so much more work to do.

I want to thank the committee for including me. I want to thank my colleagues for their bravery and their voices. And I look forward to your questions.

[The statement of Ms. Lithwick follows:]

US House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

Feb 13, 2020

Written Statement of Dahlia H. Lithwick
Protecting Federal Judiciary Employees from Sexual Harassment Discrimination and Other Workplace Misconduct

Mr Chairman, Ranking Member and Members of the Committee:

I am honored to be invited to speak with you today on the issue of sexual harassment and misconduct in the federal judiciary I am here in my individual capacity and my views do not represent those of any entity or publication

I am here in several capacities, as a former 9th Circuit law clerk, a journalist who has covered several stories of harassment and abuse both in the judiciary and in the law clerk pipeline that begins in law school I have spoken on the topic at the Judicial College and at multiple federal circuit conferences In every such presentation I am at pains to say that this is not a sex or abuse problem, but rather a power problem, and also that this is fundamentally a problem of closed systems that rely, often reasonably, on secrecy and discretion on the part of every member of a judicial chambers But that same secrecy that protects the reputational and dignitary interests of the "weakest branch" of government, can also become the kind of toxic and corrosive secrecy that allows abuse and harassment and bullying to go unaddressed At its worst, this is the same secrecy that forces victims to report such conduct by way of journalism or committee hearing, which is emphatically not the best way to police misconduct I want to say that again Journalism and congressional oversight become necessary when the judiciary fails to police itself They are not the solution to this problem, but rather a symptom

The judge-clerk experience can one of the most important relationships in a young attorney's life I can say without reservation that my clerkship made me the person I am today Judicial clerk "families" become vital job contacts, cherished wedding guests and lifelong boosters But when it is cast in terms of "family" and secrecy and loyalty, abuse can flourish there as well, and most young clerks, persuaded that they are on a trajectory to bigger and better clerkships and lucrative signing bonuses, are willing to endure almost any kind of abuse in the short term, in exchange for long term gains Indeed, prestigious clerkships are now essential for highly competitive jobs as federal prosecutors, public defenders, and civil rights lawyers And for many first-generation lawyers, without contacts in the profession, giving up a law clerk network that can level the playing field a bit with their better-connected law school peers is illogical But there is a fundamental difference between a demanding, exacting judge and a bully or misogynist, and there are insufficient mechanisms to sort the difference The ethos of the judiciary has long been to let other judges run their chambers and their courtrooms as they please, without outside comment or interference, which is why "open secrets" about abusive or

inappropriate judges become well-known, but never acted upon. My reporting also suggests that abusive and inappropriate relationships may begin even in law school, as students feel pressured even in their first weeks at school, to form relationships with law professors who are known feeders to influential judges. And as is the case in any situations in which one person appears to have the power to make or break entire legal careers, that power can be abused, and also go unredressed, over years.

I understand that there must be at least some temptation to say that law students and lawyers are adults, and enter into these asymmetrical relationships with their eyes wide open. My experience is that in some of the cases that I have reported on and learned of, the abuse can do horrific damage, careers can be short-circuited, and trauma can be lasting. This abuse transcends race and gender in some cases, and calls the integrity of the entire judiciary into question. I am very aware of the fact that judges rely on a certain amount of blind reverence and mystification in order to preserve public legitimacy. But when secret-keeping and abuse are eventually revealed it is the judiciary as a whole that suffers. That is all the more reason to craft open, transparent and fair policies to deal with complaints from law clerks and the other support staff that work in and around Article III courts. The judiciary must be beyond reproach, and judicial misconduct should not be minimized or swept under the rug in the hopes that the public never learns of it. Right or wrong, the public always finds out.

I am immensely grateful to the Chief Justice and the various circuit courts who have begun the work of improving systems by which abuse, harassment and bullying can be reported, although I am not persuaded that the systems have entirely solved the problems. I have heard more than one Article III judge tell me that he has solved the problem himself by refusing to hire female clerks, or that the problem has been solved because only one bad apple was implicated and he stepped down. Neither of those are systemic solutions and as you will hear today, the problems are not yet solved. Rightly or wrongly, the legal profession is among the most conservative and risk-averse of any modern profession and the impulse to look away, downplay, secret-keep, and justify is stronger among attorneys than any group I know. In addition to helping judges figure out how best to police themselves, we need to create a culture of bystanders willing to step up and report abuse, and to defend victims, even if at some personal and professional cost. We entrust the judicial branch with the sole power and authority to adjudicate complicated matters every day; finding out what has happened in a given chambers and why should not be an impossible task. The only cure I know for "open secrets" and suggestions that young lawyers might benefit from abusive hazing is transparency and sunlight. The alternative – whisper campaigns and summary dismissals – doesn't only hurt individual victims, but also slowly undermines the judiciary as a whole.

I want to thank the committee for including me in this important conversation and look forward to answering any questions you may have.

Mr. JOHNSON of Georgia. I thank you.
And last but not least, Ms. Feldblum.

STATEMENT OF CHAI R. FELDBLUM

Ms. FELDBLUM. Thank you, Chairman Johnson, Ranking Member Roby, members of the subcommittee. Thank you for asking me here to testify.

My name is Chai Feldblum. I am a partner at Morgan Lewis. My testimony and the answers I will give you reflect my views, and not necessarily Morgan Lewis or its clients.

For 9 years from 2010 to 2019, I served as a commissioner of the Equal Employment Opportunity Commission. While there, I worked with my fellow commissioner, Victoria Lipnic, to study how to prevent harassment. In June 2016, the two of us released a comprehensive, bipartisan report with ideas for doing so.

One of our key findings was that to stop harassment in the workplace, employers had to focus more broadly on creating safe, respectful, diverse, and inclusive workplaces. In such a workplace, unwelcome behavior, including illegal harassment, is less likely to occur, and if it does, it is more likely to be reported early, treated seriously, and stopped. Creating such a culture is worth every dollar and hour put into it.

There are five key elements to creating such a culture: The first is leadership. Leaders must believe that such a workplace is something they want to have. They have to articulate that belief, and state their expectations that everyone in the workplace will act in a manner that will support that climate. And people must believe their leaders are authentic. They have to act in a manner that makes it clear they mean what they say.

The second element is to do a cultural assessment. Leaders need to know what type of culture they currently have. At Morgan Lewis, we do cultural assessments for a range of clients. We send a short survey to the full workforce, focusing specifically on safety, respect, diversity, and inclusion, and then most importantly, we conduct focus groups and interviews with randomly selected employees. That allows us to probe deeper, have follow-up questions, and get a truly realistic sense of what is happening in that workplace.

The third element is holding people accountable. Anyone who is engaged in misconduct must be held accountable in a manner that is proportionate to the misconduct. Supervisors and judges who ignore complaints or trivialize them must be held accountable.

Finally, action must be taken against anyone who retaliates against someone who reports. People are unlikely to come forward, and organizations will lose the opportunities to stop bad behavior early if people are not protected from retaliation.

The fourth and fifth elements are effective policies and procedures and training that works. Let me say just a few things about those. One, an effective policy must use clear and plain language. Policy for employees is not where you put a lot of legalese. Second, an effective training procedure will offer multiple avenues for people to report to their own superior, to another superior, to a central office set up by the organization.

Third, investigations must be timely, thorough, and fair. That means that the organization has to commit sufficient money to hire a sufficient number of well-trained investigators.

And, finally, anti-harassment training should be supplemented with training on how to create a culture of respect. This type of training provides employees with practical skills on how to engage coworkers directly when they experience unwelcome behavior, and gives them realistic options for being engaged bystanders. This training provides supervisors with practical skills on how to take in complaints, and how to coach problematic employees.

These five elements for creating a safe, respectful, diverse, and inclusive workplace should seem like common sense. They are: leadership, assessing one's workplace culture, holding people accountable, having effective policies and procedures, and training that works. The challenge is putting these elements in place and making them sustainable.

Thank you for giving me this opportunity to testify, and I look forward to answering your questions.

[The statement of Ms. Feldblum follows:]

House Judiciary Committee
Subcommittee on Courts, Intellectual Property and the Internet
February 13, 2020
Written Testimony of Chai R. Feldblum

I. Introduction

Chairman Johnson, Ranking Member Roby, and members of the Subcommittee -- thank you for giving me the opportunity to testify at this hearing. My name is Chai Feldblum. I am a partner and a Director of Workplace Culture Consulting at the law firm of Morgan, Lewis & Bockius LLP. I served as a Commissioner of the Equal Employment Opportunity Commission ("EEOC") from 2010 to January 2019. My testimony, and the answers I provide in response to your questions, reflect solely my views and not necessarily those of Morgan Lewis or its clients.

During my time as a Commissioner of the EEOC, I worked with my colleague, Commissioner Victoria Lipnic, to study how employers might prevent harassment before it happened – that is, before the EEOC showed up at their doors. Although Commissioner Lipnic and I come from different political parties, we are united in our commitment and passion to stop harassment in the workplace. Harassment prevention helps everyone – employers and employees. It is truly a bipartisan issue.

Approximately a year ago, Sharon Masling, my lead counsel at the EEOC, and I joined the law firm of Morgan, Lewis & Bockius LLP to help businesses and organizations create safe, respectful, diverse and inclusive (SRDI) workplaces. In such workplaces, harassment is less likely to occur in the first place, and if it does occur, it is more likely to be reported early and stopped. Such workplaces also have increased employee engagement and loyalty, better quality and productivity of work, increased innovation, and decreased conflict. Creating an SRDI culture is worth every dollar and hour put into it.

II. The Work of the Select Task Force on the Study of Harassment in the Workplace

Soon after Commissioner Lipnic and I joined the EEOC in 2010, we observed that harassment on all bases appeared pervasive in our workplaces, reflected in the thousands of charges brought to the EEOC and in the scores of cases brought by the EEOC in court. Our commitment and passion to stop harassment resulted in formation of a Select Task Force on the Study of Harassment in the Workplace ("Select Task Force") that we convened from 2015 to 2016, under the leadership of our then-Chair Jenny Yang.

We carefully created equal representation on the Select Task Force from three groups: management attorneys and business association representatives; plaintiff lawyers and employee association representatives; and academics from the disciplines of sociology, psychology and organizational behavior who had been studying harassment for years. Based on testimony heard

by the Select Task Force, and as a result of many meetings and frank conversations among the participants, Commissioner Lipnic and I issued a comprehensive report in June 2016 ("2016 Co-Chairs' Report") with ideas on how to prevent and stop harassment. The report provides a comprehensive review of what we know about harassment in the workplace and provides a roadmap for change that employers can follow to prevent harassment and to respond to harassment when it does occur. The report focuses on stopping harassment on all bases under federal law, including race, national origin, ethnicity, religion, disability, age and sex (including sexual orientation and gender identity) -- and including both harassment of a sexual nature as well as gender-based but non-sexual harassment.

The Select Task Force understood the importance of looking beyond solely stopping illegal harassment. Obviously, illegal harassment on any protected basis should not exist in the workplace. However, the best way to prevent illegal harassment is to have systems in place that stop low-level misconduct that might not yet rise to the level of illegal conduct. Hence, the recommendations in the 2016 Co-Chairs' Report are designed to stop unwelcome behavior based on any characteristic protected under federal or state laws, even if such conduct has not *yet* risen to a level that would violate the law. The report, and my testimony, refer to all such behavior as "harassment."

While the 2016 Co-Chairs' Report focused on harassment, we noted that some employees engage in abusive behavior towards others that is not based on a protected characteristic of the target. These individuals are equal opportunity harassers. The report, and my testimony, refer to such behavior as "bullying." The research indicates that a workplace that tolerates bullying also is more likely to tolerate harassment. Finally, even low-level disrespectful behavior can create a workplace in which employees do not feel safe and in which their work performance suffers. Employers thus need to adopt strategies that will increase respectful behavior and decrease disrespectful behavior. In other words, employers must address the *continuum* of behavior in a workplace: from respectful behavior to disrespectful behavior to bullying to harassment.

Commissioner Lipnic and I have been gratified to find that the 2016 Co-Chairs' Report has been useful across a range of professions, occupations and industries. We were particularly pleased to meet with members of the Federal Judiciary Workplace Conduct Working Group ("Working Group") to offer our insights on the comprehensive analysis and recommendations of the Working Group. As we noted to the Working Group at the time, two essential components of a successful effort to shape workplace culture are leadership from the top and a focus on the unique needs of a particular workplace. The establishment and efforts of the Working Group are excellent examples of those two components.

III. Creating a Safe, Respectful, Diverse and Inclusive (SRDI) Workplace

The best way to stop harassment is to prevent it from happening in the first place. And the best road to prevention is a safe, respectful, diverse and inclusive (SRDI) workplace.

An organization can create an SRDI workplace, but doing so requires intentional and strategic efforts. There are five key elements for creating such a workplace:

- Leadership
- Cultural Assessment
- Accountability
- Effective Policies and Procedures
- Training that Works

My description and understanding of these elements derive from the comprehensive work done by the Select Task Force; from the many conversations I have had with management and plaintiff attorneys, human resources leaders, and ethics and compliance officers; and finally, from real-life, on-the-ground experiences that Sharon Masling and I have had over the past year since joining Morgan Lewis and advising businesses and organizations on creating SRDI workplaces.

I am pleased to say that each of these five elements are covered, in varying degrees, in the Working Group's report issued on June 1, 2018. Moreover, the Status Report from the Working Group to the Judicial Conference of the United States, issued on September 17, 2019, describes steps that have been taken to date in each of these areas.

However, none of these elements is easy to achieve and maintain, and each includes layers of complexity. The challenge for the federal judiciary is to continue to refine its work in each of these areas, until it achieves the SRDI workplaces that it clearly desires and deserves.

A. Leadership

Strong and committed leadership is the first, and essential, element required to create an SRDI workplace. There are three components to this element:

1. Beliefs

Leaders must believe that an SRDI workplace is something they want and something that is important. If leaders hold that core belief and value, much else will flow naturally from that. Conversely, if leaders are not truly committed to an SRDI workplace, it will be difficult for many of the other elements to be adopted or to have their desired effect.

2. Articulation

Leaders must articulate their belief that an SRDI workplace is valuable and that everyone in the workplace is expected to act in a manner that creates such a workplace. Written and spoken words have power, particularly when they are plain and clear. Every organization should have a simple and clear policy setting forth its expectations for respectful behavior and descriptions of the disrespectful behavior, bullying, harassment,

and retaliation that it will not tolerate. In addition, leaders should articulate these expectations verbally to everyone in the workplace on appropriate occasions.

3. Action

Leaders must act in a manner that makes their employees believe they are *authentic.* If the leaders' values and expectations remain simply words printed on paper or pronounced at meetings, they will not have the desired effect of shaping workplace culture.

B. Cultural Assessment

A significant proactive step that leaders can take to create an SRDI workplace is to assess the existing culture in their workplaces.

Almost every organization has a set of stated values, including (often) values regarding safety, respect, diversity and inclusion. The question is whether and how those values are cascaded down and reflected in reality in work settings within the organization.

The best way to assess the culture in a work setting is to ask employees how they experience their workplace. Many organizations (including the federal government) use broad employee engagement surveys that capture a portion of this information in quantitative data form. In addition, if the employee engagement survey permits respondents to answer an open-ended narrative question (such as, "what change would most improve your experience here?"), some qualitative information can be gleaned from those answers through a human review of the narrative answers. My colleague, Sharon Masling, and I recently completed a review of that kind that provided insights to the company on its perceived culture and allowed us to offer recommendations for improving the workplace going forward.

But a broad employee engagement survey, even one with narrative responses, can provide only part of the information an organization needs to truly understand its workplace culture. In order to determine what employees are actually experiencing, it is important to *talk* with them. The only way to do that is to use focus groups and individual interviews of randomly selected employees to probe deeper and ask follow-up questions. Such methods provide a granularity of qualitative data about employees' perceptions and concerns that provides a basis for smart and strategic change. Focus group discussions and interviews can also surface problems – and solutions - that are specific to a particular work location.

To the extent that an organization wishes to collect quantitative data as well, it is helpful to use a short and targeted survey focused specifically on issues of safety, respect, diversity and inclusion. Sending out such a survey communicates to the workforce that the leadership is focused on and concerned about these issues. The quantitative data can serve as a snapshot of employees' beliefs and experiences and can establish one measure against which positive change

can be assessed. While such a survey is best used in conjunction with methods to collect qualitative data, it can be a useful first step in a cultural assessment.

A cultural assessment will be worthwhile only if an organization commits ahead of time to consider ways to address the concerns that may be surfaced by the assessment. Thus, whether an assessment results in concrete success in creating an SRDI workplace depends not on the assessment itself, but on any changes implemented by the company as a result of what it learns from the assessment.

C. Accountability

While leaders must believe an SRDI workplace is important and articulate that belief, what is most important is that leaders act in a manner that makes others believe they mean what they say. Expending time and resources on a cultural assessment sends an important message regarding the value leaders place on creating an SRDI workplace. But the most important action leaders can take is to hold *accountable* those who undermine the stated values and expectations of the workplace. There are three groups of individuals that leaders must hold accountable.

First, individuals who have been found, after a fair and thorough investigation, to have engaged in harassment or bullying must be held accountable. It is particularly important that any corrective action be proportionate to the misconduct. While some forms of harassment, including sexual harassment, will be grounds for removal from a position, not every act of harassment (particularly low-level harassment that is not yet illegal) will justify that type of corrective action.

Second, those who see or receive reports of misconduct must be held accountable for responding to such information appropriately. This includes everyone from judges to mid-level supervisors. There must be repercussions for a supervisor who trivializes such behavior or sweeps complaints under the rug and does not follow the procedures set up by the organization. The best way to hold supervisors accountable is to include in their performance evaluations an assessment of how the supervisor responded upon seeing or receiving reports of harassment or bullying. Obviously, there are unique considerations that arise when a judge does not follow the procedures set up by the system. But that does not mean that the judicial system cannot come up with some means of accountability for judges as well.

Conversely, supervisors who respond well when they see or receive reports of harassment or bullying should get positive reinforcement. There are many creative ways to do this, from recognition in performance evaluations to recognition in awards. Again, while performance evaluations will not be relevant for judges, there may be other ways to provide positive recognition for judges who respond effectively and quickly to reports of harassment or bullying.

Third, anyone who retaliates against an individual who has reported harassment or bullying or who has participated in an investigation of such misconduct, must be held accountable. If

individuals are permitted to retaliate with impunity, few people will come forward with complaints and the organization will not have the chance to address problems early.

D. Effective Policies and Procedures

An organization must make clear ahead of time what behaviors will not be acceptable, both in the workplace or that may affect the workplace. It also must have appropriate procedures for reporting and investigating such behavior and for taking corrective action if reports are substantiated. With such elements in place, an organization can hold supervisors accountable for not following the organization's procedures and can ensure consistent and appropriate corrective action.

With regard to policies, the 2016 Co-Chairs' Report describes the necessary elements of an effective policy and sets them forth in a user-friendly checklist in the Appendix. The most important element is that the policy be simple and clear. In our work over the past year with organizations and companies, we usually recommend that an organization or company have a combined Respectful Workplace, Anti-Harassment and Anti-Retaliation policy.

The policy should explain the mechanisms that can be used by those who experience or observe inappropriate behavior. Those mechanisms should make it easy, safe and effective to report.

A good reporting system will have multiple avenues through which individuals can report. It is best if employees have the option to report to their own superior, to another person with supervisory responsibility, and/or to an office the organization has established to receive reports.

The system must also ensure that individuals who report misconduct are protected from retaliation. Individuals are often told that if they experience retaliation, they should report that. That is a foundational requirement. But the onus should not solely be on the individual. Ideally, an organization should put in place mechanisms that will proactively monitor, to the extent possible, what happens after someone reports a case of misconduct or participates in an investigation of such misconduct.

Finally, the organization must ensure that investigations into reports of misconduct are timely, effective and trusted. This requires allocating the necessary resources to hire a sufficient number of well-trained investigators and to create a system in which employees feel there will be an objective investigation. It is as simple (and difficult) as that.

E. Training That Works

Training is an essential component of creating an SRDI workplace.

Anti-harassment training has been the training of choice for decades and it continues to be the type of training organizations have deployed in the #MeToo era. All individuals in a workplace

should receive such training. The 2016 Co-Chairs' Report lays out the elements of effective anti-harassment training and sets them forth in a user-friendly checklist in the Appendix.

But an organization committed to an SRDI workplace must provide more than anti-harassment training. It should provide training that addresses the *continuum* of behavior in a workplace, from respectful behavior (which should predominate in a workplace), to disrespectful behavior, bullying and harassment (all of which should be absent in a workplace). This form of training establishes the underpinning of an SRDI workplace and situates harassment as one form of behavior among many that is not tolerated in the workplace.

We call this "Respectful Workplaces training," although it can go by many different names. Regardless of the name, effective training of this kind achieves two goals. First, it teaches everyone in a workplace *why* simple forms of respectful behavior are so important in creating a situation in which employees feel safe and can be productive, and how even low-level disrespectful behaviors are harmful in the workplace. It also teaches employees what behaviors are considered bullying or harassment and walks employees through the organization's Respectful Workplace, Anti-Harassment and Anti-Retaliation policy.

Second, effective training gives participants the skills they need to be active contributors to an SRDI workplace. Different types of training can teach different skills. In the training we offer, we teach participants how to give feedback when they experience unwelcome behavior of any kind, and how to receive such feedback. Neither of these skills comes naturally to us as human beings. And yet, often the best way to stop low-level bad behavior is to have the skills to engage in a direct conversation with a co-worker or someone else in the workplace. The training provides tips for giving and receiving feedback and participants are then given the opportunity to practice those tips in hypothetical scenarios that are realistic for their particular workplace.

We also teach individuals how to be active bystanders in helping to stop disrespectful behavior, bullying or harassment. Most people do not like seeing someone else being subjected to disrespectful behavior, bullying or harassment. Sometimes they feel it is not their responsibility to intervene. But often they would like to intervene, but do not know how to do so effectively and safely. The training offers realistic options that individuals can use, taking into account the specific power dynamics of their particular workplace.

We offer a different skills-building component for supervisors. This training teaches supervisors how to respond effectively to complaints about disrespectful behavior, bullying or harassment. How a supervisor responds, in those first moments when a complaint is made, largely determines how effective the rest of the process will be in addressing and resolving the complaint. Again, the training provides tips for how to respond to a complaint, and participants then practice those tips in scenarios that are realistic for their workplace.

The training also teaches supervisors how to coach employees who are engaging in problematic behavior. Many supervisors have achieved their positions because they are good at a particular substantive skill, not because they are natural managers. An organization committed to an SRDI

workplace needs to invest time and resources into training front-line supervisors on how to coach employees who are acting in ways that undermine such a workplace.

IV. Conclusion

Stopping harassment depends on having a workplace culture that simply does not tolerate harassment. The best way to create such a workplace is to create an SRDI workplace generally. That will stop low-level behavior before it becomes worse, create a safe environment for individuals to report any form of misconduct early (including harassment), and hopefully, provide concrete skills to everyone in the workplace that will enable them to be active participants in creating an SRDI workplace.

I hope the ideas I have presented in this testimony will assist the Subcommittee on Courts, Intellectual Property and the Internet in its oversight responsibilities, and the federal judiciary, in their ongoing efforts to ensure that everyone in the judicial system is able to work in an SRDI workplace. In such workplaces, everyone benefits and everyone thrives.

Mr. JOHNSON of Georgia. Thank you.

We will now proceed under the 5-minute rule with questions. I will begin by recognizing myself for 5 minutes.

As I have noted, the judiciary has made some meaningful improvements in recent years to better protect its employees and promote a safe and respectful workplace. But from the testimony we have heard today, it is clear that there is much more that has to be done.

Ms. Warren, I know that I speak for all of my colleagues on both sides of the aisle when I say that I am profoundly sorry for the harassment that you experienced. It is deeply troubling that a Federal appeals judge, someone who is tasked with ensuring equal rights under the law, could behave in such an abhorrent manner. I commend your courage throughout that experience, and in your decision to come forward and testify today.

If you are comfortable, I would like to ask you: Do you think the system failed you? And if so, why?

Ms. WARREN. As I have explained in my written testimony and some today in my statement, I do think that the system failed me. I did everything that I could to try to figure out what would happen if and when I reported that would protect me because of what I felt were reasonable fears for my professional future. I was unable to get those answers. I believe that a system should make it easy for a law clerk in a moment of distress to know where to go, to provide answers. This burden should not have been on me.

And I want to add that because of all of these secret channels, that is the reason I came forward today. When I was a law clerk here in D.C., I sat down with many people who were considering clerking. They had heard through whisper networks that something had happened to me, and they asked me what they should do. Should they go clerk? I was only able to speak to those people, because they were friends of friends, most of them were at Ivy League law schools, and that is not representative of the vast majority of people who are clerks in the Federal judiciary. It is not fair that only a few people should understand the risks and the possibility of harm, and how that harm was not addressed.

Mr. JOHNSON of Georgia. Okay. Thank you.

And with that, I will yield to balance of my time to Ms. Scanlon.

Ms. SCANLON. Thank you. I appreciate that.

I have a vested interest in this. I began my legal career by clerking, and, obviously, as several of you have testified, it can be a huge boon to your legal career. My daughter is a second-year law student, and she has obtained a clerkship for when she graduates. So, clearly, we have a family interest.

Ms. Feldblum, you spoke of the need to have an inclusive workplace as a backstop to harassment, et cetera. Have you had the opportunity to review the workplace working group report?

Ms. FELDBLUM. I have. In fact, the work—I have and, in fact, the working group asked Commissioner Lipnic and I to come speak to them, even before they issued the report because they relied significantly on our 2016 report.

Ms. SCANLON. Okay. Do you have any suggestions on how the working group's report as it is implemented could be improved?

Ms. FELDBLUM. Well, I haven't followed it directly myself. I do feel that the report looked at pretty much all of these five elements, and so I think it is really just about refining each of those to make sure that they are effective and that they are working.

Ms. SCANLON. Okay. Certainly, there is some similarities between law firms and with a partner structure and the judiciary where people run their own fiefdoms. How important is leadership from the top, from the Supreme Court?

Ms. FELDBLUM. Leadership is key. I mean, I clerked for Frank Coffin on the First Circuit Court of Appeals, and then for Justice Blackmun on the U.S. Supreme Court, and they were formative experiences. The courthouse, by the way, employs lots of people besides law clerks and that is why the leadership from the top is essential.

Ms. SCANLON. Are there particular challenges, given the fact that our judiciary is still overwhelmingly male, in terms of encouraging a culture of reporting and respect for those who do report?

Ms. FELDBLUM. Social science is clear that having diversity at the highest levels is very important for making people feel safe which is why we talk about SRDI, safe, respectful, diverse, and inclusive. They are all essential.

Ms. SCANLON. Okay. The Office of Judicial Integrity may only have one staff member responsible for providing support to 30,000 employees. Can anyone on the panel speak to whether that is sufficient?

Ms. SHAH. So I think that—I can speak to that question a little bit. I am not sure of the number of complaints that the judiciary receives through the Office of Judicial Integrity, and so, perhaps based on the number of complaints that may be sufficient for that reason, but I think that part of the issue is that the Office of Judicial Integrity at this point in time only serves an advisory purpose and does not actually allow people to report directly to the Office of Judicial Integrity.

So I think that, to the extent that they are only providing advice to people calling in, perhaps that staff member is enough. I don't know the numbers on that. But to the extent that we believe the Office of Judicial Integrity should be doing more than providing advice on specific circuits, specific and district rules, I think that more staffers are necessary.

Ms. SCANLON. Thank you.

I see my time has expired.

Mr. JOHNSON of Georgia. Thank you.

Next we will hear from the ranking member, Mrs. Roby.

Mrs. ROBY. Your workplace should always be a safe environment, regardless of your employer, safe from physical harm, verbal or psychological abuse. Though every workplace is not the same size, same type of company, or same type of supervisors, the basic right to show up, to work, and succeed in your job without being harassed in any way, shape, or form is paramount. And today's hearing has focused on the challenges within our judicial branch on how to stop, how to properly report, and investigate improper behavior amongst judicial employees.

I, too, want to take this opportunity to again to thank each of you for being here today. Thank you for your very powerful and

personal testimony. It takes incredible courage and bravery to come before Congress to speak about such traumatic experiences.

I have heard you today. I have read your testimony in full, including all of the suggestions that you have offered for improvement. This is such an important topic. I want to make sure that we get this right, and that the judiciary gets it right. We have to ensure that the changes made by the judiciary are actually working, and what, if any, additional changes may be needed.

I appreciate hearing from each of you about your views on how to shape the system moving forward and I look forward to continuing to work with my colleagues here on this committee and the judiciary to ensure that the best practices are in place. So I want to publicly say today, I am committed to continuing rigorous oversight through this committee.

And I thank you for having this hearing today.

With that, I yield back.

Mr. JOHNSON of Georgia. I thank you, Mrs. Roby.

Next, Mr. Stanton, from California.

Mr. STANTON. I thank you very much, Mr. Chairman. I appreciate that introduction, although you did downgrade me. I am from Arizona. I appreciate that.

Mr. JOHNSON of Georgia. I always get that wrong. I am sorry.

Mr. STANTON. Thanks for having this hearing. Thanks for all the witness.

Ms. Warren, in particular, thank you for your courage in coming forward here today. It is very, very important that you share that powerful story, to inspire others, and to educate us so we can be better policymakers in this arena.

Thank to you all the witness.

Ms. Lithwick, I was looking on my phone while you were testifying but I was subscribing to your podcast. So I am looking forward to listening to the Amicus.

Of course, it reminds me of, you know, what this institution is, an issue Congress had to go through over the last few years where we had to do a lot of soul-searching in how to improve the environment for our employees and put institutions in place to protect and support our employees.

And I understand, talking to some of the leaders, including Congressman Speier, who led the way on that, how difficult it was to challenge the way it has always been, and somehow, the way it is always been was somehow a reason for continuing to do it. No, it is not. It looks like we have the same thing to do with our Federal judiciary, in particular, our supportive staff and our clerks.

So, Mr. Chair, I know you are leading the way, and I know there is a bill. I am looking forward to supporting that so we can push the envelope to provide better protection for people under these circumstances.

And we have guests here who are members of the committee, but not particularly this subcommittee and I wanted to yield the remainder of my time to my friend, the Congressman Jayapal, from California, from the great—oh, Washington. I did it myself—from the great State of Washington.

Ms. JAYAPAL. I thank the gentleman from Arizona for yielding. And I thank the chairman and the ranking member for allowing me to be here.

Ms. Warren, I read your testimony last night, and I just want to say to you how grateful I am that you have come forward. I know that there are a million things that go through your mind when you have to decide whether or not you are going to tell your story, and I want you to know that your story and, Ms. Lithwick, yours as well, are the reason that women have courage to come forward and tell theirs, and they are the reason that we ultimately are able to make any change at all. So I am deeply, deeply grateful to you.

And I wanted to, if you are willing, just start with a question to you, which is to say that I was struck in your testimony, as I am with so many women who come forward to testify, about the pressures and the circumstances of your clerkship that made it very difficult for you to seek help. And I just wanted to know if you wanted to elaborate on any of those that you have not already mentioned or highlight some in particular.

Ms. WARREN. I think I have detailed in my written testimony the extent to which chambers is such an all-consuming environment. Honestly when I was in chambers, it was hard to believe that there was a world outside of the people appearing before us, and the network of former Reinhardt clerks. It seemed like the only lawyers in the world, and I understand that there are many lawyers.

What I do want to say is, I want to echo what you just said, that it is because other women came forward. From the end of May to December 8, I did not tell almost anyone in my life what was happening to me, and it was only after Dahlia Lithwick published her piece that I reached out to a mentor of mine. I am a little bit embarrassed by how deep my dance card is of mentors, but it is because of that that I am coming forward, because I have that support.

And what I do want to tell you is that mentor told me something I had never considered until the day that we spoke late in December. She told me that I could leave. That idea had not occurred to me. I honestly felt that I would walk out of chambers either at the end of my clerkship as scheduled, or on a stretcher after a heart attack. Those were the options that I saw.

I was not somebody who went straight from college to law school and who had never worked. I have been working since I was 17 years old, when I left home. I am now 31. I was 28 at the time, and I had held a number of jobs in which I understood I could leave. This was the one where I felt I had nowhere to go, and I came forward today because I have described all of the places that I felt I should go, or I could go. I tried all of those and nothing worked.

Ms. JAYAPAL. And when you approached the Office of Judicial Integrity, and when you received the letter, what did you feel at that moment about that particular process that supposedly was set up to address some of these issues?

Ms. WARREN. I was devastated, personally, and I was angry. I felt like I had done everything I could to ask someone to tell me how I could report in the way that I felt safe. I had provided details of how I felt I could report safely, and nobody could guarantee me

that there was that option. I was a young lawyer at the time that Ms. Santos and I received that letter, but an immediate read makes clear that the arguments in that letter are spurious.

I wish, as a law clerk that I could have said that things were too new to be interpreted. That would have made my life much easier, but is that not an acceptable answer about reporting procedures. If anything has changed since I received that letter, I am devastated that that was not communicated to Ms. Santos to help me.

Ms. JAYAPAL. Thank you so much, and I have many questions for all of you that I didn't get to, but I just want to thank you again for your work and for testifying before us.

Thank you, Mr. Chairman.

Mr. JOHNSON of Georgia. Next, Mr. Ben Cline, the gentleman from Virginia.

Mr. CLINE. Thank you, Mr. Chairman, and thank you for holding this hearing. I thank our witnesses for appearing. I thank Ms. Warren for her bravery and courage and coming today.

I read your testimony. It is deeply disturbing and shocking, the abuse that you were subjected to, and I agree that we must remove barriers to reporting harassment and create a process that encourages victims to come forward throughout this process. And I look forward to working with all involved to help create the process and move forward our judicial and legal system into the 21st century.

In your testimony, you concluded with three hopes: You hope that your testimony helps law clerks and other judiciary employees, who have similarly suffered harassment, to feel more able to speak about their experiences; you hope it assists the judiciary in considering the barriers to reporting that exist and in assessing the adequacy of the current mechanisms; and then finally, you said it is your hope that members of this subcommittee consider how we can help to spur further changes to ensure that victims of harassment and misconduct in the judiciary have real, viable paths forward in the future to report and address abusive conduct.

And I can say, certainly to that third hope, mission accomplished. We are grateful that you are here today, and we look forward to working with you and others to make the other goals also accomplished. Thank you.

I yield back.

Mr. JOHNSON of Georgia. Thank you.

Next, the gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. I thank the distinguished chairman for convening this very important hearing. I certainly thank all of the witnesses for coming forward. Thank you, Ms. Warren, for your courage and bravery in telling your story in this venue.

I had the opportunity to start out my law career, as well as a law clerk, in the Southern District of New York clerking for Judge Baer. And I think, like everyone, as a young law student, it is just a phenomenal opportunity to be apprenticed by someone who has got a tremendous amount of legal experience, and is currently serving on the bench. But I think as all of you have talked about, it does create quite extraordinary—and I had a phenomenal experience with Judge Baer, but it does create an extraordinary power dynamic, given the fact that you have got life-tenured individuals who are on the bench, and young law students transitioning from

law students into young lawyers starting out their careers. And then, of course, we have the dynamic of separating co-equal Article III branch of government.

But I am interested in your thoughts on the power dynamic situation and how we can create a better system so that there is accountability, given that I think we all want to maintain an opportunity for people to start their careers in an apprenticeship-type of fashion, and that should be available to people of color; that should be available to women; that should be available to traditionally disenfranchised individuals in a harassment-free setting. So maybe, Ms. Warren, we can start with you and Ms. Shah, and open it up to everyone on the panel.

Ms. WARREN. I am not an expert in sexual harassment and systems design. I am trying to become an expert in capital defense. And as I detailed in my written testimony, this experience has taken away an enormous amount of my time that other people who have not been harassed could have used to advance themselves professionally, so I would refer to people with much more knowledge than I.

Ms. SHAH. Thank you for your question. I think that the power dynamic is extremely difficult to address on this situation, but that there are two changes that would be particularly helpful. First is one that I think that this committee can help with, which is, ensuring that there are clear reporting procedures, and that there are clear guidelines for what kind of conduct is covered by both the employment dispute resolution processes, and the Judicial Conduct and Disability Act. That sort of clarity, at least, creates some sort of safeguard on that power dynamic so that people who are in a position of power know that there are still limits on that power, and so that they know that there is accountability at some point in time. As a law clerk, I think it would have made me feel more comfortable if I knew that there was some sort of accountability, and I knew exactly what kind of result that accountability could lead to which I believe is still unclear.

Second, I think that a cultural change is necessary, and I think that this committee can signal that that cultural change is necessary, but I think that that is something that Ms. Feldblum can talk about a little more in terms of leadership. I think that as long as members of the judiciary continue to believe that these issues are non-existent, or are isolated, that these changes will not occur on a broader scale.

Mr. JEFFRIES. Thank you.

Ms. LITHWICK. I would just say briefly two things: One, so extraordinary is the power differential between a clerk and their judge. It is unlike anything else. If you are doing your job extraordinarily as a law clerk, you have subsumed your entire identity into your judge's. You learn to write like your judge. By the end of it, you are, quite literally, thinking together, and I think that that makes it unique.

The only other thing I would say, and I don't know that we focused on it enough, is that the asymmetry is so profound that it really demands that bystanders, other judges who see things, who later call you and say, Oh, I knew about that for 20 years, but it was inappropriate for me to intervene. I think the pressure on

other judges to come forward and behave like bystanders who have a dog in this fight really becomes essential.

Mr. JEFFRIES. Thank you.

Ms. FELDBLUM. Sir, I would add two things: One, in the 2016 report that I issued with my Republican colleague, Vicki Lipnic. We noted that there are risk factors in different workplaces that are worth thinking about ahead of time. One risk factor is the power dynamic that exists in any number of places, and the other is decentralized workplaces which is essentially what you have in chambers.

The second thing I would say is you, in Congress, have taken a step in looking at your own procedures and updating them. I mean, when I was a commissioner, I provided technical assistance to those working on that bill, and one of the things that people working on that bill said was we have to look at our own House before we start saying things to others.

You have done that. It is not exactly the same, but look at what was done there and then think about how it applies. And again, I think many of us stand ready to provide technical assistance on that.

Mr. JEFFRIES. Thank you.

Mr. JOHNSON of Georgia. Thank you. I would now like to begin a second round of questioning, and I will recognize myself. Ms. Lithwick, you have described the relationship between law clerks and judges that they work for, law clerks and the judges that they work for as being, quote, "built on worshipful silence." Can you speak as to why this culture of silence has perpetuated, and whether you believe the judiciary has taken sufficient steps to promote transparency and encourage victims and bystanders to report misconduct?

Ms. LITHWICK. I thank you for the question. I think part of it is simply endemic to this particular—you know, the clerkship environment is usually a 1-year—it is unlike so many other employment opportunities, and I think that judges develop reputations as big personalities, or they develop reputations as feeder judges who will vault you to your next clerkship.

And I think, as Ms. Warren testified and Ms. Shah testified, when you are in law school, and the sort of myopic view of the only thing I can do to forward my career, or to level the playing field, is to get a clerkship, I think it simply contributes to this feeling that your judge is kind of a god, and you are kind of a peon, and that you can endure anything for a year. So I don't think that it is unique to the judicial clerkship relationship.

I also want to really be at pains to say we are also talking about people who are cleaning staff, who are marshals, other people in the building. So I don't want to just so narrowly define the problem as to take out other people who can be subject to harassment and abuse.

But I do think that one of the things that absolutely has to happen is sunlight. It is just to have the kinds of transparency that this hearing affords us. Nobody should be forced to keep a secret for years. I shouldn't probably have kept a secret for decades, but I think that part of the problem is because we all feel that the machinery will never change, and that all we are doing is harming our

own prospects and our own careers by coming forward. I think the incentive is to keep secrets for a very long time.

And I just would really say, again, to folks who are listening to this hearing who are thinking about this: The only way this changes is not just for women to come forward and stick their necks out, but for the machine to change around them. If it doesn't, you just feel like you wasted your time.

Mr. JOHNSON of Georgia. Thank you. The machine includes the law schools that provide the talent to go into this culture of male dominance oftentimes, power disparity, secrecy, silence, and loyalty. What role can law schools play in ensuring that that code has some exceptions when it comes to employment discrimination, sexual discrimination, and the like?

Ms. SHAH. So, I think that for a lot of law clerks, when you don't know where to turn, you are recently a law school grad, so you go back to your law school and talk to the professors and the mentors that you had about the experience that you are having during your clerkship. So, to extent that law schools are aware of misconduct, the Office of Judicial Integrity has created some kind of hotline where you can report that misconduct.

I think that the problem here, though, is that law schools face many of the same incentive problems that law clerks also do. Law schools' rankings depend on where their students clerk. Law schools have an incentive to continue good relationships with every circuit and District Court. And, so, unless there is some incentive for them to report, some kind of signaling from the judiciary that not only will those reports be listened to, but that there will not be any kind of retaliation or other kind of action towards those law schools. They face the same problem, frequently, that law clerks do.

On a separate level, I do think that some law schools have made changes to try and not have the same type of conversation that clerkships are necessary, or that every student who can get a clerkship should take the first clerkship that they get. There should be more open conversation about the risks that come with clerking, and especially for first generation students, students who don't have a network.

That sort of information, as Ms. Warren mentioned, is frequently information they only get from whisper networks, and people are left out of those whisper networks and end up taking clerkships where they don't understand any of the risks. Law schools have to be better about making sure their students understand those risks before they start clerking.

Mr. JOHNSON of Georgia. Thank you. I will next call upon Mr. Cline, if you have another round.

Okay. I will now yield to the gentleman from New York.

Mr. JEFFRIES. Thank you. I just want to follow up on one question, a question that was asked by the chairman, which I think is an important one in terms of the role of law schools, and, in particular, the capacity if law schools were to unite, that that could have an influence on a change in culture to the extent that a series of law schools, probably those that disproportionately send individuals to the bench or, you know, schools in a given State that disproportionately send students as future clerks to the judges in that particular State. Then it could have a positive impact. But you

mentioned, Ms. Shah, I think an important observation. To harken back to my time as a law student, longer ago than I would like to admit, but that I remember being told, I assume this is still the case, that if you get offered a clerkship, you do not say no.

So effectively, even at the very earliest stages of the process, the notion of the power dynamic is embedded into the culture. And I would be interested in whoever wanted to make an observation, starting with Ms. Shah, about how that may have an impact and how that, perhaps, needs to change, and if that could possibly have a positive impact on the whole process?

Ms. SHAH. So I think that that would have a positive impact on the whole process because that signals that there is an option to say no, or there is an option to leave the clerkship if that is something that you need to do. I think up until now, the language surrounding clerkships has enforced that power dynamic, has made it difficult for people to think that they can say no to a judge, which then becomes a problem once you begin your clerkship.

But one of the issues that I have is that law schools, while they can be partners in this issue, I do not believe that they can be effective partners, unless the judiciary allows them to be effective partners. And so while law schools can do everything on their end to ensure that people are learning about these risks, until the judiciary signals a willingness to work with law schools without removing that disincentive, I think that law schools can only do so much.

Ms. FELDBLUM. So I actually haven't thought about law schools as a social actor in this way, and I think it is very important thinking about my 18 years as a law professor at Georgetown Law School, and having—there is a committee that helps people get clerkships. That really could be a place where clerks could report back to that committee that there are issues, including male clerks that see things happening. I mean, that is the bystander piece that is empowering them, that there is a responsibility there.

And I think that can then make an impact if enough schools are suddenly saying Well, I am not sure about that clerkship, because we are not going to change the prestige of getting a clerkship, right.

When I was at Harvard Law School many, many years ago, and that is fine because I like getting older and wiser, absolutely, like getting a clerkship. I mean, that is why the First Circuit and then getting the Supreme Court; Harvard loves it when their folks are getting clerkships. But they actually shouldn't like it if their students are going to clerkships that will be harmful for them going forward. I think there is an opportunity there, partnered with an effective system inside the judiciary.

Mr. JEFFRIES. Thank you.

Ms. LITHWICK. I think I would just add two quick things: One is in the wake of reporting in 2017 on Judge Kozinski, one of the things I learned was an immense number of law professors got in touch and said, Oh, it was fine. I just never sent him a woman clerk, which, of course, doesn't solve the problem. And all it does is sideline women from getting a prestigious clerkship.

But more pointedly, I think one of the things I have learned, again, in subsequent reporting, is the ways in which some of these power imbalances actually replicate themselves in law schools, so

that you have students vying to have relationships with professors who are sort of the pipeline professors, who get you to these prestigious clerkships, and that has its own really pernicious effects, when you sort of replicate that asymmetry and have students who feel I have to be in a close relationship with the professor who may make me uncomfortable, simply because that is the only pathway to clerkships. So not only can law schools be part of the solution, but I think if they don't reckon with this, they can be part of the problem.

Mr. JEFFRIES. Thank you. And I think, to close, that if law schools are ignoring the problem in the way that you laid out, for instance, with Judge Kozinski, and only sending male clerks, then you are still leaving every other female employee within the courthouse vulnerable to harassing behavior who may be on the judge's staff directly or indirectly interacts with them marshals or other employees of the judiciary.

And so, thank you all for your wisdom and your thoughts and your courage, and I thank the chair for convening this hearing.

Mr. JOHNSON of Georgia. Thank you. And I can assure the witnesses and those who are following this hearing that diversity on the bench, diversity on the pipeline, or in the pipeline to the bench in terms of clerks, and also diversity in law school admissions in the universities that disproportionately feed into the clerk pipeline are areas of interest to this subcommittee. Diversity, including women, so no way we would sit back and allow this phenomenon of women coming forward to report sexual harassment, to end up reducing the number of women serving as law clerks.

So I want to assure you of that, and again, to let you and everyone listening know that our office is open for information on this issue, and this is something that we will continue to work on.

I want to thank you for your attendance and participation in this very important hearing. I want to thank my ranking member, Mrs. Roby, for her participation, and with that, without objection, all members will have 5 legislative days to submit additional written questions for the witnesses, or additional materials for the record. And with that, this hearing is adjourned.

[Whereupon, at 10:01 a.m., the subcommittee was adjourned.]

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