



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

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WASHINGTON, D.C. 20544

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Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley and Senator Feinstein:

Thank you for your letter of last Friday, February 9, 2018, concerning the status of the Federal Judiciary Workplace Conduct Working Group (Working Group). As the Chief Justice said in his 2017 year-end report, "Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made it clear that the Judicial Branch is not immune." We have acted quickly on this. At the national level, I established the Working Group. Our group is actively examining policies and procedures within the Judiciary to protect employees from inappropriate workplace conduct and, where necessary, developing enhancements to those protections. Some of the circuits and district courts have similar initiatives in progress and we are coordinating closely with them. We, of course, not only share your interest in this serious issue, we have been working on it in earnest since the formation of the Working Group in January and are pleased to update you on our progress. We certainly appreciate your staffs' willingness to discuss these matters with us and look forward to continuing that dialogue. We will address your questions in order.

- 1. On December 31, 2017, Chief Justice Roberts announced that he was creating a working group to examine protections against sexual harassment in the Judiciary. The working group was directed to explore whether the Judiciary has proper procedures in place that protect law clerks and other courtroom employees from sexual harassment.*

a. How were the seven members of the working group chosen?

Immediately upon receiving direction from Chief Justice Roberts to form a working group to examine our practices and address these issues, I identified and assembled a diverse team of leaders in the Federal Judiciary who are uniquely qualified for this important task. The seven individuals I appointed to the Working Group and the group's counsel have a breadth of experience in a wide range of judicial operations, the utmost respect from all who work in the Judicial Branch, and subject matter experience and expertise in the matters before our Working Group. Enclosed is a summary of the credentials of the Working Group and its counsel.

b. How often will the working group meet?

The Working Group has held one day-long in-person meeting and has another in-person meeting scheduled in two weeks. We will meet in person as often as needed, and we communicate in between meetings on a regular if not daily basis. We have set a very aggressive schedule to complete our work.

c. When will the working group begin to make recommendations?

The answer is immediately. In fact, we already have acted on several matters, including:

- revising the Confidentiality provisions in several employee/law clerk handbooks to reflect that nothing in those provisions prevents the filing of a complaint;
- establishing a comment mailbox on the uscourts.gov public website for current and former law clerks and other employees to send comments and suggestions to the Working Group;
- removing temporarily the Model Confidentiality Statement from the courts' intranet website in order to revise it and clarify that nothing in that statement prevents law clerks or employees from reporting sexual harassment or other workplace misconduct and filing a complaint relating to that conduct;
- enhancing and raising awareness of the data the Judiciary collects and publishes relating to judicial misconduct complaints under the Judicial Conduct and Disability (JC&D) Act to identify specifically any complaints filed relating to sexual harassment. (In many years, including 2016, there have been zero.)

Additional steps will be taken throughout our review and some issues likely will be addressed in the form of recommendations to the Judicial Conference of the United States.

d. Will the working group make their recommendations publicly available?

All final recommendations will be publicly available. We will make some recommendations public during our review. Others will be announced after the Judicial Conference considers and acts upon them.

2. Will the working group seek input from current and former law clerks and other court employees?

Yes, representatives from the group of law clerks, both current and former, who wrote to us in January, along with other court employees, will attend our next Working Group meeting to provide us with their comments and suggestions for improving our policies and processes. We are also soliciting comments through the Judiciary's Advisory Groups. Additionally, as mentioned above, we are creating a comment mailbox on the uscourts.gov website for input from current and former law clerks and court employees.

3. Will the working group consider changes in sexual harassment training and staff development?

Yes. The Federal Judicial Center (FJC) has several initiatives underway. There are three programs relating to workplace harassment that the FJC conducts 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 for U.S. Judges. These programs use a lesson plan developed by the FJC and are conducted by FJC-trained faculty in courts that request them.

Meet on Common Ground: Speaking Up for Respect in the Workplace

- FY 16: 3 programs;
- FY 17: 20 programs;
- FY 18 (to date): 6 programs

Code of Conduct

- FY 16: 14 programs;
- FY 17: 24 programs;
- FY 18 (to date): 5 programs

Preventing Workplace Harassment

- FY 16: 49 programs;
- FY17: 45 programs;
- FY18 (to date): 24 programs

The FJC will train additional trainers this spring for the Preventing Workplace Harassment program to meet increased demand.

For judges, sessions on the Code of Conduct are included in all orientation seminars and in general-subject continuing education workshops. Henceforth, these seminars and workshops will include sessions specifically devoted to workplace harassment; the first one was held in an orientation for new district judges earlier this month. Sessions devoted to workplace harassment are also scheduled for in-person education programs for chief district and bankruptcy judges this spring and for new chief judges of all kinds in the fall.

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

The FJC provides an online orientation for new law clerks each year. This is now being revised to include a separate segment on workplace harassment.

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

The Working Group also has under consideration changes in training for EDR counselors and others who may advise or assist court personnel about workplace harassment issues.

4. *What action, if any, has the AO taken following the allegations to strengthen the employee resolution process?*

The Working Group will be specifically examining all aspects of the Employment Dispute Resolution process to look for areas for possible enhancements as part of its key objectives. In an example of the Judiciary's commitment to this principle, the AO, with direct senior leadership involvement, recently finalized a years-long initiative on behalf of the Judicial

Conference to ensure that all courts have protection against retaliation for whistleblowers and to incorporate these protections into their local EDR Plans. As a result, all circuit courts, all district courts, and all bankruptcy courts have whistleblower retaliation prohibitions.

5. *What current policies for sexual harassment training are currently in place in the Judiciary? Do law clerks and court employees participate in training?*

Orientation programs for new judges, annual continuing education workshops, and periodic ethics advisories from the Code of Conduct Committee of the Judicial Conference have for many years included training on ethics and the Code of Conduct for judges.

In our response to Chairman Grassley's letter to me of December 6, 2017, we provided a detailed response, including a lengthy chart, outlining numerous types of training provided to judges, law clerks, and court staff on a variety of management and oversight responsibilities, including training on prohibited personnel practices, ethics, and general court management. (See my letter to Chairman Grassley, January 12, 2018, response to question 5 (enclosed).)

This year, the Federal Judiciary's orientation programs for new judges include specific training on "Respect in the Workplace" (a program that includes the topic of harassment). This training will also be included in continuing education workshops for judges, as well as in other programs for new and experienced judges.

Staff training includes Preventing Workplace Harassment, Meet on Common Ground (a program about diversity and civility in the workplace); and the Code of Conduct for Judiciary Employees. Law clerks are trained on the Code of Conduct through in-person and video training. There will also be harassment training at upcoming sessions for court unit executives. And there will be training for Chief District Judges in a March 2018 training session.

The FJC is also revising the Law Clerk Handbook and online orientation for new law clerks to address harassment directly, including harassment reporting procedures.

The Office of Fair Employment Practices (OFEP) also provides the following training:

- “Managing Employee Dispute Resolution Issues in the Judiciary” is web-based training the OFEP created with the Office of Human Resources that covers Title VII, sexual harassment, and sex-based harassment as part of the discussion of the “Nine Laws” applicable to the EDR Plans. This is typically directed at EDR coordinators (who are court employees).

- “EDR Training for the Judiciary” is in-person training the OFEP provides upon request to court units, generally those responsible for overseeing or those responsible for carrying out duties in the EDR process. It covers Title VII, sexual harassment, and sex-based harassment, as part of the discussion of the “Nine Laws” applicable to the EDR Plans.

- “Harassment in the Workplace” is in-person training or video conference training the OFEP provides, upon request, to court units that is customized to the needs of the court unit. It has been done, for example, with the FJC, and involved preparation of training for all employees, all managers, and judges (where the OFEP was responsible for the judges’ portion).

6. *Do anti-retaliation statutes protect law clerks or courtroom employees if they report sexual harassment against federal judges?*

The Rules for Judicial-Conduct and Judicial-Disability (RJCD) Proceedings, which along with the Judicial Conduct and Disability (JC&D) Act of 1980, 28 U.S.C. §§ 351–364, establish standards and procedures for addressing conduct and disability complaints against a federal judge, prohibit retaliation against a law clerk or courtroom employee for reporting sexual harassment by a federal judge. Specifically, Rule 3(h)(1)(H) provides that “retaliating against complainants, witnesses, or others for participating in [the conduct and disability] complaint process” constitutes “cognizable misconduct.” See Guide to Judiciary Policy, Vol. 2, Part E, Ch. 3, § 320, Article I(3)(h)(1)(G).

As I previously provided to you in correspondence on January 12, 2018, the Federal Judiciary also has put in place comprehensive protections for its employees generally including law clerks against retaliation (by judges or other judiciary employers) that mirror anti-retaliation statutes. Thus, retaliation against any Federal Judiciary employee, including law clerks or courtroom employees, for reporting sexual harassment by a federal judge is prohibited under the Federal Judiciary’s policies. Specifically, harassment against any employee based on certain protected classes, including sex, or retaliation for engaging in any protected activity is expressly prohibited under the Model Employment Dispute Resolution Plan (“Model EDR Plan”) as adopted by the Judicial Conference of the

United States. See question 7 for a discussion of our efforts to ensure the EDR plans cover all law clerks.

7. Some federal court districts allow law clerks to participate in the Judiciary's employee dispute resolution program. How many districts allow this type of dispute resolution? Why might a district not allow their law clerks to participate in this program?

The Judiciary's Model EDR Plan explicitly covers law clerks. Nine of the eleven federal circuits have included law clerks in the EDR plans for all of the courts within their jurisdiction. The only two federal circuits that do not currently cover law clerks within the EDR plans of their individual courts are the Seventh and Eleventh circuits. Those circuits have not covered law clerks in their EDR process because law clerks may raise allegations regarding harassment by a judge through the Judicial Conduct and Disability Act complaint process. Nonetheless, the Working Group is encouraging both the Seventh and Eleventh circuits to update their EDR plans to include law clerks. Both the Seventh Circuit and the Eleventh Circuit are now reviewing their EDR plans and are considering that action.

8. How many complaints alleging sexual harassment or misconduct are filed by courtroom staff and federal law clerks each year? How many of these complaints are investigated? How many result in findings for and against judges?

There are two ways in which the Judiciary typically compiles complaints from courtroom staff and federal law clerks alleging sexual harassment by a judge: the Judicial Conduct and Disability ("JC&D") complaint process and the Employment Dispute Resolution ("EDR") program.

In 2016, there were no complaints alleging sexual harassment by a federal judge filed by courtroom staff or law clerks under the JC&D Act procedures.

In 2016, there was one EDR claim alleging sexual harassment by a judge filed by a law clerk. In accordance with the applicable EDR plan, the employee initiated an action by requesting counseling. As set forth in the Model EDR Plan, which is attached in our response to Question 10, counseling involves a designated EDR counselor discussing the employee's concerns, eliciting information regarding the matter, advising the employee of his/her rights and responsibilities and the procedures applicable to the EDR process, evaluating the matter, and assisting the employee in achieving an early resolution of the matter, to the extent possible. In this situation from 2016, the employee and the employing office were

able to achieve an equitable resolution of the matter during the EDR counseling process, which concluded the matter prior to the initiation of further fact-finding.

9. Describe the process the Judiciary uses to investigate a claim of misconduct.

Misconduct claims can be filed under the JC&D Act or under the Model EDR Plan.

Complaints of judicial misconduct are governed by the JC&D Act, 28 U.S.C. §§ 351–364, and the JC&D Rules. Any person can file a complaint or a circuit chief judge can identify a complaint. Every complaint is reviewed and considered by the circuit chief judge. The circuit chief judge must refer a complaint raising factual issues to a special committee of district and circuit judges for an investigation as extensive as necessary. The special committee then submits a report, including fact-finding and recommendations to the judicial council, for consideration. A complainant can file a petition for review from a judicial council's order following appointment of a special committee to the Judicial Conduct & Disability Committee. Where a judicial council determines that a subject judge may have engaged in conduct that might constitute grounds for impeachment, the judicial council must certify such a determination to the Judicial Conference, and the Judicial Conference – if it concurs – must certify and transmit the determination and record of the proceeding to the House of Representatives.

The Model EDR Plan includes a reporting provision that encourages any judiciary employee who experiences or observes sexual harassment or other wrongful discrimination to report that to one of the court's EDR Coordinators, a unit executive or supervisor, a human resource manager or the Chief Judge. Any of those persons who receive a report of harassment are obligated to immediately notify the Chief Judge, who will then ensure that an appropriate investigation is conducted by an impartial investigator. Retaliation against any employee making such a report is prohibited. The goal of this reporting provision is to bring to the court unit's attention any sexual, racial, or other discriminatory harassment so that it can promptly be prevented or corrected.

10. Please supply all rules and procedures that may govern a claim of misconduct against a judge.

Copies of the Model EDR, the JC&D statute, and the RJCD are enclosed with this letter.

11. News reports have pointed to several specific investigations of judges accused of sexual misconduct. For each of the following individuals, please describe what action, if any, the Judiciary took to investigate and resolve these claims.

The following summaries are provided in response to this question. All of the judges you have identified are no longer on the bench. Relevant decisions and orders are enclosed.

a. U.S. District Court Judge Walter Smith on the U.S. District Court for the Western District of Texas, who in 1998 was accused of sexual harassment by a deputy court clerk.

Judge Walter S. Smith, Jr. (W.D. Tex.): Matter Investigated and Judge Resigned. On September 8, 2014, attorney Ty Clevenger filed a complaint alleging Judge Smith engaged in abusive sexual conduct toward a clerk's office employee on January 22, 1998.

The Chief Judge of the Fifth Circuit appointed a Special Committee on October 28, 2014. The Special Committee began its investigation in January 2015, and interviewed witnesses and took depositions throughout the first part of that year. The investigation was completed by mid-May. Judge Smith met with the Committee and testified under oath on August 18, 2015. In October 2015, the Special Committee provided its Report to the Judicial Council.

The Judicial Council issued an order on December 3, 2015, finding the following: (1) Judge Smith "made inappropriate and unwanted physical and non-physical sexual advances toward [the clerk's office employee];" (2) Judge Smith "does not understand the gravity of such inappropriate behavior and the serious effect that it has on the operations of the courts;" and (3) Judge Smith "allowed false factual assertions to be made in response to the complaint, which, together with the lateness of his admissions, contributed greatly to the duration and cost of the investigation." The Judicial Council issued a reprimand to Judge Smith, instructed the Clerk of Court for the Western District of Texas to suspend the assignment of new cases to Judge Smith for one year, and directed Judge Smith to complete sensitivity training.

Mr. Clevenger filed a petition for review to the JC&D Committee on January 18, 2016, in which he requested the Committee "suspend Judge Smith from the bench immediately and recommend impeachment."

Mr. Clevenger also noted he submitted “the names of witnesses to other alleged incidents wherein Judge Smith sexually harassed women in the courthouse” and alleging that “the assault of [the court employee] was [not] an isolated incident.”

On July 8, 2016, the JC&D Committee issued a decision returning the matter to the Fifth Circuit Judicial Council to make additional findings related to the other individuals who allegedly witnessed other instances of Judge Smith’s sexual harassment of women in the courthouse, which raised the question whether there was a “pattern and practice of such behavior,” and requesting “additional findings and recommendations as to the manner in which Judge Smith’s conduct adversely impacted or interfered with the inquiry, if at all.”

The Special Committee re-engaged its prior investigators. In the second investigation, over the course of approximately two months, the investigators ensured that all witnesses identified by the complainant, as well as all witnesses potentially having information relevant to the issues raised in the order of remand, were interviewed. The investigators obtained statements or affidavits from, and/or conducted depositions of, all people having relevant information. Overall, the investigators communicated with, received statements or affidavits, from or deposed over 50 people.

Before the Committee could conduct hearings, Judge Smith retired from office under 28 U.S.C. § 371(a) on September 14, 2016. Following Judge Smith’s retirement, the Judicial Council concluded

Mr. Clevenger’s complaint against Judge Smith on September 28, 2016, on the basis that a judge who retires under Section 371(a) is “no longer a judicial officer” and is “no longer subject to the disciplinary procedures of [the Act] and the remedies they prescribe.” The JC&D Committee denied Mr. Clevenger’s subsequent petition for review, concluding that “[t]he Circuit Judicial Council properly concluded the conduct and disability proceeding was unnecessary because Judge Smith . . . retired under 28 U.S.C. § 371(a).”

b. U.S. District Court Judge Edward Nottingham on the U.S. District Court of Colorado faced a judicial misconduct complaint involving allegations that he spent thousands of dollars at strip clubs and was involved in a prostitution ring.

Judge Edward W. Nottingham (D. Colo.): Matter Investigated and Judge Resigned. In August 2007, following media reports regarding allegations against Judge Nottingham, the then Chief Circuit Judge identified a misconduct complaint against Judge Nottingham. The complaint alleged that Judge Nottingham spent more than \$3,000 at a sexually oriented nightclub in one evening, that he could not

remember how he had spent that much money because he had a lot to drink, and that this conduct may have brought disrepute to the Judiciary and constituted misconduct. Based on other allegations in the news, the complaint also alleged that Judge Nottingham may have violated court policy by viewing sexually explicit images on his court computer. The Circuit Chief Judge referred the matter to a Special Committee.

On September 19, 2007, a separate misconduct complaint was filed alleging that Judge Nottingham had parked illegally in a handicapped parking space and, in an ensuing conversation with the complainant, had misused his authority by identifying himself as a federal judge and threatening to call the U.S. Marshals. The Circuit Chief Judge also referred this complaint to the Special Committee.

The Special Committee determined that Judge Nottingham may have made false statements in his initial response to the allegations regarding computer use and in a transcribed interview, and expanded the scope of the complaint to include these alleged false statements.

In March 2008, the Circuit Chief Judge and the Special Committee learned from news reports of allegations that Judge Nottingham had solicited prostitutes. Following an informal investigation into these allegations and two hearings, the Circuit Chief Judge identified a misconduct complaint against Judge Nottingham on October 1, 2008, alleging that he had been a client of prostitution businesses in violation of Colorado law, had misused his court-owned cell phone in making calls to prostitutes, and had made false statements during the investigation. This matter was referred to a new Special Committee. On October 8, 2008, the two Special Committees submitted a joint report to the Judicial Council.

On October 10, 2008, another misconduct complaint was filed against Judge Nottingham. The complainant alleged that she had been a prostitute and that Judge Nottingham had been one of her clients. She further alleged that on February 29, 2008, Judge Nottingham asked her to lie to federal investigators about the nature of their relationship and not to disclose that she was a prostitute whom he paid in exchange for sex.

Judge Nottingham resigned his commission as a United States district judge effective October 29, 2008. The Judicial Council found that the resignation was in the interest of justice and the Judiciary. The Judicial Council further noted that the misconduct procedures apply only to federal judges, and determined that the misconduct complaints should be concluded because Judge Nottingham's resignation made further proceedings unnecessary.

c. U.S. District Court Judge Richard Cebull on the U.S. District Court of Montana, accused of making racist jokes and disparaging statements about women and certain allegations.

Judge Richard F. Cebull (D. Mont.): Matter Investigated and Judge Retired. In February 2012, Judge Cebull used his court email account to forward a racist joke about President Obama to six acquaintances, which prompted widespread reporting in the local and national press. When the incident became public, Judge Cebull wrote a letter of apology to the President and asked the Chief Judge of the Ninth Circuit to identify a complaint against him. A judge from another circuit court also filed a complaint against Judge Cebull based on the same incident. The Chief Judge of the Ninth Circuit referred both complaints to a Special Committee.

The Special Committee issued its Report on December 17, 2012, describing its investigation, which included: (1) retrieval, review, and analysis of approximately four years of Judge Cebull's emails; (2) interviews with over 25 witnesses; (3) analysis of Judge Cebull's cases (with particular attention to sentencing practices, civil rights cases, and appeals); and (4) an interview with Judge Cebull and materials submitted by his counsel. The Special Committee's investigation found that there were hundreds of inappropriate emails, including a significant number of emails concerning women and/or sexual topics that were disparaging of women. The Special Committee's investigation found no evidence of bias in Judge Cebull's rulings or in his sentencing practices, and no cases that were "troubling." The Order noted the Special Committee interviewed "key individuals in Montana's legal community, court staff and Judge Cebull's professional and social contacts," and found that "[w]itnesses generally regarded Judge Cebull as a good and honest trial lawyer, and an esteemed trial judge."

On March 15, 2013, the Ninth Circuit Judicial Council issued an Order finding that Judge Cebull engaged in misconduct, as defined under the JC&D Act, and violated Canon 2 of the Code of Conduct for U.S. Judges, and issuing sanctions against Judge Cebull. The Judicial Council issued a public reprimand, ordered that no new cases be assigned to Judge Cebull for 180 days, and ordered Judge Cebull to complete training on judicial ethics, racial awareness, and elimination of bias. Further, the Judicial Council condemned Judge Cebull's initial apology as insufficient and required that he issue a second apology, approved by the Judicial Council that would "acknowledge the breadth of his behavior and his inattention to ethical and practical concerns surrounding personal email." Two members of the Judicial Council wrote a concurring statement that "the Judicial Council should request that Judge Cebull voluntarily retire from the Judiciary under 28 U.S.C. § 371(a) in recognition of the severity of his violation and the breadth of the public reaction."

On April 2, 2013, the Ninth Circuit Judicial Council announced that Judge Cebull had decided to retire, effective May 3, 2013. On May 13, 2013, the Judicial Council issued an Order vacating its March 15 Order as moot in light of Judge Cebull's retirement and stating it would "consider appropriate revisions" at a forthcoming meeting. The judge complainant filed a Petition for Review to the Judicial Conduct and Disability Committee seeking review of the May 13 vacatur.

On July 2, 2013, the Judicial Council issued an Order that "dismissed the complaints as moot," declared that the "intervening event of Judge Cebull's retirement "conclude[d] these proceedings," and that the vacatur of the March 15 Order had been predicated on "changed circumstances" resulting from Judge Cebull's retirement. The July 2 Order presented a truncated version of the March 15 Order's findings, including the description of the inappropriate emails. The judge complainant filed a second Petition for Review on July 23, 2013, incorporating the first Petition and requesting review of the July 2 Order based on the judge's "concern about the propriety of a Judicial Council issuing a final order making detailed findings of extensive judicial misconduct and then, after the subject judge retires, sua sponte vacating its own final order and issuing a new order that effectively conceals the judicial misconduct that previously had been identified and detailed."

On review, the Judicial Conduct and Disability Committee concluded that the March 15 Order was subject to the publication requirements under the JC&D Act because it was "a final decision on the merits" and Judge Cebull's retirement was not an "intervening event" because it came after the adjudication of the merits. The Judicial Conduct and Disability Committee ordered publication of the Judicial Council's March 15 Order as the final order disposing of the complaints on the merits while recognizing that the provisions commanding Judge Cebull to take remedial action were inoperative.

d. U.S. District Court Judge Samuel Kent on the U.S. District Court for the Southern District of Texas, indicted on three counts of abusive sexual contact and attempted aggravated sexual abuse. Judge Kent later pled guilty to a lesser offense.

Judge Samuel B. Kent (S.D. Tex.): Matter Investigated; Judge faced remedial action; Matter reinvestigated; Judge pled guilty to criminal charges; Matter referred for impeachment; Judge impeached and resigned. A judicial misconduct complaint was filed on May 21, 2007, against Judge Kent alleging sexual harassment of a judicial employee. The Chief Judge of the Fifth Circuit appointed a Special Committee. The Special Committee recommended reprimanding the

judge, as well as other remedial actions. The Judicial Council accepted the recommendations of the Special Committee and concluded the proceedings because appropriate remedial action had been taken, including the judge's four-month leave of absence from the bench, reallocation of the Galveston/Houston docket, and other measures. The Judicial Council also reprimanded Judge Kent based on the conduct described in the Special Committee report. See September 28, 2007 Order.

The complainant filed a motion for reconsideration, seeking a determination that Judge Kent may have engaged in conduct in violation of specific federal criminal statutes that might constitute one or more grounds for impeachment, and also asked the Council to certify such a determination, if made, to the Judicial Conference of the United States. The complainant also alleged that there was additional evidence of misconduct by Judge Kent, including inappropriate behavior toward other judiciary employees.

The Judicial Council noted that the U.S. Department of Justice had subsequently initiated a criminal investigation, with which the Council was cooperating. The Council noted that the propriety of further judicial discipline, or a certification to the Judicial Conference of the United States, could not be fairly evaluated without adversarial proceedings in which the witnesses would be subjected to cross-examination. The Council further determined that conducting adversarial proceedings while a criminal investigation was underway could prejudice the judicial misconduct investigation. The Council deferred action on the complainant's motion for reconsideration in light of the ongoing criminal investigation. During the pendency of the criminal investigation, Judge Kent agreed not to handle any civil or criminal cases in which the United States was a party or in which sexual misconduct of any kind was alleged. See December 20, 2007 Order.

On August 28, 2008, a United States Grand Jury handed down a three count indictment charging Judge Kent with felonies for conduct which had been the subject of the misconduct investigation of the Special Committee and the sanctions imposed by the Council as a result of that misconduct. On January 6, 2009, the same Grand Jury issued a superseding indictment charging Judge Kent with committing additional misconduct beyond the misconduct the Special Committee and the Judicial Council had discovered or considered when issuing its earlier sanction.

Based on these developments, the Judicial Council granted the complainant's motion seeking reconsideration of the sanctions imposed against Judge Kent. The Judicial Council further determined that, following the trial of the criminal charges

pending against Judge Kent, (including Kent's obstruction of the Council's own investigation) the Council would investigate the additional charges of misconduct alleged in the superseding indictment and any supplemental investigation of the misconduct alleged in the original indictment. The Judicial Council would then consider potential further sanctions in light of the result of the investigation.

On May 27, 2009, the Judicial Council issued an order noting that Judge Kent "has pled guilty to obstruction of justice in violation of 18 U.S.C. § 1512I(2) and has thus by his own admission engaged in conduct which constitutes one or more grounds for impeachment under Article II of the Constitution, and so certifies its determination to the Judicial Conference of the United States." The Judicial Council further determined that "the foregoing events and certification, together with the facts that Judge Kent has voluntarily moved out of his chambers and ceased handling cases, moot this Council's reopening of the disciplinary proceeding against Judge Samuel B. Kent."

e. U.S. District Court Judge Richard Roberts on the U.S. District Court for the District of Columbia, accused of raping a 16 year-old witness while he was a prosecutor.

Matter Investigated as to disability; found not to have committed misconduct as a judge; Judge retired on permanent disability. On March 14, 2016, and May 26, 2016, the Utah Attorney General's Office and Terry Mitchell filed judicial misconduct complaints against Judge Richard Roberts (D-DC). Terry Mitchell alleged in part that Judge Roberts, prior to his judicial appointment, "used his authority and status as a federal prosecutor to manipulate and coerce [then-]sixteen-year-old Terry Mitchell"—a witness in a 1981 trial—"into numerous sex acts before and throughout the trial." The Utah Attorney General made similar serious allegations.

Within a matter of days of the Utah Attorney General's judicial misconduct complaint, Judge Roberts retired based on a permanent disability. On March 18, 2016, the Acting Chief Judge of the DC Circuit dismissed the Utah Attorney General's complaint on the ground that Judge Roberts's recent retirement "render[ed] . . . the allegations moot or [made] remedial action impossible."

The Utah Attorney General filed a Petition for Review of the Acting Chief Judge's dismissal of its complaint. Upon request from the DC Circuit Judicial Council, the Chief Justice transferred to the Tenth Circuit the Utah Attorney General's complaint and any related matters (including the subsequent complaint filed by Terry Mitchell). Terry Mitchell's complaint also alleged that Judge Roberts dishonestly asserted a disability to retire and avoid the consequences of these

allegations.

The Tenth Circuit Judicial Council granted in part the Utah Attorney General's Petition for Review. Specifically, it vacated the dismissal order after determining that Judge Roberts's retirement "does not preclude him from coverage under the Judicial Conduct and Disability Act," and returned the complaint to the Chief Judge of the Tenth Circuit for further action. The Chief Judge of the Tenth Circuit consolidated the two complaints and appointed a Special Committee to determine whether the claims fell within the scope of the Judicial Conduct and Disability Act and, if so, to investigate the allegations and underlying facts.

Following the Special Committee's investigation and submission of its Report, the Tenth Circuit Judicial Council dismissed the Utah Attorney General's and Terry Mitchell's judicial misconduct complaints, concluding that Judge Roberts's pre-appointment conduct is not justiciable under the Judicial Conduct and Disability Act, and further that Judge Roberts did not dishonestly assert a disability.

Neither the Utah Attorney General nor Terry Mitchell filed a petition for review of those determinations. Judge Roberts, however, filed a Petition for Partial Review in which he objected to the Judicial Council's inclusion of the medical diagnosis underlying his disability retirement. On review, the JC&D Committee denied Judge Roberts's request to strike that specific medical diagnosis from the record on the basis that "Judge Roberts's medical diagnosis ha[d] been placed directly at issue due to the timing of his departure from judicial office, occurring within days of the filing of the Utah Attorney General's judicial misconduct complaint and Terry Mitchell's federal civil complaint." JC&D Order at 6.

On the Judicial Council's request, the JC&D Committee forwarded a copy of the Judicial Council's Order and its Decision denying Judge Roberts's Petition for Partial Review to the House Judiciary Committee, the House Oversight Committee, the Senate Judiciary Committee, and the Senate Finance Committee in recognition of "the importance of ensuring that governing bodies with clear jurisdiction [were] aware of the complaint."

f. U.S. Circuit Court Judge Alex Kozinski on the Ninth Circuit accused of sexual harassment and misconduct by several women.

Judge Alex Kozinski (9th Cir.): Retired immediately following referral for investigation. On December 14, 2017, the Chief Judge of the Ninth Circuit identified a misconduct complaint against then-Circuit Judge Kozinski "based on allegations contained in a December 8, 2017, Washington Post article entitled 'Prominent 9th Circuit Judge Accused of Sexual Misconduct' and any other

related articles.” On December 15, 2017, the Chief Justice transferred the proceeding to the Second Circuit Judicial Council.

Three days later, on December 18, 2017, then-Judge Kozinski relinquished his commission as a United States circuit judge by retiring, effective immediately, under 28 U.S.C. § 371(a).

On February 5, 2018, the Second Circuit Judicial Council concluded the proceeding on the basis of the aforementioned retirement, stating that “Because Alex Kozinski has resigned the office of circuit judge, and can no longer perform any judicial duties, he does not fall within the scope of persons who can be investigated under the Act.” Given the seriousness of the conduct alleged, however, the Judicial Council “acknowledge[d] the importance of ensuring that governing bodies with clear jurisdiction are aware of the complaint” and requested that “the Committee on Judicial Conduct and Disability . . . forward a copy of this order to any relevant Congressional committees for their information.”

12. A CNN report reviewed 1,303 misconduct complaints filed in 2016. They concluded: “of those, only four were referred to special committee for the most serious level of investigation.” The report found a similar pattern in 2015.

a. Why were so few complaints fully investigated by the Judiciary?

See answer to (b) below.

b. Do these news reports accurately reflect the pervasiveness of sexual harassment and misconduct within the Judiciary?

The media report you cite above is wildly misleading and I am pleased to have the opportunity to correct it. Any suggestion that the Judiciary does not take sexual misconduct complaints seriously is irresponsible and simply wrong.

Here are the facts: The Judicial Conduct and Disability Act and the Rules do not provide for review of case related judicial decisions. Of course, that authority resides in the courts of appeals. Nevertheless, the vast majority of the complaints we receive under the JC&D Act are complaints related to a judge’s decision. Our publicly reported data shows that of the 1,303 judicial “misconduct” complaints filed nationwide under the JC&D procedures in fiscal year 2016, cited in the media report you have referenced, over 1,200 of them were filed by dissatisfied litigants and prison inmates. No misconduct complaints were filed under these procedures by law clerks or Judiciary employees in 2016, the year cited in the

media report. Moreover, none of the four complaints in 2016 that were referred to a special committee for further investigation, as provided under the statute, involved sexual misconduct.

This has been true in most years. And it is a reason we have not created a separate category for sexual harassment in our annual published statistical report on JC&D complaints – in most years there simply have been no complaints relating to sexual harassment. Nonetheless, we will create a separate statistical category for sexual harassment complaints under the JC&D and report that data.

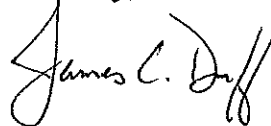
There are over 30,000 employees in the Federal Judiciary. The sad fact is that, just as in other public and private workplaces, sexual harassment issues are often not reported. Our Working Group is addressing this issue by removing barriers to filing complaints and educating employees about the options they have available.

13. What, if any, statutory recommendations does the Judiciary have for improving the current statutes involving the Judiciary's complaint process, codified in 28 U.S.C. §§ 351-353?

Our Working Group does not have any statutory recommendations concerning the Judiciary's complaint process to make to Congress at this time. We will continue to examine the statutory framework for judicial misconduct and disability complaints. We have preliminarily identified areas of potential modifications and clarifications to our codes of conduct guidelines, EDR processes, training and orientation programs to address the issues we have seen during our review.

We will continue to work on these important issues.

Sincerely,



James C. Duff
Director

Enclosure