

US House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

Feb 13, 2020

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Protecting Federal Judiciary Employees from Sexual Harassment Discrimination and Other
Workplace Misconduct

Mr. Chairman, Ranking Member and Members of the Committee:

I am honored to be invited to speak with you today on the issue of sexual harassment and misconduct in the federal judiciary. I am here in my individual capacity and my views do not represent those of any entity or publication.

I am here in several capacities; as a former 9th Circuit law clerk, a journalist who has covered several stories of harassment and abuse both in the judiciary and in the law clerk pipeline that begins in law school. I have spoken on the topic at the Judicial College and at multiple federal circuit conferences. In every such presentation I am at pains to say that this is not a sex or abuse problem, but rather a power problem, and also that this is fundamentally a problem of closed systems that rely, often reasonably, on secrecy and discretion on the part of every member of a judicial chambers. But that same secrecy that protects the reputational and dignitary interests of the “weakest branch” of government, can also become the kind of toxic and corrosive secrecy that allows abuse and harassment and bullying to go unaddressed. At its worst, this is the same secrecy that forces victims to report such conduct by way of journalism or committee hearing, which is emphatically not the best way to police misconduct. I want to say that again: Journalism and congressional oversight become necessary when the judiciary fails to police itself. They are not the solution to this problem, but rather a symptom.

The judge-clerk experience can one of the most important relationships in a young attorney’s life. I can say without reservation that my clerkship made me the person I am today. Judicial clerk “families” become vital job contacts, cherished wedding guests and lifelong boosters. But when it is cast in terms of “family” and secrecy and loyalty, abuse can flourish there as well, and most young clerks, persuaded that they are on a trajectory to bigger and better clerkships and lucrative signing bonuses, are willing to endure almost any kind of abuse in the short term, in exchange for long term gains. Indeed, prestigious clerkships are now essential for highly competitive jobs as federal prosecutors, public defenders, and civil rights lawyers. And for many first-generation lawyers, without contacts in the profession, giving up a law clerk network that can level the playing field a bit with their better-connected law school peers is illogical. But there is a fundamental difference between a demanding, exacting judge and a bully or misogynist, and there are insufficient mechanisms to sort the difference. The ethos of the judiciary has long been to let other judges run their chambers and their courtrooms as they please, without outside comment or interference, which is why “open secrets” about abusive or

inappropriate judges become well-known, but never acted upon. My reporting also suggests that abusive and inappropriate relationships may begin even in law school, as students feel pressured even in their first weeks at school, to form relationships with law professors who are known feeders to influential judges. And as is the case in any situations in which one person appears to have the power to make or break entire legal careers, that power can be abused, and also go unredressed, over years.

I understand that there must be at least some temptation to say that law students and lawyers are adults, and enter into these asymmetrical relationships with their eyes wide open. My experience is that in some of the cases that I have reported on and learned of, the abuse can do horrific damage, careers can be short-circuited, and trauma can be lasting. This abuse transcends race and gender in some cases, and calls the integrity of the entire judiciary into question. I am very aware of the fact that judges rely on a certain amount of blind reverence and mystification in order to preserve public legitimacy. But when secret-keeping and abuse are eventually revealed it is the judiciary as a whole that suffers. That is all the more reason to craft open, transparent and fair policies to deal with complaints from law clerks and the other support staff that work in and around Article III courts. The judiciary must be beyond reproach, and judicial misconduct should not be minimized or swept under the rug in the hopes that the public never learns of it. Right or wrong, the public always finds out.

I am immensely grateful to the Chief Justice and the various circuit courts who have begun the work of improving systems by which abuse, harassment and bullying can be reported, although I am not persuaded that the systems have entirely solved the problems. I have heard more than one Article III judge tell me that he has solved the problem himself by refusing to hire female clerks, or that the problem has been solved because only one bad apple was implicated and he stepped down. Neither of those are systemic solutions and as you will hear today, the problems are not yet solved. Rightly or wrongly, the legal profession is among the most conservative and risk-averse of any modern profession and the impulse to look away, downplay, secret-keep, and justify is stronger among attorneys than any group I know. In addition to helping judges figure out how best to police themselves, we need to create a culture of bystanders willing to step up and report abuse, and to defend victims, even if at some personal and professional cost. We entrust the judicial branch with the sole power and authority to adjudicate complicated matters every day; finding out what has happened in a given chambers and why should not be an impossible task. The only cure I know for “open secrets” and suggestions that young lawyers might benefit from abusive hazing is transparency and sunlight. The alternative – whisper campaigns and summary dismissals – doesn’t only hurt individual victims, but also slowly undermines the judiciary as a whole.

I want to thank the committee for including me in this important conversation and look forward to answering any questions you may have.