

Jaime A. Santos

February 11, 2020

Honorable Henry C. Johnson
Chairman
Subcommittee on Courts, Intellectual
Property, and the Internet
United States House of Representatives
Washington, DC 20515

Honorable Martha Roby
Ranking Member
Subcommittee on Courts, Intellectual
Property, and the Internet
United States House of Representatives
Washington, DC 20515

Dear Chairman Johnson, Ranking Member Roby, and the Honorable Members of the Subcommittee on Courts, Intellectual Property, and the Internet,

I would like to thank the Chairman and the Ranking Member for holding this hearing on *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct*. As you may know, I, along with my colleagues from Law Clerks for Workplace Accountability, have been deeply involved in urging the federal judiciary to take action to study, prevent, and address harassment within the federal courts system for the last several years. We have also worked with numerous federal courts of appeals, federal district courts, and state court systems to improve their sexual harassment policies, training programs, and reporting procedures. Through that work, I have been inspired by some of the incredible members of state and federal judiciaries who are committed to ensuring a safe and respectful workplace for every employee, and it has been my honor to work collaboratively with these judiciaries to help them toward meeting that goal.

Nevertheless, it is my view that it remains just as important today as it was almost two years ago when I testified before the Senate Judiciary Committee that these issues continue to be a priority for state and federal judiciaries nationwide. Sexual harassment and abuses of power in workplaces did not begin just a few years ago, and it will take a sustained commitment on behalf of judiciaries and the legal profession generally to effectively address these issues in a meaningful way. What is needed is not merely policy change, it is cultural change, and cultural change takes time. But time alone will not bring transformation—that requires a demonstrated commitment to real change by those with the power to take action.

My colleague, Deeva Shah, will be presenting written and oral testimony on her own behalf and as a representative of Law Clerks for Workplace Accountability. I write this letter to provide one personal example that illustrates the need for continued attention to these issues.

After the Federal Judiciary Workplace Conduct Working Group issued its Report on June 1, 2018, and I testified before the Senate Judiciary Committee on June 13, 2018,¹ my

¹ <https://www.judiciary.senate.gov/meetings/confronting-sexual-harassment-and-other-workplace-misconduct-in-the-federal-judiciary>

colleagues and I were invited by the federal judiciary to submit comments to the Judicial Conference of the United States about the Working Group's report and recommendations. We did just that on July 20, 2018.² That same day in response to our submission (which, again was solicited by the judiciary), a sitting federal judge took to social media to attack my colleagues and I and our work—work that we were doing *collaboratively with the judiciary*. The judge suggested that the work of our “[a]ll female” group was akin to a “New Spanish Inquisition by SJWs”³; referred to us as “uninformed busybodies who should largely be ignored” and that “understand very little”; tweeted that we were “presumptuous” for having proposed reforms to begin with; and targeted me specifically in numerous tweets, saying, “Kozinski is brilliant & flawed. But true believers like Ms. Santos scare me.”⁴ I do not have screen shots of all of the judge's posts, as he later deleted his account, but here are a few:



Richard G. Kopf
@JudgeKopf

How Appealing:

"[All female] Law Clerks for Workplace Accountability launches a web site, a Twitter account, and issues its 'Response to the Federal Judiciary Workplace Conduct Working Group's Report.'"

New Spanish Inquisition by SJWs?
Thank goodness for Article III.

RGK

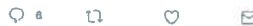


Replying to @lucasdrayton @Ja.me_ASantos @courtneymilan

Dear Mr. Bradley,

Judge Kozinski conduct re his law clerks was improper & demeaning. His alleged assault of a female claims court judge, although stale, was a concrete reason for removal if proven. Kozinski is brilliant & flawed. But true believers like Ms. Santos scare me. RGK

8:02 PM - 20 Jul 2018



² <http://clerksforaccountability.org/response-to-working-group-report?v2>

³ “SJWs” stands for “social justice warriors,” a derogatory term used to describe individuals who promote feminism and multiculturalism.

⁴ See Roberta Kaplan & Rachel Tuchman, *Time's Up for Lawyers Too*, N.Y. L.J. (July 27, 2018, 8:58 AM), <https://www.law.com/newyorklawjournal/2018/07/27/times-up-for-lawyers-too/>; Andrew Strickler, *Kopf Twitter Flap Shows #MeToo Reform Must Be Inclusive*, LAW360 (July 25, 2018, 8:58 PM), <https://www.law360.com/articles/1066968/kopf-twitter-flap-shows-metoo-reform-must-be-inclusive>; Joe Patrice, *Outspoken Federal Judge Launches Amazingly Dumb Twitter Tirade*, ABOVE THE LAW (July 24, 2018, 12:20 PM), <https://abovethelaw.com/2018/07/outspoken-federal-judge-launches-amazingly-dumb-twitter-tirade/>; Max Mitchell, *Judge Who Stirred Controversy With Tweet Unlikely to Face Discipline, Experts Say*, LAW.COM (July 23, 2018, 5:31 AM), <https://www.law.com/2018/07/23/judge-who-stirred-controversy-with-tweet-unlikely-to-face-discipline-experts-say/>; Emily Nitcher, *Outspoken Nebraska Judge Draws Criticism for Tweets About Harassment*, OMAHA WORLD-HERALD (July 27, 2018), https://www.omaha.com/news/politics/outspoken-nebraska-judge-draws-criticism-for-tweets-about-harassment/article_d3819308-625e-5b77-941d-b42d587bc7f9.html.

That night, I emailed Jim Duff, the Director of the Administrative Office of the U.S. Courts, to let him know about the judge's actions, and I linked to one of the judge's tweets. Disappointingly, I never received a response email. Early the next week, I became aware that the Eighth Circuit knew about the judge's actions and were discussing them, but no one from the court ever reached out to me to discuss the incident or to solicit information about whether or how I was impacted (professionally or personally) by the judge's actions. I do not know whether any investigation ever took place—and that is by design. As my colleague Kendall Turner and I discussed in our testimony before the Judicial Conference,⁵ the federal judiciary treats judicial misconduct complaints that are “identified” by a judge differently than judicial misconduct complaints that are “filed” by a complainant. “Filed” complaints are subject to a formal review and adjudication process, while “identified” complaints do not require any formal review process—to the contrary, beginning a formal review process is a last resort, to be used only where “there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible.”⁶ If the formal review process is not initiated, there does not appear to be any disclosure required about the potential misconduct identified, any requirement that the chief judge's decision be made public, or any requirement that the Judicial Council or the Judicial Conference receive any information about the potential misconduct.

One might reasonably ask why I did not file an official complaint. The answer to that is two-fold. First, the point of filing a complaint is to make the judiciary aware of misconduct. In this instance, I had already informed Mr. Duff about it, and I knew that the Eighth Circuit was also aware of it. Second, to be candid, I feared retaliation. As an appellate lawyer, I practice in most federal courts of appeals, and my firm practices in all of them. I had already been retaliated against by one judge within the Eighth Circuit for committing the transgression of working in partnership with the judiciary, and there seemed to me to be no upside to filing a formal complaint about an incident that the judiciary already knew about. Doing so could have adversely impacted my effectiveness as an advocate and my ability to generate business for my practice—something that is absolutely critical for a rising appellate attorney.

This was an isolated incident involving a single judge that I do not expect to see repeated. But I think it exemplifies the need for continued systemic change. The judiciary's failure to take any public action about this very public incident—indeed, to not even contact me about it—demonstrates that much work has yet to be done. If, even after the Working Group issued its Report, the judiciary did not properly handle an incident that involved a public advocate on these issues who had testified before the Senate just six weeks before, I can understand why there may be a lack of public confidence that meaningful reforms have actually been implemented effectively. And if, despite the judiciary's reassurances to our colleagues and me that there is uniform support among judges for reform, a sitting judge felt comfortable crudely attacking us in public, I can understand why there may be skepticism that judiciary employees can report harassment or misconduct without fear of retaliation.

⁵ <http://clerksforaccountability.org/docs/2018-10-31-lcwa-written-testimony-jcus-hearing.pdf> (pp. 8-9)

⁶ Rules for Judicial-Conduct and Judicial-Disability Proceedings § 320, at p. 14 (Commentary on Rule 5), https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019_0.pdf.

To be clear, I think that key reforms have been developed, and I have interacted with countless judges who seem as committed to addressing this issue as I am. I applaud the many circuits, district courts, and state courts that have worked proactively toward eradicating sexual harassment in the federal judiciary. But I don't think anyone should be taking a victory lap quite yet—in the federal judiciary or in the legal profession more generally. There is still much work to be done, and I hope to be able to continue doing that work collaboratively with state and federal judiciaries in the future.⁷

Respectfully,



Jaime A. Santos

⁷ As my colleague, Ms. Shah, may testify, we have not been involved with the Federal Working Group since it issued its Report on June 1, 2018. Although the Chief Justice of the United States directed the Working Group to continue its work, my colleagues and I have not been invited back to meet with the Working Group since my Senate testimony. On several occasions, I have reached out to members of the Working Group to express our interest in continuing to remain engaged, and I continue to hope that we will have the opportunity to do so in the future.