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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, Ranking Member Feinstein, and the Honorable Members of the Committee on the Judiciary:

I would like to thank the Chairman and the Ranking Member for holding these hearings on the Federal Judiciary Workplace Conduct Working Group's ("Working Group") Report to the Judicial Conference of the United States ("Report"). The Working Group was formed in response to reports of sexual harassment in the judiciary, and addressing harassment is a matter that is important to all.

It is of personal importance to me; I have first-hand experience with harassment in the judiciary. Along with Emily Murphy, I was one of two women who first went on the record about the harassment I experienced as a clerk in then-judge Kozinski's chambers.

I am not an expert on preventing workplace harassment, and for that reason, I do not intend to nitpick specific details in the Report or provide a line-by-line critique. I have read it, however, and see one single overarching difference between what happened to me and how the Working Group appears to view employer harassment.

It is this: the harassment that I experienced was in fact a part of a pattern of well-understood abusive behavior. Workplace harassment—both of the sexual variety and of the sort that is abusive to employees without a sexual component—rarely occurs as an isolated incident. Judges who care about treating their court staff like people—people who may have to work late to get the job done, but people nonetheless—do not generally one day slip up and accidentally harass an employee. Instead, harassment often happens as part of a larger pattern of abusive behavior. Even if the conduct itself is hidden from view, red flags are visible to outside observers—if you know what they are.

The Working Group's Report does not attempt to identify these red flags or suggest monitoring them, and for that reason, I feel that it is bound to fail in its aim.

As an example of how these differences might play out, let me discuss the Report's suggestion that judges should receive ongoing training about creating a civil environment. This will no doubt help judges who mean well but are struggling to find an effective managerial style, but I do not think that this sort of training would have had any effect on Kozinski's behavior. This is because Kozinski did not need training to know what proper behavior was.

I believe this to be the case for several reasons. First, I had a close working relationship with Kozinski during the course of which I observed his interactions with hundreds of individuals, ranging from other law clerks to judges, litigants to friends. I interacted with him on a near-hourly basis for a year. After my clerkship, while I was clerking for Justice O'Connor, Kozinski visited the

Court several times and I was able to observe his interactions with her. I have also encountered him in social settings, such as Justice Kennedy's law clerk reunions.

Kozinski did not use demeaning language in the conversations with Justice O'Connor that I witnessed, nor did he make inappropriate sexual comments to her. Based on my observations, he appears to be able to interact with most people in a manner that is civil and socially acceptable.

My conclusion—and perhaps I am wrong, but I would not do Kozinski's intelligence any favors by concluding otherwise—is that Kozinski knows precisely how to practice civility. He does not need education on proper behavior; he is able to engage in it perfectly without instruction when it benefits him.

Education will help those judges who intend to treat their staff well in the first place, but lack direction. A comprehensive approach to harassment requires a discussion of the red flags that need to be watched for so that those few individuals who purposefully abuse their staff can be discovered.

Kozinski was followed by a regular cohort of waving red flags. Those red flags would have been visible for those who knew what to look for, and without a frank discussion of what those are, which the Report does not provide, I fear that the Chief Justice's goal of guaranteeing an exemplary working environment for all judicial employees can never be achieved. I hope to provide that discussion here.

Red Flag #1: Control and isolation of employees

One of the ways that harassment flourished in the Kozinski chambers was that chambers staff were deeply isolated from most social interaction. We were not given time to form real friendships with clerks from other chambers; by my recollection, about halfway through our first summer in chambers, we were told not to have lunch with each other or the externs in our office. Leaving chambers to interact with other clerks would have been unthinkable.

We would occasionally have dinners with other clerks at sittings—when Kozinski was present and monitoring the conversation. We were allowed to attend a happy hour that Judge Ikuta held on Fridays (where, again, Kozinski was present). We were expected to arrive in the office at around 9:30 in the morning, and—with the exception of an hour or two for dinner, which was usually frantically spent obtaining dinner, handling laundry, taking care of bills, and (in my case) reading romance novels—we would remain in chambers until 1:30 AM every day, whether there was work to be done or not. Kozinski would regularly call close to the time to check to make sure we were present. We were given somewhat abbreviated days on weekends, when we were expected to be in chambers at noon (but would stay until 1:30 again), and occasionally on holidays (although I arrived at noon on Christmas and was castigated because he called at eleven in the morning and I was not present).

We were instructed not to speak with clerks from other chambers about even the most mundane judicial matters—a misplaced comma in an opinion, for instance, required us to draft a memo which Kozinski would review and personally send to the other judge, rather than picking up a phone or sending a quick email to another clerk.

Judges should rightly be able to demand that judicial employees, and particularly clerks, work diligently to manage the federal court's immense workload. Judges should also be able to ask that clerks work in the manner that best suits the judge's own working style—clerks are there to assist the judge, not the reverse. I believe that judges should be given enormous latitude in how they use the clerks who assist them.

But creating a situation where chambers staff only interact with other court employees when the judge is present, and restricting their free time to the point where they cannot form relationships

with others outside chambers does nothing to promote judicial efficiency. On the contrary; clerks who are subjected to arbitrarily impossible working hours even when they have done everything they need to do become less effective.

The control and isolation we were subjected to was visible outside chambers in multiple ways. First, the judge refused to allow his clerks to have court email addresses. This meant that we did not receive emails from other chambers about joint outings or games; it meant we could not log into the court intranet. We never interacted with any court staff about anything as mundane as asking for reimbursements (Kozinski's administrative assistant submitted all the paperwork on our behalf).

I cannot recall speaking with anyone in human resources about any aspect of my employment—the judge's administrative assistant handled our intake and exit—and it would have taken significant effort to even figure out who I should have talked to, as I did not have intranet access to staff resources.

While the Report states that “information [about reporting harassment] is usually provided commingled with a large amount of other information at the commencement of the employee's training,” p. 14, that was not the case with us. Kozinski did not hire his clerks on a typical schedule. Most judges typically had clerks start sometime in August, typically giving clerks time to take the bar before they began work. Kozinski had us start in May or early June.

By the time the clerk orientation happened in September, we were already a third of the way through our clerkship year and in the midst of writing opinions and examining circuit cases for en banc review. We were strongly encouraged to skip most of the law clerk orientation, on the grounds that we already knew our job and didn't need to be oriented.

I appreciate the work the Working Group has put into discussing reporting procedures. The adequacy of those measures is not my first concern. My point is more basic: in order for those processes to have any chance at being effective, employees must learn that those processes exist and must have a reasonable chance of being able to access them. A lengthier and more accessible description of dispute resolution procedures is pointless if the people who need them cannot access the intranet site where they are stored because their judge unreasonably denies them the computer credentials they need to log on.

I believe the following extremely reasonable protections would go a long way toward breaking isolation. These basic protections should extend to all those who work with a judge—including externs who are unpaid and who might otherwise not appear on the court's radar. I realize that some of these may seem so basic that they go without saying, but it is the “goes without saying” part that allows bad actors to circumvent workplace protections, and so they must be said.

- All judicial employees must be given an official email address with attendant access to court intranet.
- I agree with the Report's conclusion that every circuit should have officers who can formally or informally hear grievances. I additionally suggest that all judicial employees should—within a week of being hired, whenever they are hired—have a meeting with that person without their judge present, where they are given their contact information and informed of the procedure for obtaining help if needed.
- The Report mentions a number of possibilities as to who employees might contact with serious conduct issues. It suggests that perhaps it may be the chief judge, or some other person or persons. I believe that those options must be plural. Kozinski was Chief Judge of the Ninth Circuit for a long while, and if he were the only reporting option, that would effectively foreclose all options for anyone he harassed.

- Finally, I believe that a judge who isolates his employees to the point where they do not interact with court staff or the staff of other chambers should be subjected to additional scrutiny, particularly where other outwardly visible red flags can be observed.

Red Flag #2: A disproportionate number of employees leaving mid-term

Every judge has employees who quit for a variety of reasons, ranging from health issues to clerk unsuitability for the position. But anecdotal evidence suggests that Judge Kozinski had an unusually large number of clerks leave partway through their term because the work environment was unbearable.

I agree with the Report that the judiciary needs to conduct exit interviews for all its employees. This does not, however, in my view go far enough. I believe that the following additional actions would help identify unsavory working environments:

- The judiciary should keep records (possibly including gender or other reasonable metrics) for every judge as to how many clerks or externs leave before their term is up. After enough time has passed to allow the data collected to be sufficiently anonymous, the judiciary should publish those statistics for every judge. This will allow potential applicants to see upfront if any judges regularly experience disruptions in chambers that are so bad that employees regularly leave. That simple public check may create an incentive for the few bad actors in the system to restrain themselves in order to have a shot at the best clerkship candidates.
- Judges who pass a certain threshold of employee turnover should trigger an automatic investigation. The investigation does not need to be hostile—there may be a perfectly reasonable explanation—but it should involve an affirmative effort to reach out retrospectively to clerks, particularly the ones who may have left unseasonably, to ascertain if there was a reason that was not disclosed in an earlier exit interview.

Red Flag #3: Demanding confidentiality for non-official business

The Report refers to clerks “misunderstanding” the requirement of confidentiality as including judicial misconduct.

The word “misunderstanding” is a euphemism on the part of the Working Group which I believe needs to be unpacked. 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.

With all due respect to the Working Group, this is not what a “misunderstanding” looks like. I was misled; I sought advice and was given the exact information that the Working Group believes I misunderstood, and was nonetheless told that silence was still the best course of action.

For that reason, I believe the following are also necessary:

- I appreciate the creation of a Judicial Integrity Office, and particularly agree that such an office should shoulder the duty of providing ongoing counseling to former clerks about their duty of confidentiality. It is not enough, however, to say that the duty of confidentiality does not encompass misconduct. The judiciary needs to make it clear that it is *additionally* not a violation of the duty of confidentiality to recount details, in a confidential capacity, for the purpose of receiving advice, to the office charged with providing that counsel.
- I further believe that *all* details of personal interactions that do not pertain to cases should be considered relatable to those who also have a duty of confidentiality—such as therapists or priests—without being considered a breach of that confidentiality. While this may not seem directly related to the issue of workspace harassment, it is often not clear to victims what *is* harassment. Allowing them to discuss what occurred and obtain a clear-headed second perspective will help reporting.
- I personally believe that the most serious accusation I made of Judge Kozinski was not that he showed me pictures of naked people in his office and asked me if they turned me on. It was that after he had done so, he claimed that the canon of judicial confidentiality and its related doctrine meant that I could not tell any other person about what he had done. A violation of the duty of confidentiality by a lawyer can have serious career consequences. He used the power that he was given as a judge to silence me and to shelter himself from the effects of his personal wrongdoing. For that reason, I believe that the canon of judicial conduct should clarify that it is itself misconduct for a judge to claim to his employees that the duty of confidentiality means employees must keep quiet about misconduct, or be silent in the circumstances described above.

Red Flag #4: The judiciary needs to thoroughly investigate allegations of seemingly unrelated misconduct

In 2007, Kozinski was subjected to another misconduct hearing when it was discovered that he ran a publicly accessible server from his home, which he used to store a large number of materials that ranged from innocent to racy.

The misconduct hearing’s only source for its recounting of facts appears to be Kozinski’s own testimony. Portions of that testimony are hard for me to believe. For instance, he claimed to be ignorant of material on that server in a way that was inconsistent with my personal observations. He regularly used his server at work to find specific items—Weird Al Yankovic music videos, for example—and was entirely capable of navigating through entire directories containing thousands of files with ease to find the material he wanted to show us. Kozinski regularly sent links to some of that material to our personal email addresses, and to his joke email list which contained probably hundreds of members. He was aware that we could access it without a password. It would require substantial computer illiteracy to not realize his files were visible to the outside world.

Many federal judges would not know how to run a server or understand the implications of not password protecting directories. During my clerkship interview, however, I talked with Kozinski about the fact that we both built our own computers. Over the course of my clerkship, I personally watched Kozinski play doctor to a home computer that needed to be rebuilt. It seems unlikely to me that he was as ignorant as he claimed. Furthermore, his usage of the material on that server while he

was in chambers intersects directly with my own experience—the files that he showed me in private were ones he had saved to his server.

I do not believe the Second Circuit’s finding was wrong as to his server—I do believe hosting a publicly accessible server was simply a matter of incredibly bad judgment on his part—but the scope of their inquiry was too limited. Their trust in his word when he was under investigation was a matter of collegial friendliness, but a misconduct hearing is never a time to simply take a judge at his word.

If that first misconduct hearing had included an investigation beyond Kozinski’s factual claims, they might have discovered his actual misconduct a full decade before I went public. I believe Kozinski was aware that this was the case as well—he was worried enough about the possibility that he contacted me in 2007, after I had left his chambers, to make sure that I would be on his side. But nobody ever asked me if I knew about the server or what was on it during the course of that misconduct hearing, and so the matter was moot.

For that reason, I ask that in future misconduct hearings, the judiciary take the step of verifying from additional sources that a judge’s factual account is, in fact, accurate.

Red Flag #5: Kozinski has been a difficult boss for a very long time

I raise this point not because it is relevant to the Report, but because it is relevant to the larger issue of harassment in the judiciary.

The judiciary is in many ways not in the position of an ordinary employer—it is unable to hire or fire judges. That responsibility rests with the Senate. During Kozinski’s confirmation hearings, multiple individuals who had worked under him at the Office of Special Counsel spoke about his conduct as a boss.

They had this to say: “Overall I perceived Mr. Kozinski as a man without compassion. 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.” (Laura Chin, Public Information Officer for the Office of Special Counsel.) Or: “This decision made clear to the Office staff that...no federal employee's sexual harassment case would ever stand a snowball's chance of being prosecuted by Special Counsel Kozinski.” (Beth Don, Attorney in MBSP’s Office of Special Counsel) Or: “After 20 years of Federal personnel management experience, I cannot recall a more callous disregard for people than Mr. Kozinski exhibited. Incidents included demanding that a messenger be fired when one piece of correspondence could not be located; issuing a notice of farewell to an employee who had cancer and had not yet finalized plans to leave the office and retire; insulting/belittling staff in front of others in written comments...” (John Hollingsworth, Former Director of Administration and Programs for the Office of Special Counsel).

I am not raising this to point fingers for past action. Kozinski was a brilliant jurist who devoted himself completely to the federal judiciary. Kozinski’s genius is likely what motivated his confirmation when such repeated, damning testimony was in the record. But despite his brilliance, he was not suited to being a federal judge. A federal judge must do more than write intelligent opinions or devote himself to ensuring the law of the circuit is consistent or do any of the many hundreds of things that Kozinski did so well. A brilliant judge must also conduct themselves with decorum, and the evidence at the hearing was that Kozinski failed in this most basic duty.

Hindsight often provides clarity. We now know that the office of judge does not inherently change a person’s managerial style. My final suggestion is therefore for the members of this committee: Always ask people who worked under a nominee what they have experienced, and the next time you see a nominee with such a record, please do not vote to confirm.

One final note is in order. I can say from personal experience that one of the Report's suggestions would be very helpful: that of training judges bystander intervention. While I am not convinced that bystander intervention that focused on chiding another judge like Kozinski would be particularly effective, I firmly believe that intervention that focuses on providing support to observed victims can have an outsized effect. I believe this because I experienced it once, and it made a huge difference.

The event in question happened when we were in San Francisco for an en banc hearing. I had been sent to get Kozinski his coffee. It was morning, the hearing was an hour away, and naturally, the line at the coffee shop was long. After some space of time, Kozinski became impatient and went to find me. He demanded to know what was taking so long.

I do not remember precisely what he said.¹ I do remember that I felt humiliated that he had spoken to me in that manner in public. And I remember who was behind me in line when this happened—it was Judge Bybee, who was also in San Francisco for the hearing.

He waited until Kozinski had gone, and then he asked me: “Are you okay? Is there anything I can do to help?”

I don't have any idea what I said in response. I believe it was something like a terse, “I'm fine.”

And yet I remembered this exchange for years afterward. I do not know if I can convey how much power someone has to warp your world when you spend every waking hour in the chambers they control, when you have almost no chance to speak to peers to see if what is happening to you is unusual. You do not have regular conversations; you begin to forget how regular conversations happen. Your entire world revolves around one person, and his word quite literally becomes law so long as he can get one colleague to form a majority with him on a panel. There is no countervailing influence suggesting that maybe this shouldn't be happening.

With that one question, Judge Bybee helped unwarp my world. I believed I could not speak of what happened to me—not to friends, not to a therapist—because of judicial confidentiality. I was left to untangle everything I had experienced on my own. For years afterward, I thought of Judge Bybee asking if he could help. It was the countervailing influence I needed to understand that I did not deserve what had happened to me—that one time, someone saw it happening and recognized that it was wrong.

If the judiciary wants victims to speak up sooner, providing support to those victims—even informally, even with the tiniest of kind gestures—is the best way to start. The most effective way to get people to speak up is to make sure they know that someone with equal power is willing to stand on their side.

I hope that these observations are of some assistance in the matter, and wish all concerned the best.

Respectfully,



Heidi S. Bond

¹ At one point in my clerkship, he told me that I should simply walk to the front of the line and ignore others who were waiting, but I cannot remember if this was that time.