

**“CONFRONTING SEXUAL HARASSMENT AND OTHER WORKPLACE
MISCONDUCT IN THE FEDERAL JUDICIARY”**

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Thank you Chairman Grassley, Senator Feinstein, and members of the Committee for inviting me to testify today. My name is Jaime Santos, 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 George King, the former Chief Judge of the U.S. District Court for the Central District of California. I am an appellate attorney at Goodwin Procter LLP. I am here today with the support of my judges, my firm, and my family. For the past six months, I have worked with a group of current and recent law clerks—including Kendall Turner, Deeva Shah, Claire Madill, Sara McDermott, and Priya Srinivasan—urging the judiciary to take action to prevent and address sexual harassment. We have worked collaboratively with the Federal Judiciary Workplace Conduct Working Group that was convened upon the request of the Chief Justice and with a similar group formed by the Ninth Circuit.¹

I look forward to discussing what I have learned over the past six months. I applaud the judiciary’s prompt formation of the Working Group and support many of the judiciary’s actions and recommendations thus far. But in my view, the Working Group’s June 1 Report² does not go far enough, and its recommendations are not adequately specific to effectively address the barriers to reporting harassment that it acknowledges exist. I expect to provide the Judicial Conference with detailed responses to the Report, but today I propose five steps I believe are necessary to effect lasting change:

1. The Administrative Office of the U.S. Courts and the Chief Justice as the presiding officer of the Judicial Conference should take a more active oversight role to ensure that all circuits employ best practices to address harassment and other abusive behavior.
2. The judiciary must clearly define how allegations of harassment and abusive behavior will be investigated, and what consequences will be imposed if allegations are substantiated.
3. 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.
4. Going forward, law clerks need a seat at the decisionmaking table, not merely the option of offering input on an ad hoc basis.

¹ For purposes of this testimony, I refer to the Federal Judiciary Workplace Conduct Working Group as the “Working Group.” Additional groups have been established by the Seventh, Ninth, and D.C. Circuits.

² Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States (June 1, 2018), http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf.

5. Law schools must work collaboratively with the judiciary to ensure that harassment and misconduct do not continue to go unreported.

I. INTRODUCTION

Judicial chambers are unlike any other type of working environment. Individuals lucky enough to be hired to work with judges are typically law students, for whom judges are more demigods than they are employers. Judges are titans of the profession who have shaped the law as we know it. A law clerk enters a clerkship with the belief that her judge will challenge her to become a better thinker, be a lifelong mentor, and set an example that she can follow for her entire career. When a law clerk experiences or witnesses harassment, it can be devastating on a personal and professional level. And it is incredibly difficult to speak up against someone who has the unmatched power of a life-tenured federal judge.

My colleagues and I began working on issues of sexual harassment within the judiciary in December of last year, shortly after the Washington Post reported sexual harassment by a federal judge. We were concerned that the judiciary's opaque policies and processes served as a significant barrier to reporting harassment. We immediately started working on a letter that would offer modest initial suggestions to address harassment in the federal courts.³ These 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,⁴ and judiciary employees to study ways to address these issues. We also asked the Chief Justice to address this issue in his year-end report.

When we finished a draft of this letter, we reached out to our law clerk networks to see if we could persuade a few others to join. We expected a handful of additional signatures. Four days later, more than 695 individuals (mostly former clerks and law professors) had signed. As of today, there are more than 850 signatures and counting.

During this process and in the months that followed, we spoke with

³ Letter to Hon. Anthony J. Scirica, Chair of the Committee on Judicial Conduct and Disability; Hon. Jeremy D. Fogel, Director of the Federal Judicial Center; James C. Duff, Director of the Administrative Office of the U.S. Courts; and Chief Justice Roberts, Presiding Officer of the Judicial Conference of the United States Regarding Clerkships, Confidentiality, and Harassment (Dec. 20, 2017), https://docs.google.com/forms/d/e/1FAIpQLSeoZ3gk0hvfq3lfbmzjWqEINn31hhV_7rRIEqS6_zhlSr9v7GQ/viewform.

⁴ Throughout this testimony, I use the term "law clerks" to refer to current or recent law clerks.

dozens of law clerks and numerous judges. We received a mixed reception from the judiciary. Many judges, including the judges for whom I clerked, were supportive of our efforts. Others opposed law clerk involvement in any reforms or dismissed our work as an over-reaction to an isolated incident. But as we continued to speak with more law clerks, we learned that was not the case. Harassment and abuse within the judiciary are not the rule, but these experiences are not uncommon. Law clerks and externs from numerous federal courts shared with us that they had felt demeaned, belittled, or humiliated during their clerkships or externships. Some shared stories about being asked sexual questions during job interviews, hearing their judge or co-clerks speak about female attorneys in derogatory and objectifying terms, and being groped or kissed in public and in private. Many knew of other law clerks or employees who had been subjected to harassing or abusive behavior in chambers as well. These experiences did not always involve abuse by judges; they sometimes involved mistreatment by in-chambers staff or other law clerks. Moreover, these were not stories of experiences from long ago; I have spoken with law clerks as recently as this week about unacceptable behavior they were subjected to this year, after the Working Group formed.

When the Chief Justice asked the Administrative Office of the U.S. Courts to form a group to address these issues, we asked for a seat at the decisionmaking table. The Working Group declined that request but solicited our input and invited us to discuss our recommendations and the Working Group's proposals. In these meetings, I have seen the members of the Working Group dig in to these issues in a meaningful and genuine way, and focus on exactly the right points—the power dynamics in the judiciary that make reporting difficult, the lack of transparency that undermines the public trust, the lack of clear policies and reporting avenues, and abusive workplace behaviors that are just as odious as sexual harassment.

Since the judiciary found itself at the center of the #MeToo movement, it has engaged in meaningful action more quickly than many other institutions. We have not seen significant changes from the media industry or from other segments of the legal profession, and Congress has failed to enact any meaningful legislation to address harassment in its own two houses. And while we do not believe the judiciary has fully acknowledged its own past failures, and many of the Working Group's recommendations lack the specificity to create workable solutions to the problems the Report acknowledges, the judiciary is beginning to take action and has demonstrated a commitment to continually evolving policies and to cultural change.

II. THE JUDICIARY’S PROGRESS THUS FAR IS ENCOURAGING.

The Working Group’s Report makes clear that its work is ongoing, but I have already seen several encouraging signs of the judiciary’s progress.

First, the Federal Judicial Center (FJC) has already started to revise its publications and training programs to more adequately address harassment and workplace misconduct. The FJC is also revising its law clerk orientation and has reached out to me and my colleague, Kendall Turner, to help develop a specific training module that addresses workplace conduct.

Second, the judiciary is clearly communicating that it is the responsibility of *judges* to ensure a safe and respectful workplace in every chambers and in every courthouse. For far too long, the judiciary has had a “not my chambers, not my business” culture, with many judges believing that their colleagues have a right to run their chambers in any way they see fit. That is not acceptable, and as the Working Group’s Report states, it is not consistent with the Judicial Code of Conduct.

I understand that judges are starting to have candid discussions within their districts and circuits about these issues.⁵ These discussions focus not only on harassment, but on all forms of abusive behaviors and implicit bias. These conversations are critical because, while policies and procedures about harassment serve an important role, meaningful change will happen only if there is a cultural change within the judiciary, which requires judges to speak candidly with each other about the behaviors they have seen, instances in which they should have intervened but did not, and how to speak up when they learn about inappropriate conduct. These discussions are also crucial to ensure that there is no backlash—intentional or not—against women, who have urged the judiciary to take action, or against any other class of individuals who might raise these issues. Women (and people of color) have long been underrepresented in clerkship hiring, particularly within the courts of appeals and the Supreme Court.⁶ Members of the judiciary must ensure that judges do not “solve” the problem by hiring fewer women.

Third, the Report recognizes that when serious allegations of

⁵ These discussions are starting to happen throughout the legal industry, which is encouraging, as the judiciary is far from alone in struggling with these issues. *See, e.g.* Ms. JD 2018 Conference, *Beyond #MeToo: Practical advice for combatting sexual harassment in our workplaces, our profession, and beyond* (Mar. 9, 2018), <https://ms-jd.org/annual-conference/2018-conference/>.

⁶ Tony Mauro, *Supreme Court clerks are overwhelmingly white and male. Just like 20 years ago.*, USA Today, Jan. 8, 2018, <https://www.usatoday.com/story/opinion/2018/01/08/supreme-court-clerks-overwhelmingly-white-male-just-like-20-years-ago-tony-mauro-column/965945001/>

misconduct arise, an investigation should occur even if the subject of the allegation is no longer an active judge. There is much that can be gained from an investigation aside from determining the guilt or innocence of the subject. Such an investigation offers the opportunity to learn whether members of the judiciary knew about the misconduct but turned a blind eye, as well as whether victims made attempts to report it—and if not, why not. This information is vital to preventing the recurrence of similar misbehavior.

Unfortunately, the Working Group’s recognition that “systemic institutional review of workplace misconduct apart from individual disciplinary proceedings” has “value” does not go far enough.⁷ There must be mechanisms in place to conduct these investigations—a specific board or body with investigative authority that is trained in conducting robust retrospective reviews and that is required to report its results to the Administrative Office of the U.S. Courts and to the Chief Justice. But the Report lacks any details about how and by whom these institutional reviews will be implemented.

Moreover, the judiciary has missed the opportunity to conduct precisely the kind of review that the Working Group recommends. As far as I am aware, there has been no investigation about the misconduct reported by the Washington Post in December, no interviews of potential victims, and no examination of how this behavior was able to continue for years, including what individuals and norms enabled it. Thus, although I commend the Working Group’s recommendation that a retrospective assessment of reported misconduct occur despite a judge’s resignation, it is difficult to have confidence that these reviews will take place in the future when one did not occur here, despite the wide range of egregious misconduct reported.

Fourth, the judiciary has recognized that considerable resources must be devoted to this issue on an ongoing basis. The Working Group has recommended funding for a transfer process for employees who experience egregious mistreatment so they are not forced to choose between continuing to experience abuse or reporting misconduct, which could lead to retaliation or the loss of the opportunity to work for a judge. I fully support this recommendation. For law clerks, the early termination of a clerkship is a significant red flag on a resume. For law students, failing to complete an externship could leave someone without enough credits to graduate. For other judiciary employees who work in chambers, the inability to continue working with their judge could put their livelihood at risk. The possibility that, in some circumstances, employees may be able to transfer to another

⁷ Working Group Report, at 28.

chambers or another position in the judiciary could be the difference between reporting harassment and suffering silently. This proposal would also signal to employees that if they report misconduct, they will be protected.

The Working Group has also recommended funding to create an office of workplace relations in each circuit, and the Administrative Office is creating an Office of Judicial Integrity at the national level. This is a crucial recommendation. But these circuit-level and national directors should have authority not only to provide guidance and counsel to employees, but also to examine data about reports of misconduct, access exit-interview information, implement future improvements, and share best practices with each other. Putting in place competent and motivated directors to focus on these issues will help to ensure ongoing improvements.

I am also hopeful that the federal Office of Judicial Integrity will have authority to act as a liaison to the circuits and to ensure accountability by the judiciary as a whole. This type of central role, outside of the chain of command of any particular chambers and any particular circuit will help restore the public faith in the judiciary. It will also ensure that the Working Group's Report is just the beginning of long-term change.

III. ADDITIONAL STEPS SHOULD BE TAKEN TO ENSURE MEANINGFUL AND LASTING CHANGE WITHIN THE JUDICIARY.

The FJC, the federal Working Group, and several circuits have begun to address harassment and other forms of misconduct within the judiciary. But more needs to be done to ensure these actions are effective.

A. The Administrative Office and the Judicial Conference Should Take A More Active Oversight Role.

Three of the thirteen judicial circuits thus far have formed working groups to address issues of harassment and other misconduct. This is not enough. I know from our conversations with law clerks that harassment and abusive behaviors in chambers are not isolated incidents, nor are they limited to specific circuits. And while many of the Working Group's recommendations thus far address actions that *should* be taken in other circuits, there does not appear to be any requirement that the circuits do so, much less accountability if the circuits do not. The Judicial Conference should mandate that these reforms be adopted by each of the circuits, rather than simply make suggestions that could be disregarded.

To study and address these issues effectively, the Judicial Conference and Administration Office must receive more information about misconduct allegations by judiciary employees in the circuits. The Working Group's Report appropriately recommends that chief district judges and chief bankruptcy judges should be required to inform *their circuit* about reports of wrongful conduct by judges and how those reports were addressed, but there is no requirement that the circuits report that information to anyone.⁸ The Judicial Conference should go further—the Administrative Office of the U.S. Courts and the Chief Justice should receive regular reports about alleged harassment or other abusive behaviors in all federal courts so that trends and patterns can be identified and addressed. There should be no room for plausible deniability about harassment at any level of the Judiciary.

B. The Judiciary Should Clearly Define How Allegations Will Be Investigated and Addressed.

The Working Group's Report discusses the need to provide employees with numerous avenues for reporting misconduct. It also correctly identifies that law clerks and staff may be reluctant to come forward with allegations if they are not aware of or lack confidence in the available reporting avenues. But the Report does not explain what will happen after an employee invokes reporting avenues, or how the judiciary will ensure that employees are not retaliated against. It does not explain how the judiciary will ensure that credible allegations are investigated thoroughly, fairly, and by impartial individuals who are properly trained in conducting workplace investigations. Nor does it describe the consequences for substantiated allegations of harassment or other abusive behavior. To the best of my knowledge none of the circuit-specific working groups have addressed this important issue. If employees do not have confidence their allegations are going to be investigated fairly, then reporting avenues will continue to go unused.

C. The Judiciary Should Conduct a Comprehensive, Retrospective Examination of Employees' Experiences with Harassment and Other Abusive Behaviors.

The Working Group is not working on a blank slate; it is addressing an existing institution that has failed to protect employees from harassment and abusive behaviors. And although the Working Group was formed following public press accounts of egregious, inappropriate behavior experienced by law clerks over a span of more than a decade, its Report contains just one

⁸ Working Group Report, at 35.

sentence of findings about past harassment, stating vaguely that “inappropriate conduct, although not pervasive in the Judiciary, is not limited to a few isolated incidents.”⁹ These findings reflect the Working Group’s intentionally forward-looking approach—it sought recommendations for reform through an online mailbox but did not publicly solicit feedback from clerks or other employees about whether they had observed or experienced abusive behavior. A forward-looking approach is important, but in my view it is not sufficient.

We have recommended that the judiciary solicit feedback from all clerks from the past ten years seeking information about whether they observed or experienced harassment or an abusive chambers environment, whether they attempted to report misconduct and, if not, what barriers prevented them from doing so. I continue to believe that conducting a survey of this sort is essential. You cannot solve a problem if you have not developed a thorough understanding of its depth and breadth. Conducting a comprehensive retrospective analysis would send a clear signal that the judiciary welcomes and encourages employees to report misconduct. It would also ensure that victims have an opportunity to be and feel heard.

Furthermore, some of our efforts have been met with hostility by members of the judiciary who do not believe there is any pervasive problem and therefore that no significant reforms or cultural changes are necessary. If judges do not believe there is a problem, they are not going to make efforts to support the proposed solutions. More data and details about the historic scope of the problem may be the best answer to a judge who believes this is a lot of fuss for one or two bad apples. Providing a more adequate factual basis for the Working Group’s recommendations will therefore help to ensure that they are implemented effectively in practice.

D. Law Clerks Need a Seat at the Decisionmaking Table.

The judiciary did not decide to start addressing issues of harassment on its own. The judiciary is making progress because law clerks have forced the issue—by coming forward with their experiences, by urging the judiciary to take action, and by providing specific reform recommendations. And though law clerks have been asked for input, the Federal Working Group and every circuit-specific working group have excluded them and lower-level judiciary staff from the decisionmaking table.

⁹ Working Group Report, at 6-7.

Soliciting input from law clerks and other employees is very different from offering them a seat at the table. As outsiders to the working groups, my colleagues and I have shared general ideas for reform, but we have not been able to offer recommendations for effective solutions informed by access to the documents and data considered by these groups, including the thousands of comments the judiciary has received from employees providing ideas for reform. Nor did we have the opportunity to comment on the Working Group's Report before it was submitted to the Judicial Conference, despite our repeated requests.

By denying law clerks such access, the working groups have deprived themselves of a valuable perspective on the power dynamics that make reporting difficult. Established judges and judiciary executives, no matter how well intentioned, cannot be expected to know their own blind spots regarding these power dynamics or to override those blind spots when crafting reforms to address harassment. And law clerks understand perhaps better than anyone the need for specificity and accountability in the working groups' recommendations. Part of the reason why the existing policies have been so ineffective is because judges and court executives alone wrote them, using vague language that fails to provide adequate guidance to employees. History is likely to repeat itself if law clerks continue to be excluded.

Finally, giving law clerks a formal seat at the table would help to restore public confidence in the judiciary. In my interactions with the Working Group over the past three months, I have seen an engaged group of judges and judiciary officials who have demonstrated an earnest desire to show judiciary employees they deserve to be heard and treated with respect. Unfortunately, some aspects of the Working Group's Report send the opposite message—for example, the use of minimizing language in referring to law clerks' past experiences as "anonymous anecdotal reports" and the lack of specificity in many of the Report's recommendations. It is not enough for the judiciary to offer optimistic platitudes that the problem can be solved if the people these policies are designed to protect do not feel confident in the judiciary's efforts. Giving law clerks a formal seat at the table would go a long way toward improving public confidence in the judiciary's actions.

E. Law Schools Must Start To Lead on These Issues.

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 know more information about harassment and abusive behaviors in chambers than perhaps any other group, yet they have historically played no role in reporting the misconduct of which they have become aware. And they have failed to provide adequate support to their students who have experienced these abusive behaviors.

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. 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. Truly solving 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. Law schools must begin partnering with the judiciary to ensure there are adequate mechanisms for law schools to report this information without risk that their students' clerkship prospects will be adversely affected. And the judiciary must make clear that it welcomes law schools' partnership on this issue.

IV. CONCLUSION

The judiciary has made important strides in studying harassment and misconduct, and the Working Group has provided initial recommendations that should be seriously examined by the Judicial Conference. But this work must be just the beginning of a sustained, long-term effort. The judiciary must hold itself accountable for removing the barriers for reporting that it has reinforced by failing to intervene despite knowledge of inappropriate behavior, by discouraging people from reporting misconduct, and, at times, by intimidating would-be reporters

The federal judiciary has the opportunity to be a leader on these issues. Workable federal solutions could easily be adopted by state court systems, and similar power dynamics and barriers to reporting exist in the legal profession more generally. Because the judiciary is one of the first major institutions to implement systemic changes to address sexual harassment, industries will be looking to the specific reforms the judiciary implements. This leadership position increases the stakes to get the answer right.