

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

**Hearing before the Subcommittee on Courts,
Intellectual Property, and the Internet**

Testimony of Olivia Warren

Thursday, February 13, 2020

Thank you Chairman Johnson, Ranking Member Roby, and members of this Subcommittee for the opportunity to testify today. My name is Olivia Warren, and I am a former law clerk to Judge Ketanji Brown Jackson, of the United States District Court for the District of Columbia, and the late Judge Stephen Reinhardt, who sat on the United States Court of Appeals for the Ninth Circuit. I currently work as a Staff Attorney at the Center for Death Penalty Litigation in Durham, North Carolina.

I am here today to describe to you the harassment that I personally experienced while clerking for the late Judge Reinhardt in 2017 and 2018, as well as to detail my efforts to report this harassment. Those efforts included my attempts to utilize alternative avenues for reporting and advice that the judiciary implemented following the issuance of the Federal Judiciary Workplace Conduct Working Group Report on June 1, 2018. As I will explain, the frustrations and obstacles I encountered in those efforts led me to make the difficult decision to testify today.

At the outset, I would like to emphasize that it is not my intention to destroy Judge Reinhardt's legacy, to erase his significant contributions to the law, or to condemn him. I was drawn to the practice of law by an interest in indigent defense work, and, especially as a capital defense attorney, I believe it is essential to see the enormous capacity for both good and bad in all people. I view Judge Reinhardt no differently. Moreover, I am very proud of the cases we handled and the opinions that the judge authored during my clerkship.

However, the harassment that I experienced shaped my view of both the judiciary and the law more generally. The harm and pain that sexual harassment causes, and the aggravation of that harm when victims have no recourse and feel they cannot say or do anything about it, has long-term costs to the profession. I hope that my testimony today will result in law clerks (both current and former) and judiciary employees feeling less silenced and more capable of seeking accountability and redress for any harassment or other misconduct they may have suffered.

I. Background

Before delving into my experience clerking for Judge Reinhardt, I would like to first provide some background about who I am and why I became a lawyer. I went to law school to pursue a career in indigent defense: I wanted to serve poor people who are accused of crimes. While at Harvard Law School, I remained committed to pursuing a

career in public interest and participated in a range of internship and volunteer opportunities that provided further exposure to the breadth of work in indigent defense.

During my first year of law school, I was strongly encouraged by many of my mentors to pursue a clerkship with a federal judge. This advice was echoed by every available source at Harvard. Beyond my mentors, the faculty as a whole and nearly all of my first-year classmates talked about clerkships as if they were the be-all and end-all for high-performing law students. This is because clerkships are viewed as singular opportunities within the legal profession to develop close relationships with judges, to gain first-hand experience with the judicial system as a young lawyer, and, through the connections to judges' former clerks, to develop a robust professional network that can open professional doors and lead to further opportunities.

Several of my mentors at Harvard guided and supported my efforts to secure a clerkship. After I had sent out several clerkship applications, a close mentor at Harvard (who was a former clerk to Judge Reinhardt) reached out to me to gauge my interest in clerking for Judge Reinhardt. I had read some of the judge's opinions and knew his reputation as a "liberal lion," which aligned with my desire to pursue a career in indigent defense. I interviewed with Judge Reinhardt in early July 2015, after I had concluded my first year of law school. He offered me a clerkship on the spot and I readily accepted. I was thrilled to begin my career with someone who had inspired so many clerks to long

careers in public service, and I was eager to develop my nascent legal skills with such an esteemed jurist.

I started my clerkship with Judge Reinhardt in late May 2017, shortly after graduating from Harvard Law School; Judge Reinhardt died on March 29, 2018, and my tenure on the Ninth Circuit formally concluded on June 1, 2018. I then served as a law clerk for Judge Ketanji Brown Jackson of the United States District Court for the District of Columbia from August 2018 until August 2019. This past fall, in October of 2019, I began working at the Center for Death Penalty Litigation where I represent clients in capital proceedings as a Staff Attorney. I mention the professional experiences that post-date my clerkship for Judge Reinhardt because they have been critical steps in my journey to being willing to testify today.

II. Harassment During Clerkship With Judge Reinhardt

Before starting my clerkship, I received guidance, including from former Reinhardt clerks, that signaled the upcoming year would be challenging. For instance, I was told that the clerkship would be an “intense” year, and one former Reinhardt clerk cautioned me to brace myself for “your grandfather’s sexism.” Even while preparing for my interview, I had heard that the judge preferred women to wear skirts. My mentor at Harvard who had helped me secure the clerkship also spoke to me about the utmost importance of never letting the judge down and said something along the lines of not to blink first in the chambers environment, emphasizing that Judge Reinhardt liked to keep

things fun. None of this fully prepared me for the profane atmosphere I entered when I began my clerkship.

I spent my first two days in chambers training alongside the law clerk whom I was replacing. On the first morning, I met with the outgoing clerk to be briefed on Judge Reinhardt's current caseload. During this meeting, I found it difficult to focus because there was a peculiar drawing taped over the computer, something I had not seen since middle school algebra classes. The drawing depicted a sine chart, which resembles two hills drawn on an x-axis. However, in this sine chart, someone had added two round dots to the top of the curves such that the chart resembled a woman's breasts. The clerk noticed me staring at the drawing and explained that he had sketched the sine chart to explain a concept to Judge Reinhardt, and the judge himself had added the nipples. The clerk laughed the incident off as a funny story about the judge, but I remember feeling a range of conflicting emotions that included — among others — shock and trepidation for the year to come.

Two days later, Judge Reinhardt referenced the drawing when he came to my office to check in on me after my first official day as a law clerk. As he was leaving my office, he asked me if I had noticed the drawing and whether I liked it. In addition to emphasizing how proud he was of the nipples he had drawn on the chart and confirming that he and the clerk had made it, he asked me a question about whether or not it was

“accurate.” Based on his tone and demeanor, I understood his question to be asking whether or not the drawing looked like my breasts.

I quickly learned how often the judge commented in detail on the appearance of women. During my first few weeks at the clerkship, Judge Reinhardt’s chambers was in the midst of hiring new clerks for future terms. The Judge brought to my office photos that had been printed from the social media accounts of two female applicants who were scheduled to come to chambers for interviews. Judge Reinhardt instructed me to look at the photos and asked me to assess which candidate was more attractive and which candidate had nicer or longer legs. He then asked me which would add more “value” to chambers based on the photos.

Early in my clerkship, I also learned about a shelf in the judge’s office where he kept pictures of some of his female “pretty” clerks, many of which included Judge Reinhardt in the photo as well. Judge Reinhardt made it clear that photographs of male law clerks would not be placed on the shelf and that the shelf was special. Judge Reinhardt discussed the appearance of women directly, but he also had a regular euphemism: he used “short” and “tall” as code for “unattractive” and “attractive,” respectively, when referring to different women—including describing women of the same height, standing next to one another, as short and tall. Sometimes these comments were used to describe people outside of chambers, and sometimes they were used to describe us, his current and former law clerks. Judge Reinhardt only contemplated the

attractiveness of women through the male gaze, and at times he used homophobic slurs: for example, a gay female clerk was repeatedly referred to by the judge as a “dykester,” which he found funny.

All of that provides the context within which I experienced direct sexual harassment. Judge Reinhardt routinely and frequently made disparaging statements about my physical appearance, my views about feminism and women’s rights, and my relationship with my husband (including our sexual relationship). Often, these remarks included expressing surprise that I even had a husband because I was not a woman who any man would be attracted to. In that vein, Judge Reinhardt often speculated that my husband must be a “wimp,” or possibly gay. Judge Reinhardt would use both words and gestures to suggest that my “wimp” husband must either lack a penis, or not be able to get an erection in my presence. He implied that my marriage had not been consummated. I was subjected on a weekly, and sometimes daily, basis to these types of comments about my husband, our relationship, and my being a woman who no man would marry – which he attributed both to my being a feminist and to my physical appearance, including my “short” stature. Judge Reinhardt made these comments to me when we were alone, and also in front of other members of chambers at times.

The atmosphere in chambers worsened in late 2017 with the start of the Me Too movement, which became Judge Reinhardt’s favorite topic of conversation. He frequently discussed and always cast doubt upon credible allegations of sexual

harassment. The doubts he expressed were sometimes based on his assessment of the attractiveness of the accuser, and sometimes based on his general incredulity that men could be harassing women. For example, Judge Reinhardt told me that the allegations of sexual harassment that came out against people like Louis CK and Harvey Weinstein were made by women who had initially “wanted it,” and then changed their minds. Regarding Louis CK, he repeatedly asked me to explain to him why a man would want to show a woman his penis or masturbate in front of her. When I could not satisfy these kinds of questions about the alleged choices of men, Judge Reinhardt often responded by telling me that women were liars who could not be trusted. Sometimes, he read me emails that he exchanged with his friends about the Me Too movement that cast doubt on women raising sexual harassment and misconduct allegations. When I engaged in these discussions with him and would try to explain that sexual harassment was indeed a pervasive problem, he regularly replied with the same playbook I described above—that I did not understand sexual harassment because I was not attractive, that I did not understand men because I was a feminist, and that my husband was not a real man.

Another turning point in chambers occurred on December 8, 2017, when the *Washington Post* publicly reported on allegations about Judge Alex Kozinski’s conduct. I was alarmed by Judge Reinhardt’s fury at these allegations against his close friend. I was also concerned that this would prompt other people to raise similar complaints about Judge Reinhardt, even while I was still a clerk in chambers. Shortly after the first media

report, the judge again told me that women were not to be trusted and that he did not ever want to be alone in a room with a female law clerk again; he suggested that he would not hire any more female clerks or other female employees for these reasons. After he had made that statement, he would sometimes suggest when he and I were alone that he needed protection because I might sexually assault him.

In the aftermath of the initial press reports about Judge Kozinski, reading news about the allegations and disparaging Judge Kozinski's accusers became a regular focal point of our lunches and broader discussions with the judge, which often tended towards the graphic and profane. For example, immediately after Dahlia Lithwick published her piece describing her own experience with Judge Kozinski, Judge Reinhardt made us all read it. When it was clear that he was done reading the piece, he began the conversation by saying, "No one has ever ogled Dahlia Lithwick." Judge Reinhardt also repeatedly told me that he intended to publicly confront one of the women who accused Judge Kozinski at an event at UC-Irvine, with the intention of humiliating or silencing her. I later learned that when he met the woman at the event, he pointedly and publicly insulted her intellect.

I tried different ways to push back during these conversations, to no avail. On one occasion, I told the judge that I was disappointed that someone with his intellect and imagination could not grasp the pervasive and harmful nature of sexual harassment. He

screamed at me that I was not as smart as I thought I was—that I was “just a stupid little girl.”

On another occasion, a colleague and I were talking to Judge Reinhardt about a case in his office when the judge became distracted and began talking about how women lied about harassment. In an effort to appeal to his humanity, I tried to describe instances when I personally had been harassed and how those incidents had harmed me. The anecdotes I recounted included: learning on my last day of an internship after college that there had been a bet among colleagues in the office about whether I would sleep with my male supervisor; being chased down York Avenue by a stranger while screaming until a cab driver stopped to help me; and working as a paralegal at a law firm when an intoxicated associate came by my cubicle one night, placed his arms over it, and blocked my exit until I picked up the phone and told him that I would dial 911 if he did not leave. I explained to the judge that I had not reported these incidents, but that they had still hurt and frightened me, and affected the way I moved through the world. Judge Reinhardt became enraged. He yelled at me to stop speaking, and said that none of what I had just said was true. He explained to me that I had never been sexually harassed because no one had ever been sexually attracted to me. He said that to the extent that I believed I was sexually harassed, it was because men wanted to silence me and used harassment to do so—which, he added, was within their rights to free speech.

Towards the end of the clerkship, a member of the judge's family experienced some significant health setbacks, and I was therefore asked to work with Judge Reinhardt from his home on several occasions. Close to midnight on one of the nights that I was working with the judge from his home, and after we had completed our substantive work, he read aloud portions of an email from the Ninth Circuit about the working group it had created on workplace conduct, which included some proposed reforms and protections for law clerks. I remember the judge reading through each reform and explaining to me why it was unnecessary. In this discussion, he also said that *he* was the one who should be afraid of being alone in his home with *me*.

I have not attempted here to recount every instance of sexual harassment that I experienced or witnessed while clerking for Judge Reinhardt. Indeed, after December 8, 2017, there may have been a day in which I was not harassed (whether by reference to my physicality, my intellectual capacity, my feminism, my gender identity, or my sexuality), but I cannot remember one after searching my memory.

III. Attempts to Report Misconduct

During my clerkship for Judge Reinhardt, I confided in my husband throughout the year as to what was happening. Later on, particularly after the allegations about Judge Kozinski broke in December 2017, I also confided in a few close friends and mentors.

I would like to briefly recount today my efforts to formally report the harassment that I experienced while clerking for Judge Reinhardt, including through the Office of

Judicial Integrity (“OJI”)—one of the new independent resources that was created specifically “for employees to report and receive advice about workplace misconduct.”¹ These failed efforts are what bring me here today: I might have chosen to keep private the pain I endured as a result of Judge Reinhardt’s sexual harassment, but I could not justify keeping silent about the inadequacy of the procedures available to law clerks today to redress such sexual harassment if they experience it. Although I attempted to report the harassment after my clerkship had ended and the harassment had thus ceased, my experiences in attempting to report Judge Reinhardt’s conduct highlight the challenges that clerks and judiciary employees still face today if they want to report harassment or other judicial misconduct.

There are systemic barriers to reporting harassment and misconduct by judges that are unique to the legal profession, and uniquely formidable in the context of the relationship between law clerk and judge. The consequences of miscalculating the risk of possibly offending a judge are fraught with a peril that does not dissipate with time and can hang over one’s entire professional career. For a law clerk, at the precipice of his or her legal career, alienating a federal judge can spell doom for their life in the law. And it is not only the judge him or herself from whom retribution is feared. Judges have

¹ Status Report from the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States (Sept. 17, 2019) p. 1-2, available at https://www.uscourts.gov/sites/default/files/working_group_status_report_to_jcus_september_2019_0.pdf.

networks of former law clerks to whom the judge's reputation is inextricably intertwined with their own: these former clerks have made their name, in part, by reference to the reputation of the judge for whom they clerked. This group therefore has reasons both devoted and selfish to want to protect the judge's reputation at all costs.

Judge Reinhardt's clerks are dazzling, particularly to a young lawyer committed to public service. The Reinhardt clerks are legal luminaries in the field of public interest law whose accomplishments befit having clerked for a liberal lion: law school faculty, politicians, and prominent members of the civil rights and criminal defense bars. I was terrified of offending them; I still am. I draw attention to this fact because it is yet another barrier to reporting harassment for law clerks—the possibility of immediate retaliation by the judge is supplemented by the possibility of long-term retaliation by those devoted to protecting his reputation and remaining in his good graces.

I do not intend here to make a general statement about all Reinhardt clerks, or about all former law clerks. But this context is relevant to my specific story because one of the first people outside of my husband in whom I confided anything at all was a former Reinhardt clerk. I called him on the day the allegations about Judge Kozinski broke. I confided my fear that similar stories could be published about Judge Reinhardt. He denied knowledge about any misconduct by Judge Reinhardt, and asked whether the judge had ever done anything to me. I told him that Judge Reinhardt had said some "horrible" things to me, but that I was okay. Although we continued communications,

this person never discussed the call with me again, nor did he ever follow up to inquire what horrible things Judge Reinhardt had said to me.

My clerkship for Judge Reinhardt ended abruptly with his death on March 29, 2018. It is too painful to fully describe my emotions that day. I have never cried as hard I did at the judge's memorial service. The juxtaposition of my anger and my sadness and my shame was impossible to bear.

After I left the Ninth Circuit, I became concerned that similar harassment might be occurring in other chambers across the country. Although Judge Reinhardt was dead and I did not want to initiate a backward-looking investigation, I felt that people far more experienced than me might be able to implement structural changes that could protect future clerks. I also feared that the allegations against Judge Kozinski were incorrectly understood to be an isolated incident limited to one jurist. I wanted to report what had happen to me to minimize the chance that something similar could happen to someone else in my position.

My first attempt to formally report the harassment occurred on August 1, 2018, when I met with several members of the Harvard Law School administration, including the Dean. A friend and mentor who is a tenured Harvard Law faculty member helped arrange the meeting and encouraged me to communicate my concerns so that more accurate information and better support could be provided to current and future students. During the meeting, I described my experience clerking for Judge Reinhardt

and the harassment to which I was subjected. I also shared my view that I thought there was a risk this was happening with other clerkships. I emphasized that students rarely hear about negative clerkship experiences for many of the systemic reasons that I have explained, and described how misled I felt by the institutional push to clerk. Nobody has communicated to me since that meeting what, if any, steps Harvard has taken to address the issues I raised.

Afterwards, I spent extensive time reading and conferring with different lawyers about the implications of new reporting policies and rules that were implemented in 2019 following recommendations from the Federal Judiciary Workplace Conduct Working Group.² But these rules did not appear to provide a truly confidential option to report harassment or misconduct and it was unclear to me what would happen if I proceeded with reporting through any of the avenues offered. At the time, I knew that I did not want to report Judge Reinhardt's harassment to the judges or other judiciary officials on the Ninth Circuit because it was very clear how beloved Judge Reinhardt was and I could not trust that they would receive the information confidentially or with an open mind. I considered reporting the harassment to judges who I thought might be sensitive to such

² *Id.* 3–4 (describing different measures the Judicial Conference of the United States, the Administrative Office of the U.S. Courts, the Courts, and the Federal Judicial Center adopted, including: “approv[ing] revisions to the Codes of Conduct for United States Judges and Codes of Conduct for Judicial Employees, as well as the JC&D Rules in March 2019 to state expressly that sexual and other discriminatory harassment, abusive conduct, and retaliation are cognizable misconduct, as is the failure to report misconduct to the chief district or chief circuit judge”; and “appoint[ing] Jill Langley to head the newly-created OJI and that office began actively providing confidential advice and guidance since her January 2019 appointment.”)

concerns and the need for confidentiality, and who I had heard had been helpful to others going through this process. However, I could not find a way to do so confidentially.

In December 2018, while I was clerking in the District of Columbia, I attended a meeting that the D.C. Circuit held to discuss new policies and reporting procedures. It became clear during that meeting that the new policies and procedures were not fully formed. In fact, the Judicial Integrity Officer began the meeting by incorrectly suggesting that Title VII applied to the judiciary. In addition, the Office presented no clear analysis of what would happen if a law clerk followed the reporting procedures or the circumstances under which confidentiality would be available.

Eventually, I worked up the courage to approach the OJI, with the help of an advocate in this area, to try to utilize the new systems that had been implemented. My first contact with the OJI was a phone call with both the advocate and Jill Langley, the Judicial Integrity Officer, during which I identified myself only as an anonymous law clerk. Following that call, I provided, through the advocate, several hypotheticals and asked for an opinion as to what would happen, based on the detailed hypothetical scenarios, if I reported these facts. The letter response that I received from Ms. Langley is appended to this testimony. In her response, Ms. Langley explained that she could not provide any specific answers to the hypothetical questions that were posed. She also suggested that I contact the “appropriate circuit representative on the Codes of Conduct Committee” if I wanted to raise a specific concern. Given this response, and the lack of

any meaningful guidance on what confidentiality would apply should I decide to disclose the misconduct, I did not contact the Ninth Circuit representative.

IV. Conclusion

As I conclude my testimony today, I would like to briefly touch on the significant impact of the sexual harassment that I experienced—professionally and personally. It should not be hard for the Subcommittee members to imagine the psychological impact that this conduct had on me. From a professional perspective, I will note that experiencing and worrying about the harassment consumed countless hours during my clerkship for Judge Reinhardt during which I could have been learning and working. After my clerkship, while I was trying to figure out if and how I could report the sexual harassment and what the consequences of reporting it would be, my efforts often consumed many hours a week, which detracted from other professional experiences that I have found deeply enriching and rewarding, such as clerking for Judge Jackson and working for the Center for Death Penalty Litigation. It also took countless hours of many other friends and mentors in the legal profession who spoke with and supported me. This is precious time that I and others in my network could have used for professional development, scholarship, or personal leisure activities and family.

Finally, the harassment that I suffered during my first legal job and the frustrations that I felt in attempting to navigate how to report that misconduct indelibly colored my view of the judiciary and its ability to comprehend and adjudicate harm. I do not believe

it is unreasonable to be concerned about the impact of this kind of harm on the pipeline to the legal profession: I worry that others who have similarly experienced harassment are leaving the profession or changing their goals in ways that deprive all of us of the valuable contributions they could have provided to the law had they not been harassed. I am particularly concerned that these harms may fall disproportionately on populations that are underrepresented in the upper echelons of our profession, including but not limited to women and people of color.

In closing, I hope that my testimony today helps law clerks and other judiciary employees who have similarly suffered sexual harassment or other misconduct while working in the judiciary to feel more able to speak about their experiences. I hope that it assists the judiciary in considering the barriers to reporting that exist, and in assessing the adequacy of the current mechanisms. Finally, it is also my hope that the members of this Subcommittee consider how they can help to spur further changes to ensure that victims of harassment and misconduct in the judiciary have real, viable paths forward in the future to report and address abusive conduct.



JAMES C. DUFF
Director

ADMINISTRATIVE OFFICE OF THE
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JILL B. LANGLEY
Judicial Integrity Officer

June 17, 2019

Ms. Jamie A. Santos
Goodwin Procter LLP
901 New York Avenue, NW
Washington, DC 20001

Dear Ms. Santos:

In April, you posed several hypothetical questions to me on behalf of an anonymous current federal law clerk. This law clerk asked about the reporting obligations, or discretionary reporting judgments, of the Judicial Integrity Officer, sitting federal judges and federal judicial employees, respectively, to disclose to others a confidential report from a law clerk that (1) that a former federal judge harassed the law clerk while a judge; (2) the same former judge knew about misconduct by other federal judges and failed to report that information, and/or actively dissuaded others from reporting that misconduct; (3) other judges and judicial employees knew about the former judge's harassment of the law clerk; and (4) the law clerk observed another judicial employee experience adverse treatment by current federal judges and current federal judicial employees designed to deter that employee from reporting misconduct, causing the law clerk to fear retaliation.

With respect to federal judges and judiciary employees, your questions implicate interpretations of the newly revised Codes of Conduct for Judges and for Judicial Employees, and the newly-revised Rule for Judicial-Conduct and Judicial-Disability Proceedings (JC&D Rules). These new provisions, such as Canon 3(B) of the Code of Conduct for Judges, Canon 3(C)(1) of the Code of Conduct for Judicial Employees, and JC&D Rule 4(a), have not yet been the subject of any formal interpretation. Moreover, providing interpretive guidance about the Codes of Conduct or JC&D Rules is not the function of the Office of Judicial Integrity, which is primarily to provide confidential guidance and advice to judicial employees about workplace conduct concerns and to direct them to the appropriate local court resource.

Ms. Jamie A. Santos

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The judges on the Committee on Codes of Conduct are available, however, to answer ethics questions by federal judicial employees. Thus, I suggest the law clerk on whose behalf you have asked your questions contact the appropriate circuit representative on the Codes of Conduct Committee if she would like to raise a specific concern. The Committee members do not answer hypothetical questions involving interpretations of the Codes of Conduct but can be a valuable resource for addressing actual ethical conduct issues.

Similarly, I cannot answer your hypothetical question about the reporting obligations and judgments of the Office of Judicial Integrity, including myself, to report misconduct allegations. As you know, the facts matter, as does the ability to have an interactive discussion with the person who has experienced unwelcome workplace conduct. Appropriate disclosure based upon one set of facts and a particular confidentiality request, may differ for another set of facts and different confidentiality requests. Generally, however, any information shared with me will be confidential if requested by the employee. An assurance of confidentiality must yield when there is reliable information of wrongful conduct that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity of the judiciary. Additionally, with regard to a federal judge's conduct, I too may have an obligation to "take appropriate action" under Canon 3(C)(1) of the Code of Conduct for Judicial Employees. "Appropriate action" will depend on the specific facts and may, or may not, include reporting the alleged conduct to the relevant Chief Judge.

With that said, I do hope you'll also convey to the law clerk that I'd be glad to discuss her specific situation directly with her and based on that conversation, I'd be able to provide her with information about her options and resources for resolution.

Thank you for reaching out to me.

Sincerely,

Jill B. Langley
Judicial Integrity Officer