



Statement for the Record from Gabe Roth, Fix the Court Executive Director

Hearing before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Courts, Intellectual Property and the Internet: “Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct”

February 19, 2020

Chairman Johnson, Ranking Member Roby and Members of the Subcommittee:

Thank you for the opportunity to submit a written statement for the record. As you are aware, in the wake of numerous allegations of sexual misconduct against then-Judge Alex Kozinski of the Ninth Circuit, Administrative Office Director James Duff, at the behest of Chief Justice John Roberts, formed a Judiciary Workplace Conduct Working Group in 2018 to investigate workplace conduct in the federal judiciary¹.

In March 2019, the Judicial Conference implemented² a series of reforms proposed by the Working Group that updated the Code of Conduct for U.S. Judges, improved anti-harassment training and clarified what constitutes misconduct and the reporting obligations of judges and court staff. Six months later, the Conference approved a new model employment dispute resolution plan in order to further clarify workplace conduct policies and offer additional avenues to report misconduct.³

Even after the judiciary adopted these reforms, it is clear that neither the handling of complaints nor the ability of court staff to report misconduct confidentially and without retaliation has markedly improved. Former law clerk Olivia Warren detailed in her Feb. 13 testimony to this Subcommittee the extensive sexual harassment by a prior boss, Ninth Circuit Judge Stephen Reinhardt, and described how she and other judiciary employees continue to face barriers when attempting to report misconduct. For example, Ms. Warren recounted that the Office of Judicial Integrity instructed her to contact the “appropriate circuit representative on the Codes of Conduct Committee” if she wanted to raise a concern⁴ and was not offered any meaningful guidance on how and whether confidentiality would apply should she disclose the impropriety.

Given the unique power judges maintain not only within their districts and circuits but also within the professional legal world, a decision to report harassment comes with significant and long-term professional risks for lawyers embarking on their legal careers. Any inadequacy – or perceived inadequacy – in (1) the mechanisms by which employees may report misconduct, (2) the protections they have when doing so and/or (3) how the third branch supports victims is a major problem, albeit one that I am pleased this Subcommittee is now poised to address.

¹ “Federal Judiciary Workplace Conduct Working Group Formed,” <https://www.uscourts.gov/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed>

² “Judicial Conference Approves Package of Workplace Conduct Reforms,” <https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms>

³ “Judiciary Adopts New Model EDR Plan, Doubles Fee Waiver for PACER,” <https://www.uscourts.gov/news/2019/09/17/judiciary-adopts-new-model-edr-plan-doubles-fee-waiver-pacer>

⁴ One would have assumed that the OJI *was* the place to go with such a concern.

Following what can only be described as an inadequate order⁵ from the Tenth Circuit Judicial Council last fall that described rampant misconduct, including sexual harassment, by District of Kansas Judge Carlos Murguia, yet did not recommend impeachment, four Judiciary Committee members are asking important questions about what happened next. Per a Feb. 6 letter⁶, Members want to know if support was provided to employees harassed by Murguia, if those employees had the opportunity to seek employment elsewhere in the third branch given the judge's continued tenure in the courthouse and whether the confidentiality of those reporting misconduct was being preserved. I commend Chairman Nadler, Chairman Johnson, Rep. Scanlon and Rep. Sensenbrenner for seeking answers and remain hopeful you receive a response from the judiciary later this week as requested.

Though I welcome Murguia's decision to tender his letter of resignation yesterday, it does not make the Feb. 6 letter any less relevant or, more globally, put any systemic concerns about misconduct protocols to rest. This issue has always been about more than one event or one judge, and the judiciary's disciplinary regime must not be premised on a hope that public shaming alone will coerce every abusive judge out of office and ensure a safe workplace for all.

If the judiciary declines to answer these questions before Murguia resigns in six weeks, then as per the text of the Judicial Conduct and Disability Act, there would be almost no way in which the third branch or Congress could further investigate his misconduct and the judiciary's response. That would mirror what happened in Dec. 2017 following Alex Kozinski's retirement and what happened in Apr. 2019 following Maryanne Barry's retirement. That's unacceptable.

Due to the ongoing stonewalling from the Judicial Conference, I believe it now falls to Congress to step in and pass laws that do for the third branch what it has been unwilling to do for itself. To begin with, Congress should change the law so the judiciary is no longer confined by an investigative process that can be subverted simply if an accused judge chooses to retire⁷. This loophole has been used to hide credible evidence of everything from tax fraud to sexual assault,⁸ and without complete investigations, we cannot fully understand the scope of the problem or work to address it.

With regard to punishment, four penalties may be imposed under the JC&DA: private censure, public censure, requesting the judge voluntarily resign and recommending impeachment to the House of Representatives. Save for the high bar of impeachment, judges may be found culpable of misconduct and still receive upwards of \$200,000 a year if they are age 65 or older and have completed the requisite years of service. That should not stand, as Congress should give the Judicial Conference the power to revoke a judge's non-vested pension. There is no reason a former judge should receive a taxpayer-funded annuity in perpetuity after it has been proven that he failed to maintain minimal ethical standards in office.

Congressional action is also needed to ensure that judiciary employees enjoy the same protections as employees of Congress and the Executive Branch. The safeguards in Title VII of the Civil Rights Act, the Age Discrimination in Employment Act and the Americans with Disabilities Act all fail to include employees

⁵ <https://www.ca10.uscourts.gov/sites/default/files/misconduct/10-18-90022.J.pdf>

⁶ https://judiciary.house.gov/uploadedfiles/02.06.2020_murguia_letter.pdf

⁷ Had Judge Murguia been 65 years old when the Tenth Circuit Judicial Council report came out, and not a few years shy of retirement age, that would have very likely happened.

⁸ "Retiring to Avoid Consequences: Judges Exploit a Loophole to Maintain Pensions in Spite of Misconduct," <https://fixthecourt.com/2019/05/retiring-to-avoid-consequences-judges-exploit-a-loophole-to-maintain-pensions-in-spite-of-misconduct/>

in the judiciary. That should change – and it’s an easy fix. Legislation should guarantee judicial staff protection from harassment and protection from discrimination on the basis of race, color, sex, national origin, disability, sexual orientation, gender identity and age. It should allow court employees to file complaints on the basis of discrimination and seek damages in in court. And it should define and prohibit workplace retaliation in the judiciary and extend whistleblower protections to judiciary employees.

Additional work by the judiciary itself remains. We still don’t know the answer to several critical questions raised in testimony last week by Ms. Warren and co-founder of Law Clerks for Workplace Accountability Deeva Shah: Why are there no periodic, third-party climate surveys of judiciary staff? Why is there no national misconduct reporting system or an internal ombudsman to oversee complaint intake and EDR reform implementation? Why do law clerks, past and present, not have a seat at the table as reform efforts proceed?

Of course, one would expect the judiciary to resist new legislation and suggestions for how to improve its internal mechanisms. The third branch has remained hamstrung the last few years by a continued lack of appreciation for the scale of misconduct and an overconfidence in its own preexisting support structures. But I hope that, owing to the leadership of this Subcommittee and the strength and clarity of the witnesses who testified on Feb. 13, we may have finally reached a turning point.

I thank the Subcommittee again for convening this hearing and for working to ensure that the judiciary’s most vulnerable employees are better protected.