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Comment on the proposed amendments to the Code of Conduct
for U.S. Judges and the Judicial Conduct and Disability Rules

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On behalf of Fix the Court, I want to thank you for convening tomorrow's hearing, for taking the matter of sexual harassment in the judiciary seriously and for considering concrete steps to reduce its occurrence and to help victims.

In the midst of a much-needed national conversation on the topic, the judiciary has assumed a leadership role among government institutions in seeking out solutions to combat harassment, in order to make its employees feel safer and ensure they have somewhere to turn should the behavior of a judge or other colleague become inappropriate. Chief Justice John Roberts and AO Director Jim Duff deserve considerable credit for their immediate and ongoing responses. Credit is also due to the former clerks who organized hundreds of their friends and colleagues to encourage the judiciary to create a robust plan of action, which would not have happened as quickly or as comprehensively without them.

This process lies in stark contrast to our elected branches, which have also had long-standing and high-publicized instances of harassment. As you know, efforts in Congress to enact new laws and conduct codes to protect staff have stalled, and I will not delve into any such efforts in the executive branch here because clearly they have not been made a priority.

Since the beginning of the year, and with continued encouragement from the former clerks, the judiciary has maintained this commitment to improving its policies and procedures for handling misconduct claims. This has included a careful examination of the judiciary's Codes of Conduct and its rules for implementing the Judicial Conduct and Disability Act; hearing testimony from victims of harassment to better understand the types of solutions that would do the most good; reviewing in-chambers confidentiality policies to ensure that such obligations would not prevent employees from revealing misconduct; and ensuring that victims have enough time and the proper resources through which to report claims.

There have been some challenges and shortcoming during this process, which the AO, as well as the Republican and Democratic leaders in the Senate Judiciary Committee, have acknowledged. I was disappointed that former clerks were not initially included in the Working Group, though that seems to have been remedied. Further, I believe there remains some confusion over which of the Working Group's recommendations are wholly applicable to the circuits, as each circuit has its own set of rules and procedures. (A few months ago, I asked circuit executives if they would consider creating their own Working Groups. A couple since have, and I hope more will soon.)

Nevertheless, I am encouraged about the proposed changes to the Code of Conduct and the Judicial Conduct and Disability rules for several reasons. First, seeing as how the first step to fixing a problem is acknowledging its existence, I am pleased that both the Codes and JC&D proposals identify and condemn sexual harassment by name, in amendments to Canons 2A and 3B(4) in the former and in Rule 4(a)(2)(A) in the latter.

Furthermore, the addendum to the Codes makes it clear that a judge who hears about a colleague's unscrupulous behavior is obligated to report it to his or her chief judge. This strikes a balance between maintaining a level of confidentiality and the understanding that all judicial officers have an obligation to maintain a safe work environment.

These changes are more than reasonable, and the affiliated commentary does well in expounding on these ideas. Thank you for that. It remains my hope that updates like these remain a conversation between the judiciary and its various constituencies, with the Codes being updated as needed over time.

In terms of the proposed changes to the JC&D rules, I approach them in a different way; as with most federal court “fixes,” I believe it prudent for there to be a legislative solution to the problem.

Thus my suggestions for improving the Judicial Conduct and Disability Act, 28 U.S.C. §§351-364, are as follows:

- Just like with the changes to the Codes and to the JC&D rules, the act itself should be amended to call out harassment by name by adding the EEOC definition of harassment to §351(a), so that any person who alleges that a judge or other court employee “has made unwelcome sexual advances or requests for sexual favors or has engaged in other verbal or physical conduct of a sexual nature on at least one occasion, thereby creating a hostile or offensive work environment, or has engaged in other unwelcome, hostile, or offensive verbal or physical conduct of a sexual nature on at least one occasion,” may file a complaint.
- Currently, in §352, “the judge whose conduct is complained of [may be asked] to file a written response to the complaint.” But, the statute continues, this response “shall not be made available to the complainant unless authorized by the judge filing [it].” This is backwards: transparency should be the default, and complainants should automatically be granted access to the judge’s response in order to better understand a judge’s version of the facts. Similarly, in §354 there should be no “censuring or reprimanding by means of private communication.” Any such reprimand should be made public.
- In §358, a judge accused of misconduct is offered resources for his or her defense – e.g., the opportunity “to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses and to present argument orally or in writing.” Individuals who bring misconduct complaints are not currently afforded the same resources as accused judges. That should change. And in §361, the law should provide that when a complainant avails himself or herself of complaint process under the act, that should not become a financial burden.

The list of much-needed statutory changes does not end there. Though Chief Justice Roberts has been proactive in transferring judicial misconduct complaints away from the circuit in which the alleged conduct took place, that transfer should be codified, as should the national reporting mechanism that the Working Group has recommended as part of the infrastructure of the new Office of Judicial Integrity.

Finally, I believe that reforms to judicial misconduct codes and statutes would be all the more respected and accepted nationwide if all federal judges – including Supreme Court justices – were covered.

The seriousness with which the judiciary has taken its directive to “examine the sufficiency of the safeguards [...] to protect court employees, including law clerks, from wrongful conduct in the workplace” has been laudable. I hope that the changes to the Codes of Conduct are implemented as soon as possible and that the AO and JCUS consider working with Congress to amend the Judicial Conduct and Disability Act in a way that reflects a more holistic view of what constitutes misconduct and how to remedy it.

Thank you for the opportunity to submit comment.