U.S. Senate Committee on the Judiciary
Hearing dated June 13, 2018, on Confronting Sexual Harassment &
Other Workplace Misconduct in the Federal Judiciary
June 20, 2018
Questions for the Record from
Chairman Grassley

For Mr. Duff:

1. In response to a question posed by Senator Feinstein you implied that the Office of Judicial Integrity would receive and investigate harassment reports. Approximately an hour before the working group report was released you had a phone call with my staff. During that phone call, you were asked if law clerks or employees could file a complaint with the Office of Judicial Integrity or if its function was solely to provide advice and counseling. You replied that it would provide only advice and counseling.

a. Will law clerks and other AO staff be able to file a complaint directly with the Office of Judicial Integrity? If not, will the AO develop an office or mechanism for any staff to report or file complaints against any employee? Please explain.

The new Office of Judicial Integrity (OJI) will serve as a national resource outside of the circuits and local courts for any Judiciary employee or former employee to seek advice regarding both the existing processes for addressing possible workplace misconduct as well as provide more informal guidance and assistance. The Federal Judiciary Workplace Conduct Working Group ("Working Group") anticipates that the OJI may attempt informal resolution of disputes, but formal complaints will continue to be filed either through the Judicial Conduct and Disability (JC&D) complaint process or Employment Dispute Resolution (EDR) process. The process for filing a formal complaint is uniform throughout the country; the complaint forms will be on the OJI webpage along with filing information. The complaint form and procedures will be accessible on the public websites of each court.

b. Will the Office have an investigatory role, or will it merely provide counseling and advice to victims?

The primary purpose of the OJI will be to counsel and advise callers and potential complainants on all of their options early in the process as well as facilitate informal resolution of issues, rather than conduct investigations. The Working Group envisions that the OJI will work with individuals and direct them to resources for recourse and investigation in their circuit or court unit. The OJI may, however, also assist the responsible circuit or courts with resources

necessary to conduct an investigation, as well as conduct systemic analyses and reviews of workplace problems on its own.

The OJI will serve as a confidential and centralized national office to enhance and complement the process of reporting workplace conduct issues. That office will be staffed with trained professionals and will provide advice and counsel, but the Working Group did not envision it as replacing entirely the local investigative function in the circuits and districts. In the decentralized governance structure of the Judiciary, the courts, as the employing office, have authority to respond to workplace conduct issues and report claims nationally to the Administrative Office's Office of Fair Employment Practices (FEP Office).

The existing processes, when followed, have been proven effective and efficient at resolving complaints. Many complaints are best resolved informally at the local level and, as addressed in answers to other questions herein, there are options for independent, impartial resources to assist in this effort. Importantly, when a formal complaint is filed, there also are multiple levels of fact-finding that exist in the current EDR process – the local EDR Coordinator during the informal stage; an impartial judicial officer during the hearing stage; and judicial officers from another court in the appeals process may all be involved – lending the impartiality and independence that protect the employee. There also are procedures in place for eliminating any conflicts of interest, perceived or actual. For example, EDR claims procedures against district judges are handled by the relevant Circuit Council or persons designated to act on its behalf, and Rule 26 of the Judicial Conduct and Disability Rules authorizes the Circuit Council to request the transfer of judicial misconduct complaints to another circuit for investigation and decision.

The OJI will also receive informal reports of misconduct and will be a resource for compiling such reports to collaborate with the circuits in identifying any patterns of misconduct that should be addressed.

c. What is the phone number for the Office of Judicial Integrity? How will employees access information about this new office?

The Administrative Office of the U.S. Courts (AO) will post the phone number for OJI on uscourts.gov and internal Judiciary web sites as soon as staff are in place to handle calls. In the meantime, inquiries and calls at the national level concerning harassment are being directed to our Office of General Counsel, 202-502-1100.

d. How many employees does it have?

The AO is currently recruiting the first chief of OJI, and additional staffing requirements are under consideration. The initial staff of OJI will provide input and advice to the AO Director on the new office's organization and staffing level needs.

e. What are the employees' qualifications?

The qualifications for the position of the Chief of the OJI include the ability to analyze workplace relations issues from a national perspective while identifying solutions to individual workplace problems, and skill and judgment in conducting sensitive conversations. We also seek staff who can demonstrate a thorough knowledge of workplace policies covering harassment, fair employment, family and medical leave, and reasonable accommodations, including procedures and avenues for reporting and obtaining available relief. In addition, we seek staff with knowledge and expertise in the theories, principles, practices, and techniques of human resources management and employee development.

f. What's the annual budget for the Office?

The initial OJI staff position is being funded in FY 2018 from the budget of the AO Director and Deputy Director's Offices, as will any additional staff who may be hired during FY 2018. The AO is formulating a budget for OJI for fiscal year 2019, which will include one additional staff, and for fiscal year 2020, which is expected to include two additional staff.

2. Are you aware of any rumors or reports that a current judge or justice has harassed anyone?

With respect to rumors, I heard for the first time at the June 13 hearing, in response to a question from Senator Kennedy, Jaime Santos state: "I know of federal judges who have been sitting on the bench in the last several months who have—it is commonly known engaged in this behavior." In response to that statement, the General Counsel at the Administrative Office wrote to Ms. Santos by email, urging her – or those who told her about the behavior – to report the details so that those allegations could be properly investigated and remedied. We have not received any further details about such allegations. The General Counsel remains available to receive information, from Ms. Santos or any other source, so that the allegations can be addressed.

With regard to reports that a current Judge or Justice has harassed anyone, please see my detailed answer to Question 20.

3. To your knowledge, was the Chief Justice of the Supreme Court, any other Supreme Court justice, or anyone in the AO aware of any rumors about Judge Kozinski's behavior before the Washington Post's report was published?

I am not aware that any Member of the Supreme Court or anyone in the AO knew of or was aware of rumors of the misconduct reported in the Washington Post about Judge Kozinski before the newspaper revealed those allegations.

4. Knowledge of Judge Kozinski's behavior was widespread in the federal judiciary. Why didn't members of the judiciary report Kozinski's conduct? Why didn't anyone do anything at all to address his behavior?

It is not clear which behavior you are referencing. Kozinski has long been a controversial figure. When the Senate examined his qualifications during his 1985 confirmation hearing, it heard testimony that Kozinski had engaged in abusive treatment of his employees as Special Counsel of the Merit Systems Protection Board. Senator Carl Levin summarized the allegations on the Senate floor, stating:

> Mr. President, the former employees who submitted affidavits challenging Judge Kozinski's fitness to serve as a Federal judge, describe a man who was—and these are their words – "intemperate," "harsh," "cruel," "demeaning," "sadistic," "disingenuous," and "without compassion."

131 Cong. Rec. 30691 (Nov. 6, 1985). Senator Levin quoted a female employee who stated, "I believed that he engaged in sadistic behavior, because at the time he appeared to enjoy mistreating individuals. He simply did not treat the human beings at the Office with dignity and respect." Ibid. In his lengthy floor statement, Senator Levin quoted testimony that "no federal employee's sexual harassment case would ever stand a snowball's chance of being prosecuted by Special Counsel Kozinski" (id. at 30687), and he cited "a slew of reports of actions taken by Judge Kozinski which can only be described as erratic" (id. at 30694). Nevertheless, 54 Senators voted to confirm Kozinski to serve on the Ninth Circuit Court of Appeals.

As to his behavior during his service on the court of appeals, issues that were reported were addressed by the Judiciary. In response to allegations from a litigant, Judge Kozinski self-reported a misconduct complaint in 2008 concerning pornographic images on his personal computer. That complaint was referred to the Third Circuit Judicial Council for independent review. During the course of the Third Circuit's review, an additional complaint involving a policy dispute between a former AO Director and Judge Kozinski regarding band-with usage and the use of government computers – that had previously been considered by the Judicial Conference and resolved in 2001 – was resubmitted to the Third Circuit Judicial Council for its consideration. The Third Circuit Council dismissed that complaint because it had been resolved by the Judicial Conference seven years earlier.

Although those aforementioned matters may have been generally known by many in the Judiciary, I have no knowledge that any member of the Judiciary was aware of his alleged sexual harassment of law clerks before the Washington Post made those allegations public. When those allegations were published in the Washington Post, Judge Sidney R. Thomas of the Ninth Circuit identified and noticed a complaint which was transferred to the Second Circuit Judicial Council for investigation and review. (See also our answer to Question 6(a).)

5. In the hearing when asked why you had no knowledge of the Kozinski claims you testified:

"There are mechanisms in place but unfortunately employees, law clerks included, were not familiar with our processes and procedures, or found them too complicated. And some were mistakenly led to believe that our confidentiality provisions that were enacted in our guidelines in the immediate aftermath of social media to maintain confidentiality in chambers, were misunderstood to mean they couldn't report misconduct because of the confidentiality guidelines that we had. That was mistaken, we've corrected that very clearly to make certain that our employees know that there are processes and procedures available to them and we're going to expand those, Mr. Chairman."

Heidi Bond, the first individual to go on record with allegations of sexual harassment against Kozinski, wasn't mistaken about the rules of confidentiality. In her letter to the Committee, Ms. Bond correctly noted:

"I did not misunderstand the requirement of clerk confidentiality to extend to covering judicial misconduct. I was actively misled by a prominent and respected federal judge who regularly sent clerks to the Supreme Court, and the year after I left his chambers, became the Chief Judge of the Ninth Circuit. He not only made that claim repeatedly to me in the privacy of chambers, but he publicly detailed his theory of the duties required of his clerks in an article published in the Yale Law Journal. When I realized, years after my clerkship ended, that his understanding of that requirement of clerk confidentiality might be imperfect, I spoke to Judge Anthony Scirica, the chair of the Committee on Judicial Conduct and Disability, about the duty of confidentiality, and after that with the Chair of the Committee on Codes of Conduct. Both of them advised me that the duty of confidentiality did not cover judicial misconduct. They also both advised me that I could not safely speak about what happened to me. They could not tell me that what happened to me was judicial misconduct until they heard what happened; but if I told them what happened and it was not judicial misconduct, then I would have violated my duty of confidentiality. Therefore, they said, nobody could tell me whether I would violate my duty of confidentiality by speaking."

What measures will be taken to ensure that employees are not discouraged from filing complaints?

One of the primary focuses of the Working Group's Report was on your very question: reducing barriers to reporting. The Working Group addressed this by recommending changes to substantive standards, procedures for seeking advice and assistance, and educational efforts. Beginning on page 21 of the Report, the Working Group presented over 20 recommendations, most of which specifically are intended to reduce the barriers to filing complaints. Report at page 21 et seq. The Report also details steps already taken at the national and circuit level to address similar concerns, including modifying our guidance about confidentiality agreements. Reporting of suspected misconduct of a judge is never a violation of a clerk's duty of confidentiality to the judge, and we are clarifying this for all the law clerks and all employees.

6. Ms. Santos noted that "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."

a. Why hasn't the judiciary initiated an investigation of this major scandal?

It did. The statement preceding these questions is not accurate. Upon learning of the allegations against Judge Kozinski, Ninth Circuit Chief Judge Sidney R. Thomas initiated a formal complaint under the JC&D Act process. Pursuant to the JC&D Rules, Chief Judge Thomas requested that the complaint be referred to a different Circuit, and the Chief Justice referred the matter to the Second Circuit. Additionally, the Working Group examined systemic issues that may have enabled such behavior to go unreported. Following the Kozinski matter, the Ninth Circuit also undertook a comprehensive review of its policies and procedures for reporting and addressing workplace misconduct, and adopted a number of changes. (See also our answer to Question 6(b) and (c) below and Question 7.)

b. Why hasn't the AO interviewed Judge Kozinski's former clerks?

By "AO", I assume you mean the relevant Judicial Circuit Councils because the AO has not conducted the types of investigations you are asking about – that authority resides with Circuit Councils and Committees. The "AO" is the Administrative Office of the U.S. Courts. Furthermore, judges on the Ninth Circuit did speak with several of the law clerks who identified themselves in that matter. (See also our answer to Question 6(c), below.)

c. Why hasn't the AO interviewed Judge Kozinski's former judicial colleagues?

The proceedings of any JC&D investigation – which frequently includes interviews of witnesses by trained investigators hired specifically for the investigation – are confidential by statute, and as noted above, in addition to what may have occurred in the JC&D investigation, some judges did speak with law clerks and others about the Kozinski allegations. The Working Group also includes one of Kozinski's former colleagues who contributed greatly to our work and review.

When Kozinski resigned his commission, the Second Circuit Judicial Council concluded the matter because it no longer had jurisdiction. Nevertheless, the Chief Justice had recognized that this incident provided an opportunity to examine our branch's treatment of employees in the workplace. Thus, I was directed to create the Workplace Conduct Working Group – prior to receiving any letters from law clerks or others, by the way – which engaged in an in-depth nationwide study of these issues and published a detailed, comprehensive report

7. Has the judiciary learned anything about what went wrong in the Ninth Circuit's workplace environment that allowed Judge Kozinski to harass clerks for years without repercussions?

Our Report addresses in detail issues that our Working Group believes contribute to workplace misconduct and the barriers to reporting it. Report at pages 12-13 and 20-21. Our Report also calls for changes to the Code of Conduct (the Code) to state expressly the duty of judges, managers, and supervisors to take appropriate actions when they become aware of possible misconduct, and for improved training, in particular "bystander training". Report at page 42.

The Report also calls for better training for chief judges that would specifically address their role in fostering a positive working environment and in holding others accountable for maintaining such an environment, as well as their duty to take action when learning of misconduct or an apparent violation of the Code of Conduct. Report at page 43.

Specifically, immediately following Kozinski's resignation, Chief Circuit Judge Sidney R. Thomas established the Ninth Circuit Committee on Workplace Environment to: (1) undertake a top to bottom review of procedures and re-examine the current procedures to make sure that the courts throughout the Circuit are providing adequate avenues for reporting judicial misconduct and disability issues; (2) develop more effective methods of communicating the Circuit's available reporting avenues to court employees, including law clerks, externs, interns and volunteers; (3) expand training on misconduct and harassment issues; and (4) consider other policies and programs to enhance the workplace environment.

The Ninth Circuit committee undertook a broad outreach effort—through questionnaires, interviews, and focus groups involving law clerks as well as other employees—which revealed that existing policies and procedures were not well publicized and understood and thus less

effective in identifying and addressing sexual harassment and other offensive behaviors. In response, the committee put forth recommendations that have already been approved by the Judicial Council of the Ninth Circuit. These include:

- Establishing the position of Director of Workplace Relations, who will serve as an expert on workplace conduct matters for judges, court unit executives (CUEs) and Judiciary employees circuit-wide, including directing the Circuit EDR policy. The director will function with a high degree of independence and discretion, and will serve as an independent resource for both employees and supervisors.

- Adopting revisions to the Model EDR Plan (now called the Ninth Circuit Employment Dispute Resolution Policy and Commitment to a Fair and Respectful Workplace) to take effect on October 1, 2018, which include an extension of the time for filing a formal complaint to 180 days from 30 days and uniform coverage of all Ninth Circuit personnel, including those working in chambers and volunteers. Modifications to the previous plan also provide clear options for informal advice and assisted resolution of employee complaints. The Policy is rewritten in a clear, understandable fashion to break down barriers for seeking advice on workplace issues and understanding the avenues for filing formal action.

- Adopting a confidentiality policy that makes clear that reporting of sexual harassment or other misconduct is an exception to confidentiality requirements.

- Creating workplace training programs for chief judges, judges, supervisors, employees and bystanders, that can be adapted by the different courts within the Circuit.

- Revising law clerk training.

8. In 2008, the Judicial Council of the Third Circuit released a "Report Regarding Judicial Misconduct", that examined Kozinksi's publicly viewable website which contained several pornographic images. Tellingly, in that report Judge Scirica stated, "the code of conduct for United States judges . . . . 'are in many potential applications aspirational rather than a set of disciplinary rules.'" In light of this holding, why would any member of this Committee or any victim have reason to believe that the Working Group's proposed changes would deter sexual harassment or workplace misconduct within the judiciary?

With regard to reassuring victims that the Code can deter harassment, the fact is when the provisions of the Code are invoked and the process of review is engaged, there is a proven record of success in the removal or resignation of offending judges. The Working Group's proposed changes will increase awareness of the remedies available, remove barriers to reporting

misconduct, and educate judges and all employees about ways to improve the work environment, all of which are designed to deter harassment and misconduct.

Although the Code's precepts may be properly described as "aspirational," they include specific prescriptions and prohibitions, and are enforceable in proceedings under the JC&D Rules. Moreover, earlier this year, the Committee on Judicial Conduct and Disability began considering amendments to its Rules to clarify, among other things, what constitutes cognizable misconduct under the Act.

An explanation of the purpose of the JC&D Act and the Code, as well as the relationship between the two, also clarifies this issue. In the Third Circuit Judicial Council's Report, Judge Scirica quoted language from the Commentary to the Rules for Judicial-Conduct and Judicial-Disability Proceedings that stated the Code of Conduct for United States Judges "is in many potential applications aspirational rather than a set of disciplinary rules." Commentary to Rule 3. As the Third Circuit's Report explained, the Code is "necessarily cast in general terms" out of recognition that there are circumstances where "reasonable judges might be uncertain whether or not the conduct is proscribed." Report at page 22 (quoting Commentary on Canon 1).

The Code provides the rules of reason that undergird the application of the JC&D Act. See generally 28 U.S.C. §351(a) (defining misconduct as "conduct prejudicial to the effective and expeditious administration of the business of the courts"). Indeed, as the Report points out, the Code "provide[s] standards of conduct for application in proceedings under the JC&D Act." Report at page 22.

9. In the quote above, Judge Scirica was citing the comments to Rule 3, of the *Rules for Judicial-Conduct and Judicial Disability Proceedings*, those comments also note "Under Rule 3(h)(1)(G), a judge's efforts to retaliate against any person for his or her involvement in the complaint process *may* constitute cognizable misconduct." (emphasis added) Why would victims come forward when they have no protection against retaliation and the act of retaliating only might be viewed as misconduct under these rules?

One of the proposed amendments to the Rules for JC&D Proceedings that the Committee on Judicial Conduct and Disability will publish for notice and comment will delete the word "may" to clarify that retaliation constitutes misconduct under the act.

10. The Commentary on Rule 11(d) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings says that, in determining the punishment for a judge who is found guilty of misconduct, "voluntary self-correction or redress of misconduct or disability is preferable to sanctions."

a. Do you believe this is an adequate approach to punishment for harassment?

In some circumstances, yes. It depends on the facts and the degree of harassment. Report at page 9. In other circumstances, no; more sanctions are necessary. See also our answer to Question 26.

b. Do you believe that this language, which presupposes that a lighter punishment is preferable to sanctions even where judges are found guilty of misconduct, will encourage or discourage reporting of harassment?

In response to the Report, the Committee on Judicial Conduct and Disability will propose amendments to the Rules for JC&D Proceedings to the Judicial Conference. The Working Group recommended improving the transparency of the JC&D Act process, and in particular, stressed the value of public disciplinary action in assuring the complainant, other judicial employees, and the public that misconduct is met with proportionate response. Report at pages 11, 31 - 32. Such voluntary self-correction or redress is not appropriate when faced with more severe misconduct or disability. As the Commentary to Rule 11(d) currently states, any "[v]oluntary corrective action should be proportionate to any plausible allegations of misconduct in a complaint" and "to any sanctions that the judicial council might impose under Rule 20(b)."

c. Do you agree that this language is designed to protect judges, not victims? If not, please explain.

No. See my answers to Question 10 a. and b. above. See also Report pages 28-32. Our ethics systems are designed to hold judges to the highest standards of conduct. For example, Canon 2 of the Codes of Conduct says that a judge should avoid even the "appearance" of impropriety in all activities – a standard designed to protect the integrity of the judicial system, not protect individual judges.

11. If a clerk experiences harassment significant enough to make his or her working relationship with their judge untenable, how can the judicial branch try to minimize fallout to the clerk's career? Some have discussed reassignment to another judge as a potential solution, but judges vary in terms of reputation, and ideological background. Do you see reassignment as being part of the solution, at least in some circumstances? If so, how can reassignment to another judge be done in a way that does the least harm to a victim's career?

Yes, reassignment is a possible solution for an employee who requests it, and it has been utilized on an ad hoc basis in several courts. Courts, with the assistance of the AO, have in the past facilitated transfers for employees, such as law clerks, who need reassignment for many reasons

that prevent them from completing their term, including when a judge has retired, experienced a significant decline in workload, or deceased. The Working Group also explored the idea of a more organized program that would ensure that those reassigned, including victims of misconduct, can still have a positive experience during the clerkship. Report at page 38-39. We intend for these procedures to cover all court employees, including law clerks, whose employment is made untenable by egregious misconduct by someone with whom they work closely. These mechanisms will be developed at the national level and implemented at the circuit or district level and will strive to ensure the smoothest transition for the employee.

12. Ms. Santos testified before the Committee that she doubts you have any idea how pervasive sexual harassment is in the Federal Judiciary. That would certainly seem to be the case. Your testimony on the pervasiveness and the necessity of understanding the scope of the problem seems contrary at best. At one point, in response to a question posed by Senator Harris, you noted that: "you were not as aware of the rumors up there as maybe we should be. If we talk to law schools, we are encouraging exit interviews when they leave after their experience. We think that will lead to more information that we can collect and utilize if there's a trend." In that response you appear to recognize the importance of understanding the scope of the problem and identifying trends. How will you incentivize law schools to share this information with you, given that they generally don't want to upset relationships with judges and haven't shared this kind of information with the AO to date, even if they had it?

13. How do you anticipate strengthening relationships with law schools will improve reporting for clerks or externs who are victims of judicial misconduct? What mechanisms will the AO put into place to allow the complaints or reports conveyed by students through law schools to reach the appropriate adjudicators?

14. Will strengthening the relationship between the AO and individual law schools allow victims to report judicial misconduct confidentially without fear of professional recourse? If not, what can be done to protect the confidentiality of clerks or externs wishing to report misconduct without fearing professional recourse?

15. Clerks and externs often accept temporary positions with significant information asymmetry. How will strengthened relationships with law schools help students better identify judges with histories of misconduct?

16. How can the AO as a national body ensure that law schools (and their students) that cooperate with judicial misconduct investigations are not implicitly punished for reporting instances of harassment?

Response to Questions 12-16:

First, the statements leading to Question 12, conflate the scope of the Working Group's mission of improving processes and procedures with a different examination of the pervasiveness of past misconduct. Please see our answer to Questions 17 and 18 regarding this difference.

With regard to the Judiciary's interest in working more closely with law schools to gain a better understanding of law clerks' experiences, we believe it can be an important step in improving workplace conditions in the Judiciary. Enhanced communications with law schools are a mechanism for improving that understanding, as in some cases the schools may possess informal knowledge that is not always communicated to the proper channels in the Judiciary. The Working Group recognized this in its Report and recommendations. Report at pages 18, 40.

We have already begun outreach to law schools. Judges Jeffrey Howard and Margaret McKeown and I, all Working Group members, have spoken with or met with representatives from the National Association for Law Placement, as well as law school deans active in professional development and clerk placement, to discuss collaboration and concrete suggestions for efforts both before and after clerkships with their students. Judge McKeown will participate in a panel with the National Association on this very issue. I have also initiated outreach to law school deans I know to work with their clerkship coordinators.

Initial meetings have shown promise, and we will continue to work together to share information and develop procedures that enable law schools to confer with the OJI regarding any concerns, while also protecting the confidentiality of any individual students. The OJI will play a major role in shaping that relationship both to obtain the information from the law schools and to provide it to relevant offices within the circuits. I am pleased to report great interest on both sides in working towards a better experience for law clerks and an overall improved workplace environment in our federal courts. Open communications are crucial to reassuring those who report that they will not be "punished" for it.

17. Why hasn't the judiciary investigated how widespread harassment is in the judiciary?

First, some of our circuits have and are conducting surveys of employees about any experiences they have had with harassment. The Ninth Circuit received feedback in its questionnaire which assisted in the Working Group's review; the Seventh Circuit did also; and the DC Circuit is currently planning such a survey.

The Ninth Circuit's questionnaire was sent to approximately 5,000 current and former Ninth Circuit employees, including law clerks, and resulted in more than 2,800 responses. The overwhelming majority of respondents expressed positive or neutral experiences while working in the Ninth Circuit. There were some responses, however, that expressed negative experiences that could lead to an EDR complaint or investigation. Of the responses, which includes those

from law clerks, chambers staff, probation and pretrial services, clerk's office, and other court staff, fewer than one percent of responses were coded negative and involved current judges. Of those, less than half experienced such conduct first-hand, with the remaining respondents having heard about or observed the alleged conduct. This analysis, as well as other responses from the survey, reveals that misconduct related to sexual harassment and bullying is far from pervasive in the Circuit. The Ninth Circuit recognizes the barriers to reporting misconduct, however, and through its Workplace Environment Committee it has embarked on an extensive circuit-wide effort to broaden the avenues to reporting and enhance training opportunities for judges, law clerks, and employees throughout the Circuit.

Additionally, the District Court of Utah has conducted an employee survey that was useful in our review. We also provided a confidential electronic mailbox to obtain suggestions and observations from all court employees, and the responses we received, along with the thousands received in the circuits, greatly informed our work. Thus, the Working Group has heard from many sources nationwide and from our current and former employees that sexual harassment is not limited to a few isolated incidents.

From the perspective and mission of the Working Group, one incident of sexual harassment in our workplace is too many. Our mission was to review existing procedures and recommend remedies to shortcomings we discovered, and rather than spend the months that it would take to conduct a national survey – some estimates were a year – we thought our time was better spent on improving our procedures going forward. We therefore accepted the statistics cited by the EEOC Select Task Force on the Study of Harassment in the Workplace Report (EEOC Report) in their analysis of women in the overall workforce who had experienced some form of sexual harassment.

In the Working Group's view, all of these sources of input were sufficient to warrant taking immediate action to improve our workplaces. The Working Group recognized some similarities between the Judiciary and other workplaces studied by the EEOC (as well as some differences) and has moved forward with how to implement the EEOC's general recommendations to the specific circumstances of Judicial Branch employees. Report at pages 7 and 20-21.

We believe it is most effective to devote our limited resources to addressing the substantive issues as aggressively and quickly as possible because of our view that no incidents of sexual harassment, no matter how few, are tolerable in our branch of government.

We also note that Congress does not appear to have conducted a survey of its employees to determine the historical prevalence of sexual harassment, and yet both the House and Senate have passed legislation to address sexual harassment in the legislative branch workplace. We believe that current and former Congressional employees can have confidence that at some point such legislation will be enacted and be effective, even without such a survey. Likewise, we

believe the Judiciary can be trusted to act aggressively to address sexual harassment without waiting to obtain such quantitative information.

18. You were unable to say how widespread harassment is. What signal do you think that sends to victims?

I believe that the Chief Justice's direction "to ensure an exemplary workplace for every judge and every court employee" and our Working Group's view that "one episode of harassment is one too many" signals to all employees how seriously we take this issue. I agree with Senator Feinstein's articulation that we should be national leaders on this issue and set an example for all to follow. (Please also see our answer to Question 17, noting that some of the circuits have conducted and/or will conduct surveys concerning past misconduct.) We have obtained extensive qualitative information about the nature of sexual harassment in Judicial Branch workplaces from current and former employees, including law clerks. We encourage any victims of sexual harassment to read the Report and recognize that the issues they have faced in the workplace are acknowledged with the utmost of seriousness and that our branch is taking immediate action to address the concerns of employees who face harassment. We also plan to conduct outreach in a variety of ways to ensure employees are aware of their options for reporting and remediation.

As noted in our answer to Question 17, the Working Group observed at the outset of its work that Congress, as far as we are aware, has not conducted a survey of its employees to determine the historical prevalence of sexual harassment. Yet both the House and Senate have passed legislation to address sexual harassment in the legislative branch workplace. We believe that current and former employees in the legislative branch could have confidence that at some point Congress will enact such legislation, even without such a survey. Likewise, we believe, the Judiciary can be trusted to act aggressively to address sexual harassment without waiting to obtain such quantitative information, and this is as evidenced by the Report and the follow-up by the Judicial Conference of the United States which is underway.

19. You testified that you believe 25—85% of women experience sexual harassment at work. That's quite a range. Out of the 30,000 employees supervised by the AO, not one employee filed a report of sexual harassment in the last year.

a. How many female employees do you have at the AO?

I assume by "AO" here you mean the entire federal Judiciary. As of the pay period ending June 10, 2018, there are 30,223 employees employed in the federal Judiciary and 64 percent of these employees are female.

b. How do you explain how zero reports of sexual harassment could occur at the AO given that 25—85% of women experience sexual harassment at work?

The 25-85 percent figure was derived by the authors of the EEOC Report. It based those figures on testimony it gathered as well as various academic articles that apply to both public and private sector workplaces. The range in figures relates to varying definitions of "sexual harassment" that past surveys have used, as well as fluctuations that stem from how one chooses to sample a population. The Working Group accepted this statistic as evidence that all workplaces, including the Judiciary, face the challenges of misconduct by employees.

The Working Group began with the premise that any amount of harassment that exists in the Judiciary is unacceptable. One of the primary initiatives of the Working Group was to determine the barriers to reporting harassment in the workplace and to recommend solutions to removing those barriers. Report at pages 3-4. Again, we do not assert that no harassment has occurred, but very few occurrences have been subject to official complaints. There are several reasons why so few formal complaints have been made, including the fact that in some instances informal interventions have resolved the issue. Other reasons given are the power dynamic that exists in any court office between judges and staff; employees find that the reporting process is too challenging and the procedures too confusing; and employees' lack of knowledge about the procedures available. Report at pages 12-13.

One of the major goals of the Working Group was to propose recommendations that create alternative and less formal methods for reporting misconduct. The Report suggests ways employees can be made to feel safe and comfortable when bringing attention to behaviors they feel constitute misconduct. Report at pages 36-38. Additionally, the Working Group recognized a need for identifying, avoiding, and correcting misconduct through improved training and education. Report at pages 40-45. We are expanding our training efforts and revising our codes of conduct so employees understand what is expected of them in maintaining a civil workplace. In the end, we intend to effect a positive change in how all employees feel about their place of work.

c. Given the numbers of women employed by the AO and the reports about sexual harassment recently made public, would you agree that you would expect a properly functioning reporting system to result in a positive number of sexual harassment reports?

On one hand, when the reporting system is improved and barriers removed, we may see more reporting. On the other, however, we expect that the changes we implement in our Codes and Rules as well as the increased training will be disincentives and impediments to misbehavior. Our overall and ultimate goal, of course, is to eliminate harassment. And, we are interested in protecting all employees from harassment, not just women.

20. Were you notified in any manner – official or otherwise – that any female employee (AO staff, law clerks, circuit and district staff, etc.) complained of sexual harassment in the workplace in 2017? What about 2018?

At the time of the hearing on June 13, 2018, I had not been notified of any allegations by a Judicial Branch employee, regardless of gender, officially or otherwise involving sexual harassment in the workplace occurring in 2017 or 2018, other than the Kozinski matter. The Committee, however, has posed numerous similar questions before, during and after the hearing on June 13, 2018, each with slightly different parameters. (For example, this question asks only about female employees and prior questions asked about different time periods or about matters involving monetary settlements.) Continuing to respond to such questions seriatim could lead to confusion about what we know. Therefore, I am consolidating in this answer a complete summary of our knowledge of recent sexual harassment allegations in the Judiciary, both formal and informal, regardless of gender, as well as what we have identified since the hearing in an effort to be as thorough, transparent, and responsive as possible to all of your questions.

As has been described elsewhere in these responses, there are two formal complaint mechanisms principally intended for court employees alleging workplace harassment – one through the JC&D Act process and the other through claims pertaining to the denial of applicable equal employment opportunity rights afforded to employees under the applicable local EDR Plans. AO employees can similarly file equal employment opportunity complaints through the Fair Employment Practices Complaints Process (FEP-CP). Formal complaints made under any of these systems are available to the AO, either when courts report them or by records maintained within FEP Office. Currently, the data collected through the JC&D process does not separately identify allegations of "sexual harassment," (although it will in the future) and under the equal employment opportunity systems, "sexual harassment" and sex discrimination have been combined into one reporting category. (Also, I would note that JC&D claims cannot result in monetary relief; monetary relief under EDR has been too rare to be categorically reported.) Thus, under either system, it is currently necessary to review our records manually to assess exactly which formal complaints, if any, involved claims of harassment or monetary relief.

Since the hearing, I asked my staff to update our review of the formal complaints and also determine as best we can any informal complaints from our 30,000 employees in recent years. My staff have now completed a manual review of those formal records, which courts have provided the AO under either the JC&D or equal employment opportunity reporting systems for the period October 1, 2015 through July 5, 2018. (Courts are not currently required to report to the AO on a contemporaneous basis, and some courts provide us with information only annually; therefore, the information we reviewed for the period after October 1, 2017 is not complete.) Because of the difficulty and time needed for such manual review, we have not conducted a

manual review of formal complaints for other time periods. Please see my response to 20(a) and 20(b) below for details on how we plan to improve reporting and data collection going forward.

In recognition of the limitations of the reporting systems I have just described, I took an additional step of consulting with the cognizant AO senior officials whose offices courts are most likely to contact for guidance on these matters, and ascertain whether there were any other employee allegations of sexual harassment known to the AO, even if not formally reported through the JC&D or equal employment opportunity channels described above. I also asked that they determine these as best they could without regard to whether or not the alleging employee was female, and not to limit their search to any particular years.

Through these inquiries, AO staff have identified to me seven matters dating back to 2013 potentially involving sexual harassment allegations that may be of interest to you, even if not directly responsive to your questions. Because of the commitment of confidentiality that was promised to the employees who alleged sexual harassment, I can identify these matters only broadly.

- In 2013, an employee alleged sexual harassment by another employee. The matter was processed through a formal equal employment opportunity process. The matter was resolved to the satisfaction of the employee and the employee was provided nominal monetary relief.

- In 2016, an employee alleged inappropriate conduct by a judge. The matter was resolved to the satisfaction of the employee and the employee was provided nominal monetary relief. The employee did not file a formal JC&D or equal employment opportunity complaint. The subject judge is no longer on the bench.

The total amount of monetary relief combined in these two matters was less than $25,000.

- In 2014, an employee alleged inappropriate conduct by a judge. The employee filed both JC&D and EEO complaints. The matter was investigated and both the JC&D and equal employment opportunity complaints were dismissed.

- In 2016, an employee alleged sexual harassment by a contractor. The matter was processed through a formal equal employment opportunity process. There was a finding of no sexual harassment as to the employing office.

- In 2018, a judge alleged inappropriate conduct by another judge toward an employee. The matter was resolved to the satisfaction of the employee. The employee did not file a formal JC&D or EDR complaint. The subject judge is no longer on the bench.

- In 2018, an employee alleged inappropriate conduct by a judge. The matter was resolved to the satisfaction of the employee. The employee did not file a formal JC&D or EDR complaint. The subject judge is no longer on the bench.

- In 2018, an employee alleged sexual harassment by a co-worker. The matter was investigated and subsequently dismissed through a formal equal employment opportunity process.

As these matters illustrate, it is possible – and sometimes preferred by the complainant – for sexual harassment matters to be resolved informally and confidentially at the local level, including, on rare occasions, with an employee receiving nominal monetary relief (for example, to address legal or medical services they incurred).

We have no reason to believe there are many (or any) other incidents that have recently occurred, particularly any that would have had monetary relief. In light of the increased interest in accounting for such incidents, and in addition to the steps outlined in my responses to Questions 20(a) and 20(b), I have asked my staff to review the branch's mechanisms for tracking such incidents more systematically in the future (whether or not they relate to a formal complaint filed by the employee), such as by making that a responsibility of the new OJI.

I also heard Jaime Santos' testimony on June 13, 2018, about her knowledge of alleged complaints of law clerks about judges, but do not know of any specific information about those allegations. (See our answer to Question 2.)

I would also note that in my letter to the Committee of February 16, 2018, which was included with my written testimony, in response to specific questions from you and Senator Feinstein, I outlined the facts and circumstances of several additional JC&D actions, some of which involved workplace harassment allegations.

Please note that this information is current as of July 5, 2018.

a. Can you provide records of how many sexual misconduct complaints were filed for the last 12 years, since 2006?

As described in the immediately preceding answer, we engaged in a detailed manual review of the information we have from October 1, 2015 to the present, and have informed the Committee about the matters we found, as well as those recent matters our AO officials have recalled, regardless of the source. It is simply not practical (and for some of the oldest records, not possible) for us to conduct a manual review going back 12 years. Please see our response to Question 20(b) below, regarding planned improvements to our collection systems.

b. If not, what will you do to ensure that you have adequate record keeping procedures going forward?

The AO collects yearly data for complaints under the JC&D Act, and for any claims pertaining to the denial of select equal employment opportunity rights afforded to employees under the applicable local EDR Plan.

The Working Group recommended that the Committee on Judicial Conduct and Disability amend its Rules to "include express reference to workplace harassment within the definition of misconduct" and, it is expected that harassment will be included within the "Nature of Allegations" category once the Rules amendments are enacted. The number of JC&D workplace harassment complaints, if any, will be in our published annual report.

Similarly, with regard to reporting of matters that have gone through the EDR process, sexual harassment has not in the past been reported nationally as a separate category, but rather it has been combined with other forms of sex-based discrimination. We are currently engaged in a review of improvements to the EDR reporting systems so that information about the incidence of sexual harassment will be more readily available. The FEP Office had already been working on improved data collection, storage and reporting methods for claims information from the courts (as well as claims involving the FEP-CP process for AO employees, managed by the same office) – and now we have included in this ongoing effort these planned improvements to reporting of sexual harassment matters.

Finally, I have also asked my staff to review carefully options for improvements to any other reporting systems (for example, such as might be related to employee grievance s or adverse action appeals) to capture more completely and accurately information about sexual harassment complaints, particularly if they result in any monetary relief, even though it has been minimal and nominal.

In collecting and reporting this important information to help ensure equal employment opportunity and prevent harassment, however, we must also be certain to protect the privacy and confidentiality needs of all concerned.

c. What do you plan to do to keep records so that your successor has access to previous complaints of misconduct?

See my answer to Question 20 (a) and (b), above. Report at pages 11 and 31-32.

21. Do you believe that fear that their careers will be harmed hinders victims from reporting harassment in the judicial branch?

Yes, the EEOC Task Force identified fear of reporting as a significant problem across society and fear of the potential for harm to one's career was identified by the Working Group as a barrier to reporting. Report at page 12. As noted in our Report, there are numerous potential explanations for reluctance of victims to report misconduct. These include "lack of confidence that they will be believed, fear that no action will be taken, and concerns that a complaint will subject them to retaliatory action or affect future job prospects." Report at page 12. See also our answer to Question 19(b).

In the Working Group's meetings with the law clerk representatives, the members also discussed the "power disparity" relationship between a judge and law clerk, which can create a strong disincentive to report any inappropriate conduct by a judge. Understandably, a law clerk may fear that any complaint will destroy the bond of trust and cause strife in the chambers. It may also impact the judge's recommendation for the law clerk which could impact future job prospects.

The Working Group designed its recommendations to address this concern. Report at pages 36 - 38. The OJI will be organized to respond to law clerks who are uncertain of how to handle potential misconduct, and the recommendations section of the Report includes many suggestions for reducing the barriers to reporting and strengthening the protections for those who file complaints. Additionally, the Federal Judicial Center (FJC) is addressing the effects of the power disparity in its judicial education programs to raise awareness of this potential barrier. (See list of FJC programs this year in Report at Appendix 9.)

22. Will the judiciary conduct a confidential national survey of current and former clerks to determine how common harassment is?

a. If not, why not?

No. Please see our answers to Questions 17 and 18.

As stated, one incident of sexual harassment is too many, and we do not intend to conduct additional national quantitative research before commencing our work to remedy the concerns our employees have already comprehensively identified. We note that it appears that Congress has likewise proceeded with reform efforts without conducting a confidential national survey of its staff.

23. Ms. Santos reported that the judiciary is excluding clerks from access to the data and documents it gathered regarding harassment. Why doesn't the judiciary give law clerks access to its documents?

It is not clear which "data and documents" are referred to in this question. Most of the documents from which the Working Group drew its information were provided to the public as appendices to, or citations within, our published Report. The Working Group itself did not have (or need) access to specific personnel records. One important tool the Working Group used was a confidential mailbox to encourage interested parties, particularly current and former Judiciary employees, to provide candid feedback, suggestions and opinions, and a similar outreach was conducted by the Ninth Circuit in which over 2,800 responses were received. See our answer to Question 17. The information provided was very helpful to the Working Group, and because the mailbox explicitly promised strict confidentiality to encourage participation, it would have been inappropriate for the Working Group to share that information with others.

24. Do you agree that Congress and the American public are entitled to know, at least in the aggregate, how many confirmed incidents of workplace harassment have taken place in the federal judiciary?

Yes, and we intend to report in the future how many sexual harassment complaints are filed through the JC&D and equal opportunity processes. As noted in the Report, the Working Group "found that public confidence in the Judicial Conduct and Disability Act would benefit if the Judiciary specifically identified harassment complaints in its statistical reports and made decisions on those complaints more readily accessible through searchable electronic indices." Report at page 11. I intend to review thoroughly how we can improve the ways we identify harassment complaints in future statistical reports. Also noted in the Report, the Working Group encourages individual circuits to seek ways to make decisions on complaints filed in their courts more readily accessible to the public through searchable electronic databases. Report at page 32. See also our answer to Question 20(b).

25. Why did the working group exclude law clerks?

The Working Group did not exclude law clerks. Current and former law clerks were involved throughout the meetings of the Working Group. They attended three of our four meetings – all but the initial organizational meeting. Law clerks who attended the meetings provided their insights orally and in writing as to the circumstances faced by law clerks, and were actively engaged with the Working Group members in discussions about – and helping develop – many of the recommendations contained in the final Report.

Representatives from other groups of Judiciary employees also attended a Working Group meeting to provide their views on the issues before the Working Group, as they share an equal stake with law clerks in the Judiciary's response to issues of harassment and civility. This group included staff from chambers, clerk's offices, federal public defenders' offices, probation and pretrial services offices, and circuit offices.

We have 30,000 employees in the Judiciary and law clerks make up fewer than 10 percent of our employees. There are many constituent groups within the branch. The formal Working Group membership was intentionally kept small to maximize its ability to complete its work quickly and send recommendations to the Judicial Conference expeditiously, but all constituencies participated and have been supportive of our Report. See Statements submitted by the Federal Court Clerks Association, the National Conference of Bankruptcy Clerks, the Federal Judicial Assistants Association, and the Association of Bankruptcy Judicial Assistants. (Included in the hearing record on June 13, 2018.)

26. What do you believe the proper punishment should be for a judge who is found to have harassed clerks?

As stated in our Report, the Working Group concurs with the stated position of the EEOC on the topic of appropriate responses for violations of workplace harassment policies. Report at page 9. Harassment occurs in various degrees, up to and including criminal misconduct. Remedial actions taken with respect to any Judiciary employee – not just judges – should be proportional to the severity of the harassment. The EEOC report pointed out that zero-tolerance policies accompanied by harsh, automatic responses can have the effect of decreasing reporting of misconduct, especially in situations where complainants want harassment to stop, but not for the offending employee to lose their job. A judge found to have engaged in misconduct faces a range of possible actions, from a reprimand, to a temporary suspension of future cases, to referral for criminal investigation and/or a recommendation that Congress consider impeachment. Those remedial actions are determined by existing procedures under the JC&D Act and the Rules for Judicial-Conduct and Judicial-Disability Proceedings, as well as policies at the circuit level.

27. You spoke about the problem of incivility in the judiciary. Do you believe that incivility and harassment indicate that the judiciary has a culture of systemic disrespect for law clerks and other court employees?

No. The great majority of our law clerks and other staff report in their exit interview surveys that they had a positive experience working for the Judiciary and would recommend the Judiciary as an employer to others. I do not believe that the relatively small number of reported instances of misconduct by judges and managers indicates that the Judiciary has a "culture of systemic disrespect" for our staff. Our policy is that even one instance of misconduct is too

many, and our goal is not only to eliminate misconduct, but to provide an exemplary workplace for all. The Working Group recommendations are designed to ensure and enhance workplace civility for all Judicial Branch personnel. See also our answer to Question 17 regarding the Ninth Circuit's questionnaire results.

28. In your view, should judges who harass their employees lose their taxpayer-funded pensions? Why or why not?

Federal laws protect pensions from such penalties generally. It is an issue that Congress might consider in an impeachment trial. As noted in the hearing by Ms. Yang and in the EEOC's Report, however, it is important to have proportionate discipline. An organization should make very clear, as the Judiciary has, that it will not tolerate harassment, but for every allegation, if found credible, the appropriate remedy is not necessarily termination and/or loss of pension. The severity of the offense must be accounted for. Otherwise, as the EEOC found, some who see or are victimized by misconduct will be deterred from reporting it. Report at page 9.

29. In your testimony you stated "I don't know anyone on the Committee who isn't committed to eradicating harassment." Later, when Senator Harris asked if you've heard of Judges who now intend to hire only male law clerks, you replied that you have heard this and you were trying to actively discourage this behavior. Do you believe those two statements are consistent?

Yes, my statements are consistent. I believe the official transcript of my quote to which you refer will reflect it as follows: "I don't know anybody in our branch who doesn't feel the same way I do about it," which reinforced my prior statement that, "We remain committed to ensuring an exemplary workplace for every judge and every court employee." I do not know of anyone in the Judiciary who does not feel this way. Senator Harris's question was framed as one where men in general, not exclusively judges, would refrain from hiring women as a way to avoid sexual harassment claims. She asked me if I had heard of or was aware of conversations among "some men who would refrain from hiring women to avoid a sexual harassment claim." Senator Harris did not ask me if I had heard judges make that statement – in fact, moments later she stated that judges would not be having those kind of conversations with me. I stated I was aware of and had heard of that potential reaction as a concept, and that I find the idea very troubling and that it would be a very unfortunate repercussion from the needed exposure of the problems in the workplace. Therefore, the Working Group in its Report made its stance on this practice explicit:

> "The Working Group notes concerns that some may try to avoid allegations or the appearance of harassment by simply reducing their interactions with members of a different gender, ethnicity, or other group. This would result in loss of opportunities for positions, mentoring, and professional growth for members of such groups. The

Judiciary should strive to avoid this, primarily through education." Report at page 44.

Later, in fact, when Senator Harris asked how I would deal with this with respect to male judges who might harbor such thoughts (which, she stated, would not be "a conversation that male judges will be having with you"), I made reference to the excellent speech made by Judge Colleen McMahon, which we also referenced in the Report, regarding this topic. Judge McMahon's speech reflects my views and the views of the Working Group. In our dialogue, I stated to Senator Harris that I would provide the Committee with a copy of Judge McMahon's speech, and it is enclosed with these responses.

30. Senator Kennedy mentioned that there can be differences between "major league pigs, minor league pigs, and sometimes pigs." How should the judiciary distinguish between the worst offenders who should receive the maximum punishment and the offenders who deserve the minimum punishment?

Please see our answer to Questions 26 and 28, and the Report at page 9. A judge found to have engaged in misconduct faces a range of possible punishments, from a reprimand, to a temporary suspension of future cases, to referral for criminal investigation and/or a recommendation that Congress consider impeachment. These actions are governed by the JC&D Act and the accompanying Rules for Judicial-Conduct and Judicial-Disability Proceedings. For non-Article III judges such as magistrate judges and bankruptcy judges, the JC&D Act and the Rules provide for the possible removal of such judges for misconduct, where appropriate, in accordance with the required statutory provisions governing the removal process for those judges. The vigorous investigatory process that precedes the imposition of any punishment enables a circuit judicial council (and the Committee on Judicial Conduct and Disability, on review) to ensure that any punishment is proportionate. For non-judges, Judiciary employees who – after investigation, review and any appeal – are found to have engaged in misconduct similarly face a range of potential proportional punishments, up to and including termination of employment.

31. Law clerks only work in chambers for short periods of time, yet their harassment reports are investigated by judges or justices who may have worked with the subject of their complaints for decades. Is it a surprise that clerks are reluctant to report harassment for fear that their complaints will not be investigated impartially?

It was somewhat surprising but more disappointing to learn of those concerns because they are not informed. The Report discusses circumstances that may deter employees, including law clerks, from filing a complaint, including a lack of understanding of the impartial structuring of the complaint review process. Report at page 12. The Report's recommendations address these concerns by simplifying the process, expanding formal and informal reporting opportunities (including both within the relevant circuit and at the national level), and making greater

assurances to employees that a report of misconduct will not adversely affect their careers. See our answer to Question 5 for more information on how our recommendations are directed at reducing the barriers to reporting. Report at pages 28-38.

Moreover, where an employee alleges harassment by a judge under the EDR Plan, the EDR claims procedures, including determining who should conduct an investigation, are performed by the circuit council or by persons designated to act on its behalf, and not by the court in which the underlying allegations may have occurred. When determining if an investigation is warranted and if so who should conduct it, the circuit council would consider any potential conflicts of interest, including assigning the investigation to a different circuit. Report at page 33. In appropriate cases, independent counsel, independent investigators, and experts may be used to assist the Judiciary.

With regard to judicial misconduct complaints, every complainant is entitled to multiple layers of review by district and circuit judges. For example, the relevant circuit chief judge is the first to review a complaint of judicial misconduct (and a complaint against the circuit chief judge is generally reviewed by the most senior active circuit judge not disqualified). A complainant is then entitled to petition for review before the judicial council of the circuit, which consists of district and circuit chief judges. In complaints involving a factual investigation, which is conducted by a special committee of district and circuit chief judges, the complainant is entitled to additional review by the Committee on Judicial Conduct and Disability. In specific circumstances, such as where the circuit's own judges may be the subject of the investigation, or the issues are highly visible and a local disposition may weaken public confidence in the process, the Circuit Council may request the Chief Justice to transfer a judicial misconduct complaint to another circuit.

32. Would a nationwide office of trained professionals with standardized procedures, an office completely independent from the judicial branch, be more capable of impartially investigating harassment reports than district and circuit judges and justices?

No. Additionally, as described in answer to Questions 37 through 39 below, for several reasons it is unnecessary, and if "completely independent from the Judicial Branch," it is constitutionally flawed.

We are creating a "nationwide office" within the AO as described in our answer to Question #1, and while the OJI will be staffed with trained professionals and can provide advice and counsel, the Working Group does not recommend that it replace the local investigation function in the districts and circuits.

The existing processes, when followed, have been proven effective and efficient at resolving complaints. Many complaints are best resolved informally at the local level and there already are options for independent, impartial resources to assist in this effort. Importantly, when a formal complaint is filed, there also are multiple levels of fact-finding that exist in the current EDR process – the local EDR Coordinator during the informal stage; an impartial judicial officer during the hearing stage, and judicial officers from another court in the appeals process may all be involved – lending the impartiality and independence that protect the employee. Throughout, there are procedures in place for eliminating any conflicts of interest, perceived or actual. For example, EDR claims procedures against district judges are handled by the relevant Circuit Council or persons designated to act on its behalf, and Rule 26 of the Judicial Conduct and Disability Rules authorizes the Circuit Council to request the transfer of misconduct complaints to another circuit for investigation and decision.

33. In the hearing Ms. Santos noted that "for too long the judiciary has had a 'not my chambers, not my business' culture." How does the working group propose we go about changing this culture? Is this not another reason why the group's failure to examine the scope of the harassment problem is troubling.

The statement is not an informed or documented view of the Judiciary. It does not account for numerous examples of leadership and successful intervention in conduct issues in the past to resolve misconduct issues. We acknowledge, however, that we need to encourage more. Report at page 13. We are actively striving to promote a culture of accountability among judges. To achieve this goal, the Working Group has recommended the Committee on Codes of Conduct and the Committee on Judicial Conduct and Disability revise their Code and Rules to address a judge's responsibility to curtail inappropriate workplace conduct by others, including other judges, by notifying all judges that they are expected to report such conduct to the appropriate authorities. Report at pages 24–25, 31.

See also our response to Question 7 concerning bystander training.

34. When will the AO implement a refined policy reflecting the findings and recommendations in the June 1 report? If there is no timeline, why should Congress trust that the judiciary will address the current regime without legislative intervention?

Some already have been, some are expected to be approved by the Judicial Conference at its September 13, 2018 session, and some Rules changes which require public notice and comment will be considered as soon as possible after the September Judicial Conference and before the March Judicial Conference.

As noted in our June 1 Report and its appendices, the Judiciary has already completed implementation of several initiatives that respond to the findings and recommendations in the report as follows:

- Instituted sexual harassment training for newly appointed judges.
- Initiated a change in the procedure to specifically track sexual misconduct complaints in the data the Judiciary collects about judicial misconduct complaints.
- Added instructive in-person programs on judiciary workforce policies and procedures and workplace sexual harassment to the curricula at Federal Judicial Center programs for judges generally, chief district and chief bankruptcy judges, and for circuit judicial conferences throughout the country this spring and summer.
- Rescinded the model confidentiality statement so that it can be revised to eliminate any ambiguous language that could unintentionally discourage law clerks or other employees from reporting sexual harassment or other workplace misconduct.

The Report has been submitted to the Judicial Conference of the United States which is the policy-making body for the Federal Judiciary and is being considered on an accelerated timeline and in time for its consideration at its next meeting on September 13, 2018. The recommendations and findings in the Report must first be considered by the Conference committees with jurisdiction over the subject matter in the Report – the Committees on the Codes of Conduct, Judicial Conduct and Disability, and Judicial Resources – and each of these committees considering the Report is in the midst of their work. These are not "part-time advisory committees" any more than the Senate Judiciary Committee is. Similar to Congressional committees, Conference committees first consider and review issues within their established jurisdiction before they are considered and voted on by the Conference. We believe this process ensures that policy changes are made in a deliberative and careful manner.

At the upcoming September 2018 Judicial Conference session, the Committee on Judicial Resources will present specific, immediate changes to the Model EDR Plan to cover all Judiciary employees (such as chambers staff and interns and externs) and extend the time for initiating a claim under the plan from 30 days to a longer time (such as 180 days). The Committee on Codes of Conduct and the Committee on Judicial Conduct and Disability will report on their plans to respond to the Working Group's recommendations, including changes to the Codes of Conduct and the Rules for Judicial-Conduct and Judicial-Disability Proceedings, as well as updated education programs and written materials.

The Committee on Codes of Conduct, the Committee on Judicial Resources, and the Committee on Judicial Conduct and Disability are considering significant changes to rules and policies within their jurisdiction, which will take more time to complete. The proposed changes will be shared within the Judiciary for feedback and, with regard to proposed changes to the Code of

Conduct for United States Judges and the Rules for Judicial-Conduct and Judicial-Disability Proceedings, presented to the public for comment and discussed during a public hearing before being finalized. The Judiciary believes obtaining this internal and external input is vital to the success of these efforts. Proposed changes to the Code of Conduct and the Rules for Judicial-Conduct and Judicial-Disability Proceedings are expected to be circulated for comment and more extensive changes to the Model EDR Plan may be considered in early fall.

The Committees will then review the feedback and hope to present their final recommendations to the Judicial Conference soon thereafter. We expect that the Judicial Conference will act on all the Report recommendations as soon as possible, and before the March 2019 Conference session.

I intend to apply these same principles to the AO after the Judicial Conference adopts them. The Working Group will also assess the progress on its recommendations later this year.

As to your question about Congress trusting the Judiciary to act, we note that Congress has been working on its own policy regarding workplace harassment with each of its chambers voting favorably on a bill to implement new workplace conduct policies for itself, but neither has become law. The House passed H.R. 4924 on February 6, 2018, and the Senate passed S. 2952 on May 24, 2018, which as of July 30, 2018, was still pending in the House. We know of no timeline for the reconciliation of these bills, but we trust that Congress will complete its work. Congress should trust the Judiciary to complete its work, too.

The Judiciary's timeline demonstrates that the Judiciary is working swiftly, diligently, and also inclusively by soliciting comment, to achieve policy changes consistent with the Report. In the past, the Judiciary's practice has been to let Congress and the President first set policy direction regarding employee protections through enactment of the Congressional Accountability Act and its amendments. After each such enactment, we have then initiated a policy review within the Judiciary to adapt those policies for our own employees. With regard to workplace harassment, however, we have decided not to wait for Congress before commencing our policy process.

35. In a recent article entitled, "Sexual Harassment and the Bench," retired Judge Gertner addressed the recommendations proposed by the Working Group. In the article, she noted:

> **The Working Group seeks to enhance reporting by providing "one click" website access to obtain information about how to report misconduct, creating alternative and less formal options for seeking assistance with concerns about workplace misconduct, encouraging exit interviews to see if there have been issues, and lengthening the time allowed to file complaints. But relying on the complaint process is not enough to stop sexual harassment—not only because individuals may be reluctant to complain, but also because the conduct itself is ill-defined. Significantly, the Working Group has apparently not sought to**

describe what conduct comprises sexual harassment, what the line is, and how it may be crossed. Instead of taking on the difficult but important task of defining sexual harassment and bringing more clarity to the vague Model Plans, the Working Group may seek to rely on the enhanced complaint process to spell out what is or is not appropriate, in much the same way that judicial disciplinary proceedings are supposed to provide flesh on the bones of the very general Code of Conduct.[1]

Why did the working group fail to define sexual harassment? How would you define sexual harassment?

The Working Group directly and extensively addressed the need for more express language regarding sexual harassment in the Judiciary's Codes of Conduct, the JC&D Rules, the Judiciary's Model EDR Plan, and guidance documents related to all three as described again in detail below. Report at pages 21-35. It did so as part of its recommendations for actions to be taken in these areas by the Judicial Conference's Committee on Codes of Conduct, Committee on Judicial Conduct and Disability, and Committee on Judicial Resources. The Working Group's recommendations were referred to them as the committees of jurisdiction in these matters in keeping with the Judicial Branch's governance structure.

With reference to the Codes of Conduct, the Working Group noted that in referring this and related matters to the Committee on Codes of Conduct, "[t]he Working Group does not propose specific language because that is the province of the Committee" and also noted that "[s]ignificant work in this area already is underway." Report at page 23 and 24. The Report also directly addressed the need to clarify language regarding "workplace misconduct, including comments or statements that could reasonably be interpreted as harassment, abusive behavior, or retaliation for reporting such conduct." Report at page 24. The Working Group stated that "[t]he Committee should examine whether a more specific statement is needed in proscribing harassment, bias or prejudice based on ... sex ... or other bases. For example, studies reveal high rates of harassment in the private workforce based on sexual orientation or gender identity. The Committee should indicate that harassment on those bases is impermissible." Report at page 24 (citation omitted).

Similarly, the Working Group recommended that the Committee on Judicial Conduct and Disability "consider clarifying amendments to the Conduct Rules and publications describing JC&D Act procedures," observing that this "Committee is in the best position to determine whether such clarifications should be implemented through the Rules themselves, the associated commentary, or other publications" and that "[t]hat Committee has in fact already begun examination" of such matters. Report at page 29. The Working Group elaborated on this by "suggest[ing] that the Conduct Rules or commentary include express reference to workplace

[1] Nancy Gertner, Sexual Harassment and the Bench, 71 Stan. L. Rev. Online 88, 95 (2018).

harassment within the definition of misconduct," directly referencing its suggestion, discussed above, to the Committee on Codes of Conduct to "consider more specific substantive guidance on the subject of harassment and impermissible behavior in the codes of conduct for judges and employees, including a clear proscription on harassment based on sexual orientation or gender identity" and stated that "[t]he Committee on Judicial Conduct and Disability should adopt language and examples in its procedural rules that are congruent with any changes in the codes." Report at page 30.

Finally, the Working Group discussed how "[t]he Judicial Conference, through its Committee on Judicial Resources, has developed the Model EDR Plan to set out recommended policies and procedures for resolving a wide range of employee disputes." Report at 32. It cited the Model EDR Plan's current provision describing proscribed discrimination, including sexual harassment. That provision states, in pertinent part, that "[d]iscrimination against employees based on ... sex (including pregnancy and sexual harassment) ... is prohibited. Harassment against an employee based upon any of these protected categories or retaliation for engaging in any protected activity is prohibited." Id. (citation omitted). The Working Group recommended that the Committee examine this provision's reference to sex discrimination, finding the current description to be "inartful," and stated that the "provision should be rewritten to describe sex discrimination in accord with established legal definitions and separately indicate that harassment, without regard to motivation, is wrongful conduct." Report at page 34.

The Committee on Codes of Conduct, the Committee on Judicial Conduct and Disability, and the Committee on Judicial Resources all continue actively to consider how best to craft language based on the Report's recommendations that will help clarify for judges and employees what is considered to be sexual harassment. Their proposals for language revisions or amendments, when completed, will be submitted to the Judicial Conference for its consideration and adoption as part of the governance policies for the Judicial Branch.

In answer to your question as to how I would define sexual harassment, I defer to the policies and language on this subject that will be adopted by the Judicial Conference.

36. The article authored by Judge Gertner concluded "The Working Group proposals—to be sure at an early stage—seem curiously passive. They rely on the victims of sexual harassment to raise the issue, training them about how to do so. It is—in effect—an adversary model for sexual harassment remedies. If the issue isn't raised, it doesn't exist."[2] I agree with this assessment. Do you disagree? Why or why not?

I strongly disagree with your and Judge Gertner's assessment. First, many of the Working Group's recommendations, such as proposed changes in the Code and expanded education and training, are designed to prevent or avoid harassment and other unacceptable behavior before it

[2] Id. at 98.

occurs. Second, throughout the Report and in my testimony, we have repeatedly noted and recognized that simply because harassment goes unreported does not mean it does not exist. And third, we are not sitting idly by waiting for it to be reported to do something about the problem.

The challenge for us is to remove barriers to reporting. As I indicated in my testimony, the Working Group found that the Judiciary's formal mechanisms for addressing sexual harassment in the workplace (including EDR processes and the JC&D process) are effective when used. We cannot use those mechanisms to address instances of misconduct that have occurred unless we know about them. In turn, we can only learn about harassment from the victims, or from bystanders or witnesses who observe it or can otherwise provide evidence of it. I doubt that the perpetrators will report it.

Recognizing these limitations of our formal processes for reporting, the Working Group recommends both improving them as well as supplementing them. Report at pages 17-18 and 36-38. Improvements include offering greater clarity regarding what constitutes misconduct and additional channels of advice to employees about how to use those processes and their protections under them. Another key improvement recommended by the Working Group is to focus on ways to facilitate reporting not only by victims but by bystanders as well. The Working Group has also recommended supplementing the formal processes with informal channels of reporting that may prove faster and easier for victims or bystanders to initiate successfully. A critical element of the Working Group's recommendations was that the Committee on Codes of Conduct and the Committee on Judicial Conduct and Disability make clear that a judge has an obligation to report or disclose misconduct and to safeguard complainants from retaliation. See also our response to Question 5 from Senator Feinstein. Furthermore, the Working Group has recommended improving training for all judges and employees on workplace civility, respect and fair treatment of others.

Many of the Working Group's recommendations will require no action by victims to be implemented. Others are designed to make it easier for victims to protect their rights and bring specific instances of inappropriate conduct to our attention so that we are able to address it. Report at pages 28-38.

37. In your testimony, you stated that the creation of an IG to oversee the judiciary would be unconstitutional. Please explain why the appointment of an IG to oversee certain aspects of the administration of the judicial branch such as funds appropriated by Congress, the implementation of Acts of Congress, and workplace harassment would be unconstitutional.

An Inspector General (IG) that would oversee the Judicial branch and report to Congress would violate the Constitution's carefully created separation of powers. I refer to the bill that has been introduced, S. 2195, which, among its many problems, would purport to place limitations on the

appointment authority of the Chief Justice within the Judiciary, limit the authority of the Chief Justice to remove his appointed officers, impose reporting requirements on a Judicial officer to report to Congress, enable an IG to subpoena a federal judge and obtain judge's testimony, papers, documents; and require the IG to report findings to Congress. Furthermore, the proposed IG which would report to Congress would interfere with the carefully crafted intra-branch structure of the circuits' Judicial Councils to address matters short of the Congress' constitutional authority to impeach a judge. Congress went to great lengths and took care to empower judges "to put their own house in order" when it created the AO and when it enabled the Judicial Councils of the circuits in 1939 to oversee administrative matters. It also aimed "to improve judicial accountability and ethics ... and at the same time, to maintain the independence and autonomy of the Judicial Branch" when it passed the JC&D Act in 1980. H. Rept. 96 – 1313, 96th Cong., 2d Sec.1 (1980).

In response to the question from Senator Tillis at the June 13th hearing, I opposed Congressional action to impose an IG on the Judicial Branch for several reasons. In addition to its constitutional flaws, such action would be extraordinarily wasteful of taxpayer money because we already spend millions of taxpayer dollars on independent auditing of the Judiciary and we have an effective system of conduct oversight review when it is utilized.

The Judiciary has systems in place to ensure accountability for the receipt, management, and expenditure of funds – and it is served by an independent internal audit office that conducts financial statement audits, performance audits, and other attest engagements. (A more extensive description of these functions and those of the contracted outside auditors we use is in the detailed January 12, 2018, letter to the Committee included in the record with my testimony pages 8-13.) The Judiciary, through the AO and its Office of Audit, already spends millions of taxpayer dollars to perform these functions, as well as related responsibilities, all with the same goals of ensuring the efficiency of judiciary operations and detecting fraud, waste, and abuse. Any legislation mandating a similar function already being performed by the Judicial Branch would itself constitute wasteful spending on duplicative activities.

Furthermore, we also voluntarily respond to appropriate inquiries from the Government Accountability Office concerning our financial management. We continue to believe such cooperation between the branches is important not only for Congress' oversight over appropriations and other government funding, but also an effective means of improving our programs.

Additionally, it is unclear why an IG would be the proper kind of entity to oversee sexual harassment complaints. In the Executive Branch, Inspectors General are not used for processing allegations of sexual discrimination, including harassment. As we understand the statutory mission of Inspectors General, it is to combat waste, fraud, and abuse and not duplicate an

agency's programmatic functions. The Judiciary already has mechanisms to carry out reviews of alleged discrimination, including sexual harassment. Moreover, Congress retains impeachment authority through Art. 1, Sections 2 and 3.

38. In a 2003 speech, Chief Justice Rehnquist acknowledged that Congress has a legitimate interest in obtaining information from the judiciary which will assist in the legislative process. Do you agree that Congress has oversight authority over the judicial branch, at least over the operational parts of the judicial branch that are authorized by Congress?

As to oversight of "operational parts ... authorized by Congress", I agree regarding the budgetary and certain administrative elements of the Judicial Branch. Congress appropriates funds for the Judiciary and reviews how our branch uses those funds to ensure the money is appropriately spent and accounted for, through, for example, the appropriations process and, on occasion as agreed upon, review by the Government Accountability Office of court financial records. Congress also has an important oversight role with respect to the efficient and effective operation of the lower courts it creates, such as examining court workload and the number of judgeships needed. In addition, Congress has a role in collaborating with the courts on court rules and practices that apply broadly to all cases.

Congress also has important powers related to the start and end of a judge's service. The Senate has the power and responsibility to advise the President regarding judicial nominations, and consent to the President's nominees through the confirmation process before they may take the bench. And, of course, the Constitution prescribes the oversight authority of Congress through the impeachment power.

39. Please describe any limitations on Congress's oversight authority over the judicial branch.

Although Congress has certain oversight authority regarding "operational parts" of the Judicial Branch (please see our answer to Question 38), its authority is limited.

The Constitution provides for an independent Judicial Branch. The Constitutional protections for an independent branch are lifetime tenure for Article III judges and a prohibition against reducing a judge's salary. Judges may be removed by Congress only through the impeachment process. Beyond those explicit protections, Congress and the courts have worked to ensure that both the decisional and operational functions of the courts remain free from political influence.

To ensure that the Judiciary operates free from political influence, Congress has created numerous mechanisms to allow the Judiciary to perform important oversight mechanisms within our branch "to keep its own house in order." These mechanisms include the creation of the

Judicial Conference and other administrative bodies to oversee and administer the courts, make policy for the branch, and institute mechanisms for using taxpayer funds effectively and accountably. Congress also created the AO in 1939 to provide independent, expert support to the Judiciary in a wide variety of areas, as well as to provide both financial and program audits of Judiciary activities. Congress carefully crafted and enacted the JC&D Act to empower circuit councils with sufficient investigative tools to address allegations of misconduct by judges and to administer sanctions where necessary, and to maintain that oversight function within the Judicial Branch unless and until impeachment by Congress becomes necessary. Although created by Congress, these mechanisms were designed to ensure Judiciary independence and none of them are designed as conduits for Congressional influence.

U.S. Senate Committee on the Judiciary
Hearing dated June 13, 2018, on Confronting Sexual Harassment &
Other Workplace Misconduct in the Federal Judiciary
June 20, 2018
Questions for the Record from
Ranking Member Feinstein

For Mr. Duff

1. The report released by the Federal Judiciary Workplace Conduct Working Group (the "Working Group") concluded that of the inappropriate behavior that occurs in the judiciary "incivility, disrespect, or crude behavior is more common than sexual harassment." (Working Group Report, pg. 7). However, the report also concluded that "victims are hesitant to report harassment and other inappropriate behavior." (Working Group Report, pg. 12). How did the working group determine the prevalence of sexual harassment?

As noted in the Federal Judiciary Workplace Conduct Working Group's Report ("Report"), we relied on the empirical data provided in the EEOC Select Task Force on the Study of Harassment in the Workplace. The EEOC's report explained that workplace harassment is a persistent and pervasive problem in all economic sectors, in all socioeconomic classes, and at all organizational levels. As stated in our Report, "in short, the EEOC Study confirmed that the problem of workplace harassment is both widespread and underreported in workplaces throughout the nation, and—as the Chief Justice noted in his Year-End Report—there is no reason to believe that the Judiciary is immune." Report at page 6. Additionally, as described in response to Question 2 below, some circuits and districts have conducted and are conducting surveys regarding harassment that provided enough information for the purposes of our Working Group. You may also be interested in my responses to Senator Grassley's Questions 17, 18, 19.

2. Does the Administrative Office have plans to conduct a comprehensive retrospective review of sexual harassment and misconduct in the judiciary?
a. If no, please explain why not.
b. If yes, please explain how this review will be conducted.

The Federal Judiciary Workplace Conduct Working Group ("Working Group") has engaged in a comprehensive review of sexual harassment and misconduct in the Judiciary and submitted its Report to the Judicial Conference. But, if the question is whether the Working Group (or the Administrative Office of the U.S. Courts ("AO")) will conduct a nationwide survey of all Judiciary employees about past experiences they have had with harassment, the answer is no.

First, some of our circuits already have or are conducting surveys of employees about any experiences they have had with harassment. The Ninth Circuit received feedback in its questionnaire which assisted in the Working Group's review; the Seventh Circuit also did; and the DC Circuit is currently planning such a survey. The Ninth Circuit's questionnaire was sent to approximately 5,000 current and former Ninth Circuit employees and law clerks and received more than 2,800 responses. The overwhelming majority of respondents expressed positive or neutral experiences while working in the Ninth Circuit. There were some responses, however, that expressed negative experiences that could lead to an EDR complaint or investigation. Of the responses, which includes those from law clerks, chambers staff, probation and pretrial services, clerk's office, and other court units, fewer than one percent were coded negative and involved current judges. Of those, fewer than half experienced such conduct first hand, with the remaining respondents having heard about or observed the alleged conduct. This analysis, as well as other responses from the survey, reveals that misconduct related to sexual harassment and bullying is far from pervasive in the circuit. The Ninth Circuit recognizes barriers exist to reporting misconduct, however, and through its Workplace Environment Committee it has embarked on an extensive circuit-wide effort to broaden the avenues to reporting and enhance training opportunities for judges, law clerks, and employees throughout the circuit.

Additionally, the District Court of Utah has conducted an employee survey that was useful in our review. We also provided a confidential electronic mailbox to obtain suggestions and observations from all court employees and the responses we received, along with the thousands received in the circuits, greatly informed our work. Thus, the Working Group has heard from many sources nationwide and from our current and former employees that sexual harassment is not limited to a few isolated incidents.

From the perspective and mission of the Working Group, one incident of sexual harassment in our workplace is too many. Our mission was to review existing procedures and recommend remedies to shortcomings we discovered, and rather than spend the months that it would take to conduct a national survey – some estimates were a year – we thought our time was better spent on improving our procedures going forward. We therefore accepted the statistics cited by the EEOC Select Task Force on the Study of Harassment in the Workplace Report (EEOC Report) in their analysis of women in the overall workforce who had experienced some form of sexual harassment.

In the Working Group's view, these sources of input were sufficient to warrant taking immediate action to improve our workplaces. The Working Group recognized some similarities between the Judiciary and other workplaces studied by the EEOC (as well as some differences) and has moved forward with how to implement the EEOC's general recommendations to the specific circumstances of Judicial Branch employees. Report at pages 7 and 20-21.

We believe it is most effective to devote our limited resources to addressing the substantive issues as aggressively and quickly as possible because of our view that no incidents of sexual harassment, no matter how few, are tolerable for our branch of government.

We note that Congress does not appear to have conducted a survey of its employees to determine the historical prevalence of sexual harassment, and yet both the House and Senate have passed legislation to address sexual harassment in the legislative branch workplace. We believe that current and former employees can have confidence that at some point such legislation will be enacted and be effective, even without such a survey. Likewise, we believe the Judiciary can be trusted to act aggressively to address sexual harassment without waiting to obtain such quantitative information.

3. According to a CNN investigative report from January 2018, "[v]ery few cases against judges are deeply investigated, and very few judges are disciplined in any way. In many years, not a single judge is sanctioned." (CNN Investigation: Sexual misconduct by judges kept under wraps, Jan. 26, 2018, available at: https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html). Why did the Working Group decline to make significant changes to the process by which judges are investigated and disciplined?

The Working Group did, in fact, recommend significant changes to the Judicial Conduct and Disability Complaint process. These recommendations include proposed changes to the Rules for Judicial-Conduct and Judicial-Disability Proceedings that: (1) clarify that there is no standing requirement to bring a judicial misconduct complaint; (2) include workplace harassment within the definition of misconduct; (3) clarify that confidentiality obligations are not an obstacle to reporting judicial misconduct; (4) provide additional guidance on a judge's obligations to report or disclose misconduct and to safeguard complainants from retaliation; and (5) improve transparency of the judicial misconduct process.

Furthermore, as noted in my February 16, 2018, response to Chairman Grassley and you, the aforementioned article referenced in your question was very misleading. Very few judicial misconduct complaints are "deeply investigated" because the overwhelming majority of those complaints are filed by dissatisfied litigants and prison inmates and relate to the merits of a judge's decision, are frivolous, or lack sufficient evidence. In each year AO staff studied, there were either zero or a very small number of such complaints that had anything to do with sexual harassment. Those complaints that have involved harassment have been taken seriously. Any judicial misconduct complaint that is not dismissed or concluded must be referred to a special investigating committee - comprised of district and circuit judges - to conduct an investigation as thorough as necessary to determine all relevant issues of fact. The special investigating committee may hold hearings, hire outside investigators, experts or other professionals, issue

subpoenas, and initiate contempt proceedings. It must submit a detailed and comprehensive report to the Circuit's Judicial Council, which can then take action against a judge in cases where the judge has been found to have engaged in misconduct. You may also be interested in our response to Chairman Grassley's Question number 20.

4. Over 700 law clerks signed a letter to Chief Justice John Roberts asking the judiciary to develop a confidential and centralized national system for employees to report sexual harassment and misconduct. Although the Working Group report concluded that victims are hesitant to report misconduct, the Working Group declined to create a confidential and centralized national reporting system for its employees.

a. Why did the Working Group decline to implement a confidential and centralized national reporting system for employees to report sexual harassment and misconduct?

The new Office of Judicial Integrity (OJI) will serve as a national resource outside of the circuits and local courts for any Judiciary employee or former employee to seek advice regarding both the existing processes for addressing possible workplace misconduct as well as provide more informal guidance and assistance. The Working Group anticipates that the OJI may attempt informal resolution of disputes, but formal complaints will continue to be filed either through the Judicial Conduct and Disability (JC&D) complaint process or Employment Dispute Resolution (EDR) process. The process for filing a formal complaint is uniform throughout the country; the complaint forms will be on the OJI webpage along with filing information. The complaint form and procedures will be accessible on the public websites of each court.

The primary purpose of the OJI will be to counsel and advise callers and potential complainants on all their options early in the process as well as facilitate informal resolution of issues, rather than conduct investigations. The Working Group envisions that the OJI will work with individuals and direct them to resources for recourse and investigation in their circuit or court unit. The OJI may, however, also assist the responsible circuit or courts with resources necessary to conduct an investigation, as well as conduct systemic analyses and reviews of workplace problems on its own.

The OJI will serve as a confidential and centralized national office to enhance and complement the process of reporting workplace conduct issues. While that office will be staffed with trained professionals and can provide advice and counsel, the Working Group did not envision it as replacing the local investigative function in the circuits and districts which exists under the JC&D Act and EDR systems. In the decentralized governance structure of the Judiciary, the courts, as the employing office, have authority to respond to workplace conduct issues and report claims to the Administrative Office's Office of Fair Employment Practices (FEP Office).

The existing processes, when followed, have been proven effective and efficient at resolving complaints. Many complaints are best resolved informally at the local level and there are options for independent, impartial resources to assist in this effort. Importantly, when a formal complaint is filed, there also are multiple levels of fact-finding that exist in the current EDR process – the local EDR Coordinator during the informal stage; an impartial judicial officer during the hearing stage, and judicial officers from another court in the appeals process may all be involved – lending the impartiality and independence that protect the employee. There are also procedures in place for eliminating any conflicts of interest, perceived or actual. For example, EDR claims procedures against district judges are handled by the relevant Circuit Council or persons designated to act on its behalf, and Rule 26 of the Judicial Conduct and Disability Rules authorizes the Circuit Council to request the transfer of judicial misconduct complaints to another circuit for investigation and decision.

The OJI will also receive informal reports of misconduct and will be a resource for compiling such reports to collaborate with the circuits in identifying any patterns of misconduct that should be addressed.

i. Will the Working Group reconsider its decision not to implement a confidential and centralized national reporting system? If not, why not?

The Working Group decided that the OJI as it is currently proposed will serve the same functions that a confidential and centralized national reporting system would, and also would not conflict with our existing governance structure among the circuit courts.

b. What steps is the Administrative Office taking to ensure that law clerks and other judiciary employees are empowered to come forward and report sexual harassment and misconduct?

The Recommendations section of the Report specifies the Working Group's proposals that are responsive to this question. The recommendations fall into three discrete areas: revising standards and codes of conduct; improving and expanding the procedures for seeking advice, assistance, or redress; and supplementing existing training and education programs. Report at pages 20-45.

c. What steps is the Administrative Office to taking to ensure that the identities of law clerks and other judiciary employees who report sexual harassment and misconduct are kept confidential?

JC&D procedures are already required to protect the identities of complainants as well as the accused. Newly-created available resources for employees to raise concerns, the national OJI

and similar offices in each circuit, are all designed to provide employees with additional resources outside of their court, which will help address confidentiality concerns.

d. What steps is the Administrative Office taking to ensure that law clerks and other judiciary employees who report sexual harassment and misconduct are protected from retaliation?

In addition to providing easier paths to reporting misconduct, the Working Group felt it was important to ensure that every employee trust that they will be free from any retaliation for reporting misconduct. The Working Group recommended in its Report that the Committee on Codes of Conduct review its guidance to "make clear that retaliation against a person who reports misconduct is itself serious misconduct that will not be tolerated." Report at page 26. In fact, retaliation for filing a complaint or for any participation in the Judicial Conduct and Disability process is expressly listed as cognizable judicial misconduct under Rule 3(h)(1)(g). Additionally, the Working Group recommended that the Committee on Judicial Conduct and Disability provide additional guidance to judges who review JC&D complaints, consistent with the proposal to the Committee on Codes of Conduct, that would safeguard complainants from retaliation. Report at page 31. Please also see our response to your Question 5.

e. Are there other recommendations the Working Group and/or the Administrative Office received from law clerks and judicial employees that it declined to implement? If so, please describe these recommendations and why they were not implemented.

All suggestions submitted by law clerks and judicial employees were taken under consideration by the Working Group and nearly all were adopted. In each case, the Working Group attempted to develop a response that addressed the core of the suggestion while at the same time respecting budgetary, structural and statutory limitations of the Judicial Branch. One of the only substantive recommendations from the law clerks that was rejected was to "slow down" and take more time with the Report. Another was to conduct a national survey of past misconduct which, as explained in answer to Question 2, we do not believe is necessary to the Working Group's mission given the information obtained by some circuits' and districts' surveys. With regard to the Working Group's inclusion of the law clerks in three of our four meetings, you may also be interested in our response to Question 25 from Senator Grassley.

5. Many employees do not report sexual harassment and misconduct because they fear retaliation and negative consequences for their careers. What steps is the Administrative Office taking to protect employees who report sexual harassment and misconduct from retaliation?

Please see our answer to 4(d) above. The Report recommended changes that would simplify the reporting process, and the OJI will offer employees concerned about retaliation a mechanism for discussing their concerns anonymously and outside of their circuit. Additionally, the Report called for revising the Codes of Conduct to provide for clearer protections of employees who report misconduct, including clarifying that retaliation against a person who reports misconduct is itself serious misconduct that will not be tolerated. Report at pages 24 and 27. Retaliation for filing a complaint or for any participation in the JC&D process is expressly listed as cognizable judicial misconduct. Rule 3(h)(1)(g).

6. In your testimony before the Judiciary Committee, you said that the Administrative Office has begun implementing "education outreach to our employees." You testified that you would provide the Committee with a list of the training programs the Administrative Office has implemented to date.

a. Please list and describe the education and training programs that the Administrative Office has implemented to date.

Your questions specifically asked for programs implemented by the AO; however, a complete answer should include programs also offered by the Federal Judicial Center (FJC). The following is a list of programs recently offered, currently supported and/or planned by our offices.

Training Recently Conducted at AO and FJC:

- Fair Employment Practices Process training for AO staff – focused on process, discrimination, harassment, and how to report
- Sexual Harassment Prevention – training for managers and supervisors at the AO – Conducted October 2017 and February 2018
- Implicit Bias training for managers and supervisors at AO – conducted 2016 and 2017
- Town Hall: Addressed updates to the AO's Human Resources policy including: prohibited personnel practices, whistleblowing, and Fair Employment Practices procedures. Open to all managers and staff
- Town Hall: Addressed revisions to Fair Employment Practices Chapter of the AO Manual. Conducted by staff from the FEP Office and Office of the General Counsel
- Workplace Conduct for FJC employees: In-person, offered June 2018

Recent Training for Court Staff:

- Employee Dispute Resolution Training: Supported by two private court employee groups (Federal Court Clerks Association and National Conference of Bankruptcy Clerks) Conducted by court and AO staff – Omaha, Nebraska (March 2018)
- EDR Training for 11th Circuit Bankruptcy Clerks (June 2018)
- EDR Training for Federal Public Defenders organizations in the 11th Circuit (July 2018)

- Preventing Workplace Harassment: 2018 Federal Defender Administrator's Conference (July 2018)

AO and FJC Offered Training – On-Going:

- Advanced Employee Relations – uses workplace scenarios to reinforce concepts and principles relating to managing employee relations and human resources policies and best practices. In-person training for court unit executives.
- Managing Employee Dispute Resolution Issues in the Judiciary – this course addresses the nine laws covered by the EDR Plan, provides resources for an EDR coordinator, including a checklist of duties and provides real life case scenarios with follow-up questions and answers. Web Based training for Courts.
- Guidance on Sexual Harassment – provides the applicable definitions, guidance, and employee responsibilities related to sexual harassment in the workplace. Web Based training for AO staff.
- Court Unit Executives and Chief Deputies Annual Conference – this four-day training includes human resources and employee relations session. Conducted in-person.
- New Federal Defender and Administrative Officer Orientation – includes sessions on human resources and employee relations, and code of conduct. Conducted in-person.
- Federal Defender Conference – includes session on employee dispute resolution; (CDO) employment law, and fair employment practices. Conducted in-person.
- Preventing Workplace Harassment - emphasizes managers' responsibility to maintain environment free of hostility. Conducted in-person by FJC. (See more in 6(b))
- Meet on Common Ground – Program on diversity and civility in the workplace. Conducted in-person by FJC. (See more in 6(b))
- Code of Conduct for Federal Judges - Conducted in-person by FJC. (See more in 6(b))

Upcoming Training programs

- August 2018 – Comprehensive HR Academy – featuring the Advanced Employee Relations and Preventing Workplace Harassment
- August 2018 – EDR Training for Chambers Staff Administrative Workshop
- Fall 2018 – EDR Training for Wisconsin Eastern
- Fall 2018 – EDR Training for Virgin Islands
- By December 2018 AO staff and managers will be directed to take a sexual harassment training program offered on the Judiciary's Online University
- FJC is adding programs on workplace conduct to training programs for managers at all levels. (See more in 6(b))
- FJC is creating web conferences on workplace conduct. (See more in 6(b))
- FJC is adding a module on workplace conduct to their on-line orientation for new law clerks. (See more in 6(b))
- FJC has added a session on harassment to their judge programs.

b. How are these education and training programs different from the education and training programs previously provided?

Beginning in 2018, orientation and continuing education programs for judges have each addressed civility, "power disparities," and bystander intervention. For judges, sessions on the Code of Conduct have always been included in all orientation seminars and in general-subject continuing education workshops. Another difference this year, however, is that all seminars and workshops now include sessions specifically devoted to workplace harassment. These new sessions are being incorporated into orientation programs for new district judges, in-person education programs for new chief judges of all courts and all judges, and in sessions at our national workshops for district, bankruptcy and magistrate judges. The Working Group recommended changes to the Codes of Conduct for judges and staff. Training will be updated to address all changes to the Codes.

The approach adopted in these new sessions is a facilitated discussion involving the FJC's director, a chief judge or program mentors, followed by an open discussion with program attendees. We have found the quality of discussion to be candid, illuminating, thoughtful, and a reinforcement of the need for continued focus on this topic.

Additionally, an FJC national conference for court unit executives in the fall will include workplace harassment training.

As mentioned in my February 16, 2018, letter referenced above, the FJC has initiatives underway that both continue the successful approaches we have used to date and offer new approaches to education on these topics. Three primary programs offered by the FJC are conducted in courts throughout the country: Preventing Workplace Harassment; Meet on Common Ground (a program about diversity and civility in the workplace); and the Code of Conduct. These programs use lesson plans developed by the FJC and are conducted by FJC-trained faculty in courts that request them. Another difference this year is the volume of requests we have had specifically for the Preventing Workplace Harassment program. Reflected below are the programs conducted from fiscal year (FY) 16 to date.

Meet on Common Ground: Speaking Up for Respect in the Workplace
- FY 16: 3 programs;
- FY 17: 20 programs;
- FY 18 (to date): 13 programs

Code of Conduct
- FY 16: 14 programs;
- FY 17: 24 programs;
- FY 18 (to date): 19 programs

Preventing Workplace Harassment
• FY 16: 49 programs;
• FY 17: 45 programs;
• FY 18 (to date): 110 programs
The data reflects that there has been tremendous interest from court units throughout the country in education focused on preventing workplace harassment. What is also encouraging is that in many cases, the increased number of programs reflects a commitment within a given district to train all of its employees and not just discrete units within the district. To meet the additional demand, we conducted a "train the trainer" program to qualify an additional 12 faculty members this spring.

The FJC's online orientation for new law clerks is now under revision to include a separate segment on workplace harassment. Significantly, current and former law clerks are involved in the effort to produce that new segment.

In addition to a change already made in the Law Clerk Handbook to clarify that law clerks' duty of confidentiality does not extend to misconduct by a judge, the FJC is reviewing this and other publications to address workplace harassment, including reporting procedures.

The FEP Office will revise trainings on Employment Dispute Resolution (EDR) processes after the Committee on Judicial Resources of the Judicial Conference completes its changes to the EDR model plan. Staff at the AO also will revise its Judicial Conduct and Disability (JC&D) Act procedures training after the Committee on Judicial Conduct and Disability of the Judicial Conference completes its changes to its processes.

c. What steps is the Administrative Office taking to implement additional training and education programs?

d. Will the Administrative Office provide supplemental education and training programs as it implements new rules and procedures relating to sexual harassment and misconduct in the workplace?

Response to Question 6 c & d:
As noted in detail above in response to Question 6(b), additional changes to existing programs administered by the AO and decisions about new programs will follow the actions taken by the Judicial Conference and its committees in response to recommendations in the Working Group's Report (e.g., a new Model EDR Plan, updates to the Codes of Conduct, and revised JC&D definitions and procedures) and the work of the new OJI.

7. In your testimony before the Judiciary Committee, you said that the Administrative Office collects and maintains demographic data for law clerks and other employees.

a. Please describe the demographic data that the Administrative Office collects for all employees, including law clerks.

The federal courts collect and both the courts and the AO maintain data on the race/ethnicity, gender, age, and disability status of the Judiciary's federal judges and bi-weekly employees, which includes law clerks.

b. How is this data collected?

The demography of bi-weekly employees, including law clerks, is collected by human resources specialists on voluntary identification forms provided to new employees at the time of hiring.

c. How often is this data collected and updated?
d. How is this data collected and maintained?

The data is collected at the time of hiring. On an annual basis, individual federal courts' fair employment practices contacts review the data, which is maintained in the Human Resources System (HRMIS) and update the data as needed.

e. Can this data be disaggregated by court and judge?

Our reporting practices are not designed to disaggregate such data in those ways. Annually, the Administrative Office collects and maintains demographics data received from each of the federal courts regarding the court's judges and bi-weekly workforce which includes law clerks. Per Judicial Conference policy, the AO aggregates the demographical data received and reports the Judiciary's aggregate workforce data on gender, race/ethnicity, age, disability, personnel actions, and claims in the *Judiciary Fair Employment Practices Annual Report*.

f. Does the Administrative Office track the race and gender of law clerk applicants? If so, does the Administrative Office have any systems in place to identify judges who receive disproportionately few applications from women and minorities?

Interviewed applicants are offered the opportunity to self-identify demographic information. Federal court units and the AO collect and track this data by position type (e.g., Law Clerks). The AO's system would not be able to identify the gender and race of an individual judge's applicants.

8. For each of the last ten years, please provide the percentage of judicial clerkship positions that have been occupied by women.

	APPELLATE			
	Male		Female	
FY 2007	479	53.5%	417	46.5%
FY 2008	502	54.8%	414	45.2%
FY 2009	526	56.9%	399	43.1%
FY 2010	514	55.5%	412	44.5%
FY 2011	533	57.0%	402	43.0%
FY 2012	511	55.2%	415	44.8%
FY 2013	535	57.1%	402	42.9%
FY 2014	484	57.5%	358	42.5%
FY 2015	454	55.1%	370	44.9%
FY 2016	454	56.5%	350	43.5%
FY 2017	434	55.5%	348	44.5%

	DISTRICT			
	Male		Female	
FY 2007	898	41.6%	1,259	58.4%
FY 2008	931	42.8%	1,246	57.2%
FY 2009	955	43.2%	1,255	56.8%
FY 2010	955	43.0%	1,266	57.0%
FY 2011	941	41.8%	1,311	58.2%
FY 2012	958	42.4%	1,300	57.6%
FY 2013	1,009	43.3%	1,321	56.7%
FY 2014	1,071	44.3%	1,347	55.7%
FY 2015	1,064	43.5%	1,381	56.5%
FY 2016	1,097	45.3%	1,326	54.7%
FY 2017	1,007	44.5%	1,256	55.5%

For FY 2017, the total number of male law clerks was 1441 and the total number of female law clerks was 1604.

9. Does the Administrative Office have any system(s) in place to collect and maintain data regarding: (a) complaints filed against judges alleging that the judge engaged in harassment or misconduct; (b) monetary settlements entered into by judges as the result of harassment or misconduct perpetrated by the judge; and (c) the results of any disciplinary proceedings against judges stemming from sexual harassment or misconduct perpetrated by the judge.

a. If no, please explain why not.

b. If yes, please describe the Administrative Office's procedures for collecting and maintaining this data.

10. Does the Administrative Office have any plans implement, expand, and/or modify its data collection practices? Please explain.

Response to Questions 9 & 10:

Judicial Conduct & Disability Act

The AO collects data related to complaints and actions taken under the Judicial Conduct and Disability Act (the Act). This data includes information regarding the "Nature of Allegations," which tracks the language of the Act and the Rules for Judicial-Conduct and Judicial-Disability Proceedings. Currently, the "Nature of the Allegations" data does not explicitly capture workplace harassment. The Working Group has recommended that the Committee on Judicial Conduct and Disability amend its Rules to "include express reference to workplace harassment within the definition of misconduct," and it is expected that harassment will be included within the "Nature of Allegations" category this year once the rules amendments are enacted after the Judicial Conference meets.

With regard to "monetary settlements entered into by judges," such settlements are not provided for under the JC&D process. Complaints are either dismissed or concluded pursuant to the Rules for Judicial-Conduct and Judicial-Disability Proceedings and not by settlement between the covered judge and a complainant.

The results of disciplinary proceedings are reported–and will be reported for complaints alleging harassment–under the "Remedial Action Taken" category.

With regard to procedures, each circuit is tasked with completing a reporting form for each complaint filed under the Act. Each form contains categories for reporting the nature of the allegations, the procedural posture (such as whether the complaint was referred to a special investigating committee), and remedial actions taken (if any).

Employment Dispute Resolution

When an Employment Dispute Resolution (EDR) complaint (or if the complaint is from an AO employee, a Fair Employment Practices (FEP) complaint) is filed, the respondent is the employing office responsible for redressing, correcting, or abating the violations alleged in the complaint. No individual is named as a respondent in the complaint and no individual enters into monetary settlements. In addition, you may also be interested in our answer to Question 20 from Senator Grassley.

With regard to reporting of matters that have gone through the EDR process, sexual harassment has not in the past been reported nationally as a separate category, but rather it has been combined with other forms of sex-based discrimination. We are currently engaged in a review of improvements to the EDR reporting systems so that information about the incidence of sexual harassment will be more readily available. The FEP Office had already been working on improved data collection, storage and reporting methods for claims information from the courts– and now we have included in this ongoing effort these planned improvements to reporting of sexual harassment matters.

11. Many law schools know which judges engage in sexual harassment and other misconduct. What steps is the Administrative Office taking to work with law schools to identify judges with reputations for inappropriate behavior?

With regard to the Judiciary's interest in working more closely with law schools to gain a better understanding of law clerks' experiences, we believe it can be an important step in improving workplace conditions in the Judiciary. Improved communications with law schools are a mechanism for enhancing that understanding, as in some cases the schools may possess informal knowledge that is not always communicated to the proper channels in the Judiciary. The Working Group recognized this in its Report and recommendations. Report at pages 18, 40. We have already begun outreach to law schools. Judges Jeffrey Howard and Margaret McKeown and I, all Working Group members, have spoken with or met with representatives from the National Association for Law Placement, as well as with a number of law school deans active in professional development and clerk placement, to discuss collaboration and concrete suggestions for efforts both before and after clerkships with their students. Judge McKeown will participate in a panel with the National Association on this very issue. I have also initiated outreach to law school deans I know, to work with their clerkship coordinators.

Initial meetings have shown promise, and we will continue to work together to share information and develop procedures that enable law schools to confer with the OJI regarding any concerns, while also protecting the confidentiality of any individual students. The OJI will play a major role in shaping that relationship both to obtain the information from the law schools and provide it to relevant offices within the circuits. I am pleased to report great interest on both sides in working towards a better experience for law clerks and an overall improved workplace environment in our federal courts. Open communications are crucial to reassuring those who report that they will not be "punished" for it.

12. In your testimony before the Judiciary Committee, you said that the Administrative Office is "encouraging exit interviews of all the law clerks."

a. What steps is the Administrative Office taking to make exit interviews mandatory?

Standard human resources and employment law guidance holds that exit interviews should be voluntary. The AO's Human Resources Office, however, has provided best practices for exit interviews for use by the courts. The AO's Human Resources Office sends exit interview surveys by e-mail to departing employees to identify trends. The new OJI will work with these tools to enhance this process as another method for identifying and reporting workplace conduct issues.

b. What questions are asked in an exit interview?

The questions that typically have been asked in our exit interviews are listed below. I am also attaching the exit questionnaire the Ninth Circuit intends to use which asks specific questions regarding harassment. These kinds of questions could be used in local courts and in the national exit interview survey.

Exit Interview Questions:
1. If you have accepted another job, does your position offer: lower salary, comparable salary, higher salary, N/A (retired, have not accepted another job).
2. Would you recommend the Judiciary as an employer?
3. What are the Judiciary's strengths as an employer?
4. Which areas could the Judiciary improve?
5. Reason for leaving (End of appointment, transfer to another federal agency, work outside federal government, retirement, other).
6. Influence for leaving (better pay/advancement opportunities, conflict with manager/supervisor, job stress, more interesting work, work-life balance, other).
7. Provide any additional comments.

c. What steps will the Administrative Office take to protect the identity of clerks who participate in the exit interviews?

Personal identifying information is neither requested or published.

d. What is the exit interview completion rate?

The current response rate as of July 5, 2018 for 2018 is 63 percent.

e. Please describe the process for administering exit interviews.

The AO Human Resources Office sends the exit interview survey to departing employees who provide a personal email address. Some local courts also administer exit interviews, either in

person or by survey. The AO Human Resource Office has provided guidance on best practices for conducting exit interviews.

f. Who will conduct exit interviews?

The national exit interview process will continue to be conducted by e-mail and described above, and the involvement of the newly created OJI may provide an additional level of comfort to encourage those responding to be candid. Local in-person exit interviews are conducted by the courts' human resources personnel or the court unit executive depending on local practice.

g. What steps is the Administrative Office taking to ensure that exit interviews are conducted by an independent party?

The AO Human Resources Office is independent of any court. This process is being evaluated to include the OJI as an independent entity to review exit interview data to identity workplace conduct issues.

h. What process does the Administrative Office have for reviewing exit interviews?

The AO Human Resources Office compiles the data to identify trends and issues for consideration by the Human Resources Advisory Council and to develop human resources policy. Going forward, we plan to create mechanisms for the OJI to gain information related to workplace misconduct from these interviews as well.

13. In your testimony before the Judiciary Committee, you said that the Administrative Office is engaging in "information gathering" from judicial employees regarding their workplace experiences. Please describe the Administrative Office's efforts to collect workplace experience information from judicial employees.

The exit interview process discussed in response to your Question 12 describes this effort. As noted, we will be evaluating these processes and involving the OJI. The Working Group also created a confidential mailbox for all Judiciary employees to raise issues, make comments and suggestions on existing policies and procedures, during our review. And the Working Group was informed both from surveys conducted by the circuits and by its own in-person meetings with all constituencies in the Judiciary. You may also be interested in our response to Senator Grassley's Question 17.

14. What processes are in place for reviewing information provided by judicial employees?

Please see answer to Question 13, above.

15. Does the Administrative Office of the Courts have an official policy governing the use of non-disclosure agreements by federal judges?

a. If so, please describe the policy.

16. Does the Administrative Office have any plans implement, expand, and/or modify its policies governing the use of non-disclosure agreements by federal judges? Please explain.

17. Does the Administrative Office collect data on which judges require law clerks and/or other employees to sign non-disclosure agreements?

a. If so, please provide that data to the Committee.

b. If not, please explain why the Administrative Office does not monitor the dissemination of non-disclosure agreements by judges.

18. Does the Administrative Office provide law clerks and other employees with information regarding their rights with respect to non-disclosure agreements?

a. If no, will you reconsider?

b. If yes, please identify each source of information made available to law clerks and other employees regarding non-disclosure agreements.

c. Does any of the information disseminated to law clerks and other employees by the Administrative Office explain that non-disclosure agreements cannot be used to prohibit them from reporting sexual harassment or misconduct?

19. Does the Administrative Office review the non-disclosure agreements that federal judges require their law clerks and/or other employees to sign?

a. If so, please explain the nature and extent of the Administrative Office's review.

b. Does the Administrative Office provide federal judges advice on how to structure non-disclosure agreements?

<u>Response to Questions 15-19</u>:

As general background in response to Questions 15-19, the Judicial Conference of the United States (JCUS) would be the governing body for such policies, not the AO. In that regard, the Code of Conduct for Judicial Employees prohibits a judicial employee from disclosing "confidential information received in the course of official duties except as required in the performance of such duties," and imposes a continuing duty of confidentiality on a former judicial employee, but allows for a former employee to be released from that duty. In addition, the Judicial Conference in 2011 approved a "model confidentiality statement" to assist judges and court employees to understand their confidentiality obligations under the Code of Conduct. (JCUS-SEP 11, p. 13.) This model confidentiality statement was created based on concerns at the time related to the new challenges presented by social media platforms and the possibility that court employees might, through their use of social media, reveal confidential information underlying case decision making. Thus, the confidentiality provision was intended to provide guidance to prevent such disclosures.

The JCUS did not require judges nor court unit executives to ask judicial employees to sign a confidentiality statement. There is not a reporting requirement of any type for the judges or court unit executives regarding such statements. There was no additional advice provided by the AO on structuring of such statements and the AO is not involved in any review or data collection process.

The Working Group found that the model statement included language that was misinterpreted and unintentionally discouraged some law clerks or other employees from reporting sexual harassment or other workplace misconduct. Report at pages 15; 26-28. In February 2018, the JCUS, at the recommendation of its Committee on Codes of Conduct, rescinded the model statement and removed it from the Judiciary's internal website to allow for review and potential revision to clarify that it does not prevent any judicial employee from revealing or reporting misconduct, including sexual or other forms of harassment, by a judge or any other person. This review is ongoing and is focused on addressing the issue raised by the Working Group that the Code and the Model Statement unintentionally may have discouraged a law clerk from reporting misconduct.

Furthermore, in the immediate aftermath of Judge Kozinski's resignation, the FJC revised the Law Clerk Handbook to make clear that nothing in the confidentiality provisions precludes law clerks from reporting misconduct.

In my hearing testimony on June 13, 2018, during an exchange with Senator Harris, I commented that I believed we could gather data on judges who have used confidentiality statements. After conferring with AO staff, however, I now understand that we do not have this data available to us in any national system as the statements were not mandated and have been left up to each judge to use or not. I understand Senator Harris' interest in this information; however, collecting such information at this time is not possible.

U.S. Senate Committee on the Judiciary
Hearing dated June 13, 2018, on Confronting Sexual Harassment &
Other Workplace Misconduct in the Federal Judiciary
June 20, 2018
Questions for the Record from
Senator Ben Sasse

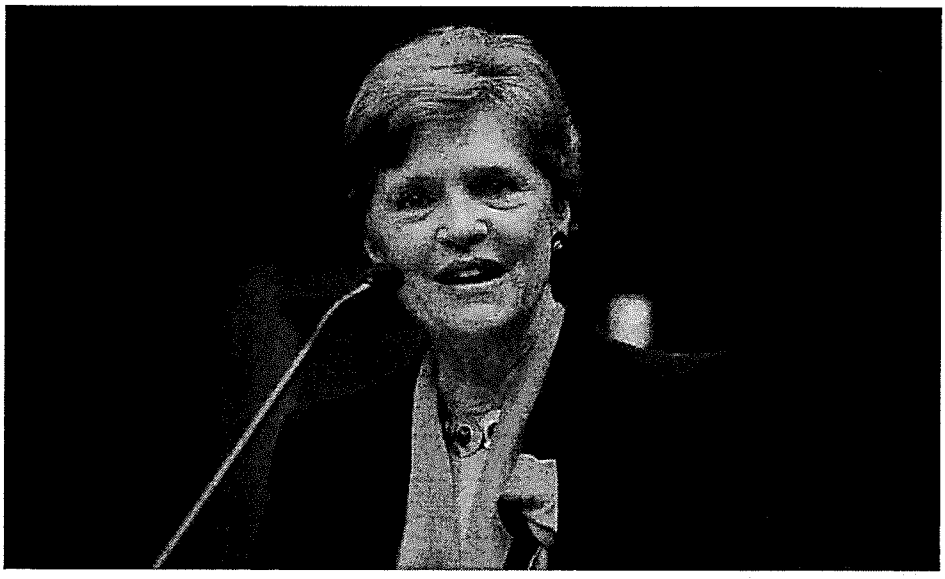
For Mr. Duff:

In the midst of our current crisis of public trust in our institutions of civil society, the Federal Judiciary Workplace Conduct Working Group is absolutely right to conclude that "[a]s the branch of government whose core purpose is equal justice under law, the Judiciary must hold itself to the highest standards of conduct and civility to maintain the public trust" and to seek policy changes to root out harassment and "pursue the overarching goal of an inclusive and respectful workplace." How do these recommendations pursue these imperatives without compromising federal judges' Article III authority and independence with regard to the hiring and supervision of law clerks?

Our Working Group's observations and conclusions about holding our branch to the highest standards of conduct and civility reflect the beliefs of the Judiciary as a whole. We have attempted in our recommendations to strike the proper balance between recognizing the importance of an individual judge's independence with the need to ensure institutional integrity and an exemplary workplace for every employee. For example, we have encouraged "bystander" involvement when misconduct by a colleague is observed or known. Report at p. 24-25. And, we are providing more training that focuses on the cultural aspects of our workplace environment – such as its natural "power imbalance" and its need for confidentiality of its work product – that are both necessary but potentially challenging for office conduct and safeguards. We have included all levels of Judiciary employees, from judges to law clerks to court staff, in the drafting process of our recommendations and believe that by doing so we have found that proper balance in our recommendations. We received positive feedback from the Federal Court Clerks Association, the National Conference of Bankruptcy Clerks, the Federal Judicial Assistants Association, the Association of Bankruptcy Judicial Assistants and the Federal Judges Association which has been encouraging in that regard.

SDNY Chief Judge Colleen McMahon Takes on Sexual Harassment

LAW.COM **ALM Media** December 12, 2017



Judge's award acceptance speech becomes an impassioned appeal: "It is a very good thing that the workplace's dirty little secret has finally been subjected to a healthy dose of Justice Louis Brandeis' strongest disinfectant. Now that we have let the sunshine in, More

In accepting the William Nelson Cromwell Award Monday night, Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York made an impassioned speech about sexual harassment. At the 103rd annual dinner of the New York County Lawyers Association, she urged men and women to ensure that the continuing scandals do not lead to a different type of discrimination against women. Chief Judge Janet Difiore also received the award. Here is Judge McMahon's speech in its entirety: As a number of speakers have observed, we are here tonight to honor Outstanding Women in the Legal Profession, at a time when women in the workplace are very much in the headlines—not for what we have done, but for what has been done to entirely too many of us. That is the elephant in the room at tonight's celebration. And I have something serious I need to say about it. It is a very good thing that the workplace's dirty little secret has finally been subjected to a healthy dose of Justice Louis Brandeis' strongest disinfectant. Because now that we have let the sunshine in, we can finally address the nefarious and way too prevalent

scourge of sexual harassment in the workplace. But a corollary development is largely being ignored. It is the re-emergence of a very offensive "defensive" practice that today bears the moniker of a prominent politician, but that used to be known as the "Graham Rule." The Graham Rule says that a man should make sure he is never alone in a room with any woman other than his wife for any reason—including perfectly legitimate business reasons. That way, he can avoid both the temptation to engage in inappropriate behavior and any chance that he might be the victim of an unwarranted accusation. As revelation cascades upon revelation, some perfectly sensible men, concerned that there may be difference of opinion between men and women over what constitutes unacceptable behavior in the workplace, have wondered aloud in my presence whether something like the Graham Rule might not be a salutary and effective prophylactic. That scares me to death. Because I remember a time when entirely too many women, in our profession and every other, were denied opportunities for mentoring, for networking, for assignment to the best deals and the most exciting, challenging cases—all because someone was, or claimed to be, living by the Graham Rule. The generation of women whom Janet DiFiore and I represent—on whose behalf we accept the William Nelson Cromwell Award—fought to get the Graham Rule recognized for what it was: a way of keeping women in our place. Which, by the way, was second place. The Graham Rule does not belong in the 21st century workplace, because it is both illegal and immoral. It is illegal because it violates the law to treat women and men differently at work in any respect. That includes refusing to meet with or mentor colleagues of one gender but not another, or cutting colleagues of one gender off from opportunities, even in the name of propriety. And it is immoral because it puts the onus for controlling inappropriate behavior on the wrong person. Women in this room, especially young women, you dare not let this pernicious form of discrimination creep back, in the guise of making your workplace safer. For if you do, you will discover that women can be victimized because of their gender in many ways, not all of which involve sexual misconduct, but all of which are detrimental to your chance of becoming an outstanding member of our profession. Men in this room, you cannot allow this sort of thinking to return to your law firm, your corporation, your government office. For if you do, it will also return to the places where your friends, your sisters, your wives and your daughters work. And those women—the women you love, the women for whom you are ambitious—will be the losers. My career is a testament to the lack of necessity for any Graham Rule in the workplace. I was fortunate to be

mentored by a group of great men. Those men—Marty London, Arthur Liman, Lew Kaplan, Bob Smith—had no problem having dinner or a drink with me, or meeting with me privately to deal with confidential client matters, or working together until the wee hours of the morning when necessary, or allowing me to accompany them on business trips—all the things they did with my male colleagues. And never once—never once—did any of them say or do anything that made me uncomfortable. If they were following a rule, it was the rule that some of us at Paul Weiss used to call the Liman Rule, because we heard Arthur say it over and over again to his clients. It went like this: Don't do anything you wouldn't want your mother to read about on the front page of The New York Times. Of course, most of the time, Arthur was talking to his clients about their business dealings. But the rule works equally well in the context of interpersonal relations in the workplace. I know what would have made my mother cringe if she learned about it in the morning news. And I am reasonably certain that no one, including the worst predators who have been outed over the past few months, would have wanted his mother to open the newspaper or turn on the TV and read or hear about the behavior that has been publicly revealed in recent weeks. So if the men who are worried about what behaviors might cross which lines in the brave new workplace would just ask themselves WWMS—What Would Mom Say—when dealing with their subordinates, then Ala Glazer Murphy and Katie Sica and all of our daughters and granddaughters will not need to fight anew a battle I thought the women of my generation had won, for us and for them. What's good for the gander is good for the goose, by the way. The same simple rule applies to the still too small but growing number of women who hold the reins of authority in their workplaces. We, too, must treat our subordinates with the respect they deserve, and do nothing to take advantage of our power or their status. So when your clients come to you in these fraught times for advice about how to avoid sexual harassment in the workplace, or as you update your in-house training for employees, don't suggest adopting the Graham Rule. Instead, follow the Liman Rule … or the Mom Rule … or The New York Times Rule … whatever name works for you. Because if people actually follow that rule, we won't need any other rule. And we can all—women and men alike—stop worrying about what ought to be obvious, and focus on becoming the best possible advocates, advisers and adjudicators, for our clients, for the courts, for the government and for the rule of law in our beloved country.

United States Court of Appeals for the Ninth Circuit Employee Exit Questionnaire

Introduction

1. What was your role at the court?

- ○ Law clerk in chambers
- ○ Support staff in chambers
- ○ Intern or Extern
- ○ Staff Attorney or Mediator
- ○ Staff Attorney or Mediator support
- ○ Librarian or Library support
- ○ Employee of the Circuit Executive's Office
- ○ Employee of the Clerk's Office
- ○ Other - Write In

2. How long did you work at the court?

- ○ one year or less
- ○ one to three years
- ○ three to six years
- ○ over six years

3. My job duties and responsibilities were clearly defined.

- Strongly agree
- Agree
- Disagree
- Strongly disagree
- Please explain

4. How would you rate the availability and quality of any orientation or training materials you received?

- High quality
- Adequate
- Not adequate
- Please explain

5. I felt my work was valued.

- Always
- Usually
- Sometimes
- Rarely
- Never
- Please explain

6. I felt I was treated with respect.

- Yes
- No
- Please explain

7. What obstacles or barriers, if any, affected your ability to do your job?

8. Have you encountered bullying, harassment or inappropriate behavior (whether intentional or unintentional) directed toward you by anyone associated with the court?

- Yes
- No
- Please explain

9. Did you witness harassment, bullying or inappropriate behavior (whether intentional or unintentional) directed at someone else by anyone associated with the court?

- Yes
- No
- Please explain

10. If the answer to either 8 or 9 is yes, did you report it anyone in the workplace, either informally or formally?

- Yes
- No
- Please explain

11. If you did report such a matter - to whom did you report?

- Director of Workplace Relations
- Human Resources
- My immediate supervisor
- Other - Write In

12. If you did not report this behavior, please explain why not.

13. Do you have any specific suggestions for how we can improve our workplace, including our workplace culture?

14. What did you enjoy most about working at the court?

15. Feel free to provide any additional thoughts or comments about your work at the court.