

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

PEOPLE'S
PARITY
PROJECT

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

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

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

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

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

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

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

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

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

Conduct a Climate Survey:

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

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

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

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

³ FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 19 (2018),

http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf.

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

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

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

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

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

⁵ See FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., *supra* note 3, at 56.

⁶ EQUAL EMP’T OPPORTUNITY COMM’N, SELECT TASK FORCE, *supra* note 34 at 9.

⁷ Debra Cassens Weiss, *Revision to federal law clerk handbook addresses sex harassment complaints*, ABA JOURNAL, (Dec. 19, 2017, 11:56 AM), http://www.abajournal.com/news/article/revision_to_federal_law_clerk_handbook_addresses_sex_harassment_complaints.

⁸ EQUAL EMP’T OPPORTUNITY COMM’N, SELECT TASK FORCE, *supra* note 34 at 43.

⁹ See OFFICE OF THE PROVOST, YALE REPORT ON THE AAU CAMPUS CLIMATE SURVEY (2015), <https://provost.yale.edu/title-ix/yale-report-aau-campus-climate-survey>.

¹⁰ See ASS’N OF AM. UNIVS., AAU CLIMATE SURVEY ON ASSAULT AND SEXUAL MISCONDUCT (2015), <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>; see, e.g., U.S. ARMY RESEARCH INST. FOR THE BEHAVIORAL AND SOC. SCIS., MILITARY COMMAND CLIMATE SURVEY, http://www.belvoir.army.mil/climate_survey/military_survey.asp.

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

Establishing a National Reporting Avenue

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

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

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

Accountability Mechanisms

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

¹¹ *Id.* at 37.

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

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

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

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

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

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

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

¹³ See *Forrester v. White*, 484 U.S. 219, 229–30 (1988).

¹⁴ *Id.*

¹⁵ See *infra* at 11-12.