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WORKPLACE PROTECTIONS FOR FEDERAL JUDICIARY EMPLOYEES: FLAWS IN THE CURRENT SYSTEM AND THE NEED FOR STATUTORY CHANGE

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

THURSDAY, MARCH 17, 2022

Serial No. 117–59

Printed for the use of the Committee on the Judiciary



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48–530 WASHINGTON : 2022

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WORKPLACE PROTECTIONS FOR FEDERAL JUDICIARY EMPLOYEES: FLAWS IN THE CURRENT SYSTEM AND THE NEED FOR STATUTORY CHANGE

Thursday, March 17, 2022

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 10:06 a.m., in Room 2141, Rayburn House Office Building, Hon. Hank Johnson [Chair of the Subcommittee] presiding.

Members present: Representatives Johnson of Georgia, Nadler, Stanton, Jones, Ross, Issa, Jordan, Gohmert, Tiffany, Fitzgerald, and Bentz.

Also present: Representative Dean.

Staff present: Aaron Hiller, Chief Counsel and Deputy Staff Director; John Doty, Senior Advisor and Deputy Staff Director; David Greengrass, Senior Counsel; Moh Sharma, Director of Member Services and Outreach & Policy Advisor; Cierra Fontenot, Chief Clerk; Gabriel Barnett, Staff Assistant, Merrick Nelson, Digital Director; Kayla Hamedi, Deputy Communications Director; Jamie Simpson, Chief Counsel for Courts & IP; Evan R. Christopher, Counsel for Courts & IP; Matt Robinson, Counsel for Courts & IP; Atarah McCoy, Professional Staff Member/Legislative Aide for Courts & IP; Ella Yates, Minority Member Services Director; Betsy Ferguson, Minority Senior Counsel; Andrea Woodard, Minority Professional Staff Member; and Kiley Bidelman, Minority Clerk.

Mr. JOHNSON of Georgia. The Subcommittee will come to order. Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

We welcome everyone to this morning's hearing on Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change.

Without objection, the gentlewoman from Pennsylvania, Ms. Dean, will sit with the Subcommittee for this hearing and will be permitted to ask questions of the Witnesses if yielded time by a Member of the Subcommittee.

Before we begin, I will remind Members that we have established an email address and distribution list dedicated to circulating ex-

hibits, motions, or other written materials that Members might want to offer as part of today's hearing. If you would like to submit materials, please send them to the email address that has been previously distributed to your offices and we will circulate the materials to Members and staff as quickly as we can.

I would also ask all Members to please mute your microphones when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself any time you seek recognition.

I will recognize myself for an opening statement.

Good morning, and welcome to today's hearing on Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change. The purpose of this hearing is simple. The more than 30,000 women and men who work for our Federal courts deserve a workplace free from sexual harassment, discrimination, and retaliation. Yet, the Federal civil rights statutes that protect nearly every civilian employee in the country, public or private, do not extend to them. This is by design. Policymakers in the judiciary have waged a decades-long campaign to stop Congress from remedying this grave injustice.

As hard as it may be to believe, the same judges who are obligated to enforce our foundational anti-discrimination laws, have fought off every attempt to extend those same laws to their own employees. The results are as predictable as they are devastating. In our Subcommittee hearing on this topic two years ago, we heard about the tremendous unconscionable impact it had on Olivia Warren, who testified about the abuse she endured as a law clerk and about how the system failed her when she reported that abuse.

These results are not inevitable. Thanks to Ms. Warren, her fellow Witnesses and many other experts and whistleblowers, we now have the Judiciary Accountability Act, bipartisan legislation that will give judiciary employees meaningful rights against workplace misconduct.

While this legislation provides a pathway for real change, until it passes, Judicial Branch employees continue to be harassed and discriminated against with little recourse. Time and time again, representatives of the judiciary have told us that there isn't a problem and we should let them handle it themselves. Yet, time and time again, we hear from employees that the system is not working. Not only is it not working, but we continue to hear how the system worked against employees when they tried to report wrongdoing. Some of them fearing retaliation have chosen to remain anonymous. Others cannot speak because of the nondisclosure agreements the judiciary has shockingly forced them to sign. Three former judiciary employees are here today willing to speak out, Ms. Clark, Ms. Strickland, and Ms. Minor.

I especially want to thank you for being with us today and I know that it wasn't an easy choice, but your testimony brings us that much closer to giving every Judicial Branch employee the foundational rights that they deserve. You are making a difference and we are forever in your debt.

In closing, I want to read from the powerful letter Ms. Warren submitted for today's hearing. It is a lengthy quote so stick with me.

> When I made the difficult choice to testify, I naively hoped that no one else would have to do so. I am in awe of the bravery of the Witnesses today and heartbroken that more individual courage is required to continue to expose the depth and breadth of harassment in the judiciary. I hoped that the judiciary would take decades of calls to action seriously, especially in light of the repeated revelations over the past four and a half years. But instead of meaningfully investigating a problem that every other workplace also faces and is under legal obligation to address, Members of the judiciary prefer to minimize the problem, applaud themselves for establishing working groups, and write law review articles extolling purported progress. The inaction on this imminently actionable problem remains baffling and deeply painful. It is a stain on our judiciary. And today marks yet another sad and shameful day in a line of sad and shameful days. I hope that Congress will enact this bipartisan legislation and step in to guarantee basic workplace protections for the 30,000 employees of the Federal judiciary. I hope that members of the legal profession, most of whom continue to remain silent and disengaged, will support this call to action. And I hope that one day our courts will be deserving of public confidence and the promise of equal justice to all, equal justice for all.

Those are powerful words from an extraordinary, courageous, and powerful woman.

It is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentleman from California, Ms. Issa, for his opening statement.

Mr. ISSA. Thank you, Mr. Chair. In this particular case, I want to associate myself, first, with all of your remarks. They help us set the gravity of what we are considering today and what we are hearing today. I want to thank our Witnesses.

This type of a situation of hostile workplaces in the past and likely in the present and even with action in the future must be a continued process of accountability. I am more than many Members a believer in the separation of powers. I know that the 600 or so article III Federal judges are to enjoy a special deference from this branch and from the Executive Branch to ensure that they can maintain the independence that our Founding Fathers wanted them to have and gave them special standing to have. They are not the only employees of the Judicial Branch. There are, in fact, thousands of employees. They are men and they are women. They are human. Humans do things wrong every day in the workplace predictably.

So, as much as I believe that we have to think of and look at our constitutional officers, including the nine that sit just a quarter of a mile from here, with some deference, we also have to look at this large amount of Federal employees who employ other employees and who as we will hear today have and perhaps a rare exception, but not nearly rare enough, have in fact engaged in conduct which has been both statutorily defined and Federally adjudicated as wrong.

That last part is the part I most want to associate myself with Chair on. The adjudication of what is wrong under these statutes should not be a different standard simply because you work in the article III versus the article 2 or article 1.

When I came to this body some 22 years ago, we had reduced the amount of times that we as a body, Congress, exempted ourselves. Over the last 22 years, we have further reduced that and particularly when a process that we had had to deal with workplace inappropriate behavior including by Members, was brought to light, it

was brought to light with great embarrassment. We had basically paid employees to go away and kept quiet the misconduct sometimes of nonconstitutional officers, but sometimes of these constitutional officers in the House and the Senate.

For that reason, the 30,000 employees that work for judges as law clerks or other clerks, for Federal defenders, court support staff, deserve this hearing and deserve thoughtful legislation to ensure that they are protected at least as well as they are in the other two branches.

The harmonizing to the greatest extent possible needs to occur and we need to do it and this is the part where I show my deference, if you will, we need to do it in a way that is accepted by those Federal judges, excepted by the 30,000 people who work over there, as fair and showing appropriate deference to the branch having certain differences. Let's not exaggerate those differences. If a Federal judge assaults someone, they need to be held accountable.

By the way, this is not the only place that this Committee needs to continue working. Another example is lawyers in the Department of Justice, to this day, refuse to have any disclosure to the Inspector General. They continue to consider themselves separate even when they have been accused of wrongdoing including workplace harassment, including sexual harassment.

So, as we look appropriately at Chair's work product, I think we look at it not as the final product, but not as a product to be cast aside. We will take action. We will take action on a bipartisan basis.

Today, we will hear from one of the Witnesses about some of the progress that has been made, and I look forward to that. The question is is progress something that can be verified and relied on and, in fact, does it take the place of a statute? I believe in some cases it might. Self-rule by the article III branch is perfectly reasonable. It has to be the equivalent of statute. It has to be accountable, and it has to be transparent. That last part is the part over and above what we are already dealing with here today that I am most concerned about. I do not want accusations that might be related to keeping a judge off of a case or the like which certainly, and all of you who have seen lawyers work and work very diligently know, lawyers can be so nefarious that they actually would try to have someone come forward that would bounce a judge. We have to protect against that.

At the same time, we have to hold everyone, including these constitutional officers, accountable. So, for that reason, I come here with an open mind toward not just the legislation, before us, but other measures that we will need, too. Again, I want to thank this panel of all women, who come before us today to tell us what they believe needs to be changed and what happened to them in their lives.

With that, Mr. Chair, again, thank you for this important hearing and I yield back.

Mr. JOHNSON of Georgia. I thank the Ranking Member for his statement and I am now pleased to recognize the Chair of the Full Committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chair NADLER. Thank you, Mr. Chair, for holding this important hearing and for leading this Subcommittee's ongoing efforts to investigate the persistent problem of harassment and discrimination in the Federal judiciary and explore what Congress can do to address it.

The United States courts are supposed to be a pillar of our democracy built on justice and fairness, but it is becoming increasingly obviously that there is a crack in that foundation. Our courts are charged with dispensing justice to the litigants before them. Judiciary employees who are victims of harassment and discrimination are too often kept quiet, shut out in the very courtrooms they work so hard to support, and forced into Byzantine internal processes that effectively deny them the most basic procedural rights.

It frequently seems that the courts' internal processes work to the benefit of the accused rather than the safety of the accuser. Judiciary employees are virtually alone among employees of both the public and private sectors in being carved out from certain protections of the foundational civil rights laws. Racial discrimination, age discrimination, disability discrimination, religious discrimination, gender discrimination, and sexual harassment, all these and more are prohibited by Federal statutes that are backed by the strength and certainty of Federal court litigation.

An employee who has been victimized and who sues a harasser or abuser in court, has the right to discovery, inspecting documents and examining Witnesses, as well as the right to a neutral, disinterested arbiter to hear and resolve the dispute. These are only a handful of the many rights inherent to litigation that are meant to ensure plaintiffs' meaningful participation in the investigation and adjudication of their claim. These rights protect victims of discrimination and harassment and encourage the kinds of reporting and transparency that can identify hostile workplaces and stop patterns of abuse.

Unfortunately, judiciary employees are guaranteed none of these rights. Employees of the third branch have no assurance that their harassment of discrimination claims will be addressed and their harms redressed in the same manner as nearly every other American worker.

Fortunately, Congress can take action. We did so in 1995 and again in 2018, when we closed the loopholes that exempted employees in our own branch from the same statutes. The judiciary should have been included in those efforts, but such reform faced strong resistance from the leadership of the courts at the time, a position that has endured for nearly three decades.

Meanwhile, the need to extend these basic protections to judicial branch employees becomes more urgent all the time. As this Subcommittee's 2020 hearing exposed, harassment and discrimination remain serious problems within the Judicial Branch. Even more concerning, these problems have persisted notwithstanding the judiciary's attempt to address them with changes to its internal human resource policies, policies that are currently the only recourse of judicial branch employees when they have been victims of harassment or discrimination. That is why Congress must ex-

tend to them the protections of Federal civil rights laws. What the judiciary is doing is not working and Congress must intervene.

Today, we will hear from a diverse panel of experts and advocates and whistleblowers, all whom have long-standing experience with the judiciary and the workplace misconduct suffered by judiciary employees. We will also hear from representatives of the judiciary and I appreciate hearing their perspective.

To the Witnesses who are appearing today at their personal and professional risk, I want to thank you for your determination, your integrity, and your commitment to fair and equal justice.

Today's hearing will serve as yet another piece of necessary labor towards maintaining the integrity and the independence of our third branch. Our work is not done. We will keep working to give Judicial Branch employees the rights and protections they need and deserve.

Thank you, Mr. Chair. I yield back the balance of my time.

Mr. JOHNSON of Louisiana. I thank the gentleman from New York. Before we introduce our first panel of Witnesses, without objection, I will enter—

Mr. JORDAN. Mr. Chair, I just want to thank our Witnesses for being here today. Thank you.

Mr. JOHNSON of Georgia. Thank you, Mr. Ranking Member.

The first statement that I will enter for the record is the statement of Professor Aziz Huq who is the Bernice J. Greenberg Professor of Law at the University of Chicago Law School. Professor Huq's statement concerns the constitutionality of congressional regulation of sexual harassment and related forms of misconduct within the judiciary.

The second is a statement from Aliza Shatzman who served as a law clerk to a judge on the D.C. Superior Court. Ms. Shatzman describes the abuse of misconduct to which she was subjected while serving in that judge's chambers, the damage to her professional advancement and reputation that judge inflicted, and the lack of recourse she faced as she tried to report it.

The third is a statement from Olivia Warren who testified before this Subcommittee in 2020. Ms. Warren builds on her earlier testimony and provides new, additional information and perspectives on this committee's investigation and the Judiciary Accountability Act.

The fourth, a letter organized by the Project on Government Oversight and signed by more than 60 organizations applauding the Judiciary Accountability Act's inclusion of a provision that would extend and codify best practice whistleblower protections for all employees of the judiciary.

I would also like to add a written statement from Michelle Cohen Levy who was counsel for one of our Witnesses here today, Caitlin Clark, during Ms. Clark's employment dispute resolution process.

Finally, I would like to add a letter from Deeva Shah, an attorney from Keker, Van Nest & Peters which includes two anonymous statements from her clients, one from a former law clerk detailing the harassment she experienced while working at the Federal judiciary, and another from a judiciary employee detailing the use of nondisclosure agreements in the judiciary's employment dispute resolution process.

[The information follows:]

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Washington, DC 20515

The Honorable Darrell Issa
Ranking Member
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Dear Chairman Johnson, Ranking Member Issa, and members of the subcommittee,

I write respectfully to offer my view of Congress's power under Article I of the Constitution to enact a federal statute that regulates sexual harassment and related forms of misconduct within the federal judiciary. I believe such a statute is comfortably within Congress's authority, and I explain why in this letter.

As I understand it, the question of congressional power is sparked by the Judiciary Accountability Act, H.R. 4827, introduced on July 29, 2021. In a letter dated August 25, 2021, Hon. Rosalynn Mauskopf, Secretary of the Judicial Conference, argues that such new legislation "interferes with the internal governance of the Third Branch."[1] This language gestures toward a constitutional argument, although it can be construed also as a policy concern. Similarly, in his 2021 letter to the federal judiciary, Chief Justice Roberts wrote that "courts also require ample institutional independence" because "[t]he Judiciary's power to manage its own internal affairs

[1] Letter from Hon. Rosalynn Mauskopf, Secretary of the Judicial Conference, to Hon. Henry 'Hank' C. Johnson, Jr. (Aug. 25, 2021), https://www.uscourts.gov/news/2021/08/25/judiciary-informs-congress-its-opposition-bill.

insulates courts from inappropriate political interference."[2] Neither Judge Mauskopf nor Chief Justice Roberts makes an explicitly *constitutional* argument. Nevertheless, Article III of the Constitution obviously looms in the background in both instances.

To aid in the committee's deliberations about the Judiciary Accountability Act, I make three points. First, the source of Congress's power in respect to the judiciary's administration is the 'horizontal' component of the Necessary and Proper Clause of Article I—which gives Congress power to legislate the form and operation of other branches of government.[3] Second, the judiciary is defined in Article III of the Constitution to benefit from specific forms of constitutional protection. The Constitution protects individual judges from certain kinds of improper influence; it does not protect the institutional functioning of the judiciary as a whole from legislative regulation and change. Even in respect to the core judicial task of adjudication, moreover, Congress exercises a very high degree of control over outcomes through its ability to alter the rule of decision applicable in pending cases. Finally, Congress has historically exercised extensive control over the judiciary at the institutional level. It would be an abrupt and unwarranted departure from historical practice to conclude that the Judiciary Accountability Act lies beyond constitutional bounds.

A. Congress's Power Over Judicial Administration

There is no doubt that the Constitution vests Congress with wide authority respecting the existence and structure of the federal judiciary below the apex Supreme Court. Diverging from the British practice,[4] Article 1, Section 8 specifically deposits in Congress the power to "constitute Tribunals inferior to the supreme Court."[5] Under these clauses, "Congress judges whether there will be inferior courts, their structure, and how they will function under the Supreme Court."[6]

Article I authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [Article I] Powers," and further to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[7] The second part of this clause is called the "horizontal" component of the Necessary and Proper

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[2] Hon. John Roberts, *2021 Year-End Report on the Federal Judiciary* 1 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[3] *See* U.S. Const. art. 1, §8, cl.18.

[4] Akhil Reed Amar, *America's Constitution: A Biography* 111 (2005).

[5] U.S. Const. art. I, § 8, cl. 9; *see also id.* art. III, § 1, cl. 1 (vesting the "judicial Power" in "such inferior Courts as the Congress may from time to time ordain and establish").

[6] Saikrishna Bangalore Prakash, *Congress As Elephant*, 104 Va. L. Rev. 797, 826–27 (2018).

[7] U.S. Const. art. I, §8, cl. 18.

Clause.[8] As a leading historical treatment of the Article III suggests, this "horizontal" power "gives Congress considerable power" over the structure and operation of the federal courts.[9]

The leading decision glossing the Necessary and Proper Clause remains *McCulloch v. Maryland*, upholding the Bank of the United States.[10] Although it does not involve the scope of congressional power over the judiciary's operation, *McCulloch* is widely understood as "a canonical statement about the scope of Congress's powers under the Necessary and Proper Clause."[11] The Court described Congress's power in broad and deferential terms, rejecting the idea that a law must be "indispensable."[12] In Chief Justice John Marshall's most canonical formulation, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[13]

Since *McCulloch*, the Court itself has repeatedly underscored the "large discretion as to the means that may be employed in executing a given power" created under the Necessary and Proper Clause.[14] That Clause, the Court said almost a century ago, allows Congress to "adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution."[15] The same remains so today. More recently, it has confirmed the "broad" character of the horizontal legislative authority.[16]

The sweep of the horizontal element of the Necessary and Proper Clause specifically in relation to the Supreme Court was addressed in 1838 by the Taney Court:

> It was necessarily left to the legislative power to organize the Supreme Court .... No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power; leaving the details to congress, in whom was vested,

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[8] *See* William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 Ohio St. L.J. 788 (1975).

[9] Caleb Nelson, *Sovereign Immunity As A Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1629 (2002) (focusing on the power "to specify the types of writs that federal courts can use and the restrictions to which those writs are subject").

[10] 17 U.S. (4 Wheat.) 316, 413 (1819).

[11] William Baude, *Sharing the Necessary and Proper Clause*, 128 Harv. L. Rev. F. 39, 42 (2014).

[12] 17 U.S. at 411, 413.

[13] *Id.* at 421.

[14] The Lottery Case, 188 U.S. 321, 355 (1903).

[15] *James Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924).

[16] *United States v. Kebodeaux*, 570 U.S. 387, 394 (2013); *see also United States v. Comstock*, 560 U.S. 126, 134 (2010) (describing the test for Congress's exercise of its necessary and proper power as "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power"); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012) (underscoring "very deferential" judicial approach to the Clause).

> by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own.[17]

Modern scholars concur. Speaking to the horizonal component of the Necessary and Proper Clause, Dean John Manning of Harvard Law School has explained that "as long as Congress acts constitutionally, the clause gives it express priority over the coordinate branches as implementer-in-chief."[18] In a similar vein, Prof. William van Alstyne explained that the Necessary and Proper Clause "assigns to Congress alone the responsibility to say by law what additional authority, if any, the ... courts are to have beyond that core of powers that are literally indispensable."[19]

In sum, the express text of the Constitution gives Congress very wide discretion over the structure and functioning of the federal courts—at least absent some express constraint on such power. The next question, therefore, is whether any such constraint exists under Article III of the Constitution.

B. The Judiciary's Immunities from External Influence under Article III

No express or implied limit constrains Congress's regulation of sexual harassment within the judiciary. This conclusion follows from both constitutional text and precedent alike. Let us consider each of these in turn.

First, the text of Article III embodies the Framers' choice as to how judicial independence is realized. There are many ways to protect judicial independence.[20] Not all are to be found in the Constitution. The autonomy of the courts is defended by protections focused on the individual, and not the institution. To begin, Article III provides federal judges with tenure during "good [b]ehaviour"[21] to protect them from removal outside the impeachment process. Next, they are protected from reductions in (non-inflation adjusted) salary.[22] By selecting these measures only, the Framers deliberately opted not to protect the judiciary in other ways. There is no good reason to

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[17] *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838) (citation omitted).

[18] John F. Manning, *The Supreme Court, 2013 Term--Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 64 (2014); *see also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 67 (1994) ("In as clear a textual commitment as possible, it is Congress that is granted the power to determine the means for specifying *how* powers-and again, *all powers*-in the federal government are to be exercised.").

[19] Van Alstyne, *supra* note 8, at 794.

[20] Aziz Z. Huq, *Why Judicial Independence Fails*, 115 Nw. U. L. Rev. 1055, 1098 (2021).

[21] U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ").

[22] U.S. CONST., Art. III, § 1. (entitling judges to "Compensation, which shall not be diminished during their Continuance in Office."). *But see* United States v. Hatter, 532 U.S. 557, 571 (2001) (holding that "the Compensation Clause does not forbid Congress to enact a law imposing a nondiscriminatory tax (including an increase in rates or a change in conditions) upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect")

read the Framers' express choice of good behavior and salary protection as inviting a wide-ranging, free-floating inquiry into other, unrelated measures to advance judicial independence.

The inclusion of the term "good behavior" in the text of Article III further confirms that there is no constitutional bar on the statutory regulation of federal judges in respect to sexual harassment. That language "clearly was not [the same as] life tenure."[23] In addition to criminal acts,[24] English authorities picked out abuse of office, nonuse of office, and refusal to exercise an office as acts for which removal was allowed.[25] Then-judge Ruth Bader Ginsburg offered in 1980 the following list of conduct that fell short of good behavior:

> [F]inancial misdeeds or irregularities (for example, borrowing from the court's till); "intemperate use of ardent spirits" (sometimes described more bluntly as "habitual drunkenness"); tyrannous treatment of counsel; income tax evasion; and fabrication of per diem expenses. Exotic or singular items also appear in the catalogue; for example, plotting with Spain to seduce Kentucky from the Union, and serving simultaneously as active judge and baseball arbiter. Finally, not least of the offenses, one judge (only one) was accused of ignorance of the law.[26]

In short, the use of the term "good behavior" in Article III signals that even federal judges—who, again, are by no means the only persons covered by the Judicial Accountability Act—have no general license under the Constitution to engage in improper behavior: Indeed, they may be removed for such acts.

The second relevant source of authority comprises the previous decisions of the Supreme Court. That tribunal's precedents do indicate certain red lines that Congress cannot constitutionally cross. None of these are implicated here. And while these cases identify some elements of the Constitution's text that raise difficult questions of interpretation in respect to congressional power, none are at stake here.[27] Indeed, the relevant precedent demonstrates that

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[23] Saikrishna Prakash and Steven D. Smith, *How to Remove A Federal Judge*, 116 Yale L.J. 72, 90 (2006).

[24] *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir. 1974) ("Protection of tenure is not a license to commit crime or a forgiveness of crimes committed before taking office.").

[25] The relevant English precedent includes *Henry v. Barkley*, (1596) 79 Eng. Rep. 1223, 1224 (K.B.), and *R v. Bailiffs of Ipswich*, (1706) 91 Eng. Rep. 378 (K.B); *see also* Saikrishna Prakash and Steven D. Smith, *(Mis)understanding Good-Behavior Tenure*, 116 Yale L.J. 159, 162 (2006) ("A judge who decided cases based on bribes she received or by peering at a crystal ball would be guilty of misbehavior because such means of resolving cases were not permissible or acceptable.").

[26] Hon. Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges the John R. Coen Lecture Series University of Colorado School of Law*, 55 U. Colo. L. Rev. 1, 5 (1983).

[27] For instance, Article III identifies categories of cases and controversies in which the Supreme Court "shall have original Jurisdiction," and directs that "[i]n all other cases" the Court "shall have appellate Jurisdiction … with such Exceptions, and under such Regulations, as the Congress shall make." U.S. Const. art. III, §§ 1-2. There has long been a lively debate about what Congress can do under this so-called Exceptions Clause. The classic treatment is Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1364 (1953). A recent

Congress has broad power even when it comes to the core Article III duty of adjudication. This suggests that legislative power in respect to more peripheral questions (as here) raises no problem under Article III.

In other cases, the Supreme Court has held that Congress cannot reopen damages judgments entered by the federal courts.[28] To allow legislators to do so, the Court has explained, would impermissibly contravene the Court's power to enter final judgements in cases and controversies.[29] It would thereby permit legislators to assume the judicial power.[30] And courts, not Congress, must have the last word on the meaning of the Constitution.[31]

Yet even in respect to adjudication—which is the core task of the Article III judiciary—the Court has allowed Congress a broad leeway to act.[32] In *Bank Markazi v. Petersen*, the Court upheld provisions of the Iran Threat Reduction and Syria Human Rights Act of 2012 stating that the "financial assets that are identified in ... *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518" would be available "to satisfy any judgment ... awarded against Iran for damages for personal injury or death caused by" acts of terrorism.[33] The Court validated the law as consistent with the "independent Judiciary" established by Article III, even though it altered the outcome of a pending case.[34] Then, in *Patchak v. Zinke*, the Court upheld a statute that singled out and authorized a Department of the Interior decision to take certain land into trust, and then directed the federal courts to dismiss all suits related to the land in question.[35]

Decisions such as *Bank Markazi* and *Patchak* demonstrate the breadth of Congress's power to regulate the work of the federal courts *even in respect to the core adjudicative work of those tribunals*. They support, a fortiori, Congress's power to regulate matters peripheral to adjudication—such as sexual harassment and its ilk within the judiciary workplace.

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summary of the literature is Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 Va. L. Rev. 1043, 1065-68 (2010).

[28] *E.g.*, Plaut v. Spendthrift Farm, 514 U.S. 211, 240 (1995).

[29] *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 150 (2015) (citing *Plaut* for the finality principle); *Gundy v. United States*, 139 S. Ct. 2116, 2142 & n.77 (2019) (Gorsuch, J., dissenting) (same).

[30] *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) ("The separation of powers, among other things, prevents Congress from exercising the judicial power." (citing *Plaut*)).

[31] *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

[32] *See* Huq, note 20, at 1065-76 (discussing doctrine on Article III independence).

[33] 22 U.S.C. § 8772(a)(1)(C), (b); *Bank Markazi v. Peterson*, 578 U.S. --, 136 S. Ct. 1310 (2016).

[34] *Bank Markazi*, 136 S. Ct. at 1322

[35] 138 S. Ct. 897, 910 (2018) (Thomas J., plurality op.).

C. The Historical Record of Legislative Regulation of the Judiciary

The historical usage of constitutional power is an important source for understanding the scope of Congress's horizontal power to regulate the operations of the federal court.[36] The breadth of congressional control over judicial operations is amply confirmed by the history of legislation directing the manner in which federal courts carry out their core mission, and manage their own operations. The leading examples here concern the kinds of process that federal judges would use to hale litigants into court and to conduct litigation. But the historical record concerns elements of judicial operation that are *closer* to the core judicial responsibility to decide cases and controversies. If Congress can lawfully cut to the heart of the adjudicative function—and it plainly can—it is hard to understand why it would lack the lesser, constitutionally peripheral, power to regulate personnel matters and workplace conduct.

The first Congress understood itself to have broad authority to decide on basic questions of federal-court process.[37] In 1789 and 1792, for example, Congress enacted statutes that required federal courts to use state procedures in common-law cases.[38] In 1792, Congress also enacted a statute authorizing the federal courts (both the Supreme Court and lower federal courts) to issue their own rules.[39] Congress would have had no power to enact these laws if the federal courts had a monopoly under Article III to enact their own rules and regulate their own manner of organizing adjudication. Yet all these measures were and are utterly uncontroversial applications of the horizontal Necessary and Proper power in relation to the Article III judiciary.[40] Congress has also enacted statutes determining, *inter alia*, what constitutes a quorum on the Court,[41] the date on which the Court's term begins;[42] and the time to file a petition for a writ of certiorari.[43] It has also provided for the temporary suspension of judges, with certification to the House of Representatives for possible impeachment proceedings.[44]

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[36] *See, e.g.*, Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 526-36 (2003) (discussing the eighteenth-century expectation that constitutional meaning would become fixed through practical construction); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 910 (1985) (same).

[37] *See* Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 509-35 (1971).

[38] Judiciary Act of 1789, ch. 20, §14, 1 Stat. 73, 81-82, 93-94; Process Act of 1792, ch. 36, §2, 1 Stat. 275, 276.

[39] 1 Stat. 275-79.

[40] For a judicial endorsement of these measures, see *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

[41] 28 U.S.C. § 1 (2012).

[42] *Id.* § 2.

[43] *Id.* § 2101(c).

[44] 28 U.S.C.A. § 372; *see also Hastings v. Judicial Conference of U.S.*, 829 F.2d 91 (D.C. Cir. 1987) (finding authorization for sanctions in cases of "conduct prejudicial to the effective and expeditious administration of the business of the courts" was not overbroad), *cert. denied* 485 U.S. 1014 (1988).

More pertinent here, legislative control over the personnel-related functioning of the federal courts has been extensive since the beginning of the Republic. From the 1790s, Congress tasked each Justice with not one but two judicial roles: acting as a Justice and also riding "circuit," serving as the intermediate federal court between the federal trial courts and the Supreme Court.[45] It imposed specific administrative responsibilities on the Chief Justice reaching far beyond judicial management.[46] And it compelled circuit judges (and so Supreme Court Justices) to serve as pension commissioners to determine whether veterans were disabled.[47] The decision to permit federal judges to hire law clerks, moreover, is one that rests with Congress. Indeed, early efforts to enable law-clerk hiring met with fierce opposition: In 1850, Rep. David K. Carter of Ohio scornfully suggested that the justices seeking appropriations for clerks were asking Congress "that they might be furnished with auxiliary brains, to do their thinking...which now, God knows, they did not do."[48] Hence, Congress authorized Supreme Court Justices to hire stenographic clerks only in 1886,[49] and then permitted law clerks in 1919.[50] Court of appeals judges were first authorized to hire law clerks in 1930.[51] Federal district court judges were first allowed to hire law clerks only in 1936.[52] Congress has never been under any compulsion to allow clerk hiring: It has always set the terms for such hiring (including statutory specification of the tasks to be executed). Congress therefore has ample authority to create a structure that those clerks, and other judicial employees, have a workplace free of harassment or abuse.

Many of the legislative powers that Congress has already exercised present a far greater risk of what Chief Justice Roberts called "inappropriate political interference" than the Judiciary Accountability Act. Yet they are all constitutional. Therefore, the risk of inappropriate legislation in the abstract is simply not enough to precipitate an Article III objection. Instead, the history of statutory regulation of judicial administration demonstrates that the present legislation is in the heartland of Article I power.

* * *

In conclusion, I am aware of no decisive authority or judicial decision suggesting that Congress lacks power to enact the Judicial Accountability Act, or a like measure, under the broad aegis of the Necessary and Proper Clause. Neither text nor precedent support a pertinent limit on Congress's capacity here. To the contrary, it may well be that the proposed measure is a needful

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[45] Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74-75.

[46] Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 246, 250 (ex officio member of board of assay for coins); *see also* Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186 (ex officio member of committee to decide when to purchase federal debt).

[47] Invalid Pension Act of 1792, ch. 11, § 2, 1 Stat. 243, 244.

[48] Cong. Globe, 31st Cong., 1st Sess. 351 (1850).

[49] Act of Aug. 4, 1886, ch. 902, 24 Stat. 253, 254

[50] Act of July 19, 1919, ch. 24, 41 Stat. 209, 209.

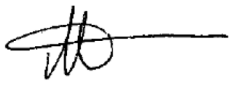
[51] Act of June 17, 1930, ch. 509, 46 Stat. 774.

[52] Act of Feb. 17, 1936, ch. 75, 49 Stat. 1140.

step in restoring public confidence in our nation's judiciary, especially among young people who enter law school and who may seek employment in federal judicial institutions.

I would be happy to answer any questions you have, and can be reached at your disposal at huq@uchicago.edu.

Sincerely,



Aziz Huq
Frank and Bernice J. Greenberg Professor of Law

Statement for the Record of Aliza Shatzman, Former DC Superior Court Law Clerk

House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
"Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change"

March 17, 2022

Chairman Johnson, Ranking Member Issa, and Members of this Subcommittee, my name is Aliza Shatzman, and I am a family law attorney in Washington, DC. After graduating from Washington University School of Law in St. Louis, Missouri in 2019, I served as a Law Clerk in the Superior Court of the District of Columbia (DC Superior Court), in both the Criminal and Family Court Divisions, from August 2019 to May 2020. My forthcoming law journal article, "Untouchable Judges? What I've learned about harassment in the judiciary, and what we can do to stop it," will be published with the *UCLA Journal of Gender & Law* in June 2022, and it details my personal experience with harassment in the judiciary—including my attempts to report the mistreatment, how the system failed me when I tried to report, and my efforts to seek justice for myself and accountability for the misbehaving former judge. The following written statement does not attempt to document every instance of gender discrimination, harassment, retaliation, and misconduct that I experienced during my clerkship and in the years following it. However, I have chosen to highlight the following examples as evidence of the scope of the problem, the entrenched systems that contribute to it, and the deficiencies in the judicial accountability mechanisms that perpetuate these types of injustices. I hope that my experience provides a framework for considering why the Judiciary Accountability Act of 2021 (H.R. 4827) is so urgently needed, and why the bill should be amended to include the DC Courts.

I. DC Superior Court Clerkship (August 2019-May 2020)

Early in my law school career, I decided that I wanted to be an Assistant United States Attorney (AUSA) with the DC U.S. Attorney's Office (USAO). I was highly focused on this goal, so I interned with four different U.S. Department of Justice (DOJ) offices during law school in order to gain a breadth of government experience. I spent hundreds of hours building relationships with government attorneys, in the hopes that they would assist me when I applied for an AUSA position. I chose to clerk in DC Superior Court because that is the jurisdiction in which DC AUSAs practice. The DC Courts are unique. DC judges are confirmed by the Senate for 15-year terms.[1] The DC judiciary enjoys many of the same benefits as the federal judiciary. At the time I interviewed for the clerkship, the DC Courts seemed to be a particularly appealing place to clerk. Local crime is prosecuted and adjudicated with federal resources.

The judge for whom I clerked was a former AUSA himself. At least one female professor from my law school—a personal friend of the judge's—made calls on my behalf to help me secure the clerkship. I thought the position would be a good fit. Unfortunately, it was not.

[1] *See* Code of the District of Columbia, § 11–1501.

Beginning just weeks into my clerkship, in September 2019, the judge would throw me out of the courtroom, ordering me to switch places with my male co-clerk, stating that I made him "uncomfortable" and that he "just felt more comfortable" with my male co-clerk. The judge later snapped that he was "trying to punish" me because he "knew how much I liked to be in court."

In October 2019, the judge escalated the situation. Hours after I learned that I had passed the District of Columbia Bar Exam, the judge called me into his inner chambers and began to detail what he referred to as my "personality issues." The judge raised his voice, wagging his finger, visibly frustrated, and stated, "You're *bossy*! And I know bossy because my *wife* is bossy!"

The judge would call me into his inner chambers at least weekly—almost always when my male co-clerk was not around—to berate me for being "bossy" and "aggressive" and "nasty" and a "disappointment." He would criticize my personality because I did not behave the way he expected female clerks to behave in the workplace. The judge would demand that I stay late, until after my male co-clerk had left for the evening, and he would berate me when he knew no one was around to witness it. I could feel the fear building inside me on those nights, as I watched my co-clerk pack up and leave chambers. I felt defenseless.

I wished there was a place where I could report the mistreatment without fear of retaliation. I wanted to be reassigned to a different judge for the remainder of the clerkship, but there was no Employee Dispute Resolution (EDR) plan in place at the time that might have provided for a reassignment.[2] I knew that, if I did report, the judge could retaliate against me and fire me at any time. After all, it would be my word against his. He was a Senate-confirmed judge. I was just a law clerk a few months out of law school. My legal career could easily be over before it even started.

From the time the courthouse transitioned to remote work in mid-March until late April of 2020, the judge ignored me for six weeks during the COVID-19 pandemic. My emails, texts, and calls went unanswered. While it was a welcome respite from the mistreatment I was experiencing in chambers, it was difficult to do my job without a supervisor to provide guidance or answer questions. I would email the judge orders to sign off on, but I would not hear back from him. Several days would go by. Then, I would receive a text from my male co-clerk, indicating that the judge had told him to tell me that the orders I had drafted were approved.

Finally, in late April 2020, after weeks of almost total silence, the judge called me and told me that he was "ending my clerkship term of appointment" four months early. He said that I "made him uncomfortable" and that I "lacked respect for" him, but that he "didn't want to get into it." While the judge refused to elaborate on the "issues" that led to my early separation, I understood that he did not approve of the fact that I did not present in the way he felt women should in the workplace—because I was assertive, confident, and voiced my opinions.

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[2] *See* DC Courts, *District of Columbia Courts Announce New Employment Dispute Resolution Plan* (May 20, 2021), https://newsroom.dccourts.gov/press-releases/district-of-columbia-courts-announce-new-employment-dispute-resolution-plan.

In my final phone conversation with the judge, he stated that he would provide a "neutral" reference if contacted during a background investigation. I decided not to pursue legal action because I mistakenly believed the judge did not intend to interfere with my future career prospects. The judge knew how focused I was on securing a position with the DC USAO. Interfering with the USAO application process would be particularly malicious.

After the judge informed me that he was ending my clerkship early, I contacted Human Resources (HR) for the DC Courts, hoping that HR could assist me with workplace harassment. They told me there was "nothing they could do" because "HR doesn't regulate judges" and that "judges and law clerks have a unique relationship." They asked me, "Didn't I know that I was an 'at-will' employee?" No one ever mentioned my Equal Employment Opportunity (EEO) rights or directed me to the DC Courts' EEO Office. I asked multiple times to be reassigned to a different judge for the remainder of my scheduled clerkship period. HR said that "the DC Courts doesn't handle that" (referring to requests for judicial reassignment).

After confiding in another DC judge about the harassment I experienced during my clerkship, I drafted a complaint to submit to the DC judicial regulatory body. However, I decided to wait until I had secured a new job to file my complaint. I feared that the judge would retaliate against me, especially since I was job-searching in the jurisdiction where he presided.

II. Post-Clerkship Period

After a challenging pandemic job search, I accepted a position as a Special Assistant U.S. Attorney (SAUSA) with the DC USAO in late spring of 2021. These positions are difficult to secure: it often takes months between the application process and multiple rounds of interviews. I began USAO training in early July, while my background investigation was still pending. However, I had previously undergone five government background investigations at various security clearance levels—four for DOJ internships, and one for my clerkship—as well as a background check for the DC Bar, so I was not overly concerned when my background check seemed to drag on.

I quickly fell in love with my position, relieved to have finally put my negative clerkship experience behind me. I even spent one morning shadowing domestic violence prosecutors in remote court, envisioning myself taking over their caseload later that month. However, two weeks into training, I received several devastating calls from leadership that altered the course of my legal career. On Friday, July 16, 2021, the USAO alerted me that the judge had given me a "bad reference" and had made negative statements about me during my background investigation. They told me that I "would not be able to obtain a security clearance" and therefore that my job offer was being revoked.

That afternoon, I sobbed on the phone with the EEO Officer for the DC Courts, as I told her about both the harassment I had experienced during my clerkship, and the judge's recent misconduct. I choked back tears during calls with several members of the USAO's leadership team, including a representative from HR. I was devastated that my job had suddenly been yanked away, since I had been working toward the goal of becoming a federal prosecutor for the past five years. It seemed like the judge's conduct would make it difficult for me to ever obtain

another government position. I could not believe that one person could have such enormous power and influence over my career and reputation. The USAO would not tell me what the judge had said about me, even after I told them that I had been the victim of gender discrimination and harassment, and even after I explained that the judge had previously agreed to provide a neutral reference if contacted. The USAO refused to reconsider. The damage had been done.

After the phone call with the HR representative, I emailed her to ask for a formal letter documenting the job offer revocation and the security clearance denial. It took HR more than a week to send me the letter.

On July 19, 2021, I filed a lengthy complaint with the DC Commission on Judicial Disabilities and Tenure (CJDT), the regulatory body for DC judges. I described both the harassment I experienced during my clerkship, and the judge's recent negative reference, which I believed was gender-based.

The same day I filed my CJDT complaint, I received a call from the USAO, inviting me to interview for a different position with the office, based on an application that I had submitted in April 2021. I was thrilled for the opportunity. I spent the week preparing for the interview.

On July 26, 2021, three days before the scheduled interview, I finally received a letter from the USAO's HR department. The letter both formally revoked my SAUSA job offer, and also stated that my previously scheduled AUSA interview was being canceled, based on the judge's same negative reference. The judge seemed to have limitless power to destroy my career, ruin my reputation, and prevent me from ever securing a government position.

III. Judicial Complaint Process

In the late summer and early fall of 2021, I participated in the CJDT's investigation of my former supervisor. Toward the end of the investigation, I found out that the judge had been on administrative leave, pending an investigation, since June. In fact, he had already agreed to take leave when he filed the negative reference with the DC USAO.

I understood that the CJDT was not the ideal forum to seek relief, but I had very few options. My complaint was filtered through an unelected, un-appointed Special Counsel, who wielded enormous power over the investigation. I could not make arguments directly to most of the Commissioners. I could not question any witnesses—in fact, the CJDT would not even confirm who the witnesses were. I had no ability to recover damages. The CJDT is not empowered to provide relief to victimized clerks—its purpose is to potentially discipline misbehaving judges.

I had taken on enormous professional risk by coming forward with allegations of gender discrimination and harassment against a then-sitting judge, at a time when I had no job security. I subjected my own reputation in the DC legal community—including among the government attorneys who I hoped would assist me in my job search—to scrutiny. I understood that my complaint would not be anonymous. I accepted that the judge might continue to retaliate against me. I had no reason to be anything less than fully truthful.

Unfortunately, the CJDT seemed to be searching for witnesses to disprove my claims. It felt like the CJDT was set up to protect misbehaving judges, no matter how much misconduct they commit. I was told that I had a "personality issue" and that what transpired between myself and the then-judge was merely a "personality conflict." Just minutes into my first formal conversation with the CJDT, I was told that I "must have done *something* wrong, because the judge hired [me] in the first place." The CJDT seemed to blame me for not being able to make things work with the judge, asking me repeatedly what steps I had taken to try to adjust to the judge's unique work style of harassing me. I understood that this type of skepticism and mistreatment were not unusual for a judicial misconduct investigation, since the judge's friends and colleagues in the DC legal community were the ones deciding whether to discipline him. I feared that the CJDT's mishandling of the investigation would chill future complaints by law clerks against DC judges, if they believed that their allegations would not be taken seriously.

I knew—based on both personal experiences and conversations with attorneys, judges, law clerks, and court employees—that the CJDT's investigation barely scratched the surface of the misconduct the judge committed during his five years on the bench. I was frustrated that many stories about the judge were told to me in confidence, and that most attorneys told me they would "never" file a complaint against a judge because he would "definitely" retaliate against them.

The former judge is no longer on the bench. He was ordered by the CJDT into "involuntary retirement"[3] in 2021. He was disciplined for violating Rule 2.5 (Competence, Diligence, and Cooperation), Canon 2 of the Code of Judicial Conduct, due to extraordinary delays on his judicial calendar, which caused emotional and financial harm to litigants in family law matters. He was also certified as having a disability that would prevent or interfere with performance of his judicial duties.

IV. Ongoing Effects of Judicial Misconduct on My Life, Career, and Reputation

I eventually read the former judge's inflammatory negative reference to the USAO. Based on the phrasing of his statements, I believe the judge acted with the intent of thwarting my ability to ever obtain a job with the USAO. Drawing from his experience as a former AUSA and a former judge, he phrased the statements in such a way as to maximally harm me, while minimizing my ability to raise a tort claim against him. The former judge took time out of his life to maliciously try to destroy my career and ruin my reputation. The USAO accepted his statements unquestioningly. After all, he was a judge in their jurisdiction, and the USAO is incentivized to maintain positive relationships with judges. They did not ask any follow-up questions of the judge. They did not afford me the opportunity to defend myself. The USAO was never alerted that the then-judge was under investigation and on administrative leave at the time he gave the negative reference. I felt the USAO should have been told—by the CJDT, by the DC Courts, or by the then-judge—about the circumstances surrounding the negative reference.

I was shocked when the CJDT told me that the negative reference was beyond the scope of their judicial misconduct investigation and that they were not going to investigate it. To the best of my knowledge, the CJDT did not ask the then-judge for a copy of the negative reference,

[3] *See* D.C. Code § 1526(b).

nor did they question him about it. The CJDT only asked me one question about the negative reference—whether I believed that I had been retaliated against—despite the fact that my allegations about the reference were thoroughly detailed in my judicial complaint. I answered this question affirmatively. No follow-up questions were asked.

The former judge has since agreed to "clarify" some but not all of his outrageous statements about me to the USAO, in a message that admitted no responsibility or contrition for his misconduct. However, the office can never "un-know" the contents of the negative reference. I will probably never be able to work at the DC USAO, a career goal for which I made so many sacrifices, including enduring eight horrible months as a law clerk. In exchange for the "clarification," I have agreed not to publicly identify the former judge by name. The fact that the former judge could dangle the reference—and the prospect that I might one day be able to secure an AUSA position after all—in order to exact this concession from me, is evidence of the scope of the problem of judicial misconduct. The former judge never should have filed the negative reference, both because he had previously agreed to provide a neutral reference if contacted and, more importantly, because his statements were untrue and misleading. Unfortunately, there are no effective safeguards to prevent this type of misconduct, nor are there real remedies for law clerks.

There is nothing that the former judge can do to repair the damage he has done to my life. No employer—not even a Senate-confirmed judge—should be able to exert unchecked power over former clerks' careers and reputations, nor should they be able to disparage their clerks with impunity. However, a judge's word is currently accepted unquestioningly by employers in the legal community, regardless of how they privately view the judge, and a judge's reference can make or break a former clerk's career.[4]

My personal experience with judicial harassment and misconduct over the past few years showed me that statutory reforms are urgently needed. No law clerk should ever endure the type of mistreatment that I experienced, both during my clerkship and in the years following it.

V. Judiciary Accountability Act of 2021

In late July 2021, when I was already involved with the DC judicial complaint process, I became aware of the proposed Judiciary Accountability Act (JAA).[5] I knew that the federal judiciary was exempt from Title VII of the Civil Rights Act of 1964.[6] Because DC judges, like federal judges, are Senate-confirmed, I suspected that DC judges and DC law clerks were likely also exempt from Title VII. I read the JAA and discovered that the DC Courts were not covered under the proposed legislation. Therefore, I reached out to House and Senate offices involved with JAA drafting to share my experience and explain why I felt the DC Courts should be included in the bill.

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[4] *See* Leah M. Litman & Deeva Shah, Essay, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 616 (2020).

[5] *See* H. Comm. on the Judiciary, *Nadler & Johnson Introduce Bipartisan, Bicameral Legislation to Hold Judiciary Accountable to Workers* (July 29, 2021), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4685.

[6] *See* 42 U.S.C. §§ 2000e-2000e(17)(b).

The judiciary is unique even among hierarchical workplaces. Members of Congress are subject to Title VII pursuant to the Congressional Accountability Act of 1995.[7] Furthermore, Members are accountable to the voters via congressional elections every two or six years. Federal judges evade scrutiny and avoid accountability due in part to their life tenure (or tenure during "good behavior").[8] They can only be removed from office by impeachment, which is exceedingly rare.[9] Additionally, if a misbehaving judge "retires" rather than "resigns" after misconduct allegations, he can continue to collect his lifetime pension—consuming taxpayer dollars even after committing misconduct.[10] Senate-confirmed judges act as if they are accountable to no one—and the longer they are on the bench, the more dangerous this god-like complex becomes. Judges who believe they are untouchable mistreat their clerks with impunity.

Harassment in the judiciary is pervasive because of the enormous power disparity between Senate-confirmed judges and fresh-out-of-law-school clerks. This problem persists because of a lack of accountability mechanisms—both a lack of reporting avenues that are accessible to clerks, and the judiciary's repeated failure to punish judges who abuse their clerks. The JAA is a strong piece of legislation that would begin to address the lack of workplace protections in the judiciary. The JAA has three major parts to its framework.[11] First, it empowers judiciary employees to sue their harassers under Title VII. Second, it creates real accountability for judicial misconduct by creating a Special Counsel to investigate some misconduct complaints, revising the judicial complaint process under the Judicial Conduct and Disability Act,[12] standardizing Employee Dispute Resolution (EDR) plans, and creating a confidential reporting system. Finally, it provides for the collection and publication of data on diversity in clerkship hiring, workplace culture, and the outcomes of judicial complaints, areas that are shrouded in secrecy.

The DC Courts should be included in the JAA. Due primarily to their Senate-confirmed status, DC judges enjoy many of the same protections as federal judges—they are difficult to discipline, and difficult to remove.[13] Furthermore, the DC Courts resemble the federal judiciary in many ways. In fact, DC attorneys treat local judges, despite their unique status, like federal judges.[14]

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[7] *See* 2 U.S.C. § 1301 et. seq.; Pub. L. 104-1, 109 Stat. 3 (104th Cong.); *see also* Congressional Accountability Act of 1995 Reform Act, Pub. L. 115-397, 132 Stat. 5297 (115th Cong.).

[8] *See* art. III(1).

[9] *See* U.S. Courts, Judges and Judicial Administration—Journalist's Guide, https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide.

[10] *See* 28 U.S.C. §§ 371-74 (defining judicial retirement and resignation).

[11] *See* H.R. 4827, S. 2553 (117th Cong.).

[12] *See* 28 U.S.C. §§ 351–364.

[13] *See* D.C. Code § 11–1501.

[14] *See* Lorelie S. Masters, Latosha M. Ellis, James S. Bubar, Thorn L. Pozen, and Kevin Hilgers, Brief of the District of Columbia Affairs Community of the District of Columbia Bar, and Other Concerned District of Columbia Legal Organizations and Professionals as *Amici Curiae* in Support of Petitioners and Reversal, at 19-20, https://www.supremecourt.gov/DocketPDF/20/20-1279/175729/20210414150102962_20-1279%20Amici%20Brief.pdf.

1. DC Courts: A Workplace That Lacks Oversight

The DC Courts—specifically, the Superior Court of the District of Columbia[15] and the District of Columbia Court of Appeals[16]—are described by many DC attorneys as "hybrid" state/federal courts. They are Article I courts[17] (or "legislative courts") that were created by Congress in 1970.[18] That same year, Congress also created the CJDT to regulate DC judges[19] and to ensure that judges complied with the Code of Judicial Conduct.[20] Several years later, in 1973, under the District of Columbia Home Rule Act, Congress clarified that the DC Council could not pass laws that would alter the composition or jurisdiction of the DC Courts.[21] In effect, Congress asserted ongoing federal authority over the DC Courts.[22] This differentiates the DC Court system from other state court systems. In no jurisdiction are local judges as unaccountable to the public as they are in DC, due to both their Senate-confirmed status and the politicized nature of DC judicial appointments.[23]

DC judges resemble federal judges because they are appointed by the President and confirmed by the Senate.[24] For every judicial vacancy, the Judicial Nomination Commission (JNC) provides the White House with a list of three candidates from which to select a nominee.[25] Rather than receiving lifetime appointments, DC judges serve for fifteen-year terms.[26] They are then considered for reappointment by the CJDT.[27] However, the majority of DC judges who seek reappointment are reappointed for a second term.[28] This creates a system of de facto life tenure, since very few judges would reasonably seek to serve for more than thirty years (two terms).

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[15] *See* DC Courts, *About DC Superior Court*, https://www.dccourts.gov/superior-court.

[16] *See* DC Courts, *District of Columbia Court of Appeals Judges*, https://www.dccourts.gov/court-of-appeals/judges.

[17] *See Legislative Courts*, https://www.law.cornell.edu/constitution-conan/article-3/section-1/legislative-courts.

[18] *See* Pub. L. 91-358, 84 Stat. 475; *see also* D.C. Code Sec. 11-101.

[19] *See* DC Court Reform and Criminal Procedure Act, 84 Stat. 473, 91 Pub. L. 91-358; D.C. Code § 11-1525(a).

[20] *See* DC Courts, *Code of Judicial Conduct, 2018 Edition, District of Columbia Courts* (updated Mar. 2021), https://www.dccourts.gov/about/code-of-judicial-conduct.

[21] *See* District of Columbia Self-Government and Government Reorganization Act (1973), Pub. L. 93-198, 84 Stat. 744.

[22] *See* House Committee on Oversight and Reform, Committee Jurisdiction, https://oversight.house.gov/about/committee-jurisdiction; *see also* U.S. Senate Committee on Homeland Security and Governmental Affairs, District of Columbia, https://www.hsgac.senate.gov/issues/district-of-columbia.

[23] *See* Ann E. Marrimow, "Two judges, one courthouse and an unusual accusation of unethical conduct," WASH. POST (Nov. 8, 2021), https://www.washingtonpost.com/politics/courts_law/judge-emmet-sullivan-ethics-allegation-laurence-silberman/2021/11/08/81d83056-400a-11ec-a3aa-0255edc02eb7_story.html; *see also* Meagan Flynn and Michael Brice-Saddler, "D.C. courts 'sound the alarm' on judicial vacancies as local officials demand movement in the Senate," WASH. POST (Jan. 1, 2022), https://www.washingtonpost.com/dc-md-va/2022/01/01/dc-judges-vacancy-senate/?wpisrc=nl_sb_smartbrief.

[24] *See* DC Courts, *Types of Judges*, https://www.dccourts.gov/court-of-appeals/judges.

[25] *See* Judicial Nomination Commission (JNC), FAQs About JNC's Application Process, https://jnc.dc.gov/page/faqs-about-jnc%E2%80%99s-application-process.

[26] *See* Judicial Nomination Commission, Judicial Service in the District of Columbia Courts Frequently Asked Questions, https://jnc.dc.gov/page/judicial-service-district-columbia-courts-frequently-asked-questions.

[27] *See* Commission on Judicial Disabilities and Tenure, Judicial Reappointments, https://cjdt.dc.gov/service/judicial-reappointments.

[28] *See* Commission on Judicial Disabilities and Tenure, About CJDT, https://cjdt.dc.gov/page/about-cjdt.

The structure of the DC Courts also enables various groups who might reasonably be expected to exert oversight over judges, to disclaim responsibility. HR does not regulate DC judges. The EEO Office handles workplace dispute resolution, but they are not empowered to discipline judges either. Even the Chief Judges of the DC Superior Court and the DC Court of Appeals do not have real disciplinary authority over DC judges. Similar to a federal judge, a DC judge's "boss" for removal purposes is the President of the United States.[29] The CJDT has both disciplinary authority over judges—which they rarely exercise—and control over reappointments, creating the appearance of a conflict of interest for one of the few entities empowered to remove misbehaving judges from the bench.

Not only is the DC judiciary likely exempt from Title VII, but the DC judiciary is also exempt from the DC Human Rights Act.[30] While DC judges are theoretically subject to §1983 claims, there has never been a § 1983 claim by a law clerk against a DC judge.[31] Victimized judiciary employees are understandably skeptical about legal claims against Senate-confirmed superiors, filed in the jurisdiction where the misbehaving judge works and where one of his judiciary colleagues would preside over the case.

2. The DC Courts share many similarities with federal courts.

The DC Courts should be covered under the JAA because they resemble federal courts. The DC Courts are funded through the federal budget.[32] They are regulated by the House and Senate Oversight Committees.[33] Furthermore, DC judges follow the federal judicial salary plan.[34] Additionally, DC judges interact closely with the local federal prosecutor's office—the DC USAO.[35]

In addition, many of the DC Courts policies, including the recently-adopted EDR Plan, are modeled after the federal courts' plan.[36] Furthermore, DC law clerks,[37] with whom judges interact on a daily basis, resemble federal clerks in both their daily clerkship tasks and their employment benefits structures (including their salary plans, health insurance, and receipt of

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[29] *See* James Durling, *The District of Columbia and Article III*, 107 GEO. L.J. 1205, 1212 (2019) (explaining that DC judges do not have life tenure and "can be removed outside of the impeachment process.")

[30] *See* Robertson v. District of Columbia, et al., No. 19-CV-567, DC Ct. App. (Feb. 17, 2022).

[31] *See* 42 U.S.C. § 1983; *see also See* Forrester v. White, 484 U.S. 219, 228-30 (1988).

[32] *See* House Appropriations Comm., Financial Services and General Government Subcomm., https://appropriations.house.gov/subcommittees/financial-services-and-general-government-117th-congress; *see also* H.R. 4345 (No. 117-79), 117th Cong., https://www.congress.gov/117/bills/hr4345/BILLS-117hr4345rh.pdf.

[33] *See* House Committee on Oversight and Reform, Committee Jurisdiction, https://oversight.house.gov/about/committee-jurisdiction; *see also* U.S. Senate Committee on Homeland Security and Governmental Affairs, District of Columbia, https://www.hsgac.senate.gov/issues/district-of-columbia.

[34] *See* Judicial Nomination Commission, Judicial Service in the District of Columbia Courts Frequently Asked Questions, https://jnc.dc.gov/page/judicial-service-district-columbia-courts-frequently-asked-questions; *see also* U.S. Courts, Judicial Compensation, https://www.uscourts.gov/judges-judgeships/judicial-compensation.

[35] *See* U.S. Attorney's Office for the District of Columbia, *Superior Court Division*, (last updated Nov. 29, 2021), https://www.justice.gov/usao-dc/superior-court-division.

[36] *See* DC Courts, Employment Dispute Resolution Plan, https://www.dccourts.gov/sites/default/files/divisionspdfs/DC_Courts_Employment_Dispute_Resolution_Plan.pdf.

[37] *See* D.C. Code § 11-708 (explaining that "each associate judge may appoint and remove two personal law clerks").

Standard Form 50 proof of employment at the end of their clerkships).[38] Finally, other Article I courts—including the U.S. Court of Federal Claims—are currently covered under the JAA.[39] In fact, the Senate Judiciary Committee recently dealt with a similar issue related to Article I courts in a judicial security bill: that legislation (S. 2340) specifically enumerates several Article I courts to be included.[40] It makes no sense to exclude the DC Courts from the JAA.

3. The JAA Would Provide Critical Workplace Protections to Uniquely Vulnerable DC Courts Law Clerks.

The existing avenues for judicial accountability—internal EDR with the DC Courts and/or a judicial complaint with the CJDT—do not protect DC law clerks. As previous House Judiciary Committee[41] and Senate Judiciary Committee testimony[42] about similar processes in the federal courts have revealed, EDR and judicial complaints provide inadequate relief, considering the sensitivity of the issues, the scope of the problem, the lack of available remedies, and the long-term negative ramifications of judicial misconduct on law clerks' careers. For law clerks seeking to achieve justice for themselves and accountability for the judges who harassed them, the message from the DC judiciary is one of deafening silence in the face of misconduct.

If the JAA is not amended to cover the DC Courts, DC law clerks will have limited recourse against judges who mistreat them during their clerkships. The right to sue one's harasser is critical, and Title VII is a particularly robust antidiscrimination law with decades of precedent from which complainants could structure their claims. Through Title VII litigation, law clerks can seek monetary damages.[43] Monetary relief is particularly important for clerks who were wrongfully terminated or who were harassed until they quit partway through their clerkships. Financial remedies are also important for clerks who experience the far-reaching consequences of a malicious judge working against them, by giving negative references or badmouthing them to potential employers, and who remain unemployed for long periods after their clerkships. Furthermore, litigation (or the threat of litigation) can produce legally-binding documents—for example, an agreement for a neutral or positive reference. In order to eliminate any uncertainty about whether DC law clerks are protected by Title VII, the JAA should cover the DC Courts.

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[38] *See* D.C. Code § 11-1726; *see also* DC Courts, *Clerking on the D.C. Court of Appeals*, https://www.dccourts.gov/court-of-appeals/judges/clerkships; *and see* DC Courts, *Benefits of the DC Courts*, https://www.dccourts.gov/about/benefits-of-dccourts.

[39] *See* Judiciary Accountability Act, §5(c)(1)(B).

[40] *See* Daniel Anderl Judicial Security and Privacy Act of 2021, S. 2340 (117th Cong.).

[41] *See* Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary, 116th Cong. (Feb. 13, 2020) (testimony of Olivia Warren), https://www.congress.gov/116/meeting/house/110505/witnesses/HHRG-116-JU03-Wstate-WarrenO-20200213-U2.pdf.

[42] *See generally* Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary, Senate Comm. on the Judiciary, 115th Cong. (June 13, 2018); https://www.judiciary.senate.gov/meetings/confronting-sexual-harassment-and-other-workplace-misconduct-in-the-federal-judiciary.

[43] *See* 42 U.S.C. § 1981a(a)(l)-(3).

DC law clerks would also benefit from the JAA's other important provisions. For example, if the JAA covered the DC judiciary, this would reduce the burden on the CJDT, since a representative from the centralized Special Counsel's Office would be assigned to the DC Courts and could assist with judicial misconduct investigations. Additionally, DC clerks would benefit from the JAA's data collection provisions—data on diversity in hiring, workplace culture, and complaints against DC judges. In DC, the CJDT has not released an annual report documenting data on complaints against judges since 2018 (representing Fiscal Year 2017's data).[44] Without access to data on judicial complaints, the DC legal community is unaware of the scope of misconduct within the DC judiciary. This threatens both judicial legitimacy and public confidence in the DC judiciary. Law clerks, litigants, and attorneys who interact with and appear before judges have a right to know about judges' misconduct.

VI. Conclusion

The JAA would make vital and necessary changes to protect law clerks and other judiciary employees from harassment, discrimination, and retaliation. It would provide judiciary employees with the right to sue their harassers; it would make real strides toward robust judicial accountability by investigating and punishing judges who abuse their clerks; and it would finally aggregate and publicize data on issues that have remained hidden for decades.

Congress should amend the JAA to cover the DC Courts, in order to protect more vulnerable judiciary employees and expand their rights. DC law clerks deserve the same access to the legal system as the litigants who appear before them every day. Furthermore, DC judges, who preside over antidiscrimination cases, should be subject to antidiscrimination laws themselves.

Congress should pass the JAA, so that fewer law clerks are harassed the way I was, and those who are, can hold their harassers accountable. My story of harassment by a member of the judiciary is not rare. I am grateful for the brave law clerks who have already spoken out on this issue. I appreciate the opportunity to share my experience with this Subcommittee and to explain why harassment in the judiciary is one of the most urgent issues facing the legal community. My experience illustrates why the DC Courts should be included in the JAA: to prevent Senate-confirmed superiors from harassing and retaliating against future generations of clerks. I hope that other law clerks will feel empowered to speak out, file complaints, and work to remove more abusers from the bench. Harassment and misconduct should not be tolerated in any workplace. The judiciary is uniquely insulated from scrutiny, and uniquely unaccountable to the public. I applaud the Committee's work to draft the JAA, and I hope that it will be amended to include the DC Courts and passed this year.

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[44] *See* CJDT Publications, https://cjdt.dc.gov/publications; *see also* CJDT, 2017 Annual Report, https://cjdt.dc.gov/sites/default/files/dc/sites/cjdt/publication/attachments/CJDT%20annual%20report.pdf. In 2019 and 2020, the CJDT provided extremely limited data about the number of judicial complaints filed and their dispositions—but not annual reports—in response to questions from the DC Committee on the Judiciary and Public Safety. *See* JPS Performance Oversight Responses (Feb. 6, 2019), https://dccouncil.us/wp-content/uploads/2019/02/JPS-Performance-Oversight-Responses-2019-CJDT.pdf; *and see* JPS Performance Oversight Responses 2020 CJDT (Feb. 11, 2020), https://dccouncil.us/judiciary-public-safety-3/jps-performance-oversight-responses-2020-cjdt/.

March 17, 2022

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

It has been more than two years since I testified before this Subcommittee about the extreme and pervasive harassment I endured as a law clerk to the late Judge Reinhardt. I am grateful for this Subcommittee's ongoing commitment to protecting federal judicial employees from workplace harassment, discrimination, and retaliation. I write to convey my enthusiastic support for the Judiciary Accountability Act of 2021, and to urge Congress to pass this critical legislation.

As I testified in 2020, I chose not to report the harassment through the judiciary's Employment Dispute Resolution Plan because no one could assure me of the confidentiality I felt was necessary to prevent retaliation against me and others aware of my experience.[1] Ultimately, I concluded that testifying publicly was a safer option than reporting internally without a confidentiality guarantee.[2] The JAA's explicit protections for whistleblowers would have made an enormous difference for me as I analyzed how to proceed. And I wonder if, with such protections, others who experienced and witnessed misconduct by Judge Reinhardt in the decades before me might have spoken up sooner.[3]

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[1] Testimony of Olivia Warren Before the Subcomm. On Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary, 116th Cong., at 11–17, 19 (Feb. 13, 2020) (available at https://docs.house.gov/meetings/JU/JU03/20200213/110505/HHRG-116-JU03-Wstate-WarrenO-20200213-U2.pdf).

[2] Olivia Warren, *Enough Is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 HARV. L. REV. F. 446, 452 (2021).

[3] Two hours after my testimony concluded, one of the former Reinhardt clerks responsible for sending me into chambers emailed me an apology for her own role in the harassment I endured. She explained:

> Every single Reinhardt clerk knows that everything you said (and much, much more) is true and nevertheless, we have all given him a pass because we believe in the rest of what he did (and, let's face it, that clerkship is really good for our careers).
>
> I'm sorry for the role I played in convincing you to take the job and glossing over/justifying/compartmentalizing the mistreatment that I knew you would face because every woman in that Chambers (and many men) face it. I regret that I was not better able to see if [sic] for what it was and stand up for myself and for you and for the rest of the clerks to stop it.

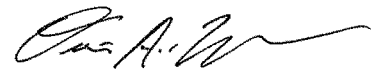
Id. at 454–55.

When I made the difficult choice to testify, I naively hoped that no one else would have to do so. I am in awe of the bravery of the witnesses today, and heartbroken that more individual courage is required to continue to expose the depth and breadth of harassment throughout the judiciary. Over two hearings you have heard from several witnesses, including myself, who tried to report and seek remedies for wrongdoing under many iterations of the judiciary's internal resolution procedures. That none have succeeded further underscores the importance and urgency of the JAA.

I hoped that the judiciary would take decades of calls to action seriously, especially in light of the repeated revelations over the past four and a half years. But instead of meaningfully investigating a problem that every other workplace also faces and is under legal obligation to address, members of the judiciary prefer to minimize the problem, applaud themselves for establishing working groups, and write law review articles extolling purported progress. The inaction on this eminently actionable problem remains baffling and deeply painful. It is a stain on our judiciary, and today marks yet another sad and shameful day in a long line of sad and shameful days.

I hope that Congress will enact this bipartisan legislation and step in to guarantee basic workplace protections for the more than 30,000 employees of the federal judiciary. I hope that members of the legal profession, most of whom continue to remain silent and disengaged, will support this call to action. And I hope that one day our courts will be deserving of public confidence in the promise of equal justice for all.

With gratitude,



Olivia Warren

March 16, 2022

The Honorable Henry C. "Hank" Johnson
Chairman, House Judiciary Committee,
Subcommittee on Courts, Intellectual Property,
and the Internet
2240 Rayburn House Office Building
Washington, DC 20515

The Honorable Darrell Issa
Ranking Member, House Judiciary Committee,
Subcommittee on Courts, Intellectual Property,
and the Internet
2300 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Johnson and Ranking Member Issa:

We, the undersigned organizations, represent a broad cohort of civil society groups, each with our own perspectives and ideological preferences on a wide range of public policy issues. However, we all share a commitment to protecting government whistleblowers as a key means of promoting a more accountable government and cracking down on waste, fraud, abuse, and corruption.

Whistleblowers are often on the front lines when it comes to exposing problems in the government, ranging from misuse of COVID-19 funding to deadly secret wait-lists for veterans seeking medical care.[1] One of the perpetual problems whistleblowers face is a lack of adequate protections from retaliation and intimidation from those who stand to be embarrassed (or worse) by a whistleblower's revelations.[2]

While our organizations may have differing positions on H.R. 4827, the Judiciary Accountability Act of 2021,[3] and this letter is not an endorsement of the bill in its entirety, we all strongly support efforts to enact protections for whistleblowers in the government, no matter which branch of government those individuals happen to serve. We are thus writing to express our support for the substance of Section 3 of H.R. 4827, which we also note closely mirrors similar whistleblower protection language contained in a previous bill championed by Senate Judiciary Committee Ranking Member Chuck Grassley (R-IA).[4] The bipartisan and bicameral interest in protecting federal judiciary whistleblowers is encouraging and should provide a strong impetus for action on this issue.

Many of our organizations have fought for years to promote enhanced protections for different types of whistleblowers, including federal government employees as a whole and, more narrowly, employees in

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[1] Roxanna Gonzalez, "False Claims Act Anti-Retaliation Claim Leveled at PPP Recipient," JDSupra, March 16, 2021, https://www.jdsupra.com/legalnews/false-claims-act-anti-retaliation-claim-5985381/; Melissa Wasser, "Protecting Whistleblowers and Promoting Accountability," Project On Government Oversight, May 19, 2021, https://www.pogo.org/testimony/2021/05/protecting-whistleblowers-and-promoting-accountability/.
[2] Nicole Ogrysko, "Federal employees have some of the worst whistleblower protections in the country, advocates say," *Federal News Network*, August 2, 2021, https://federalnewsnetwork.com/workforce-rightsgovernance/2021/08/federal-employees-have-some-of-the-worst-whistleblower-protections-in-the-country-advocates-say/.
[3] Judiciary Accountability Act of 2021, H.R. 4827, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/4827/text?r=81&s=1.
[4] Judicial Transparency and Ethics Enhancement Act of 2017, S. 2195, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/senate-bill/2195?s=1&r=83.

the intelligence community.[5] Different circumstances call for different kinds of protections, but an untenable reality remains: Across all levels of the federal government, whistleblowers do not have the protections they need in order to reveal hard truths without fear of reprisal. This creates a chilling effect on those who could blow the whistle on government malfeasance and, in turn, produces a less accountable and more corrupt government. But as some pro-whistleblower stakeholders have noted, Congress is in prime position to do something about this troubling situation.[6]

All of this applies to the federal judiciary just as much as it does to any other branch or entity within the federal government. Therefore, we write to applaud the committee for considering the bipartisan Judiciary Accountability Act, which would extend best practice whistleblower protections for all employees, irrespective of employment category, within the judicial branch. The lack of such existing protections is another manifestation of the government-wide problem of impunity for those who act improperly and retaliation against those who bravely attempt to shine a light on that misconduct from within. The judiciary is no exception. Ensuring that whistleblowers in the judiciary have appropriate and robust protections will only benefit the judicial branch as a whole by deterring misconduct and promoting accountability. Several instances in recent years lay bare the accountability problem in the courts.

First, in 2018, the Judicial Council of the U.S. Court of Appeals for the Tenth Circuit was alerted to several instances of sexual harassment by District of Kansas Judge Carlos Murguia. Pursuant to the Judicial Conduct and Disability Act, Chief Judge Timothy Tymkovich appointed a Special Committee to investigate these allegations, which found that "Murguia gave preferential treatment and unwanted attention to female employees of the Judiciary in the form of sexually suggestive comments, inappropriate text messages, and excessive, non-work-related contact, much of which occurred after work hours and often late at night."[7] The council added, "All of the harassed employees stated that they were reluctant to tell Judge Murguia to cease his behavior because of the power he held as a federal judge."[8] This grave concern about retaliation contributed to an environment that deterred victims from coming forward, prolonging a cycle of harassment as Murguia kept his job far longer than he should have.

And in 2020, Olivia Warren, a North Carolina-based attorney and former law clerk to Ninth Circuit Judge Stephen Reinhardt, testified before your subcommittee about the harassment she was subjected to by Reinhardt. She said, "[A] barrier to reporting harassment for law clerks [is] the possibility of immediate retaliation by the judge," which "is supplemented by the possibility of long-term retaliation by those

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[5] Government Accountability Project, "Make It Safe Coalition Praises New Legislation to Protect Whistleblowers," Press Release, August 4, 2020, https://whistleblower.org/press-release/press-release-make-it-safe-coalition-praises-new-legislation-to-protect-whistleblowers/; Melissa Wasser, "Fact Sheet: Strengthening Protections for Intelligence Community Whistleblowers," Project On Government Oversight, January 3, 2022, https://www.pogo.org/resource/2022/01/strengthening-protections-for-intelligence-community-whistleblowers/.

[6] Andrew Lautz, "House Oversight Should Advance Three Bills to Improve Oversight of Taxpayer Dollars," National Taxpayers Union, June 28, 2021, https://www.ntu.org/publications/detail/house-oversight-should-advance-three-bills-to-improve-oversight-of-taxpayer-dollars.

[7] Order at 2 in re: Complaint under the Judicial Conduct and Disability Act (No. 10-18-90022), Judicial Council of the Tenth Circuit, September 30, 2019, https://www.ca10.uscourts.gov/sites/ca10/files/misconduct/10-18-90022.J.pdf.

[8] Order at 2-3 in re: Complaint under the Judicial Conduct and Disability Act (No. 10-18-90022), Judicial Council of the Tenth Circuit, September 30, 2019, https://www.ca10.uscourts.gov/sites/ca10/files/misconduct/10-18-90022.J.pdf.

devoted to protecting his reputation and remaining in his good graces."[9] This includes not only future employers in the private sector, but also judges and officials elsewhere in the judicial branch, since law clerks often have multiple clerkships or take positions as staff attorneys later in their careers.

We believe that the substance of Section 3 of H.R. 4827 would greatly protect whistleblowers in the judiciary, which would help promote a more accountable government, with fewer opportunities for corruption and abuse to go unchecked. We thank you for your vital work on this matter. We stand ready to support these efforts and look forward to engaging with your offices further.

Sincerely,

Accountability Lab
Alabama Black Women's Roundtable
Alliance to Counter Crime Online
Blue Ridge Environmental Defense League
Blue Wave Postcard Movement
Broward for Progress
Center for Justice & Democracy
Center for Media and Democracy
Center for Progressive Reform
Chapel Hill Organization for Clean Energy
Clean Elections Texas
Community Science Institute, Inc.
Constitutional Alliance
Consumer Action
Corruption Kills
Council for a Livable World
Defending Rights & Dissent
Demand Progress
Fight for the Future
Fix the Court
Government Accountability Project
Government Information Watch
Indivisible Santa Fe
International Association of Whistleblowers (IAW)
Kentucky Equal Justice Center
Kohn, Kohn and Colapinto, LLP
Law Enforcement Action Partnership

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[9] *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet*, 116th Cong. (February 13, 2020)(testimony of Olivia Warren), https://www.congress.gov/116/meeting/house/110505/witnesses/HHRG-116-JU03-Wstate-WarrenO-20200213-U2.pdf.

Liberty Shared
Mariposa Legal, program of COMMON Foundation
National Center for Health Research
National Employment Law Project
National Employment Lawyers Association
National Freedom of Information Coalition
National Judicial Conduct and Disability Law Project, Inc
National Taxpayers Union
National Whistleblower Center
Ohio Fair Courts Alliance
Open The Government
PRESS4WORD2020
Pride at Work
Project On Government Oversight
Protect All Children's Environment
Protect Democracy
Public Citizen
Public Employees for Environmental Responsibility
R Street Institute
Revolving Door Project
Safe Harbor Law, LLC
Shriver Center on Poverty Law
Stand Up America
The Digital Democracy Project
The Signals Network
Transparency International U.S. Office
UNITED SIKHS
Washington Coalition for Open Government
Whistleblower Network News
Whistleblowers of America
WhistleblowersUK
Woodhull Freedom Foundation
Workplace Fairness
X-Lab

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To:	Subcommittee on Courts, Intellectual Property, and the Internet
From:	Michelle Cohen Levy, EDR Counsel for Ms. Caitlyn Clark
Date:	March 17, 2022
Re:	Hearing on Workplace Protections for Federal Judiciary Employees

Thank you for the opportunity to submit written testimony today. My name is Michelle Cohen Levy, and I am an attorney admitted to practice in Maryland and Florida, including the District Courts in the Southern and Middle Districts of Florida. After graduating with a B.A. from The Johns Hopkins University, I went to The University of Miami School of Law and graduated in 2009. I began my legal career working for a small firm in Miami, Florida before being recruited to an AM Law 100 Firm. During those first five years of practice, I handled a variety of civil litigation claims, including employment matters. At the time, I represented almost exclusively defendants. I was a "super star" attorney, sought out for my writing and creative arguments –developing arguments that prevailed in the trial and appellate courts.

Ultimately, I decided to open my own practice in Fort Lauderdale, Florida. Over the last 8 years, my practice has grown to employ a team of women – unintentionally, all mothers. I grew that practice during two of my own pregnancies and while parenting a one-year-old and a three-year-old during a global pandemic. I decided to focus on employment law because it has impacted me my entire working life – before, during, and after law school. Having practiced employment law for nearly a decade, I have had the privilege of litigating approximately 90% of my cases in federal court. I predominantly represent employees at all stages of their claims – from internal investigations to the EEOC process and, ultimately, in litigation. Based on my experience attempting to navigate the judiciary's reporting procedures as counsel for a complainant, I strongly support the need for expanding statutory protections available to employees of the federal judiciary.

Over the past year, I have had the privilege of representing Ms. Caitlyn Clark with respect to her claims for pregnancy discrimination, harassment, and retaliation arising from her employment as a term law clerk for the Honorable Ashley Royal in the Middle District of Georgia. As you will no doubt hear during her courageous testimony, Ms. Clark is an intelligent, hard-working, personable attorney, wife, and mother.

In January 2020, six months into the first year of her two-year clerkship, Ms. Clark joyfully announced that she was pregnant with her second child. Suddenly, her bright career – one she hoped would continue as a staff attorney or career clerk with the federal judiciary – was derailed. In November 2019, Judge Royal offered Ms. Clark an extension of her clerkship to a four-year term, but subsequently rescinded that offer in June 2020 after Ms. Clark announced her pregnancy and complained to Judge Royal about discriminatory and harassing treatment from his career clerk. Ms. Clark's testimony will provide the details of the treatment she received for the remaining months of her clerkship, which culminated when Judge Royal notified her of her termination just days before her maternity leave. Shortly after Ms. Clark was terminated and gave birth, the Middle District of Georgia adopted the Employment Dispute Resolution Plan, effective September 14, 2020 ("EDR").[1] Some months later – after Ms. Clark navigated the "Informal Advice" and "Assisted Resolution" steps of the EDR Plan – she retained me to represent her through the Formal Complaint process.[2]

[1] Available at https://www.gamd.uscourts.gov/sites/gamd/files/GAMD-EDR-Plan.pdf.

For those of you who are not familiar with federal employment-discrimination claims outside of the EDR process, in order for an employee to pursue a typical claim, the employee must allege (1) membership in a protected class; (2) qualifications for the position; (3) treatment that differed from individuals not in the protected class; and (4) an adverse employment action. In order to pursue a typical retaliation claim, the employee needs to allege that she engaged in protected activity and suffered an adverse employment action as a result. In my experience, employers file motions to dismiss and/or motions for summary judgment – and prevail – based on two main theories: (1) lack of evidence of discriminatory intent; and (2) lack of temporal proximity (i.e. too much time has passed between the protected activity and the adverse employment action). In reviewing Ms. Clark's claims, I had no doubt that Ms. Clark would be able to overcome both of those hurdles, because her case presented some of the strongest facts I've ever seen.

Ms. Clark had the qualifications, an offer of a raise, and an offer to extend her clerkship for two additional years because of the excellent quality of her work. But when she announced her pregnancy, all of that began to slip away. Judge Royal's career clerk immediately expressed dismay at Ms. Clark's pregnancy announcement, spent the next few months undermining, excluding, and excessively criticizing and harassing Ms. Clark, and finally admitted that she was "infuriated" at Ms. Clark for being pregnant. When Ms. Clark reported the career clerk's harassment to Judge Royal, he began searching for her replacement within 24 hours. There was no indication that Judge Royal informally investigated or attempted to resolve the issue – in fact, Judge Royal admitted in his interview that he "laughed" at the suggestion that he speak with human resources. Two months later, Judge Royal rescinded his offer of the two-year extension of Ms. Clark's clerkship. Finally, just before Ms. Clark went on maternity leave, Judge Royal informed Ms. Clark that her employment would be terminated at the conclusion of her maternity leave. More than 18 months later, Ms. Clark remains unemployed. Ms. Clark's testimony will explain the significant, ongoing impact of this misconduct on both her personal and professional life.

This letter does not aim to speak for Ms. Clark or to tell her story, because her testimony will speak to that. Instead, the EDR process is what keeps me up at night. The idea that employees of the federal judiciary – the very same branch of government making daily determinations on claims of employment discrimination – are not entitled to have their claims independently investigated in a transparent process that protects their confidentiality is deeply disturbing. The final nail in the coffin is that, even after navigating this opaque, biased process, the employee does not have any effective remedy. In all my years litigating federal employment-discrimination claims, I have rarely – if at all – seen a complaint for discrimination, harassment, and retaliation as meritorious as this case; however, the merits of this case were irrelevant given the highly flawed nature of the EDR process itself. And although I wish I could attribute all of these flaws to the process as applied to Ms. Clark's case or within that particular district, I've come to realize that these flaws are how the process is intended to work. The following sections provide a brief overview of the numerous procedural hurdles, inconsistencies, and questionable decisions I encountered as Ms. Clark's counsel. These examples are by no means exhaustive.[3]

Opaque Processes and Procedures

From the outset of my involvement in this process, I came up against unnecessary, seemingly manufactured hurdles. First, despite the fact that neither Georgia nor federal law applied to Ms.

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[2] Ms. Clark had to navigate this pre-complaint process without counsel. As I explain, *infra*, the process is not welcoming to legal representatives.

[3] I have obtained Ms. Clark's permission to discuss these particular items.

Clark's claims, the Presiding Judicial Officer ("PJO") required that I submit a motion for admission *pro hac vice* to the Middle District of Georgia.[4] This required retaining counsel admitted to practice before the very Court that was the subject of Ms. Clark's claims. That unwritten requirement in and of itself creates a virtually insurmountable obstacle for employees of the judiciary. Employees must find an attorney willing to take on the Court – perhaps even the very Judge – before which they practice regularly. I was fortunate to find someone who was admitted to the jurisdiction but did not practice there regularly who was willing to check this box. This requirement was an unnecessary barrier given that, as the EDR Plan says, neither the rules of evidence or civil procedure apply.

After clearing that obstacle, I learned that the PJO had unilaterally scheduled Ms. Clark's "interview" to take place in person, despite being aware that I did not reside nearby. When I requested that the interview be conducted via videoconference, the PJO declined. When I requested reconsideration based on the PJO's own administrative order from only two weeks prior. which recognized that "the Covid-19 coronavirus remains a serious health crisis in the Southern District of Georgia," the PJO again denied my request. I appeared by telephone while Ms. Clark appeared in person. No explanation was provided for the repeated denials, which was particularly disturbing given the health risks posed to Ms. Clark and her children.

When Ms. Clark's interview started, we learned that the PJO had already interviewed the career clerk and the Clerk of Court and was scheduled to interview Judge Royal and his former deputy the following day. That was when we first realized that we would not have the opportunity to attend or participate in the interviews or ask any questions. None of these decisions had been conveyed to me or Ms. Clark by either the PJO or the EDR plan administrators.

Also at the outset of Ms. Clark's interview, we learned that the PJO had already requested documents from Judge Royal, his career clerk, his former deputy, and the Clerk of Court for the Middle District of Georgia. We still do not know the specifics of what the PJO requested. We still do not know what parameters were provided in asking for documents. And we still do not know what was searched. What we do know is that the time-period covered by the curated documents starts on the day that Ms. Clark announced her pregnancy, intentionally omitting everything from the first six months of her clerkship, which would be highly relevant to her complaint. We also know that, despite having retired in December 2020, the former deputy was able to contact Judge Royal's chambers and simply ask for certain documents, an opportunity that was never afforded to Ms. Clark and that flies in the face of considerations of judicial confidentiality.

We did not get the opportunity to submit our own discovery requests or access any of Ms. Clark's emails or internal messages or work product. We did not get the opportunity to speak with other witnesses like the former law clerk, part-time law clerk hired around the same time as Ms. Clark's complaint to Judge Royal, or the replacement law clerk hired immediately thereafter. Judge Royal, however, contacted the former law clerk and relayed his version of that conversation during his interview, a practice which would be highly questionable in any other proceeding.

In reviewing the interview transcripts, it was clear that Judge Royal, his career clerk, and his former deputy had all spent a significant amount of time discussing this matter with one another, even going so far as to rely on each other's documents and timelines. The PJO never asked about those internal

[4] Under the EDR, the PJO is the Chief Judge of the Middle District of Georgia or another federal court judge appointed by the Chief Judge. In Ms. Clark's proceeding, the Chief Judge of the Middle District of Georgia appointed Judge Hall, the Chief Judge of the Southern District of Georgia. I understand that the Federal Judiciary Workplace Conduct Working Group recommended that Formal Complaints be overseen by a PJO from outside of the court where the complaint originated. In Ms. Clark's case, the PJO was from outside of the court where she filed her complaint. Nevertheless, the issues described below regarding impartiality persisted.

conversations or how much of the information each individual provided based on their personal recollection versus the recollection of the collective. I had no reason to believe that the PJO had been trained in how to conduct this investigation in a fair or impartial way.

At the end of Ms. Clark's interview, I asked the PJO how things would proceed from there given that the EDR Plan did not provide any specific guidance regarding a party's ability to conduct discovery. The PJO said that he would "send out a schedule and let [us] know what [he]'ll be seeking in terms of input and timeframe for any responses." The PJO never provided any schedule or further information. Instead, the PJO issued a proposed decision. In response, we submitted Ms. Clark's factual and procedural objections, only a handful of which were even mentioned in the final order – and then, only to dismiss them outright.

The proposed written order and final written order were, in essence, summary judgment motions. But unlike any summary judgment motion I had ever encountered before, they were based on unsworn interviews and gave weight to the testimony of one witness over another despite the inconsistencies between them. We received the transcripts less than two weeks before the PJO issued the proposed written order and had no opportunity to effectively rebut any testimony.

The entire process – conducted via email through an "EDR Coordinator" – was shrouded in secrecy, making it ripe for abuse. There was correspondence between the PJO and Judge Royal that we did not receive a copy of, only learning of it for the first time when it was attached as an exhibit to the final written opinion issued by the PJO. The absence of rules or explanation of rights regarding discovery means a judicial employee does not know what they can and cannot do. The lack of any docket for EDR complaints makes it impossible for anyone to rely on precedent.

On July 23, 2021, we filed an appeal to the Eleventh Circuit Court of Appeals. Briefing on the appeal concluded with Ms. Clark's surresponse on October 8, 2021. Since that time, we have not received any communication from the Eleventh Circuit.

The process contains too many flaws to effectuate real justice or to serve as a meaningful check on the judiciary. It's almost as if the process is created entirely from scratch for each complaint, without any of the due process protections or procedural mechanisms available to any litigant that appears before a federal court. The irony is that the PJO, who is a federal judge with his own docket, applies those processes and procedures every day in other cases; however, Ms. Clark did not receive even the benefit of a case schedule.

Lack of Meaningful Confidentiality – Risk of Retaliation

Without meaningful confidentiality – and consequences for breaching that confidentiality – any judicial employee who pursues a claim runs the risk of retaliation. While some may scoff at the idea that judges would retaliate against employees, one need only read the interview of Judge Royal to understand not only the anger and offense taken, but also the retaliatory animus. Judge Royal does not hold back in talking about Ms. Clark's "devious" and "corrupt" action in bringing her claims – the very same type of claims addressed in his courtroom on a regular basis. Judge Royal goes on to state that he discussed this matter with others in the courthouse, including other judges, and "nobody at [his] courthouse wants her back."

These comments are deeply troubling for numerous reasons. First, there is nothing devious or corrupt about using the procedures created by the judiciary to report misconduct, even if Judge Royal disagrees with the merits of Ms. Clark's case. Comments like these can only stifle others who may want to report misconduct. Second, Judge Royal made these comments in the context of a formal

proceeding before another federal judge. That the PJO did not question the propriety of these comments or the potential risk of retaliation—which the EDR Plan also prohibits, at least on paper—is highly concerning. Third, the fact that Judge Royal discussed the EDR complaint with others in the courthouse—including other judges who do not appear to be related to the case—is in and of itself appears to be a violation of the EDR policy. Fourth, Judge Royal admitted to violating the confidentiality of the EDR process in an interview with the PJO and the PJO did not address that violation in any way or express concern with how this might constitute retaliation.

Not only does the employee bringing the claim run the risk of retaliation, but also employees who are interviewed as part of any investigation run that risk as well. There is no protection whatsoever for these employees. If an employee witnesses discrimination, harassment, or retaliation, that employee could themselves be the subject of retaliation for speaking about it. These concerns are why the functions of investigation and adjudication are typically separated in our legal system; however, they appear to be of no concern in administering the EDR Plan to employees that work within that system.

Not only do judicial employees run the risk of retaliation; their representatives do as well. When I took this case, one of my first questions was where the claim was pending, because I was worried about the impact on my other clients or my own legal career. While I initially didn't think much of pursuing a claim in Georgia, I now wonder what the Eleventh Circuit Court of Appeals must think of me, particularly given that this appeal is likely the first time they've heard my name. Ideally, these matters would be handled by an independent office. And under any circumstance, one would hope that the EDR Plan's language concerning retaliation would be taken more seriously.

Complete Lack of Impartiality

This complaint involving a judge from one district was referred to a judge from another district within the same circuit. This did not insulate this process from bias. From the discovery process through the final order, the entire process has been fraught with what are essentially ex parte communications between the PJO and the employees of the Middle District of Georgia who are the subject of Ms. Clark's complaint. Any other litigant in any other action would have filed a motion to recuse the PJO. Even now, we ask judges to recuse themselves when they own stock in a company – how can we not insulate this process that has a significantly more direct impact on the legitimacy of the judiciary?

At the conclusion of Ms. Clark's interview, I initially felt reassured when the PJO informed us that he would issue a schedule and some guidance. He went so far as to say that "there probably would be a fair amount of disputed facts in this case" when discussing the possibility of a hearing. Despite those statements, he entered a proposed written order without issuing a scheduling order, without allowing Ms. Clark to pursue any discovery, without giving Ms. Clark the opportunity to request a hearing, and without holding a hearing. He then issued a final written order over Ms. Clark's factual and procedural objections.

There were several questions of fact that, in any other litigation, would have precluded the entry of summary judgment. From the career clerk's admission that she was "infuriated" to the patriarchal comments that permeate the interviews of Judge Royal and his former deputy, there are questions about the motivation for rescinding the extended clerkship and ultimately terminating Ms. Clark's employment. In any other litigation, the parties would have been permitted to engage in discovery to further flesh out statements like that of Judge Royal saying that when Ms. Clark returned from leave they would "just kind of put her out to pasture[.]"

At minimum, I cannot imagine a tribunal entering summary judgment – especially without discovery – where the employer admitted on the record that the day after an employee complained of discrimination, the employer began looking for the employee's replacement. That seems particularly true when that employer has already offered the employee a two-year extension because of the employee's work.

At the outset of every interview, the PJO explained the process of the interview and what he would do with the information and documentation. Notably, at the outset of his interview of Judge Royal, the PJO did not provide any such guidance. Instead, he and Judge Royal immediately launched into discussion, as if they already had a separate conversation. As the interview progressed, the PJO interceded at times to guide Judge Royal's statements in a particular direction, highly unusual for a purportedly impartial investigation.

Lack of Effective Remedies

Virtually every other employee in the country – especially those who work for the federal government – have a mechanism for addressing workplace harassment/discrimination and retaliation. The laws designed to protect employees from discrimination and retaliation do not apply to the federal judiciary. The EDR talks about those laws and dismisses their applicability, but then tells the presiding judicial officer to look at them as a "guide."

Under normal circumstances, an employee would be entitled to back pay, front pay, compensatory damages, interest, and attorney fees. Under the EDR, the employee might be entitled to – at most – some amount of back pay. This discourages an employee from pursuing a claim since there is effectively no upside and the downside is high: to do so is tantamount to career suicide. It also makes it even more difficult to obtain legal representation since pursuing a claim on behalf of an employee of the judiciary can also be career suicide. The judicial employee needs to essentially be independently wealthy or hope to obtain pro bono representation.

In conclusion, this process undermines the legitimacy of the judiciary by holding the judiciary to a completely different standard. Not only is the standard applicable to the judiciary different from any other employer, the judiciary is fully aware of the standards that apply to all other employers because the federal judiciary is charged with resolving those disputes. In allowing the judiciary to operate as its own investigator and arbiter, there is no meaningful path for a judicial employee to make a confidential complaint, obtain an independent investigation of that complaint, and, if dissatisfied with the outcome of that investigation, pursue their claim through the means available to virtually every other employee.

Respectfully,



Michelle Cohen Levy

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March 17, 2022

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

Re: Hearing on Workplace Protections for Federal Judiciary Employees

Dear Chairman Johnson, Ranking Member Issa, and members of this Subcommittee:

Thank you for the opportunity to submit a letter to the record today. My name is Deeva Shah, and I am an attorney at Keker, Van Nest & Peters LLP. I am also a former law clerk to Judge Raymond Fisher, who sat on the U.S. Court of Appeals for the Ninth Circuit, and to Judge Stephen Wilson, a Judge of the U.S. District Court for the Central District of California.

Just over two years ago, I testified before this Subcommittee about the federal judiciary's reporting procedures and what more could be done to encourage and facilitate the reporting of misconduct. I write to support the Judiciary Accountability Act of 2021 and to provide materials that explain the need for this legislation.

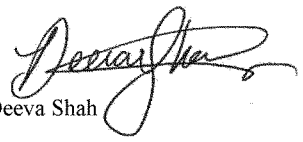
In August of 2021, my colleagues and I submitted an amicus brief in a case pending before the Fourth Circuit on behalf of current and former employees of the federal judiciary who had witnessed or experienced harassment and discrimination. That brief, which is attached as **Exhibit A**, recounts these instances of misconduct and the ways in which the judiciary's internal adjudication processes failed to prevent or remedy that misconduct. We described the ongoing, tangible impact of that misconduct on the lives and careers of these employees. A number of amici signed the brief anonymously because they still fear retaliation.

The flaws in the judiciary's reporting procedures impact its employees in different ways. Two individuals who have worked in the federal judiciary asked my colleagues and I to submit letters on their behalf to further explain these flaws. These individuals wished to provide this Subcommittee with specific examples of why the judiciary's Employment Dispute Resolution (EDR) Plan does not effectively address misconduct; however, they sought to do so anonymously because of their well-founded fears of retaliation. In providing these letters to the subcommittee, I have verified the identities of these individuals and confirmed that both have worked in the federal judiciary in the roles described in their letters. The letter from an anonymous former law clerk is attached as **Exhibit B** and the letter for an anonymous federal judiciary employee is attached as **Exhibit C**.

I hope that the attached brief and letters can provide insight into the serious problem of misconduct within the federal judiciary and the significant lack of both effective reporting procedures and adequate remedies. Congressional action is necessary to guarantee basic workplace protections for the employees of the judiciary.

Regards,

KEKER, VAN NEST & PETERS LLP



Deeva Shah

KEKER\4443\TAKEBACK\1840775.v1-3/16/22

Exhibit A

21-1346

United States Court of Appeals

for the

Fourth Circuit

JANE ROE,

Plaintiff/Appellant,

– v. –

UNITED STATES OF AMERICA, *et al.*,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT ASHEVILLE

BRIEF FOR NAMED AND UNNAMED CURRENT AND FORMER EMPLOYEES OF THE FEDERAL JUDICIARY WHO WERE SUBJECT TO OR WITNESSED MISCONDUCT AS *AMICI CURIAE* IN SUPPORT OF APPELLANT JANE ROE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1346 Caption: Jane Roe v. United States, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Named and Unnamed Current and Former Employees of the Federal Judiciary Who Were Subject to or
(name of party/amicus)

Witnessed Misconduct

who is amici curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 8/26/2021

Counsel for: Amici - Judiciary Employees, App. A

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United States Courts, *Model Employment Dispute Resolution Plan* 2

INTEREST OF AMICI CURIAE

Amici curiae are current and former employees of the federal judiciary who were subject to or witnessed harassment, discrimination, and retaliation during and after their tenure as judiciary employees.[1] They include current and former federal public defenders, law clerks, and employees of the Administrative Office of the Courts ("AO"). They were subject to and witnessed harassment, bullying, and discrimination—frequently based on sex, race, sexual orientation, and pregnancy status—in courts and defenders' offices across the country. Some amici reported their experiences through formal processes, but many did not feel able to do so without considerable risk. Some amici have faced explicit retaliation for their attempts to address wrongful conduct.

For many amici, the harassment and discrimination they were subject to while working for the judiciary continues to have a tangible impact on their lives and careers, affecting the location and subject

[1] A list of amici curiae is appended to this brief. Pursuant to Fed. R. App. P. 29, amici certify that no party's counsel authored this brief, in whole or in part, and that no person other than amici or their counsel have made any monetary contributions to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

areas in which they work, how they navigate workplaces, and their sense of personal and professional self-worth. These effects—as well as the trauma and cost of sharing these experiences—deterred many potential amici from joining this brief, even anonymously. Of the dozens of current and former judiciary employees who expressed interest, only about a third felt able to share their experiences.

SUMMARY OF ARGUMENT

When it comes to employment law, the federal judiciary is a uniquely insulated institution: responsible for interpreting laws but exempt from many of them, run by judges who dole out justice for a living but are functionally immune from lawsuits.[2] As a result, judiciary employees—unlike most other workers in the United States—lack basic workplace protections, including those guaranteed by Title VII of the Civil Rights Act and the Americans with Disabilities Act.[3] In place of these anti-discrimination statutes is an entrenched reverence for

[2] *See, e.g.*, *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978).

[3] *Cf.* United States Courts, *Model Employment Dispute Resolution Plan* ("EDR Plan") at 2, https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a_oji-2019-09-17-post-model-edr-plan.pdf (listing statutory provisions not directly available to judiciary employees).

judicial independence and an inflexible belief that the judiciary "can police [its] own."[4]

Yet the judiciary's self-policing neither protected Jane Roe from being stalked and harassed by her supervisor nor remedied this harassment after the fact. In fact, Jane Roe's experience with the judiciary's inadequate internal disciplinary procedures drove her out of a public defense career to which she had long aspired (and in which she was excelling). She is hardly alone, both in terms of the harassment she faced and how the judiciary's reporting procedures failed her.

In the past few years, a handful of former law clerks have come forward to describe sexual harassment they were subject to while clerking for federal judges.[5] But these publicly shared stories are

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[4] Ann E. Marimow, *Federal judiciary leaders approve new rules to protect court employees from workplace harassment*, Wash. Post (Mar. 12, 2019), https://www.washingtonpost.com/local/legal-issues/federal-judiciary-leaders-approve-new-rules-to-protect-court-employees-from-workplace-harassment/2019/03/12/588a7208-44c3-11e9-8aab-95b8d80a1e4f_story.html.

[5] *See, e.g.*, *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet* of the H. Comm. on the Judiciary, 116th Cong. (2020) (Testimony of Olivia Warren), https://www.congress.gov/116/meeting/house/110505/witnesses/HHRG-

dwarfed by similar experiences that have not been shared in public. When harassment is perpetrated or sanctioned by a life-tenured judge or judicially appointed Federal Defender, reporting the misconduct may not feel like an option. And even for those brave enough to report their experiences, like Roe, the adjudication of their complaints often leaves them without meaningful recourse, subject to retaliation for exposing that misconduct in the first place.

Amici file this brief to illustrate the nature of harassment and discrimination to which judiciary employees were subjected and the ways in which the judiciary's internal adjudication processes have failed to prevent or remedy such misconduct. We hope the Court takes away from this brief an understanding that Jane Roe's experience was far from isolated. As is true within any institution, employees of the judiciary have faced and will continue to face instances of harassment

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116-JU03-Wstate-WarrenO-20200213-U2.pdf ("Warren Testimony"); Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, Wash. Post (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html.

and discrimination. They deserve a reporting and disciplinary process that is fair, unbiased, and which provides meaningful redress, reflecting best practices that are standard in other fields—including the rest of the legal industry.

ARGUMENT

The federal judiciary employs more than 30,000 people. These employees include judicial staff and administrators, probation and pretrial services officers, and federal public defenders. When these employees face workplace harassment and discrimination, their avenues to report misconduct are limited—in number, in substance, and in outcome.

Section I provides employees' first-hand accounts of harassment and discrimination to highlight the nature of that misconduct. Section II details the general failures of the judiciary's current reporting procedures, which leave employees without real remedy and vulnerable to retaliation. Section III explains how these failures have long-term impacts on amici, the legal profession, and the judiciary.

I. DISCRIMINATION AND HARASSMENT OF ALL KINDS ARE PERPETRATED WITHIN THE JUDICIARY

A. Federal Public Defenders' Offices

Multiple amici were subject to harassment or discrimination while working, like Roe, in federal public defenders' offices. One amicus was encouraged to apply for a job as an assistant federal public defender ("AFPD") by a male attorney in the office.[6] Before she started work, this attorney, whom she understood would be her supervisor, asked her out for drinks. The amicus accepted, "believing that he would be a long-term friend and mentor."[7] He acted inappropriately, eventually attempting to kiss her.[8] When the attorney asked her out again, she declined. After that, the amicus explained: "I felt that [the supervisor] began to treat me differently. At one point, I was so terrified of him when I was alone in his office that I sprinted out. I started feeling extreme anxiety."[9] The amicus received very few assignments, and after only three weeks, the Defender asked her to resign.[10] When she asked

[6] June 10, 2021 Interview.

[7] May 10, 2021 Testimonial.

[8] *Id.*

[9] *Id.*

[10] *Id.*

why, he told her that she "seemed generally unhappy" and that some of the staff felt uncomfortable because she had asked if her "healthcare covered birth control."[11] She had no choice but to resign on the spot.[12]

Another amicus learned soon after becoming an AFPD that his supervisor was gossiping with coworkers, U.S. Marshals, and even a judge about the fact that the amicus was gay.[13] This supervisor "would come into [the amicus'] office and put his foot up on the chair or otherwise try to assert some sort of dominance," and even "tried to convince [amicus] to go to church with him."[14] The amicus eagerly accepted a position in a different office, only to experience worse treatment.[15] Coworkers told him that his new supervisor and others speculated about his sex life and spread rumors that he slept with his clients.[16] This supervisor also assigned him "all of the transgender

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[11] *Id.*

[12] June 10, 2021 Interview.

[13] June 4, 2021 Testimonial.

[14] *Id.*

[15] *Id.*

[16] *Id.*

cases" and "a disproportionate share of the child pornography cases."[17] Although amicus attempted to informally discuss the misconduct with the Defender, amicus was fired shortly thereafter in what he alleges was retaliation for reporting misconduct.[18]

One amicus noted that at least seven of his coworkers openly acknowledged the "rampant racial discrimination" in his FPD office. This discrimination took multiple forms: attorneys of color were bullied regularly, given higher caseloads and more grunt work, deprived of opportunities to work on high profile cases, and consistently denied leave for family-related matters.[19] He noted that the discrimination was subtle; instead of being overt, it was embedded in the office culture. But just as with overt acts of harassment, the amicus found that the ongoing, pervasive discrimination affected his ability to do his job and seek advancement.

Another amicus, who worked in a defender's office with a history of discrimination and harassment, was hopeful when a new Defender

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[17] *Id.*

[18] *Id.*

[19] Aug. 20, 2021 Interview.

was appointed.[20] However, when she learned that he planned to promote certain attorneys with a history of harassing behavior, she raised concerns with him—a decision predicated on his repeated promises that any reports would remain confidential.[21] Soon after, one of the attorneys she had discussed with the Defender aggressively confronted her, yelled at her and threatened to have her fired because she reported his history of engaging in discriminatory harassment.[22] The amicus again reported that attorney's behavior to the Defender, who instructed her to keep quiet and move forward. Over the following years, the Defender—and each member of the management team about whom she had complained—intimidated the amicus, made baseless accusations that she failed to follow rules, pressured her to give a false narrative to an investigator about a separate misconduct complaint filed by a colleague, and demanded she disclose confidential

[20] July 15, 2021 Interview.

[21] *Id.*

[22] *Id.*

conversations with that investigator.[23] This concerted behavior and hostile environment made it impossible for her to do her work.[24]

B. Judicial Clerkships

Other amici were subject to harassment by coworkers while clerking for federal judges. One amicus was persistently harassed by her judge's judicial assistant, who critiqued her clothes, hair, and lack of makeup.[25] "It was so stressful to get dressed in the morning," the amicus recalls.[26] The judicial assistant also made disparaging comments about queer and Jewish individuals—this amicus is bisexual and Jewish.[27] "I felt persistently harassed every day and it made it really hard to show up and try to succeed at my job," she said.[28]

Another amicus was targeted by her judge's permanent clerk after disclosing she was pregnant.[29] Before that point, the judge had been

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[23] *Id.*

[24] *Id.*

[25] July 22, 2021 Interview.

[26] *Id.*

[27] *Id.*

[28] July 22, 2021 Email.

[29] May 20, 2021 Testimonial.

pleased with her work, approved a raise, and asked the amicus to clerk for two more years.[30] After she disclosed her pregnancy, the permanent clerk acted in a hostile manner and privately criticized her work to the judge.[31] When the amicus confronted her, the permanent clerk said "she was angry that [amicus] was pregnant" because "the pregnancy and the baby were going to add to [the permanent clerk's] workload" and interfere with her personal life.[32] The day after the amicus reported this abuse, the judge began looking for a new term clerk to replace amicus. The judge eventually rescinded his offer of an additional two-year clerkship term and terminated amicus' employment during the pandemic, just ten days before her baby was born.

Other amici were sexually harassed by their co-clerks. One amicus reports that, during an appellate clerkship, her male co-clerks "liked to joke about having sex with or raping [her]."[33] They asked about her sexual preferences and simulated anal sex by grabbing her and

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] May 6, 2021 Testimonial.

spinning her around.[34] Another amicus described how her male co-clerk, with whom she shared an office, made inappropriate remarks about her body, including trying to guess her bra size.[35] He also asked graphic questions about her sex life and speculated about what sexual acts she and her partner might perform.[36] The co-clerk told female externs to "act more like Monica Lewinsky," and later announced proudly that he had gotten "handsy" with one of those externs.[37] The amicus was so afraid of being left alone with the co-clerk that she began leaving work early and skipping social events (which can be important for professional advancement).[38]

Then, of course, there are the amici who were subject to misconduct by judges. For some amici, this harassment was sexual. In 2020, amicus Olivia Warren testified before Congress about her clerkship with the late Judge Stephen Reinhardt. Warren described the judge's constant denigration of her appearance, demeaning speculation

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[34] *Id.*

[35] June 28, 2021 Interview.

[36] *Id.*

[37] *Id.*

[38] *Id.*

about her sex life, and combative comments about feminism and the #MeToo movement.[39] Multiple women have also come forward with allegations of sexual harassment by former Judge Alex Kozinski. Amicus Heidi Bond described her experience of being summoned to Kozinski's office so that he could show her pornography and ask if it aroused her.[40] She described how his conduct during her clerkship was "beyond inappropriate."[41] She explained: "I wished that he had never told me that he controlled when I slept, when I ate, that I had never been given reason to worry about whether my bodily autonomy was at stake in other ways, too."[42] Other amici witnessed Kozinski make "sexist comments and jokes on a regular basis,"[43] and were the recipients of some of these comments.[44] Kozinski's misconduct was an "open secret"—to his clerks, his peers, and even circuit executives.[45]

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[39] Warren Testimony at 7-8.

[40] Heidi Bond, Kozinski, *Courtney Milan*, https://www.courtneymilan.com/metoo/kozinski.html.

[41] *Id.*

[42] *Id.*

[43] April 27, 2021 Testimonial

[44] May 3, 2021 Testimonial.

[45] Dahlia Lithwick, *He Made Us All Victims and Accomplices,* Slate

Another amicus accepted a clerkship with a preeminent appellate judge after her first year of law school.[46] Before she started, she was approached by at least three former clerks to warn her that the judge might treat her differently because of her appearance.[47] To combat her increasing anxiety, she purchased new clothes to obscure her figure and developed an "emergency plan" in case the harassment became unbearable.[48] Throughout her clerkship, she kept a running log of comments the judge made about her appearance: his remarks on her legs and hair and instructions on what to wear.[49] She ultimately decided that the benefits of the clerkship outweighed the costs, but she found the experience to be "a disruption: frustrating, annoying, and exhausting."[50]

The abusive behavior to which amici were subjected would never be tolerated in most workplaces. One amicus, who is queer, learned

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(Dec. 13, 2017) https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html.

[46] July 29, 2021 Interview.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

that—before she started her appellate clerkship—her judge repeatedly referred to her by using a slur for her sexual orientation.[51] Another clerk told the judge that was inappropriate, and the amicus believes the judge felt policed and treated amicus with suspicion and hostility, while repeatedly attempting to ascertain details of her sexual history.[52] The judge also constantly yelled at and belittled amicus, questioning her intellect.[53] At one point, the amicus had a major confrontation with her judge about these comments.[54] The amicus lost job opportunities in retaliation for her "disloyalty."[55] The amicus moved and began practicing in a different location to avoid further retaliation.

A different amicus was bullied by his judge.[56] The judge subjected him "to verbal hostility and mind games, including characterizing [his] work as garbage, assigning the other clerks to supervise [his] work, and

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[51] May 10, 2021 Interview.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] May 21, 2021 Testimonial.

consistent double standards."[57] The amicus now practices in an area of the law where he will not encounter his judge.[58]

Judges and supervisors within the judiciary have also engaged in discriminatory treatment in the context of hiring. One amicus interviewed with a high-profile appellate judge, but the interview felt off from the beginning.[59] The judge exhibited no interest in her legal achievements and instead fixated on her husband.[60] When she mentioned that she and her husband would have a long-distance relationship if she were to clerk for the judge, the judge "grimaced" and said, "Well, in my experience, a good clerk is a happy clerk, and I don't think you'll be happy in that situation."[61] The amicus realized she was not getting the job—despite limited discussion of her qualifications—and left the interview feeling deflated and confused.[62] Another amicus, who was engaged at the time, was asked to confirm in an interview that

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[57] *Id.*

[58] *Id.*

[59] June 25, 2021 Testimonial.

[60] *Id.*

[61] *Id.*

[62] *Id.*

she would not become pregnant during the clerkship.[63] Multiple former clerks noted that their judges made discriminatory remarks about clerkship candidates based on race, gender, and sexual orientation.

Although this section provides first-hand accounts of harassment, bullying, and discrimination, many potential amici chose not to include their accounts (even anonymously) for fear of retaliation. Nevertheless, the experiences highlighted above illustrate that misconduct is not an isolated problem within the federal judiciary.

II. THE JUDICIARY'S CURRENT REPORTING PROCEDURES ARE FUNDAMENTALLY FLAWED

Although there are multiple avenues to report misconduct, judiciary employees tend to go through either the Fair Employment Practices System (FEPS) complaint process, available to AO employees, or the Employment Dispute Resolution (EDR) Plan, available to all other judiciary employees.[64]

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[63] June 28, 2021 Interview.

[64] Although there are other reporting mechanisms, they fall outside the scope of this brief. For example, the Judicial Conduct and Disability Act applies only to federal judges.

Following the allegations against Kozinski, Chief Justice Roberts established the Federal Judiciary Workplace Conduct Working Group ("Working Group") to examine workplace misconduct in the judiciary.[65] The Working Group revised the model EDR Plan, which the Judicial Conference approved in 2019 for adoption by each court.[66] The EDR Plan provides three reporting options: employees (1) may seek informal advice about their rights and reporting options from an EDR Coordinator, the Circuit Director of Workplace Relations, or the national Office of Judicial Integrity; (2) can request Assisted Resolution, which may include preliminary investigation and mediation; and (3) can file a Formal Complaint.[67] Once a Formal Complaint is filed, the Presiding Judicial Officer (PJO) determines the nature—if any—of

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[65] United States Courts, *Fact Sheet for Workplace Conduct in the Federal Judiciary*, https://www.uscourts.gov/about-federal-courts/workplace-conduct/fact-sheet-workplace-conduct-federal-judiciary.

[66] *Id.* Courts do not have to adopt the Model EDR Plan. *See* EDR Plan at 12. Because plans vary, this brief refers to the Model EDR Plan to discuss specific provisions. Although some amici were subject to misconduct prior to the 2019 revision, the scope of that revision does not obviate the issues and challenges described herein.

[67] EDR Plan at 5-7.

discovery, written submissions, and hearings.[68] The PJO then issues a written decision, ordering dismissal or implementing remedies.[69] An employee may appeal that decision to the judicial council of the circuit, although the PJO's decision will be affirmed "if supported by substantial evidence and the proper application of legal principles."[70]

The AO's FEPS complaint process requires employees to first complete informal counseling, after which they may file a Formal Complaint. If the FEP officer accepts the complaint, an investigation is conducted and a report prepared. The complainant may then request a hearing, but ultimately the FEP officer issues a final decision, which can be appealed to an Article III judge in certain instances.

Although the plans are different, they share four significant flaws:

(1) opaque processes;

(2) lack of meaningful confidentiality, which heightens the risk of retaliation;

(3) no indicia of impartiality; and

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[68] *Id.* at 6-10.

[69] *Id.* at 9-11.

[70] *Id.* at 11.

(4) limited remedies.

Each flaw disincentivizes reporting, entrenches misconduct, and leaves judiciary employees without basic employment protections or due process. As demonstrated below, Roe and the amici confronted these flaws throughout their employment. Some amici discovered the flaws upon reporting; others decided not to report at all.

A. The reporting processes and procedures are opaque.

A lack of clear procedures prevents judiciary employees from obtaining full and fair investigation and adjudication of complaints regarding misconduct. Employees reporting misconduct frequently lack significant information about the scope and breadth of an investigation.

For example, no district is required to adopt the model EDR Plan. And because that Plan is not administered by a central entity, the process due to any complainant varies significantly. Some districts allow full-fledged discovery; others limit investigation to those interviews the district's investigator chooses to conduct. Even when a particular district permits discovery, the procedures may not be outlined anywhere. This prevents complainants from demanding

discovery to which they may be entitled.[71] In some districts, the complainant may also never review a final report.

Multiple amici who reported misconduct noted that, if their claims were investigated, any investigation was cursory at best. One amicus expressed incredulity that she was not interviewed about her own experience prior to the conclusion that her claims lacked merit.[72] Another amicus stated that the investigator did not interview any of the individuals on the amici's witness list. A third amicus reported a pattern of abusive behavior by a member of chambers' staff; the investigator failed to investigate any evidence of a pattern or practice.

The amici also felt they lacked guidance and communication. One amicus described submitting his complaint, only to hear nothing for months; eventually, he learned there was confusion over whether the district or appellate court would have jurisdiction.[73] Another amicus was frustrated that she was not allowed to conduct discovery or cross-

[71] EDR Plan at 9 ("The Federal Rules of Evidence and any federal procedural rules do not apply.").

[72] June 10, 2021 Interview.

[73] June 4, 2021 Testimonial.

examination before the ruling against her.[74] The PJO never provided guidance on discovery,[75] and interviewed witnesses on his own, including the judge who allegedly retaliated against the amicus. The transcript of that interview revealed that the PJO "steer[ed]" the accused judge's answers and "ask[ed] leading questions."[76] The amicus and her counsel had no opportunity to object or cross-examine the judge.[77] The interview ended with the witness-judge asking the PJO to grab lunch.[78]

The above-described obstacles—which mirror Roe's experience—seem to be a feature of the system rather than a bug. For example, Roe met with the national Judicial Integrity Officer (JIO) to discuss these difficulties. The JIO allegedly told Roe that every court handles these processes differently, which means the judiciary's decentralized approach is inherently "barebones" and has "no rules."[79] The JIO

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[74] June 29, 2021 Email.
[75] *Id.*
[76] July 19, 2020 Email.
[77] *Id.*
[78] *Id.*
[79] *Id.* ¶ 430.

encouraged Roe to pursue motions and discovery, despite the lack of any formal guidance.[80] In effect, Roe—like many amici—began learning the rules of the proceeding while in the middle of it, but she had no way to confirm the accuracy of those rules or their application in practice.

B. The lack of meaningful confidentiality in reporting heightens the risk of retaliation.

Confusion regarding confidentiality contributes to the ever-present fear of retaliation. The judiciary wields confidentiality as both a sword and a shield. In multiple instances, employees have been unable to keep the contents of their complaints confidential. Without clear delineation of what information will be kept confidential, employees face the almost-certain knowledge that their colleagues—and potential witnesses—will learn about the specifics of their complaint. But the judiciary also uses confidentiality to limit employee knowledge, by citing confidentiality concerns to preclude complainants from reviewing investigation reports or confronting witnesses. Employees are thus deterred from reporting because of the inevitable disclosure of their

[80] *Id.* ¶ 432.

complaints, all while the judiciary strictly controls what—if any—information is available to that employee.

The fear of retaliation is quite possibly the largest barrier to reporting harassment or discrimination within the judiciary. Although the plans define misconduct to include retaliation, that alone cannot dampen the threat of retaliation or its far-reaching consequences. On a professional level, judiciary employees face losing recommendations and tarnishing their reputations if they report misconduct. Because many supervisors in the judiciary are the only managers of their silos, they become the sole reference for those employees when seeking future employment. These fears are particularly acute in small or isolated districts or where an employee does not have many other references—i.e., a recently graduated law clerk. And on a personal level, retaliation—or even the possibility of it—can make it difficult to complete the day-to-day tasks of a job.

The current procedures also do not explain how the judiciary determines whether a complainant has been subject to retaliation and what the appropriate remedy is. The only option seems to be filing

another EDR complaint, a circular solution that does not instill confidence in the workability of the system.

Facing the potential professional and personal repercussions, many amici did not feel reporting was a realistic option without meaningful confidentiality. Amicus Olivia Warren testified that even the new reporting policies—following recommendations from the Working Group in 2019—"did not appear to provide a truly confidential option to report harassment or misconduct."[81] Given the "lack of meaningful guidance on what confidentiality would apply" to her complaint—even from the JIO, she decided not to report within the judiciary. She concluded that publicly testifying before Congress would be far more likely to protect her against retaliation. As one amicus who was bullied by his judge explained, "If that happened to me in my current professional setting, I would absolutely report."[82] But, like Ms. Warren, he was not aware of any truly confidential internal reporting

[81] Warren Testimony at 15.

[82] May 27, 2021 Interview.

mechanisms, and the professional consequences of leaving his clerkship early felt too great.[83]

Another clerk decided not to report because she had already suffered retaliation after confronting her judge.[84] She described how chambers staff contacted potential employers and, in at least one instance, succeeded in having amicus' offer of employment revoked.[85] Although at least one other judge was aware of the retaliation she was subject to, he did not seek further information. This interaction cemented her belief that reporting would be ineffective. As for one amicus who was sexually harassed by her co-clerks, she didn't know to whom she could effectively report without retaliation.[86] Her harassment was "not a secret"—other clerks in her courthouse and at least one judge knew about the harassment and did nothing to stop it. Approaching her judge was not an option.[87] "There was a serious

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[83] *Id.*

[84] May 10, 2021 Interview.

[85] *Id.*

[86] July 28, 2021 Interview.

[87] *Id.*

possibility he would just do nothing, and that people would know I had tried to talk to him about it."[88]

Multiple law-clerk amici acknowledged that they chose not to report for fear of retribution from former law clerks. Olivia Warren's congressional testimony explained why:

> Judges have networks of former law clerks to whom the judge's reputation is inextricably intertwined with their own. This group therefore has reasons both devoted and selfish to want to protect the judge's reputation at all costs. . . . [T]he 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.[89]

As another amicus explained, the reporting systems were "beside the point," because potential retribution ensured that the "incentives were so warped" against reporting.[90] She noted that former clerks with a

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[88] *Id.*

[89] Warren Testimony at 12-13; *see also* Olivia Warren, *Enough is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 Harv. L. Rev. F. 446, 451 n.18 and n.19 (Jun. 20, 2021), https://harvardlawreview.org/2021/06/enough-is-not-enough-reflection-on-sexual-harassment-in-the-federal-judiciary/ (detailing public and private fallout after testimony).

[90] July 29, 2021 Interview; *see also* Leah M. Litman and Deeva Shah, On Sexual Harassment in the Judiciary, 115 Nw. U. L. Rev. 599 (2020), https://scholarlycommons.law.northwestern.edu/nulr/vol115/iss2/5 (describing myriad ways in which the clerkship system and professional

vested interest in protecting their judge's reputation would undoubtedly impact her ability to find a job.[91]

For those amici who filed an EDR report, these concerns affected their ability to engage in the process. One amicus explained how uninvolved colleagues were somehow aware of the details of her complaint despite the promise of confidentiality.[92] Another AFPD was "severely shamed and ridiculed" by colleagues in her small office when she did file a complaint.[93]

The fear of retaliation does not just affect whether employees report; it deters people from challenging these EDR or FEPS processes or serving as counsel for complainants. Amicus Heidi Bond, who publicly disclosed the harassment she was subject to during her clerkship, expressed immense frustration that the Working Group report attempted to blame any confusion about confidentiality on law clerks. She described how the Working Group reached this "damaging"

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norms disincentivize reporting and replicate hierarchies).

[91] *Id.*

[92] July 15, 2021 Interview.

[93] June 10, 2021 Interview.

conclusion without talking to her even once—notwithstanding her public comments—thus "minimizing the actual gaslighting that happened to [her]."[94]

Amici have been subject to retaliation for speaking publicly about these issues.[95] Moreover, these amici receive requests each month from current judiciary employees seeking EDR counsel. But amici have found that fear of retaliation also deters volunteers; many lawyers who practice in federal courts refuse to take on (mostly pro bono) cases that involve the judges, staff, and federal defenders they interact with on a regular basis.

C. The reporting procedures do not ensure impartiality.

The judiciary's current processes entrench—instead of assuage—concerns about impartiality and fairness. Unlike the strict division

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[94] May 11, 2021 Testimonial.

[95] *See, e.g.,* Letter submitted for the record from Jaime Santos, https://docs.house.gov/meetings/JU/JU03/20200213/110505/HHRG-116-JU03-20200213-SD001.pdf (describing a federal judge's retaliatory public comments about law clerks' advocacy efforts and how there was "no upside to filing a complaint about an incident that the judiciary already knew about. Doing so could have adversely impacted [her] effectiveness as an advocate and [her] ability to generate business.").

among investigation, prosecution, and adjudication that governs cases filed in court, the federal judiciary's reporting procedures do not explicitly differentiate among these steps. This elision of roles creates a high risk of incomplete investigations and unfair judgments.

The investigators and decision-makers within the judiciary are frequently supervisors and are likely to know—or have recommended, hired, or become friends with—people accused of misconduct. Even when the investigator does not directly know the subject of investigation, this proximity—usually within the same district—creates situations where protecting personal relationships can outweigh fairness and impartiality. This concern is illustrated by the experiences of many amici outlined *supra*. Moreover, many judges are loath to criticize how another judge runs her chambers, which can impact the quality of an investigation and limit the relief available to a complainant. This self-policing system lacks both the substance and veneer of impartiality.[96]

[96] Although the EDR Plan recognizes the importance of impartiality, it fails to explain how the Plan guarantees impartiality. *See* EDR Plan at 4.

Amicus Olivia Warren expressed concerns about reporting within the Ninth Circuit because "it was very clear how beloved Judge Reinhardt was and [she] could not trust that they would receive the information confidentially or with an open mind."[97] Another amicus explained that the small federal bench in her district meant her complaint would—and did—inevitably end up before her judge's friends.[98] And like Roe, multiple amici noted similar concerns about filing complaints against their local Defender, who (1) had been appointed by the judges who would adjudicate the complaint, and (2) were friends with many of the investigators and coordinators. These biases also found their way into the investigative process; one amicus recounted an investigator's description of a decade-long relationship

[97] Warren Testimony at 15; *see also* Cathy A. Catterson, Opinion, *Letters to the Editor: In Defense of the Late 9th Circuit "Liberal Lion" Judge Stephen Reinhardt*, L.A. Times (Feb. 26, 2020, 3:00 AM), https://www.latimes.com/opinion/story/2020-02-26/9th-circuit-liberal-lion-judge-stephen-reinhardt (public letter from former Ninth Circuit executive chastising Olivia Warren for her testimony; the Ninth Circuit has never addressed the letter).

[98] May 20, 2021 Testimonial.

with the "good people" the amicus had accused of discrimination and how those people "didn't mean to" engage in misconduct.[99]

Another amicus grew increasingly frustrated about racial disparities in his office after over 20 years as an AFPD.[100] He considered the EDR process but decided that it would be—at best—pointless. He understood that any complaint against the Defender would be decided by federal judges in that circuit. Because the Defender was "very chummy" with the judges who had appointed him, the amicus felt that his concerns would not receive a fair evaluation and that he would likely face further discrimination and harassment for filing a complaint.[101] So, after two decades in a job he loved, he quit.[102]

D. Remedies are severely limited.

Finally, the judiciary's current reporting procedures leave victims without adequate redress. The EDR Plan is severely limited in what actions can be taken against a judge, as removal is not possible.

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[99] June 10, 2021 Interview.

[100] July 24, 2021 Interview.

[101] *Id.*

[102] *Id.*

Adjudicators generally lack any enforcement ability within chambers, FPD's offices, or in probation and pretrial services.[103] Thus, any complaint may be futile from the start, as the available remedies are incomplete, ineffective, or unenforceable.[104]

Roe's case exemplifies the futility of reporting procedures without remedies. Months after Roe filed her complaint, the JIO allegedly told Roe that Article III judges lacked the authority to order a federal defender's office to comply with any settlement terms.[105] The circuit mediator recognized the futility of the EDR process, explaining that many settlements "were vetoed by the AO because the judiciary lacked statutory authority to implement those remedies."[106] These limitations were not outlined in the EDR Plan.

Similarly, an amicus filed an EDR complaint in which her allegations were substantiated. That victory was hollow. The sole

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[103] EDR Plan at 11 n.3 ("The [PJO] lacks authority to impose disciplinary or similar action against an individual.").

[104] Ironically, although AFPDs don't have access to statutory protections (i.e., Title VII and the ADA) as employees of the judiciary, their counterparts—AUSAs—do as employees of the Department of Justice.

[105] Compl. ¶ 439.

[106] *Id.* ¶ 416.

recommendation was that the judicial assistant who engaged in misconduct watch a training video; no one ever followed up on whether that occurred.[107] The judicial assistant faced no other consequences and refused to speak to the amicus for the rest of the year.[108] The amicus expressed frustration at the "toxic" lack of oversight in the judiciary, despite ongoing retaliation after her complaint.[109]

Other amici noted how the judiciary's remedies stifle complainants. For example, the judiciary's proposed settlements following investigations force complainants into further silence. Many amici did not realize that EDR settlements typically require a non-disclosure agreement, regardless of whether an investigation substantiated the complaint. For those amici, the NDA requirement confirmed their suspicions that the judiciary's focus was to limit public blowback—not to ensure effective redress.

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[107] April 27, 2021 Interview.

[108] *Id.*

[109] *Id.*

III. THESE FLAWED REPORTING PROCEDURES HAVE A LONG-TERM IMPACT ON EMPLOYEES' LIVES

Amici have felt the repercussions of this misconduct far beyond their employment with the judiciary. On a personal level, multiple amici described the compounding anxiety of coping with harassment and discrimination while also deciding whether and how to report. They described bouts with depression, anxiety, and PTSD during and after their employment. As one amicus explained, "I felt so invalidated during the EDR process . . . and went to therapy for over a year to cope."[110] A former law clerk described her experience as "traumatic," a "year" of "feeling emotionally unsafe at work."[111] She described daydreaming about getting into a car accident so she could avoid going into chambers.[112] A former AFPD disclosed that her colleagues' "ridicule and attacks" after she reported made her consider ending her life.[113]

Many of the amici who reported misconduct emphasized that they would not report misconduct in the future. Many amici left their dream

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[110] May 10, 2021 Testimonial.

[111] July 22, 2021 Interview.

[112] *Id.*

[113] May 10, 2021 Testimonial.

jobs or the legal profession entirely because of this misconduct. One amicus, who had a passion for criminal defense work, now works in-house in a non-litigation role to avoid interactions with her harasser in her small legal community.[114] Others physically moved to locations where retaliation was less likely.

Unsurprisingly, these repercussions disproportionately impact underrepresented populations in our profession—i.e., women, people of color, and other minority groups. One amicus, a woman of color, began her clerkship right after law school; the judge "regularly verbally abused, insulted, and yelled at" her.[115] This amicus lost her confidence and "was convinced that [she] could not be successful, either as a clerk or in the legal profession."[116] By the time she realized her situation was not normal, "reporting felt extremely scary—made worse by [her] sense that there were no clear policies, safeguards, or mechanisms for fairness in place."[117] Another amicus, who saw several colleagues make failed

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[114] *Id.*

[115] Aug. 16, 2021 Testimonial.

[116] *Id.*

[117] *Id.*

attempts to file EDR complaints, explained that the judiciary's processes exhibit a pattern of disregard for complaints.[118] Another amicus dejectedly concluded that the "whole EDR process is a sham and a complete injustice."[119]

This disillusionment with the judiciary and the profession is particularly unfortunate.[120] As amicus Olivia Warren testified, "[A]ttempting to navigate how to report that misconduct indelibly colored my view of the judiciary and its ability to comprehend and adjudicate harm."[121]

Multiple amici echoed that the judiciary is simply unable to police itself. Those amici include Laura Minor, the former Equal Employment Opportunity Officer for the AO and the former Secretary of the Judicial Conference, both positions providing insight into misconduct

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[118] July 15, 2021 Interview.

[119] July 19, 2021 Email.

[120] As one amicus noted, "federal judges are among those best-positioned . . . in terms of acting against discrimination and harassment." June 3, 2021 Interview. But "like many workplaces, when there is a problem, those in power can have an effect on whether justice prevails." *Id.*

[121] Warren Testimony at 17.

proceedings.[122] Ms. Minor noted that even as an executive in the AO, she was subject to discrimination as a Black woman; however, the FEPS plan—which she administered—exempted her from filing a complaint.[123] She summarized her significant experience overseeing workplace-misconduct complaints:

> I watched for over 20 years and what I saw, every step of the way, was the judiciary circling the wagons any time there was a complaint made by an employee. It was impossible for an employee to break through that. Even if the judiciary says they can monitor themselves, the culture prohibits that. A lot of judges are really good people, but there's something about being a member of the club. When somebody violates the rules, instead of holding them accountable, the judiciary makes sure nobody comes in and tells them what to do.[124]

She emphasized that despite over two decades of working groups, she has yet to see ***any*** meaningful change in how the judiciary handles complaints.[125] The flaws she described had a common thread: the

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[122] March 24, 2021 Interview.

[123] *Id.*

[124] *Id.*

[125] *Id.*

judiciary's insistence on policing itself without oversight or accountability.

Amici recognize the irony of the fact that the judiciary insists it can police itself, yet it does not have enough faith in its self-policing to allow Roe to bring her complaint in federal court. In dismissing Roe's complaint, the district court confirmed that Roe—and others—could not access the same procedures and remedies the federal judiciary uses to resolve thousands of employment cases every year. Thus, amici respectfully submit this brief in support of Petitioner Jane Roe, because they know firsthand the repercussions of enduring and reporting misconduct as employees of the federal judiciary. Amici hope that current and future employees of the judiciary can access the same rights and protections afforded to their peers and supposedly guaranteed by the Constitution.

IV. CONCLUSION

For the foregoing reasons and those stated in Jane Roe's brief, the decision of the district court should be reversed.

Dated: August 26, 2021

Respectfully submitted,

KEKER, VAN NEST & PETERS LLP

/s/ Erin E. Meyer
ERIN E. MEYER
DEEVA SHAH
Attorneys for Amici Curiae

CERTIFICATE OF RULE 32 COMPLIANCE

I certify the following in accordance with Fed. R. App. 32(g)(1):

1. This brief complies with the type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (i.e., cover page, disclosure statement, table of contents, table of authorities, certificate of counsel, signature blocks, proof of service, addendum), this brief contains 6,499 words.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Federal R. App. 32(a)(6), because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Century Schoolbook type style.

Dated: August 26, 2021

/s/ Erin E. Meyer
ERIN E. MEYER
ATTORNEY FOR AMICI CURIAE

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Erin E. Meyer
ERIN E. MEYER
ATTORNEY FOR AMICI CURIAE

APPENDIX A

LIST OF AMICI CURIAE

Olivia Warren

Former Law Clerk

Heidi Bond

Former Law Clerk

Laura Minor

Former Associate Director for the Department of Program Services for the Administrative Office of the Courts (AO), Former Equal Employment Opportunity Officer for the AO, Former Secretary to the Judicial Conference of the United States

Leah Litman

Assistant Professor of Law, University of Michigan Law School
Former Law Clerk

Joanna L. Grossman

Ellen K. Solender Endowed Chair in Women and the Law, SMU Dedman School of Law
Former Law Clerk

Caitlin Halpern

Former Law Clerk

Leah Judge

Former Law Clerk

Jaime A. Santos

Former Law Clerk

Deeva Shah

Former Law Clerk

Maile Yeats-Rowe

Former Law Clerk

Anonymous

Former Employee, Administrative Office of the Courts

Anonymous

Former Federal Public Defender Administrator

Anonymous

Assistant Federal Public Defender

Anonymous

Former Assistant Federal Public Defender

Anonymous

Former Assistant Federal Public Defender

Anonymous

Former Assistant Federal Public Defender

Anonymous

Deputy Federal Public Defender, Former Law Clerk

Anonymous

Former Law Clerk, U.S. Court of Appeal

Anonymous

Former Law Clerk, U.S. Court of Appeal

Anonymous

Former Law Clerk, U.S. Court of Appeal

Anonymous

Former Law Clerk, U.S. District Court

Anonymous

Former Law Clerk, U.S. District Court

Anonymous

Former Law Clerk,
U.S. District Court

Anonymous

Former Law Clerk

Anonymous

Former Law Clerk

Anonymous

Former Law Clerk

Exhibit B

To:	Subcommittee on Courts, Intellectual Property, and the Internet
From:	Anonymous Former Law Clerk, submitted through counsel[1]
Date:	March 17, 2022
Re:	Hearing on Workplace Protections for Federal Judiciary Employees

Dear Chairman Johnson, Ranking Member Issa, and members of this Subcommittee,

Thank you for the opportunity to submit written testimony today. My testimony arises from my attempt to use the federal judiciary's Employment Dispute Resolution (EDR) process to report the harassment and discrimination that I faced during my clerkship. I understand that the judiciary has stated on multiple occasions that the newest version of the EDR plan can effectively address misconduct. I disagree. I ultimately succeeded on the merits of my EDR complaint, but the process still failed me.

As a brief background, because I graduated from a top law school with excellent grades, I was able to launch my legal career with the most prestigious and competitive of first legal jobs: a clerkship in the federal judiciary. I was proud and thrilled. I hoped to develop research and writing skills, become familiar with the judicial process, and gain a powerful mentor.

But the harassment began on Day One and only escalated from there.[2] I was openly taunted on the basis of my gender expression, sexual orientation, and religion. The bullying and harassment were ongoing, pervasive, and continuous.[3] My modest aspirations of learning and being mentored were quickly replaced with a more primitive goal: just make it through the year.

Clerking is a tremendously insular experience. I spent 60-80 hours a week working with just a handful of people. The nature of the job requires that almost everything that occurs in chambers remains confidential, a practice reinforced multiple times when I began clerking. My judge was protected by his lifetime appointment, and his permanent staff had been working with him for over a decade. Relative to any of them, I was powerless, working a one-year term alone in a city where I had no friends and no support system. I wanted to quit, but I could not; I did not have the financial means to be unemployed for even a brief period, and I knew that legal employers for the rest of my career would have questions about a clerkship that ended before the one-year mark. Instead, I daydreamed every

[1] To preserve my anonymity, I am submitting this letter through my counsel at Keker, Van Nest & Peters LLP. *See* Letter of Deeva V. Shah.

[2] The harassment I faced was not from the judge but from a member of the judge's staff. Harassment and discrimination in this uniquely isolated environment can take many forms.

[3] As I explain at the end of this letter, I submit this letter anonymously because I am concerned about potential retaliation. For that reason, I also do not provide specific, identifiable details about the harassment and discrimination I faced, nor do I believe such details are necessary given the meritorious result of my EDR complaint.

morning about getting hit by a bus on the way to work. To put it lightly, my mental health suffered.

It took months for me to muster the courage to go to Human Resources to learn about the EDR options, and months after that to make the decision to file a formal complaint. When I finally spoke to the Human Resources Director about what was happening to me, almost six months into my one-year clerkship, I learned that I was running out of time to file a complaint. The policy forbade reporting incidents over 180 days old, regardless of whether there was an ongoing pattern of such behavior. If I wanted to capture my experiences to date, I had to be prepared to file a complaint immediately, with six months of my clerkship still ahead.

I spent the next three months trying to decide whether to file a complaint. I was scared of retaliation, of burning bridges with my judge, and of losing future opportunities. I had worked so hard to obtain this clerkship, and I had already survived several months of the job. I consistently received glowing feedback on my substantive work. If I could just finish out the year without making a fuss, I could leave with a positive reference from a powerful judge. Filing a complaint meant losing what I had sacrificed so much to gain. I felt alone in facing this massive decision. And all the while, because of the 180-day statute of limitations, every day that I delayed resulted in losing another day of my early experiences of harassment.

Everything changed for me when it came time to interview candidates for the next clerkship term. Bright-eyed, intelligent, eager law students from all over the country were flying to our city and arriving in chambers to interview, desperate to impress us and to secure this life-changing opportunity. As I interviewed these candidates, I was not asking, "*Who is most qualified?*" but rather, "*How can I choose someone to subject to this experience?*" As I participated in offering the job to two wonderful applicants—one of whom shares with me an identity that had been the basis for some of the most hurtful harassment I'd experienced—I knew I could not make peace with my role in the hiring process if I did not simultaneously take any action within my power to address the hostile work environment in my chambers. I decided to file a formal EDR complaint.

I filed the complaint about nine months into my one-year clerkship. I could not wait any longer; I had already lost the ability to include several salient stories from my onboarding process, and two of the most robust, overt, and well-witnessed incidents of harassment and discrimination had taken place exactly six months earlier. I would have vastly preferred to file a comprehensive complaint after the conclusion of my clerkship, but I did not have that option. I could only show up every day and continue to do my best as a clerk, even as my complaint detonated on my chambers like a bomb.

I did my best to continue performing my job while the judge, my co-clerk, and chambers staff were subjected to detailed interviews about each and every allegation in my complaint. No one in my chambers received any guidance, support, or training about how to handle the impacts of the investigation. I had the strong

impression that the individuals overseeing the investigation had never conducted one before. I also had the strong impression that, to the extent my allegations were taken seriously, they were concerning because of their reflection on the judge and the federal judiciary, and not because of their impact on me. The outcome of my case reaffirmed that impression.

About a month after I filed the complaint, I received a written decision. The decision validated the truthfulness of my allegations and found, in very clear terms, that I had been subject to harassment and bullying that contributed to a hostile work environment. The decision stated that any distributed copies of the decision should remain confidential, although I had never agreed to keep my allegations or the outcome of the complaint confidential. Notably absent from the decision were any required modifications to the work environment, only limited recommendations regarding training. I also learned that the EDR Policy did not empower the Hearing Officer to impose remedies impacting the chambers of another judge—only to make recommendations—a fact that was not apparent from the text of the policy. The investigator congratulated me on my favorable decision and sent me back to my office.

That was the end of the process. I had to continue working in chambers for two more months. There were no consequences to the finding that my work environment was hostile and no discernable efforts to correct the problems identified. At no point did anyone from Human Resources contact me again or ask if the issues had been resolved. To the contrary, I experienced retaliation from the staff member against whom I had filed the complaint; they refused to speak with me, even about job-related functions. When my clerkship ended, I provided feedback to the Human Resources Director about how I felt disappointed and let down by the process. No one ever followed up. After everything I had risked, I was left with no reason to believe that the situation would be any better for the incoming clerks. I had succeeded, but still, I had failed.

I was able to finish out the year and move on to an excellent opportunity, but the experience has had a lasting impact. I do not use my judge as a reference when applying for jobs. I am anxious when starting new jobs and hyper-alert to the possibility of harassment. I do not view Human Resources as a safe or useful workplace resource. In an exit interview for the job I had following my clerkship, I mentioned that there were assignment issues that had gone unaddressed. The Human Resources staff member shared many ways she could have intervened to improve my experience in that workplace. I regretted that I did not approach her sooner, but after my experience with the judiciary, it simply had not occurred to me that Human Resources could provide me with any meaningful support. That conversation also highlighted the many ways in which the judiciary's reporting procedures are less effective and far less meaningful than the basic protections available in other workplaces. I cannot provide a rational explanation for that difference other than that the judiciary sees itself as an exception to the rules it is tasked with interpreting.

Though it is difficult to recount my experience with the federal judiciary's EDR process, I will continue to do so in every setting available to me, knowing that clerks continue to cycle through my judge's chambers every year without any protections or oversight. However, I retain my anonymity because I know that my judge's name carries so much more power than mine. Moreover, the EDR process made the limits of my power perfectly clear: even if I am corroborated, believed, and validated, nothing will change. I did everything a person in my position could do, and still I accomplished nothing at all. These limits on my power are the logical outcome of the judiciary's EDR process, even—and especially—when the process performs as designed.

I hope that changes now. Thank you for your consideration.

Exhibit C

To:	Subcommittee on Courts, Intellectual Property, and the Internet
From:	Anonymous Judiciary Employee, submitted through counsel[1]
Date:	March 17, 2022
Re:	Hearing on Workplace Protections for Federal Judiciary Employees

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

I write this letter to share my experience with an insidious, unwritten feature of the federal judiciary's Employment Dispute Resolution (EDR) Plan: the use of non-disclosure agreements (NDAs). I write this letter anonymously because of my enduring fear that I will be harassed and retaliated against for sharing my experiences related to the EDR Plan.

Several years ago, I reported to my employer conduct by other staff that amounted to pervasive abusive conduct and discriminatory harassment against other employees. Rather than investigate my reports of wrongful conduct, my employer began to harass, discriminate and retaliate against me, which culminated in threatening behavior. I engaged the EDR process because of the escalating nature of my employer's behavior, including the threat of termination.

It quickly became clear to me that the EDR process itself was riddled with numerous conflicts, including the requirement that I negotiate with my employer about the conduct they perpetuated. The process was skewed in terms of support; my employer not only had the ability to use government funds to hire counsel, but also had the round-the-clock, free help from the Office of General Counsel and circuit employees to navigate my case. I was unable to find any local lawyers who were versed in the EDR Plan, and I was relegated to representing myself or paying an attorney to learn about and muddle through the intentionally nebulous process. At every turn, the process took on whatever form was most advantageous to my employer in burying my claims.

At the conclusion of one part of the EDR process, there was a stated interest to reach a settlement. At that late stage in the EDR process, I learned for the first time that I would be required to sign an NDA. It became clear to me that signing the NDA was the only way to reverse the retaliatory actions to which I was unlawfully subjected. Other than that, I had little to gain from settling my case given the limited remedies available under the EDR Plan. For my employer, however, the NDA assured them that their unlawful and illegal conduct would never be discussed.

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[1] To preserve my anonymity, I am submitting this letter through my counsel at Keker, Van Nest & Peters LLP. *See* Letter of Deeva V. Shah.

If I chose not to sign the NDA, I had three options: (1) walk away from the negotiations and continue to endure the illegal behavior in the workplace; (2) quit, or (3) request a hearing where I would be revictimized all over again and forced to re-litigate my claims from scratch. If I chose the hearing phase, I faced the same dilemma regarding counsel; I could represent myself or hire someone to represent me while my employer benefitted from several layers of representation, including counsel specializing in the EDR Plan. The EDR Plan provided no guidance on whether, at the hearing, the Court's chosen judicial officer would allow me to submit any of the admissions made in earlier stages of the EDR process. Given the options, I chose settlement with the accompanying NDA.

Since settling my EDR matter and signing what I was told is the standard NDA used in EDR proceedings, I learned that other federal judiciary employees signed NDAs when their matters were resolved. In no way did the text of the EDR Plan in any of the provisions discussing settlement provide notice that my silence would be a necessary prerequisite to settlement. Given that I had experienced unlawful retaliation and colleagues heard and witnessed the retaliation and had been made aware of my complaint (without my permission), I had hoped that a positive and public resolution would repair the reputational damage I suffered, and also deter any future retaliation.

I suffered in silence believing I was an outlier navigating the EDR process, only to learn that others have used the process but are forbidden from talking about it when the resolution is favorable, thereby protecting the people who engage in misconduct. The NDA severely limited my ability to even seek advice about what portions of the EDR process I could not disclose. On a larger scale, the common use of NDAs likely contributed to my inability to find others who could provide guidance on these proceedings. The NDAs are coercive, as they are used as bargaining chips to guarantee an end to the confusing, harrowing, traumatic process that is the EDR Plan.

I often reflect on the irony of the repeated assertion I heard when I joined the federal judiciary, claiming that federal judiciary employees enjoy added employment protections. The reality, as I learned it while trying to remedy violations of my employment rights, was that I had fewer protections than the majority of the workforce in the United States. I even dug through my onboarding documents to find where I received notice concerning my waiver of Title VII and other federal employment protections and was instead knowingly and willingly availing myself to the EDR process as the only means to resolve workplace misconduct claims. In a legal system that rises and falls on notice, knowing and voluntary waiver, and assumption of risk, I was never advised of the substantial workplace protections and constitutional rights that I gave up to become a federal judiciary employee.

I learned exactly what I gave up and what limited options I had to resolve serious violations of my rights only when I confronted the grim reality that I had nowhere to go other than to use the EDR Plan. When I buy appliances I am better aware of my rights to litigate problems than when I agree to work for the very system tasked with enforcing those rights. Those of us who have come forward represent a sliver of those harmed. Had I not had documented proof of the harassment and retaliation I suffered, I am unsure whether I would have pursued an EDR claim to conclusion—or perhaps at all—given what I learned about the process.

Notwithstanding all of this I have endured, I remain proud to be part of the federal judiciary system. I am proud of every aspect of the brilliant public service work we do. What I cannot begin to understand is why we are excluded from using the very system we work so hard to support. I have full faith that had my claims been brought to court, or the recognition that I had that ability to openly and fairly litigate my claims, they would have been resolved in the fair, impartial manner that all other matters are resolved. Even the mere existence of an ability to openly and fairly litigate my claims would have served as a deterrent to any subsequent harms perpetuated by the same actors.

Mr. JOHNSON of Georgia. Today, we will have two panels of Witnesses. The first is a panel of individuals with experience in or testimony relevant to the Federal judiciary. The second consists of representatives of the U.S. Judicial Conference.

I will now introduce the first panel of Witnesses.

Caitlyn Clark is a Georgia attorney who has worked in private practice and previously served as a law clerk for Judge C. Ashley Royal in the United States District Court for the Middle District of Georgia. Ms. Clark earned her undergraduate degree from the Georgia Institute of Technology in Atlanta and her law degree, cum laude, from Mercer University Law School in Macon, Georgia. Welcome, Ms. Clark.

Caryn Strickland is a former assistant Federal public defender who currently works in private practice representing indigent criminal defendants. She is a former law clerk for a State Supreme Court Justice, a Federal District Court Judge, and a Federal Circuit Court Judge. She was the recipient of a prestigious Supreme Court fellowship working in the Administrative Office of the U.S. Courts. Ms. Strickland received her B.A. with highest distinction from the University of Vermont and her J.D. magna cum laud and Order of the Coif from Duke University School of Law. Welcome, Ms. Strickland.

Laura C. Minor worked for the Federal judiciary for 23 years in numerous capacities with the Administrative Office of the U.S. Courts including as the Associate Director for Program Services, the Equal Employment Opportunities Officer, and Secretary to the Judicial Conference. She is now retired after her over two decades of distinguished public service. Ms. Minor is an attorney who earned her B.A. from Georgetown University and her J.D. from Georgetown University Law Center. Welcome, Ms. Minor.

Sarah Parshall Perry is a Legal Fellow for the Edwin Meese III Center for Legal and Judicial Studies, part of the Institute for Constitutional Government at The Heritage Foundation. Her previous positions include Senior Counsel to Assistant Secretary for Civil Rights at the U.S. Department of Education and Senior Fellow for Education Reform at the Family Research Council. Ms. Perry earned her B.S. from Liberty University and her J.D. from the University of Virginia School of Law. Welcome, Ms. Perry.

Ally Coll is the President and Co-Founder of The Purple Campaign and an Adjunct Professor for Civil Rights Law at George Mason University. Prior to that, Ms. Coll worked in numerous capacities as a Hill staffer on political campaigns and as an attorney in private practice. Ms. Coll is nationally recognized as an expert on workplace harassment and discrimination and has been a contributor on numerous national news outlets. Ms. Coll earned her B.A. in history and political science magna cum laude from Tulane University and her J.D. magna cum laude from Harvard Law School. Welcome, Ms. Coll.

Before we proceed with testimony, I would like to remind all of our Witnesses that you have a legal obligation to provide truthful testimony and answers to the Subcommittee and that any false statements you make today may subject you to 18 U.S.C. 1001. Please note that your written statements will be entered into the record in their entirety. Accordingly, I ask that you summarize

your testimony in five minutes. To help you stay within that time frame, there is a timing light on your table. When the light switches from green to yellow, you have one minute to conclude your testimony. When the light turns red, it means that your five minutes have expired.

With this panel, we will have five-minute rounds of questions after the Witnesses' testimonies.

Ms. Clark, you may begin.

STATEMENT OF CAITLYN CLARK

Ms. CLARK. Chair Johnson, Ranking Member Issa, and Members of the Subcommittee, good morning.

My name is Caitlyn Clark and I appreciate the opportunity to testify at this Subcommittee hearing on protecting workplace rights for judiciary employees.

At the outset, I'd like to emphasize that I am not here today to personally attack anyone I worked with in chambers. I am here to describe my experience clerking in the judiciary as an expectant mother.

My sole purpose is to shed light on the inadequate protections for judiciary employees. The current protections failed me. I do not want them to fail others.

In July 2019, I began what I thought would be a two-year term clerkship for Judge C. Ashley Royal, a senior U.S. District Court judge for the Middle District of Georgia.

During the first six months of my clerkship, I built great relationships with Judge Royal's staff, including his career clerk, who had worked for the judge for more than 15 years. She seemed to think very highly of my work and I looked up to her as a mentor and a friend.

By November of 2019, Judge Royal offered to extend my clerkship for an additional two years, and by January 2020, I received a performance-based raise. When I became pregnant with my second child, my hopes of building a career in the judiciary fell apart.

After I announced my pregnancy to my colleagues in chambers, the career clerk's treatment of me changed. She became hypercritical of my writing, providing excessive and often contradictory feedback, which made it difficult to complete my work.

If I asked her a question about her edits, she would belittle and berate me about the quality of my writing until I was reduced to tears. She never did any of this before I was pregnant.

In early April of 2020, a few weeks into the pandemic lockdown, Judge Royal called me to his house, which he had never done before. He expressed frustration about the pace of my work and brought up my pregnancy. I remember him saying something along the lines of while clerking may be a good mommy job, work still has to be done.

Later that same day, I called the career clerk to discuss a motion I was drafting. She grew impatient, raised her voice and said, "It's infuriating to me. I mean, you're pregnant." I remember that word "infuriating." She complained that my new baby was going to ruin her ability to enjoy her son's senior year of high school.

I reported this conversation to Judge Royal the very next day, but he saw no need to intervene, and because clerks lack standard workplace protections under title VII, I had nowhere else to turn.

Two months later, Judge Royal revoked the additional two-year offer that he had made in November. Then, just 10 days before my daughter was born, he told me to clear out my office. Once my maternity leave ended, I would be terminated.

I was shocked. I felt wronged. I had no recourse. At the time, there was no mechanism for me to file a complaint. In the days after my daughter was born while I was, of course, overjoyed at her arrival, my wrongful termination and treatment in chambers was weighing on me.

Fortunately, a few weeks later, the Middle District of Georgia partially adopted the model Employee Dispute Resolution, or EDR plan, and allowed clerks to file misconduct complaints.

I quickly discovered this system was broken. Pursuant to the plan, I first submitted a request for assisted resolution seeking reinstatement to a comparable position and a positive letter of recommendation.

Judge Clay D. Land, who had served on the bench with Judge Royal for nearly 20 years, reviewed my request. His final two-page report stated that my claims could not be resolved to my satisfaction and a resolution could not be reached.

I then filed a 23-page formal complaint alleging unlawful harassment, retaliation, and discrimination. Judge Randal Hall, the chief judge of the Southern District of Georgia, adjudicated my complaint.

Like Judge Land, Judge Hall, and Judge Royal are colleagues with nearly identical backgrounds. They have no incentive to police each other.

I did not stand a chance in this forum either. I was denied the opportunity to conduct any discovery, cross-examine Witnesses, or participate in a hearing.

Unsurprisingly, Judge Hall ruled against me and found I had no claim. I then had 30 days to appeal the decision. On the day of the deadline, the EDR coordinator told me that, unlike all of my earlier filings, my appeal had to be submitted in person. This was in July 2021 during the height of COVID.

Determined to keep fighting, I drove three hours to Atlanta with my newborn and toddler in the car and filed the appeal with minutes to spare. Just this morning, nearly eight months later, the 11th Circuit affirmed the decision denying my claim. This decision is final.

The EDR process is severely flawed. Law clerks are denied basic procedural protections and the independent evaluation that employees in virtually any other sector receive.

Judges are left in charge of policing their own colleagues, allowing their conscious or unconscious biases to affect their decision. This stacks the deck against law clerks who are already extremely reluctant to speak out regarding misconduct, given the power and influence of Federal judges.

Challenging a sitting Federal judge and, potentially, ruining one's career is simply not worth the risk.

I urge Congress to reform the system to allow for basic procedural fairness, to eliminate the self-regulation of the judiciary, to guarantee Federal judiciary employees title VII protections, and to protect those who speak out against discrimination from the threat of retaliation.

Thank you.

[The statement of Ms. Clark follows:]

Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change

Hearing before the House Judiciary Committee

Subcommittee on Courts, Intellectual Property, and the Internet

Testimony of Caitlyn Clark

March 17, 2022

Thank you Chairman Johnson, Ranking Member Issa, and members of this Subcommittee for the opportunity to testify today. My name is Caitlyn Clark, and I am a former law clerk to Judge C. Ashley Royal, a Senior U.S. District Judge on the U.S. District Court for the Middle District of Georgia. I am here today to describe to you my experience clerking in the federal judiciary, both as a woman, and as an expectant mother.

While clerking for Judge Royal, I became pregnant with my second child. I quickly learned that "pregnant" is something that law clerks cannot be. My pregnancy was blatantly treated as a burden and an inconvenience, and I felt belittled because of it. I believe that I was ultimately terminated because of my pregnancy. To seek justice, I attempted to utilize the Middle District of Georgia's current Employment Dispute Resolution procedures. As I will explain, despite recent reform efforts, this process remains fraught with inherent procedural flaws and systemic obstacles. The process completely failed me. Because I do not want it to fail other women—for any woman to experience similar treatment in chambers and face what has often felt like insurmountable obstacles in seeking justice—I decided to testify today.

At the outset, I would like to emphasize that it is absolutely not my intention to smear Judge Royal's name, or to personally attack anyone I worked with in chambers.

For those reasons, I have decided not to share the name of his career clerk or of any other employees. Instead, my testimony will tell my story and my experience with the inadequate mechanisms currently in place to protect the rights of judiciary employees.

I. Background

I graduated cum laude from Mercer University School of Law in Macon, Georgia in 2017. I placed thirteenth in my class of over 120 students and served on the editorial board for the Mercer Law Review. During my third and final year of law school, I held a part-time position with Judge Royal's chambers. Before passing the Georgia Bar Exam, I was hired by a mid-sized law firm in my home town of Macon. While pregnant with my first child, I practiced general litigation full-time, and passed a second state's Bar Exam. My son, Jeffrey, was born in December 2018. I worked at the firm for nearly two years before Judge Royal asked me to return to his chambers for a two-year clerkship. At the time, I was thrilled. Clerking for a federal judge is a prestigious opportunity, and I was honored—it seemed that Judge Royal remembered and appreciated the quality of my work.

I began working in Judge Royal's chambers in July 2019, and for the first six months of my clerkship, I had a wonderful experience. By November 2019, Judge Royal asked me to stay for an additional two years, and I immediately agreed, meaning I was set to clerk in his chambers for a total of four years. I enjoyed the work and was eager to take on more responsibility. I consistently received positive feedback on my writing, and in early January 2020, I received an encouraging performance review and a nearly $15,000 raise.

I had great relationships with Judge Royal's staff, including his career clerk, who has been working for the judge for over fifteen years. The career clerk trained and mentored new law clerks, and she worked directly with me throughout my time in

chambers. Because Judge Royal often worked remotely, even before the pandemic, he depended on his career clerk to review all of my work. In fact, Judge Royal never reviewed my work firsthand. I looked up to the career clerk as a mentor and a friend, and was hopeful that I could follow a similar career path. I truly believed I could achieve this dream—until I got pregnant, and the career and reputation I had spent years building imploded within months.

II. Treatment During Pregnancy

I told Judge Royal and his staff that I was pregnant with my second child on January 23, 2020. Judge Royal and his court deputy responded with congratulations, and I expected the judge's career clerk, who also has children, albeit teenagers, to respond in the same way. But when I told her, her reaction was strange and inappropriate. She told Judge Royal's court deputy that I would "never get work done now." Judge Royal's court deputy, who was in the room with us, later confronted the career clerk about her negative reaction and rude comments. It was obvious to everyone that the career clerk was upset that I was pregnant. At home, my husband and I were excited to grow our family. At work, I felt awkward and belittled.

The atmosphere in chambers worsened over the next few weeks, and Judge Royal's career clerk began to treat me differently. Where she was once friendly and supportive, she was now snappy, rude, and caustic. Before I was pregnant, I considered her a mentor. But now, when I asked for help or training, she made it clear that I was bothering her. Additionally, she began treating my work differently. Before I was pregnant, we worked as a team. She had a practice of reviewing each draft before sharing it with the judge, and in the past, she provided light edits and helpful feedback. But now—at a time when we needed to move quickly to get a handle on the judge's burdened docket—she became hypercritical of my writing. She provided excessive and often

contradictory edits to the point that I could barely even work. What used to take days began to take weeks, and I struggled to meet deadlines because of the delay. If I called her to ask her a question about her edits, she would berate the quality of my work. She frequently brought me to tears, and although I have always been a strong writer, I completely lost confidence in my writing ability. She never did any of this before I was pregnant. I recognize the career clerk's actions now as sabotage—she wanted me to quit. But at the time, I took her feedback in stride and did my best to implement her edits without complaint.

In addition to treating me differently, she routinely made my pregnancy the topic of conversation around chambers and suggested that I would not be able to satisfy my job responsibilities due to my pregnancy. For example, in the spring, we began planning for the judge's upcoming Ninth Circuit sitting in San Francisco. Judge Royal often sits by designation with the Ninth and Eleventh Circuits, meaning that, in addition to his district court caseload, he takes on a number of appellate cases in these Circuits each year. As a clerk assisting Judge Royal during his Circuit sittings, my job was to help the judge prepare for the sittings by writing preparatory memos, attending the sittings, and ultimately drafting his final opinions. COVID later forced the sitting to take place virtually, but initially, Jude Royal's Ninth Circuit sitting was scheduled to take place in San Francisco in June 2020. While discussing our upcoming travel arrangements with the judge, the career clerk inappropriately—and falsely—suggested to the judge that because of my pregnancy, I may not be able to fly or accompany the team to San Francisco and that another term clerk should go instead. This was completely unfounded. By June, I would be twenty-seven weeks pregnant. In most cases, pregnant women can safely travel until they are thirty-six weeks pregnant. (Indeed, I myself am now thirty-one weeks pregnant with my third child, and I flew from Georgia to Washington to be here today.) I was absolutely prepared to travel to San Francisco with the judge, and I made

this clear to my colleagues. But Judge Royal did not listen to me, nor did he make use of the countless publicly available medical sources that clearly say women who are twenty-seven weeks pregnant can travel freely. Instead, he required that I obtain permission from my physician to travel. Medically, physician approval was completely unnecessary. I see now that the judge's career clerk was sending me a signal—now that I was pregnant, I would be excluded from career opportunities.

In early April 2020, a few weeks after I transitioned to telework due to the pandemic, Judge Royal called me to his home for a discussion. He had never done this before, and I could tell that he was angry when I arrived. He told me that I was moving too slowly, and when I tried to explain, I recall that he suggested that I was either "too stupid or just didn't care" about my clerkship. He insulted my work ethic, and told me that I lacked the "drive and intensity" that his career clerk had for her work. And then he brought up my pregnancy. I remember him saying something along the lines of: "While clerking may be a good 'mommy job,' work still has to be done." I was stunned—not only by the judge's disparaging words, but because I had never received criticism like this from him (or anyone) before. A few months earlier, Judge Royal sang my praises, asked me to extend my clerkship an additional two years, and offered me a raise.

I was so shocked and upset by the judge's comments that, in the moment, I did not even think to explain the difficulties I had been having with his career clerk or the new challenges I was facing as a result of the pandemic. Like so many other parents at that time, I was balancing working from home with caring for my fifteen-month-old son without any childcare. Instead, I apologized and told him I would improve. After I left Judge Royal's home, I was devastated and extremely anxious. I felt that my job was in danger, but I did not know where to turn. The career clerk's unrelenting criticism had taken hold, and by then, I had completely lost confidence in my ability to write. But I kept

my head down and vowed to work harder. After calling my husband and mother in tears, I went back to work.

A few hours later, I called Judge Royal's career clerk to ask a work-related question. The conversation was entirely unrelated to my earlier conversation with Judge Royal. But during the call, as I sought clarity about a motion I was drafting, she became irate and started yelling at me. I recall her saying, "it's infuriating to me. I mean, you're pregnant." I distinctly remember that word—"infuriating." She told me that she was frustrated that I got pregnant so soon after starting my clerkship, that it was unfair that she would be responsible for my work during my maternity leave, and that she would be expected to travel more in my place. She suggested that my new baby was going to ruin her ability to enjoy her son's senior year of high school. I was reduced to tears. I realized that *this* was what had been building ever since I shared the news of my pregnancy. This was why she treated me differently; this was why she sabotaged my work. My pregnancy inconvenienced her. She wanted me gone so that Judge Royal could hire someone in my place. Gradually, she got her way.

I reported this conversation and the career clerk's conduct to Judge Royal the next day. At the time, the Middle District of Georgia had a dispute resolution process in place, but it did not cover law clerks, so resolving the issue through Judge Royal was my only hope. But when I told him, he pretended that he could not hear me—he did not even respond. It was obvious that he was going to prioritize his career clerk, who had worked for him for fifteen years, over me. Since the career clerk had apologized to Judge Royal for her outburst, he stated that he didn't see the need to do anything about it. He "thought that it was fine."

After the meeting at Judge Royal's home, I decided to start working in the office again, in hopes that I would have more direct contact with him. Even though we were in

a pandemic and vaccines were not yet available, I wanted to demonstrate my commitment, and hoped that being in the office would allow Judge Royal to see for himself that I was completely dedicated to my clerkship. Luckily, my son's day care re-opened, primarily to serve the children of hospital workers. Although I was concerned about my son Jeffrey's health and the health of my unborn child if Jeffrey was exposed to COVID-19, I felt I had no other option.

Despite my efforts, I was not able to save my job. On June 23, 2020, I met with Judge Royal to discuss my upcoming maternity leave. During our meeting, I asked for eight to twelve weeks of unpaid leave and told the judge that I would come back as early as needed. He agreed that I could take twelve weeks of unpaid leave. He also told me that he had hired an additional two-year law clerk to begin in September 2020. At the time, I understood this clerk would be a third term clerk, and that I would work alongside him after I returned from maternity leave. I later learned that this clerk was actually hired to replace me—Judge Royal started to search for a replacement clerk *the day after* I told him about the statements that his career clerk made about my pregnancy. He interviewed and hired the (male) replacement clerk within the same week.

During that same meeting, immediately after we discussed my maternity leave, the judge informed me that he was rescinding the extended two-year clerkship offer that he had made to me in November 2019. This meant my clerkship would end in September 2021, instead of September 2023. He pointed to the quality of my work, and told me that I was not keeping up with the workload. But when I asked him for specifics—for any reoccurring issues, or ways that I could improve—he could not provide a single example. All of my writing went through his career clerk; she edited every order before he read it. I do not believe that Judge Royal ever reviewed my work product for himself, as he could not point to any specific issue with my writing. He seemed to be merely repeating the false complaints of his career clerk—and she wanted me gone.

On August 18, 2020, ten days before my daughter Eileen was born, Judge Royal terminated me. He called me into his office, and told me that I could take twelve weeks of paid maternity leave—but afterwards, I would not be welcomed back to his chambers. He also instructed me to clear out my office for the male clerk replacing me. The Clerk of Court was present at this meeting, and offered me a cart so that I could take my personal items to my car. At first, I was in shock. Although chambers had become a hostile environment, I truly believed that everything would go back to normal upon my return from leave. But after my termination sank in, I was devastated, and I lost my self-confidence.

I firmly believe that if I had not gotten pregnant, I would still have my job. And if I were any other federal employee—if I worked for Congress, if I worked for an executive agency—I would have the right to sue under federal civil rights laws. But because I worked in the federal judiciary, I had no right to fight back.

III. Flawed Employment Dispute Resolution Process

My despair over losing my job ten days before giving birth was made worse because I had no recourse to challenge my wrongful termination. Judicial employees do not have the same anti-discrimination rights and remedies afforded to private sector and government employees, and whistleblowers are not protected from retaliation. Although the judiciary has professed that its internal employment dispute resolution procedures are sufficient, they are not. Employees who face discrimination in the judiciary do not stand a chance against the deeply engrained, systemic barriers that prohibit judicial employees from obtaining justice. The legal profession venerates judges, especially those with life-tenure, as powerful, untouchable authorities. They belong to an elite club whose members know each other, understand each other, and protect each other. Although our

judiciary was created to protect the rights of all people, when it comes to protecting its own employees, it functions only to protect itself.

Two weeks after I gave birth to my daughter, I consulted with the human resources specialist for chambers and the Clerk of Court regarding the circumstances surrounding my termination and my ability to get my clerkship back. I was told that I had no recourse because chambers employees serve at the will of the Court. Days later, though, the Middle District of Georgia partially adopted the model Employee Dispute Resolution ("EDR") Plan, which allowed claims to be filed by chambers staff and interns. However, I quickly learned that this process would not provide the impartial forum I needed to remedy the unfair treatment I had endured.

The EDR Plan provides three avenues for reporting allegations of wrongful conduct by a judge: Informal Advice, Assisted Resolution, and a Formal Complaint. First, an employee may contact one of the court's designated EDR Coordinators, the Circuit Court's Director of Workplace Relations, or the National Office of Judicial Integrity for informal advice regarding his or her rights and protections and the available options for addressing the misconduct. Second, an employee may submit a "Request for Assisted Resolution" to one of the court's EDR Coordinators. When the allegations concern the conduct of a judge, the Chief Judge of the appropriate district or circuit court is responsible for coordinating the Assisted Resolution. The Assisted Resolution process may include: discussing the matter with the judge; conducting a preliminary investigation; engaging in voluntary mediation between the judge and the employee; and/or resolving the matter by agreement. The Chief Judge responsible for assessing the allegations has enormous discretion to deny the Request for Assisted Resolution at any time if he or she concludes it is frivolous or it does not allege violations of the rights or protections in the EDR Plan. Lastly, within 180 days of the alleged wrongful conduct, an employee may file a Formal Complaint with one of the court's EDR Coordinators. The

Formal Complaint is not filed against the judge but against the district or circuit court, which is the Complainant's employing office. In some cases, including my own, the judge who oversaw the Assisted Resolution process now becomes the respondent to the Complaint and replies on behalf of the court. The Chief Circuit Judge selects a fellow district or circuit court judge to act as the Presiding Judicial Officer, who oversees the complaint proceeding. Again, the Presiding Judicial Officer has enormous discretion to direct the proceeding, which *may* include investigation and discovery, settlement discussions, the filing of written submissions by the parties, and/or a hearing, but only to the extent deemed necessary by the Presiding Judicial Officer.

There is no appearance of impartiality to this process. In each of the available avenues for dispute resolution under the EDR Plan, complaints against sitting judges are adjudicated by the judges' peers, leaving the fox guarding the henhouse. The inherent bias of this process is most evident in cases like my own, where a judge serves as the neutral arbiter or mediator in the Assisted Resolution process and then turns around and defends the alleged conduct in response to a Formal Complaint. The judges overseeing the EDR process are then given enormous discretion to direct the proceedings in ways that intentionally favor their colleagues. As I discovered through my own personal experience, meaningful investigation and fair procedure, including the opportunity for discovery and cross examination, are not guaranteed.

After I gave birth to my daughter, I searched for someone to help me navigate the EDR process. I reached out to my former law professors, law school classmates, and local advocacy groups, but no one could help me. Judges wield an immense amount of power and influence, especially in a small town, and I quickly realized that engaging in this process would make me a pariah within the legal community. Judicial employees invoking the EDR Plan dispute resolution procedures have a right to be represented by an attorney at their own expense, but I could not even find counsel willing to represent

me. The local labor and employment attorneys I consulted laughed at my request for representation and said that challenging a sitting federal judge would damage their careers. As a result, I was forced to navigate the initial stages of the EDR process alone.

A. Assisted Resolution

I decided to move forward with the resolution process, and on December 3, 2020, I submitted a Request for Assisted Resolution to one of the Middle District of Georgia's EDR Coordinators, seeking reinstatement to a comparable position and a positive letter of recommendation. Judge Clay D. Land, a fellow judge of the Middle District of Georgia, was responsible for coordinating the Assisted Resolution process. My interactions with Judge Land during my clerkship were very limited, but Judge Royal and Judge Land had served together on the bench for nearly twenty years. In fact, they assumed their place on the bench on the very same day.

The Assisted Resolution process consisted of Judge Land interviewing me, Judge Royal, Judge Royal's career clerk, and the Clerk of Court. There was no written discovery and no opportunity to submit evidence. Judge Land's final report, which was less than two pages, concluded that I genuinely believed I was treated unfairly, while Judge Royal and his career clerk believed that they did not engage in wrongful conduct. The report stated that my claims could not be resolved to my satisfaction and a resolution could not be reached.

I then had thirty days to decide whether to submit a formal complaint. I was afraid that filing a complaint would ruin my career, but I did not want to regret not standing up for myself, and I feared that the damage to my career was already done. I suspected that Judge Royal had already given me a bad reference amongst his colleagues in the courthouse, effectively "black-balling" me from obtaining other employment in the Middle District of Georgia. The Clerk of Court suggested as much when I consulted with

him regarding my options for getting my clerkship back. He told me that he doubted anyone else in the courthouse would be willing to hire me again.

The legal community in Macon, Georgia is incredibly close knit, and I knew that word of my termination would spread beyond the courthouse if it had not already. Shortly before Judge Land issued his report denying my requested relief in the Assisted Resolution process, I had interviewed for a position in the civil division of the Air Force Materiel Command. Out of over forty applicants, I was one of five selected for an interview, and I believed my chances of getting the position were high. However, my hopes were dashed when I arrived at the interview and learned that one of my interviewers knew Judge Royal personally. Unsurprisingly, on January 27, 2021, I was notified that I did not get the position. The EDR Plan purports to prohibit retaliation against an employee based on the employee's exercise of rights under the plan, but judicial employees have no right to sue if they are retaliated against for reporting misconduct in the judiciary. I felt helpless, and the EDR process was my only hope.

B. **Formal Complaint**

On February 11, 2021, six months after giving birth to my daughter, I filed a twenty-three page formal complaint (the "Complaint") against the Middle District of Georgia, alleging unlawful harassment, retaliation, and discrimination, resulting in a demotion and termination of my employment based on my pregnancy. I wrote the Complaint myself, because I was still unable to find counsel willing to represent me. Fortunately, after filing the Complaint, I was referred to a lawyer who agreed to represent me pro bono.

Judge Randal Hall, the Chief Judge of the Southern District of Georgia, was eventually appointed to act on behalf of the Eleventh Circuit Judicial Council in adjudicating my complaint. Like Judge Land, Judge Hall has a professional history with

Judge Royal. Judge Hall and Judge Royal are peers with nearly identical backgrounds. Both are from Augusta, Georgia. Both graduated from the University of Georgia School of Law. And since 2008, they both have served as federal district court judges in Georgia. These judges are colleagues, and they have no incentive to police each other, especially when it comes to managing their clerks and running their chambers. Judges think they are above the law, because they are. It was clear to me I did not stand a chance in this forum either.

Judge Land, who previously served as the "independent" investigator in the Assisted Resolution process, represented the Middle District of Georgia in the EDR proceeding and filed a one-page response to my Complaint, categorically denying the allegations. Judge Hall then interviewed me, Judge Royal, Judge Royal's career clerk, the courtroom deputy, and the Clerk of Court over a two-day period.

Despite repeated requests for my interview to be via Zoom, Judge Hall required all parties to be interviewed in-person in Dublin, Georgia, even after my counsel objected by pointing to Judge Hall's own order allowing sentencing and other court proceedings to be held via Zoom. (And this was in February 2021, before the COVID vaccine was widely available.) My counsel was unable to travel from Florida to Dublin, so I attended the interview by myself, with my counsel only able to listen via phone.

The interview itself felt like a deposition. I was seated alone in the courtroom at one counsel table, and Judge Hall was seated at the other counsel table with two of his female law clerks. The testimony transcripts reveal how biased the process was. While I was subjected to a cross examination, Judge Hall interviewed the other witnesses as if he was counsel for the Middle District, guiding their testimony. For example, after Judge Royal stated that the law clerk who started in September "replaced" me, Judge Hall interrupted Judge Royal to question whether Judge Royal meant to say "succeed" instead

of "replace." Meanwhile, when Judge Hall asked me about the law clerk who started in September, he phrased the questions in an argumentative way. He asked, "[the clerk who started in September] was the third clerk hired; right? He was not replacing you; correct? Wasn't he hired to actually follow [a part time clerk] in [a] third position that the Eleventh Circuit had approved?" In addition to asking leading and softball "questions" to Judge Royal, Judge Hall allowed Judge Royal to give a monologue through most of the 53-page interview, much of which was irrelevant.

After the interviews, I was denied the opportunity to conduct any discovery, cross-examine any witnesses, or participate in a hearing. I had no access to my Middle District e-mail or the documents saved on my work computer. Without cross examination, I had no opportunity to address substantially damaging and untrue statements made against me in the interviews. I was not allowed to submit interrogatories or ask follow-up questions. The EDR plan gave the Presiding Judicial Officer, Judge Hall, extraordinary discretion to "provide for such discovery to the parties as is necessary and appropriate."

On May 26, 2021, Judge Hall submitted a proposed decision that found I had no claim against the Middle District, to which I objected. After denying me the opportunity to address any of the inaccurate statements made during the interviews, Judge Hall overruled all of my objections, noting that they were "rife with speculation." Unsurprisingly, Judge Hall's final written decision, issued on June 25, 2021, overruled or ignored my objections and found that I had failed to establish a claim against the Middle District. Judge Hall also reported to Chief Judge Pryor his finding that Judge Royal committed no "cognizable misconduct under Rule 4 of the Judicial Conduct and Disability Rules."

C. **Judicial Misconduct Complaint**

Frustrated with the obvious failings of the EDR process, on July 16, 2021, I submitted a judicial misconduct complaint regarding Judge Royal's treatment of me in chambers and Judge Hall's handling of the EDR proceeding to the Eleventh Circuit Court of Appeals. The judicial misconduct complaint process is a separate complaint process from the Middle District of Georgia's EDR Plan. Under the Judicial Conduct and Disability Act of 1980 and the Rules for Judicial-Conduct and Judicial-Disability Proceedings, anyone can file a complaint alleging a federal judge has committed "conduct prejudicial to the effective and expeditious administration of the business of the courts." I initially believed that the EDR process was a more appropriate avenue to confidentially resolve my complaint against Judge Royal. However, after Judge Hall issued his final decision, I realized that I needed to pursue all available options. On July 21, 2021, I received a letter acknowledging receipt of my judicial misconduct complaint. I have not received a further update in the over six months since.

D. **Eleventh Circuit Appeal**

The EDR Plan provides a thirty-day deadline to file an appeal with the Eleventh Circuit of a Presiding Judicial Officer's final decision on a Formal Complaint. On July 23, 2021, the day of the deadline to appeal Judge Hall's decision, the EDR Coordinator informed me for the first time that I could not submit my appeal via an e-mail, the method I used to file all the previous pleadings. When my counsel e-mailed the EDR Coordinator only a couple of hours later, she received an "out of the office" message and all of her phone calls went unanswered. I then called the Eleventh Circuit Director of Workplace Relations, who insisted that the appeal must be physically received by the Eleventh Circuit Court of Appeals, not mailed, e-mailed, or electronically filed, before the thirtieth day. This was in July 2021, during the height of the COVID-19 pandemic. Even if I overnighted the appeal, I was not sure it would arrive on time. I e-mailed and called the

Judicial Integrity Officer multiple times throughout the day to seek advice on how I could submit my appeal on time, but I received no response. Determined to keep fighting and with my newborn and toddler in tow, I drove to Atlanta (a three-hour drive due to Friday-afternoon traffic) and filed the appeal myself on the same day with minutes to spare. I finally received a call back from the Judicial Integrity Officer at exactly 5 p.m., the deadline for submitting my appeal.

After the pleadings in the appeal had closed, Judge Royal wrote an ex parte letter to the Circuit Executive, describing my EDR claim as false character attacks. Although any communication between a party and the presiding body without the opposing party is highly improper in an ongoing suit, Judge Royal felt entitled to this personal communication. The Judicial Council leniently construed the letter as a sur-reply, sent me a copy, placed it in the record, and gave me an opportunity to respond. Nearly eight months later, my appeal is still pending before the Eleventh Circuit. I believe I am the first person, or one of the first people, to ever appeal an EDR complaint to the Eleventh Circuit. The system is deeply flawed, biased and unfair. And I want to do everything in my power to make it better for the next person who uses this process.

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My case confirms that the federal judiciary's EDR process is severely flawed. I was denied basic procedural protection and the independent evaluation that anyone employed by virtually any other employer would have received. Any "normal" litigant would have had the opportunity to conduct discovery, cross-examine witnesses, and resolve factual disputes through a full and fair hearing before an impartial arbiter. I did not.

The EDR process continues to leave the judiciary in charge of policing its own personnel disputes, allowing judges' conscious or unconscious biases to affect their

discretion over both the process itself and their ultimate decisions. Judges are kings in the castle of their chambers, and they have no incentive to police how their friends and colleagues manage clerks or run their respective chambers. Judge Royal said in his interview that he laughed at the suggestion in my Complaint that he should have talked to Human Resources because "it would never cross [his] mind to talk to [Human Resources] about a problem with a law clerk."

Leaving judges in charge of investigating their own colleagues also deters employees from even coming forward with their allegations. There already exists a significant power disparity between clerks and the judges, who are charged with overseeing the EDR proceeding. Article III judges are appointed for life, while law clerks serve at the will of the court and rely on their experiences in chambers and their relationships with their judges to buoy their legal careers. Federal judges hold enormous power to shape and influence the careers of their former clerks, especially in a small town, where former clerks will go on to practice before the judge and his or her colleagues on the bench. Challenging a sitting federal judge and ruining one's career is simply not worth the risk to most young lawyers, especially when the only available resolution processes are not impartial.

IV. Policy Recommendations and Conclusion

I am heartened by Congress's desire to reform the broken EDR system and I close my testimony today by briefly highlighting several key legislative reforms needed to truly protect law clerks and other federal judiciary employees against discrimination.

Do Away With Self-Regulation. My experience with the judiciary's misconduct procedures was defined by a pervasive sense of partiality and an inability to tell my story to a fair audience. To have Judge Royal's own peers act as judge and jury, and to have my case adjudicated in the small, insular, Georgia judicial community, made it

impossible for me to be heard by an unbiased and impartial audience. Independent oversight is essential. I am glad that the Judiciary Accountability Act empowers a Special Counsel to investigate complaints of judicial misconduct, and it is imperative that Congress's legislation include mechanisms designed to ensure that both the Special Counsel and the Commission remain independent. Federal judges are powerful people, and bodies designated to investigate them must be given the powers necessary to do so.

Guarantee Title VII Rights. I am similarly heartened that a key feature of the Judiciary Accountability Act is to extend to judiciary employees the same anti-discrimination protections that have been available to private sector and government employees for years. No defensible reason exists for why such protections should be denied to employees of the federal judiciary. Extending anti-discrimination guarantees to federal judiciary employees would also correct an even more basic injustice. By treating the federal judiciary like all other employers, Congress would send a powerful message: the judiciary is not above the very laws it purports to uphold.

Enhance Procedural Protections. Congress's proposal must also incorporate guarantees to ensure basic procedural fairness in any EDR investigations. In my own experience, I was thwarted at every turn because the current EDR Plan does not guarantee victims basic procedural fairness. Congress's proposal must correct this deficiency so victims of misconduct can put forward evidence essential to their claims and the Special Counsel can fairly vet the veracity of victims' complaints.

Safeguard Against Stigma. While Congress's current proposal requires safeguards against retaliation, those protections must be rigorously enforced. The ivory tower of the federal judiciary is an excruciatingly small world, and I felt the threat of stigma looming around every corner as I navigated the EDR process. Lawyers laughed when I asked them to help me challenge a federal judge, and law school classmates told

me I should just keep quiet rather than risk my legal career by speaking up. Congress must ensure its legislation shores up any cracks through which stigma might seep.

Promote Transparent Reporting With Protections For Victims. Finally, I observe that Congress's current proposal would create an Office of Judicial Integrity that would anonymize reporting of misconduct complaints and demographic statistics within the judiciary. But such reporting will only be effective if it is done in a rigorous, fairly administered manner. In my case, the complaint I lodged under the Code of Conduct for U.S. Judges six months ago against Judges Royal and Hall has still to this day not been resolved or made public in accordance with standard procedure. I hope that reporting structures enacted by the Office of Judicial Integrity will not be as toothless. Congress must require that any such reporting protect the anonymity and dignity of victims.

I urge Congress to give serious consideration to each of these reforms, as I firmly believe them to be essential to any meaningful attempt to enact proper oversight over judicial misconduct and prevent future injustice. The desire to ensure that future law clerks do not suffer under a broken system is the reason I have chosen to testify today. I know that I might be risking my reputation and my future legal career by appearing before this Committee and speaking out against the fundamental lack of accountability for federal judges. While I want to tell my story, my motivation is rooted in something much bigger. I feel that I must speak from this place of personal experience and advocate for meaningful change so that future lawyers can clerk for brilliant judges, have children, raise families, and pursue their professional dreams without fear of discrimination or humiliation. I aim to work with Congress to help make that dream a reality for all of the bright and talented law clerks and federal judiciary employees working today and in future generations.

Mr. JOHNSON of Georgia. Thank you.

To my colleagues, I do want to acknowledge that those who will be giving testimony will be given a little time to be able to finish. I think you should know that out of courtesy to the victimization that they have experienced. So, thank you very much for your understanding.

With that, I'll now turn to Ms. Caryn Strickland. You may begin.

STATEMENT OF CARYN D. STRICKLAND

Ms. STRICKLAND. Chair Johnson, Ranking Member Issa, and Members of this Subcommittee, thank you for the opportunity to testify.

My name is Caryn Devins Strickland. Before I complained of sexual harassment, I was a valued judiciary employee. I clerked for a judge on the Second Circuit and served as a Supreme Court fellow before becoming a Federal public defender, my dream job since law school.

When I reported sexual harassment and sex discrimination by my supervisors, I was stonewalled at every turn as judiciary officials protected the perpetrators and punished me.

I was forced to resign and lose my chosen career. I did everything I could to report the harassment. The officials in charge of addressing workplace misconduct failed to take the most basic steps to address it and instead facilitated and aggravated the hostile working environment.

Almost as soon as I began my job, the second in charge of my office, the first assistant, began targeting me with unwelcome attention that escalated into quid pro quo advances.

When I told his supervisor, the Federal defender, that he was behaving inappropriately and I was leaving work early every day to avoid being alone with him, the defender responded in part by comparing my harassing supervisor's authority over me to a marriage and ordering me to compromise with him. He then placed me more closely under my harasser's supervision.

I reached out to the judiciary civil rights officer for guidance on my rights. She said the behavior I reported was classic sexual harassment. She said I was highly credible, but she candidly advised that it would be less risky to find another job than file a complaint because the cards were stacked against me and in favor of management.

In an effort to help me, she reached out to a senior official in the administrative office, who advised the defender to appropriately address the sexual harassment.

Instead, the defender angrily berated me and said he was being blamed and attacked for something that was not his fault. Officials at the judiciary's highest levels then intervened to protect the defender and block the efforts to address the harassment.

I was taken off the track for advancement and denied a promotion for which I qualified, a culmination of the first assistant's efforts to punish me for rejecting his advances.

The EDR coordinator, who was supposed to be advising me on my rights, told me it was not helpful that I reported discrimination to the Administrative Office because barriers go up and people are on guard.

Ultimately, I did file a complaint under the judiciary's employment dispute resolution plan. The EDR process went off the rails, and for more than six months officials took no meaningful action on my complaint.

They denied my request to disqualify the defender from representing the office even though he was a subject of my complaint. They also failed to conduct an appropriate investigation.

They told me that my claims against the defender would not be investigated. My witnesses were never interviewed. The investigator who the defender selected admitted she was not trained or qualified.

After the investigation ended, I was told I would not receive the report or its findings. Officials deliberately delayed taking disciplinary action, pressuring me to resign.

During mediation—a mandatory stage of the process—the mediator told me that the defender was from a generation that didn't get sexual harassment, but officials wouldn't micromanage him. He said that the defender who, again, was an accused person was the decision maker.

At this point, I reached out to the judicial integrity officer who had recently been appointed to advise employees like me. She confirmed that officials would not meddle in the office and could not order remedies because article III judges do not have authority to manage Federal defender offices. She called this issue jurisdictional.

Having endured a hostile working environment for more than six months with no meaningful action on my complaints, having been subjected to a deeply biased and unfair EDR process, and having been told that no remedies would be ordered even if I prevailed, I had no choice but to resign. I accepted a temporary clerkship, a devastating step backwards from my dream job, in the hopes of mitigating any further attempts to ruin my reputation and career.

Almost a full year after I raised my complaints and several months after I resigned, the EDR coordinator informed me that disciplinary action was taken against my supervisors for wrongful conduct.

I was still not told the investigation's findings or what corrective action was taken, nor was I offered the possibility of any remedies. My career was severely damaged while the supervisors who discriminated against me stayed in their positions.

For the past two years, I have been challenging the discriminatory and unfair EDR process in Federal court under the pseudonym Jane Roe. The defendants argue that because I am not covered by title VII of the Civil Rights Act I have no right to review in a Federal court, even under the Constitution.

If their position prevails, then I will have absolutely no remedy for the denial of my right to be free from sex discrimination.

Although I fear further retaliation, I am testifying publicly because you, as a co-equal branch of government, have the power to provide judiciary employees like me meaningful protections from harassment and discrimination.

Thank you.

[The statement of Ms. Strickland follows:]

Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change

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

Testimony of Caryn Devins Strickland

Thursday, March 17, 2022

Chairman Johnson, Ranking Member Issa, and members of this Subcommittee, thank you for the opportunity to testify today. My name is Caryn Devins Strickland, and I am a former assistant federal public defender who was forced to resign because judiciary officials failed to protect me from sexual harassment or provide a fair process to review my claims. I diligently pursued remedies under the judiciary's Employment Dispute Resolution Plan ("EDR Plan") that would allow me to work free of sex discrimination. But the EDR Plan failed to provide a fair process, meaningful review of my claim, or remedies to stop the harassment. Through the EDR process, judiciary officials facilitated and aggravated the hostile work environment, which became so intolerable that I was forced to resign and lose my career as a federal public defender.

I. Background

I graduated *summa cum laude*, *Phi Beta Kappa*, from the University of Vermont, and *magna cum laude*, *Order of the Coif*, from Duke University School of Law, where I served as an editor of the Duke Law Journal. After law school, I

served as a judicial law clerk for a state supreme court chief justice, a federal district judge, and a circuit judge on the Second Circuit Court of Appeals. I then held a Supreme Court Fellowship in a placement at the Administrative Office of the U.S. Courts ("AO"). In that role, I worked on a number of projects to support the federal courts and the Judicial Conference of the United States. I wrote a law review article on a topic of interest to the federal courts, and presented my research at Judicial Conference committee meetings. As a fellowship alumna, I was invited to assist the Office of the Counselor to the Chief Justice with recruiting other judicial law clerks for the fellowship program, including in the Second and Fourth Circuits.

After the Supreme Court Fellowship, I began work as a federal public defender in the Federal Defender Office for the Western District of North Carolina ("FDO") in August 2017. Starting in law school, my dream job was to be a federal public defender, based on my interest in federal criminal law and my desire to help vulnerable clients navigate the criminal justice system. I was also inspired by the experiences of other Supreme Court fellows with similar credentials who have since gone on to illustrious careers in public service, using the fellowship as a springboard. My mentors and supervisors at high levels of the judiciary during my fellowship year strongly supported and encouraged my ambitions to become a federal public defender.

II. Workplace Discrimination

Initially, I hesitated to accept the employment offer because that office had a troubled reputation. A federal judge in the district had publicly testified about its myriad problems, including a federal investigation for embezzlement by an administrative officer, the embezzlement being "kept from the judges" for a "long period of time until after the investigation was done," employees being "afraid that they'll be fired" for coming forward, the office's "unsatisfactory representation for our district," and the overall "need[]" for "a change." Testimony of Hon. Max O. Cogburn, Ad Hoc Committee to Review the Criminal Justice Act at 14, 33, 34 (Jan. 11–12, 2016), *available at* https://tinyurl.com/y3bjugxy. Shortly before I began employment, the district judges converted the office from an independent community defender office to a federal defender office to make the office more accountable to the judiciary. *Id.* at 33. I believed that the new incoming Defender would serve as a change agent to bring needed reforms to the office.

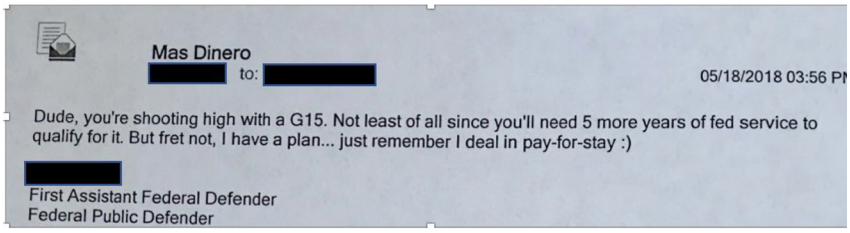
But upon joining the office, I saw its leaders foster a workplace culture where discrimination, harassment, and retaliation were casually accepted. For example, a "Team Leader" who supervised employees, including me, routinely compared his Black clients to "dogs" that could be trained and repeatedly called an intellectually disabled client a "retard" during an all-staff meeting. Employees joked about a Black federal prosecutor's *rapping* to the jury. The toxic workplace

culture also encouraged homophobia and sexism. For example, the FDO's administrative officer made jokes that a gay male employee was "like a girl." Another employee was subjected to homophobic rumors, including that he exchanged sexual favors with prison guards. Employees continued to spread rumors about his "dildo collection" many months after he left the office. The Defender himself described women in crude and derogatory language. Women were belittled, not taken seriously as professionals, and targeted for abusive behavior. Examples were made of employees who complained of mistreatment, through retaliation ranging from vicious and false rumors to disciplinary actions and firings.

From the start, the First Assistant, who had control over the FDO's operations and supervisory authority over trial units, singled me out to be his mentee, assigned me almost exclusively to his cases, and targeted me for unwelcome attention. Coworkers described him as "lustful," "fixated," "sexually attracted," and "wanting" me in "not such a professional way." One coworker stated, "Thank God the attorneys don't have the ability to really undress you with their eyes. Or you wouldn't be dressed at work." After Judge Kozinski of the Ninth Circuit retired following allegations of sexual misconduct, the First Assistant gloated to me that the process for bringing sexual harassment complaints in the judiciary is useless. He said he was personally aware of a complaint against a

judge that, according to him, was appealed all the way to the "top" and went nowhere.

As I approached one year at the FDO, I was widely praised by both my colleagues and the judges before whom I appeared for my excellent work performance, and I anticipated a highly positive performance review. The Defender told me that the First Assistant would be my "mentor" in charge of my advancement, even though the FDO had no formal mentoring program. In May 2018, I told the First Assistant that I planned to request a promotion for which I qualified based on my years of experience, federal service, and education, and, eventually, a "duty station" transfer to the FDO's other office location. In response, he became visibly agitated and emotional. He then said, "don't worry, we're going to take care of you." Later that day, he sent me an email titled "Mas Dinero" (Spanish for "More Money").



Mas Dinero

[redacted] to: [redacted] 05/18/2018 03:56 PM

Dude, you're shooting high with a G15. Not least of all since you'll need 5 more years of fed service to qualify for it. But fret not, I have a plan... just remember I deal in pay-for-stay :)

[redacted]
First Assistant Federal Defender
Federal Public Defender

The First Assistant's claim that I needed more years of service to qualify for a promotion was plainly false, as was his improper assertion that he could help me skirt such a requirement. In the context of his excessive interest in me, I viewed

his email as quid-pro-quo sexual harassment in which he proposed a "deal" to "pay" for his inappropriate advances.

From there, the First Assistant's unwelcome advances only intensified. He repeatedly and persistently pressured me to see him outside of the office alone. He asked me out for drinks, "mentoring" sessions, and out-of-office meetings. When I tried to distance myself, he aggressively interfered with my job duties, reminded me of his control over my job, threatened disciplinary action, and called me "manipulative" and "deceitful" for seeking trial experience that would allow me to work outside his control. When the Defender assigned me as second chair on a trial, the First Assistant shook with anger that the work pulled me away from him. He would physically lurk in hallways waiting to corner me.

I asked the Defender for help, but he dismissively told me to work it out with the First Assistant, and then removed me from the trial he assigned me, despite acknowledging my excellent performance and his understanding that I wanted to gain more trial experience. In July 2018, I notified the Defender that the First Assistant was behaving inappropriately and I was leaving work early every day to avoid being alone with him. The Defender responded by calling me in to meet with the First Assistant to discuss the matter. There, he compared my harassing supervisor's authority over me to a marriage, requiring "compromise"

where a couple must "meet in the middle." Days later, he assigned me to work even more closely under the First Assistant's supervision.

I sought guidance on both supervisors' conduct from the AO's Fair Employment Opportunity Officer, the civil rights office for the courts. She said the behavior I reported was "classic sexual harassment." She said I was "highly credible," but it would be less risky to find another job than seek redress through the EDR Plan, because the cards were "stacked" against a complainant and in favor of management. She encouraged me to call in sick to "protect myself."

The Fair Employment Opportunity Officer spoke with the AO's Chief of Defender Services, who advised the Defender to appropriately address the sexual harassment. Instead, the Defender angrily berated me and said he was being "blamed" and "attacked" for something that was not his "fault." He downplayed the harassment, saying, "but there was no physical contact."

Next, the Defender worked to control the complaint process to protect himself from liability. He contacted officials at the Fourth Circuit and the AO's Office of General Counsel. These officials decided that the Office of General Counsel, as management's representative, would take over the matter and limit any investigation of wrongful conduct to the First Assistant. I was prohibited from seeking any further guidance from the Fair Employment Opportunity Officer. The Circuit Executive, whom the EDR Plan designated as EDR Coordinator, criticized

me for engaging in protected activity, saying it was not "helpful" that I reported discrimination to the AO because "barriers go up" and "people are on guard."

After one year at the FDO, despite my recognized excellent work, I did not receive any performance evaluation and was not considered for a promotion for which I qualified. Instead, the Defender diminished my job duties and targeted me for discriminatory treatment that facilitated the First Assistant's continuing harassment. The Defender refused to remove the First Assistant from supervising me and allowed him to continue having input on my job duties, including my request to move to the appeals unit to get away from the harassment. He also attempted to drastically reduce my salary by stripping me of a locality adjustment to which I was entitled as a federal employee. In refusing to consider a promotion—even going to lengths to *backdate* a reclassification of my title to the day before I became eligible for a promotion—the Defender made good on the First Assistant's threat that if I didn't "pay" in the way he wanted, that is, sexually, I would not get the promotion or raise for which I qualified.

III. Judiciary Officials' Grossly Inadequate Response

Despite having been warned by a senior judiciary official that the cards would be stacked against me, I decided to pursue my rights under the EDR Plan to seek remedies allowing me to work safely. In September 2018, I filed a report of wrongful conduct against the Defender and the First Assistant under Chapter IX of

the 2013 Fourth Circuit EDR Plan,[1] which provided for investigation and disciplinary action. I also filed a claim under the "Dispute Resolution Procedures" of Chapter X of the Plan and, as required, initiated the proceeding with a formal "request for counseling." I requested "[a]n environment free of harassment, retaliation, and discrimination, the opportunity for merit-based advancement, and any other appropriate relief." The EDR Plan invited a request to disqualify an "employee or other person involved in a dispute," and I made a written request that the Chief Judge disqualify the Defender from exercising authority in the EDR process.

Over the next six months, the Circuit Executive, Chief Judge, and AO officials kept me on telework while making no meaningful efforts to stop the harassment so I could return to the office. This lengthy period of telework isolated me from my coworkers, who, led by a supervising Team Leader, openly mocked me and spread disparaging rumors. I was asked about my EDR case by a former employee, who told me he found out about it because "people talk." During a team meeting, my coworkers mocked and belittled me, joking: "Should we meet her at Waffle House?" Others added: "Where's Waldo?," to more chuckles and laughter.

[1] The EDR Plan was amended again in 2018 and 2020, but my case arose under the 2013 EDR Plan.

During this period, judiciary officials failed to conduct an appropriate investigation. Despite his conflict of interest as an accused person and my request for his disqualification, the Defender was allowed to appoint the Investigator. The Investigator, a court employee, told me that my allegations of the Defender's violations of the EDR Plan were not being investigated because the EDR Coordinator/Circuit Executive excluded them from the investigation. The Investigator went periods of three to six weeks without providing me any updates on the investigation's progress. More than two months after the investigation opened, the report was sent back to be redone. My witnesses were never interviewed. The Investigator confessed she lacked training to make findings and conclusions, and yet, the EDR Coordinator asked her to make findings and conclusions. The Investigator said the EDR Coordinator, in consultation with the Chief Judge, would make final decisions, even though the EDR Plan did not give the EDR Coordinator that role.

After the investigation was completed, the EDR Coordinator told me that I would not be permitted see the investigation report or its findings because it would make it difficult to resolve the matter informally. He said that even if the investigation found wrongdoing, no disciplinary action would be taken until I ended the dispute resolution process—which, at this rate, could add months. By withholding the investigation's findings and then explicitly conditioning any

corrective action on concluding the EDR process, judiciary officials pressured me to resign to avoid further delaying accountability for those responsible for sex discrimination. I still have not seen the investigation report.

Meanwhile, the Chief Judge said he would not decide my request to disqualify the Defender until the investigation was complete. But the Investigator told me that my allegations against the Defender were not being investigated. The EDR Coordinator emphasized that the Chief Judge was "taken aback" by my request to disqualify the Defender, and said that if the Defender were disqualified, then "no one" could "represent" the employing office in the EDR process. After four months, the EDR Coordinator told me that the Chief Judge "intended to" deny my request to disqualify the Defender; the EDR Coordinator first said that the Chief Judge made the decision before the investigation report was complete, but later contradicted himself and said he made the decision afterward. I never received an explanation for the decision, nor clarification about when it actually occurred.

Because the Defender was not disqualified, I was forced to negotiate with the Defender, an accused party, acting on behalf of the employing office in the EDR process. When I repeatedly requested concrete steps to abate the continuing hostile work environment, the EDR Coordinator said: "Reiterating that you want a safe workplace free of harassment isn't helpful because [the Defender] already

believes he's done and is doing all he can to provide such a workplace for you." The Defender made clear that he would have me return to the First Assistant's duty station no matter the outcome of the EDR process. I therefore requested that the Fourth Circuit assist with a transfer to a different FDO in the circuit, where neither the Defender nor the First Assistant would have supervisory authority over me. I explained: "This situation has irreparably damaged my relationships with the Federal Defender and my colleagues, and I believe I am no longer welcome in that environment." Even after repeated requests, I was not transferred.

In January 2019, nearly five months after I filed my claim, I proceeded to mediation, a mandatory stage in the EDR dispute resolution process before I could request a hearing. The Fourth Circuit's Chief Circuit Mediator told me that the accused Defender was the "decision maker," but that he was from a "generation" that doesn't "get" sexual harassment, and if I proceeded to a final hearing, the presiding officer would not "micromanage" the Defender. The Mediator explained that, at times, the judiciary lacked statutory authority to implement remedies and that "you give up a lot" as a judiciary employee. Because the Defender was the "decision maker," neither mediation nor a hearing could produce a remedy that he resisted, and he was expected to resist because he didn't "get" sexual harassment.

In February 2019, I met with the new Judicial Integrity Officer, whom the AO had recently appointed "to provide counseling and assistance regarding

workplace conduct to all Judiciary employees."[2] She said that the way my complaint was being handled was unusual, and that the Circuit Executive should never be the EDR Coordinator because of inherent conflicts of interest. She said a presiding officer would not "meddle" in the FDO, and regardless of the hearing outcome, the presiding officer could not order remedies, because Article III judges did not have authority to "manage" a federal defender office. She called the issue "jurisdictional."

Having endured a hostile working environment for more than six months with no meaningful action on my complaints, having been subjected to a deeply biased and unfair EDR process, and having been told that a hearing officer would not order remedies even if I prevailed, I had no choice but to resign. I informed the Mediator that I was being constructively discharged. The Mediator, Chief Judge, and EDR Coordinator then worked to find me a Fourth Circuit clerkship to work in for a few months, even though I had previously clerked for a Second Circuit judge and two other judges, and the term clerkship was not comparable to my prior position and a devastating step backwards from my career goal of being a federal public defender. Given my observation of FDO leaders vindictively spreading false rumors about employees who complained of unlawful conduct, I accepted the

[2] Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States 7 (June 2018).

temporary clerkship in hopes of mitigating further attempts to ruin my reputation and career.

In June 2019, almost a *full year* after I first reported my concerns and several months after my constructive discharge, the EDR Coordinator informed me that "disciplinary action was taken last week as a result of your report of wrongful conduct." I was not told the investigation's findings or what corrective action was taken. I later learned during litigation only that the Chief Judge disciplined the Defender, and the Defender disciplined the First Assistant. Despite the apparent findings of wrongful conduct in violation of my rights, I was not offered the possibility of any remedies for wrongful conduct.

The events at the FDO severely damaged my career, while my male supervisors stayed in their positions.[3] After my clerkship ended, I tried but failed to secure employment comparable to my previous position. In seeking employment, I cannot provide references from my former office because my supervisors discriminated against me and spread false rumors about my sexual harassment complaint. I learned that my Team Leader spread rumors that I "made up" being sexually harassed so that I could work at a different duty station and that

[3] In April 2021, the Defender announced his intent to seek another four-year term as Defender. In August 2021, the Fourth Circuit posted a vacancy for his position. In January 2022, the Fourth Circuit announced the appointment of a new Defender, John G. Baker. Despite the Defender's non-reappointment, I have never been offered reinstatement.

coworkers spread rumors that I "lost." The North Carolina Board of Law Examiners flagged my EDR complaint as an area of concern and questioned me about it during my Character and Fitness interview for admission to the bar.

Although I continue to pursue indigent criminal defense work, I have been working in temporary and substantially lower-paying positions. Because judiciary officials' unlawful actions during the EDR process resulted in continuing reputational damage, it is unlikely that I will ever secure a position with terms and compensation comparable to the one I held before I was sexually harassed.

IV. Litigation Conduct

For over two years, I have been seeking remedies for the misconduct in federal court under the pseudonym Jane Roe. In March 2020, I filed suit alleging that officials of the FDO, Fourth Circuit, and federal judiciary violated my Constitutional Fifth Amendment equal protection right by subjecting me to sex discrimination and violated my Fifth Amendment due process right by denying me fair procedures for resolving my discrimination complaint. I requested a pseudonym because, as an attorney struggling to establish my career following my constructive discharge, I feared further retaliation and reprisal, both from the judiciary and the legal community at large. All judges in the Fourth Circuit were recused, so the case was subject to an intercircuit assignment.

Despite my hope that litigation might bring about the remedies and protections that I believe that I—along with all other employees of the federal judiciary—am entitled to, and that the judiciary's internal EDR process utterly failed to provide, the process has been rife with similar problems and inequalities. From the outset, an unknown judicial officer ordered the sealing of my *entire* case *sua sponte*. The sealing was a clear First Amendment violation, seemingly aimed at protecting Defendants by preventing disclosure of embarrassing information. The case was unsealed, without explanation, only after I filed a petition for a writ of mandamus in the Fourth Circuit.

Having refused to show me the investigation report in my EDR proceeding, Defendants have continued to withhold the investigation report from me and from the court. But they have quoted phrases from it in the litigation to support their position, including that I somehow "exploited" the "poor judgment and decisionmaking skills" of my male supervisors.

Defendants also violated the District Court's pseudonym order by exposing my true name and other personally identifying details including photos taken at my wedding. In response, the District Court judge failed to provide a transparent and public explanation of how he was handling the issue. Instead, he memorialized the correspondence between Defendants' counsel and the Clerk's office—some of which did not include my counsel—in sealed docket entries. He provided neither

notice nor explanation of why he was creating sealed docket entries regarding Defendants' violations of court orders, despite his obligation to do so under Fourth Circuit precedent. He unsealed the entries only after my counsel inquired about missing docket entry numbers.

The District Court judge dismissed my suit in its entirety, and the case is now pending on appeal. On appeal, I learned for the first time that blatant and disqualifying conflicts of interest had tainted the entire proceeding. Namely, Defendants participated in hand-selecting the judges for their own case, both in the district court and in the appeal, by virtue of their roles in the intercircuit assignment process, from which they failed to recuse themselves. Further, Defendants, including the Fourth Circuit's Chief Judge and Circuit Executive, knew the appellate panel's identity for six months during the briefing of the appeal before it was disclosed to me and the public. These blatant conflicts of interest and unfair favoring of one party over the other create a severe appearance of impropriety that is apparent to any reasonable observer. Moreover, Defendants displayed a shocking lack of candor about their conflicts of interest in the intercircuit assignment process and, to this day, have avoided a full and transparent disclosure of the intercircuit assignment records. Given the judiciary's strong interest in defending its procedures for handling workplace misconduct, the public

has every right to expect full procedural propriety in this case. Unfortunately, the judiciary defendants in my case have fallen far short of meeting that standard.

The judiciary's official position in the litigation is that because I am not covered by Title VII of the Civil Rights Act, I am not entitled to any review of my allegations in a federal court. If this position prevails, then my rights to be free from sexual harassment, sex discrimination, and retaliation under the EDR Plan that exist on paper will be fictional in practice. And even an EDR process that goes off the rails, as mine clearly did, will have no remedy or opportunity for meaningful review.

V. Conclusion

I diligently pursued my remedies for sex discrimination under the EDR Plan, but I was stonewalled at every turn. Judiciary officials failed to take the most basic steps to address the sexual harassment. The EDR process was deeply biased and unfair, and judiciary officials told me that a hearing officer would not order remedies even if I prevailed at a hearing. Now, the judiciary is fighting the possibility of any judicial review of the EDR process's failures by a federal court. And, as you know, the judiciary is also fighting the possibility of any legislation to provide judiciary employees, like me, the same statutory protections from discrimination that apply to every other federal employee. Thus, as the judiciary

would have it, judiciary employees would have absolutely no remedy for the right to be free from workplace sexual harassment and sex discrimination.

Although I have already suffered, and continue to fear, retaliation and reprisal, I have come forward publicly today because I was asked to testify, and I believe it is my responsibility to share my experience with you. I am giving up my pseudonym in order to bring the issues of unfair and biased internal procedures for handling sexual harassment in the judiciary to the attention of members of a co-equal branch of government, despite the fact that even having a pseudonym has not protected me from career damage. I hope you will see, from my experience and that of others, that there is no reason for the judiciary to receive exceptional treatment when it comes to the nation's civil rights laws. On the contrary, the judiciary's ongoing failure to enforce the protected rights of its employees undermines confidence in the integrity and legitimacy of the federal court system. It is deeply disturbing that the judiciary—the branch of government that Americans depend upon to uphold the rule of law and vindicate civil rights—has failed, and continues to fail, to afford those same basic civil rights protections to its own employees. By disproportionally impacting minorities, women, and other protected classes, this failure also fosters a perception that the judiciary does not value or enforce due process and equal protection under the law. There is simply no reason to trust that the judiciary is uniquely capable of responsibly handling these matters internally, without oversight and transparency. Thank you.

Mr. JOHNSON of Georgia. Thank you.
Ms. Minor, you may now begin.

STATEMENT OF LAURA C. MINOR

Ms. MINOR. Thank you, Chair Johnson, Ranking Member Issa, and distinguished Members of this Committee for inviting me to testify.

My name is Laura Minor and I worked in the Federal judiciary at the Administrative Office of the United States for 23 years. During that time, I had direct insight into how the judiciary handles misconduct proceedings.

Before I proceed, however, I would like to thank Ms. Clark and Ms. Strickland for sharing your experiences with us. I am sorry for what you were forced to endure and I appreciate your efforts to address the misconduct that you experienced.

When I began working in the Federal judiciary, I had hoped to reach a point where employees did not have to testify before Congress to hold the judiciary accountable.

Based on what I learned about the judiciary's response to workplace misconduct, although I am disheartened by your experiences, I am, sadly, unsurprised. I wish I could have done more, which is why I am here today.

I am testifying today with the support of many of my former colleagues, my friends, and, most importantly, my family. I am a wife, a mother, and the grandmother of two young girls, Naomi and Olivia. I care deeply about making the world a better, safer, and more just place for my granddaughters and others, which is why I am sharing my experience.

I spent 23 years working in the judiciary in various positions that progressed in responsibility, ultimately, serving as the Associate Director for the Department of Program Services, a position which reported directly to the director of the Administrative Office.

During my tenure, I spent 16 years as the agency's Equal Employment Opportunity officer and became intimately familiar with the judiciary's struggles to deal with misconduct.

In this position, I observed a process that discouraged people from speaking out for fear of retaliation and a system that did not have adequate procedural mechanisms in place to keep employees safe.

Employees often left the judiciary after facing misconduct or attempting to report it. They were almost always worse off because of their experience, more hurt, more cynical, and more worn down.

Despite repeatedly flagging these issues for leadership, I felt my concerns were not heard. Although my written testimony provides more depth, I want to outline four specific observations about the judiciary's inadequate procedures.

(1) Complaints were frequently chalked up to bad management instead of discrimination or harassment, which minimized misconduct and allowed management to ignore patterns.
(2) Management would immediately question the veracity of any allegation and then fixate on questioning the complainant's competence. Employees who reported misconduct were very quickly labeled problem employees.
(3) The lack of knowledge, training, resources, and awareness was glaring. Even when a complaint presented a clear case of sexual harassment, someone in management said there was nothing particularly attractive about the complainant, an irrelevant assessment used to diminish the misconduct.

(4) Management lacked any interest in systemic change. I asked for transparency through statistics about reporting and workforce demographics. I was told that was not possible.

I also asked about impartial appeals procedures and clearer guidance for employees. My concerns were dismissed. Eventually, despite over a decade of service as the agency's EEO officer, I accepted that I could no longer make a difference and resigned from that position.

I continued working for the agency, was promoted soon afterwards, and retired on good terms and entirely by my own decision. The critiques I provide here and in my written testimony also apply to other reporting avenues in the judiciary.

As the secretary to the Judicial Conference for many years, I became familiar with the reporting procedures for judicial misconduct and also the EDR plan described by Ms. Strickland and Ms. Clark.

Although, I am aware of the incremental changes that have been made to these reporting procedures since my departure, the testimony today confirms what I already know. Those changes are insufficient.

Despite my faith and belief in the judiciary as an institution, I feel hopeless about the judiciary as an employer. In my opinion, the ineffective reporting procedures are merely a symptom of the larger problem—a culture that no amount of self-policing can fix.

Although judges hold many of us accountable, they cannot and do not want to hold each other accountable. I urge this Committee to consider the pervasive nature of the misconduct you've heard about, the many instances that go unreported, and the employees that are silenced through well-founded fears of retaliation or unwanted NDAs.

My testimony does not come lightly and my criticisms are not directed at any particular judges. I understand that you will hear from Judges McKeown and Robinson, for whom I have the utmost respect.

I understand the difficulty and the gravity of their work because I also tried for years to reform these processes. I pushed judges to bring the thoughtfulness and brilliance that they exhibit in the courtroom to addressing issues of misconduct for their own employees.

Now, I have no choice but to accept that the judiciary either cannot or will not shine a necessary light on this problem. Resolving this dissonance and guaranteeing basic workplace protections will require congressional action.

Although the issues will not end with statutory protections alone, I ask you to provide judiciary employees with basic workplace protections for three reasons.

(1) These employees need concrete enforcement mechanisms instead of the current vague, biased, and ineffectual procedures.
(2) Legislation will help chip away at the judicial exceptionalism that, unfortunately, prevents any accountability.
(3) External pressure will be more effective in changing the culture of the judiciary and making accountability the norm, not just in the courtroom but in chambers and in our administrative offices, which have long been ignored.

Thank you.

[The statement of Ms. Minor follows:]

Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change

Hearing before the Subcommittee
on Courts, Intellectual Property, and the Internet
Thursday, March 17, 2022

Testimony of Laura Minor
Former Associate Director for the Department of Program Services and
Former Equal Employment Opportunity Officer
for the Administrative Office of the Courts
Former Secretary to the Judicial Conference of the United States

Thank you, Chairman Johnson, Ranking Member Issa, and distinguished members of this Subcommittee for inviting me to testify today. My name is Laura Minor, and I worked in the federal judiciary at the Administrative Office (AO) of the United States Courts for 23 years. For most of that time, I served in positions that gave me direct insight into how the judiciary handles proceedings related to misconduct. Prior to my retirement, I served as the Associate Director for the Department of Program Services, a position directly under the Director of the AO. I am here today to describe to you what I learned about the judiciary's responses to workplace misconduct and why I believe statutory workplace protections—protections other than the ineffective internal procedures that currently exist—are necessary for employees of the federal judiciary.

I. Background

Before delving into the details of my time working for the judiciary, I would like to first provide some background about who I am and my qualifications to speak to the issues before you today. I am an attorney who graduated from Georgetown University Law Center, and I have spent over 35 years working in both the public and private sectors. I began my career with the Legal Aid Bureau of Maryland, where I represented abused and neglected children. I then spent nine years working in higher education at my alma mater, Georgetown University, where I handled harassment and sexual harassment cases in the university context. I left that position in 1994 to join the Administrative Office of the United States Courts.

During my 23 years working in the judiciary, I served in various positions that progressively involved more and more responsibility. I began my career at the AO as an attorney advisor in the Equal Employment Opportunity (EEO) Office, where I worked with AO and court staff on matters related to the judiciary's model Equal Employment Opportunity plan. I then moved on to positions with an internal focus on the business of the Administrative Office, including overseeing the agency's budget, procurement for the AO and the judiciary, and various other internal functions. In 2004, the AO Director at the time selected me to serve as the Chief of the Office of the Judicial Conference Secretariat, which staffs the Judicial Conference of the United States—chaired by the Chief Justice of the United States—and the Executive Committee of the Judicial Conference. In that capacity, I was responsible for supporting the policy-making apparatus of the judiciary.

During my tenure at the AO, I continuously served as the AO's Equal Employment Opportunity Officer, a position which allowed (and indeed required) me to become

intimately familiar with the agency and the judiciary's struggles to deal with discrimination and harassment issues. I was responsible for running the AO's reporting procedures; this included assisting AO employees who considered formally reporting misconduct and advising AO leadership on how best to address those complaints. This was a volunteer position that I held separately from my day job, and for which I was not separately compensated. I asked to remain in this role for most of my tenure—even when I changed roles or was promoted within the agency—because I thought I could make a difference. Nevertheless, after 16 years as the agency's EEO officer (with a few small gaps in between), I resigned from that position in 2013 due to my frustrations with the process. I felt that I could not effectively impact the way that the agency and the judiciary handled complaints of discrimination and harassment and that my concerns were not being taken seriously.

Despite my frustrations and eventual resignation from my role as EEO Officer, I continued working for the AO. The next year, the Director of the AO chose me to work directly under him as the Associate Director for the Department of Program Services, where I was responsible for leading an organization of over 500 employees and contractors. In 2016, I suffered a serious injury, which led me to retire from the judiciary a year later. I am still in touch with many of my friends and colleagues from the judiciary family and will be forever grateful to the federal judiciary, an institution that afforded me so many wonderful opportunities. I would especially like to thank Cecelia Wirtz, my passionate and committed teammate who fought the good fight for fairness and diversity within the judiciary.

I am testifying today with the support of many of those colleagues, my friends, and, most importantly, my family. I am a wife, a mother, and the grandmother of two young girls, Naomi and Olivia. I care deeply about making the world a better, safer, and more just place for them and others, which is why I am sharing my experience.

II. Experience Working in the Federal Judiciary

I worked for the federal judiciary for over two decades because I truly believe in the judiciary as an institution. But like any other employer, the judiciary must confront the realities of workplace misconduct. Despite numerous opportunities to do so for many years—through working groups, committees, and frank internal discussions—the judiciary has failed to adequately step up to this challenge.

Although there are multiple avenues through which employees can report misconduct, most judiciary employees tend to go through either the Fair Employment Practices System (FEPS) complaint process, available to AO employees, or the Employment Dispute Resolution (EDR) plan, available to all other judiciary employees. Much of my direct experience involved administering the FEPS plan as the AO's EEO Officer; however, I also became quite familiar with the EDR plan during my time in the judiciary.

As the agency EEO officer, I had oversight over harassment and discrimination cases that came into the FEPS office. Although the FEPS program director handled the day-to-day management of complaints, I focused on the overall process and discussions with management. When an AO employee filed a formal complaint, the program director and I were partners in the process; we discussed any issues and concerns that came up during the investigation phase, the preparation of any report, and issuance of a final decision by the AO Director. I would discuss with AO leadership how best to address the misconduct, including case settlement, termination, remedial training, and other alternatives. Before and during the reporting process, I would also serve as a sounding board for complainants, helping them assess how and whether to file a complaint. I developed a rapport with AO employees, because I was honest and forthright about their cases and about the realities of the process.

Today, I want to share that same candor with you and describe what I told every AO employee that sought my advice before filing a complaint. I told these employees that if they chose to report, I would help them in whatever way I could. But I also made sure they knew how hard it would be to report and what they should expect. I warned them that the process favored management. I reminded them that, although the system appeared to be designed to protect employees, in practice that was not the case. In practice, the reporting process did not protect the employee as much as it protected the institution, a truth that would permeate every step of their attempt to report. And I also explained that the remedies available to employees—even if a complaint was successful—were highly limited and unlikely to lead to a fulfilling result.

My advice was not based on a few isolated incidents or issues, but what I saw as a pattern in almost every case. When employees formally chose to report misconduct, oftentimes investigations were biased against the individual filing the report and conducted in a way that favored the interests of those with greater power and influence. Over the years, I observed a cycle that discouraged people from speaking

out for fear of retaliation or losing out on opportunities. At every step of the way, I saw the institution circle the wagons—a myopic focus on protecting the institution instead of making it better.

Without revealing any identifiable details of specific complaints that I helped shepherd through the process, I noticed that management within the judiciary employed the same tactics in dealing with these complaints. Complaints were frequently chalked up to "bad management" instead of discrimination or harassment, minimizing the individual concerns about that specific case and allowing everyone to ignore any patterns—either in reports of misconduct or in how the AO chose to address them. In one case, our investigation verified that a supervisor had racially discriminated against an employee multiple times; there were witnesses for many of the incidents, and the complainant had taken copious notes about each statement the supervisor had made. Nevertheless, the narrative in management became that the complainant was a "problem employee." Although I recommended termination of the supervisor, my recommendation was ignored until the next EEO officer—months later—reviewed the complaint, was horrified by the result of the investigation, and also recommended termination. Discouraged by these events, I frequently began hoping that a complainant would have a perfect record, because otherwise, it was too easy for management to simply blame the problem on the employee. Even that thought was frustrating, however, because it underscored the difficulty of ever succeeding on the merits and highlighted how unfair the system truly was.

The lack of knowledge, training, and awareness was also glaring. Even well-meaning individuals would immediately question the veracity of any allegation, instead asking whether the complainant was actually competent at their job or about other unrelated issues. For example, even when presented with a textbook case of sexual harassment, I heard someone in management opine that there was nothing particularly attractive about the complainant, an assessment intended to diminish the misconduct that had occurred.

Although my goal was to serve as an impartial resource for both agency leadership and employees, management did not always seem to have the same goal. While I worked for the AO, there was a tendency to hire friends of management into the agency, a pattern that was known to most employees. Not only did that lead to hiring individuals who were not always the most qualified for the job, it also meant that the agency hired supervisors who were not always the most qualified to manage. This practice ultimately affected the reporting process and the likelihood

that an employee would report, because employees did not feel comfortable reporting a supervisor that they knew had connections to agency management.

Each of these issues pervaded any ability to find an effective resolution. Even in the most egregious cases, termination of an employee who was found to have engaged in misconduct was not a viable option. For example, based on an investigation, I recommended that the agency prevent a certain employee from supervising others in the future. Although that employee was temporarily removed from a supervisory position, the agency eventually brought them back to supervise again despite that guidance.

I did my best to address these comments and issues on a one-off basis; however, I was at a loss on how to address them at a systemic level. During my time as the EEO officer, I pushed for appeals to be heard outside of the agency. I told management that employees would be highly unlikely to report if the final decision rests with the AO Director, a procedure that rendered the reporting system meaningless. At no point during my tenure was I successful in creating that process, although a version of that process is available now, over a decade later. I also encouraged management to be more transparent about the reporting process and about underlying issues related to a lack of diversity; for example, I recommended sharing statistics within the agency about the makeup of our workforce and the resolution of FEPS complaints. I was told that was not possible. On multiple occasions, I also told management that the FEPS process was too complicated and burdensome for employees. Employees had to make decisions that would require a lot of thought, even for those well-versed in the process. In any other context, these types of decisions would usually benefit from guidance from a lawyer. Instead, we asked our employees to navigate the system with little guidance and the hope that they knew the right people to talk to and the right questions to ask.

As the agency EEO officer, I was not shy about my concerns with these processes. For over 15 years, I repeatedly told the leadership about the issues I saw. I told them that the existing procedural mechanisms deterred reporting and that I did not think actual remedies were available for those who reported. I also noted how frequently I saw employees leave the judiciary after facing misconduct or attempting to report it. In almost every case, the employees were worse off because of their experiences—they were more hurt, more cynical, and more worn down.

As an African-American woman, I too faced discrimination while working at the AO. Given what I had seen as the EEO officer, I did not believe that the issues I—or other employees—faced could be effectively addressed internally. Despite my faith and belief in the judiciary as an institution, I felt hopeless about the judiciary as an employer. By 2013, despite over a decade of service as the agency's EEO officer, I accepted that I could no longer make a difference and resigned from that position.

After my resignation from that role, I remained with the AO and was eventually promoted to the Associate Director of Program Services. Given the length of time I served as the EEO officer, I still provided advice and offered guidance to my replacement. I am aware of the incremental changes that have been made to these reporting procedures and processes since then; however, I do not believe they are or can be sufficient.

III. A Culture of Silence

Although I am particularly well-versed in the deficiencies of FEPS, which governs reporting for employees of the AO, I am also familiar with the other avenues for reporting within the judiciary. While I was a staff attorney at the AO, our office also served as a resource for judiciary employees who were contemplating reporting through the EDR plan. Moreover, as the Secretary to the Judicial Conference for many years, I was privy to complaints of judicial misconduct and how the judiciary's policy-making body attempted to address them.

Given my experience, I commend Ms. Clark and Ms. Strickland for sharing their experiences with us today. I am sorry for what they were forced to endure and thank them for your efforts to address the misconduct that them experienced. Their testimony is particularly important because, contrary to what the judiciary has said in recent years, issues of misconduct within the judiciary are not limited to a few bad apples or bad managers. Although the media has focused on the most extreme, egregious instances of harassment and discrimination, I urge this committee to understand the pervasive nature of misconduct and not ignore the many instances of harassment, discrimination, and abusive conduct that go unreported. Moreover, Ms. Clark and Ms. Strickland also shared the difficulties they faced in attempting to report through the EDR process. Many of these flaws are not accidents or one-off issues with how the process was applied; the problems were the logical outcome and intended consequences of the reporting procedure's design.

In my opinion, the lack of effective reporting practices and procedures is merely a symptom of the larger problem: the root cause of the judiciary's inability to effectively address misconduct is its culture, a culture that no amount of self-policing can fix. Based on my 23 years of experience in the judiciary, the culture of the judiciary makes it incapable of holding people accountable for discrimination and harassment. The irony is that while judges are responsible for holding many of us accountable, they do not hold each other accountable. The judiciary is far more interested in protecting the status quo than addressing the real problems their employees face.

My testimony today does not come lightly. During my time in the judiciary, I worked with many wonderful federal judges, people who I greatly admire and respect. As the Secretary to the Judicial Conference, I saw how the judiciary can truly be thoughtful about legal issues in the courtroom. My criticisms are not directed to any particular judges. I understand that you will also hear from Judge McKeown and Judge Robinson today, for whom I have the utmost respect. I have worked with them before, and I commend them for the changes the Working Group has made to the internal reporting processes and procedures. I understand the difficulty and the gravity of their work, because I also tried for years to reform these processes and procedures.

But my work on these issues is why I firmly believe that no internal tweaks or changes can comprehensively address the pervasive problems of misconduct and harassment within the federal judiciary. As someone who tried for years to push for change from inside the system, I learned the significant limitations of asking for accountability from the very people that I had to work with every day. Although self-policing may be effective in other industries and professions, it requires awareness, full and fair processes, and a cultural commitment to address these issues. But as I saw for 23 years—and from what I can see today and what we all have heard—the judiciary's insistence on self-policing only serves its interest in self-protection.

IV. Conclusion

In concluding my testimony today, I want to address the importance—as well as the limitations—of statutory protections for employees of the federal judiciary. To be honest, I felt that the lack of any external oversight or accountability made cultural change highly unlikely, if not impossible, during my time working for the judiciary. In contrast, the Judiciary Accountability Act provides many necessary protections

to these employees, protections that apply to most other employees in the United States and do not depend on internal oversight alone to effect change. These basic workplace protections will hopefully serve three functions. First, I hope that they will provide employees of the federal judiciary with more concrete enforcement mechanisms than the current procedures, which lack clarity, impartiality, and any discernable remedy. Second, I hope this legislation will help chip away at the judicial exceptionalism that unfortunately shrouds any discussion of the judiciary as an employer. And third, I hope these workplace protections will jumpstart a cultural change within the judiciary, one where accountability is the norm—not just in the courtroom but in chambers and in our administrative offices.

Although the proposed legislation is necessary, it is also the bare minimum to create and preserve effective change. The judiciary will need significant resources to implement these programs in any meaningful way. And the judiciary will still need time to cultivate a culture of accountability. Although this legislation will make it easier for employees to report misconduct, statutory protections alone cannot prevent discrimination and harassment from occurring altogether.

Mr. JOHNSON of Georgia. Thank you.
Ms. Perry, you may now begin.

STATEMENT OF SARAH PARSHALL PERRY

Ms. PERRY. Chair Johnson, Ranking Member Issa, Members of the Committee, thank you for giving me the opportunity to testify today. I also commend these brave women for sharing their stories. How easily 100-plus years of women's progress can be forgotten in some circles, how quickly we are relegated, in some circles, to nothing more than our sex.

The late Supreme Court Justice and feminist icon Ruth Bader Ginsburg once said that judicial independence is vulnerable to assault. It can be shattered if the society law exists to serve does not take care to assure its preservation.

The separation of powers demands that the three branches of American government operate separately from one another, and judicial independence is a foundational tenet of the third branch.

As the only nonpolitical branch, the judiciary must be independent of the Executive and the Legislature to assure the absence of political influence.

Congress has already empowered the Judicial Conference and the Circuit Judicial Councils to respond to complaints of judicial misconduct and prevent the legislature from meddling in the affairs and administration and workings of the judiciary, which is why this chamber's advancement of H.R. 4827 is concerning.

As the Judicial Conference's year-end report from 2021 demonstrates, the judiciary is both aware of problems concerning the integrity of some judges and making extensive efforts to address them through wide-ranging reforms.

In that Conference's report, Chief Justice John Roberts noted that the Judiciary Working Group recognized the seriousness of several high-profile incidents, but found that inappropriate workplace conduct is not pervasive within the judiciary. Yet, this bill would impose on the third branch a Commission on Judicial Integrity to oversee workplace misconduct and administer relief.

Its membership would consist of Executive appointees, recommendations from the EEOC, the U.S. Commission on Civil Rights and other experts recommended by the Senate. The Chair and Vice Chair would serve for five years and be appointed by the Executive.

The bill also calls for special counsel for equal employments and the establishment of an office for employee advocacy reporting to the House and Senate. Executive branch appointees overseeing the judicial branch, reporting to the legislative branch, is perhaps the penultimate separation of powers violation.

This body's failure to seek input from the judiciary on this bill only proposes such an intrusion and how it's telling. The bill also duplicates recently updated employee protections.

A 2018 June report commissioned by the Chief Justice after sexual harassment allegations surfaced against then Judge Alex Kozinski—surfaced, leading to the Federal judiciary's overhaul of its responses to workplace misconduct.

The Judicial Working Group's 2018 findings and its 30 adopted recommendations led to an amendment of the code of conduct for

judges, the code of conduct for judicial employees, and the Judicial Conduct and Disability Act rules.

The Judicial Conference also created the National Office for Judicial Integrity and offices for circuit directors of workplace relations.

In 2019, the Judicial Conference also revamped its employment dispute resolution plan and placed EDR coordinators at every local court. Judicial branch employees now have whistleblower protections.

They have newly expanded protections against abusive conduct—that above and beyond discriminatory behavior—and they have confidentiality policies to remove barriers to reporting.

If these changes don't evidence the judiciary's interest in and commitment to eliminating workplace misconduct, it's hard to imagine what would.

Then, there is the bill's back door affirmative action plan, an expansive diversity-driven effort in tension with both title VII of the Civil Rights Act and the EEOC's explicit guidance making it illegal for covered employers to make employment decisions because of race, color, religion, sex, or national origin.

This bill requires reporting on both hiring and interviewing individuals on those qualities alone. It runs afoul of the Supreme Court's assertion that diversity-driven hiring plans must be flexible enough to allow candidates to compete with other qualified candidates on a level playing field.

Judges look for law clerks that share their judicial philosophy, who bring the sharpest minds to the tasks of interpreting and applying the law. To hamstring them by forcing them to adhere to faux diversity requirements does the Federal judiciary and our entire legal profession a disservice.

Whether by violating the separation of powers, duplicating new efforts addressing misconduct, or placing undue emphasis on candidate identities over qualifications, this body's foray into oversight of the third branch can look a little like a hostile takeover.

Employment discrimination and harassment must be rooted out and the Judicial Branch is no exception. Federal judge or not, no one is above the law. The very premise of this hearing runs counter to available evidence and proposes a solution to the problem of discrimination that is constitutionally suspect.

I look forward to welcoming your questions. Thank you.

[The statement of Ms. Perry follows:]

The Heritage Foundation

CONGRESSIONAL TESTIMONY

H.R. 4827, Judiciary Accountability Act of 2021

"Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change"

Sarah Parshall Perry
Legal Fellow
Edwin Meese III Center for Legal and Judicial Studies
The Heritage Foundation

Chairman Johnson, Ranking Member Issa, and members of the committee:

Thank you for giving me the opportunity to appear before you today. I commend the committee for holding a hearing on this important topic.

My name is Sarah Parshall Perry. I am a Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. I am also a former senior counsel to the Assistant Secretary for Civil Rights at the Department of Education, a former in-house counsel and business director for a Maryland corporation, and a former plaintiff's lawyer specializing in employment discrimination law and Title VII, among others.

In December 2017, the United States Court of Appeals for the Ninth Circuit learned of multiple allegations of sexual misconduct against then-Judge Alex Kozinski. He resigned 10 days later.[1] Almost immediately thereafter, on December 20, 2017, Chief Justice John G. Roberts, Jr., asked the Director of the Administrative Office of the United States Courts (AOC) to establish a working group to examine the sufficiency of the safeguards currently in place within the judiciary to protect court employees from inappropriate conduct in the workplace. The goal of this undertaking was to "ensure an exemplary workplace for every judge and every court employee."

On January 12, 2018, the Director of the AOC announced the formation of the Federal Judiciary Workplace Conduct Working Group, consisting of eight experienced judges and court administrators from diverse units within the judiciary.[2] Its year of work resulted in revisions to its codes of conduct, a strengthening of its internal procedures for identifying and correcting misconduct, and an expansion of its training programs. These recommendations were adopted by the Judicial Conference, the

[1] Niraj Chokshi, "Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations," N.Y. TIMES (Dec. 18, 2017), https://www.nytimes.com/2017/12/18/us/alex-kozinskiretires.html [https://perma.cc/XZ3S-3MNM].

[2] *See* Federal Judiciary Workplace Conduct Working Group Formed, U.S. CTS. (Jan. 12, 2018), https://www.uscourts.gov/news/2018/01/12/federal-Judiciary-workplace-conduct-working-groupformed [https://perma.cc/P6GB-MFJ6].

judiciary's policymaking body, in 2019, and the Working Group's monitoring of progress toward rectifying employee misconduct continues to this day.

Three years of intensive work aimed at eliminating harassment, bullying, and discrimination within the federal Judiciary has resulted in new and significant expansions of employee safety and reporting measures.

Just a few short weeks ago, in December 2021, Chief Justice Roberts issued his year-end report on the federal judiciary in accordance with his role as Chief Justice of the Judicial Conference of the United States, an entity on the cusp of its centennial anniversary. In it, he identified findings of the Judicial Conference after a thorough review of the federal judiciary. The Chief Justice noted that:

> We are duty-bound to strive for 100% compliance because public trust is essential, not incidental, to our function. Individually, judges must be scrupulously attentive to both the letter and spirit of our rules, as most are.... Briefly stated, the Working Group recognized the seriousness of several high-profile Incidents but **found that inappropriate workplace conduct is not pervasive within the Judiciary**.[3]

He further discussed the judiciary's need for independence, adding: "The Judiciary's power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government."[4]

Now this chamber is advancing H.R. 4827, the Judiciary Accountability Act of 2021. This bill, which would overhaul the entire judiciary, threatens to taint its integrity and its independence. The fact that it was drafted and introduced without any input from the judiciary whatsoever simply goes to prove that point. As the Judicial Conference's year-end report clearly demonstrates, the judiciary is well aware of the problems that recently surfaced, is making sincere and concerted efforts to address them, and has already implemented some much-needed reforms to address employee misconduct within the judiciary.

Of course, this body and the witnesses present here today are genuinely committed to eliminating harassment and discrimination within the judiciary. Those perpetuating hostile cultures within their places of employment need to be rooted out, and the judicial branch is no exception.

But the very premise of this hearing—that the judiciary is unaccountable and permits rampant discrimination within its ranks that leaves victims without sufficient recourse—runs counter to all available evidence and proposes a solution to the problem of discrimination that is constitutionally suspect.[5]

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[3] Roberts, C.J., "2021 Year-End Report on the Federal Judiciary," December 2021. https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf (emphasis added).

[4] Id., at 1.

[5] Constitutional scholars have said as much. Professor Thomas Morgan of George Washington University Law School has said, "For many, many years, Congress has largely and I think appropriately left drafting the ethics regime for judges to the Judicial Conference.... The power of Congress to set some ethics standards has not really been challenged because there is a consensus between the branches.... One might imagine some members of the current Congress wanting to use

I. The Separation of Powers Problem

Article III of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.[6]

Particular to the nature of the three branches of government is that each operates separately from the other two. To ensure this, Congress has empowered the Judicial Conference and the circuit judicial councils to respond to complaints of judicial misconduct. In this way, Congress is prevented from meddling in the internal administration and workings of the judiciary.[7] Judicial independence is a foundational tenet of the judiciary as the third branch of government.[8] The judiciary absolutely must be independent of the executive and the legislative branches to ensure the absence of political influence so that judges can render decisions legitimately, transparently, and without partiality.

However, among its many provisions, H.R. 4827 would impose upon the third branch a Commission on Judicial Integrity[9] to oversee allegations of workplace misconduct and administer relief. Its membership would consist of executive appointees, individuals recommended by the Equal Employment Opportunity Commission (EEOPC) and U.S. Commission on Civil Rights, and other purported "experts" recommended by Senate majority and minority leadership.[10]

The commission would be staffed with two federal judges, but *only* after consultation and approval of the Chair and Vice Chairs of the Commission on Judicial Integrity, all three of whom are selected by

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what they might call ethics standards, for example, to reduce the courts' power of judicial review. Congress has wisely not tested those limits." James V. Grimaldi, Joe Palazzolo, and Coulter Jones, "Judges Held Off Congress's Efforts to Impose Ethics Rules—Until Now," WALL ST. JOURNAL, Dec. 23, 2021.

[6] U.S.C.A. Const. Art. III § 1, USCA CONST Art. III § 1.

[7] Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 820–21 (1987) (Scalia, J., concurring) (stating that the "Judicial Branch[ ] must…possess those powers *necessary to protect the functioning of its own processes*") (emphasis added).

[8] *See* JUD. CONF. OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, at 4 (1996) [hereinafter JUDICIAL CONFERENCE REPORT] ("The Judiciary's internal governance system is a necessary corollary to judicial independence.").

[9] Judiciary Accountability Act, H.R. 4827, Sec. 4 (a) et seq., 117th Cong., 1st Sess., https://www.congress.gov/bill/117th-congress/house-bill/4827/cosponsors?r=53&s=1.

[10] According to section 4(b)(2), expert representation consists of seven members selected by the Judicial Conference of the United States, but only after consultation by the majority and minority leaders of the Senate, the Speaker and minority leader of the House of Representatives, the Council of the Inspectors General on Integrity and Efficiency, the Equal Employment Opportunity Commission, and the United States Commission on Civil Rights. Among those experts are two members with "substantial experience" in alternative dispute resolution, two members with substantial experience in enforcing and investigating civil rights laws, and one member with experience providing licensed counseling and other support for victims of harassment. "Substantial experience" is not defined.

the President. Four other judicial branch employees would also serve but also would be selected solely by the chair and vice chairs of the commission. The chair and vice chairs would serve for five years, and any commissioner could be removed in the event of permanent incapacity, inefficiency, neglect of duty, or malfeasance. Since "inefficiency" and "neglect of duty" are not defined, the potential for subjectivity regarding removal of commission members is readily apparent.

The bill also calls for a special counsel for equal employment opportunity, to be appointed by the commission for a term of five years, who would be tasked with carrying out his or her duties in consultation with the House and Senate Judiciary Committees. Likewise, the bill calls for the establishment of an Office for Employee Advocacy, whose director, like the special counsel, would report to the House and Senate Judiciary Committees.

An executive branch appointee tasked with overseeing the judicial branch who would report to the legislative branch presents perhaps the quintessential separation of powers dilemma. The mind reels at the potential for political encroachment into the judiciary—the one branch of government designed to be apolitical.

The separation of powers doctrine was instituted not with the idea that it would promote governmental efficiency, but to establish a bulwark against tyranny.[11] A breach in the separation of powers is permissible only if (1) explicitly authorized by the Constitution[12] or (2) shown to be necessary to the harmonious operation of workable government.[13] H.R. 4827 satisfies neither condition.[14]

The inherent authority vested in federal courts by Article III of the Constitution, grounded in the separation of powers doctrine, may be exercised *even in face* of contrary legislation.[15] Therefore, even if the bill is passed, the judiciary might simply ignore H.R. 4827 as an appropriate exercise of its inherent power and independence.

As the Supreme Court said in *United States v. Richard Nixon*, perhaps the seminal case addressing the separation of powers doctrine:

> Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be

[11] U.S. v. Brown, 381 U.S. 437 (1965).

[12] *See* Huff v. TeleCheck Services, Inc., 923 F.3d 458, 462 (6th Cir. 2019) ("[The Art. III] limitation checks…the power of the legislative branch by prohibiting it from using the Judiciary as an adjunct to its own powers") (internal citations omitted).

[13] *See* Nixon v. Sirica, 487 F.2d 700, 715 (D.C. Cir. 1973) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

[14] Congress's intent to modify the judiciary's internal personnel procedures and internal operations is clearly not authorized by the Constitution. Nor can it be argued that the legislative branch's interference with the judiciary's internal operations is required for workable government; indeed, wholesale public access to employee disputes, judicial complaints, workplace studies, and diversity reporting would cripple the judiciary as a coequal branch.

[15] Bothwell v. Republic Tobacco Co., 912 F. Supp. 1221, 1225–1226 (D. Ne. 1995) ("Since its inception the federal judiciary has maintained that federal courts possess inherent powers which are not derived from statutes or rules…. The inherent authority in this category is grounded in the separation of powers doctrine and thus may be exercised even in the face of contrary legislation." (Citing Eash v. Riggins Trucking Inc., 757 F.2d 557 at 562 (3rd Cir.1985) (en banc)).

> shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. **Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.**[16]

Understanding these principles, this body's foray into legislative and executive oversight of the third branch seems more like a hostile takeover.

II. Duplicative and Unnecessary

Assuming, arguendo, that H.R. 4827 were to survive a challenge to this constitutional defect, the bill still would merely duplicate the extensive protections that have already been put in place for judicial employees, including protections against discrimination, harassment, retaliation, and abusive conduct. The "workplace misconduct prevention program" proposed by this bill would result in the creation of more administrative bodies, more wasteful spending, and a list of onerous regulations geared at interfering with the internal operations of the judiciary.

As a result of the Workplace Conduct Working Group's 2018 findings and recommendations (including the adoption of clear and consistent workplace conduct policies, the offering of additional avenues to report misconduct, and the providing of more workplace conduct training), the Judicial Conference amended the Code of Conduct for U.S. Judges, the Code of Conduct for Judicial Employees, and the Judicial Conduct and Disability Act Rules. In 2019, it also completely revamped its Employment Dispute Resolution (EDR) plan.

Multiple processes to identify, report, and rectify judicial employee misconduct already exist within the judiciary itself. Judicial branch employees have whistleblower protection; newly expanded protections against "abusive conduct" (*even when not discriminatory or based on protected categories*); multiple avenues to report workplace concerns; clarified confidentiality policies to remove potential barriers to reporting; and much more.

Among the many employee safeguards for judicial employees, many updated as recently as 2019,[17] are:

- Simplification and expansion of the options for addressing wrongful workplace conduct as laid out in the updated (2019) EDR.[18]
- Additional prohibitions against Abusive Conduct that protect employees even when the

[16] U.S. v. Nixon, 418 U.S. 683, 705 (1974) (emphasis added) (internal citations omitted).

[17] Fact Sheet for Workplace Protections in the Federal Judiciary, *Administrative Office of the U.S. Courts*, https://www.uscourts.gov/about-federal-courts/workplace-conduct/fact-sheet-workplace-protections-federal-Judiciary, last accessed Feb. 7, 2022.

[18] Guide to Judiciary Policy, Vol. 12, Appx. 2A, "Model Dispute Resolution Plan," last revised Sept. 17, 2019, available at: https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a_oji-2019-09-17-post-model-edr-plan.pdf.

misconduct is not discriminatory.[19]

- Express discrimination and harassment prohibitions and workplace protections available to non-judicial employees in other workplaces.[20]

- Emphasis in the Codes of Conduct and Judicial-Conduct and Judicial-Disability (JC&D) Rules that judicial employees and judges must affirmatively report potential workplace misconduct upon learning of it, even if as bystanders.

- Clarified confidentiality policies to remove potential barriers to reporting and to encourage reporting, even for chambers staff, who are bound by other confidentiality requirements in the course of their work.

- Multiple avenues to report workplace conduct concerns, including anonymously, to designated points of contact within or outside the employing office. This includes a multi-layer network of personnel—at the national, circuit, and local court levels—to provide confidential and impartial advice and guidance to judicial employees, managers, and judges.

- A formal Employment Dispute Resolution complaint process and an informal ("assisted resolution") complaint process with an increased user-friendly structure for both (including flow charts that explain EDR rights and options).

- Annual training for all EDR coordinators, judges, and judiciary employees on workplace conduct protections and processes.

- A broad range of publications, online resources, and in-person training programs from the Federal Judicial Center (FJC) to supplement court-sponsored training and materials.

- Data collection across the judiciary on the type and number of formal and informal EDR complaints, as well as judicial conduct and disability complaints and actions under the JC&D Act.

- Continuing operation of the Working Group, in collaboration with Judicial Conference committees and Administrative Office advisory groups, to maintain constant assessment of workplace policies and procedures.

In addition to the foregoing, and as with other government officials, federal judges, who are permitted

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[19] Id. (EDR Plans prohibit Abusive Conduct, defined as "a pattern of demonstrably egregious and hostile conduct not based on a Protected Category that unreasonably interferes with an employee's work and creates an abusive working environment. Abusive conduct is threatening, oppressive, or intimidating." The Judicial-Conduct & Judicial-Disability Rules define misconduct to include treating judicial employees "in a demonstrably egregious and hostile manner." In this way, employees are now protected not only from discriminatory harassment, but also from any harassment that interferes with the work environment, no matter the motivation.)

[20] Id. EDR Plans prohibit the same conduct that would violate Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990 and Rehabilitation Act of 1973. And the JC&D Rules go further, defining misconduct to include discrimination, abusive or harassing behavior, and retaliation.

to "hold their Offices during good Behaviour,"[21] may be removed following impeachment and conviction for "Treason, Bribery, or other high Crimes and Misdemeanors."[22] Historically, the impeachment power has been used by Congress against judges in cases of serious ethical or criminal misconduct, including making false statements, showing favoritism toward litigants, being intoxicated on the bench, and abusing the contempt power.[23] No matter the judicial complaint procedure or other available employee remedies, impeachment always remains an avenue for the Senate should concerns about ethical or criminal conduct arise. Likewise, the Constitution does not immunize sitting federal judges from criminal prosecution prior to their removal from office by the impeachment process.[24] In short, misbehaving judges can be held accountable by the judiciary itself, by the Congress, and, in extreme cases, by the criminal justice system.

H.R. 4827, however, would modify 28 U.S.C. § 351(f)(1) by continuing the judicial complaint process even if a judge has retired, resigned, or died, meaning literally that H.R. 4827 would ensure that employee complaints would follow federal judges to the grave.

As the wave was cresting on the #MeToo movement, the Judicial Conference of the United States, led by Chief Justice Roberts, began a multi-year effort to amend and enhance procedures designed to secure the judiciary's commitment to a workforce free of discrimination and harassment with guarantees of security for judicial employees that often exceed those available to their civilian counterparts. Among those advances are the establishment of a national Office of Judicial Integrity;[25] circuit-wide Directors of Workplace Relations; multiple avenues for the reporting of misconduct; revised and enhanced workplace dispute policies; tightened ethics, reporting, and discipline rules; and more.

If these developments don't evidence the judiciary's commitment to a workplace that is consistent with the principles of employee respect and dignity, it's hard to imagine what would.

III. Affirmative Action Plan in the Judiciary

Even as the Supreme Court has just granted review in a pair of cases[26] in which the justices have been asked to overrule the use of racial preferences in admissions policies at institutions of higher education,

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[21] U.S.C.A. Const. Art. III § 1, USCA Const. Art. III, § 1.

[22] U.S.C.A. Const. Art. II § 4, USCA Const. Art. II, § 4.

[23] Federal Bar Association, FedBar Blog, "Washington Watch: When Federal Judges Are Impeached," March 11, 2020, https://www.fedbar.org/blog/washington-watch-when-federal-judges-are-impeached/#:~:text=As%20with%20other%20government%20officials,Offices%20during%20good%20Behaviour.%E2%80%9D%20The. Also, federal courts have held that service during "good behavior" functions as a term limit only on federal judges: U.S. v. Isaacs, 493 F.2d 1124 (7th Cir. 1974), *cert. denied*, reh'g denied, 418 U.S. 955, *cert. denied*, 417 U.S. 976.

[24] *See* U.S. v. Claiborne, 727 F. 2d 842 (9th Cir. 1984), *stay denied*, 465 U.S. 1305, *cert. denied* 469 U.S. 829.

[25] H.R. 4827 proposes to establish an "Office of Judicial Integrity," sec. 5(a), although one already exists within the judiciary and this body has made no showing that such office is incapable of performing its duties impartially or effectively.

[26] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, No. 21A393 (2022); Students for Fair Admissions, Inc. v. University of North Carolina, No. 21-707 (2022).

it is rather ironic that this body would consider legislation that would require federal judges to produce annual reports on the diversity not only of their staffs, but also of those they interview for employment. This would create a backdoor effort to bring racial preferences and gender-based and sexual orientation–based hiring into the federal Judiciary.

Specifically, H.R. 4827, § 4 (f)(8) requires the proposed Judicial Integrity Commission to submit to Congress a report that includes the number of individuals who were interviewed and hired for positions within the judiciary during the previous year. The data are to be disaggregated by sex, sexual orientation, gender, race, ethnicity, and disability[27] with year-to-year trends identified. Moreover, the Special Counsel to the Equal Employment Opportunity Commission is required to provide an annual workplace culture assessment that includes indicators of positive and negative trends for maintaining a safe, respectful, diverse, and inclusive work environment.[28]

Such so-called diversity-driven efforts are in tension with Title VII of the Civil Rights Act of 1964 and the EEOC's guidance on the same,[29] which makes it illegal for covered employers to make employment decisions "because of" an individual's race, color, religion, sex, or national origin. The Supreme Court has construed Title VII's prohibition against discrimination to recognize reverse discrimination claims by non-minority groups.[30] But it has likewise clarified that race-conscious or gender-conscious decisions made pursuant to an appropriately tailored voluntary affirmative action plan designed to remedy the effects of discrimination in traditionally segregated job categories will not violate Title VII.[31]

Therefore, employers can adopt voluntary affirmative action plans to correct an imbalance in a traditionally segregated job category, but that plan cannot unnecessarily trample the interests of those outside the group that the plan is designed to protect. It also cannot involve a hiring quota or an inflexible hiring goal.[32]

H.R. 4827—because of its required reporting on both hiring and interviewing segregated by individual characteristics—appears to run afoul of the Supreme Court's assertion that diversity-driven hiring plans must be flexible enough to allow candidates to compete with other qualified candidates on a level playing field.

A federal judge searches for law clerks who share his or her judicial philosophy and those who have reached the highest levels of achievement and bring the sharpest minds to the task of helping the judge

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[27] Notably, statistics on another protected class recognized by this nation's civil rights canon—religious Americans—are not requested.

[28] "Diverse" and "inclusive" are not defined in H.R. 4827, but the bill's failure to include religion among categories of otherwise protected categories in civil rights law—and particularly within employment under Title VII of the Civil Rights Act, 29 CFR Part 1608—presupposes that "diversity" would not include diversity of thought or belief.

[29] *See* CM-607, "Affirmative Action," published October 1, 1981, available at: https://www.eeoc.gov/laws/guidance/cm-607-affirmative-action'

[30] *See* McDonald v. Santa Fe Trail Transp., 427 U.S. 273 (1976).

[31] *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, Santa Clara Cty., 480 U.S. 616 (1987).

[32] *See* Gratz v. Bollinger, 539 U.S. 244 (2003).

to understand the current state of the law and to apply the law to the facts in particular cases. Those individuals are hired not by virtue of their identifying characteristics, but because of their suitability to the task of judicial interpretation and application. To hamstring federal judges by forcing a reporting on sufficient "diversity" efforts does the entire legal profession and the federal Judiciary a disservice.

If anyone can point me to a similar proposal that has been aimed not at the judiciary, but at the legislature, please tell me. I have found none.

Conclusion

It is hard to see how this bill is not a violation of the constitutional separation of powers. It certainly skates close to the constitutional line. It also duplicates the myriad existing structures within the judiciary that address and rectify workplace misconduct and imposes intrusive requirements on Judicial Conference procedures—even as the Chief Justice has clearly expressed and demonstrated the Conference's commitment to build on the vast progress it has already made.

A hundred years ago, Chief Justice William Howard Taft acknowledged that while criticism (and strident calls for reform) of the courts will always be inevitable, the judiciary must be left to manage its internal affairs, both to promote informed administration of the courts and to ensure their independence from the other political branches of government.[33] And as noted in his 2021 annual report, our current Chief Justice has acknowledged that for the past 100 years, the Judicial Conference has been both an enduring success and up to the task of effectively addressing employee misconduct.[34]

It is one of the chief merits of the American system of constitutional law that all of the powers entrusted to government are divided into three branches and that the functions appropriate to each of these branches of government are vested in separate bodies of public servants. But this system—as the Supreme Court has held—requires for its protection that the lines that separate and divide those branches be broadly and clearly defined.[35]

Passage of H.R. 4827 would threaten both the independence of the judiciary and the separation of powers and would irreparably blur those lines,

I thank the committee for inviting me to testify today and welcome any questions you might have.

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The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

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[33] Roberts, C.J., "2021 Year-End Report on the Federal Judiciary," December 2021, at 3, 5, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[34] Id. at 5.

[35] *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168 (1880).

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Mr. JOHNSON of Georgia. Thank you, Ms. Perry.
Next, we will hear from Ms. Coll. You may begin.

STATEMENT OF ALLY COLL

Ms. COLL. Thank you, Chair Johnson, Ranking Member Issa, and Members of the Subcommittee. Thank you for calling this important hearing today and for the opportunity to testify.

I also want to begin by thanking Ms. Clark, Ms. Strickland, and Ms. Minor on behalf of everyone who will benefit from your courage. Thank you for your powerful testimony.

My name is Ally Coll and I'm the President and Co-Founder of the Purple Campaign, a non-profit organization I started to address workplace harassment. I'm also an attorney and an Adjunct Professor at George Mason University where I teach civil rights law.

In the fall of 2017 I made the difficult decision to publicly share my own experience with sexual harassment as an 18-year-old congressional intern. It was only then that I learned that because I was an intern and not a full-time employee when my harassment occurred I was not protected at all under existing Federal law.

That changed thanks to Members on this Subcommittee and others here in Congress when my story came out and I had the opportunity to work with lawmakers here to draft and enact the Congressional Accountability Reform Act. Today however there is still a segment of the workforce where employees continue to lack these important statutory protections, the Federal judiciary.

In his 2021 year-end report, Chief Justice John Roberts insinuated that such protections are unnecessary because workplace misconduct in the Federal judiciary is not pervasive. With all due respect to the Chief Justice, the stories you just heard from the brave Witnesses who testified before me today make clear that workplace misconduct is a significant problem in the Federal judiciary and that the institution's efforts at self-policing have failed.

In January of this year the Administrative Office of the U.S. Courts sent a form to thousands of judiciary staffers asking if they had witnessed wrongful conduct in the workplace. After 40 people responded to the question and 34 of them, or 85 percent, answered that they had observed inappropriate behavior, the judiciary shut down the question, removed it from the survey, and claimed that the result was, quote, "an unfortunate administrative error."

As Olivia Warren, the former law clerk who testified before this Committee in 2020, explained, many employees do not feel safe reporting misconduct to the judiciary because they fear retaliation, a concern that is amplified by the fact that unlike almost all other private and public sector employees the people who work in the Federal judiciary lack whistleblower protections under Federal law.

As you are aware various Federal laws such as title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act exist to protect employees from discrimination and harassment at work. Until the 1990s however these laws did not apply to employees of the three branches of the U.S. Government. In 1995, Congress extended coverage of Federal employment laws to its employees through the Congressional Accountability Act and to Executive Branch employees through the Presidential and Executive Office Accountability Act.

To this day, despite its role as the institution tasked with enforcing anti-harassment and discrimination laws to other work places, the Federal judiciary continues to resist calls to provide similar statutory protections to its own employees.

In its 2021 Annual Report released just this week, for example, the Judicial Conference reiterated its opposition to legislative action on the grounds that it would interfere with the internal governance of the third branch.

Last year Members of this Committee introduced the Judiciary Accountability Act of 2021, the JAA, bipartisan, bicameral legislation that would provide strong statutory rights and protections against discrimination, sexual harassment, retaliation, and other forms of workplace misconduct to Federal judiciary employees. Thank you for taking this important step.

The JAA would finally give Judicial Branch employees the same anti-discrimination rights and remedies that private sector employees have had for decades and that employees here in Congress and in the Executive Branch now have as well and it would protect whistleblowers by explicitly prohibiting retaliation against them and providing them with the right to sue for relief if they are retaliated against.

On behalf of the more than 30,000 people who work in the Federal judiciary today I urge you to pass the JAA and ensure that Federal judiciaries are guaranteed the basis fundamental right to work in an environment free from harassment and discrimination and that nobody, not even the most powerful lifetime-appointed judges, are above the law. Thank you.

[The statement of Ms. Coll follows:]

TESTIMONY OF ALEXANDRA R. COLL
HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

"Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Reform."

March 17, 2022

Introduction

Chairman Johnson, Ranking Member Issa, and members of the Subcommittee: thank you for calling this important hearing and for the opportunity to testify today. My name is Ally Coll and I am the President of the Purple Campaign, a non-profit organization I co-founded in 2018 to address workplace harassment by implementing stronger corporate policies and establishing better laws. I am also an attorney and an adjunct professor at George Mason University, where I teach civil rights law.

In the fall of 2017, after Tarana Burke's longstanding #MeToo movement went viral, I made the difficult decision to publicly share, for the first time, my own experience with sexual harassment as an 18-year-old Congressional intern. It was only then–fifteen years after the harassment occurred–that I learned that, because I was an intern and not a full-time employee when I was sexually harassed, I wasn't protected under existing federal law.

I chose not to report my harassment through formal channels at the time it occurred for a variety of reasons. I don't recall now whether I received anti-harassment training when I started my internship in the U.S. Senate, but if I did, the program did not leave me with a clear understanding of how to report misconduct or about the process for investigating and addressing such incidents.

More importantly, I understood from informal conversations I had at the time with others on the Hill that this Senator's inappropriate behavior was an open secret in Congress. People told me that they were sorry about what happened to me, but not surprised, because I was "his type" or he was known to be "handsy." The message I internalized at age 18 from such comments was that sexual harassment was simply a cost of doing business on Capitol Hill–something my colleagues viewed as regrettable, but ultimately not worth doing anything about. The fact that I lacked any statutory protections under federal law confirms this viewpoint.

That changed after my story and many others like it came out and lawmakers on both sides of the aisle and in both chambers took action to create stronger protections under federal

law for Congressional branch employees. I had the opportunity to work with lawmakers as they drafted new legislation to better protect their workers, and in December of 2018 the Congressional Accountability Reform Act was enacted. The bill improved upon the original Congressional Accountability Act of 1995 (the CAA) by creating broader statutory protections for Congressional employees; expanding coverage of federal labor laws to interns, fellows, detailees, and others; and by making significant improvements to the process for reporting, investigating, and resolving claims of workplace misconduct.

Harassment in the Federal Judiciary

Despite Congress's swift action to create greater statutory protections for its employees in the wake of #MeToo, there is still a segment of the workforce in which employees remain completely unprotected by federal labor laws: the federal judiciary.

In his 2021 Year-End Report, Chief Justice John Roberts asserted that workplace misconduct in the federal judiciary is confined to "several high-profile incidents" and "not pervasive within the Judiciary."[1] With all due respect to the Chief Justice, the stories you just heard from the brave witnesses who testified before me today, together with additional evidence described below, make clear that workplace misconduct ***is*** a significant problem in the federal judiciary, and that the institution's efforts at self-policing have failed.

In January of this year, the Administrative Office of the U.S. Courts sent a training registration form to thousands of judiciary staffers asking if they had "witnessed wrongful conduct in the workplace." After the first 40 employees responded to the question, revealing that 34 of them–85 percent of respondents–answered that they ***had*** observed some form of inappropriate behavior, the judiciary shut down the question, removed it from the survey, and claimed that the result was "an unfortunate administrative error."[2]

This pattern is supported by more than 20 current and former employees of the federal judiciary who filed an amicus brief in *Jane Roe v. United States et. al*, a case brought by a former public defender who was sexually harassed by her supervisor and retaliated against when she came forward. The amici explained that "Roe is hardly alone, both in terms of the harassment she faced and how the judiciary's reporting procedures failed her" and described harassment, bullying, and discrimination–frequently based on sex, race, sexual orientation, and pregnancy status–they were subjected to and witnessed in courts and defenders' offices across the country.[3]

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[1] *2021 Year-End Report on the Federal Judiciary*, at 4, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[2] Ann Marimow, *Federal courts drop survey question about workplace misconduct, but not before judges' staffers said they'd witnessed such problems*, The Washington Post, Jan. 14, 2022, https://www.washingtonpost.com/politics/courts_law/federal-court-workplace-misconduct/2022/01/13/1c4a0b6e-7481-11ec-bc13-18891499c514_story.html.

[3] Brief for Named and Unnamed Current and Former Employees of the Federal Judiciary who were Subject to or Witnessed Misconduct as Amici Curiae, p. 3, *Jane Roe v. United States et al.*, No. 21-1346 (4th Cir. 2021) [hereinafter *Jane Roe Amicus Brief*].

The amici's experiences echo that of Olivia Warren, a former law clerk who testified before this Committee in February 2020. Warren described how she was warned to "brace [herself] for 'your grandfather's sexism'" before her clerkship had even begun, and how the judge she worked for told her that allegations of sexual harassment were made by women who had initially "wanted it" and that women generally were "liars who could not be trusted."[4] As Warren explained, the "frustrations and obstacles" she encountered in attempting to use the judiciary's internal procedures to report the harassment "indelibly colored [her] view of the judiciary and its ability to comprehend and adjudicate harm."[5]

In the words of former Chair of the Equal Employment Opportunity Commission (EEOC) Jenny Yang, these public stories represent only "the 'tip of the iceberg.'"[6] As Yang explained in her 2018 testimony before the U.S. Senate Judiciary Committee, it is misleading to use "the small number of formal complaints to draw any conclusions about the overall rate of harassment or other inappropriate conduct" in the federal judiciary, because about 70 percent of people who experience harassment never report it.[7]

Indeed, the federal judiciary has acknowledged as much. In 2018, the judiciary's Workplace Conduct Working Group found that its employees "are hesitant to report harassment and other inappropriate behavior for a variety of reasons, including lack of confidence that they will be believed, fear that no action will be taken, and concerns that a complaint will subject them to retaliatory action or affect future job prospects."[8]

This conclusion is supported by the fact that, as James Duff, then-Director of the Administrative Office of the U.S. Courts, told the U.S. Senate Judiciary Committee, in 2017 there were ***zero*** reports of sexual harassment filed in the federal judiciary.[9] This complete absence of reports indicates not that the federal judiciary is a workplace devoid of misconduct, but rather that its hierarchical culture and opaque reporting procedures have created an environment in which employees are afraid to report.

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[4] *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2020), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2791 (testimony of Olivia Warren) [hereinafter *Warren Testimony*].

[5] *Id.* at 1, 17.

[6] *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: S. Comm. on the Judiciary*, 115th Cong., (2018), at 3, https://www.judiciary.senate.gov/imo/media/doc/Yang%20Testimony.pdf (testimony of Jenny Yang) [hereinafter *Yang Testimony*].

[7] *Id; see also, Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace*, U.S. Equal Employment Opportunity Commission, (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace.

[8] *Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States*, (2018), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf.

[9] Letter from James C. Duff, Dir., Admin. Office of the U.S. Courts, to Chairman Grassley & Senator Feinstein, (Feb. 16, 2018), at 2, https://www.judiciary.senate.gov/imo/media/doc/2018-02-16%20AOUSC%20to%20Grassley,%20Feinstein.pdf.

While some of the *Jane Roe* amici "reported their experiences through formal processes," many "did not feel able to do so without considerable risk" and others "have faced explicit retaliation for their attempts to address wrongful conduct."[10] Moreover, of "the dozens of current and former judiciary employees who expressed interest" in joining the amicus brief, "only about a third felt able to share their experiences," even anonymously.[11]

Warren likewise explained to this Committee that she did not feel comfortable using the judiciary's reporting procedures because she "could not trust that they would receive the information confidentially or with an open mind," particularly after the Judicial Integrity Officer told Warren that confidentiality was not guaranteed, and that she could not answer Warren's questions about how to interpret the judiciary's rules or reporting processes.[12] As a result, Warren feared retaliation and "did not feel safe reporting to the judiciary."[13]

Despite this mounting evidence of workplace misconduct–and after decades of working groups, task forces, and status reports examining the issue–the federal judiciary has failed to meaningfully protect its employees from harassment and discrimination. As a result, federal legislation is necessary to ensure that the more than 30,000 people who work in the federal judiciary are afforded the same right to an equal workplace that Congress has guaranteed to employees in other institutions.

The Judiciary Accountability Act

While myriad federal laws–such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act–safeguard employees' right to be free from discrimination and harassment at work, until the 1990s these laws did not apply to employees of the three branches of the U.S. government.[14] In 1995, however, Congress extended coverage of federal employment laws to Congressional employees through the CAA and to Executive Branch employees through the Presidential and Executive Office Accountability Act.[15]

A provision of the 1995 CAA required the Judicial Conference to draft a report including recommendations it had for legislation to provide its employees with rights, protections, and procedures under federal law. The resulting Conference Report, however, resisted the enactment of such legislation, citing the "fundamental need to preserve judicial

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[10] *Jane Roe Amicus Brief* at 1.
[11] *Id.* at 2.
[12] Letter from Jill B. Langley, Judicial Integrity Officer for the Federal Judiciary, to Jamie A. Santos, Goodwin Proctor LLP, (June 17, 2019) (Attachment to *Warren Testimony*), at 2.
[13] Olivia Warren, *Enough Is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 Harv. L. Rev. F. 446, 452 (2021).
[14] *See* Robert M. Agostisi and Brian P. Corrigan, *Do as We Say or Do as We Do?: How the Supreme Court Law Clerk Controversy Reveals a Lack of Accountability at the High Court*, Hofstra Labor & Employ. Law Journal: Vol. 18: Iss. 2, Article 10, (2001), https://scholarlycommons.law.hofstra.edu/hlelj/vol18/iss2/10.
[15] *See* Robert M. Agostisi and Brian P. Corrigan, *Do as We Say or Do as We Do?: How the Supreme Court Law Clerk Controversy Reveals a Lack of Accountability at the High Court*, Hofstra Labor & Employ. Law Journal: Vol. 18: Iss. 2, Article 10, at 8-9, (2001), https://scholarlycommons.law.hofstra.edu/hlelj/vol18/iss2/10.

independence" and arguing against the need for Congress to "micro-manage or unnecessarily bureaucratize the day-to-day management of the courts."[16]

Despite its role as the institution tasked with enforcing anti-harassment and discrimination laws to other workplaces, the federal judiciary continues to resist calls to provide such statutory protections to its own employees. In its 2021 Annual Report released just this week, for example, the Judicial Conference reiterated its opposition to the creation of statutory workplace rights for federal judiciary employees because doing so would "interfere[] with the internal governance of the Third Branch."[17]

On July 29, 2021, several members of this Committee, together with their colleagues, introduced the Judiciary Accountability Act of 2021 (the JAA)–bipartisan, bicameral legislation to provide strong statutory rights and protections against discrimination, sexual harassment, retaliation, and other forms of workplace misconduct to federal judiciary employees. The JAA would finally ensure that federal judiciary employees have the same basic statutory protections that are guaranteed to most other workers in America.

First and foremost, the JAA would give judicial branch employees the same anti-discrimination rights and remedies private sector employees have had for decades, and that employees here in Congress and in the Executive Branch now have as well.[18] The JAA would also protect whistleblowers by explicitly prohibiting retaliation against them and providing them with the right to sue for relief if they are retaliated against. Again, unlike most other federal employees, judicial branch employees currently have no statutory protection against retaliation, which leads to an increased fear of reporting misconduct.

Like the CAA, the legislation would also establish various institutional programs, commissions, and offices to increase transparency around the process for reporting and addressing misconduct in the federal judiciary and provide employees with more information about their rights and options. The JAA calls for the establishment of a comprehensive workplace misconduct prevention program, which would be overseen by a newly established Commission on Judicial Integrity. The Commission would include members who are experienced in investigating and enforcing relevant civil rights laws, as well as current federal judiciary employees and former law clerks.

The JAA also calls for the establishment of an Office of Judicial Integrity to administer a nationwide, confidential reporting system; a comprehensive training program addressing workplace behavior and bystander intervention; and public reporting of demographic

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[16] *See Id.* at 10 (quoting the Rep. Of The Proceedings Of The Jud. Conf. Of The United States (Dec. 1996)).

[17] *The Courts and Congress–Annual Report 2021*, https://www.uscourts.gov/statistics-reports/courts-and-congress-annual-report-2021.

[18] Judicial branch employees who have attempted to assert claims under Title VII of the Civil Rights Act of 1964, the federal law that provides most employees with anti-harassment, discrimination, and retaliation remedies in situations where their employer's internal policies and procedures fail to do so, have had their claims dismissed by the EEOC due to a lack of jurisdiction. *See, e.g.*, *Kiesha D. Lewis v. Roslynn Mauskopf*, No. 1:22-cv-00189-CKK (D.D.C. 2021).

information for judicial clerkship positions. It would also create a Special Counsel for Equal Employment Opportunity that would be empowered to investigate all workplace misconduct complaints, including misconduct by judges, and regularly audit the judicial branch's misconduct programs and procedures, and report back to Congress on its findings.

In addition, the JAA would require regular assessments of the federal judiciary's workplace culture to determine the effectiveness of judicial branch policies designed to prevent and remedy harassment and discrimination, and ensure judiciary employees are entitled to the same workplace protections currently enjoyed by those in the private sector and other branches of the federal government.

Finally, the JAA would make clear that discrimination and retaliation constitute judicial misconduct, ensure that the judicial misconduct laws apply to all federal judges and justices, and guarantee that all allegations of misconduct will be investigated, regardless of whether the judge subsequently resigns, retires or passes away.

Thank you for your time and attention today–and on behalf of the more than 30,000 people who work in the federal judiciary today, I urge you to pass the Judiciary Accountability Act and ensure that federal judiciary employees are guaranteed the basic, fundamental right to work in an environment free from harassment and discrimination, and that nobody–not even the most powerful, lifetime appointed judges–are above the law.

Mr. JOHNSON of Georgia. Thank you. We will now proceed under the five-minute Rule with questions, and I will begin by recognizing myself for five minutes.

Ms. Clark and Ms. Strickland, thank you for your powerful testimony and for being here today. It might not seem like it yet, but I can promise you that you have made a difference in the effort to give judiciary employees the rights that they deserve. As I listened to you describe your ordeals I kept thinking about the impact it must have had on you and how many other people probably have had similar experience who you are speaking up for today.

I can think back in my own life to a time when I was your age and was the victim of mistreatment, not in any way similar to yours, but just the injustice that I felt having been treated the way, that I was treated and had no recourse; couldn't do anything about it. It sticks to you, sticks with you throughout your career and throughout your life. I know that many of us have had that same experience, not to equate it to what you all shared with us today.

Ms. Clark, how did your treatment by Judge Royal and his career clerk affect your personal—affect you personally and professionally and how did the profound flaws in the EDR process exacerbate that?

Ms. CLARK. Thank you, Chairn, for your question. The discrimination that I faced while in chambers completely broke me mentally, emotionally. I've lost a lot of confidence that I had gained in law school and while working in private practice, so much so—I'm not sure if the law is really something that I'd even want to continue.

Professionally speaking, a judge can't—a clerkship with a judge can make or break your professional career. In my case—it broke my career.

Mr. JOHNSON of Georgia. Ms. Strickland?

Ms. STRICKLAND. Thank you for that question. This has been devastating for me both professionally and personally. Before all this I was a Supreme Court fellow, I was working in the administrative office, I was working for the Judicial Conference, I was highly respected and made lots of connections there. I was doing all these amazing things, but as soon as I made a complaint, all of that changed. Through the EDR process I found that my name was dragged through the mud, I was vilified and ostracized, my character and integrity were brought into question. The only thing that changed was that I had made a complaint. Now, I don't know if my career will ever be the same as what it was.

On a personal level it's been humiliating, intimidating, and demoralizing, but when I think about the fact that with everything I had done, being a trained attorney and everything I had accomplished and I was still treated this way, it really made me fear and worry for how other people were being treated. That is why I felt like I had to stand up for myself and I have to fight for this. I have to fight for change so that no one else will have to go through what I went through.

Mr. JOHNSON of Georgia. Well, we appreciate you sharing this private pain with us and I am sure that it will have such a tremendous impact on those coming after you. For you both, I know that as you move through life you will be able to put this experience

into perspective and see it as being a benefit to you. So, please continue your hard work.

I would like to read from a letter we received from another judiciary employee who went through the EDR process, received a favorable decision, but then learned that the EDR policy did not empower the hearing officer to impose any remedies. Nothing changed except that the employee faced retaliation and the fear of further retaliations has kept the employee anonymous.

This is what that employee says, quote:

> The EDR process made the limits of my power perfectly clear. Even if I am corroborated, believed, and validated, nothing will change. I did everything a person in my position could do and still I accomplished nothing at all. These limits on my power are the logical outcome of the judiciary's EDR process even, and especially when the process performs as designed.

Ms. Clark, and Ms. Strickland, and Ms. Minor, is there anything about those words that ring true to you? Ms. Clark?

I'm sorry. Yes. Well, I am out of time and I don't want to exceed my time. So, with that, I am going to ask that you submit an answer to that question for the record.

I will now yield to the distinguished gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chair, and I appreciate you having this hearing. In preparation it has been quite revealing. Having been a litigator in Federal and State courts before my time as a State District Judge, when I first heard this could be a problem years ago, identifying—I mean, everybody knew what was going on in my judicial office as a State District Judge. There was no privacy. The people that worked for me were not attorneys and they didn't seem to have a problem expressing their displeasure with things that went on.

Then after getting to Congress, right off the bat we had two Federal judges that we impeached, one from Galveston who had actually sexually assaulted one of his staff, and actually harassed others. So, my naivete was blown away pretty quickly. Of course, another was impeached. He didn't seem to think there was a problem since he appointed people to lucrative appointments that—why not have them contribute to his son's tuition when it came due.

So, anyway, I appreciate all you coming out. I know it is personal; there is nothing pleasant about coming forward, so thank you. That takes obviously courage. Like I say, I didn't realize it was a problem until I got to Congress. So, I want to make sure that people that are victimized have a proper opportunity not to have to go through what Ms. Clark, Ms. Strickland—you endured, and others we have heard about.

I do have concerns about giving authority to the Executive Branch in areas of investigating or making decisions on sexual harassment allegations. That seems to be contrary to the balance of power that we have, the checks and balances. I was not aware that Judge Roberts had taken the position until I saw what the testimony was. I would have hoped, for heaven's sake the Supreme Court would be supremely sensitive to making sure that our courts were acting with propriety.

Ms. Perry, what is your thought about the Executive Branch having any role in enforcement?

Ms. PERRY. I have grave concerns about it and the fact that the Chair and the Vice Chairs are all appointed by the President and serve for a period of five years, that puts a lasting imprimatur of the Executive on the Federal judiciary. There are no judiciary employees that participate themselves on the proposed Commission on Judicial Integrity. In fact, the newest iteration from the judiciary workforce has created the Judicial Office of Integrity. So, those two are duplicative already.

Beyond that, there are three Executive appointees that serve at the President's request for five years.

Mr. GOHMERT. Well, but if you got a Chief Justice that doesn't see that it is a problem—and I would say the same thing if Congress is supposed to be investigating and—not just investigating, but actually sentencing judges. If you have got a Chief Justice that doesn't see there is a problem, where is the answer? You would have to have buy-in from the Chief Justice to make it work. What is the solution?

Ms. PERRY. So, I think that's a great point. The Chief Justice mentioned the fact that there was a problem with certain high-profile cases. He did not however find it to be—

Mr. GOHMERT. Well, that was generous of him.

Ms. PERRY. Correct. He did not find it to be—

Mr. GOHMERT. I am being sarcastic.

Ms. PERRY. He did not find it to be an endemic problem. As a result of all the modifications that have been made for these past four years, I think reading his year-end report on the Federal judiciary he is hopeful that those changes, once they are allowed to take root, will prevent some of this conduct in the future.

Mr. GOHMERT. Well, my time is expired as well, but for the Chief Justice to be hopeful doesn't give me a lot of hope to avoid these kind of circumstances for the future. Hope is not enough unless you have got the structure in place where judges know they too will be held accountable. I just want to do it in a way we don't lose the balance of power, the checks and balances. No judge should ever have people that feel like they cannot complain about truly inappropriate conduct.

Again, appreciate all of you being here. You have obviously given this tremendous thought.

Again, Johnson, thank you for having the hearing.

Mr. JOHNSON of Georgia. Thank you, judge. Thank you, Judge Gohmert.

I will now turn to the gentleman from New York, Mr. Nadler, for five minutes, the Chair of the Full Judiciary Committee.

Chair NADLER. Thank you, Mr. Chair.

Ms. Minor, I want to thank you for being here today and for lending your voice and experience to this hearing. I also appreciate your call for giving Judicial Branch employees enforceable rights and meaningful protections against discrimination, harassment, and retaliation.

As I listened to your testimony, I was struck by how important it is that you decided to come forward now after your many years working at the AO. So, I would like to ask you this: Ms. Minor, why now?

Ms. MINOR. Thank you. I would say that this moment found me. I retired and I thought that I had done all that I could do when I left the Administrative Office of the United States Courts. Then someone reached out to me and said I'm still having issues and can you give me any advice based on your experience? Ever since I left the AO people have reached out, both from the courts and from the AO, and asked what can you help me with? What can you tell me about what has been going on? I offered my experience to them.

As this evolved, I honestly felt like it was a gift to be able in retirement to say this because I didn't feel like I could say it in a very loud and public when I was working for the judiciary. I'm just like the other people on this panel. I tried internally. I made comments, I brought issues up, but I certainly never brought them to Congress or to anybody else. I tried from the inside to make a change. So, I think this is a moment and a gift to me.

Chair NADLER. Thank you.

One of the most concerning things we hear from the judiciary is that Congress cannot provide Judicial Branch employees with statutory civil rights and meaningful protections because it would somehow infringe on judicial independence, but I would like to read from a—or quote from a letter to the Subcommittee from Constitutional Law Professor Aziz Huq, who writes that, quote, "neither text nor precedent support a pertinent limit," unquote on Congress' power to legislate in this area.

Ms. Coll, does Congress have the authority to give employees of the judiciary enforceable rights and protections against discrimination and harassment?

Ms. COLL. Thank you for that question. I want to start by saying of course the separation of powers between Congress and the Federal judiciary is an important component of our constitutional system. In particular, the decisional independence of the courts is vital. We would not want Congress punishing the Judicial Branch for rendering a decision that it disagrees with, for example, but that is not what we are talking about here.

We are talking about legislating around the basic administrative functioning of the courts, which is something that this Subcommittee has already done in various ways, this Congress, and something that has been historical practice since the beginning of the Republic.

The necessary and proper clause of Article 1 of the Constitution gives Congress broad powers to legislate around the functioning of the courts in this way and so it would be a significant departure from both constitutional law principles and also from historical practice to conclude that the JAA does so in any inappropriate way.

Chair NADLER. Thank you.

Ms. Clark, sounds to me like the EDR process which is supposed to give employees rights and protections protects the perpetrators instead of the victims and was actually being used against you. What would you say to judiciary employee who was considering using the EDR process?

Ms. CLARK. Thank you for your question. I would tell them that it's most likely a waste of time. I did every avenue, the three different ways you can complain. I asked for informal advice, I did the assisted resolution, and I also did the formal complaint, all three

of which were fraught with hoops to jump through, road blocks and discretionary rules made against—not in my favor. So, I would say that it is a waste of time.

Chair NADLER. Thank you.

Ms. Strickland, what about you? Is there anything you would like to add?

Ms. STRICKLAND. Yes, thank you. I think it's a really difficult decision. In my case, I was specifically told that the process would be stacked against me and I would be better off finding another job. Frankly, I think that was really good advice and that's probably true, but I also understand the absolute crushing burden of feeling like you can't come forward and you can't stand up for yourself. So, really at the end of the day what we need is some sort of process where people actually have basic fairness and a basic impartial forum where they feel like they can be heard and adjudicate their claims.

So, I suppose I would tell that person it's a personal decision. Hopefully they can get personal empowerment out of it, but I wouldn't expect anything from the process itself.

Chair NADLER. Thank you. My time is expired. I yield back.

Mr. JOHNSON of Georgia. Thank you. We will now hear from the gentleman from Wisconsin, Mr. Tiffany, for five minutes.

Mr. TIFFANY. Thank you, Mr. Chair.

Thank you to all the Witnesses for appearing before the Subcommittee today. I share the same sentiment as my colleagues on both sides of the aisle that there is no place for workplace misconduct and hostile work environments.

Ms. Coll, you heard from Representative Gohmert, as well as Chair of the Committee in regards to the encroachment on one of the branches of government, and it is a deep concern of us, and I think Representative Gohmert began to—I believe he touched on it quite well.

We have been having hearings in this Committee where we have seen abuses by the FBI, where they are now going after parents for just attending school board meetings, participating in school board meetings, where there has been even talk by the Executive Branch of using the Patriot Act against those parents. We have seen the abuse of the FISA courts, which is—clearly has separation of powers concerns for us.

I believe the Chair touched on this a little bit, but do you have any concerns with how this bill is written about that separation of powers that we think is so important? We really have to be neutral abaters up here in terms of looking at the information and making the best decision to protect the freedoms and liberties of people in America. Does this bill bring up any concerns for you in regards to this?

Ms. COLL. Thank you for the question. So, I endorse this bill as it is written, but I understand and would be happy to talk further with you and other Members of this Committee about specific concerns you might have.

I will say with respect to the involvement of the Executive Branch—I just want to point out that the commissioners are removable by the Judicial Conference, so I think there are appropriate checks and balances built into the bill as written.

I also think it's important to remember that Congress has legislated with the Executive Branch and with itself in a way to provide employees with these basic statutory protections and that without those statutory protections there is no equivalent recourse.

The idea that this is duplicative of the judiciary's own internal EDR process is not—it doesn't make sense when you think about the way that Congress has legislated around this issue vis-à-vis the private sector, its own employees, and the Executive Branch. So, for example, it would be to say that a private sector company's employee handbook or HR department is duplicative of title VII of the Civil Rights Act of 1964.

That's simply not the case. We've decided there needs to be Federal legislation and statutory rights for those employees in the event those procedures fail, and that's what the JAA does.

Mr. TIFFANY. Do you think there has been any improvement made in the last few years?

Ms. COLL. I think that the judiciary has taken important steps in the right direction through its EDR plan, but I think those are not equivalent to statutory rights that the JAA provides.

Mr. TIFFANY. So, Ms. Perry, you talked about reforms. Have they been substantive?

Ms. PERRY. They've been extremely substantive. These have been going on for four years and each year the Chief Justice has recognized that there have been more and more changes that have been added. In fact, some of these changes again from, the last few months, have not yet taken place.

In fact, the Judiciary Workplace Working Group's report just came out yesterday. They have not only highlighted all the changes they've made within the past few months, but also have made additional recommendations that I think are a sufficient substitute, an appropriate substitute for this bill, which goes too far in intervening in the internal workings of the judiciary.

Mr. TIFFANY. So. you say it goes too far, and the question that I have been asking—so do you believe that this is giving too much power to the executive?

Ms. PERRY. I do. I do, absolutely. Not only because there are appointees from the Executive Branch, but because there was no input solicited from the judiciary itself. There are no judiciary Members, save those who are confirmed by the Senate or by the House, so the judiciary itself in a piece of legislation that will directly affect its operations, notwithstanding even the employment disputes, but then allowing the Congress to ultimately dictate diversity requirements for the hiring of staff or law clerk when, in fact, judges want to hire people with the same judicial philosophy.

It really is a one-two punch. The effect of the Executive and the Legislature within the judiciary is problematic for me. I think the judiciary is heading in exactly the right direction. In fact, the EEOC Commission has called it a model response saying that they wished more governmental agencies, more branches took this level of extensive reform.

Mr. TIFFANY. Thank you.

I yield back, Mr. Chair.

Mr. JOHNSON of Georgia. Thank you, sir.

We will now turn to the gentleman from New York, Mr. Jones, for five minutes.

Mr. JONES. Thank you, Mr. Chair, for holding this vital hearing today.

Thank you to our Witnesses for courageously sharing your traumatic experiences with such heinous harassment and discrimination that you have experienced. Of course to the many women across the Nation who have had similar experiences, who have spoken up to demand an end to this unacceptable status quo. You should never have had to do this work, but we are all grateful that you are doing this work.

I want to make a few observations before getting to my line of questions. I have found this discussion of an opposition to the bill under consideration, the Judiciary Accountability Act, on some theory that it would violate separation of powers to be entirely incoherent. It actually undermines the system of checks and balances that our Framers wanted, to have an entire class of people, in fact 30,000 or so within the judiciary, who are unable to vindicate their constitutional rights.

So, this isn't just about the Administration of the courts. We are talking about title VII rights meant to implement constitutional provisions. That is one of the various things that this bill under consideration would do. It would follow the recommendations of several experts in this area by broadening title VII of the Civil Rights Act and, of course, the Americans with Disabilities Act to cover the 30,000 Judicial Branch employees. So, I want to be very clear on that.

I also think discussions about the Patriot Act and, respectfully, Ms. Perry, affirmative action to be red herrings in the context of a hearing about workplace discrimination and harassment—and I would ask that folks who have raised those red herrings to really have some perspective.

Ms. Coll, the leaders of the Federal judiciary assure us that they understand the crisis of sexual harassment in our courts and that they are committed to addressing it, yet they insist that the best way to protect judicial employees from abuse by their bosses is to trust those bosses to end the abuse themselves. No one is more insistent that the status quo was working than Chief Justice Roberts.

As you noted, in his 2021 year-end report on the Federal judiciary Chief Justice Roberts wrote briefly about sexual harassment and discrimination. The Chief Justice spared just two paragraphs, just two paragraphs in his nine-page report to address this crisis, fewer than he wrote about William Howard Taft.

What little the Chief Justice did have to say did not inspire confidence. Instead of acknowledging that untold numbers of judicial employees have experienced abuse that in any other workplace would be unlawful, he simply reiterated the conclusion of his Workplace Conduct Working Group, that misconduct is, quote, "not pervasive in the judiciary." We know that nothing could be further than the truth.

Instead of committing to whatever it takes to guarantee the rights, safety, and inclusion of all judicial employees and hold perpetrators accountable, our nation's top jurist merely expressed his hope that judges themselves would weed out, quote, "incivility and

disrespect." I don't want a system of accountability where we rely on the Chief Justice of the Supreme Court to be a person of good conscience and to do something like what we are seeing these Witnesses today ask. That is not a true system of accountability.

Ms. Coll, what message do you hear when the Chief Justice of the United States can only be troubled to write two paragraphs on sexual harassment and discrimination in his year-end report?

Ms. COLL. I find the repeated assertion from the Chief Justice and from the Federal judiciary that workplace misconduct is not pervasive to be very problematic. I think, as you heard from the testimony today, we know that these public stories are only the tip of the iceberg. Most people who experience harassment do not report it, even through internal channels, let alone come forward publicly, as these three women have done today.

A major reason why people don't come forward is because they believe that their institution won't take them seriously. So, when that is repeated over and over again, that the judiciary itself does not believe it has a problem, that is only going to further discourage people from coming forward and lose trust in the process.

So, I think it is important to create these statutory rights as a way for Congress to say, "We believe that this is a problem." We believe, if the judiciary doesn't take the steps it needs internally to protect you, that you all will do so.

Mr. JONES. Thank you.

In closing, I feel compelled to say to our courageous Witnesses today what Chief Justice John Roberts would not, which is that sexual harassment and discrimination, like what you and countless colleagues of yours have experienced, was not isolated incivility. It was the systematic violation of your civil rights that the law should guarantee to everyone, rights that the law will guarantee to everyone when we pass the Judiciary Accountability Act this year.

Thank you, and I yield back, Mr. Chair.

Mr. JOHNSON of Georgia. Thank you.

We will next hear from the gentlelady from North Carolina, Ms. Ross, for five minutes.

Ms. ROSS. Thank you, Mr. Chair, and to the Ranking Member, for holding this very important hearing and taking this situation seriously.

I also want to thank all the panelists for your powerful and personal testimony.

Under current law, the more than 30,000 employees of the Federal judicial branch are not protected by the foundational Federal statutes that prohibit workplace discrimination, harassment, and retaliation—30,000 employees. This lack of protection and accountability is especially concerning, given that Federal judges are given lifetime appointments to the bench.

Unlike Members of Congress, Federal judges do not run for reelection. There is not built-in mechanism to keep them in check. As a result, bad actors in the Federal judiciary have a license to Act inappropriately. As we have heard today, the judiciary does not maintain a sufficient internal process for holding these individuals accountable.

Moreover, the Federal judiciary is one of the many fields in which men outnumber women, and again, for their lifetimes. This

imbalance creates a culture that is resistant to change and is overly tolerant of toxic workplace practices like those we have heard described today. It is critical that we pass legislation to establish protections to ensure oversight and accountability within the judicial branch. No one is above the law.

My first question is for Ms. Strickland. I would like to hear your reaction to how the Judicial Conference describes its dispute resolution process. Here is what they say:

> Our Employment Dispute Resolution system has long provided judiciary employees enforceable protections against all the same conduct covered under title VII of the Civil Rights Act of 1964, the Age Discrimination Act of 1967, as well as the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973.

Based on your experiences, are any of the protections in the EDR plan actually enforceable in Federal court?

Ms. STRICKLAND. Thank you for that question.

With all due respect, the idea that these protections are actually enforceable is completely inaccurate. In my experience, they were not enforceable through the EDR process itself. I was told that by multiple high-level judiciary employees, that they would not be enforceable, even if I went to a final hearing. Now, that I am in litigation, the judiciary defendants have taken the position that none of these rights are enforceable in Federal court, even if this process goes off the rails.

Ms. ROSS. Thank you.

Ms. Clark, I think it can be hard for people who haven't worked for the judiciary to understand what it is like to work there. Can you explain why judicial branch employees are especially vulnerable to discrimination and harassment?

Ms. CLARK. Yes. Thank you for your question.

Judicial employees are extremely vulnerable for several reasons, but what sticks out to me the most is the power disparity between you and the judge that you work for. Like I said earlier, that they can make or break your career. So, people don't want to come forward with this information, for fear of retaliation.

Ms. ROSS. Great.

To both—we only have 37 seconds—Ms. Clark and Ms. Strickland, briefly, why is the lack of transparency an impediment to navigating the internal processes?

Ms. STRICKLAND. Because it creates a culture of silence, because it makes people feel alone and compartmentalized, and it intimidates them from coming forward.

Ms. ROSS. Ms. Clark?

Ms. CLARK. Yes, I had the exact same experience. So, yes, I would agree with Ms. Strickland on that.

Ms. ROSS. Thank you so much.

Mr. Chair, I yield back.

Mr. JOHNSON of Georgia. Thank you.

I must compliment the gentlewoman from North Carolina for her efficient use of 37 seconds.

[Laughter.]

Ms. ROSS. The Witnesses.

Mr. JOHNSON of Georgia. Now, we will hear from the gentleman from Wisconsin, Mr. Fitzgerald, for five minutes.

Mr. FITZGERALD. Thank you, Chair.

Thanks to the panel. I apologize upfront if I am redundant here in the questions because I am running between two different things right now.

Ms. Perry, in addition to the creation of the Commission on Judicial Integrity, H.R. 4827 creates an Office of Judicial Integrity and an Office of Special Counsel for Equal Employment Opportunity, and an Office of Employee Advocacy. With each office being led by individuals appointed by the Commission, would any of these new offices be duplicative of workplace protections and resources already available to the judiciary?

Ms. PERRY. Yes, Representative. In the first of those, the Commission on Judicial Integrity absolutely duplicates the Judicial Office for Integrity that was created two years ago, during the height of some of these reforms that have piggybacked on one another. There has been a continual evolution towards stricter and stricter regulations, more enhanced protections for judicial employees, whether that is enhancement of the Judicial Code of Ethics, the Judicial Conduct and Disability Rules, or the Code for Judicial Employees. There have been a number of expansions. So, first, the office itself duplicates an office that was just created two years ago.

I'm sorry, Congressman, what was the other question that you asked?

Mr. FITZGERALD. Well, the follow-up would—and maybe you talked about this already, which, again, I apologize—but there was an issue in the ability of judges to select law clerks.

Ms. PERRY. Yes. That, as well, goes to specifically the diversity reporting requirement that's required under the Judicial Accountability Act. In other words, not just those who are hired, but those who are interviewed, disaggregated by all protected categories under civil rights law, placing an undue emphasis on individuals to be hired strictly because of these identifying characteristics, in violation of title VII.

Law clerks are chosen for their judicial philosophies, their suitability to the task of interpreting and applying the law. So, it is, as Mr. Jones said, a red herring in this situation. It is something that is not required. It doesn't go to the issue of solving the workplace dilemma, and it is duplicative of other protections in Federal law.

Mr. FITZGERALD. Thank you very much. Thanks to the panel.

I yield back, Mr. Chair.

Mr. JOHNSON of Georgia. Thank you.

We will now turn to the gentleman from Arizona, Mr. Stanton, for five minutes.

Mr. STANTON. Thank you very much, Mr. Chair, for holding this important hearing.

Before I begin, I will yield one minute of my time to the Vice Chair of our Committee, Congresswoman Dean.

Mr. JOHNSON of Georgia. Ms. Dean is recognized.

Ms. DEAN. I thank you, Mr. Chair. I thank you for this hearing. I also thank you, Representative Stanton, for yielding for just one minute.

I want to offer a special thank you to every woman on this panel, and many others out there, who find the strength and courage to speak up.

First, I want you to know I truly wanted to be with you today, and but for my current positive COVID diagnosis, I would be there with you.

I was a young trial attorney, and I intimately recall the authority and the power a judge could hold over his courtroom. I am old enough to say "his" more often than "hers."

Although I did not clerk, I could only imagine from your testimonies what may happen in the confines of a judicial chamber.

I wanted you to know that I spoke with Aliza Shatzman, a Pennsylvanian, a lawyer, a young woman who shared with me her experience within the chambers and without. She recalled the feelings of isolation, the silent treatment, the different treatment from her male co-clerk. Aliza described the current State of judiciary as uniquely insulated from scrutiny, unaccountable to the public, based on the testimony we have also heard here today.

I would have to agree this must change. Thank you, Mr. Chair, for recognizing that.

I recognize, too, that her full testimony has been entered into the record, without objection.

So, I just simply thank the Subcommittee for working to ensure that no other woman is subject to harassment in the workplace without recourse.

Representative Stanton, I yield back.

Mr. STANTON. Thank you very much, Congresswoman Dean, and wishing you a swift and full recovery from COVID.

Thank you to our Witnesses who have testified so honorably at today's hearing. I join my colleagues in condemning the outrageous behavior and the appalling circumstances that you have endured in the workplace. It is clear to me that reforms are necessary and essential to better protect the rights of those employed by the Federal judicial. Your testimony here today is a key to spurring positive action. So, thank you for speaking up, speaking out, and for sharing your important stories.

I have a question for Ms. Minor. You worked at the AO for many years, including as the AO's Equal Employment Opportunity Officer. Can you speak to the culture to the judiciary as it pertains to addressing workplace conduct? What was the attitude at the AO when it came to investigating these types of complaints?

Ms. MINOR. I appreciate the chance to speak to this, because I think it is actually the key to why involvement of the Legislative Branch is so important.

The general attitude and the culture in the AO, quite frankly, and in the judiciary as a whole, is that judges are the last word on everything. So, while there were people within the judiciary who tried to address the issues, at the end of the day, if the judges were not willing to be accountable to each other or to hold each other accountable, all the systems in the world don't really make a difference.

What is happening now is nibbling around the edges of things; I will tell you that. I told someone once I heard a chief judge say to me, "I'm not going to meddle in anybody else's business in cham-

bers, because when I'm not the chief judge anymore, I don't want anybody meddling in my business."

Now, that is not every judge, but there were enough judges who felt that way that it is very clear to me that, without real cultural and structural change within the judiciary and oversight, the judiciary will want to do the right thing; it can't do the right thing. Nibbling around the edges will not change that culture.

It certainly did not change it at the AO. I am still in contact with many friends and colleagues who are very clear with me that nothing has changed.

Thank you.

Mr. STANTON. Right now, there is a series of voluntary policies and procedures instead of enforceable statutory protections. You somewhat answered it in the answer you just gave, but why do you think those kinds of internal policies and procedures will fail if they are not backed up with enforceable rights? This is for Ms. Minor.

Ms. MINOR. I guess I will repeat what I said, which is those are nibbles around the edges. The culture and the structural barriers that exist within the judiciary will make those fail, as they have for so many years.

My personal story is that I came to the judiciary in 1994, and the very first job I had was responding to the Congressional Accountability Act, which originally included the judiciary. They successfully got themselves out from under that.

I spent two years traveling all around this country, educating people about equal employment opportunity, and then, it was over and everybody went back to business as usual. I fear that is exactly what will happen this time, unless this Committee moves forward and puts the statutory protections in place for judiciary employees.

Thank you.

Mr. STANTON. Thank you very much.

I yield back. I yield back. Thank you, Mr. Chair.

Mr. JOHNSON of Georgia. Thank you.

The gentleman from California, Mr. Issa, is recognized for five minutes.

Mr. ISSA. Thank you, Mr. Chair.

I want to thank you all for your indulgence. Unfortunately, the classified briefing on Iran gets in the way of everything, because you can only have the White House when you have them.

Ms. Perry, you obviously spoke very eloquently about the separation of powers and our limitations. Let me start by asking a question. If you set aside 600 article III judges, and presume that we judge them based on their good behavior, and you look at the entire rest of the 30,000 employees, for all practical purposes, is there any reason that we should not consider their protection separate from the question of those constitutional officers?

Ms. PERRY. I think, factually, as long as we are satisfied that there is an endemic problem, I think there is nothing preventing us from taking that into account. For example, the Administrative Office of the Courts was at one point under the jurisdiction of the Department of Justice. So, it is created by Congress from 1939, but operates distinctly separate, as an administrative agency tasked with assistance of the Federal judiciary. Those particular protec-

tions, again, as applied to Federal judges themselves, I find to be more problematic than against those who are employees of the Federal judiciary.

Mr. ISSA. Okay. Then, switching to the other side, Ms. Minor, because you have operated in that oversight role, isn't—and I don't want to lead you unfairly—but isn't it fair to say that we lack today, here in this body, the transparency of the conduct of those 600 or so Federal article III judges that would allow us to proactively know whether or not their behavior was good?

The standard under which we are charged to impeach them and remove them is, obviously, it's high crimes and misdemeanors, but it is really good behavior. What you have all talked about today isn't in some cases a clear absence of good behavior. Do we have the transparency today, or would you say that all or part of the reforms we're talking about are to get transparency sufficient to know what is going on in a way that we can meet that responsibility?

I am making the assumption for a moment, with Ms. Perry, that we set aside the article III judges for a moment and say we judge them under our constitutional limitation. Then, how do we amass that information? If you could opine on that?

Ms. MINOR. Well, thank you for leading me in the direction. My sense is that you have very little transparency right now as a branch into what happens in the judiciary. In fact, what I generally find—and it has happened over and over—over the years is that whenever an issue comes up, they circle the wagons and they keep everything inside.

There is also something about the structure of these courts. I think people sometimes miss this. We have a lot of small courts in our Federal judiciary, where there are only one or two judges, sometimes three, where it is almost like a family. In fact, the judiciary describes themselves as "the judiciary family."

Mr. ISSA. Even San Diego does that.

[Laughter.]

Yes, the eastern wing that only goes a couple of days a week really is quiet.

Ms. MINOR. So, as a result of that, what you have is what I think you find in families, quite frankly. That is, if there is an issue, let's keep it in-house and let's deal with it. So, very little comes out about what is actually happening.

So, I think there is a huge problem with transparency right now. If there are things in the JAA that will help create that transparency, I think that is critical to trying to address these issues.

Mr. ISSA. Now, let me ask one final question, if I could, Mr. Chair. The judiciary, and particularly, Chief Justice Roberts, has opposed anything that would be the equivalent of an Inspector General, even one that he would create and appoint.

When we look at the AO, and we look at the cases that we dealt with here, isn't it the absence of that process, an advocate for finding wrong, which is what Inspector Generals do, the absence of that in the AO? As a result, the absence of that as one more availability for 30,000 nonconstitutional officers that work there, isn't that inherently a flaw that we need to look at to create that, whether we do it through this legislation or something else, with

or without the support of perhaps the justices? I use the AO because I think it is a good example of something that is not inherently our article III judges directly and that separation of powers.

Ms. MINOR. Yes.

Mr. ISSA. Okay. Then, Mr. Chair, with your indulgence of giving me additional time, I just want to close and say I want to thank all of our Witnesses today.

Particularly, I am going to look at my former member of our branch, and the protections that we need to always give in this branch are something that is on our mind. Because Mr. Johnson and I—and for that matter, Chair and others—we lived through that period. We were embarrassed by what we discovered and made the decision to legislate on ourselves.

Lastly, I apologize that we often leave that third branch out, out of deference, and sometimes to the detriment of having to go back, as we are here today.

So, I just want to thank you all.

Thank you, Mr. Chair.

Mr. JOHNSON of Georgia. Thank you, Representative Issa. I am sorry to trample upon your closing statement. I had agreed, before you got here, with Mr. Gohmert that I would allow him, in the spirit of bipartisanship within which we have held this hearing, to ask one last question that he wanted to pose to all the Witnesses.

So, with that, Representative Gohmert?

Mr. GOHMERT. Yes, and I do appreciate the opportunity.

I want to be clear. I have no problem legislating a solution here. We have got every authority to do that. My constitutional law professor that I lost last year, I grew to love when he was my professor. He used to say, "There's only one court that doesn't owe its existence to the Congress." Congress brought all the other courts in to being, except the Supreme Court, and we can take them out. There is a delicate balance.

So, my one question to each of you, very sincere. Obviously, hope is not enough, as we share that concern. If you could change one thing to help tweak the legislation to providing appropriate accountability, which we clearly don't have yet, but observing the need for the judiciary independence—and, Ms. Minor, I would like to ask that question to you, and get each of your buy-in. You have all, obviously, given this a great deal of thought. You have bound to have seen something, you know, "I wish it did this."

Ms. MINOR. Well, I am here today because of the experience I had in the judiciary, not because I am an expert on the JAA.

Mr. GOHMERT. That makes you an expert.

Ms. MINOR. So, I think I will cede my time over to the rest of the experts on the panel here.

Ms. STRICKLAND. I am not an expert, either. I think what I will say is that it was very clear from my situation that these people believed that they faced absolutely no liability exposure. So, there was no incentive for them to do the right thing. So, I think the most important thing, in my personal opinion, about this legislation is providing a cause of action, so that people can pursue their rights.

Mr. GOHMERT. Ms. Clark?

Ms. CLARK. I am no expert, either. I will say that the most important thing about this piece of legislation is that it will create an independent Special Counsel to investigate claims of misconduct. Independence is something that virtually every person in corporate America gets an independent arbitrator of their claims of discrimination. So, I feel like that is very, very basic. That is the least we can do.

Mr. GOHMERT. Thank you.

Ms. Coll?

Ms. COLL. I think the core of this legislation is about providing these basic statutory rights to employees that they currently lack.

Ms. Strickland's case is a great example. She has tried to bring her claim in Federal court. The judiciary knows that this is typically how employees whose internal processes fail them find relief. It is what they do under title VII every day. In her case, the judiciary's lawyers are arguing that she has no—that the EDR plan provides no property right under the Fifth Amendment. Employees who have tried to bring these cases under title VII have had their cases dismissed by the EEOC for lack of jurisdiction.

Mr. GOHMERT. Back to circling the wagons, actually.

Ms. COLL. Yes. So, I think the fact that there is no remedy, as I said earlier, the idea that the EDR plan is duplicative of statutory rights is not the way Congress has seen this issue in any other workplace. So, I think providing those fundamental rights will go a long way, both toward allowing appropriate remedies, but also just sending a message to employees. Circling back to my own experience as an intern—being told you have no rights under Federal law does not engender a lot of faith in your institution.

Mr. GOHMERT. Ms. Perry?

Ms. PERRY. So, if I have to pick one thing, Representative, I would want to eliminate the Commission on Judicial Integrity, knowing that the judiciary has already established that precise mechanism within its own body.

I would also like to see this chamber hold regular hearings from the Administrative Office of the Courts on what workplace conduct, what workplace study and data is transpiring; what they are seeing at the ground level, and how they are responding to it, either annually or biannually. So, that we can be assured fully that they are responsive and they are not shrouded behind a veil of secrecy.

Mr. GOHMERT. Thank you.

Mr. Chair, thank you.

Mr. JOHNSON of Georgia. Thank you.

I want to thank all of the Witnesses.

Ms. Perry, you have been a magnificent defender of the status quo. I may not agree with what you have to say, but I admire your professionalism. So, thank you.

Ms. PERRY. Thank you, Chair.

Mr. JOHNSON of Georgia. Ms. Minor, you have been on the inside and you have seen what happens, and you have tried to make a difference while there. Your efforts were not at the right time, or the time was not right for you in that position. Yet, things have changed. You have retired, and you don't have to stay in your comfort zone, as many would. You decided to come out and say what you know, and we deeply appreciate that.

Ms. Coll, as a young 18-year-old suffering discrimination, you could have been snuffed out in terms of your contribution to the legal profession, but, instead, you have become like the phoenix. So, you are a shining example to Ms. Clark and Ms. Strickland, who have just begun this journey.

Without you all, we would not have a foundation for this hearing. So, you all have been the foundation for this hearing, and we thank you for your courage in coming forward.

With that, I would also like to recognize some unsung individuals, not in the courtroom, but in the hearing room, the pro bono attorneys who represent Ms. Clark, Ms. Strickland, and Ms. Minor.

For Ms. Minor, we have Deeva Shah and Erin Meyer, both from the firm of Keker, Van Nest & Peters. Thank you all for being here.

For Ms. Caryn Strickland, we have Jeannie Suk Gersen and Cooper Strickland who are here. Thank you all for your pro bono work.

Last, but not least, for Ms. Caitlyn Clark, we have Mr. Roscoe Jones, Jr., and also Ms. Greta Williams, who is a repeat offender here today. They are from the firm of Gibson Dunn. We appreciate your pro bono representation.

With that, we will now proceed to our second panel of Witnesses.

We will allow you to collect your belongings and depart while I have a phone call right quick. So, I am going to step down.

[Recess.]

Mr. JOHNSON of Georgia. I will now introduce the Witnesses on our second panel.

Judge M. Margaret McKeown. I hope I pronounced that correct. McKeown. Judge M. Margaret McKeown has served as a Circuit Judge on the United States Court of Appeals for the Ninth Circuit in San Diego, California, since 1968. She is chair of the Ninth Circuit Committee on Workplace Environment and a member of the Federal Judiciary Workplace Conduct Working Group.

Prior to joining the Federal bench, Judge McKeown was a partner in private practice and served as a White House fellow under President Carter. Judge McKeown earned her BA from the University of Wyoming and her JD from Georgetown University Law Center.

I know I would be catching glances of disapproval, now, if we were in the courthouse but, welcome, Judge McKeown. I hope I've given you some—I hope I've pronounced that name somewhat correctly.

Judge Julie Robinson is a Senior Judge from the district of Kansas where she has served since her appointment in 2001.

Judge Robinson was the first African American to be appointed to the district of Kansas bench and served the Federal judiciary with distinction in several capacities, including as a Member of the Federal Judiciary Workplace Conduct Working Group.

Before her appointment to the Federal bench, Judge Robinson clerked for bankruptcy Judge Benjamin E. Franklin, worked as an Assistant U.S. Attorney for a decade and herself became a bankruptcy judge. She earned both her undergraduate and juris doctorate degrees from the University of Kansas. Welcome, Judge Robinson.

Before the proceeding—before proceeding with testimony, I would like to remind all our Witnesses that you have a legal obligation

to provide truthful testimony and answers to this Subcommittee, and that any false statement you make today may subject you to 18 U.S.C. 1001.

Please note that each of your written statements will be entered into the record in their entirety. Accordingly, I ask that you summarize your testimony in five minutes. There is a timer and that should be visible on your screen. That should help you stay within that time limit.

Judge McKeown, you may begin.

STATEMENT OF M. MARGARET McKEOWN

Judge MCKEOWN. Thank you.

Chair Johnson, Ranking Member Issa, and Members of the Committee, I am Judge Margaret McKeown, a United States circuit judge for the Ninth Circuit, and I note, Mr. Chair, that you've come the closest of anyone to pronouncing my name correctly. So thank you for that.

I'm accompanied today by Judge Julie Robinson, United States District Judge for the District of Kansas. We are both Members of the Workplace Conduct Working Group established at the direction of Chief Justice Roberts, who, in 2018, called for swift action to address workplace concerns.

Thank you for the invitation to be here today on behalf of the Judicial Conference of the United States.

The Federal judiciary is committed to the well-being of its employees and to an exemplary workplace by ensuring a safe, respectful, and professional environment free from discrimination, harassment, abusive conduct, and retaliation.

Over the past four years, the Working Group has, in consultation with judiciary employees, law clerks, outside experts, and interested groups, recommended more than 30 changes to the policies and practices and procedures of the judiciary, all which have been adopted by the Judicial Conference.

The judiciary is also committed to ensuring that every employee has a clear avenue to obtain confidential advice, report misconduct, and seek and receive remedial action.

Our written testimony describes many of the transformative actions that have been taken. I will briefly highlight just a few points.

To begin, judiciary employees are protected from the same conduct that would violate 10 enumerated employment laws and policies, including title VII of the Civil Rights Act of 1964, the Age Discrimination and Employment Act, the Americans with Disabilities Act, the Rehabilitation Act, and whistleblower protections.

The judiciary also provides expanded protections beyond these statutes against abusive conduct. Based on the Working Group's finding that while inappropriate conduct is not pervasive, incivility, disrespect, and abusive behavior is more common than sexual harassment.

Second, we have improved the workplace protections and procedures. Revised model employment dispute resolution plans are in place for the courts and for Federal public defender organizations.

Codes of conduct confidentiality obligations were updated and they now remove barriers to reporting and emphasize the responsi-

bility of judges and judiciary employees to take appropriate action upon learning of potential misconduct.

Confidentiality provisions for law clerks were also revised to clarify that confidentiality does not prohibit the reporting of misconduct by judges, supervisors, or any other judicial employee.

Rules under the Judicial Conduct and Disability Act clarify that discrimination, harassment, abusive behavior, and retaliation are cognizable misconduct, and added that a bystander judge's failure to report is also cognizable misconduct.

Third, we have streamlined our procedures and made it easier for employees to seek confidential help and report misconduct, while enhancing impartiality and protecting confidentiality.

A network of trained professionals, including local, circuit, and national workplace specialists are now available to provide confidential guidance and advice.

We took to heart the EEOC's advice regarding the importance of having multiple avenues for reporting. We have expanded the paths for employees to raise concerns, to choose the options that best fit their needs—informal advice, assisted resolution, or formal complaint.

The incorporation of informal advice and assisted resolution has provided additional opportunities for reporting, and that's been indicated by the increased use of these processes and has allowed issues to be resolved more quickly.

The Directors of Workplace Relations—a judiciary innovation—report that more time is spent on confidential informal advice than anything else, and that these interactions involve a range of workplace issues, not just harassment.

These confidential conversations provide for a variety of interventions that would not have been possible if employees were uncomfortable coming forward or limited to filing a formal complaint.

Fourth, and finally, we have emphasized training at all levels to ensure employees are aware of their rights and protections. EDR training, orientation, management training, and educational programs all contribute to transforming workplace culture.

The positive effects of the protection and improved processes have already begun to take hold. The judiciary looks forward to even greater improvements that will further enhance the fairness, dignity, and respect with which we treat our employees.

Mr. Chair, I thank you and look forward to questions from you and the committee.

Mr. JOHNSON of Georgia. Thank you, Judge McKeown.

Next, Judge Robinson, you are recognized.

STATEMENT OF JULIE A. ROBINSON

Judge ROBINSON. Thank you.

Chair Johnson, Ranking Member Issa, Chair Nadler, and other Members of the Committee, thank you for the invitation to appear today to discuss workplace conduct matters in the Federal judiciary.

I share my experiences and views not only as a member of the Working Group, but also as a Chief Judge who served from 2017 until last December.

As you have heard and read in our testimony, the judiciary is committed to an exemplary workplace and has taken action to improve workplace protections and the dispute resolution process. These improvements are the result of leadership, which is a key imperative for creating a safe workplace.

Chief Justice Roberts demonstrated decisive leadership from the top by creating the Working Group. In addition, engaged leadership by chief judges and court unit heads sends a powerful signal to our community that everyone must support a safe and civil workplace.

While many protections and procedures have been improved, the judiciary's work is not done. The Working Group has proposed additional recommendations that would strengthen policies and procedures, expand communication and training, and improve our measurement of our progress.

The Working Group, for example, recommends a nationwide climate survey disseminated at regular intervals to all judiciary employees to assess the workplace environment and also to provide insight into the prevalence of workplace conduct issues and the impact and effectiveness of the improvements we have made to our policies and processes.

In addition to leadership, a continuing focus has been to build confidence and trust in the changes that have already occurred and that will occur. Building that trust requires a clear explanation of how we are addressing workplace misconduct.

We have done so with training and awareness at all levels with judges, with judiciary employees, locally and nationally. The Working Group recommends strengthening annual EDR training. A related recommendation to expand outreach and engagement will help courts fully understand employee concerns.

Another element of trust is regular reporting. The Working Group recommends including in our data collection information and data related to informal advice contacts. We also recommend issuing an annual judiciary workplace conduct report.

Confidence is further enhanced by ensuring fair and impartial procedures. The Working Group is further proposing that in addition to existing recusal requirements the judiciary's policies be enhanced to specify that an employee complaint must be overseen by a judge from outside the court from which the complaint originated.

Another key imperative for creating a safe workplace is to have effective policies and procedures written in clear and plain language. You have heard or read in our testimony many improvements in that area.

The Working Group has additional recommendations to enhance policy. These include assessing incorporation of additional monetary remedies as part of the EDR complaint process, and developing a system for regular review of the judiciary's workplace conduct policies to ensure comprehensive implementation across courts and circuits.

We also recommend adopting an express policy regarding romantic relationships in the workplace where there is a supervisory or evaluative relationship.

Solutions that work must account for the unique culture and governance of a particular workplace, which, in the case of the judiciary, includes a dispersed regionalized governance structure.

Individual courts at the district and circuit levels possess significant administrative autonomy, including authority to address workplace conduct matters. The reforms instituted since 2018 took careful account of the judiciary's decentralized governance and culture.

We have now established a system that empowers employees to seek advice and guidance from experts at the local, regional, and national level, and empowers them to seek resolution through informal advice, assisted resolution, and/or formal complaint procedure.

This is more likely to be used and to be more effective than a single national oversight body. We believe that the judiciary's response to workplace conduct concerns is succeeding locally at the circuit level and nationally.

While the judiciary has made significant strides and with—expeditiously so, some changes do not occur overnight. Thus, this is a continuing effort and we expect some cultural changes will need time to take root.

That said, we do not condone this conduct at any level. The judiciary recommends that our strategy for an exemplary workplace continue on its current course without sweeping legislative overhaul.

Thank you, Mr. Chair. I look forward to questions from you and the Members of the Committee.

[The statement of Judge McKeown and Judge Robinson follows:]

TAB C

COMBINED WRITTEN STATEMENT OF
THE HONORABLE M. MARGARET McKEOWN
UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

AND

THE HONORABLE JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF KANSAS

ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

BEFORE THE
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

"WORKPLACE PROTECTIONS FOR FEDERAL JUDICIARY EMPLOYEES:
FLAWS IN THE CURRENT SYSTEM AND THE NEED FOR STATUTORY CHANGE"

March 17, 2022

INTRODUCTION

I am Judge Margaret McKeown, a United States Circuit Judge for the Ninth Circuit. I am accompanied by Judge Julie A. Robinson, a United States District Judge for the District of Kansas. We are members of the Workplace Conduct Working Group established under the leadership of Chief Justice Roberts, who in 2018, called for swift action to address workplace concerns. Thank you for the invitation to be here today on behalf of the Judicial Conference of the United States.

The federal Judiciary is committed to the well-being of its employees and to an exemplary workplace by ensuring a safe, respectful, and professional environment free from discrimination, harassment, abusive conduct, and

retaliation. Over the past four years, the Working Group has, in consultation with Judiciary employees, law clerks, outside experts, and interested groups recommended more than thirty changes to the Judiciary's policies and procedures—all of which have been adopted by the Judicial Conference.

These include increasing the scope of employee protections, strengthening the obligations of judges and Judiciary employees to report misconduct or take other appropriate action, and improving the processes for reporting and addressing reports of misconduct. Every Judiciary employee has clear and multiple avenues to obtain confidential advice, report misconduct, and seek and receive remedial action.

These improvements are a result of leadership – a key imperative for creating a safe workplace. Engaged leadership by chief judges and the heads of each court unit sends a powerful signal to our community that everyone must support a safe and civil workplace.

JUDICIARY EMPLOYEES HAVE PROTECTIONS

To begin, Judiciary employees are protected from discrimination (based on, race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age (40 years and over), and disability); sexual, racial, and other discriminatory harassment; retaliation; as well as abusive conduct.

The Judiciary provides expanded protections against abusive conduct, based

on the Working Group's finding that while inappropriate conduct is not pervasive, incivility, disrespect, or abusive behavior is more common than sexual harassment. Abusive conduct is defined as "a pattern of demonstrably egregious and hostile conduct not based on a protected category that unreasonably interferes with an employee's work and creates an abusive working environment."

Judiciary employees are protected by at least ten employment laws and policies:

- Title VII, Civil Rights Act of 1964, as amended and codified in 42 U.S.C. §§ 2000e–2- 2000e-3, 2000e-16(a);
- Age Discrimination in Employment Act of 1967, as codified in 29 U.S.C. §§ 623 and 633a;
- the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12102, 12111-12114, as amended by the Americans with Disabilities Act Amendments Act of 2008;
- the Rehabilitation Act of 1973;
- Family and Medical Leave Act of 1993;
- Uniformed Services Employment and Reemployment Rights Act of 1994;
- Worker Adjustment and Retraining Notification (WARN) Act, codified at 29 U.S.C. § 2101;
- Occupational Safety and Health Act of 1970, as amended;
- the Employee Polygraph Protection Act of 1988 (EPPA), codified at 29 U.S.C. §§ 2001-2009;
- and whistleblower protections.

Judiciary whistleblower protections require that any Judiciary personnel with authority to take, direct others to take, recommend, or approve any personnel action may not use such authority to take or threaten to take an adverse employment action against an employee because of any disclosure of specified information. These protections make clear that retaliation against a person who reveals or reports wrongful conduct is itself wrongful conduct.

IMPROVEMENTS

Second, we have improved workplace protections and procedures. Revised Model Employment Dispute Resolution (EDR) plans are in place for courts and federal public defender organizations. The Model EDR Plan included enhanced policy protections, covers all paid and unpaid employees, provides specific informal avenues for reporting and addressing wrongful conduct, and provides a more streamlined formal complaint process that allows for more time to file a formal claim. A new Model Federal Public Defender Organization (FPDO) EDR Plan was developed and approved by the Judicial Conference, designed to address the issues unique to the FPDO community, including: the distinct employment relationship between the federal public defenders and their employees; their role as legal representatives with ethical obligations to clients on whose behalf they appear in court; and the need to mitigate concerns regarding access to sensitive information.

The Code of Conduct for United States Judges makes clear that "a judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct." Codes of Conduct confidentiality obligations were updated to remove barriers to reporting and to emphasize the responsibility of all judges and Judiciary employees to "take appropriate action upon receipt of reliable information indicating a likelihood" of misconduct. Confidentiality provisions for law clerks were revised to clarify that they do not prohibit reports of misconduct by judges, supervisors, or any Judiciary employee. Improved guidance ensures that judges and employees understand that confidentiality obligations should never prevent any employee – including a law clerk – from revealing abuse or reporting misconduct by any person.

Judicial Conduct and Disability (JC&D) rules clarify that discrimination, harassment, abusive behavior, and retaliation are cognizable misconduct and added that a bystander judge's failure to report is also cognizable misconduct. Specifically, JC&D Rules and Commentary (1) require Judges to report or disclose misconduct; (2) expressly prohibit sexual and other discriminatory harassment (intentionally discriminating on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability), abusive conduct, and retaliation; (3) exempt reports of misconduct from

confidentiality rules; (4) clarify eligibility to file a JC&D complaint; (5) improve transparency through expanded disclosure provisions; and (6) authorize the Judicial Conference and judicial council of a judge who is the subject of a complaint to conduct systemic evaluations affirming they have ample authority to assess potential institutional issues related to the complaint as part of their respective responsibilities to promote "the expeditious conduct of court business."

EXPANDED NETWORK OF TRAINED PROFESSIONALS

A network of trained professionals, including local, circuit, and national workplace specialists, are now available to provide confidential guidance and assistance to all Judiciary employees. These professionals are expert in matters of workplace conduct and are outside of the traditional court chain of command to support and provide services to both employees and employing offices. The national Office of Judicial Integrity (OJI) at the Administrative Office of U.S. Courts, Directors of Workplace Relations (DWR) in each circuit, and EDR Coordinators in each employing office and court are all able to assist employees with a broad range of workplace conduct concerns.

The OJI was established to, among other duties, provide independent, confidential advice on workplace conduct; outreach to future, current, and former Judiciary employees and law clerks; and analyze workplace issues and trends. Workplace conduct committees and DWRs provide circuit-wide guidance and

oversight of workplace conduct matters. The DWRs, among other duties, offer workplace conduct training; give confidential guidance to employees and managers about conduct issues; provide advice, training and assistance to court EDR Coordinators; and assist with workplace conduct investigations, mediation, and dispute resolution.

New requirements in the Model EDR Plan have helped to ensure that every court and employing office has at least two trained and certified EDR coordinators to give employees additional avenues to report issues and seek advice. An online training course must be taken and passed by EDR coordinators in order to become certified, and over 400 individuals have been certified to date. The EDR Handbook provides detailed explanations for each of the EDR options for resolution, step-by-step directions for each process, information about the remedies available under the EDR Plan, proactive and responsive steps for safeguarding the rights and protections afforded under the EDR Plan, and more.

This multi-layer network of dedicated personnel – at the national, circuit, and local court levels – is available to provide confidential and impartial advice and guidance to Judiciary employees, managers, and judges. Together, they support and facilitate EDR processes; coordinate training programs; propose and assist in the implementation of policy initiatives; and collaborate on best practices to foster consistency across the circuits and courts

CLEAR AND MULTIPLE AVENUES TO REPORT

Next, we have streamlined our procedures and made it easier for employees to seek confidential help and report misconduct, while enhancing impartiality and protecting confidentiality. We took to heart the EEOC's advice regarding the importance of multiple avenues for reporting. Employees are free to contact whomever they feel most comfortable with and often coordinate with more than one resource, within or outside their employing office, including local court and circuit-level positions, as well as managers, unit executives, human resources staff, or judges. Employees can also report anonymously through an online reporting portal.

In addition to multiple avenues to report, we have expanded the paths for employees to raise concerns, choosing the option(s) that best fit their needs and comfort level – informal advice, assisted resolution, or formal complaint.

Robust informal processes provide valuable flexibility for employees to address workplace concerns, while retaining the option of filing a formal complaint. In some circumstances, an employee may seek informal advice – confidential guidance on an employee's rights and options. "Assisted Resolution" provides an interactive and flexible option to address concerns, without the need for rules, deadlines, or other fixed parameters. This might include facilitated discussions with the source of the conduct, voluntary mediation, preliminary

investigations including interviewing witnesses, and/or seeking a mutually agreeable resolution.

The incorporation of informal advice and assisted resolution has provided additional opportunities for reporting as indicated by the increased use of these processes and has allowed issues to be resolved more quickly. The DWRs report that more time is spent on confidential informal advice than anything else, and that these interactions involve a range of workplace issues, not just harassment. Those confidential conversations have provided opportunities for a variety of interventions that would not have been possible if employees were uncomfortable coming forward or were limited to filing a Formal Complaint.

The formal complaint process has been revised in recent years to be more approachable and provides well-defined procedures through which workplace conduct issues are heard by an impartial federal judge. The formal complaint process includes mechanisms for the investigation of allegations and holding hearings for disputed issues. Parties have the right to be represented by counsel and a resulting decision can be appealed to the Circuit Judicial Council.

When misconduct allegations involve a judge, employees have the option to file a complaint through either of both the EDR process and the JC&D process, providing mechanisms for seeking both employment-based remedies and specific accountability for judicial misconduct, respectively.

TRAINING

Fifth, we have emphasized training at all levels to ensure employees are aware of their rights and protections. EDR training sessions, orientation sessions, management training, and educational programs all contribute to transforming the workplace culture and highlighting the responsibilities of employees and judges to promote and ensure an exemplary workplace.

All courts and employing offices must conduct annual training for all Judiciary employees and judges on workplace conduct protections and processes. A recent virtual training series in November and December 2021 was viewed live by over 6,000 employees and judges, and another tailored for chambers staff was attended by nearly 100 staff, including law clerks and judicial assistants.

The Federal Judicial Center (FJC) plays an instrumental role in education and has implemented training recommendations made by the Working Group: (1) ensure that all new judges and new employees receive basic workplace standards training as part of their initial orientation programs, with refresher training at regular intervals; (2) develop an advanced training program aimed at developing a culture of workplace civility; and (3) continuously evaluate the effectiveness of workplace conduct educational programs. The FJC has prioritized education on workplace conduct issues and has broadened the availability and scope of its programs. The FJC integrates workplace conduct-related scenarios and

discussions into all of its leadership-oriented programs for both new and experienced leaders, it has especially sought to leverage its reach with podcasts, webcasts, and webinars. In addition, it has created a broad range of publications, on-line resources, and in-person and virtual training programs to promote fair employment practices and workplace civility that supplement court-sponsored training and materials.

RECOMMENDATIONS FOR ADDITIONAL ACTION

While many protections and procedures have been improved, the Judiciary's work is not done. As is the case in all workplaces, the Judiciary must continue to take stock of what it has accomplished and find those areas where more can be done. Accordingly, the Working Group has proposed additional recommendations that would strengthen policies and procedures, expand communication and training, and improve our measurement of progress.

The Working Group recommends a nationwide climate survey, disseminated at regular intervals to all Judiciary employees, to assess the workplace environment and to provide insight into the prevalence of workplace conduct issues and the impact and effectiveness of the improvements the Judiciary has made to its policies and processes.

A continuing focus has been to build confidence and trust in the changes that already have occurred and that will occur. Building that trust requires a clear

explanation of how we are addressing workplace misconduct. We have done so with training and awareness at all levels, including nationwide and locally, to include judges and Judiciary employees. The working group recommends strengthening annual EDR training. A related recommendation – to expand outreach and engagement – will help circuits fully understand employee concerns.

Another element of trust is regular reporting. The Working Group recommends including data collection related to Informal Advice contacts and recommends issuing an annual Judiciary workplace conduct report.

Confidence is further enhanced by ensuring fair and impartial procedures. The Working Group is further proposing that, in addition to existing recusal requirements, the Judiciary's policies be enhanced to specify that an employee complaint must be overseen by a judge from outside the court from which the complaint originated.

Another key imperative for creating a safe workplace is effective policies and procedures, using clear and plain language. The working group recommended additional policy enhancements. These include assessing incorporation of additional monetary remedies as part of the EDR complaint process; developing a system for regular review of the Judiciary's workplace conduct policies to ensure comprehensive implementation across courts and circuits; and adopting an express policy regarding romantic relationships that exist or develop between employees

where there is a supervisory or evaluative relationship.

The Working Group's most recent recommendations report are listed below:

- Recommendation 1: Conduct a nationwide climate survey, disseminated at regular intervals to all Judiciary employees, to assess the workplace environment and to provide insight into the prevalence of workplace conduct issues and the impact and effectiveness of the improvements the Judiciary has made to its policies and processes.
- Recommendation 2: Augment annual EDR-related data collection to include data related to Informal Advice contacts, while ensuring that confidentiality is protected.
- Recommendation 3: Enhance the Formal Complaint process by revising the Model EDR Plan to specify that an employee complaint must be overseen by a Presiding Judicial Officer from outside the court from which the complaint originated.
- Recommendation 4: Develop an express policy regarding romantic relationships that exist or develop between employees where there is a supervisory or evaluative relationship. The policy should apply to all Judiciary employees and judges.
- Recommendation 5: Assess incorporation of additional monetary remedies as part of the EDR complaint process.
- Recommendation 6: Direct the Office of Judicial Integrity, with the assistance of the Directors of Workplace Relations, to issue an annual Judiciary workplace conduct report.
- Recommendation 7: Expand Outreach and Engagement.
- Recommendation 8: Strengthen annual EDR training by revising the Model EDR Plan to emphasize that courts and employing offices have a responsibility to ensure that EDR training is offered and accessible to all employees and judges on an annual basis, and to take affirmative steps to ensure completion.

- Recommendation 9: Develop a system for regular review of the Judiciary's workplace conduct policies to ensure comprehensive implementation across courts and circuits.

CONCERNS REGARDING THE JUDICIARY ACCOUNTABILITY ACT

Solutions that work must account for the unique needs and governance of a particular workplace, which for the Judiciary includes a dispersed, regionalized structure. Individual courts at the district and circuit levels possess significant administrative autonomy, including the authority to address employment and workplace conduct matters. We have established a system that empowers employees to seek advice and guidance from experts at the local, regional, or national level, and empowers them to seek resolution through informal advice, assisted resolution or a formal complaint procedure. This is more likely to be used and to be more effective than a single national oversight body.

The Judiciary's approach of establishing DWRs at each circuit, training and empowering EDR coordinators in each court, and requiring the courts to provide annual training for every judge and employee, matches well with the Judiciary's decentralized governance and culture. The Judiciary Accountability Act of 2021 (JAA) would reorganize the workplace misconduct program as a national centralized structure that operates outside of the Judicial Conference and the purview of the courts. A centralized structure, as proposed by the JAA, would

provide no mechanism for the Judicial Conference, the courts, or other judicial branch entities to influence or provide input regarding the workplace misconduct prevention program, which could result in policy and programmatic decisions that lack an essential understanding of the unique character of each court and unit. For example, the JAA fails to acknowledge the fundamental differences between FPDOs and other Judiciary units. Yet, such differences led the Judicial Conference to approve a separate EDR plan for FPDOs. The JAA's approach to distancing leaders at the top and its failure to focus on the unique needs of a particular workplace, in this instance the individual courts, is unworkable and unwise.

The JAA proposes to replace existing judicial branch personnel at the local, circuit-wide, and national levels with individuals who are employed by a "judiciary" entity that is centralized at the national level and does not operate under the supervision or direction of a circuit council, the Judicial Conference, or the AO Director. The Judiciary's internal governance system is a necessary corollary to judicial independence. Accordingly, the Judicial Conference has serious concerns that this arrangement would infringe on judicial branch self-governance, undermine the integrity of the branch, threaten the independence of judicial decision making, implicate judicial autonomy, or impair the administration of justice.

By inserting Congress and the Executive Branch within internal Judiciary governance, in the form of a Commission with vast reporting and investigative authorities, including subpoena powers, appointed by and in continual communication with the political branches, the JAA creates a risk that it could be used by the political branches or others to influence, intimidate, harass, or punish judges, or could target its investigative resources at judges based on their decisions, perceived political affiliations, or the party of their appointing president.

Beyond judicial governance concerns, the construct of the JAA removes avenues for reporting misconduct, possibly discouraging reporting. Some employees might be hesitant to report misconduct to a national, centralized entity, rather than within the familiar ambit of their particular court or circuit. The Judicial Conference would not favor legislation to the extent that it would centralize the reporting and processing of workplace misconduct claims (including claims that could potentially lead to judicial conduct and disability proceedings), contrary to best practices, as recommended by the EEOC, which emphasize the importance of multiple advice and reporting options. Centralizing the reporting and processing of workplace misconduct claims would unduly hinder many Judiciary employees from coming forward to report misconduct.

The Judiciary's approach – creating a national, regional, and local networks to receive workplace conduct reports – means multiple resources are fully

accessible to all employees, who can choose the communication path that feels safest to them. Employees should have the option to utilize the avenue they are most comfortable pursuing. Local reporting options provide access to and availability of knowledgeable individuals who can assist with oftentimes complicated and sensitive issues. This is far more effective than one centralized national office.

The JAA's approach to confidentiality is another area of concern. The legislation imposes extensive public reporting requirements that could compromise confidentiality. The Judiciary's recommendation is that data should be collected at a high level (e.g., only the number of contacts), to avoid even the perception that the strong confidentiality protections attached to providing informal advice might be lessened by the collection of court- or allegation-specific data.

Another element of confidentiality relates to ethics advice. The Judicial Conference opposes any legislative proposal that permits any entity other than the Committee on Codes of Conduct (Codes Committee) to provide confidential ethics advice to judges or employees because it infringes on the Committee's authority and may create confusion within the Judiciary. Unlike the Codes Committee, which includes a member judge from every judicial circuit as well as a magistrate judge and bankruptcy judge member, it is doubtful that most members of the Commission proposed by the JAA would have sufficient familiarity with judicial

ethics and the various adjudicative and administrative responsibilities that come with being a judge. To the extent that any office created by the JAA would have the authority to provide advice regarding the Codes, this would interfere with the Codes Committee's authority to provide such advice and could lead to a judge or employee receiving conflicting guidance.

Similarly, the Judicial Conference opposes any provision that authorizes any entity to issue subpoenas without an exception for the Codes Committee's advice because it imposes an intrusive requirement that would interfere with existing policies and procedures regarding the confidentiality of ethics advice and may undermine the role of the Committee by discouraging judges and employees from seeking guidance. If a judge or employee knew that the Committee's confidential advice might be subject to a subpoena as part of a workplace conduct investigation, then the judge or employee might be reluctant to seek the Committee's advice to resolve workplace conduct matters.

A third aspect of confidentiality concerns judicial conduct and disability proceedings. The JAA would amend the JC&D Act to require the Judicial Conference to provide to Congress its determination and the record of the proceedings where it affirms or imposes remedial action on a subject judge (and not only when there is a referral to Congress for consideration of impeachment). Furthermore, the bill would give power to various officials created by the

legislation to obtain all information or subpoena materials related to judicial conduct and disability proceedings. Such provisions threaten the confidentiality of judicial conduct and disability proceedings, which could impact decisional independence and be a deterrent to reporting.

In many regards, the JAA includes provisions that are duplicative of current judiciary processes. For example, under the JAA, the Commission and associated offices would recommend to the Judicial Conference, every four years, revisions to the Codes of Conduct for United States Judges, Judicial Employees, and Federal Public Defender Employees. This creates a structure that unnecessarily duplicates the work of the Codes Committee, and the Judicial Conference does not support this provision.

The Judicial Conference further opposes the bill to the extent it essentially codifies—and to some extent duplicates—existing procedures under the JC&D Act and Rules, which may limit the Judiciary's flexibility to amend its procedures to account for changing circumstances or future developments.

Beyond duplication of effort and loss of flexibility, the Judicial Conference has additional concerns related to JAA provisions that substantially alter the Judicial Conduct and Disability process so that it would no longer adequately reflect judicial self-regulation and independence. The inclusion of members of a Commission appointed by or in consultation with the executive and legislative

branches on JC&D special committees and judicial councils would undermine judicial self-regulation and independence and would unnecessarily insert the political branches into the realm of judicial discipline.

Furthermore, the JAA threatens to undermine the delicately crafted incentive structure Congress established in the JC&D Act that encourages judicial resignation in appropriate circumstances – by amending the JC&D Act to exclude a judge's resignation, retirement, or death as grounds for dismissal or conclusion of a JC&D complaint. Because only Congress can remove Article III judges through impeachment proceedings, and because it is a time and resource intensive process that is rarely invoked, a structure that encourages judges to resign when allegations of judicial misconduct are determined to be valid is beneficial to society at large, and to the Judiciary in particular.

The Judicial Conference opposes the JAA to the extent that it establishes a broader scope of workplace protections for the Judiciary than those applicable to other branches of government. The bill would extend workplace and whistleblower protections to categories of individuals with whom the Judiciary does not have an employment relationship, and which are not covered by workplace protections applicable to other branches of government and the private sector.

CONCLUSION

The Judiciary has built an exemplary workplace and is committed to sustaining it. The Working Group will continue to monitor and assess workplace conduct matters throughout the Judiciary, to assist with continued implementation of the workplace initiatives already in place, and to recommend additional changes whenever it sees needs for improvement.

While the Judiciary has made significant strides and improvements, and has done so expeditiously, some changes do not occur overnight. This is a continuing effort, and we expect some cultural changes will need time to take root. However, the Judiciary's process for protecting employees is demonstrating its promise and should be given time to build upon the significant strides made to date. Making premature or sweeping changes could undo several years of steady improvement, with no assurance that alternatives would lead to an improved workplace, more reporting, greater employee trust, or more effective responses to complaints.

The positive effects of the protections and improved process have already begun to take hold. The Judiciary looks forward to even greater improvements that will further enhance the fairness, dignity, and respect with which we treat our employees.

TAB D

FACT SHEET
Workplace Protections in the Federal Judiciary

Background

Workplace protections have long existed for judicial employees, including explicit prohibitions on discrimination and harassment. Significant improvements have been implemented over the last several years that have increased the scope of employee protections, strengthened the obligations of judges and other employees to report misconduct or take other appropriate action, and improved the processes for reporting and addressing reports of misconduct.

In 2018, at the request of the Chief Justice, the Director of the Administrative Office created the Federal Judiciary Workplace Conduct Working Group to examine the sufficiency of safeguards currently in place within the Judiciary to protect judicial employees from inappropriate conduct in the workplace. In its first six months it conducted extensive investigation and research, and published a 45-page report that contained numerous findings and recommendations to the Judicial Conference of the United States for enhancing protections, improving working conditions, and refining procedures.

Based on those recommendations, the Judicial Conference approved and implemented sweeping improvements to the Model EDR Plan, Codes of Conduct, and Judicial-Conduct & Judicial-Disability (JC&D) Rules. A national Office of Judicial Integrity was created and the circuits established offices for Circuit Directors of Workplace Relations, in addition to existing Employment Dispute Resolution (EDR) Coordinators at every local court.

Facts

- **Express discrimination and harassment prohibitions and protections have long existed for all judicial employees.**
  - Court EDR Plans prohibit discrimination, harassment, and retaliation, including conduct that would violate Title VII, Civil Rights Act of 1964; the Age Discrimination in Employment Act of 1967; and the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. The JC&D Rules define misconduct to include discrimination, abusive or harassing behavior, and retaliation.

- **An additional prohibition against Abusive Conduct protects employees even when the misconduct is not discriminatory.**
  - Court EDR Plans prohibit Abusive Conduct, defined as "a pattern of demonstrably egregious and hostile conduct not based on a Protected Category that unreasonably interferes with an employee's work and creates an abusive working environment. Abusive conduct is threatening, oppressive, or intimidating." The JC&D Rules define misconduct to include treating judicial employees "in a demonstrably egregious and hostile manner."

- **The Codes of Conduct and JC&D Rules emphasize that judicial employees and judges have a responsibility to take appropriate action upon learning of potential workplace misconduct, even if they are only a bystander.**

- **Confidentiality policies have been clarified to remove potential barriers and encourage reporting.**
  - Employee confidentiality obligations, such as those for chambers staff, expressly do not preclude one's ability to report wrongful conduct.

- **Judicial employees have multiple avenues to report workplace conduct concerns, including anonymously and to points of contact within or outside their employing office. A multi-layer network of dedicated personnel—at the national, circuit, and local court levels—is available to provide confidential and impartial advice and guidance to judicial employees, managers, and judges.**
  - The Office of Judicial Integrity at the Administrative Office of the US Courts, Directors of Workplace Relations in each circuit, and Employment Dispute Resolution Coordinators in each court and employing office are all able to assist employees with a broad range of workplace conduct concerns. Employees are free to contact whomever they feel most comfortable and often contact more than one resource.

- **Robust informal processes provide valuable flexibility for employees to address workplace concerns.**
  - In addition to the formal complaint process, employees can also utilize a more flexible Assisted Resolution option, which has fewer fixed rules or deadlines.

- **The Formal EDR Complaint process has been revised in recent years to be more user-friendly and provides well-defined procedures through which workplace conduct issues are heard by an impartial federal judge.**
  - The Formal EDR Complaint process allows for an investigation of allegations and potential hearings for disputed issues. Parties have the right to be represented by counsel and a resulting decision can be appealed to the circuit judicial council.

- **In addition to a Formal EDR Complaint, employees can also file a complaint under the JC&D Act to address allegations of misconduct by a judge.**

- **All courts and employing offices must conduct annual training for all judicial employees and judges on workplace conduct protections and processes.**

- **The Federal Judicial Center (FJC) has created a broad range of publications, on-line resources, and in-person training programs to promote fair employment practices and workplace civility that supplement court-sponsored training and materials.**
  - The FJC regularly provides training programs for judicial employees in individual districts. Programs include Preventing Workplace Harassment, which is available in two versions, one for managers and one for employees; Respect in the Workplace, which fosters workplace civility; and another regarding the Codes of Conduct. Since 2016, the FJC has presented these programs nearly 200 times in courts around the country.

- **Data is collected across the Judiciary on Formal EDR Complaints and requests for Assisted Resolution, as well as judicial conduct and disability complaints and actions under the JC&D Act.**

- **The Federal Judiciary's Workplace Conduct Working Group, in collaboration with Judicial Conference committees and Administrative Office advisory groups, continues to engage in evaluation and assessment of existing policies, procedures, and practices to ensure an exemplary workplace for judicial employees.**

- **The Judiciary continues to actively engage internal and external stakeholders. For example, recently a letter was sent to approximately 200 law schools across the country, highlighting the Office of Judicial Integrity and Circuit Directors of Workplace Relations as confidential avenues for law school administrators to seek guidance and/or report concerns of which they become aware.**

TAB E

REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES

March 15, 2022

INTRODUCTION

The Workplace Conduct Working Group (Working Group) was launched in January 2018, at a time when many individuals came forward as part of the #MeToo movement to relate distressing accounts of sexual abuse and sexual harassment in workplaces throughout the country. The federal Judiciary was not immune. In his 2017 year-end report, Chief Justice John G. Roberts Jr. called for the creation of a Working Group to recommend any changes needed to promote an exemplary workplace and to protect Judiciary employees from harassment and other misconduct.

"These concerns warrant serious attention from all quarters of the judicial branch," the Chief Justice wrote. "I have great confidence in the men and women who comprise our judiciary. I am sure that the overwhelming number have no tolerance for harassment and share the view that victims must have clear and immediate recourse to effective remedies."

For the past four years, the Workplace Conduct Working Group, the Judicial Conference, the courts and circuits, the Federal Judicial Center, and the Administrative Office of the U.S. Courts, have been engaged in a substantive and deliberate effort to ensure a safe, respectful, and professional environment. The federal Judiciary is committed, without reservation, to sustaining an exemplary workplace and to the well-being of all its employees.

Workplace protections have long existed for Judiciary employees, including explicit prohibitions on discrimination and harassment. Soon after its formation, the Working Group began a dialogue with Judiciary employees to identify necessary improvements to the Judiciary's workplace policies and procedures. These conversations led to a series of policy changes and

new initiatives. Significant revisions have expanded and clarified the scope of employee protections, strengthened the obligations of judges and employees to report misconduct, and expanded the avenues for addressing reports of misconduct.

This report summarizes the extensive steps the federal Judiciary has taken since January 2018, when the Working Group was formed. The Judiciary's priorities have included not just meaningful revisions and improvements to its conduct policies, complaint procedures, and ethics codes, but an equally important and enduring commitment to promoting an exemplary workplace through engaged leadership and more expansive education in the areas of civility, respect, and communication. In brief, the Judiciary has improved the environment in which its employees work and serve the public in numerous ways:

- The Judiciary's employment dispute resolution processes have been significantly streamlined and improved, including effective formal and informal avenues to address concerns.
- Workplace protections were significantly expanded to include an express prohibition against abusive conduct, addressing harassing behavior even when it is not discriminatory.
- A national Office of Judicial Integrity was established and Directors of Workplace Relations were hired in every circuit, creating an interlaced network of local, circuit, and national workplace specialists who are outside the supervisory chain of command, positioned to provide confidential guidance and assistance to all Judiciary employees.
- Codes of Conduct have been updated to clarify confidentiality obligations, to remove barriers to reporting, and to emphasize the responsibility of all judges and Judiciary employees to take appropriate action upon learning of potential misconduct.
- The Judicial Conduct and Disability (JC&D) Rules were expanded and, among other changes, now include a mandatory "bystander" reporting obligation.

- A new Model Federal Public Defender Organization Employment Dispute Resolution (EDR) Plan was developed, addressing the issues unique to the federal public defender community.
- An EDR Interpretive Guide and Handbook was created and made available Judiciary-wide, providing detailed explanations and step-by-step directions for each of the EDR options for resolution, which is especially useful to EDR coordinators, Directors of Workplace Relations, unit executives, judges, and others directly involved in or who support the formal and informal EDR processes.
- Training and awareness at all levels is vastly greater than in 2018, including nationwide, circuit, and local workplace conduct training programs aimed at judges and Judiciary employees, as well as additional programs on promoting civility and respect, and other initiatives designed to prevent misconduct from occurring and foster an exemplary workplace.

Notwithstanding all of these significant enhancements, the Judiciary's work is not done. After reflecting on the major changes already made, this report recommends that the Judiciary adopt more tools and policies to build on the progress to date. Recommendations to better measure how well the Judiciary's systems are functioning, to further strengthen policies and procedures, and to expand communication and training are being forwarded to committees of the Judicial Conference for consideration. A full list of recommendations may be found in Section 2.

Specifically, the Working Group recommends that an in-depth nationwide climate survey of Judiciary employees be conducted at regular intervals. It also recommends additional data reporting to measure the utilization of and effectiveness of resources available to employees.

The Working Group is further proposing that, in addition to existing recusal requirements, the Judiciary's policies be amended to require that complaints about wrongful conduct always be reviewed by judges outside the court where a complaint originates, fostering greater employee trust and confidence in the complaint process. And the possibility of

incorporating additional monetary remedies into the Judiciary's employee complaint process, comparable to those available to other federal employees, should be assessed.

A continuing focus is to build confidence and trust in the changes that already have occurred. A groundbreaking 2016 report by the U.S. Equal Employment Opportunity Commission (EEOC) concluded that employees in most workplaces significantly underreport sexual harassment and other misconduct. The EEOC identified various reasons, common to all workplaces, why employees may be reluctant to come forward, including distrust in their workplace policies and an unwillingness to become embroiled in formal proceedings. As the EEOC noted, underreporting weakens any organization's ability to respond consistently and effectively, even if its system is otherwise sound.

The Working Group structured its reforms around the EEOC's recommendations, and the Judiciary's initial set of reforms was later endorsed by the Chair of the EEOC as "the type of effort that we need to see more of."

Consistent with the EEOC's research, the Working Group has prioritized reducing barriers to employee reports of misconduct. Every circuit now has a Director of Workplace Relations—a high level and functionally independent professional—whom employees can approach confidentially for informal advice, support, and information about how to initiate formal proceedings. The Judiciary has revised its confidentiality policies to clarify that employees are always permitted to bring forward reports of misconduct. And, consistent with EEOC recommendations, the Judiciary has created a flexible and accessible process for those employees who wish to attempt resolving their concerns informally in the first instance.

In the Judiciary, building trust begins with a clear explanation of how we are addressing workplace misconduct. It is essential that employees have the opportunity to receive confidential

advice and guidance without fear of retaliation or professional injury. They must also know it is possible to come forward and report their concerns and have them addressed without harm to their careers. To further strengthen accountability, the Judiciary has adopted robust whistleblower protections and has imposed a mandatory obligation on all judges and Judiciary employees to report any misconduct they learn of or witness.

Training programs are communicating these points to judges and employees in every court, court unit, and circuit. Employee focus groups and informal workplace dialogues also are creating a safe environment to discuss workplace conduct concerns and protections. The Working Group is expanding its own emphasis on direct discussions with employees, which provide valuable feedback that informs the Judiciary's continued efforts. Several circuits have also created law clerk advisory committees to ensure that law clerks have direct input into their workplaces' policies.

As this report demonstrates, the recommendations made by the Working Group in 2018 are proving effective, and they are well designed to meet the workplace needs of federal Judiciary employees within the unique governance structure of the Branch. The Judiciary's strong and far-reaching response promotes a positive workplace environment and, when misconduct occurs, enhances the chance of early reporting, meaningful intervention, and long-term prevention of abusive conduct. Judiciary employees now have access to direct assistance, clear and immediate recourse, and effective remedies.

The recommendations for further action contained in this report represent the next steps in the Judiciary's ongoing effort to ensure an exemplary workplace for all its employees. In making these recommendations, the Working Group has sought to build on its progress to date, rather than make premature or sweeping changes that could undo several years of constructive

change. It is the view of the Working Group that concrete and iterative improvements to the Judiciary's policies allow for a more meaningful dialogue with employees and preserve employees' familiarity with the Judiciary's existing procedures.

The Judiciary has developed initiatives and revised its procedures to promote an exemplary workplace. As in any workplace, continual review and thoughtful revision are needed, but the Working Group believes that the Judiciary's process for protecting employees is demonstrating its promise and should be given time to build upon the significant strides made to date.

SECTION 1: The Judiciary's Response

Drawing on the expertise of the EEOC, the Working Group's initial proposals addressed five key areas that work in harmony to define a healthy workplace:

- Committed and Engaged Leadership
- Cultural Assessment
- Consistent and Demonstrated Accountability
- Effective Policies and Procedures
- Training that Works

Of equal importance, the Working Group's findings, and its recommendations for change, emerged from extensive dialogue with Judiciary employees. The Working Group conferred with many groups of Judiciary employees and reviewed anonymous email comments. The Working Group met multiple times with law clerks and law clerk groups. The Working Group also met with groups representing a cross-section of all Judiciary employees, including staff from federal defender offices, probation and pretrial services offices, clerks of court staff, chambers staff, and other employees.

The Judiciary's strategy and tools for supporting a respectful workplace align closely with the needs and concerns expressed by employees in these conversations. Based on the communications, the Working Group concluded that abusive behavior, rather than sexual harassment, was the most common form of wrongful conduct in the Judiciary. The Working Group also concluded that workplace misconduct was likely being underreported in the Judiciary.

"The Working Group believes that inappropriate conduct, although not pervasive in the Judiciary, is not limited to a few isolated instances. This information suggests that, of the inappropriate behavior that does occur, incivility, disrespect, or crude behavior is more common than sexual harassment," the Working Group stated in June 2018. The report noted that formal complaint procedures under the Judicial Conduct and Disability Act and EDR plans "generally work well in addressing workplace misconduct in the instances when they are invoked." But the Working Group added that formal complaints by Judiciary employees against judges and senior staff were rare.

Although the sexual harassment of law clerks by judges was an initial emphasis and focus, the Working Group defined a broader scope, proactively seeking a positive work environment for all of the Judiciary's 30,000-plus employees. "The Judiciary should set as its goal the creation of an exemplary environment in which every employee is not only free from harassment or inappropriate behavior, but works in an atmosphere of civility and respect," the Working Group's first report said in June 2018.

That report contained more than 30 recommended changes, all of which were quickly adopted by the Judiciary. Since then, courts and circuits have worked aggressively to implement those changes, and have taken additional steps to carry out the Judiciary's shared vision of an

exemplary workplace.

A timeline of Working Group and Judiciary activity is available in Appendix A, including links to the Working Group's 2018 and 2019 reports. Appendix B provides a detailed summary of specific measures and initiatives undertaken since the Working Group's last report. But a true understanding of what the Judiciary has achieved, and what the Working Group believes is needed going forward, is helped by explaining the Group's history in narrative form. This report seeks not merely to catalog the Working Group's original recommendations, but also to illustrate how those recommendations are working in practice—especially focusing on how employees' experience has improved.

Recognizing Barriers to Reporting

One of the key issues facing the Judiciary, as with all employers, is reluctance to report wrongful conduct.

The 2016 EEOC report on sexual harassment in the workplace served as a foundation for the Working Group's efforts. The EEOC said workplace harassment exists in virtually all workplaces, and that in most instances a victim does not report perceived mistreatment to superiors.

Every organization seeking to eliminate harassment and other workplace misconduct must address employees' reluctance to report when they believe they have been mistreated. A key goal of the Judiciary's program, as first laid out by the Working Group, is to make it safer for all employees to come forward when inappropriate behavior is identified. Key areas of the Judiciary's workplace strategy—changes to policy, expansion in training, multiple channels to receive confidential guidance and support from workplace specialists at the circuit and national

levels, and the opening of informal avenues to resolve workplace concerns—all work together to make reporting of misconduct more likely to occur.

In detailed conversations with Judiciary employees, including current and former law clerks, the Working Group probed the complex and conflicting choices employees face when choosing whether or not to report workplace concerns.

The Judiciary recognized the need to expand employees' reporting options. In early 2018, an employee could file a formal complaint under the Judicial Conduct & Disability Act or under a court's EDR plan. Or they could take their complaint to a chief judge. Some employees told the Working Group that they perceived all of these choices as highly risky.

Expanding Avenues to Reporting and Assistance

Employees frequently requested a clearly identifiable and independent person to whom employees could report misconduct and discuss other workplace concerns. Employees stressed that the person should be outside of the supervisory chain of command.

To address these concerns, the Judiciary established separate and independent reporting channels outside the court or unit where an employee works. These include the national Office of Judicial Integrity, headed by the Judicial Integrity Officer, and a Director of Workplace Relations in each circuit. The Directors of Workplace Relations and the Judicial Integrity Officer are workplace conduct specialists who bring wide-ranging experience to their roles. The Directors of Workplace Relations include former federal circuit court law clerks, Title IX officers, mediators, employment law attorneys, and EEOC administrative law judges.

The impact of these workplace officers for employees is immediate and positive. Today, when Judiciary employees need help with a workplace concern, they are not isolated or limited.

Their choices in whom they can confidentially contact and how they can address concerns are far more varied and effective than in 2018.

First, employees continue to be served by a court-level EDR coordinator. While there were EDR coordinators before 2018, changes in the Model EDR Plan greatly expanded the ways they can assist employees. They can counsel employees on informal resolution options and even assist in face-to-face conversations between employees and their coworkers or superiors. EDR coordinators now receive enhanced training to support their expanded role.

In addition to local EDR coordinators, employees now have two additional channels for confidential guidance that exist entirely outside their court's chain of command. The Office of Judicial Integrity provides confidential help, information, referral, and guidance to any Judiciary employee on options to address workplace harassment, abusive conduct, or other forms of wrongful conduct. Similarly, circuit Directors of Workplace Relations confidentially discuss issues with judges and employees (including law clerks, supervisors, managers, and court unit executives), provide information about policies and procedures, and help facilitate informal resolutions and support formal complaint procedures. Additionally, Directors of Workplace Relations coordinate and provide numerous training programs throughout their circuits, propose and assist in the implementation of various policy initiatives, and collaborate on best practices to foster consistency across the circuits and courts.

Directors of Workplace Relations serve all court units within a circuit—the court of appeals, district and bankruptcy courts, probation and pretrial offices, and federal public defender offices. Because the Directors of Workplace Relations are available to employees in all court units, they function as centralized and uniform resources for employees to learn about their

rights and options without fear that their supervisors or local leadership will be informed of their confidential conversations.

This approach is consistent with the EEOC Study recommendation that "Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment."

This increased level of assistance has improved the experience of Judiciary employees, including those who work in chambers and other isolated settings. If an employee needs help or guidance, the assistance of trained professionals who understand workplace issues is available every step of the way. The request for help remains confidential and, if the employee chooses, completely independent of the court's chain of command. By creating a national, regional, and local network to receive workplace conduct reports, assistance is fully accessible to all employees, who can choose the communication path that feels safest to them. These officers also provide the Judiciary with an internal network of experts who can spot systemwide workplace trends and are well-positioned to recommend additional improvements to the Judiciary's policies, processes, and structures for addressing workplace issues. This approach is far more effective and comprehensive in providing help than one centralized national office.

Providing Informal Advice and Assisted Resolution

Early conversations with Judiciary employees identified another factor that discouraged reporting of workplace misconduct.

The Judiciary has long had processes for addressing misconduct, and they carry potentially significant consequences, including referral to Congress for possible impeachment in the case of judges. But employees reported that these two processes—formal complaints under

the Judicial Conduct and Disability Act or through their court's EDR Plan—often seemed excessive in relation to the more common, but less egregious issues of concern they faced.

As the 2018 Working Group report said: "The JC&D Act and the EDR Plans provide useful formal mechanisms for responding to serious cases of harassment and workplace misconduct, but the Working Group found that they are not well suited to address the myriad of situations that call for less formal measures. For example, an employee may be uncomfortable with a well-meaning supervisor's familiarity or avuncular physical contact and seek advice on how to express discomfort. Or an employee may encounter crude or boorish behavior from a coworker and not want to file a formal complaint, but may want a supervisor to step in and curtail the conduct. . . . Neither the JC&D Act procedures nor the EDR Plans are designed to address those situations."

The EEOC's 2016 report said that "Increasing informal, confidential options within the complaint–response system is important . . . to create more supportive environments for those who have experienced sexual harassment." Judiciary employees concurred that they feel more confident pursuing grievances when informal advice and multiple communication channels are available to them.

In accordance with these recommendations and the supporting research, the Judiciary undertook significant reforms to its complaint processes in 2019. Those reforms included changes to the Model EDR policy that emphasized informal resolutions as an important tool for addressing workplace conduct issues.

"Informal Advice" is an option that allows an employee to air their concerns and receive confidential advice and guidance from a local EDR Coordinator, a circuit Director of Workplace Relations, or the national Judicial Integrity Officer. This confidential guidance may include

providing information on the employee's rights, discussing ways to respond to the conduct, and providing an outline of potential options for how to proceed with their concerns. Having an informal advice channel also can overcome any perceived barriers to reporting in a more formal process.

The "Assisted Resolution" option available under court EDR plans is an interactive and flexible process that may include discussions with the source of the conduct, voluntary mediation, preliminary investigations including interviewing witnesses, and/or seeking a mutually agreeable resolution. Consistent with the EEOC Report, this option gives employees an informal method to resolve a workplace matter, typically at an early stage. At all stages, an employee retains the option of filing a formal complaint.

Early evidence indicates that the creation of multiple and confidential informal avenues for reporting has been successful in removing barriers to reporting. The Directors of Workplace Relations report that they spend more of their time on confidential informal advice than anything else, and that these interactions involve a range of workplace issues, not just harassment. Those confidential conversations have provided opportunities for a variety of interventions that would not have been possible if employees were uncomfortable either coming forward or engaging in a more formal process.

The interventions have included informal actions to stop inappropriate behavior, mediations and facilitated conversations, and investigations that resulted in settlements. These informal, confidential, and flexible options can counter-balance some of the power disparities inherent in the Judiciary. And again, pursuing these options does not preclude the filing of a formal complaint.

Clarifying and Strengthening Employee Workplace Protections

The Working Group's conversations with Judiciary employees revealed that some employees were unsure about the scope and meaning of certain provisions of the Judiciary's policies and Codes of Conduct as they related to workplace conduct. The Judiciary collectively spent much time and energy clarifying and strengthening its policies and codes of conduct, as well as enacting significant enhancements to the Model EDR Plan.

For example, the Working Group learned that there was confusion and ambiguity about whether confidentiality obligations impeded the reporting of harassment. The Working Group stressed that the "confidentiality obligations [of Judiciary employees] must be clear so both judges and judicial employees understand these obligations never prevent any employee—including a law clerk—from revealing abuse or misconduct by any person."

Judiciary employees and judges also said it was unclear whether they were supposed to report potential misconduct by workplace colleagues. The Codes of Conduct for employees and judges were thus amended to emphasize the responsibility to take appropriate action upon learning of potential wrongful conduct, and the Judicial Conduct and Disability Rules were expanded to include a mandatory "bystander" reporting obligation for judges.

Under the revised JC&D Rules, judges engage in misconduct if they fail "to bring 'reliable information reasonably likely to constitute judicial misconduct' to the attention of the relevant chief district judge or chief circuit judge." This change is significant, as the information ultimately must be shared with chief circuit judges who, in addition to an individual complainant, have the authority to initiate a complaint against a judge.

The revised Model EDR Plan also provides that those managing or presiding over an EDR process must recuse if they witnessed, or were otherwise involved in, the alleged conduct.

It also requires recusal if the matter creates an actual or perceived conflict of interest. Where appropriate, it allows for a judge from a different court to be brought in to preside over a complaint. In January 2020, the Judiciary issued an internal EDR interpretive guide and handbook for all employees, managers, and judges, so that EDR claims can be processed in a uniform, conflict-free manner nationwide.

One of the more impactful policy enhancements to the Model EDR Plan is the addition of express protections against "abusive conduct," defined in the Model EDR Plan as "a pattern of demonstrably egregious and hostile conduct not based on a Protected Category that unreasonably interferes with an employee's work and creates an abusive working environment." This protection affords Judiciary employees a specific standard and meaningful avenues for addressing workplace concerns that previously lacked recognition. It also extends beyond similar protections under federal employment laws, as it defines and prohibits workplace harassment even when it is not based on the recipient's membership in a protected class.

As courts and employing offices have updated their EDR Plans to include a defined prohibition against abusive conduct, the bulk of inquiries and concerns among Judiciary employees have related to this type of non-discriminatory abusive conduct or other forms of uncivil behavior, according to the experience collected. Positively, employees are using the new informal avenues of Informal Advice and Assisted Resolution to raise, address, and resolve these concerns. This experience demonstrates that the improvements to the EDR process were both necessary and have made a difference.

Leadership, Training, and Trust

Key elements tying the Judiciary's workplace conduct program together are leadership and education. Chief judges, judges, and unit executives are actively engaged in training and

other initiatives, and they are leading by example through their personal commitment to maintaining an exemplary workplace. Since 2018, there has been a dramatic increase in training related to workplace conduct.

This has led to two beneficial developments. Knowledge about issues and resources related to workplace conduct has steadily grown as trainings have been conducted by the Federal Judicial Center, the Office of Judicial Integrity, and the circuit Directors of Workplace Relations. In addition, the Directors of Workplace Relations have become much better known inside courts and offices as they lead workplace conduct trainings. Direct interaction has made these workplace specialists reliable and trustworthy to court employees, and has opened up informal communication channels when help is needed.

Throughout the Working Group's early deliberations, an urgent need for training was expressed in all quarters. Survey responses and other feedback revealed that, prior to 2018, many employees were unaware of policies prohibiting misconduct, their rights under those policies, and to whom they could turn with workplace conduct concerns. In addition, some judges, managers, and supervisors were unsure of their obligations and responsibilities if they observed or otherwise became aware of misconduct.

Examples of specific national training requirements and initiatives include:

- The revised Model EDR Plan now requires annual EDR training to be provided for all employees, including law clerks, and judges.
- All EDR coordinators in the Judiciary must now be trained and certified on the information and skills necessary to fulfill their function, and the Office of Judicial Integrity has developed a uniform national training and certification curriculum for EDR Coordinators. This training is in addition to the annual training provided for all employees.

- Information on workplace conduct protections, resolution options, and resources is provided as part of orientations for new law clerks, recently appointed judges, and new chief judges.
- The Federal Judicial Center regularly organizes educational programs for judges, court unit executives, managers and supervisors, and Judiciary staff.
- The Federal Judicial Center also has conducted trainings and programs on respect in the workplace, civility, implicit bias, and other workplace topics.

Extensive training also is being offered at the circuit level. As an example, one circuit has developed special initiatives focusing on law clerks—expanded law clerk orientation agendas that include sessions on discrimination and harassment policies and employment dispute procedures, and sample chambers checklists on workplace expectations. These resources also explain how law clerks can seek help.

Increased education about the workplace makes employees aware of their rights, makes judges more aware of their obligations and responsibilities, reinforces behavioral expectations, and sends a clear message that these issues matter and are taken seriously. When employees, including law clerks, are informed—early, clearly, and repeatedly—of their rights and options and of the expectations and obligations placed on judges and Judiciary employees, the Judiciary's commitment to a fair and transparent workplace is reinforced.

While imparting knowledge about workplace conduct is essential, the trainings also are building trust in, and use of, the system that has been created. The Directors of Workplace Relations work across their circuits, providing training for all levels of Judiciary employees in different court units. The Directors of Workplace Relations and Judiciary employees are forming direct channels of communication with one another. Such connections are vital in letting employees know there is a reliable person to turn to if needed.

The Judicial Integrity Officer, chief judges, and Directors of Workplace Relations are seeing the impact of increased communications and training through additional inquiries about possible misconduct. Many employees have stated that these trainings alerted them to the inappropriate nature of certain behaviors and to the resources available to address them.

By creating a training network with local as well as national and circuit level resources, the enhanced commitment to an exemplary workplace is permeating courts and other Judiciary offices. The Working Group believes that broad changes at the local level, supported by local and circuit training, are the best path to a sustainable and positive environment for federal Judiciary employees.

Solutions That Work

Finding Solutions That Work

Testifying before Congress in 2020, a co-author of the EEOC's 2016 study on sexual harassment noted that "two essential components of a successful effort to shape workplace culture are leadership from the top and a focus on the unique needs of a particular workplace."

Finding solutions that work requires consideration of the unique culture and governance of a particular workplace. Any effort to promote an exemplary workplace must take into account the Judiciary's dispersed, regionalized governance structure. Individual courts possess significant administrative autonomy, including the authority to address workplace conduct matters.

Chief Justice Roberts has demonstrated decisive leadership from the top, and the Judiciary and Workplace Conduct Working Group have been well served by his commitment to an exemplary workplace. In the federal Judiciary, "leadership from the top" requires leadership from many "top" individuals, not just one national leader or agency. At a minimum, this includes the chief judge of each court and also the head of each court unit. The personal commitment of

judges and court leaders sends a powerful signal that everyone must support a safe and civil workplace.

The policies and procedural changes adopted since 2018 took careful account of the Judiciary's decentralized governance and culture. By establishing Directors of Workplace Relations at each circuit, by training and empowering EDR coordinators in each court, and by requiring the courts to provide annual training for every judge and employee, among other things, the Judiciary's approach is making itself known, available, and trusted in every court and Judiciary office. This comprehensive approach, operating locally, regionally by circuit, and nationally, is supporting necessary culture changes that can sustain themselves over time. Judges and other court leaders are actively engaged, and employees are learning that they can discuss inappropriate workplace behavior, and receive confidential guidance, without incurring professional risk.

Change is happening, and it is happening at the courthouse — the place where employees work and where the authority to address workplace issues actually resides.

In its early discussions, the Working Group concluded that an approach that empowers employees to bring complaints in their local courthouses or circuits is more likely to be used and to be effective than a single national oversight body. For many years, the Judiciary has long had a formal complaint process. But the historic lesson is that without on-the-ground training and counseling, the Judiciary's formal complaint process did not inspire trust among employees to use it.

As employees described their views and recommendations to the Working Group and in surveys, it became apparent that proposals for a national commission to investigate workplace complaints could suffer from the same trust and safety issues that historically limited employee

use of the Judiciary's formal workplace complaint procedures. Further, the employees were not in favor of an outside body to oversee workplace issues.

Without employee trust and participation, any workplace conduct program is at high risk of failure. And in the Judiciary, that means any proposed program to report and prevent abuse must earn trust in the local workplace. That is where the investment has been made, and that is where the important work is being done. As the Working Group's 2018 recommendations have been adopted, the necessary trust is taking root.

The Working Group believes that the Judiciary's response to workplace conduct concerns is succeeding, locally, by circuit, and nationally. While the Judiciary has made significant strides and improvements, and has done so expeditiously, some changes don't occur overnight. There is a continuing effort to monitor what we have done, and we expect some of the cultural changes will need time to take root. That said, we do not condone misconduct at any level. The Working Group recommends that the Judiciary's strategy for an exemplary workplace continue on its current course.

SECTION 2: Recommendations for Additional Improvements

Workplace conduct programs in any workplace must always evolve to address a constantly changing workforce. The Judiciary, like any workplace, must continue to take stock of what it has accomplished and find those areas where more can be done. Section 2 contains nine recommendations to address further areas of improvement. Where needed, the Working Group asks that these recommendations be considered by appropriate committees of the Judicial Conference.

A. Measure the Use and Effectiveness of Existing Procedures

Now that the Judiciary has implemented the various changes in policies, procedures, and education described in this report, the time is appropriate to assess the workplace climate in the Judiciary and the effectiveness of the changes in addressing workplace conduct issues. The Working Group has two recommendations in this regard.

Recommendation 1: Conduct a nationwide climate survey, disseminated at regular intervals to all Judiciary employees, to assess the workplace environment and to provide insight into the prevalence of workplace conduct issues and the impact and effectiveness of the improvements the Judiciary has made to its policies and processes.

Background: Several circuits and individual courts have conducted their own climate surveys or workplace environment assessments, and the resulting information has proven useful for their respective populations. A uniform climate survey across the Judiciary as a whole can provide additional valuable insight into not only the prevalence of certain types of workplace conduct issues in the Judiciary, but also the impact and effectiveness of the numerous improvements the Judiciary has made to its policies and processes since 2018.

The Working Group has partnered with the Federal Judicial Center to develop a draft Judiciary climate survey. The Working Group recommends that the Federal Judicial Center administer and disseminate the survey to all Judiciary employees, managers, unit executives, and judges for their voluntary participation.

The draft climate survey would:

- provide a general picture of the federal Judiciary workplace environment, including employee assessments of how the Judiciary's overarching commitment to civility, respectfulness, equity, diversity, and inclusion have been realized;

- help the Judiciary understand the nature and extent of any wrongful conduct employees may have experienced;
- explore whether wrongful conduct has been disclosed or reported and identify any potential barriers to reporting;
- assess the knowledge of and satisfaction with how reports of wrongful conduct are handled;
- assess the effectiveness of confidential advice provided by the Office of Judicial Integrity and Directors of Workplace Relations; and
- gather information and feedback that will help improve the Judiciary's policies, procedures, and education and training initiatives.

Recommendation 2: Augment annual EDR-related data collection to include data related to Informal Advice contacts, while ensuring that confidentiality is protected.

Background: Judicial Conference policy currently requires the annual collection of certain data regarding use of the EDR process throughout the Judiciary. Judiciary EDR Plans provide three distinct options for addressing instances of wrongful conduct: (1) Informal Advice, (2) Assisted Resolution, and (3) Formal Complaint. Only the latter two are currently the subject of nationwide data collection.

The Working Group recommends that, in addition to current EDR-related data collection, the Judiciary also collect anonymized data regarding the number of Informal Advice contacts received by the Office of Judicial Integrity and circuit Directors of Workplace Relations. Data should be collected at a high level (i.e., only the *number* of contacts), to avoid even the perception that the strong confidentiality protections attached to Informal Advice might be lessened by the collection of court- or allegation-specific data. This will provide a "usage rate" for how often the Judiciary's new positions at the circuit and national level are being used by employees for confidential advice and guidance.

B. Strengthen Policy and Procedure

Recommendation 3: Enhance the Formal Complaint process by revising the Model EDR Plan to specify that an employee complaint must be overseen by a Presiding Judicial Officer from outside the court from which the complaint originated.

Background: The Model EDR Plan includes a number of procedural safeguards to ensure that the informal and formal EDR options for addressing workplace conduct concerns are consistent, unbiased, and effective. Among these safeguards are robust recusal requirements.

Moving the investigative and adjudicative functions within the Formal Complaint process to a different court could further enhance the perceived impartiality of the process. The Working Group believes that employee confidence in the Formal Complaint process could be strengthened if the Model EDR Plan were revised to require the role of Presiding Judicial Officer to be outside of the court from which the complaint originated.

Recommendation 4: Develop an express policy regarding romantic relationships that exist or develop between employees where there is a supervisory or evaluative relationship. The policy should apply to all Judiciary employees and judges.

Background: Current Judicial Conference policy specifically prohibits instances of nepotism and favoritism, and relevant advisory opinions by the Committee on Codes of Conduct provide further guidance for the application of existing policies to various, more nuanced situations. Some non-Judiciary workplaces have adopted an express policy for both pre- and post-appointment situations in which romantic relationships exist or develop, particularly between individuals where there is a supervisory or evaluative relationship.

The Working Group believes an express Judiciary-wide policy in this area is necessary and suggests that it should apply to all Judiciary employees, managers, unit executives, and

judges. The Working Group recommends that the Office of Judicial Integrity work with others in the Administrative Office and relevant advisory councils to further examine the issue and develop a proposed policy for consideration by the relevant Judicial Conference committees.

Recommendation 5: Assess incorporation of additional monetary remedies as part of the EDR complaint process.

Background: The Model EDR Plan applies to Judiciary employees the protections accorded to many federal employees under the federal employment statutes. Certain monetary remedies and attorney fees are already available within the EDR complaint process through its incorporation of the Back Pay Act. However, the Judiciary is one of the few workplaces that does not include the additional monetary remedies available to employees in other agencies or organizations, including other federal employees. With enhanced protections and improved policies now in place through a significantly revised Model EDR Plan, the Working Group recommends that the Judiciary assess incorporation of additional monetary remedies into the EDR framework.

C. Expand Communication

Recommendation 6: Direct the Office of Judicial Integrity, with the assistance of the Directors of Workplace Relations, to issue an annual Judiciary workplace conduct report.

Background: As the Judiciary's Strategic Plan states, "Public trust and confidence and workforce morale and productivity are enhanced when the Judiciary provides an exemplary workplace for everyone." One necessity for public trust and confidence is regular reporting on the progress and evolving challenges of fostering an exemplary workplace. The Working Group believes that the Office of Judicial Integrity can help pursue this goal through the publication of an annual report.

Recommendation 7: Expand Outreach and Engagement.

Background: As this report and the Working Group's June 2018 report make clear, the Working Group's efforts have benefited immensely from interactive dialogue with numerous Judiciary employees, including law clerks, court executives, and employees in defender offices, probation and pretrial services, and a wide range of administrative positions. In August 2021, that outreach was expanded by way of a letter sent to approximately 200 law schools across the country, highlighting the Office of Judicial Integrity and circuit Directors of Workplace Relations as confidential avenues for law school administrators to seek guidance and/or report concerns of which they become aware.

The Working Group encourages circuits to continue, institute, or expand interactive-listening efforts with focus groups and possibly advisory bodies to ensure that they fully understand employee concerns. The Working Group, in turn, will increase its own emphasis on interactive listening, by inviting employee groups to meet directly with the Working Group, and also to partner with circuits to attend circuit-level discussions.

D. Additional Recommendations

Recommendation 8: Strengthen annual EDR training by revising the Model EDR Plan to emphasize that courts and employing offices have a responsibility to ensure that EDR training is offered and accessible to all employees and judges on an annual basis, and to take affirmative steps to ensure completion.

Background: Under existing policy, the Model EDR Plan currently requires courts and employing offices, including federal public defender offices, to conduct training annually for all judges and employees, including chambers staff, to ensure that they are aware of the rights and obligations under the EDR Plan and the options available for reporting wrongful conduct and

seeking relief. However, there is no requirement that courts and employing offices ensure that all employees attend training that is offered or that they keep track of who has completed training each year.

The Working Group believes the Model EDR Plan's current training efforts could be further strengthened if courts and employing offices ensured that all their employees not only have access to but also complete EDR training on an annual basis. Tracking and ensuring consistent completion of annual training is especially important for employees in term positions, such as law clerks, who may serve in the Judiciary for only a year or two.

Recommendation 9: Develop a system for regular review of the Judiciary's workplace conduct policies to ensure comprehensive implementation across courts and circuits.

Background: The Working Group emphasized in its 2018 report the value of systemic institutional review and recommended further steps be taken to ensure the consistent application of workplace conduct policies across the Judiciary. A system for regularly assessing the comprehensive implementation of the Judiciary's workplace conduct policies achieves this goal.

The resources necessary for conducting such regular assessments were provided with the creation of the Office of Judicial Integrity and the Directors of Workplace Relations. These professionals already provide training, guidance, and programmatic support for courts and employing offices throughout the year, and are well-positioned to reinforce ongoing efforts by the Judiciary to ensure an exemplary workplace for employees.

APPENDIX A

Federal Judiciary Workplace Conduct Working Group Timeline

December 31, 2017: In his Year-End Report on the Federal Judiciary, Chief Justice John G. Roberts, Jr., calls for creation of a working group to undertake "a careful evaluation of whether [the Judiciary's] standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure exemplary workplace conduct for every judge and every court employee."

Early January 2018: The Federal Judiciary Workplace Conduct Working Group is established. It is chaired by James C. Duff, then director of the Administrative Office of the U.S. Courts (AO), and among its members are chief judges, district and appeals court judges, a circuit executive, the current Director of the Federal Judicial Center, and the counselor to the Chief Justice.

January to May 2018: The Working Group holds a series of meetings with current and former law clerks, a cross-section of Judiciary employees, Judiciary advisory councils, industry experts, and the authors of a 2016 report from the Equal Employment Opportunity Commission Select Task Force on the Study of Harassment in the Workplace. They review employee surveys and set up a comment mailbox on the Judiciary's public website for employees to offer suggestions, anonymously if desired.

The Judiciary takes several early actions to improve workplace protections. Confidentiality provisions in the law clerk handbook are revised to clarify that they do not prohibit reports of misconduct by judges, supervisors, or any Judiciary employee. A session on sexual harassment and other workplace conduct issues is added to the training program for newly appointed judges.

June 1, 2018: The Workplace Conduct Working Group issues a report with more than 30 detailed recommendations for improvements in policies and procedures.

August 2018: The U.S. circuit courts begin the process of recruiting and hiring circuit Directors of Workplace Relations to provide confidential guidance and assistance to employees within the circuit, assist in resolving workplace issues (including those involving both mediation and workplace investigations), and offer training on identifying and reporting workplace misconduct. The Tenth Circuit hires the first Director of Workplace Relations.

September 13, 2018: Based on the Working Group's recommendations, the Judicial Conference approves several of the changes to the Model Employment Dispute Resolution plan (EDR) – to cover interns and externs and extend the time for initiating EDR complaints from 30 to 180 days. A list of proposed amendments is published for public comment.

October 2018: An EDR Working Group is appointed and begins work on additional revisions to the Model EDR Plan. The working group consists of judges, court executives, and Judiciary employees.

October 30, 2018: Judicial Conference committees hold a public hearing on the proposed changes to the judges' Code of Conduct, the employees' Code of Conduct, and the Judicial Conduct and Disability Rules in Washington, DC.

December 2018: Based on recommendations from the Working Group, the Judiciary hires its first national Judicial Integrity Officer to provide confidential advice and guidance on conflict resolution, mediation, and formal complaint options. Local court EDR coordinators serve as a resource for employees within their respective courts, while circuit Directors of Workplace Relations and the national Office of Judicial Integrity serve as additional points of contact from whom employees can seek guidance and assistance outside their court's chain of command.

January 2019: The Judicial Integrity Officer begins holding twice monthly meetings with circuit Directors of Workplace Relations to discuss best practices, trends, and training needs. Within the first months of 2019, the Office of Judicial Integrity develops a workplace conduct section for the Judiciary's intranet to make information easy to find and to provide a portal for employees to submit anonymous reports. Throughout 2019 and early 2020, the Judicial Integrity Officer travels extensively around the country to educate judges, managers, and employees about the Judiciary's standards for workplace conduct and the EDR options for resolution.

March 12, 2019: The Judicial Conference approves the Working Group's recommendations for changes to the Codes of Conduct for judges and Judiciary employees, and to the Judicial Conduct and Disability Rules. These include: 1) expressly stating that judges and judicial employees should neither engage in nor tolerate workplace misconduct and that workplace harassment is within the definition of judicial misconduct; 2) emphasizing that judges and judicial employees have a responsibility to take appropriate action upon learning of potential workplace misconduct and including within the definition of judicial misconduct a judge's failure to report or disclose misconduct; 3) further clarifying that confidentiality obligations do not preclude reporting or disclosing judicial misconduct; 4) clarifying that judicial misconduct includes retaliation against employees for reporting or disclosing misconduct; and 5) recognizing that the Judicial Conference and judicial councils have the authority to assess potential institutional issues related to a judicial misconduct complaint, such as an analysis of conditions may have enabled misconduct or prevented its discovery, even in cases where a subject judge resigns.

September 17, 2019: The Judicial Conference approves a new Model EDR plan that expands the options for addressing wrongful workplace conduct. The new plan includes definitions and examples of wrongful conduct; three flexible options for addressing workplace conduct issues; flowcharts that explain EDR rights and options; and training and certification requirements for court EDR coordinators. The changes were all recommended by the Working Group to improve the Judiciary's procedures for identifying and correcting wrongful conduct and providing more informal and flexible ways to report and address workplace conduct issues.

September 2019: The Working Group issues a status report on the actions taken on its recommendations and notes that "nearly all" of them have been implemented through a concerted effort by the Judicial Conference, the courts, the AO, and the Federal Judicial Center.

January 2020: The Office of Judicial Integrity and the EDR Working Group issue a 150-page Employment Dispute Resolution Interpretive Guide and Handbook for employees, managers, and judges to foster uniform and effective processes to resolve workplace conduct issues through the EDR options for resolution.

July 2020: An online workplace conduct training course for EDR coordinators is distributed to the courts. All EDR coordinators must pass tests in five modules to become certified. Amidst the global pandemic, the Office of Judicial Integrity and Directors of Workplace Relations continue to provide workplace conduct training to courts and judicial employees remotely via Zoom and Teams.

August 2020 to July 2021: Additional training programs are developed; circuits continue outreach efforts to both internal and external stakeholders; specialized training and tailored resources are developed for law clerks; and websites are updated to provide clear information on workplace resources.

August 2021: All of the circuits have a Director of Workplace Relations in place to provide confidential guidance and assistance to employees within the circuit and to provide training.

A letter is sent to every American Bar Association-accredited law school in the country, explaining how the Office of Judicial Integrity and Directors of Workplace Relations can assist law clerks and law school administrators, and emphasizing that these officials offer a confidential forum for law schools to seek guidance and report workplace conduct concerns when they become aware of them.

Nearly all courts adopt the revised EDR plan. The Working Group and the Director of Workplace Relations Advisory Group continue to meet regularly to monitor and assess workplace conduct matters throughout the Judiciary.

APPENDIX B

Major Actions in 2020 and 2021

The improvements implemented throughout 2020 and 2021 include the following:

- The Judiciary has in place a strong network of professionals who are expert in matters of workplace conduct and are outside of the traditional court chain of command to support and provide services to both employees and employing offices. Key to this network are the Directors of Workplace Relations, and every circuit now has a Director of Workplace Relations (or analogous position). These positions focus on workplace conduct issues and serve all courts and employing offices within a circuit.

  In addition, the national Office of Judicial Integrity, headed by the Judicial Integrity Officer, was established by the Administrative Office to also serve as an independent avenue for employees and employing offices. The Office of Judicial Integrity collects information about the use of EDR processes nationally, monitors workplace issues to identify trends, and provides leadership on policy initiatives. The Office of Judicial Integrity is in the process of expanding to include additional staff to assist with national efforts. Together, this network of individuals provides confidential advice and guidance to employees, managers, and judges; supports and facilitates EDR processes; coordinates training programs; proposes and assists in the implementation of policy initiatives; and collaborates on best practices to foster consistency across the circuits and courts.

- Judiciary employees benefit from a wide range of outreach and engagement opportunities provided by Directors of Workplace Relations. The Office of Judicial Integrity and Directors of Workplace Relations provide training to clearly communicate employee rights and the workplace conduct process, and disseminate resources through websites, newsletters, posters, and other outreach initiatives. A recent virtual training series in November and December 2021 was viewed live by over 6,000 employees and judges, and another tailored for chambers staff was attended by nearly 100 staff, including law clerks and judicial assistants. Several circuits have formed workplace conduct committees, diversity and inclusion task forces, focus groups, and employee advisory groups, such as those specific to law clerks and probation/pretrial employees, to garner valuable feedback and inform future initiatives.

- The Judiciary has taken active steps to establish clear and trusted lines of communication with law schools to ensure they are aware of the Judiciary's workplace protections and available processes for addressing concerns and highlighting the Office of Judicial Integrity and Directors of Workplace Relations as confidential avenues for law school administrators to seek guidance and/or report concerns of which they become aware. This has resulted in outreach from law schools seeking guidance or inviting the Office of Judicial Integrity or Directors of Workplace Relations to provide presentations or training

to their staff or students regarding the Judiciary's workplace conduct policies and processes.

- The Federal Judicial Center, in concert with the Office of Judicial Integrity and Directors of Workplace Relations, has increased the availability and dissemination of workplace conduct training to the entire Judiciary – judges, law clerks, chamber staff, and other staff – tailored to their roles and responsibilities. The Federal Judicial Center provides sessions that address various aspects of workplace conduct at orientations for new judges and through continuing education programs. Virtual and in-person programs, webinars, and podcasts for new and current Judiciary employees address topics such as preventing workplace harassment, civility in the workplace, dealing with difficult situations, and the codes of conduct.

- The strengthened and streamlined Model EDR Plan has been adopted by every circuit and virtually all courts and employing offices. The Model EDR Plan includes enhanced policy protections, including an express prohibition for abusive conduct, covers all paid and unpaid employees, provides specific informal avenues (Informal Advice and Assisted Resolution) for reporting and addressing wrongful conduct, and provides a more streamlined formal complaint process and allows for more time to file a formal claim. Employees are aware of their enhanced protections regarding abusive conduct and are using the EDR options to effectively address those concerns. The addition of informal advice and assisted resolution has broken down barriers to reporting as indicated by the increased use of these processes and has allowed issues to be resolved more quickly. This demonstrates that the improvements to the EDR process, addressing this newly defined category of wrongful conduct and providing flexible options for resolution, were both necessary and have proven impactful.

- A new Model Federal Public Defender Organization EDR Plan was developed and approved by the Judicial Conference, designed to address the issues unique to the federal public defender organization community, including: the distinct employment relationship between the federal public defenders and their employees, their role as legal representatives with ethical obligations to clients on whose behalf they appear in court, and the need to mitigate concerns regarding access to sensitive information. The foundational policy protections and general processes, timelines, and standards for reporting wrongful conduct, filing complaints, conducting investigations, and achieving resolution under this plan remain consistent with those set forth in the Judiciary's Model EDR Plan previously adopted.

- New requirements in the Model EDR Plan have helped to ensure that every court and employing office has at least two trained and certified EDR coordinators. An online training course must be taken and passed by EDR coordinators in order to become certified, and over 400 EDR individuals have been certified to date.

- The EDR Interpretive Guide and Handbook (EDR Handbook) was prepared by the Office of Judicial Integrity, in collaboration with the Directors of Workplace Relations, and made available Judiciary-wide, but especially useful to EDR coordinators, Directors of Workplace Relations, unit executives, judges, and others directly involved in or who support the formal and informal EDR processes. The EDR Handbook provides detailed explanations for each of the EDR options for resolution, step-by-step directions for each process, information about the remedies available under the EDR Plan, proactive and responsive steps for safeguarding the rights and protections afforded under the EDR Plan, and more.

- Policies for the provision of interim and permanent relief related to allegations of wrongful conduct were clarified and streamlined. Courts and employing offices can provide immediate interim remedies such as temporary reassignment or relocation as allegations of wrongful conduct are being investigated. To streamline the process, the Judicial Conference delegated to the Committee on Judicial Resources the authority to more expediently grant permanent relief without diminution of an employee's salary, grade, and employment status.

- The Codes of Conduct – for judges, employees, and federal public defender office employees – were modified to ensure that judges and employees understand that confidentiality obligations should never prevent any employee, including a law clerk, from revealing abuse or reporting misconduct by any person. In addition, the Codes of Conduct and Judicial Conduct and Disability Rules were modified to provide clear obligations for judges and employees to take appropriate action upon learning of potential misconduct. Extensive training, highlighting these changes, has been conducted for judges and employees throughout the Judiciary.

TAB F

STATUS REPORT FROM THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES SEPTEMBER 17, 2019

INTRODUCTION

This status report summarizes progress made on recommendations in the Federal Judiciary Workplace Conduct Working Group Report (Report), submitted to the Judicial Conference of the United States on June 1, 2018. At the direction of Chief Justice John G. Roberts, Jr., the Federal Judiciary Workplace Conduct Working Group (Working Group) was established in January 2018 to evaluate the Judiciary's standards of conduct and procedures for investigating and correcting inappropriate workplace conduct. The Working Group made more than thirty detailed recommendations to improve the Judiciary's policies and procedures and achieve the Chief Justice's goal of creating an exemplary workplace for every federal judicial employee and judge.

The Working Group's recommendations cover three general categories:

- Revisions to the Codes of Conduct for United States Judges (Codes of Conduct or Code) to state clear and consistent standards describing inappropriate workplace behavior.
- Improvements to the Judiciary's procedures for identifying and correcting misconduct and providing more informal and flexible ways to report and resolve workplace conduct issues, including revising the Rules for Judicial-Conduct and Judicial-Disability Proceedings (JC&D Rules) and the Model Employment Dispute Resolution (EDR) Plan, and creating a national Office of Judicial Integrity (OJI) and circuit directors of workplace relations as independent

resources for employees to report and receive advice about workplace misconduct; and

- Enhancements to the Judiciary's educational and training programs to raise awareness of workplace conduct issues, prevent discrimination and harassment, and promote civility throughout the Judicial Branch.

Prior to the submission of the Report, the Judiciary took several actions that did not require Judicial Conference action. Those included:

- Revising the confidentiality provisions in the law clerk handbook to clarify that nothing in those provisions prevents revealing workplace misconduct, including harassment, and removing the Model Confidentiality Statement from JNet, the courts' intranet website;
- Establishing a comment mailbox on the uscourts.gov public website for current and former law clerks and other employees to send comments and suggestions to the Working Group;
- Meeting with the authors of the 2016 report from the Equal Employment Opportunity Commission Select Task Force on the Study of Harassment in the Workplace;
- Meeting with a group of law clerks, and a cross-section of Judiciary employees to hear their workplace experiences;
- Adding instructive in-person programs on Judiciary workforce policies and procedures and workplace sexual harassment to the curricula at Federal Judicial Center programs for chief district and chief bankruptcy judges; and

- Providing a session on sexual harassment during ethics training for newly appointed judges.

Since the receipt of the Working Group's Report in June 2018, the Judicial Conference of the United States, the Administrative Office of the U.S. Courts (AO), the Courts, and the Federal Judicial Center have acted on nearly all of the Working Group's recommendations. These actions include the following:

- The Judicial Conference approved 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.
- AO Director James C. Duff appointed Jill Langley to head the newly-created OJI and that office began actively providing confidential advice and guidance since her January 2019 appointment.
- Many federal circuits and courts established workplace conduct committees and created directors of workplace relations (or similar positions) to provide circuit-wide guidance and oversight of workplace conduct matters.
- The Federal Judicial Center (FJC) has provided nation-wide training on preventing harassment, workplace civility, and diversity and inclusion.
- Most recently, on September 17, 2019, the Judicial Conference approved a significantly revised and simplified Model EDR Plan that clearly states that harassment, discrimination, abusive conduct, and retaliation are prohibited; provides several options for employees to report and seek redress for wrongful

conduct; and ensures that Judiciary employees know the many resources available to them.

This report addresses these improvements in more detail below. The Working Group has been encouraged by the initiatives at the national and local levels to assure professionalism, civility, and accountability in the workplace. The Working Group remains in place to monitor the progress and success of these initiatives and the ongoing work on the remaining recommendations.

I. AMENDMENTS TO THE CODES OF CONDUCT

The Judicial Conference took action in response to several recommendations in the Working Group's Report. This action includes the overall recommendation that the Judiciary "revise its codes and other published guidance in key respects to state clear and consistent standards, delineate responsibilities, and promote appropriate workplace behavior." Report at 21. The Judicial Conference Committee on the Codes of Conduct's (Codes Committee) proposed revisions to the Codes of Conduct were published for written comment in September 2018. In October 2018, the Codes Committee held a public hearing to consider comments on the proposed amendments. After further consideration of all comments, the Codes Committee developed final recommendations, which the Judicial Conference approved in March 2019. The revisions to the Codes addressed the following Working Group recommendations.

A. Promoting Appropriate Workplace Behavior and Prohibiting Workplace Harassment

In its Report, the Working Group suggested clarifying in the Codes of Conduct that a judge has an affirmative duty to promote civility not only in the courtroom but throughout the courthouse. This includes the duty to promote appropriate behavior in the workplace, especially in chambers. The Working Group further recommended that the Code explicitly affirm that a

judge must not engage in or tolerate any workplace misconduct, including harassment, abusive behavior, or retaliation for reporting such conduct.

In response to these recommendations, the Judicial Conference amended the Codes of Conduct at Canon 2A (Commentary), the introduction to Canon 3, Canon 3B(4), and Canon 3B(4) (Commentary). These amendments make clear that a judge should promote and practice civility—by being patient, dignified, respectful, and courteous—in dealings with court personnel, including chambers staff. The amendments also prohibit judges from taking part in, or allowing, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct.

B. Prohibiting Impermissible Harassment, Bias, or Prejudice

The Working Group recommended Code amendments to clarify that harassment, bias, or prejudice based on race, color, religion, national origin, sex, age, disability, or other bases (including sexual orientation or gender identity) is impermissible. In response, the Judicial Conference added Commentary to Canon 3B(4) that "harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others."

C. Requiring Appropriate Action Concerning Misconduct

The Report recommended clarifying a judge's existing obligation under the Code to "take appropriate action" against misconduct extends to the inappropriate treatment of court employees, including those in chambers. The Report advised that "appropriate action" should reasonably address the misconduct, prevent harm to those affected by it, and promote public confidence in the integrity and impartiality of the Judiciary.

The Code amendments that are responsive to these recommendations are in Canon 3B(6) and Canon 3B(6) Commentary. As noted in the Commentary, "Public confidence in the integrity and impartiality of the Judiciary is promoted when judges take appropriate action based on reliable information of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence."

D. Clarifying Confidentiality and Reporting

The Report stressed that confidentiality obligations must be clear so both judges and judicial employees understand these obligations never prevent any employee—including a law clerk—from revealing abuse or misconduct by any person. In response, the Codes Committee recommended, and the Judicial Conference approved ,an amendment to the Code of Conduct for Judicial Employees at Canon 3D(3) to clarify that the "general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee or former employee from reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person."

E. Coordinating Amendments with Other Codes of Conduct

The Working Group recommended making similar changes to the codes of conduct that apply to all judicial employees (including the Code of Conduct for Judicial Employees and the Code of Conduct for Federal Public Defender Employees). In response, the Judicial Conference adopted amendments to the Code of Conduct for Judicial Employees at Canon 3C and 3D. These amendments include a duty to promote appropriate workplace conduct, prohibit workplace harassment, take appropriate action to report and disclose misconduct, and prohibit retaliation for

reporting or disclosing misconduct. The Codes Committee expects to recommend similar revisions to the Code of Conduct for Federal Public Defender Employees later this year.

The Working Group also asked the Codes Committee to consider whether there was a continuing need to use the existing model confidentiality statement to inform employees about their confidentiality obligations. The Working Group viewed the statement—and the Codes Committee agreed—as an impediment to reporting workplace misconduct. The confidentiality statement was rescinded in February 2018. The Codes Committee further decided that developing a new confidentiality statement may not be necessary, as working groups at the circuit level have issued a variety of proposals to improve understanding of employee confidentiality issues. The Codes Committee intends to develop ethics education programs on this topic, including assisting judges and court executives to educate judicial employees about their confidentiality obligations.

F. Improving Educational and Guidance Materials

The Report included a recommendation to review and revise all written ethics guidance concerning workplace conduct. The recommendation aims to ensure that the Judiciary provides a consistent and accessible message that it will not tolerate harassment or other inappropriate conduct. The Report further recommended developing ethics education programs, in cooperation with the FJC, on these topics. The Codes Committee has begun to review and revise existing written educational materials that inform judges and judicial employees of their ethical obligations related to workplace conduct and is working with the FJC to develop new ethics education programs for judges and court employees on these topics.

II. AMENDMENTS TO THE PROCEDURES AND NEW INITIAITIVES FOR IDENTIFYING AND CORRECTING WORKPLACE MISCONDUCT

A. Rules for Judicial-Conduct & Judicial-Disability Proceedings (JC&D Rules)

In response to the Working Group's recommendations, the Committee on Judicial Conduct and Disability (JC&D Committee) proposed amendments to the JC&D Rules. The JC&D Committee released final draft proposed amendments to the JC&D Rules on September 13, 2018, for a sixty-day public comment period that ended on November 13, 2018. The JC&D Committee, in coordination with the Codes Committee, held a public hearing on October 30, 2018, to hear testimony and comments concerning the proposed amendments to the JC&D Rules, as well as the Codes of Conduct. The JC&D Committee prepared a final set of proposed amendments, which the Judicial Conference approved at its March 2019 session. The amendments address the following Working Group recommendations.

1. Requiring Judges to Report or Disclose Misconduct

Most significantly, the Working Group recommended that the JC&D Committee "provide additional guidance . . . on a judge's obligations to report or disclose misconduct and to safeguard complainants from retaliation" and that the Committee "reinforce the principle that retaliation for reporting or disclosing judicial misconduct constitutes misconduct." Report at 31. In response, the JC&D Committee recommended, and the Judicial Conference adopted, an expansion of the JC&D Rules' misconduct definition to include retaliation for reporting or disclosing judicial misconduct or disability. *See* Rule 4(a)(4) ("Retaliation"). The Judicial Conference also added a new provision that includes a judge's failure to bring "reliable information reasonably likely to constitute judicial misconduct" to the attention of the relevant chief district judge or chief circuit judge within the definition of cognizable misconduct. *See*

Rule 4(a)(6) ("Failure to Report or Disclose") & Commentary; *see also* Rule 23 ("Confidentiality") Commentary.

2. Expressly Prohibiting Workplace Harassment

In its Report, the Working Group suggested that the JC&D "Rules or commentary include express reference to workplace harassment within the definition of misconduct," and include changes "clear[ly proscribing] harassment based on sexual orientation or gender identity." Report at 30. The Judicial Conference responded by revising the JC&D Rules and related Commentary to include abusive or harassing behavior (including unwanted, offensive, or abusive sexual conduct; hostile work environment; and discrimination based on race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, and disability) within the definition of misconduct. *See* Rule 4(a)(2) ("Abusive or Harassing Behavior"); Rule 4(a)(3) ("Discrimination.")

3. Exempting Reports of Misconduct from Confidentiality Rules

The Working Group proposed that "the Committee on Judicial Conduct and Disability make clear . . . that confidentiality obligations should never be an obstacle to reporting judicial misconduct or disability" in order to ensure that complainants "understand that the obligations of confidentiality that judicial employees must observe in the course of judicial business do not shield a judge from a complaint under the JC&D Act." Report at 30-31. In response, the Judicial Conference adopted a new JC&D Rule and related Commentary emphasizing that nothing in the JC&D Rules regarding confidentiality of the complaint process prevents a judicial employee from reporting or disclosing misconduct or disability. *See* Rule 23(c) ("Disclosure of Misconduct and Disability"). *See also* Rule 4 ("Misconduct and Disability Definitions") Commentary; Rule 6 ("Filing of Complaint") Commentary.

4. Clarifying Eligibility to File a JC&D Complaint

The Working Group recommended that the "Rules or associated commentary state with greater clarity that traditional judicial rules respecting 'standing'— viz., the requirement that the complainant himself or herself must claim redressable injury from the alleged misconduct—do not apply to the JC&D Act complaint process." Report at 29–30. In response, the Judicial Conference revised the JC&D Rules and related Commentary to note that traditional standing requirements do not apply, and that individuals and organizations may file a complaint even if they have not been directly injured or aggrieved. *See* Rule 3(c)(1) ("Complaint") & Commentary.

5. Improving Transparency

The Working Group recommended that "the Judiciary as a whole consider possible mechanisms for improving the transparency of the JC&D Act process." Report at 31. The Judicial Conference approved various changes to the JC&D Rules, including: expanding the provision regarding confidentiality to allow judicial councils and the JC&D Committee (and not just circuit chief judges) to disclose the existence of proceedings in specific circumstances, *see* Rule 23(b)(1)) ("General Rule" on "Confidentiality in the Complaint Process"); expanding the provision regarding disclosure of information about the consideration of a complaint where a complainant or other person has publicly released information regarding the existence of a complaint proceeding, *see* Rule 23(b)(8) ("Disclosure in Special Circumstances") & Commentary; permitting the disclosure of a subject judge's name in additional circumstances where a complaint is concluded based on voluntary corrective action, *see* Rule 24 ("Public Availability of Decisions") Commentary; and including language that the Judiciary will seek ways to make decisions available to the public through searchable electronic indices, *id.*

6. Authorizing Systemic Evaluations

As the Working Group notes, the Judiciary has an "institutional interest in determining, apart from any disciplinary action, what conditions enabled the misconduct or prevented its discovery, and what precautionary or curative steps should be undertaken to prevent its repetition." Report at 39. The Judicial Conference added language to the JC&D Rules that the Judicial Conference and judicial council of the subject judge have ample authority to assess potential institutional issues related to the complaint as part of their respective responsibilities to promote "the expeditious conduct of court business." 28 U.S.C. § 331. This includes making "all necessary and appropriate orders for the effective administration of justice within [each] circuit," *id.* at § 332(d)(1), including consideration of what precautionary or curative steps could be undertaken to prevent the recurrence of misconduct. *See* Rule 11 ("Chief Judge's Review") Commentary.

B. Amendments to the Model Employment Dispute Resolution ("EDR") Plan

The Working Group recommended revisions to the Model EDR Plan to provide clear, uniform definitions of "wrongful conduct," such as harassment and discrimination; offer informal avenues for employees to report wrongful conduct; allow employees more time to file a formal claim; cover all paid and unpaid Judiciary employees; increase awareness of EDR rights and options to address workplace misconduct; and ensure the appropriate chief judge is notified of potential misconduct by a judge.

The Judicial Conference approved two of the Working Group's recommendations in September 2018: increasing the time to file a formal EDR Complaint from 30 to 180 days and extending EDR coverage to all paid and unpaid interns and externs. As it always has, the Model EDR Plan applies to all Article III and other judicial officers of the federal courts; all current and

former Judiciary employees, including all chambers staff; federal public defenders and their staffs; and all applicants for employment who have been interviewed.

The Director of the AO established a Model EDR Plan Working Group (EDR Group), made up of federal judges and Judiciary officials with expertise in employment dispute resolution. The EDR Group drafted a revised Model EDR Plan to incorporate the Working Group's recommendations and ensure consistency with the amendments to the Codes of Conduct and the JC&D Rules. The proposed revision was circulated for Judiciary-wide comment. The Judicial Resources Committee of the Judicial Conference and its Diversity Subcommittee then considered the revised Model EDR Plan and recommended its adoption, which the Judicial Conference adopted at its September 2019 session. Some of the significant changes to the Model EDR Plan are highlighted below.

1. Providing Clear and Consistent Definitions of Wrongful Conduct

The Working Group recommended revising all of the Judiciary's guidance documents, including the Model EDR Plan, in parallel fashion with the Codes of Conduct to provide consistent standards of workplace conduct. In response, the revised Model EDR Plan now states the Judiciary's core values, including a commitment to a workplace of respect, civility, fairness, tolerance, and dignity, free of discrimination and harassment. Consistent with changes to the Codes of Conduct and the JC&D Rules, the Model EDR Plan encourages reports of wrongful conduct and makes clear that confidentiality requirements do not prohibit anyone, including law clerks, from reporting any type of workplace misconduct. Furthermore, consistent with the revised Codes of Conduct and JC&D Rules, the revised Model EDR Plan includes a clear policy statement of prohibited "wrongful conduct" in the workplace, using explanatory examples,

namely: discrimination; sexual, racial or other discriminatory harassment; abusive conduct; retaliation; and violations of specific employment laws.

The Model EDR Plan has always protected against discrimination and harassment based on race, color, national origin, sex, gender, pregnancy, religion, and age (40 years and over), but the Working Group recommended expanding the Model EDR Plan's definition of sex discrimination to match established legal definitions and the language used within the Codes of Conduct and other Judiciary policy statements. The revised Model EDR Plan includes gender identity and sexual orientation as a "protected category" consistent with similar action taken by the Judicial Conference in March 2019 in amending the Codes of Conduct and the JC&D Rules.

2. Prohibiting Abusive Conduct

The Working Group suggested that the revised Model EDR Plan state that harassment, without regard to motivation, is wrongful conduct. The revised Model EDR Plan adds "abusive conduct" as a form of wrongful conduct, defined as "a pattern of demonstrably egregious and hostile conduct *not* based on a protected category that unreasonably interferes with an employee's work and creates an abusive working environment." This definition is consistent with language defining abusive behavior in the JC&D Rules. The definition excludes communications and actions reasonably related to performance management.

3. Providing Flexible and Informal Options for Resolution

The Working Group recommended that the Model EDR Plan provide an avenue for employees to report wrongful conduct without filing a formal EDR complaint. The revised Model EDR Plan provides new flexible and more informal ways for reporting and resolving allegations of wrongful conduct, called "Options for Resolution:" (1) informal advice; (2) assisted resolution; or (3) formal complaint. Based on the Working Group's recommendation,

the revised Model EDR Plan allows an employee, including a law clerk or other chambers employee, to request interim relief during the pendency of any Option for Resolution, including transfer or an alternative work arrangement.

Informal advice is just that: an employee can contact an EDR Coordinator, circuit director of workplace relations, or the national OJI for informal, confidential advice and guidance about workplace misconduct. Assisted resolution simply means an employee can ask for help with a workplace conduct issue. Assistance under this option includes facilitated discussions, voluntary mediation, a preliminary investigation, or any other steps that may yield an effective resolution of the issues.

The formal EDR complaint option is substantially the same: it allows an employee to use a structured claims process overseen by a presiding judicial officer assigned by the chief judge. It provides for a fair and impartial investigation, a hearing before the presiding judicial officer to resolve material factual disputes, a written decision, and a right to have that decision reviewed by the circuit judicial council. The new Model EDR Plan sets out mandatory recusal standards for those involved in the EDR process to avoid conflicts of interest.

4. Increasing Awareness of EDR Rights and Options for Resolution

The Working Group found that employees lacked awareness of the rights and options available to them under the Model EDR Plan. In response, the new Model EDR Plan is written in "plain English"; includes easy-to-follow infographics describing EDR rights and options; and requires courts to post the EDR Plans and infographics prominently on their websites, along with contact information for the court's EDR Coordinators and the national OJI. The Model EDR Plan now also requires courts to conduct EDR and workplace conduct training annually for all judges and employees, including chambers staff.

Based on a Working Group recommendation, the revised Model EDR Plan requires that all EDR coordinators be trained and certified on the Model EDR Plan's rights, processes, and Options for Resolution. The EDR Group is currently developing materials to assist in training and to answer frequently asked questions about EDR.

5. Providing Notice of Wrongful Conduct Allegations Against Judges

The Model EDR Plan has always permitted employees, including chambers employees, to report judicial misconduct in the workplace. Implementing the Working Group recommendation, the revised Model EDR Plan now requires notice to the appropriate chief district or circuit judge when an EDR-level allegation is made against a judge in their district or circuit. In such a case, the appropriate chief district or chief circuit judge is responsible for coordinating an Assisted Resolution request or overseeing a formal EDR Complaint. As it has in the past, the Model EDR Plan states that if a judge is the subject of both a formal complaint under the Model EDR Plan and a complaint under the Judicial Conduct and Disability Act, the chief circuit judge will determine the appropriate procedure for addressing both.

C. Creation of Office of Judicial Integrity

The Working Group recommended that the Judiciary offer employees a broad range of options and methods to report harassment and seek guidance about workplace conduct concerns, with multiple points-of-contact at both the local and national level. As part of that goal, it recommended the AO establish a national OJI to provide confidential assistance regarding workplace conduct to all Judiciary employees.

1. Providing Independent, Confidential Advice on Workplace Conduct

The Director of the AO created the OJI, which began operations in January 2019. The OJI serves as an independent resource where current and former Judiciary employees can seek—by phone or confidential email—counseling, guidance, and intervention regarding sexual and other harassment, abusive conduct, discrimination, and other workplace misconduct. The OJI ensures employees are aware of all the informal and formal options available to them to report and address workplace harassment or other wrongful conduct. The OJI provides a safe and confidential avenue for employees who, for whatever reason, choose not to report misconduct to, or discuss their workplace concerns with, their local court office.

Employees can make confidential, even anonymous, reports of harassment or other wrongful conduct on an email form located on the OJI's JNet website, linked prominently on a Workplace Conduct Quick Link on the front page of the JNet. Former employees and members of the public can submit similar confidential reports on the OJI's public site on www.uscourts.gov. The OJI's JNet website provides links to other workplace resources, such as court EDR Plans and EDR Coordinators, the Codes of Conduct and JC&D Rules, the Working Group's June 2018 Report, and the FJC's workplace conduct training programs and offerings.

The OJI also provides guidance and advice to judges, unit executives, managers, and EDR Coordinators about workplace conduct matters. It provides advice on best practices for conducting a fair, thorough, and impartial workplace investigation, and, at the request of a court Chief Judge, can assist with a workplace investigation. It ensures managers are aware of other workplace conduct resources at the AO, including the AO's Court Human Resources Division,

the Office of the General Counsel, and the FJC's workplace conduct in-person and web-based training programs.

The OJI is headed by the first appointed Judicial Integrity Officer, Jill Langley, formerly the Tenth Circuit's Director of Workplace Relations. Prior to her appointment, Ms. Langley was an attorney with the Tenth Circuit for twenty-three years and spent thirteen years focusing on EDR, during which time she developed an EDR training program that she presented nation-wide. Before joining the court, Ms. Langley was in private practice with a law firm in Phoenix, Arizona. She graduated cum laude from the Sandra Day O'Connor College of Law at Arizona State University, where she was an editor of the law review, and received her undergraduate degree from the University of Arizona.

2. Outreach to Future, Current, and Former Judicial Employees and Law Clerks

The OJI provides an avenue for law schools to report any information they learn from students about judicial workplace misconduct. Law schools and law students who worked in chambers can report a judicial workplace misconduct issue directly to the OJI. If the law school or student would prefer to remain anonymous, they can submit a confidential report via the OJI's public website. After receiving any such report, the OJI will notify the appropriate Chief Judge of the reported information.

The Judicial Integrity Officer travels extensively to circuit and court conferences to increase awareness of the OJI and its workplace conduct resources and of workplace conduct issues generally. In 2019, the Judicial Integrity Officer has been invited by courts in the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh and District of Columbia circuits to participate in, or provide, training on the role of the OJI, workplace conduct, and the Model EDR Plan. The conferences have included judge conferences, court manager conferences, new law

clerk orientations, workplace conduct workshops, and training programs for Human Resource Professionals and EDR Coordinators. As courts adopt their EDR Plans based on the new Model EDR Plan, the OJI will be available to provide training next year to educate employees about their rights and options under the Model EDR Plan and make them aware of the many ways—informal and formal—they can get help with a workplace conduct concern.

3. Analyzing Issues and Trends

The OJI maintains a confidential database of all contacts with the OJI, including the nature of the allegations, to inform the Judiciary and this Working Group about the frequency and the nature of the reported workplace conduct issues and any notable trends. In addition, the OJI works with the Court Human Resources Division, which currently administers a national exit survey of all former Judiciary employees, to identify workplace conduct issues or trends revealed in the exit surveys.

The AO is in the process of clarifying the data that courts will be required to report under the new Model EDR Plan and creating easier and more accurate ways for courts to provide that information. This data collection will include a requirement that courts annually report sexual harassment claims.

D. Circuit and Court Initiatives

Following the recommendation of the Working Group, many circuits have now hired trusted individuals, often called Directors of Workplace Relations, to provide confidential guidance and resolution of workplace conduct issues to Judiciary employees within the circuit. The Directors of Workplace Relations offer workplace conduct training; give guidance to employees and managers about conduct issues; provide informal workplace conduct advice, train and assist court EDR Coordinators; and assist with workplace conduct investigations, mediation,

and dispute resolution. It is anticipated that the OJI and Circuit Directors of Workplace Relations will meet at least annually to develop best practices, identify effective training programs, improve methods and processes for employees to report misconduct, and identify workplace conduct trends. Many circuits have also created workplace conduct committees, either in addition or as an alternative to, a circuit director of workplace relations.

Many circuits and individual courts have conducted confidential climate surveys, developed their own workplace conduct training programs, and offered workplace conduct workshops and seminars. Courts in every circuit have provided training and education to staff and employees about workplace conduct, particularly the ways that employees can report issues and how managers can address and correct issues. The Seventh Circuit and the Ninth Circuit, which amended their EDR Plans in advance of the new Model EDR Plan, provided circuit-wide training to EDR Coordinators, including training on mediation skills and conducting a workplace investigation.

III. TRAINING AND EDUCATION

The Working Group made three recommendations to the FJC regarding training. First, the FJC should ensure that all new judges and new employees receive basic workplace standards training as part of their initial orientation programs, with refresher training at regular intervals. Second, the FJC should develop an advanced training program aimed at developing a culture of workplace civility. Finally, the FJC, in coordination with the AO and individual courts, should continuously evaluate the effectiveness of workplace conduct educational programs.

The FJC has delivered "workplace standards" training at the initial orientations of new federal judges (phases I and II of the orientations for new district, bankruptcy, and magistrate judges). The FJC also regularly offers periodic refresher training consisting of sessions at

national and circuit judicial workshops. An orientation video covering workplace conduct issues for new law clerks was produced in time for summer 2018 term law clerks entering into their duties. That video is currently being updated to reflect changes recommended and implemented following the Working Group report, and to include the formation of the OJI and the amendments to the Codes of Conduct and JC&D Rules. The FJC anticipates creating EDR training programs after the Judicial Conference approves the revised Model EDR Plan.

With respect to an initial orientation for all new Judiciary employees, an FJC webcast last fall in the series "Court Web" reached roughly 2,400 participants and consisted largely of scenario-based discussions of acceptable workplace conduct. It is likely that an online approach, whether via podcast, webcast, or a similar mechanism, which allows the recipients to absorb the content at a time their choosing, offers the best chance of reaching the entirety of the target audience.

The FJC believes the most effective educational approach is to use scenarios, some of which are adapted from actual reports received, that enable candid discussions among groups of judges, court unit executives, and managers and supervisors. The formal ethics presentations at new judge orientations (typically consisting of a judge representative from the Codes Committee and a representative from the AO's Office of the General Counsel) have been expanded to include greater focus on the ethical obligations of judges in responding to workplace misconduct allegations. The perceptions formed at orientations for new judges as to what is and is not acceptable within the Judiciary's culture, guided by mentor judge observations, are critical. Discussions at national workshops of district, bankruptcy, and magistrate judges, circuit judicial workshops, chief district and bankruptcy judge workshops, and the new chief judge (circuit,

district, and bankruptcy) leadership seminar program have all proven useful in capturing important workplace conduct insights.

The FJC's lineup of in-person programs for unit and deputy unit executives, experienced supervisors, and new supervisors all address various issues affecting workplace conduct. The Conference for Court Unit Executives, a national-level gathering, addressed various aspects of workplace conduct both in plenary and elective sessions. At the court staff level, the primary educational method of learning more about these issues is a variety of in-district training seminars (e.g., Preventing Workplace Harassment, Dealing with Difficult Situations; Meet: Breaking New Ground – Respect and Inclusion in the Workplace) delivered by court trainers. In the year ahead, the FJC intends to add another program, Civility in the Workplace, to those seminars.

CONCLUSION

The Judicial Branch has demonstrated commitment from courts nationwide to creating and ensuring exemplary workplaces. Managers are offering workplace training and workshops, judges are actively involved in workplace concerns, and employees are coming forward, both locally and to the OJI, to discuss and resolve any concerns they may have. Our Working Group will continue to monitor and assess workplace conduct matters throughout the Judiciary, to assist with continued implementation of the workplace initiatives already in place, and to recommend additional changes whenever we see needs for improvement.

TAB G

REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES JUNE 1, 2018

INTRODUCTION

On December 20, 2017, Chief Justice John G. Roberts, Jr., asked the Director of the Administrative Office of the United States Courts to establish a working group to examine the sufficiency of the safeguards currently in place within the Judiciary to protect all court employees from inappropriate conduct in the workplace.[1] The Chief Justice highlighted this issue in his 2017 *Year-End Report on the Federal Judiciary*, noting that the Judicial Branch cannot assume that it is immune from the problems of sexual harassment that have arisen elsewhere in the public and private sectors. He directed the working group to consider whether changes are needed to: the Judiciary's codes of conduct; its guidance to employees on issues of confidentiality and reporting of instances of misconduct; its educational programs; and its rules for investigating and processing misconduct complaints.[2] The ultimate goal of this undertaking is "to ensure an exemplary workplace for every judge and every court employee."[3]

On January 12, 2018, the Director announced the formation of the Federal Judiciary Workplace Conduct Working Group (Working Group).[4] The Working Group, chaired by the Director, consists of eight experienced judges and court administrators from diverse units within

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[1] *See* Appendix 1: Memorandum from James C. Duff, Director of the Administrative Office, to all Judiciary Employees (Dec. 20, 2017).
[2] *See* Appendix 2: Chief Justice John G. Roberts, Jr., United States Supreme Court, *Year-End Report on the Federal Judiciary* at 11 (2017).
[3] *Id.*
[4] *See* Appendix 3: Press Release, Federal Judiciary Workplace Conduct Working Group Formed (Jan. 12, 2018).

the Judiciary. The members include representatives from the Administrative Office, the Federal Judicial Center (FJC), and six different courts from five different circuits.[5] The Director has enlisted the Administrative Office's General Counsel and her staff to provide additional subject-matter expertise, counsel, and support. The Working Group has collaborated continuously since its inception by telephone and electronic means, and it has convened monthly in-person meetings at the Administrative Office in Washington, D.C., on February 7, 2018; March 1, 2018; April 6, 2018; and May 21, 2018.

The Working Group took its charter from the Chief Justice's goal of ensuring an exemplary workplace for every judge and every court employee. As the branch of government whose core purpose is equal justice under law, the Judiciary must hold itself to the highest standards of conduct and civility to maintain the public trust. The Working Group developed its findings and recommendations not only to address harassment, but to pursue the overarching goal of an inclusive and respectful workplace.

The Working Group proceeded from the premise that in many respects the Judiciary shares common features with other public and private workplaces. The Working Group therefore analyzed existing literature on workplace misconduct in those sectors. The Working Group found particularly helpful a June 2016 study by a Select Task Force of the United States Equal Employment Opportunity Commission (EEOC).[6] The EEOC Study analyzes the prevalence of harassment, employee responses, risk factors, and steps that can be taken to prevent and remedy inappropriate conduct.[7] Its summary of recommendations provides

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[5] *Id.*

[6] U.S. Equal Emp. Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic, (2016), (*EEOC Study*).

[7] *Id.*

invaluable general guidance on developing harassment prevention policies, providing education and compliance training, and promoting workplace civility.[8]

The Working Group included in its review the entire federal Judiciary, including judges, court unit executives, managers, supervisors and others serving in supervisory roles, as well as employees, law clerks, interns, externs, and other volunteers. It recognized that, despite the Judicial Branch's many shared characteristics with other workplaces, the judicial workplace is unique in certain respects. On the one hand, the Judiciary has distinct features that are likely to lessen the risk of employee harassment. For example, the Judiciary, by virtue of its institutional role, is committed to fairness and the rule of law; it has a tradition of formality and decorum; its Article III judges are subject to rigorous screening through the judicial confirmation process; its bankruptcy and magistrate judges are carefully vetted before appointment; its executives and most employees are subject to pre-employment background investigations; it has long maintained codes of professional conduct; it has developed and maintained a host of fair employment training and educational programs; and it is subject to both statutory and regulatory programs to investigate and remedy misconduct.[9] But on the other hand, some elements of the judicial workplace can increase the risk of misconduct or impose obstacles to addressing inappropriate behavior effectively. For example, there are significant "power disparities" between judges and the law clerks and other employees who work with them, which may deter a law clerk or employee from challenging or reporting objectionable conduct. Judges enjoy life tenure, and they are subject to discipline only through formal processes. Further, the judicial decision-making process requires a high degree of confidentiality, and law clerks and other

[8] *Id.* at 66-71.
[9] *See* Appendix 4: Letter from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley and Ranking Member Dianne Feinstein (Feb. 16, 2018).

chambers employees may mistakenly believe that the obligation of confidentiality extends to the reporting of misconduct.

The Working Group accordingly embraced the recommendations set forth in the EEOC Study, but it focused additional effort on identifying those factors that distinguished the Judiciary and called for further refinement of the standards that would apply in other workplaces. The Working Group sought out the views of interested constituencies, including current and former law clerks, court employees, and Judicial Branch advisory councils. It conducted in-person meetings with representative law clerks, employees, and industry experts, including the co-chairs of the EEOC Study.[10] The Working Group broadly solicited input through an "electronic mailbox" that enabled any current or former Judiciary employee to provide anonymous or attributable suggestions and comments. The Working Group sought and received input from several circuits' own workplace conduct working groups. Based on its input from these sources and its members' own experiences in the Judiciary, the Working Group then engaged in a review of: (1) the Judiciary's codes of conduct and published guidance for judges, law clerks, and other judiciary employees; (2) the existing statutory framework for misconduct complaints under the Judicial Conduct and Disability Act (JC&D Act) and the Judiciary's internal framework of Employment Dispute Resolution Plans (EDR Plans); and (3) the Judiciary's educational programs and publications for promoting fair employment practices and workplace civility.[11]

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[10] The Working Group appreciates the written submissions and detailed in-person discussions during meetings between the Working Group members and the co-chairs of the EEOC Study (*supra* note 6), Acting Commission Chair Victoria A. Lipnic and Commissioner Chai R. Feldblum, and with current and former law clerks Jaime Santos, Kendall Turner, Deeva Shah, Claire Madill, and Sara McDermott, as well as many other current employees within the Judiciary.

[11] In the course of this undertaking, the Working Group briefed the Judicial Conference and all Judiciary employees on its progress, answered media inquiries, and responded to communications from interested members of Congress. *See,* e.g., Appendix 4, *supra* note 9. *See also* Appendix 5: Letter from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley and Ranking Member Dianne Feinstein (Mar. 8, 2018); Memorandum from James C. Duff, Director of the Administrative Office, seeking comments from all Judiciary employees (Feb. 20, 2018); Press Release, Judiciary Workplace Conduct Group Seeks Law

The product of these efforts is this report to the Judicial Conference of the United States. The Judicial Conference, presided over by the Chief Justice, is the national policy-making body for the federal courts. It establishes policies based on the advice of its various committees. The Working Group's Report offers a number of recommendations to the Judicial Conference and its committees for their consideration and further action. The Report also includes recommendations that the Administrative Office, as the administrative arm of the Judiciary, and the FJC, as the Judiciary's education and research agency, can implement directly.

The Report first provides a summary of what was learned through the meetings with affected constituencies, subject-matter experts, and other interested groups, and from comments submitted by employees. The Report then sets forth recommendations and identifies steps already taken to: (1) revise and clarify the Judiciary's codes and other published guidance for promoting appropriate workplace behavior; (2) improve the procedures for identifying and correcting misconduct, including the creation of new avenues for employees to seek advice and register complaints; and (3) enhance educational and training programs to raise awareness of conduct issues, prevent harassment, and promote an exemplary workplace environment.

The Working Group's submission of this Report does not conclude its work. Under the Chief Justice's direction, the Working Group intends to monitor ongoing initiatives and measure progress to ensure its goals are fulfilled.

I. FINDINGS

Clerk, Employee Input (Feb. 21, 2018); Memorandum from James C. Duff, Director of the Administrative Office, to all United States Judges (Feb. 28, 2018). *See* Appendix 6: Press Release, Judicial Conference Receives Status Report on Workplace Conduct Review (Mar. 13, 2018).

The EEOC Study of harassment in the workplace provided the Working Group with a current and reliable empirical baseline to understand the problem and focus its inquiries. The EEOC Task Force conducted its study over 18 months from January 14, 2015, through June 2016. The 88-page report convincingly explains that workplace harassment is a persistent and pervasive problem in all economic sectors, in all socioeconomic classes, and at all organizational levels. The EEOC Study noted that almost one third of the 90,000 charges it received in 2015 included an allegation of workplace harassment. Those charges included harassment on the basis of sex (including sexual orientation, gender identity, and pregnancy), race, disability, age, ethnicity/national origin, color, and religion.[12] The EEOC Study found that between 25 percent and 85 percent of women in the private sector and federal sector workplace experienced sexual harassment, depending on how that term is defined.[13] The EEOC Study stated that three out of four individuals who experienced harassment never talked to a supervisor or manager about it.[14] In short, the EEOC Study confirmed that the problem of workplace harassment is both widespread and underreported in workplaces throughout the nation, and—as the Chief Justice noted in his *Year-End Report*—there is no reason to believe that the Judiciary is immune.[15]

The information that the Working Group gathered is generally consistent with the EEOC Study. The Judicial Branch employs 30,000 individuals in a broad range of occupations. Based on input from the electronic mailbox, the advisory groups, and circuit surveys (much of which was anonymous), and from interviews with employees, including law clerks, the Working Group believes that inappropriate conduct, although not pervasive in the Judiciary, is not limited to a

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[12] *EEOC Study, supra* note 6, at iv.
[13] *Id.* at 8.
[14] *Id.* at v.
[15] As the EEOC Study points out, harassment for any reason is problematic, and the Working Group's references to harassment are therefore not limited to harassment of a sexual nature.

few isolated instances. This information suggests that, of the inappropriate behavior that does occur, incivility, disrespect, or crude behavior is more common than sexual harassment. As the EEOC Study noted, "incivility is often an antecedent to workplace harassment." The Working Group agrees that, rather than focusing simply on eliminating unwelcome behavior, the Judiciary should "promot[e] respect and civility in the workplace generally."[16]

The EEOC Study was useful in another important respect. It provided the Working Group with a cogent approach for assessing and addressing the problem of workplace harassment and inappropriate behavior within the Judiciary. The EEOC Study's recommendations, which the co-chairs recently distilled in a *Harvard Business Review* article,[17] identify five key steps that employers can take to end harassment:

- Demonstrate Committed and Engaged Leadership
- Require Consistent and Demonstrated Accountability
- Issue Strong and Comprehensive Policies
- Offer Trusted and Accessible Complaint Procedures
- Provide Regular, Interactive Training Tailored to the Organization.

Those elements provide a sound framework for evaluating the information that the Working Group received from its in-person interviews, electronic mailbox submissions, advisory council input, and other sources.

[16] *EEOC Study, supra* note at 55.
[17] Chai R. Feldblum & Victoria A. Lipnic, *Breaking the Silence*, Harvard Business Review (2018), https://hbr.org/2018/01/breaking-the-silence. (*Breaking the Silence*).

A. Does the Judiciary Demonstrate Committed and Engaged Leadership?

The EEOC Study emphasizes that the leadership of an organization must show its commitment "to a diverse, inclusive, and respectful workplace in which harassment is not accepted."[18] Additionally, "leadership must come from the very top of the organization."[19]

The Chief Justice's formation of this Working Group, and the Judicial Conference's interim review of the Working Group's progress at the March 2018 Judicial Conference session, demonstrate a commitment "from the top" of the Judiciary.[20] But that leadership must extend throughout the Judiciary, beginning with judges. The Judicial Branch's administration and management is dispersed through thirteen circuit courts, 94 district courts, and a host of other judicial entities. Many of those entities have already expressed a commitment to the goals of a welcoming and civil workplace. For example, several circuits and district courts already have launched their own workplace initiatives.[21] Other circuits and district courts are following suit.

The Working Group received anonymous anecdotal reports about harassment or other inappropriate behavior that were not properly addressed. It is therefore vital that judges and court executives ensure, through educational programs, performance reviews, and other mechanisms for motivating positive change, that judges, executives, supervisors, and managers at every level throughout the Judiciary demonstrate the same strong commitment to workplace civility.

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[18] *EEOC Study, supra* note 6 at 31.
[19] *Id.*
[20] *See* Appendix 6, *supra* note 11.
[21] *See, e.g.*, Press Releases, Ninth Circuit Committee Begins Workplace Environment Review (Feb. 28, 2018) and Ninth Circuit Judicial Council Acts on Workplace Environment Recommendations (May 21, 2018). *See also* United States Court of Appeals for the Seventh Circuit Announcement by Chief Judge Diane Wood appointing Committee to examine harassment claims process. (Dec. 29, 2017). On April 18, 2018, the District Court for the District of Utah issued recommendations for how to promote a respectful workplace in its court.

B. Does the Judiciary Require Consistent and Demonstrated Accountability?

The EEOC Study co-chairs have noted that "[e]mployees have to see that bad behavior will not stand and that everyone complicit in that behavior will be held responsible."[22] Additionally, when an instance of harassment has been determined, "the discipline that follows must be proportionate."[23] "There should be zero tolerance for harassment, but that does not mean that all harassers should be disciplined the same way—that is, by being fired."[24]

Judicial employees who are subject to harassment or other forms of workplace abuse currently have two principal mechanisms for seeking redress. First, if an employee is harassed or mistreated by a judge, the employee may file a written complaint under the Judicial Conduct and Disability Act (JC&D Act), 28 U.S.C. §§ 351-364, a statutory mechanism specifically designed for disciplining judges. The filing of a written complaint triggers a formal review process, which can result in sanctions ranging from a private reprimand to a recommendation of impeachment.[25] The JC&D Act and the Rules for Judicial Conduct and Judicial Disability Procedures (Conduct Rules) provide authority for a chief circuit judge to initiate an inquiry and identify a complaint even if that judge receives information about misconduct in a form other than a formal, signed complaint.[26]

Alternatively, an employee subjected to misconduct, whether by a judge, supervisor, or other employee, may report the wrongful conduct or initiate a claim under one of the Employment Dispute Resolution Plans (EDR Plans) that have been established in all thirteen of the nation's judicial circuits. An EDR Plan is a judicially created program, based on the

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[22] *Breaking the Silence, supra* note 17 at 5.
[23] *Id.*
[24] *Id.*
[25] *See* Appendix 7: An Executive Summary of the current JC&D Act.
[26] *See* Conduct Rule 5. This mechanism has been used in the past to initiate complaints against judges.

Judiciary's Model Employment Dispute Resolution Plan (Model EDR Plan), for resolving a wide range of employee disputes.[27]

The Judiciary has a good record for accountability under both of these disciplinary mechanisms. Under either system, a complaint, reported matter, or claim receives careful evaluation. In the case of the JC&D Act, very few complaints are filed alleging workplace harassment. Rather, the bulk of the complaints are filed by litigants who are dissatisfied with the outcome of their cases or incarcerated individuals challenging their confinement, both of which are not cognizable under the Act.[28] The Judiciary's publicly reported data shows that, of the 1,303 judicial "misconduct" complaints filed nationwide under the JC&D Act procedures in fiscal year 2016, over 1,200 were filed by dissatisfied litigants and prison inmates. No misconduct complaints were filed under these procedures by law clerks or judiciary employees that year. And, none of the four complaints that were referred to a special committee for further investigation involved sexual misconduct. This pattern of filings is true year after year. But in those instances where complaints have identified judges as subjecting employees to sexual harassment or other forms of misconduct, the process has triggered a thorough investigation and, when the claim is substantiated, the process has resulted in reprimand, removal, or retirement of the judge.[29] An important feature of the JC&D Act process is that serious complaints that reach the investigative stage receive multiple levels of review by multiple panels of judges.

The Working Group found that the JC&D Act and the EDR Plans are effective *when their provisions are invoked*. But there is room for improvement in terms of transparency and accessibility. The Working Group received suggestions that the complainants should have

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[27] *See* Appendix 8: Executive Summary of Model Employment Dispute Resolution Plan.
[28] 28 U.S.C. § 352(b)(1)(A)(i).
[29] *See* Appendix 4, *supra* note 9, at 9-17.

additional time under the EDR Plans for filing complaints, and complainants should receive more communication and updates during the investigatory phase of the proceedings. Confidence in court EDR Plans could be increased if those plans required chief district judges and chief bankruptcy judges to inform their chief circuit judge or circuit judicial council of reports of wrongful conduct by judges in their district and how those reports were addressed locally. Ensuring that the circuit court is informed of such reports would provide an additional incentive to investigate that report properly, could provide the basis for identification of a JC&D Act complaint, as discussed below, and would create a record at the circuit level that could prove relevant if there are future complaints against the same judge.

The Working Group found that public confidence in the JC&D Act would benefit if the Judiciary specifically identified harassment complaints in its statistical reports and made decisions on those complaints more readily accessible through searchable electronic indices. Some commenters noted that accountability could be strengthened through better communication about the outcome of disciplinary proceedings. Commenters noted the value of more regular employee input on workplace conditions and implementing exit interviews for employees who leave the workforce more consistently.

Law clerks and others with whom the Working Group spoke expressed concern about the seeming lack of punishment for a judge who, under allegations of serious misconduct, retires or resigns and thereby terminates the disciplinary proceeding. Some believe that if the disciplinary process compels a life-tenured judge to leave the bench under the cloud of alleged misconduct, then the process has produced an appropriate result, and the removal of that judge from the bench without much expense or delay is beneficial. But others noted that a judge who meets the service requirements for retirement benefits suffers no monetary penalty and may return to legal

practice. They have expressed the view that additional steps, such as a report to the local bar association, should be considered. More generally, commenters have noted that the termination of a disciplinary action should not prevent the Judiciary from continuing an institutional review to determine if there are systemic problems within a court or judicial organization that require correction.

The most significant challenge for accountability, however, arises from the reluctance of victims to report misconduct. Neither the JC&D Act nor the EDR Plans can ensure accountability if victims are unwilling to come forward. Victims are hesitant to report harassment and other inappropriate behavior for a variety of reasons, including lack of confidence that they will be believed, fear that no action will be taken, and concerns that a complaint will subject them to retaliatory action or affect future job prospects. Additionally, some forms of inappropriate conduct—such as isolated acts, insensitive comments, or unintentional slights—do not lend themselves to a formal complaint process and are better addressed through less formal mechanisms. As explained below, the Working Group found that the Judiciary must both reduce barriers to reporting and provide alternative avenues for seeking advice, counseling, and assistance.

Although the reluctance to report misconduct arises in all employment categories, it deserves special attention in the case of law clerks, most of whom serve in the courts for only one to two years. The Working Group met with law clerk representatives who provided invaluable insight into the problems they and their peers face when confronted with harassment. Law clerks, who are typically at the start of their legal careers, must step into a new, unfamiliar, and sometimes daunting work environment when they join a judge's chambers. They work in close quarters with their judge, providing confidential support in an isolating environment.

There is an acute "power disparity" between a life-tenured judge, who is a person of stature and influence, and a law clerk. Law clerks face strong disincentives to report inappropriate conduct. The law clerk who reports misconduct may understandably fear that the complaint will permanently destroy the bond of trust between the judge and clerk and cause unwelcome strife in the chambers. Law clerks know that a judge's recommendation often plays a crucial role in the individual's future job prospects. A judge's rancor may result in embarrassment among peers, tarnish the clerk's professional reputation, and curtail career opportunities. The Judiciary has a need to provide clear avenues for relief that recognize those legitimate concerns.

The Working Group believes that an important first step is vigilance on the part of judges themselves. Under the Code of Conduct for United States Judges, judges have a responsibility to promote appropriate behavior in the workplace, and that responsibility should extend beyond one's own chambers. Judges respect one another's independence, and each is reciprocally disinclined to intrude into another's relationships with employees. But the virtues of mutual respect, independence, and collegiality should not prevent a judge from intervening when necessary to protect an employee from another judge's inappropriate conduct.

The Working Group knows from firsthand experience that many judges, especially chief judges, take action when they observe, or become aware of, a colleague's inappropriate behavior. But neither the Judiciary's Code of Conduct nor its educational programs have provided sufficiently focused guidance on this matter. The Code of Conduct should make clearer that judges cannot turn a blind eye to a colleague's mistreatment of employees, and the training programs for new and experienced judges should provide direction on how to navigate this sensitive issue without eroding the distinctive values of the Judicial Branch.

C. Does the Judiciary Have Strong and Comprehensive Policies?

The EEOC Study co-chairs have observed that employees in workplaces without express anti-harassment policies report the highest levels of harassment. They urge the adoption of anti-harassment policies that: (1) provide clear and simple explanations of prohibited conduct; (2) assure employees who report harassment that they will be protected from retaliation; (3) describe multiple avenues for making complaints; (4) provide confidentiality to the extent possible; (5) lead to prompt, thorough, and impartial investigations; and (6) result in proportionate corrective action.[30]

The Judiciary has long had in place a number of codes of judicial and employee conduct and a large body of publications designed to maintain high standards of behavior and preserve the independence and integrity of the Judicial Branch. Those carefully conceived publications, individually and collectively, reflect the essential characteristics that the EEOC Study has highlighted. The Working Group found, however, that those codes and publications were not developed with the aim of addressing the particular issues of workplace harassment or incivility, and they do not take full account of the nuances of these problems. The Working Group identified a number of areas where the codes and publications warrant clarification and revision to leave no doubt that disrespect, abuse, and harassment are impermissible and should be reported without fear of retaliation or adverse consequences.

First, commenters noted that many employees are not aware of the codes, publications, other sources of information regarding appropriate workplace behavior, and the mechanisms for recourse that are available when workplace issues arise. That information is usually provided commingled with a large amount of other information at the commencement of the employee's

[30] *Breaking the Silence, supra* note 17, at 6.

tenure and, unless reinforced through regular training, may be overlooked or forgotten when inappropriate conduct arises.

Second, the codes and publications do not provide sufficiently clear advice on some pivotal questions respecting prohibited conduct and responses to harassment. For example, a number of commenters did not understand that the confidentiality provisions, which are designed to ensure the integrity of the judicial decision-making process, do *not* prevent an employee from reporting misconduct. Others noted that the codes and publications do not provide clear guidance on protection from harassment based on sexual orientation or gender identity. Still others suggested that the guidance documents do not highlight sufficiently the prohibitions on retaliation for reporting misconduct.

Third, law clerks and others expressed concern that efforts to avoid situations that might raise the potential for inappropriate behavior, or the perception of it, should not lead to diminished opportunities for any group of people. Efforts to promote a respectful workplace should promote, not detract from, an inclusive workplace.[31]

Fourth, commenters expressed a desire for simplified and easily accessible mechanisms for seeking relief from inappropriate behavior. The Working Group discusses those options in the following section. But for present purposes, there is also a strong desire to simplify and clarify, to the extent possible, the existing JC&D Act and EDR Plan processes. Among the proposals, commenters have suggested that: court websites should provide "one-click" electronic access to JC&D Act and EDR Plan information; information and the EDR Plans themselves should be clear and easy to understand; and the Administrative Office should develop

[31] *SDNY Chief Judge Colleen McMahon Takes on Sexual Harassment* (Dec. 12, 2017), https://finance.yahoo.com/news/sdny-chief-judge-colleen-mcmahon-163150749.html.

concise visual flowcharts of the complaint processes under the JC&D Act and the EDR Plans. A graphical overview of the Judicial Conduct and Disability process, as well as a collection of frequently asked questions, already exist, but could be improved. [32] A list of key contacts should be readily available in all relevant employee guidance publications, including the *Law Clerk Handbook* and other resources on the courts' intranet sites.

Fifth, commenters suggested programmatic improvements. They noted the need for better qualifications and training of EDR Coordinators who assist employees in navigating the EDR reporting and claims process. They proposed that the Judiciary develop mechanisms for separating alleged harassers or abusers from complainants during the investigation process and, if necessary, following resolution of the complaint. Commenters noted that law clerks may feel especially vulnerable if required to remain in close proximity to a judge during a misconduct inquiry, especially in small judicial districts, and there are currently no formal mechanisms for relocating law clerks to other chambers or work stations. Employees commented on the lack of options available to be reassigned or transferred during the pendency of a complaint or after a resolution finding misconduct occurred.

Finally, commenters noted the need for greater uniformity in approach across circuits. They noted, for example, that EDR Plans vary from circuit to circuit on coverage of chambers employees, law clerks, and interns/externs.

[32] *See* FAQs: Filing a Judicial Conduct and Disability Complaint Against a Federal Judge (June 2016), http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability/faqs-filing-judicial-conduct-or-disability-complaint.

D. Does the Judiciary Provide Trusted and Accessible Complaint Procedures?

The EEOC Study co-chairs observe that institutions must not only create effective complaint procedures, but they should also offer workers multiple channels for seeking relief.[33] As previously discussed, the Judiciary employs two formal mechanisms for reporting misconduct: (1) the JC&D Act's statutory procedures for complaints against judges; and (2) the EDR Plans developed in each circuit, based on the Model EDR Plan approved by the Judicial Conference, for reporting and making claims against both judges and other judicial employees. The Working Group found that, while each of those procedures fulfills an important function, the Judiciary should develop additional, less formal alternatives for addressing inappropriate workplace behavior.

Judges, managers, and employees all recognized the virtue of having other options, apart from a formal complaint, for guidance, counseling, and relief related to workplace conduct issues. Inappropriate workplace behavior can take many forms, ranging from unconscious verbal slights to intentional physical assaults. There is a corresponding need to have a range of avenues for advice, counseling, mediation, and relief that are calibrated to the nature of the conduct. There is a need for response mechanisms at the local, regional, and national level.

The Working Group received suggestions that individual courts identify, enlist, and train trusted individuals within their workplace who can provide employees with informal and confidential counseling and mediation of disputes at the local level. The Working Group heard concerns that those employees also need to have avenues for advice and assistance from outside the local environment, and the Judiciary should therefore provide counseling and mediation services on a confidential basis as appropriate at the regional or national level by persons who

[33] *Breaking the Silence, supra* note 17, at 7.

are free from any perception of local bias. Commenters noted that law clerks and employees may need post-employment advice and assistance. Finally, the Working Group received suggestions that the courts strengthen their relationships with law schools, which receive feedback from former students who serve as law clerks about the working environment in the Judiciary to gain additional insights into the problem of workplace harassment of law clerks.

E. Does the Judiciary Provide Regular, Interactive Training Tailored to the Organization?

The EEOC Study identifies effective training as an essential component of an anti-harassment effort, but that training must be part of a holistic effort, coupled with committed leadership, demonstrated accountability, clear policies, and effective complaint procedures.[34] The EEOC Study co-chairs note that not all traditional anti-harassment training has proven effective, and the most promising programs focus on "compliance training," "workplace civility," and "bystander intervention."

The Judiciary's FJC has, as one of its core missions, the responsibility to "stimulate, create, develop, and conduct programs of continuing education and training for judges and employees of the Judicial Branch."[35] Working with the Administrative Office and individual courts, the FJC has created a broad range of publications, on-line resources, and in-person training programs to promote fair employment practices and workplace civility.[36] For example, the FJC has regularly provided training programs for court employees in individual districts. It offers a program entitled "Preventing Workplace Harassment" in two versions, one for managers and one for employees. It offers a program on workplace civility called "Respect in the Workplace," and another on the Code of Conduct. These programs each use an FJC-designed

[34] *EEOC Study, supra* note 6, at 45.
[35] 28 U.S.C. § 620(b)(3).
[36] *See* Appendix 9: List of Federal Judicial Center training resources.

lesson plan and materials tailored specifically to the judicial workplace and delivered by FJC-trained faculty. Since 2016, the FJC has arranged for these three programs to be conducted nearly 200 times in courts around the country. The Judicial Conference's Committee on Codes of Conduct also provides programs on a variety of ethical issues, including the duty to report misconduct.

The Administrative Office, through its Office of the General Counsel, Office of Fair Employment Practices, and Office of Human Resources, provides training through the Human Resources Academy and by videoconference on the employee dispute resolution process, employment laws, wrongful conduct, and unconscious bias, as well as other relevant topics. Furthermore, individual circuits, courts, and various committees have taken the initiative to develop their own training programs, building on the materials and resources provided by the FJC and the Administrative Office.

Although the Judiciary has very vigorous training programs, the Working Group found several areas in which those efforts could be improved or refined. First, the Judiciary would benefit from a more focused emphasis on workplace civility training as part of the orientation program for *all* new employees, including law clerks and judges, with "refresher" training repeated at regular intervals. Use of the current programs varies from court to court and even within individual court systems. Second, there may be opportunities to integrate training on those subjects into existing programs on judicial management, court administration, and courtroom practices, emphasizing that civility is a responsibility—not an option—and each judge and employee should actively promote appropriate workplace conduct as an integral element of their day-to-day duties. Third, judicial managers could benefit from increased emphasis on proactive measures, including how to encourage civility and identify the risk factors for abusive

work environments before problems develop. Fourth, the Judiciary should place greater emphasis on "bystander intervention," encouraging all who witness misconduct to take action through channels for reporting and response. Finally, the Working Group endorsed the observation of the EEOC Study's co-chairs that training programs should be continuously evaluated to determine their effectiveness, paying close attention to new learning, techniques, and developments in this field.

II. RECOMMENDATIONS

The Judiciary has already taken important steps under each of the EEOC Study's benchmarks for preventing harassment. The Judiciary has shown leadership in responding to reported sexual harassment, and it has demonstrated a genuine commitment to accountability through its past disciplinary actions. The Judiciary has detailed codes of conduct and guidance documents for judges and other judicial employees, and it has carefully reticulated complaint procedures that have proven effective when invoked. The Judiciary also has a variety of judicial and employee training programs to address the problems of fair employment practices and to promote workplace civility.

But meeting those benchmarks is not enough, nor has it proven sufficient to address the issue fully. The Judiciary should set as its goal the creation of an exemplary environment in which every employee is not only free from harassment or inappropriate behavior, but works in an atmosphere of civility and respect. The Judiciary cannot guarantee that inappropriate behavior will never occur, but when it does, the Judiciary should ensure that every employee has access to clear avenues to report and to seek and receive remedial action free from retaliation.

The Working Group offers recommendations in three discrete areas that are central to achieving these goals: (1) substantive standards; (2) procedures for seeking advice, assistance,

or redress; and (3) educational efforts. First, the Judiciary should revise its codes and other published guidance in key respects to state clear and consistent standards, delineate responsibilities, and promote appropriate workplace behavior. Second, the Judiciary should improve its procedures for identifying and correcting misconduct, strengthening, streamlining, and making more uniform existing processes, as well as adding less formal mechanisms for employees to seek advice and assistance. Third, the Judiciary should supplement its educational and training programs to raise awareness of conduct issues, prevent harassment, and promote civility throughout the Judicial Branch. These efforts will require the concerted efforts and collaboration of the Administrative Office, the FJC, and the Judicial Conference. Those organizations have all expressed strong support for this undertaking, and significant work in many areas already is underway.

A. Codes of Conduct and Guidance Documents

The Judicial Conference has adopted the Code of Conduct for United States Judges as a set of ethical principles to guide judges in the conduct of their responsibilities. The Code consists of five basic Canons and related commentary.[37] The captions of the five Canons capture their essential themes: (1) A Judge Should Uphold the Integrity and Independence of the Judiciary; (2) A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities; (3) A Judge Should Perform the Duties of the Office Fairly, Impartially, and Diligently; (4) A Judge May Engage in Extrajudicial Activities that Are Consistent with the Obligations of Judicial Office; and (5) A Judge Should Refrain from Political Activity.[38]

[37] *See Code of Conduct for United States Judges*, Committee on Codes of Conduct, Judicial Conference of the United States (rev. Mar. 2014).
[38] *Id.*

> Canon 1 of the Code sets out the most fundamental principle:
>
> A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the Judiciary may be preserved.

As the commentary to Canon 1 explains, the Canons are rules of reason. They are aptly described as an "aspirational" set of standards that judges should follow to promote public confidence in the integrity of our judicial system.[39] They may provide standards of conduct for application in proceedings under the JC&D Act, but not every violation of the Code should lead to disciplinary action, nor is the Code designed or intended as a basis for civil liability or criminal prosecution.[40]

The Canons contain a number of provisions that indicate, either expressly or by clear implication, that judges have a duty to refrain from and prevent harassment and other inappropriate workplace conduct. For example, Canon 2 notes that "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[41] The associated commentary notes:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.[42]

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[39] *Id.*
[40] *Id.*
[41] *Id.* at Canon 2A.
[42] *Id.* at Canon 2A Commentary.

Canon 2 does not specifically mention employee harassment or inappropriate workplace behavior. But the lack of specificity is not surprising. The commentary explains, "[b]ecause it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code."[43] Canon 3 addresses the matter of incivility with greater specificity. In addressing a judge's adjudicative responsibilities, Canon 3 states that "[a] judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity."[44] But Canon 3 does not provide a similar prescription when addressing a judge's administrative responsibilities, including supervision of chambers employees, and interactions with other court employees.[45] Rather, as the Commentary to Canon 2 indicates, the Code has relied on the ability of judges to discern that incivility is harmful or otherwise wrong in the administrative setting.

The Working Group does not doubt that judges and judiciary employees should be able to discern that harassment and other inappropriate workplace behavior is impermissible in any setting. But public confidence in the Judiciary would be strengthened if the Code made clear, through express language in the Canons or the associated commentary, that judges have an obligation to promote civility and maintain a workplace that is free from harassment. The Code of Conduct was last substantially revised in 2009. The time is ripe for the Judicial Conference's Committee on Codes of Conduct to consider revisions to the Canons and their commentary that would provide more specific guidance to judges regarding their responsibilities. The Working Group does not propose specific language because that is the province of the Committee.

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[43] *Id.*
[44] *Id.* at Canon 3A(3).
[45] *Id.* at Canon 3(B).

Significant work in this area already is underway. The Working Group believes that the Committee should clarify three key points.

First, the Code should make clear that a judge has an affirmative duty to promote civility, not only in the courtroom, but throughout the courthouse. As the EEOC Study indicated, leadership is critical to the prevention of harassment. Judges set the tone for conduct in the judicial workplace. They must demonstrate, through their words and actions, their own commitment to high standards of conduct. Canon 3 admonishes judges to show patience, dignity, respect, and courtesy to litigants, jurors, witnesses, lawyers, and others. The Code should impress upon judges that those virtues are vital in their chambers and throughout the court building as well.

Second, the Code should expressly recognize that a judge should neither engage in nor tolerate workplace misconduct, including comments or statements that could reasonably be interpreted as harassment, abusive behavior, or retaliation for reporting such conduct. The Committee should examine whether a more specific statement is needed in proscribing harassment, bias, or prejudice based on race, color, religion, national origin, sex, age, disability, or other bases. For example, studies reveal high rates of harassment in the private workforce based on sexual orientation or gender identity.[46] The Committee should indicate that harassment on those bases is impermissible.

Third, the Committee should provide additional guidance on a judge's responsibility to curtail inappropriate workplace conduct by others, including other judges. Canon 3B(5) of the Code currently states that "a judge should take appropriate action upon learning of reliable

[46] *See, e.g.,* Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide (Christine Michelle Duffy, Denise M. Visconti, D'Arcy Kemnitz and National LGBT Bar Association eds., 2014).

evidence indicating the likelihood that a judge's conduct contravened this Code[.]" The Committee should clarify that the obligation to take appropriate action extends to inappropriate treatment of court employees, including chambers employees. The Judiciary would benefit from explicit recognition that the judicial virtues of mutual respect, independence, and collegiality should not prevent a judge from intervening when necessary to protect an employee from another judge's inappropriate conduct. The Canon 3B(5) Commentary states that "appropriate action" can include "direct communication with the judge" or "reporting the conduct to appropriate authorities," noting that "a judge should be candid and honest with disciplinary authorities." The Committee could usefully clarify that "appropriate action" depends on the circumstances, but that action should be reasonably likely to address the misconduct, prevent harm to those affected by it, and promote public confidence in the integrity and impartiality of the Judiciary.

The Working Group suggests that the revision of the Code of Conduct for United States Judges be the first of several steps to clarify substantive standards. There are other codes and guidance documents that require comparable revisions. For example, the Judiciary maintains a Code of Conduct for Judicial Employees (Code for Employees), which similarly consists of an aspirational set of standards expressed through five Canons that mirrors the Code for Judges.[47] Like Canon 3 of the Code for Judges, Canon 3C of the Code for Employees provides guidance

[47] The captions of those five Canons state: (1) A Judicial Employee Should Uphold the Integrity and Independence of the Judiciary and of the Judicial Employee's Office; (2) A Judicial Employee Should Avoid Impropriety and the Appearance of Impropriety in All Activities; (3) A Judicial Employee Should Adhere to Appropriate Standards in Performing the Duties of the Office; (4) In Engaging in Outside Activities, A Judicial Employee Should Avoid the Risk of Conflict with Official Duties, Should Avoid the Appearance of Impropriety, and Should Comply with Disclosure Requirements; and (5) A Judicial Employee Should Refrain from Inappropriate Political Activity. *See Code of Conduct for Judicial Employees*, Committee on Codes of Conduct, Judicial Conference of the United States (Mar. 2014).

on an employee's responsibility to those who use the courts, but does not expressly address the employee's responsibility to fellow employees:

> A judicial employee should be patient, dignified, respectful, and courteous to all persons with whom the employee deals in an official capacity, including the general public, and should require similar conduct of personnel subject to the judicial employee's direction and control.[48]

The Code for Employees would similarly benefit from more specific direction regarding the duty of employees—and especially supervisors—to promote workplace civility, avoid harassment, and take action when they observe misconduct by others. The Committee on Codes of Conduct should consider additional changes to the Code for Employees to ensure that both judges and judicial employees understand that confidentiality obligations should never prevent any employee—including law clerks—from revealing abuse or reporting misconduct by any person. Canon 3D of the Code for Employees currently states:

> A judicial employee should never disclose any confidential information received in the course of official duties except in the performance of such duties, nor should a judicial employee employ such information for personal gain. A former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.[49]

As the Working Group noted in its findings, some law clerks have misunderstood their obligation of confidentiality to require that they refrain from reporting misconduct. The Committee should make revisions to the Code to cure that misunderstanding and make

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[48] *Id.*
[49] *Id.*

absolutely clear that the general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee from revealing abuse or reporting misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person. Those revisions should also make clear that retaliation against a person who reports misconduct is itself serious misconduct that will not be tolerated.

The Judiciary has a wide range of guidance documents, policy statements, and instructions issued by the Administrative Office, individual courts, and other Judicial Branch entities that should be revised in parallel fashion to ensure that the Judiciary's substantive standards of workplace conduct are set out and explained in a consistent and cohesive manner. As one example, the Working Group reviewed a model confidentiality statement that was posted on the Judiciary's internal website. The Working Group found that this statement contained ambiguous language that could unintentionally discourage law clerks or other employees from reporting sexual harassment or other workplace misconduct. The Judicial Conference, at the recommendation of its Committee on Codes of Conduct, removed that model statement from the internal website and its text is in the process of being reviewed. The Judiciary has already revised language in the *Law Clerk Handbook* to clarify that nothing in applicable confidentiality provisions precludes consulting about instances of misconduct or the filing of a misconduct complaint.

The Working Group recommends that the Administrative Office and the FJC take on the challenge of reviewing all of their guidance respecting workplace conduct and civility to ensure that they provide a consistent, accessible message that the Judiciary will not tolerate harassment or other inappropriate conduct. Those efforts should include both traditional publications and electronic information that employees can access through Judiciary websites. All employees

need to know that they have access to a variety of mechanisms, including those described in the following section, to obtain relief without fear of retaliation.

B. Procedures for Identifying and Correcting Misconduct

The Judicial Conference promulgated the Code of Conduct for United States Judges and the Code of Conduct for Judicial Employees to set out the substantive standards of conduct for judges and employees. As explained in the Working Group's findings, judges are subject to discipline through the statutory procedures set out in the JC&D Act, which the Judicial Conference has implemented through its Conduct Rules.[50] In addition, both judges and employees are subject to EDR Plans already in place in all thirteen circuits. The Working Group suggests some changes to both of these procedures. But the Working Group concludes that, beyond those changes, there is a pressing need to develop responsive informal processes to counsel employees and rectify inappropriate behavior. The Judiciary should also recognize the value, in appropriate cases, of systemic institutional review of workplace misconduct apart from individual disciplinary proceedings.

1. The Judicial Conduct and Disability Act

The JC&D Act authorizes any person to file a complaint alleging that a federal judge has engaged in conduct "prejudicial to the effective and expeditious administration of the courts" or has become, by reason of a mental or physical disability, "unable to discharge all the duties" of the judicial office.[51] Congress enacted the statute to provide "a fair and proper procedure whereby the Judicial Branch of the Federal Government can keep its own house in order" by identifying and correcting instances of judicial misconduct and disability that do not involve

[50] *See Guide to Judiciary Policy*, Vol. 2E, Ch. 3 (as amended Sept. 17, 2015), http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability.
[51] 28 U.S.C. §§ 351-364.

impeachable offenses.[52] The Judicial Conference has formulated its Conduct Rules to provide mandatory and nationally uniform provisions for implementing the JC&D Act.[53]

In 2004, Chief Justice Rehnquist established a study committee to examine the effectiveness of the JC&D Act. The study committee submitted a comprehensive report in 2006 that found "no serious problem with the judiciary's handling of the vast bulk of complaints under the Act," but that recommended a number of changes in the Conduct Rules to further enhance the effectiveness of the Act.[54] The Judicial Conference's Committee on Judicial Conduct and Disability drafted proposed changes, which the Judicial Conference adopted.[55] The Working Group has found that the JC&D Act procedures generally work well in addressing workplace misconduct in the instances when they are invoked. Like the Chief Justice's study committee, the Working Group sees no need for any legislative changes. The Working Group does recommend, however, that the Judicial Conference's Committee on Judicial Conduct and Disability consider clarifying amendments to the Conduct Rules and publications describing the JC&D Act procedures. The Committee is in the best position to determine whether the clarifications should be implemented through the Rules themselves, the associated commentary, or other publications. That Committee has in fact already begun examination of some of those matters.

First, the Working Group recommends that the Conduct Rules or associated commentary state with greater clarity that traditional judicial rules respecting "standing"— viz., the requirement that the complainant himself or herself must claim redressable injury from the

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[52] S. Rep. No. 96-362, (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4325.
[53] *See* Appendix 7, *supra* note 25, for a more detailed description of the JC&D Act and its associated Conduct Rules.
[54] *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, The Judicial Conduct and Disability Act Study Committee (Sept. 2006).
[55] JCUS-MAR 08, p. 21.

alleged misconduct—do not apply to the JC&D Act complaint process. The Conduct Rules currently provide that "[a] complaint is . . . a document that . . . is filed by *any person* in his or her individual capacity or on behalf of a professional organization" (emphasis added).[56] The Committee on Judicial Conduct and Disability and individual circuit judicial councils have regularly stated in their decisions that traditional standing requirements do not apply to judicial conduct and disability proceedings. *See, e.g.*, *In re Complaints of Judicial Misconduct*, No. 93-372-001 (U.S. Jud. Conf. Nov. 2, 1993). Nevertheless, the Conduct Rules or commentary should state so expressly to ensure that complainants understand that they need not themselves be the subject of the alleged misconduct. That clarification should encourage and facilitate early reporting and action on potential misconduct.

Second, the Working Group suggests that the Conduct Rules or commentary include express reference to workplace harassment within the definition of misconduct.[57] The Working Group has previously suggested that the Committee on Codes of Conduct should consider more specific substantive guidance on the subject of harassment and impermissible behavior in the codes of conduct for judges and employees, including a clear proscription on harassment based on sexual orientation or gender identity. The Committee on Judicial Conduct and Disability should adopt language and examples in its procedural rules that are congruent with any changes in the codes.

Third, the Working Group proposes that the Committee on Judicial Conduct and Disability make clear through the Conduct Rules, commentary, or other guidance documents that confidentiality obligations should never be an obstacle to reporting judicial misconduct or

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[56] *See* Appendix 7, *supra* note 25, Conduct Rule 3(c)(1).
[57] *See id.* Conduct Rule 3(h)(1) (providing a non-exclusive list of actions that constitute misconduct).

disability. The Conduct Rules discuss confidentiality primarily in the context of protecting the complainant and judge from publicity during the investigatory process.[58] But complainants additionally need to understand that the obligations of confidentiality that judicial employees must observe in the course of judicial business do not shield a judge from a complaint under the JC&D Act. To promote this goal, the Committee should consider clarification that the confidentiality provisions in both the JC&D Act and the Conduct Rules relate to the fairness and thoroughness of the judicial conduct and disability complaint process, and not to reporting or disclosing judicial misconduct or disability.

Fourth, the Working Group recommends that the Committee on Judicial Conduct and Disability provide additional guidance, consistent with the proposal to the Committee on Codes of Conduct, on a judge's obligations to report or disclose misconduct and to safeguard complainants from retaliation. These substantive obligations, which are critical in maintaining public confidence in the Judiciary, warrant repetition in the Conduct Rules. If judges ignore or conceal potential misconduct, they undermine employee and public respect for the justice system. The Conduct Rules and commentary or associated guidance should reinforce the principle that retaliation for reporting or disclosing judicial misconduct constitutes misconduct.

Fifth, the Working Group recommends that the Judiciary as a whole consider possible mechanisms for improving the transparency of the JC&D Act process. As the Working Group noted in its findings, employees—as well as members of the press and public—seek greater insight on the progress of individual complaints and the complaint process generally. In some circumstances, the most appropriate remedy for misconduct—particularly for minor or unintentional infractions—is a private reprimand. But in other cases, there is considerable value

[58] *See id.* Conduct Rule 23.

in revealing disciplinary action so that the complainant, other judicial employees, and the public can see that misconduct is met with a proportionate response. Chief circuit judges should be mindful of their authority under Conduct Rule 23(a) to "disclose the existence of a proceeding…when necessary or appropriate to maintain public confidence in the judiciary's ability to redress misconduct or disability." As previously noted in the Working Group's findings, public confidence in the JC&D Act will benefit from efforts, already agreed upon by the Administrative Office to identify harassment complaints in its statistical reports. Individual circuits should seek ways to make decisions on complaints filed in their courts more readily accessible to the public through searchable electronic indices.

2. Employment Dispute Resolution Plans

The Judicial Conference, through its Committee on Judicial Resources, has developed the Model EDR Plan to set out recommended policies and procedures for resolving a wide range of employee disputes. The Model EDR Plan specifically provides at Ch. II, § 1:

> Discrimination against employees based on race, color, religion, sex (including pregnancy and sexual harassment), national origin, age (at least 40 years of age at the time of the alleged discrimination), and disability is prohibited. Harassment against an employee based upon any of these protected categories or retaliation for engaging in any protected activity is prohibited. All of the above constitute "wrongful conduct."

Although individual court units may create their own EDR Plans, most follow the parameters of the Model EDR Plan. Judiciary employees may report wrongful conduct, which will result in a confidential investigation and possible disciplinary action.[59] Employees who believe they have been harassed or discriminated against on the basis of race, color, religion,

[59] *See* Appendix 8, *supra* note 27, Model EDR Plan Ch. IX.

national origin, sex, age, or a disability may seek remedies through the dispute resolution procedures of their court's EDR Plan.[60] The Model EDR Plan's dispute resolution procedure consists of counseling and mediation, a hearing before the chief judge of the court (or a designated judicial officer), and a review of the hearing decision under procedures established by the judicial council of the circuit.[61] When an employee files a claim against a district judge under the Model EDR Plan, the claim is handled by the relevant circuit council, and the claim may be transferred for disposal to a court in the circuit other than the judge's own court.

As noted in its findings, the Working Group received comments from former and current employees concerning the accessibility, visibility, ease of use, and coverage limitations under the Model EDR Plan. Based on those concerns, the Working Group recommends the Judicial Conference consider amendments to the Model EDR Plan as described below. As in the case of the Working Group's proposed revisions to the Codes of Conduct and the Conduct Rules, the Model EDR Plan amendment process will involve initial consideration by the relevant Judicial Conference committee—in this case the Committee on Judicial Resources. The Working Group recommends revisions in several general areas.

First, the Working Group recommends that the Committee on Judicial Resources examine whether EDR Plans can be rendered more "user-friendly." Commenters observed that the existence of EDR Plans is not well publicized, the text of individual EDR Plans is difficult to locate, and the language is sometimes difficult to understand. The Committee should examine whether the Model EDR Plan, and court plans based on it, can be featured more prominently on Judiciary websites, and whether the text can rely to a greater extent on "plain English" that is

[60] *See id.* Model EDR Plan, Ch. X.
[61] *See* Appendix 8, *supra* note 27, for a more detailed description of the procedures established in the current Model EDR Plan.

more easily comprehensible. The Model EDR Plan might be helpfully shortened to prescribe more clearly and succinctly the steps to be followed in the employment dispute resolution process. The Model EDR Plan could, for example, include a one-page flowchart of the EDR claims process and could include answers to frequently asked questions.

Second, the Working Group recommends that the EDR Plans' scope of coverage be consistent throughout the Judiciary. For example, under the current Model EDR Plan, the term "employee" excludes interns and externs providing gratuitous service. Interns and externs are typically new to the Judiciary's workforce and may be at higher risk than other employees in encountering discrimination, harassment, and inappropriate behavior.[62] The Working Group recommends treating interns and externs as "employees" for purposes of EDR Plans, consistent with the coverage of the Code of Conduct for Judicial Employees. Some circuits exclude chambers employees from EDR Plan coverage. The Working Group recommends that the Committee on Judicial Resources ensure that EDR Plans uniformly cover all Judiciary employees, including those working in chambers.

Third, the Working Group recommends examination of the Model EDR Plan's reference to "sex discrimination." The current Model EDR Plan inartfully describes sex discrimination as "including pregnancy and sexual harassment."[63] That provision should be rewritten to describe sex discrimination in accord with established legal definitions and separately indicate that harassment, without regard to motivation, is wrongful conduct. The Working Group also recommends that various statements respecting sexual harassment, including a separate sample sexual harassment policy currently posted on the Judiciary's internal website as part of the

[62] *See EEOC Study supra* note 6, at 27 (discussing youth and relative inexperience of some employees as a risk factor for encountering workplace harassment).
[63] *See* Appendix 8, *supra* note 27, Model EDR Plan, Ch. II, § 1.

Model EDR Plan, be removed and replaced with consistent statements of policy concerning harassment, which can be incorporated into a revised Model EDR Plan. Similarly, there should be a consistent definition of "wrongful conduct" in the workplace throughout the Judiciary.

Fourth, the Working Group notes that the EDR Plans provide an avenue for employees to report wrongful conduct without filing a claim for redress. The Working Group recommends that Chapter IX of the Model EDR Plan be revised to state that, when a chief district judge or chief bankruptcy judge receives a report of wrongful conduct that could constitute reasonable grounds for inquiry into whether a judge has engaged in misconduct under the JC&D Act, the chief judge should inform the chief circuit judge of the report and any actions taken in response.

Fifth, the Working Group recommends that the Committee on Judicial Resources extend the time for initiating an EDR claim. Currently, employees must request counseling—the first step in initiating an EDR claim—within 30 days of the alleged violation or within 30 days of the time the employee became aware of the alleged violation. The Working Group recommends extending the time limit to 180 days from the date of the alleged violation or when the complainant became aware of the violation to accommodate the additional time employees may reasonably need to ascertain and assess their options under the EDR Plan.

Sixth, the Working Group recommends that the Committee on Judicial Resources consider steps to improve the training and qualifications of EDR Coordinators. The Model EDR Plan envisions that each court will identify an EDR Coordinator who is responsible for overseeing the effectiveness of the program. The EDR Coordinator provides information and training to employees regarding their rights under the EDR Plan and assists them in accessing the claims procedures.[64] Given the critical role that EDR Coordinators play in the EDR process, the

[64] *See id.* Model EDR Plan Ch. X, § 6.

Working Group recommends the Judiciary set forth minimum qualification requirements for EDR Coordinators and institute nationwide training of EDR Coordinators at regular intervals.

3. Alternative Informal Procedures

The JC&D Act and the EDR Plans provide useful formal mechanisms for responding to serious cases of harassment and workplace misconduct, but the Working Group found that they are not well suited to address the myriad of situations that call for less formal measures. For example, an employee may be uncomfortable with a well-meaning supervisor's familiarity or avuncular physical contact and seek advice on how to express discomfort. Or an employee may encounter crude or boorish behavior from a coworker and not want to file a formal complaint, but may want a supervisor to step in and curtail the conduct. Or an employee may encounter sexual advances from a judge and seek confidential advice on what support is available if a formal complaint is filed, such as placement in another chambers. Or a former law clerk, now in private practice, may seek advice on application of the Judiciary's confidentiality requirements in deciding whether to file a misconduct claim. Neither the JC&D Act procedures nor the EDR Plans are designed to address those situations.

It is clear from these examples, and from the input the Working Group received from employees in meetings, mailbox comments, and questionnaires, that there is a need for the Judiciary to develop multiple informal mechanisms that can provide a broad range of advice, intervention, and support to employees. This is consistent with the EEOC Study recommendation that "Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment."[65] Accordingly, the Working

[65] *EEOC Study supra* note 6, at 43.

Group recommends the establishment of offices at both the national and circuit level to provide employees with advice and assistance with their concerns about workplace misconduct apart from the JC&D Act and EDR Plans. The assistance will range from a discussion of options to address their concerns, to intervention on their behalf with appropriate court personnel and similar support. One goal of these offices will be to address problems and concerns in an earlier stage, before more serious issues evolve.

In that regard, at the national level the Administrative Office is establishing an internal Office of Judicial Integrity to provide counseling and assistance regarding workplace conduct to all Judiciary employees through telephone and email service. This office should provide advice on a confidential basis to the extent possible. It should also be able to assist in resolving a matter when requested by an employee or when otherwise warranted. The newly created position at the Administrative Office could be combined with existing offices there that help ensure the integrity of the Judiciary. These offices provide and coordinate independent financial auditing and management analysis services to the courts to prevent and expose waste, fraud, and abuse in the Judiciary.[66]

At the circuit level, the Ninth Circuit Judicial Council recently announced the creation of a new office for a Director of Workplace Relations to oversee workplace issues and discrimination and sexual harassment training in that circuit.[67] The Working Group recommends that the Judicial Conference encourage and approve funding through its budgeting process for all other circuits to provide similar services for their employees.

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[66] *See* Appendix 10: Letters from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley (Jan. 12, 2018, and Jan. 22, 2018).
[67] Press Release, United States Courts for the Ninth Circuit, Ninth Circuit Judicial Council Acts on Workplace Environment Recommendations (May 21, 2018).

The Working Group believes that every employee should have the benefit of knowledgeable and responsive advisers who can counsel the employee on workplace rights and suggest practical solutions to the broad range of workplace issues that can arise, both in chambers and in the other offices that provide the courts with administrative support. The advisers must have sufficient rank and stature to engage actively with judges and supervisors. They must have the training necessary to initiate the difficult conversations that invariably result in addressing inappropriate workplace behavior. They must be independent of influence from local human resources and management. And they must have access to the resources necessary to engage in effective problem solving. Former employees should have access to guidance on the scope of the confidentiality requirements.

In addition to these national and circuit-level resources, every court should clearly identify for its employees local sources to which they can turn for advice or assistance about workplace conduct issues. Such sources could include the chief judge, another judge, a unit executive, or other persons. There could be multiple sources, particularly in large courts. Any such persons should be trained in conducting sensitive conversations and be thoroughly familiar with formal and informal options including the complaint process and remedies.

The Working Group believes that the introduction of innovations to respond to workplace misconduct will be effective only if those processes are well publicized, readily available to all employees, and considered a vital part of the Judiciary's existing human resources programs. The Working Group therefore recommends that the Judicial Conference should incorporate informal employee protection programs into its training and educational initiatives.

Protection programs should include contingency plans and funding to provide for a transfer or alternative work arrangements for an employee, including a law clerk, when

egregious conduct by a judge or supervisor makes it untenable for the employee to continue to work for that judge or supervisor. The absence of such a remedy can be a significant deterrent to reporting misconduct.

4. Systemic Evaluations

The JC&D Act and the EDR Plans provide avenues to resolve specific misconduct complaints. They may lead to a wide range of disciplinary actions depending on the nature of the misconduct, and they do not foreclose the possibility, in cases of truly serious misconduct, of tort liability, separate disciplinary action by bar associations or other licensing bodies, criminal prosecution, or impeachment. But the Judiciary also has an institutional interest in determining, apart from any disciplinary action, what conditions enabled the misconduct or prevented its discovery, and what precautionary or curative steps should be undertaken to prevent its repetition. The Working Group believes that the Judicial Conference and the individual circuit judicial councils have ample authority to conduct such systemic reviews as part of their respective responsibilities to promote "the expeditious conduct of court business," 28 U.S.C. § 331, and to "make all necessary and appropriate orders for the effective administration of justice within [each] circuit." 28 U.S.C. § 332(d)(1). Systemic reviews of this sort can shed useful light on whether existing procedures are sufficient, whether workplace practices should be modified, and whether further training or other preventative measures are necessary. This Working Group's efforts, and those of individual circuits and courts, are in fact examples of that type of systemic institutional review.

5. Follow-up Procedures

The Working Group received substantial input on the need for follow-up procedures when Judiciary employees, including law clerks, leave their positions for other employment. They may have valuable information about their experiences or have observed instances of harassment or other workplace misconduct that for whatever reason they chose not to report or share during the pendency of their employment. Exit interviews are useful for that purpose. Methods to capture that data can be useful not only in preventing future occurrences but may lend credence and support to a similar report or complaint that another employee might file. Follow up with law schools, which often keep track of experiences their former students had as law clerks, would also be useful.

C. Education and Training Programs

The Working Group believes that rigorous and recurrent education programs are essential to cultivate and maintain a respectful workplace for all employees throughout the Judiciary. The Judiciary already has in place vibrant educational and training programs for judges, supervisors, and other employees. Those programs, managed by the FJC, the Administrative Office, and individual courts, include a wide array of publications, on-line resources, and in-person training programs to promote fair employment practices and workplace civility. Nevertheless, there are several areas related to education and training in the Judiciary that would benefit from further direction and refinement.

First, the Judiciary should ensure that all new judges and new employees receive basic workplace standards training as part of their initial orientation program, with "refresher" training conducted at regular intervals. The Working Group received numerous comments demonstrating a lack of awareness at all levels of the Judiciary about the existence of the JC&D Act and EDR processes, how they work in practice, and how to obtain assistance in filing a complaint, report,

or claim. The FJC has developed high-quality educational programs, but they are not reaching all employees—in significant part, because they are not consistently offered throughout the Judicial Branch. These programs will need to be retooled to reflect any revisions that the Judicial Conference implements with respect to the current standards, procedures, and informal avenues for relief.

Efforts in this area already are underway. In December 2017, the FJC amended the *Law Clerk Handbook* to clarify that the duty of confidentiality does not prohibit a law clerk or other employee from reporting misconduct by a judge or other person. The *Handbook* and other publications will continue to be reviewed for potential revision or updating. The FJC has already placed most of its handbooks and other published guidance online. Since January 2018, the FJC has included workplace conduct sessions in each of the following programs for judges: one conference for chief district judges; one conference for chief bankruptcy judges; one national workshop for district judges; one national workshop for bankruptcy judges; one national workshop for magistrate judges; and three orientation seminars for new district and court of appeals judges. The FJC will include sessions on workplace conduct in scheduled educational programs for new chief circuit, district, and bankruptcy judges, and for court unit executives, as well as in additional national workshops and orientation seminars for judges, all to be held during 2018. The FJC is revising its curriculum for managers and supervisors, and for other court employees, including law clerks, to expand coverage of workplace harassment issues. Circuit judicial conferences in 2018 will include sessions to address workplace conduct. Several courts already have conducted internal education programs on workplace conduct as well.

Second, the FJC should develop advanced training programs specifically aimed at developing a culture of workplace civility. The FJC already is considering opportunities to

integrate civility training into existing programs on judicial management, court administration, and courtroom practices to make civility an essential component in all aspects of court operations. There is a particular need to train judicial managers on proactive measures to encourage civility and defuse abusive work environments before problems develop. Those efforts should include training on "bystander intervention," which would encourage judges, supervisors, and other employees who witness misconduct to take action through channels for reporting and response.

Third, the FJC, the Administrative Office, and individual courts should continuously evaluate their educational programs to assess their effectiveness, paying close attention to new learning techniques and developments in the field. Those components should consider new or revised offerings on a number of specific topics of special relevance to the judicial workplace, including:

- Judicial codes of conduct;
- The Judiciary's procedures for seeking advice and assistance, and filing a complaint;
- Risk factors that can contribute to problems in the judicial workplace;
- Peer-to-peer interactions and bystander intervention;
- Gray areas: differing perceptions of what is inappropriate behavior;
- Promoting respect; and
- Equal treatment and opportunity.

Where feasible, the FJC should tailor its advanced programs to specific groups.

FJC programs for new chief circuit, district, and bankruptcy judges should devote considerable attention to effective leadership principles and techniques. Those programs should specifically address the chief judge's role in fostering a positive working environment and in

holding others accountable for maintaining that environment. That training should include a focus on risk factors that are highly relevant in chambers, such as power imbalances and isolated workplaces, and it should encourage all judges to exercise leadership in modeling exemplary behavior. Those programs should specifically address the judge's duty to take appropriate action when learning of an apparent violation of the Code of Conduct or professional responsibility standards by another judge. Consistent with the Working Group's proposal for creation of informal avenues for advice and assistance, those programs should address both formal and informal ways to deal with judges and employees who are suspected of inappropriate behavior.

FJC programs for court executives should address their leadership roles and how to conduct effective education and training in their courts. Managers and supervisors should understand that their efforts to cultivate a positive workplace environment will be recognized in evaluating their job performance. Education for managers and supervisors should emphasize the importance of their "front line" position in fostering a positive workplace and in detecting and acting on instances of inappropriate behavior. For all persons in leadership and management positions, education should include methods for conducting difficult conversations. Managers cannot be reluctant to approach someone suspected of misconduct because of uncertainty about how to engage the individual. If leaders build skill and confidence in carrying out such conversations, they will be more effective in achieving positive outcomes.[68]

FJC programs for court employees, including law clerks, should emphasize standards and procedures, and highlight where and how to get advice and help. The FJC and the Administrative Office should develop materials on workplace conduct for courts to use in

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[68] As previously noted, the EDR program would benefit from more focused training for EDR Coordinators. They, and others whose responsibilities include advising or assisting employees reporting misconduct, should be well versed in the applicable standards and procedures, and they should receive training on skills for dealing effectively with persons who may be fearful or lack trust in the system.

orienting new employees. Those materials should include guidance on persons to contact in seeking advice and clear explanations on procedures for reporting misconduct. Most courts conduct initial orientation programs for new employees that cover a broad range of unfamiliar subjects, such as building security, computer usage, health and retirement benefits, and time-keeping. Programs on workplace conduct, including what to do when experiencing or witnessing inappropriate conduct, should be distinct. Workplace conduct training should be timed and offered in a way that critical information about the Judiciary's workplace standards and remedies does not get lost in the swirl of other new employee training.[69]

The Working Group notes concerns that some may try to avoid allegations or the appearance of harassment by simply reducing their interactions with members of a different gender, ethnicity, or other group. This would result in loss of opportunities for positions, mentoring, and professional growth for members of such groups. The Judiciary should strive to avoid this, primarily through education.

The Working Group took note of the many education and training opportunities already being developed in circuit and district courts across the country. The Working Group encourages the Judicial Conference, the Administrative Office, and the FJC to facilitate the sharing of best practices that can be tailored to the unique situations of individual courts, and further recommends that development of such programs be done in coordination with each circuit and with fellow courts.

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[69] Orientation programs for law clerks deserve special attention. Given the relatively short duration of law clerks' employment, training on workplace conduct must be timely and focused. The FJC has prepared an online Interactive Orientation for Law Clerks (IOLC), which should be updated to include more extensive coverage of standards of conduct, the scope of the duty of confidentiality, and ways to seek help or file a complaint. But those principles can be usefully reinforced through an in-person session with a chief judge, or other experienced jurist, who can authoritatively emphasize the importance of those principles.

Education aimed at promoting a positive and respectful workplace and preventing harassment and abusive conduct requires a sustained effort. The FJC and other Judiciary providers of education and training should consistently reexamine their programs and materials to ensure their relevance and effectiveness.

CONCLUSION

The Judiciary should aspire to be an exemplary workplace, taking strong affirmative measures to promote civility, minimize the possibility of inappropriate behavior, remove barriers to reporting misconduct, and provide prompt corrective action when it occurs. The Working Group accordingly recommends that the Judicial Conference undertake an ongoing program, as described above, to promote a culture of mutual understanding and respect, through improvements to its standards of conduct, its procedures for addressing inappropriate behavior, and its educational and training programs for judges, supervisors, and employees. The Working Group remains committed to assisting with that effort and offers its continued service in whatever capacity the Chief Justice and the Judicial Conference direct.

APPENDIX 1

Memorandum from James C. Duff, Director of the Administrative Office, to all Judiciary Employees (Dec. 20, 2017)

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

December 20, 2017

MEMORANDUM

To: All United States Judges
Circuit Executives
Federal Public/Community Defenders
District Court Executives
Clerks, United States Courts
Chief Probation Officers
Chief Pretrial Services Officers
Senior Staff Attorneys
Chief Circuit Mediators
Bankruptcy Administrators
Circuit Librarians
Judicial Assistants-Secretaries
Law Clerks

From: James C. Duff

RE: WORKPLACE CONDUCT **(ACTION REQUESTED)**

The Chief Justice has asked me to establish a working group to examine the sufficiency of the safeguards currently in place within the Judiciary to protect court employees, including law clerks, from wrongful conduct in the workplace. I plan to establish a working group in the coming weeks that will produce its report and recommendations by May 1, 2018.

In the meantime, this memorandum provides a reminder that processes and procedures exist for *all* Judicial Branch employees to report concerns of wrongful workplace conduct, including sexual harassment. This memorandum also provides information on the educational tools and materials available to help prevent illegal and prohibited conduct in our workplaces. It is important that all employees, including judges, court unit executives, and law clerks be aware of the applicable rules, recourse, and resources, that are available. **Please share this memorandum with all staff**.

First, any aggrieved employee may file a complaint regarding wrongful conduct under the Judicial Conduct and Disability Act (JC&D) which can result in remedial action against the subject of the complaint. Moreover, the Judiciary's Model Employment Dispute Resolution (EDR) Plan, which every circuit court, all 94 district courts, and all bankruptcy courts have

adopted in whole or with local modifications, identifies the range of personnel actions that are prohibited and states the procedures to initiate, pursue, and obtain resolution of a complaint. The Model EDR Plan and related resources can be found on the JNet. Court employees should follow their own court's EDR Plan and/or the JC&D process when filing a complaint. Coupled with the JC&D, these EDR plans provide all employees protection from wrongful conduct and recourse.

Second, the Administrative Office (AO) through its Office of the General Counsel, Office of Fair Employment Practices, and Office of Human Resources has created a range of on-line training through the HR Academy by video conference or, upon request, in-person, that addresses the EDR process, employment laws, wrongful conduct, and unconscious bias, among other relevant topics for the workplace.

Third, the Federal Judicial Center (FJC) added a statement in the Law Clerk Handbook this week that makes clear that nothing in the Handbook, nor the Code of Conduct, prevents a law clerk or any Judiciary employee from revealing or reporting misconduct, including sexual harassment. The FJC offers many in-person and video presentations that address prohibited workplace discrimination, as well as techniques to ensure a respectful and inclusive workplace. In-district training on the topic of "Preventing Workplace Harassment" has been utilized by many courts. Districts may request this training by contacting Phyllis Drum at the FJC at PDrum@fjc.gov or at 202-502-4134. Several videos provide valuable information for managers and employees on how to prevent and counter instances of prohibited misconduct, including harassment. The trainings and videos cover topics ranging from the definition of wrongful conduct, to the responses to it, to reducing the threats of it. The videos also provide training on techniques for improving overall communication, teamwork and morale. And they provide prevention and response tools for unwelcome behavior and procedures for reporting misconduct. The FJC is also assembling a list of relevant videos on its homepage. These can be accessed at http://fjc.dcn/content/326872/preventing-sexual-harassment or by clicking on fjc.gov from this memorandum.

All of these resources are intended to help foster a safe, comfortable, and respectful workplace in the Judiciary. I encourage the courts to make full use of these resources and I also encourage all who are in the Judiciary to take action when they observe or encounter inappropriate conduct. Everyone who works in the Judiciary has recourse if they are subjected to inappropriate behavior.

As we re-examine our procedures, we welcome your input. You may contact me at 202-502-3000 or JDuff@ao.uscourts.gov with your suggestions.

APPENDIX 2

Chief Justice John G. Roberts, Jr., United States Supreme Court
Year-End Report on the Federal Judiciary (2017)

EMBARGOED until 6 p.m. E.S.T. December 31, 2017 (No wires, TV, radio, Internet, or other formats before 6 p.m. E.S.T.)
For further information, contact the Public Information Office
pio@supremecourt.gov

2017 Year-End Report on the Federal Judiciary

In October 1780, while American patriots engaged the British in decisive battles for independence, a storm was brewing in the Caribbean. The Great Hurricane of 1780—the deadliest Atlantic hurricane on record—tracked a course from the Lesser Antilles to Bermuda, leaving a trail of destruction that touched both Florida and Puerto Rico. Historians estimate that more than 20,000 people died. The "Great Hurricane" was just one of several storms that ravaged the Caribbean and Gulf of Mexico that fall. In all, more than 28,000 perished.

Nearly two and a half centuries later, we remain vulnerable to natural catastrophes. Modern communication has enhanced our ability to learn of impending disasters, take precautions, and respond to those in need. But today's news cycle can also divert attention from the continuing consequences of calamities. The torrent of information we now summon and dispense at the touch of a thumb can sweep past as quickly as the storm

itself, causing us to forget the real life after-effects for those left in misfortune's wake.

Federal disaster response is primarily the responsibility of the executive and legislative branches of the federal, state, and territorial governments, which can muster, fund, and deploy the resources needed to respond to emergencies. Still, during this season of holidays and celebrations, we cannot forget our fellow citizens in Texas, Florida, Puerto Rico, and the Virgin Islands who are continuing to recover from Hurricanes Harvey, Irma, and Maria, and those in California who continue to confront historic wildfires and their smoldering consequences. The courts cannot provide food, shelter, or medical aid, but they must stand ready to perform their judicial functions as part of the recovery effort. The federal judiciary has an ongoing responsibility to prepare for catastrophes and ensure that the third branch of government remains open and functional during times of national emergency.

Court emergency preparedness is not headline news, even on a slow news day. But it is important to assure the public that the courts are doing their part to anticipate and prepare for emergency response to people in need.

The Administrative Office of the United States Courts is the agency within the judicial branch responsible for providing the broad range of managerial and program support necessary for federal courts throughout the country. The Administrative Office staff addresses matters that span the federal court system, including human resources, information technology, and facilities stewardship. The Administrative Office has established an Emergency Management and Preparedness Branch that maintains continuity of operations programs within that agency and provides training and consulting functions for hundreds of court units across the country. That's no small task for a court system that employs 30,000 people and includes 12 regional courts of appeals, 94 district courts, 90 bankruptcy courts, and a collection of other specialized tribunals, probation and pretrial services offices, and federal defender offices.

Our federal courthouse communities vary in size. Some large cities, like Houston, are home to dozens of federal judges and have substantial support teams for busy dockets. Smaller locales, like Key West, may have only a single judicial officer and a handful of court employees. The deadly hurricanes of 2017 and other emergency events brought home the need for a national response capability to deal with emergencies on a scale both large and small. Preparation begins with planning. The judiciary must anticipate

the broad range of calamities that might strike, ranging from severe weather to earthquakes, from cyberterrorism to on-the-ground terrorist attacks. The planners must identify the particular risks and available resources by region and locality to calculate how to deploy manpower and maintain channels of communication. Plans must be scaled to enable prompt and flexible response to both foreseeable and unforeseeable consequences of emergency events.

The Emergency Management and Preparedness Branch provides critical consultation and planning support for federal courts throughout the country as they design their emergency plans and run drills. But the Branch also goes a step further by operating a Judiciary Emergency Response Team, which offers courts facing an emergency a single point of contact for logistical support. The Response Team serves as a principal node for communication and a clearinghouse for information. It provides a central source for assisting personnel and directing resources to support the affected court's administrative needs, including procurement, information technology, facilities, and security.

I recognize that this might sound like trying to fight fire with administrative jargon. But imagine yourself one of a handful of employees of the bankruptcy court in Santa Rosa, California, when raging wildfires

suddenly approach the courthouse where you work and state officials order evacuation—as happened this past September. The staff members did not face the emergency alone; they had at their disposal a professional response team to assist in making quick decisions to protect personnel, relocate services, and ensure continuity of operations.

The Administrative Office's national support system includes the provision of remote information technology resources. These resources can enable courts to keep case management and electronic filing systems online for judges, attorneys, and court personnel, who can continue their work from safe locations during and after storms and other emergency events. These resources also allow courts with public websites to provide the bar and public with critical updates and notices about operations. During Irma, Harvey, and Maria, the Administrative Office's communications team monitored the status of all affected courts and provided regular public updates on the judiciary's own central website (http://www.uscourts.gov) and on the Administrative Office's Twitter feed.

The courts are continuously enhancing and enlarging their response capabilities, building on gradual improvements over the past 30 years. The Administrative Office and individual courts learned valuable lessons from the Loma Prieta earthquake that struck San Francisco in 1989, the

September 11 terrorist attack in 2001, and Hurricanes Katrina and Rita, which devastated the city of New Orleans and other parts of Louisiana and Mississippi in 2005. Those upgraded emergency preparedness practices were put to the test by the 2008 floods in Cedar Rapids, Iowa, the 2012 Superstorm Sandy in New York and New Jersey, and the 2016 floods in Baton Rouge and surrounding parishes. The severe weather events of this past summer, affecting disparate parts of the country so close in time, placed unique challenges on our emergency response capabilities.

The hurricanes brought flooding, power outages, infrastructure damage, and individual hardship to Texas and Florida. But the judicial districts of the Virgin Islands and Puerto Rico were especially hard hit. Judges and court employees responded in dedicated and even heroic fashion. They continued to work even in the face of personal emergencies, demonstrating their commitment to their important public responsibilities.

The Judicial Emergency Response Team assisted local judges and court employees in finding missing court personnel, securing buildings, and continuing or resuming court operations. But the efforts did not stop there. The storm also affected persons subject to the courts' continuing jurisdiction. For example, the courts have responsibility to hear legal claims of individuals detained in criminal proceedings prior to sentencing, and

special measures were required for those in custody in Puerto Rico and the Virgin Islands. Before Hurricane Maria made landfall, the Justice Department's Bureau of Prisons moved more than 1,200 detained individuals to mainland facilities in Mississippi, Florida, Alabama, and Georgia. In addition to facilitating secure transport arrangements with the U.S. Marshals Service, judicial personnel made arrangements to ensure assignment of mainland judges to handle urgent proceedings, the provision of necessary language interpreter services, and continued access to lawyers in the Federal Defender system. I happened to be in Jackson meeting with Mississippi federal judges when word arrived that a large number of the detainees would be sent to that state. Many of the judges in the room raised their hands on the spot to volunteer to take on the extra work.

For individuals who had completed terms of imprisonment but were serving sentences of supervised release, the Administrative Office's Probation and Pretrial Services Office stepped in to assist. The office joined in tracking individuals and responding to location monitoring alerts in every district affected by the hurricanes when local staff was unavailable. The Probation Office for the Southern District of New York took the initiative to help colleagues in the District of Puerto Rico by monitoring electronic arrest

notices. That office's generous support freed local probation officers to tend to their own families and homes.

The Administrative Office and affected courts also learned some lessons about improving future response. They discovered gaps in our communications protocols for Puerto Rico and the Virgin Islands arising from widespread power outages, impaired cellular networks, and limited internet connectivity. The scope of infrastructure damage on those islands impeded efforts to reach key personnel during and immediately after storms. Going forward, the Administrative Office will do more to pre-position essential equipment, such as satellite telephones, batteries, generators, and emergency supplies on islands and other areas susceptible to hurricanes and flooding. The Administrative Office will also identify and develop better backup communications systems and networks to reach critical personnel when routine telecommunications services are down or mainline power is lost.

The most important lesson learned is a gratifying one. Judges and court employees responded to daunting challenges with extraordinary neighborliness, generosity, and dedication. For example, when the chief probation officer for the District of Puerto Rico made it to work on the second business day following Hurricane Maria's destructive passage

through San Juan, he discovered 25 members of the District's probation staff already at the office, raring to go. They assembled search parties to fan out across the city and nearby areas to find the 40 staff members unaccounted for at that time. Another example comes from the Virgin Islands. Court employees in St. Thomas, who endured catastrophic damage from Hurricane Irma, took up a collection to assist their counterparts in St. Croix when it was hit by Hurricane Maria two weeks later—even as they themselves coped with their own loss of homes, food, clothes, and personal effects. Court employees around the country not only assisted with the workloads of the affected courts, but also contributed funds and sent care packages to help their colleagues struggling with loss or damage to their homes. And many other court employees have made generous contributions to disaster relief charities, directly or through the Combined Federal Campaign.

The courts also received critical assistance from our colleagues in the Executive Branch. The judiciary owes special thanks to the United States Marshals Service and the General Services Administration (GSA). Among other duties, the Marshals Service provides security for judges and staff. Deputy marshals and court security officers around the country safeguard our facilities and our people. The GSA, which manages the hundreds of courthouses and other federal buildings, worked with local court employees

to confront flooding, mold, damage to power generators, and the inherent challenge of operating when public electric and water services are unavailable. All these public servants helped us restore operations as quickly as possible.

Congress has provided that, "All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." 28 U.S.C. § 452. On fair weather days, it is easy to take that provision for granted. When disaster strikes, it can be honored only through the tireless efforts of judges, court employees, Administrative Office staff, and the many friends of the judiciary. I know full well that many members of the public, including members of our court family, continue to face hardship. We should continue to keep them in our thoughts and prayers.

Last year, in my annual report, I noted that federal trial judges must often work alone, without the benefit of collegial decision-making or the comfort of shared consensus. But this year, we have many rich examples of federal judges working together, with the support of court employees and Administrative Office staff, to keep courthouses open and operational. Those examples are a reminder that we have a national court system that can

work collectively to address challenges that would overwhelm individual courts.

* * *

We have a new challenge in the coming year. Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune. The judiciary will begin 2018 by undertaking a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee.

I have asked the Director of the Administrative Office to assemble a working group to examine our practices and address these issues. I expect the working group to consider whether changes are needed in our codes of conduct, our guidance to employees—including law clerks—on issues of confidentiality and reporting of instances of misconduct, our educational programs, and our rules for investigating and processing misconduct complaints. These concerns warrant serious attention from all quarters of the judicial branch. I have great confidence in the men and women who comprise our judiciary. I am sure that the overwhelming number have no

tolerance for harassment and share the view that victims must have clear and immediate recourse to effective remedies.

Once again, I am privileged and honored to be in a position to thank the judges, court staff, and judicial personnel throughout the Nation for their continued excellence and dedication. Let's not forget the victims of the disasters that occurred over the past year. I hope we can all find opportunities to assist our fellow citizens who remain in need.

Best wishes to all in the New Year.

Appendix

Workload of the Courts

In the 12-month period ending September 30, 2017, the number of cases filed in the Supreme Court decreased. The number of cases filed in the regional appellate courts, the district courts, and bankruptcy courts also decreased. Cases activated in the pretrial services system declined, as did the number of persons under post-conviction supervision.

The Supreme Court of the United States

The total number of cases filed in the Supreme Court decreased by 2.63 percent from 6,475 filings in the 2015 Term to 6,305 filings in the 2016 Term. The number of cases filed in the Court's *in forma pauperis* docket decreased by 3.47 percent from 4,926 filings in the 2015 Term to 4,755 filings in the 2016 Term. The number of cases filed in the Court's paid docket increased from 1,549 filings in the 2015 Term to 1,550 filings in the 2016 Term. During the 2016 Term, 71 cases were argued and 68 were disposed of in 61 signed opinions, compared to 82 cases argued and 70 disposed of in 62 signed opinions in the 2015 Term. The Court also issued one *per curiam* decision during the 2016 Term in a case that was not argued.

The Federal Courts of Appeals

In the regional courts of appeals, filings fell 16 percent to 50,506. Appeals involving pro se litigants, which amounted to 50 percent of filings, declined 20 percent. Total civil appeals increased one percent. Criminal appeals fell 14 percent, appeals of administrative agency decisions decreased five percent, and bankruptcy appeals declined four percent.

Original proceedings in the courts of appeals, which include prisoner requests to file successive habeas corpus proceedings in the district court, dropped 60 percent this year to 5,486, accounting for most of the overall caseload decline. These filings had spiked in 2016, after the Supreme Court's decision in *Welch v. United States*, No. 15-6418 (Apr. 16, 2016), which provided a new basis for certain prisoners convicted under the Armed Career Criminal Act to challenge their sentences.

The Federal District Courts

Civil case filings in the U.S. district courts fell eight percent to 267,769. Cases with the United States as defendant decreased 29 percent. That reduction returned filings to typical levels, following a spike in 2016 caused by post-*Welch* challenges to criminal sentences. Cases with the United States as plaintiff increased five percent because of actions related to foreclosures. Cases involving diversity of citizenship (i.e., disputes between

citizens of different states) fell seven percent as personal property damage cases dropped 40 percent.

Filings for criminal defendants (including those transferred from other districts) changed little, decreasing less than one percent to 77,018. Defendants charged with property offenses fell six percent, mainly in response to a five percent drop in defendants charged with fraud. Defendants accused of immigration violations declined two percent, with the southwestern border districts receiving 77 percent of national immigration defendant filings. Drug crime defendants, who accounted for 32 percent of total filings, fell one percent, although defendants accused of crimes associated with drugs other than marijuana rose four percent. Reductions also were reported for filings involving sex offenses, general offenses, and violent crimes. Filings for defendants prosecuted for firearms and explosives offenses rose 11 percent. Increases also occurred in filings related to traffic offenses, regulatory offenses, and justice system offenses.

The Bankruptcy Courts

Bankruptcy petition filings decreased two percent to 790,830. Fewer petitions were filed in 56 of the 90 bankruptcy courts. Consumer petitions dropped two percent, and business petitions fell six percent. Filings of petitions declined two percent under Chapter 7 and five percent under

Chapter 11. Filings under Chapter 13 remained relatively stable, decreasing one percent.

This year's total for bankruptcy petitions is the lowest since 2007, which was the first full year after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect. From 2007 to 2010, bankruptcy filings rose steadily, but they have fallen in each of the last seven years.

The Federal Probation and Pretrial Services System

A total of 134,731 persons were under post-conviction supervision on September 30, 2017, a reduction of two percent from one year earlier. Of that number, 116,708 persons were serving terms of supervised release after leaving correctional institutions, a one percent decrease from the prior year.

Cases activated in the pretrial services system, including pretrial diversion cases, declined three percent to 88,750.

APPENDIX 3

Press Release, Federal Judiciary Workplace Conduct Working Group Formed
(Jan. 12, 2018)

Federal Judiciary Workplace Conduct Working Group Formed

Published on January 12, 2018

James C. Duff, Director of the Administrative Office of the U.S. Courts, has established a Federal Judiciary Workplace Conduct Working Group to review the safeguards currently in place within the Judiciary to protect employees from inappropriate conduct in the workplace.

Chief Justice John G. Roberts, Jr., noted in his 2017 Year-End Report on the Federal Judiciary that he asked Director Duff to form the working group, observing, "The Judiciary will begin 2018 by undertaking a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure exemplary workplace conduct for every judge and every court employee."

Chief Justice Roberts directed the working group to examine whether changes may be needed to the Judiciary's codes of conduct; its guidance to employees – including law clerks – on issues of confidentiality and reporting instances of misconduct; its educational programs; and its rules for investigating and processing misconduct complaints.

Working Group Members are:

James C. Duff, Director of the Administrative Office of the U.S. Courts, Chairman. As Director and Secretary to the Judicial Conference, Mr. Duff has been involved in several high profile judicial misconduct matters and oversees staff support to Judicial Conference Committees, including the Codes of Conduct Committee and the Judicial Conduct and Disability Committee. Mr. Duff served as counselor to the Chief Justice during the Presidential impeachment trial in 1999.

Chief Judge Jeffrey R. Howard, First Circuit. Chief Judge Howard is a member of the Judicial Conference of the United States. As Circuit Chief, he has the statutory authority to review all judicial misconduct and disability complaints and presides over the Circuit Council. Before becoming a judge, he had been chair of the New Hampshire Governor's Commission on Domestic Violence and Sexual Assault, which developed interdisciplinary response protocols that became the model for programs in a number of other states.

Judge M. Margaret McKeown, Ninth Circuit. Judge McKeown chaired the Judicial Conference Codes of Conduct Committee, is chair of the newly formed Ninth Circuit Workplace Environment Committee, and served on various committees, working groups, and panels related to workplace and gender discrimination while on the bench and in private practice.

Chief Judge Julie A. Robinson, District of Kansas. Judge Robinson served on the Tenth Circuit Judicial Council and was a member of the committee that developed the 2010 and 2015 Strategic

Plan for the Federal Judiciary, which dealt with workplace issues, ethics, and integrity, as well as other topics.

Judge Sarah S. Vance, Eastern District of Louisiana. Judge Vance is a former Chief Judge of the district and a former member of the Fifth Circuit Judicial Council. She also was a member of the Executive Committee of the Judicial Conference of the United States and the Board of the Federal Judicial Center.

Margaret A. Wiegand, Circuit Executive for the Third Circuit. Ms. Wiegand supports the Chief Circuit Judge in administering the Judicial Conduct and Disability Act and manages and supports the workplace complaint process under the Consolidated Equal Employment Opportunity and Employee Dispute Resolution Plan. She also chairs the federal Judiciary's Human Resources Advisory Council.

Jeffrey P. Minear, Counselor to the Chief Justice for the past 11 years. Previously Mr. Minear clerked for a federal appellate judge and before joining the Supreme Court, held a variety of policy, legislative, and appellate positions at the Department of Justice.

John S. Cooke, Deputy Director of the Federal Judicial Center for the last 12 years. Before joining the center in 1998 as Director of Judicial Education, Mr. Cooke was the Chief Judge of the Army Court of Criminal Appeals. In 2013-2014 he served on a committee established by the Secretary of Defense to study responses to sexual assault in the armed forces.

Sheryl Walter, General Counsel at the Administrative Office of the U.S. Courts, will serve as counsel to the working group. She previously held senior positions at the Department of Justice and Department of State and on the staff of the Senate Judiciary Committee. She also clerked for a federal appellate judge.

In the course of its review, the working group will examine workplace relations practices in the public and private sectors and consult with other authorities as appropriate. The group will also solicit input from federal judges, law clerks, and other judicial employees. In addition, the group will coordinate its efforts with those of other federal courts that are reviewing similar matters. It will submit a written report and recommendations to the relevant committees of the Judicial Conference of the United States.

APPENDIX 4

Letter from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley and Ranking Member Dianne Feinstein (Feb. 16, 2018)

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

February 16, 2018

Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley and Senator Feinstein:

Thank you for your letter of last Friday, February 9, 2018, concerning the status of the Federal Judiciary Workplace Conduct Working Group (Working Group). As the Chief Justice said in his 2017 year-end report, "Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made it clear that the Judicial Branch is not immune." We have acted quickly on this. At the national level, I established the Working Group. Our group is actively examining policies and procedures within the Judiciary to protect employees from inappropriate workplace conduct and, where necessary, developing enhancements to those protections. Some of the circuits and district courts have similar initiatives in progress and we are coordinating closely with them. We, of course, not only share your interest in this serious issue, we have been working on it in earnest since the formation of the Working Group in January and are pleased to update you on our progress. We certainly appreciate your staffs' willingness to discuss these matters with us and look forward to continuing that dialogue. We will address your questions in order.

1. *On December 31, 2017, Chief Justice Roberts announced that he was creating a working group to examine protections against sexual harassment in the Judiciary. The working group was directed to explore whether the Judiciary has proper procedures in place that protect law clerks and other courtroom employees from sexual harassment.*

a. How were the seven members of the working group chosen?

Immediately upon receiving direction from Chief Justice Roberts to form a working group to examine our practices and address these issues, I identified and assembled a diverse team of leaders in the Federal Judiciary who are uniquely qualified for this important task. The seven individuals I appointed to the Working Group and the group's counsel have a breadth of experience in a wide range of judicial operations, the utmost respect from all who work in the Judicial Branch, and subject matter experience and expertise in the matters before our Working Group. Enclosed is a summary of the credentials of the Working Group and its counsel.

b. How often will the working group meet?

The Working Group has held one day-long in-person meeting and has another in-person meeting scheduled in two weeks. We will meet in person as often as needed, and we communicate in between meetings on a regular if not daily basis. We have set a very aggressive schedule to complete our work.

c. When will the working group begin to make recommendations?

The answer is immediately. In fact, we already have acted on several matters, including:

- revising the Confidentiality provisions in several employee/law clerk handbooks to reflect that nothing in those provisions prevents the filing of a complaint;
- establishing a comment mailbox on the uscourts.gov public website for current and former law clerks and other employees to send comments and suggestions to the Working Group;
- removing temporarily the Model Confidentiality Statement from the courts' intranet website in order to revise it and clarify that nothing in that statement prevents law clerks or employees from reporting sexual harassment or other workplace misconduct and filing a complaint relating to that conduct;
- enhancing and raising awareness of the data the Judiciary collects and publishes relating to judicial misconduct complaints under the Judicial Conduct and Disability (JC&D) Act to identify specifically any complaints filed relating to sexual harassment. (In many years, including 2016, there have been zero.)

Additional steps will be taken throughout our review and some issues likely will be addressed in the form of recommendations to the Judicial Conference of the United States.

d. Will the working group make their recommendations publicly available?

All final recommendations will be publicly available. We will make some recommendations public during our review. Others will be announced after the Judicial Conference considers and acts upon them.

2. *Will the working group seek input from current and former law clerks and other court employees?*

Yes, representatives from the group of law clerks, both current and former, who wrote to us in January, along with other court employees, will attend our next Working Group meeting to provide us with their comments and suggestions for improving our policies and processes. We are also soliciting comments through the Judiciary's Advisory Groups. Additionally, as mentioned above, we are creating a comment mailbox on the uscourts.gov website for input from current and former law clerks and court employees.

3. *Will the working group consider changes in sexual harassment training and staff development?*

Yes. The Federal Judicial Center (FJC) has several initiatives underway. There are three programs relating to workplace harassment that the FJC conducts in courts throughout the country. Preventing Workplace Harassment; Meet on Common Ground (a program about diversity and civility in the workplace); and the Code of Conduct for U.S. Judges. These programs use a lesson plan developed by the FJC and are conducted by FJC-trained faculty in courts that request them.

Meet on Common Ground: Speaking Up for Respect in the Workplace
- FY 16: 3 programs;
- FY 17: 20 programs;
- FY 18 (to date): 6 programs

Code of Conduct
- FY 16: 14 programs;
- FY 17: 24 programs;
- FY 18 (to date): 5 programs

Preventing Workplace Harassment
- FY 16: 49 programs;
- FY17: 45 programs;
- FY18 (to date): 24 programs

The FJC will train additional trainers this spring for the Preventing Workplace Harassment program to meet increased demand.

For judges, sessions on the Code of Conduct are included in all orientation seminars and in general-subject continuing education workshops. Henceforth, these seminars and workshops will include sessions specifically devoted to workplace harassment; the first one was held in an orientation for new district judges earlier this month. Sessions devoted to workplace harassment are also scheduled for in-person education programs for chief district and bankruptcy judges this spring and for new chief judges of all kinds in the fall.

An FJC national conference for court unit executives in the fall will include workplace harassment training.

The FJC provides an online orientation for new law clerks each year. This is now being revised to include a separate segment on workplace harassment.

In addition to a change made in the Law Clerk Handbook in December, to clarify that law clerks' duty of confidentiality does not extend to misconduct by a judge, the FJC will make further revisions in this and other publications to address workplace harassment, including reporting procedures.

The Working Group also has under consideration changes in training for EDR counselors and others who may advise or assist court personnel about workplace harassment issues.

4. *What action, if any, has the AO taken following the allegations to strengthen the employee resolution process?*

The Working Group will be specifically examining all aspects of the Employment Dispute Resolution process to look for areas for possible enhancements as part of its key objectives. In an example of the Judiciary's commitment to this principle, the AO, with direct senior leadership involvement, recently finalized a years-long initiative on behalf of the Judicial

Conference to ensure that all courts have protection against retaliation for whistleblowers and to incorporate these protections into their local EDR Plans. As a result, all circuit courts, all district courts, and all bankruptcy courts have whistleblower retaliation prohibitions.

5. *What current policies for sexual harassment training are currently in place in the Judiciary? Do law clerks and court employees participate in training?*

Orientation programs for new judges, annual continuing education workshops, and periodic ethics advisories from the Code of Conduct Committee of the Judicial Conference have for many years included training on ethics and the Code of Conduct for judges.

In our response to Chairman Grassley's letter to me of December 6, 2017, we provided a detailed response, including a lengthy chart, outlining numerous types of training provided to judges, law clerks, and court staff on a variety of management and oversight responsibilities, including training on prohibited personnel practices, ethics, and general court management. (See my letter to Chairman Grassley, January 12, 2018, response to question 5 (enclosed).)

This year, the Federal Judiciary's orientation programs for new judges include specific training on "Respect in the Workplace" (a program that includes the topic of harassment). This training will also be included in continuing education workshops for judges, as well as in other programs for new and experienced judges.

Staff training includes Preventing Workplace Harassment, Meet on Common Ground (a program about diversity and civility in the workplace); and the Code of Conduct for Judiciary Employees. Law clerks are trained on the Code of Conduct through in-person and video training. There will also be harassment training at upcoming sessions for court unit executives. And there will be training for Chief District Judges in a March 2018 training session.

The FJC is also revising the Law Clerk Handbook and online orientation for new law clerks to address harassment directly, including harassment reporting procedures.

The Office of Fair Employment Practices (OFEP) also provides the following training:

- "Managing Employee Dispute Resolution Issues in the Judiciary" is web-based training the OFEP created with the Office of Human Resources that covers Title VII, sexual harassment, and sex-based harassment as part of the discussion of the "Nine Laws" applicable to the EDR Plans. This is typically directed at EDR coordinators (who are court employees).

- "EDR Training for the Judiciary" is in-person training the OFEP provides upon request to court units, generally those responsible for overseeing or those responsible for carrying out duties in the EDR process. It covers Title VII, sexual harassment, and sex-based harassment, as part of the discussion of the "Nine Laws" applicable to the EDR Plans.

- "Harassment in the Workplace" is in-person training or video conference training the OFEP provides, upon request, to court units that is customized to the needs of the court unit. It has been done, for example, with the FJC, and involved preparation of training for all employees, all managers, and judges (where the OFEP was responsible for the judges' portion).

6. *Do anti-retaliation statutes protect law clerks or courtroom employees if they report sexual harassment against federal judges?*

The Rules for Judicial-Conduct and Judicial-Disability (RJCD) Proceedings, which along with the Judicial Conduct and Disability (JC&D) Act of 1980, 28 U.S.C. §§ 351–364, establish standards and procedures for addressing conduct and disability complaints against a federal judge, prohibit retaliation against a law clerk or courtroom employee for reporting sexual harassment by a federal judge. Specifically, Rule 3(h)(1)(H) provides that "retaliating against complainants, witnesses, or others for participating in [the conduct and disability] complaint process" constitutes "cognizable misconduct." See Guide to Judiciary Policy, Vol. 2, Part E, Ch. 3, § 320, Article I(3)(h)(1)(G).

As I previously provided to you in correspondence on January 12, 2018, the Federal Judiciary also has put in place comprehensive protections for its employees generally including law clerks against retaliation (by judges or other judiciary employers) that mirror anti-retaliation statutes. Thus, retaliation against any Federal Judiciary employee, including law clerks or courtroom employees, for reporting sexual harassment by a federal judge is prohibited under the Federal Judiciary's policies. Specifically, harassment against any employee based on certain protected classes, including sex, or retaliation for engaging in any protected activity is expressly prohibited under the Model Employment Dispute Resolution Plan ("Model EDR Plan") as adopted by the Judicial Conference of the

United States. See question 7 for a discussion of our efforts to ensure the EDR plans cover all law clerks.

7. Some federal court districts allow law clerks to participate in the Judiciary's employee dispute resolution program. How many districts allow this type of dispute resolution? Why might a district not allow their law clerks to participate in this program?

The Judiciary's Model EDR Plan explicitly covers law clerks. Nine of the eleven federal circuits have included law clerks in the EDR plans for all of the courts within their jurisdiction. The only two federal circuits that do not currently cover law clerks within the EDR plans of their individual courts are the Seventh and Eleventh circuits. Those circuits have not covered law clerks in their EDR process because law clerks may raise allegations regarding harassment by a judge through the Judicial Conduct and Disability Act complaint process. Nonetheless, the Working Group is encouraging both the Seventh and Eleventh circuits to update their EDR plans to include law clerks. Both the Seventh Circuit and the Eleventh Circuit are now reviewing their EDR plans and are considering that action.

8. How many complaints alleging sexual harassment or misconduct are filed by courtroom staff and federal law clerks each year? How many of these complaints are investigated? How many result in findings for and against judges?

There are two ways in which the Judiciary typically compiles complaints from courtroom staff and federal law clerks alleging sexual harassment by a judge: the Judicial Conduct and Disability ("JC&D") complaint process and the Employment Dispute Resolution ("EDR") program.

In 2016, there were no complaints alleging sexual harassment by a federal judge filed by courtroom staff or law clerks under the JC&D Act procedures.

In 2016, there was one EDR claim alleging sexual harassment by a judge filed by a law clerk. In accordance with the applicable EDR plan, the employee initiated an action by requesting counseling. As set forth in the Model EDR Plan, which is attached in our response to Question 10, counseling involves a designated EDR counselor discussing the employee's concerns, eliciting information regarding the matter, advising the employee of his/her rights and responsibilities and the procedures applicable to the EDR process, evaluating the matter, and assisting the employee in achieving an early resolution of the matter, to the extent possible. In this situation from 2016, the employee and the employing office were

able to achieve an equitable resolution of the matter during the EDR counseling process, which concluded the matter prior to the initiation of further fact-finding.

9. Describe the process the Judiciary uses to investigate a claim of misconduct.

Misconduct claims can be filed under the JC&D Act or under the Model EDR Plan.

Complaints of judicial misconduct are governed by the JC&D Act, 28 U.S.C. §§ 351–364, and the JC&D Rules. Any person can file a complaint or a circuit chief judge can identify a complaint. Every complaint is reviewed and considered by the circuit chief judge. The circuit chief judge must refer a complaint raising factual issues to a special committee of district and circuit judges for an investigation as extensive as necessary. The special committee then submits a report, including fact-finding and recommendations to the judicial council, for consideration. A complainant can file a petition for review from a judicial council's order following appointment of a special committee to the Judicial Conduct & Disability Committee. Where a judicial council determines that a subject judge may have engaged in conduct that might constitute grounds for impeachment, the judicial council must certify such a determination to the Judicial Conference, and the Judicial Conference – if it concurs – must certify and transmit the determination and record of the proceeding to the House of Representatives.

The Model EDR Plan includes a reporting provision that encourages any judiciary employee who experiences or observes sexual harassment or other wrongful discrimination to report that to one of the court's EDR Coordinators, a unit executive or supervisor, a human resource manager or the Chief Judge. Any of those persons who receive a report of harassment are obligated to immediately notify the Chief Judge, who will then ensure that an appropriate investigation is conducted by an impartial investigator. Retaliation against any employee making such a report is prohibited. The goal of this reporting provision is to bring to the court unit's attention any sexual, racial, or other discriminatory harassment so that it can promptly be prevented or corrected.

10. Please supply all rules and procedures that may govern a claim of misconduct against a judge.

Copies of the Model EDR, the JC&D statute, and the RJCD are enclosed with this letter.

11. News reports have pointed to several specific investigations of judges accused of sexual misconduct. For each of the following individuals, please describe what action, if any, the Judiciary took to investigate and resolve these claims.

The following summaries are provided in response to this question. All of the judges you have identified are no longer on the bench. Relevant decisions and orders are enclosed.

a. U.S. District Court Judge Walter Smith on the U.S. District Court for the Western District of Texas, who in 1998 was accused of sexual harassment by a deputy court clerk.

Judge Walter S. Smith, Jr. (W.D. Tex.): Matter Investigated and Judge Resigned. On September 8, 2014, attorney Ty Clevenger filed a complaint alleging Judge Smith engaged in abusive sexual conduct toward a clerk's office employee on January 22, 1998.

The Chief Judge of the Fifth Circuit appointed a Special Committee on October 28, 2014. The Special Committee began its investigation in January 2015, and interviewed witnesses and took depositions throughout the first part of that year. The investigation was completed by mid-May. Judge Smith met with the Committee and testified under oath on August 18, 2015. In October 2015, the Special Committee provided its Report to the Judicial Council.

The Judicial Council issued an order on December 3, 2015, finding the following: (1) Judge Smith "made inappropriate and unwanted physical and non-physical sexual advances toward [the clerk's office employee];" (2) Judge Smith "does not understand the gravity of such inappropriate behavior and the serious effect that it has on the operations of the courts;" and (3) Judge Smith "allowed false factual assertions to be made in response to the complaint, which, together with the lateness of his admissions, contributed greatly to the duration and cost of the investigation." The Judicial Council issued a reprimand to Judge Smith, instructed the Clerk of Court for the Western District of Texas to suspend the assignment of new cases to Judge Smith for one year, and directed Judge Smith to complete sensitivity training.

Mr. Clevenger filed a petition for review to the JC&D Committee on January 18, 2016, in which he requested the Committee "suspend Judge Smith from the bench immediately and recommend impeachment."

Mr. Clevenger also noted he submitted "the names of witnesses to other alleged incidents wherein Judge Smith sexually harassed women in the courthouse" and alleging that "the assault of [the court employee] was [not] an isolated incident."

On July 8, 2016, the JC&D Committee issued a decision returning the matter to the Fifth Circuit Judicial Council to make additional findings related to the other individuals who allegedly witnessed other instances of Judge Smith's sexual harassment of women in the courthouse, which raised the question whether there was a "pattern and practice of such behavior," and requesting "additional findings and recommendations as to the manner in which Judge Smith's conduct adversely impacted or interfered with the inquiry, if at all."

The Special Committee re-engaged its prior investigators. In the second investigation, over the course of approximately two months, the investigators ensured that all witnesses identified by the complainant, as well as all witnesses potentially having information relevant to the issues raised in the order of remand, were interviewed. The investigators obtained statements or affidavits from, and/or conducted depositions of, all people having relevant information. Overall, the investigators communicated with, received statements or affidavits, from or deposed over 50 people.

Before the Committee could conduct hearings, Judge Smith retired from office under 28 U.S.C. § 371(a) on September 14, 2016. Following Judge Smith's retirement, the Judicial Council concluded

Mr. Clevenger's complaint against Judge Smith on September 28, 2016, on the basis that a judge who retires under Section 371(a) is "no longer a judicial officer" and is "no longer subject to the disciplinary procedures of [the Act] and the remedies they prescribe." The JC&D Committee denied Mr. Clevenger's subsequent petition for review, concluding that "[t]he Circuit Judicial Council properly concluded the conduct and disability proceeding was unnecessary because Judge Smith . . . retired under 28 U.S.C. § 371(a)."

b. U.S. District Court Judge Edward Nottingham on the U.S. District Court of Colorado faced a judicial misconduct complaint involving allegations that he spent thousands of dollars at strip clubs and was involved in a prostitution ring.

Judge Edward W. Nottingham (D. Colo.): Matter Investigated and Judge Resigned. In August 2007, following media reports regarding allegations against Judge Nottingham, the then Chief Circuit Judge identified a misconduct complaint against Judge Nottingham. The complaint alleged that Judge Nottingham spent more than $3,000 at a sexually oriented nightclub in one evening, that he could not

remember how he had spent that much money because he had a lot to drink, and that this conduct may have brought disrepute to the Judiciary and constituted misconduct. Based on other allegations in the news, the complaint also alleged that Judge Nottingham may have violated court policy by viewing sexually explicit images on his court computer. The Circuit Chief Judge referred the matter to a Special Committee.

On September 19, 2007, a separate misconduct complaint was filed alleging that Judge Nottingham had parked illegally in a handicapped parking space and, in an ensuing conversation with the complainant, had misused his authority by identifying himself as a federal judge and threatening to call the U.S. Marshals. The Circuit Chief Judge also referred this complaint to the Special Committee.

The Special Committee determined that Judge Nottingham may have made false statements in his initial response to the allegations regarding computer use and in a transcribed interview, and expanded the scope of the complaint to include these alleged false statements.

In March 2008, the Circuit Chief Judge and the Special Committee learned from news reports of allegations that Judge Nottingham had solicited prostitutes. Following an informal investigation into these allegations and two hearings, the Circuit Chief Judge identified a misconduct complaint against Judge Nottingham on October 1, 2008, alleging that he had been a client of prostitution businesses in violation of Colorado law, had misused his court-owned cell phone in making calls to prostitutes, and had made false statements during the investigation. This matter was referred to a new Special Committee. On October 8, 2008, the two Special Committees submitted a joint report to the Judicial Council.

On October 10, 2008, another misconduct complaint was filed against Judge Nottingham. The complainant alleged that she had been a prostitute and that Judge Nottingham had been one of her clients. She further alleged that on February 29, 2008, Judge Nottingham asked her to lie to federal investigators about the nature of their relationship and not to disclose that she was a prostitute whom he paid in exchange for sex.

Judge Nottingham resigned his commission as a United States district judge effective October 29, 2008. The Judicial Council found that the resignation was in the interest of justice and the Judiciary. The Judicial Council further noted that the misconduct procedures apply only to federal judges, and determined that the misconduct complaints should be concluded because Judge Nottingham's resignation made further proceedings unnecessary.

c. U.S. District Court Judge Richard Cebull on the U.S. District Court of Montana, accused of making racist jokes and disparaging statements about women and certain allegations.

Judge Richard F. Cebull (D. Mont.): Matter Investigated and Judge Retired. In February 2012, Judge Cebull used his court email account to forward a racist joke about President Obama to six acquaintances, which prompted widespread reporting in the local and national press. When the incident became public, Judge Cebull wrote a letter of apology to the President and asked the Chief Judge of the Ninth Circuit to identify a complaint against him. A judge from another circuit court also filed a complaint against Judge Cebull based on the same incident. The Chief Judge of the Ninth Circuit referred both complaints to a Special Committee.

The Special Committee issued its Report on December 17, 2012, describing its investigation, which included: (1) retrieval, review, and analysis of approximately four years of Judge Cebull's emails; (2) interviews with over 25 witnesses; (3) analysis of Judge Cebull's cases (with particular attention to sentencing practices, civil rights cases, and appeals); and (4) an interview with Judge Cebull and materials submitted by his counsel. The Special Committee's investigation found that there were hundreds of inappropriate emails, including a significant number of emails concerning women and/or sexual topics that were disparaging of women. The Special Committee's investigation found no evidence of bias in Judge Cebull's rulings or in his sentencing practices, and no cases that were "troubling." The Order noted the Special Committee interviewed "key individuals in Montana's legal community, court staff and Judge Cebull's professional and social contacts," and found that "[w]itnesses generally regarded Judge Cebull as a good and honest trial lawyer, and an esteemed trial judge."

On March 15, 2013, the Ninth Circuit Judicial Council issued an Order finding that Judge Cebull engaged in misconduct, as defined under the JC&D Act, and violated Canon 2 of the Code of Conduct for U.S. Judges, and issuing sanctions against Judge Cebull. The Judicial Council issued a public reprimand, ordered that no new cases be assigned to Judge Cebull for 180 days, and ordered Judge Cebull to complete training on judicial ethics, racial awareness, and elimination of bias. Further, the Judicial Council condemned Judge Cebull's initial apology as insufficient and required that he issue a second apology, approved by the Judicial Council that would "acknowledge the breadth of his behavior and his inattention to ethical and practical concerns surrounding personal email." Two members of the Judicial Council wrote a concurring statement that "the Judicial Council should request that Judge Cebull voluntarily retire from the Judiciary under 28 U.S.C. § 371(a) in recognition of the severity of his violation and the breadth of the public reaction."

On April 2, 2013, the Ninth Circuit Judicial Council announced that Judge Cebull had decided to retire, effective May 3, 2013. On May 13, 2013, the Judicial Council issued an Order vacating its March 15 Order as moot in light of Judge Cebull's retirement and stating it would "consider appropriate revisions" at a forthcoming meeting. The judge complainant filed a Petition for Review to the Judicial Conduct and Disability Committee seeking review of the May 13 vacatur.

On July 2, 2013, the Judicial Council issued an Order that "dismissed the complaints as moot," declared that the "intervening event of Judge Cebull's retirement "conclude[d] these proceedings," and that the vacatur of the March 15 Order had been predicated on "changed circumstances" resulting from Judge Cebull's retirement. The July 2 Order presented a truncated version of the March 15 Order's findings, including the description of the inappropriate emails. The judge complainant filed a second Petition for Review on July 23, 2013, incorporating the first Petition and requesting review of the July 2 Order based on the judge's "concern about the propriety of a Judicial Council issuing a final order making detailed findings of extensive judicial misconduct and then, after the subject judge retires, sua sponte vacating its own final order and issuing a new order that effectively conceals the judicial misconduct that previously had been identified and detailed."

On review, the Judicial Conduct and Disability Committee concluded that the March 15 Order was subject to the publication requirements under the JC&D Act because it was "a final decision on the merits" and Judge Cebull's retirement was not an "intervening event" because it came after the adjudication of the merits. The Judicial Conduct and Disability Committee ordered publication of the Judicial Council's March 15 Order as the final order disposing of the complaints on the merits while recognizing that the provisions commanding Judge Cebull to take remedial action were inoperative.

d. U.S. District Court Judge Samuel Kent on the U.S. District Court for the Southern District of Texas, indicted on three counts of abusive sexual cntact and attempted aggravated sexual abuse. Judge Kent later pled guilty to a lesser offense.

Judge Samuel B. Kent (S.D. Tex.): Matter Investigated; Judge faced remedial action; Matter reinvestigated; Judge pled guilty to criminal charges; Matter referred for impeachment; Judge impeached and resigned. A judicial misconduct complaint was filed on May 21, 2007, against Judge Kent alleging sexual harassment of a judicial employee. The Chief Judge of the Fifth Circuit appointed a Special Committee. The Special Committee recommended reprimanding the

judge, as well as other remedial actions. The Judicial Council accepted the recommendations of the Special Committee and concluded the proceedings because appropriate remedial action had been taken, including the judge's four-month leave of absence from the bench, reallocation of the Galveston/Houston docket, and other measures. The Judicial Council also reprimanded Judge Kent based on the conduct described in the Special Committee report. See September 28, 2007 Order.

The complainant filed a motion for reconsideration, seeking a determination that Judge Kent may have engaged in conduct in violation of specific federal criminal statutes that might constitute one or more grounds for impeachment, and also asked the Council to certify such a determination, if made, to the Judicial Conference of the United States. The complainant also alleged that there was additional evidence of misconduct by Judge Kent, including inappropriate behavior toward other judiciary employees.

The Judicial Council noted that the U.S. Department of Justice had subsequently initiated a criminal investigation, with which the Council was cooperating. The Council noted that the propriety of further judicial discipline, or a certification to the Judicial Conference of the United States, could not be fairly evaluated without adversarial proceedings in which the witnesses would be subjected to cross-examination. The Council further determined that conducting adversarial proceedings while a criminal investigation was underway could prejudice the judicial misconduct investigation. The Council deferred action on the complainant's motion for reconsideration in light of the ongoing criminal investigation. During the pendency of the criminal investigation, Judge Kent agreed not to handle any civil or criminal cases in which the United States was a party or in which sexual misconduct of any kind was alleged.
See December 20, 2007 Order.

On August 28, 2008, a United States Grand Jury handed down a three count indictment charging Judge Kent with felonies for conduct which had been the subject of the misconduct investigation of the Special Committee and the sanctions imposed by the Council as a result of that misconduct. On January 6, 2009, the same Grand Jury issued a superseding indictment charging Judge Kent with committing additional misconduct beyond the misconduct the Special Committee and the Judicial Council had discovered or considered when issuing its earlier sanction.

Based on these developments, the Judicial Council granted the complainant's motion seeking reconsideration of the sanctions imposed against Judge Kent. The Judicial Council further determined that, following the trial of the criminal charges

pending against Judge Kent, (including Kent's obstruction of the Council's own investigation) the Council would investigate the additional charges of misconduct alleged in the superseding indictment and any supplemental investigation of the misconduct alleged in the original indictment. The Judicial Council would then consider potential further sanctions in light of the result of the investigation.

On May 27, 2009, the Judicial Council issued an order noting that Judge Kent "has pled guilty to obstruction of justice in violation of 18 U.S.C. § 1512I(2) and has thus by his own admission engaged in conduct which constitutes one or more grounds for impeachment under Article II of the Constitution, and so certifies its determination to the Judicial Conference of the United States." The Judicial Council further determined that "the foregoing events and certification, together with the facts that Judge Kent has voluntarily moved out of his chambers and ceased handling cases, moot this Council's reopening of the disciplinary proceeding against Judge Samuel B. Kent."

e. U.S. District Court Judge Richard Roberts on the U.S. District Court for the District of Columbia, accused of raping a 16 year-old witness while he was a prosecutor.

Matter Investigated as to disability; found not to have committed misconduct as a judge; Judge retired on permanent disability. On March 14, 2016, and May 26, 2016, the Utah Attorney General's Office and Terry Mitchell filed judicial misconduct complaints against Judge Richard Roberts (D-DC). Terry Mitchell alleged in part that Judge Roberts, prior to his judicial appointment, "used his authority and status as a federal prosecutor to manipulate and coerce [then-]sixteen-year-old Terry Mitchell"—a witness in a 1981 trial—"into numerous sex acts before and throughout the trial." The Utah Attorney General made similar serious allegations.

Within a matter of days of the Utah Attorney General's judicial misconduct complaint, Judge Roberts retired based on a permanent disability. On March 18, 2016, the Acting Chief Judge of the DC Circuit dismissed the Utah Attorney General's complaint on the ground that Judge Roberts's recent retirement "'render[ed] . . . the allegations moot or [made] remedial action impossible.'"

The Utah Attorney General filed a Petition for Review of the Acting Chief Judge's dismissal of its complaint. Upon request from the DC Circuit Judicial Council, the Chief Justice transferred to the Tenth Circuit the Utah Attorney General's complaint and any related matters (including the subsequent complaint filed by Terry Mitchell). Terry Mitchell's complaint also alleged that Judge Roberts dishonestly asserted a disability to retire and avoid the consequences of these

allegations.

The Tenth Circuit Judicial Council granted in part the Utah Attorney General's Petition for Review. Specifically, it vacated the dismissal order after determining that Judge Roberts's retirement "does not preclude him from coverage under the Judicial Conduct and Disability Act," and returned the complaint to the Chief Judge of the Tenth Circuit for further action. The Chief Judge of the Tenth Circuit consolidated the two complaints and appointed a Special Committee to determine whether the claims fell within the scope of the Judicial Conduct and Disability Act and, if so, to investigate the allegations and underlying facts.

Following the Special Committee's investigation and submission of its Report, the Tenth Circuit Judicial Council dismissed the Utah Attorney General's and Terry Mitchell's judicial misconduct complaints, concluding that Judge Roberts's pre-appointment conduct is not justiciable under the Judicial Conduct and Disability Act, and further that Judge Roberts did not dishonestly assert a disability.

Neither the Utah Attorney General nor Terry Mitchell filed a petition for review of those determinations. Judge Roberts, however, filed a Petition for Partial Review in which he objected to the Judicial Council's inclusion of the medical diagnosis underlying his disability retirement. On review, the JC&D Committee denied Judge Roberts's request to strike that specific medical diagnosis from the record on the basis that "Judge Roberts's medical diagnosis ha[d] been placed directly at issue due to the timing of his departure from judicial office, occurring within days of the filing of the Utah Attorney General's judicial misconduct complaint and Terry Mitchell's federal civil complaint." JC&D Order at 6.

On the Judicial Council's request, the JC&D Committee forwarded a copy of the Judicial Council's Order and its Decision denying Judge Roberts's Petition for Partial Review to the House Judiciary Committee, the House Oversight Committee, the Senate Judiciary Committee, and the Senate Finance Committee in recognition of "the importance of ensuring that governing bodies with clear jurisdiction [were] aware of the complaint."

f. U.S. Circuit Court Judge Alex Kozinski on the Ninth Circuit accused of sexual harassment and misconduct by several women.

Judge Alex Kozinski (9th Cir.): Retired immediately following referral for investigation. On December 14, 2017, the Chief Judge of the Ninth Circuit identified a misconduct complaint against then-Circuit Judge Kozinski "based on allegations contained in a December 8, 2017, Washington Post article entitled 'Prominent 9th Circuit Judge Accused of Sexual Misconduct' and any other

related articles." On December 15, 2017, the Chief Justice transferred the proceeding to the Second Circuit Judicial Council.

Three days later, on December 18, 2017, then-Judge Kozinski relinquished his commission as a United States circuit judge by retiring, effective immediately, under 28 U.S.C. § 371(a).

On February 5, 2018, the Second Circuit Judicial Council concluded the proceeding on the basis of the aforementioned retirement, stating that "Because Alex Kozinski has resigned the office of circuit judge, and can no longer perform any judicial duties, he does not fall within the scope of persons who can be investigated under the Act." Given the seriousness of the conduct alleged, however, the Judicial Council "acknowledge[d] the importance of ensuring that governing bodies with clear jurisdiction are aware of the complaint" and requested that "the Committee on Judicial Conduct and Disability . . . forward a copy of this order to any relevant Congressional committees for their information."

12. A CNN report reviewed 1,303 misconduct complaints filed in 2016. They concluded: "of those, only four were referred to special committee for the most serious level of investigation." The report found a similar pattern in 2015.

a. Why were so few complaints fully investigated by the Judiciary?

See answer to (b) below.

b. Do these news reports accurately reflect the pervasiveness of sexual harassment and misconduct within the Judiciary?

The media report you cite above is wildly misleading and I am pleased to have the opportunity to correct it. Any suggestion that the Judiciary does not take sexual misconduct complaints seriously is irresponsible and simply wrong.

Here are the facts: The Judicial Conduct and Disability Act and the Rules do not provide for review of case related judicial decisions. Of course, that authority resides in the courts of appeals. Nevertheless, the vast majority of the complaints we receive under the JC&D Act are complaints related to a judge's decision. Our publicly reported data shows that of the 1,303 judicial "misconduct" complaints filed nationwide under the JC&D procedures in fiscal year 2016, cited in the media report you have referenced, over 1,200 of them were filed by dissatisfied litigants and prison inmates. No misconduct complaints were filed under these procedures by law clerks or Judiciary employees in 2016, the year cited in the

media report. Moreover, none of the four complaints in 2016 that were referred to a special committee for further investigation, as provided under the statute, involved sexual misconduct.

This has been true in most years. And it is a reason we have not created a separate category for sexual harassment in our annual published statistical report on JC&D complaints – in most years there simply have been no complaints relating to sexual harassment. Nonetheless, we will create a separate statistical category for sexual harassment complaints under the JC&D and report that data.

There are over 30,000 employees in the Federal Judiciary. The sad fact is that, just as in other public and private workplaces, sexual harassment issues are often not reported. Our Working Group is addressing this issue by removing barriers to filing complaints and educating employees about the options they have available.

13. What, if any, statutory recommendations does the Judiciary have for improving the current statutes involving the Judiciary's complaint process, codified in 28 U.S.C. §§ 351-353?

Our Working Group does not have any statutory recommendations concerning the Judiciary's complaint process to make to Congress at this time. We will continue to examine the statutory framework for judicial misconduct and disability complaints. We have preliminarily identified areas of potential modifications and clarifications to our codes of conduct guidelines, EDR processes, training and orientation programs to address the issues we have seen during our review.

We will continue to work on these important issues.

Sincerely,

James C. Duff
Director

Enclosure

APPENDIX 5

Letter from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley and Ranking Member Dianne Feinstein (Mar. 8, 2018)



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

March 8, 2018

Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley and Senator Feinstein:

This is a follow up to my letter to you of February 16, 2018, on actions by the Judiciary's Workplace Conduct Working Group (Working Group) in its examination of policies and procedures within the Judiciary to protect employees from inappropriate workplace conduct and develop enhancements to those protections.

Our Working Group held its second in-person meeting on March 1, 2018. Our meeting included productive sessions with representatives from current and former law clerks, as well as a cross section of other Judiciary employees. We will meet again in about three weeks.

The Working Group made progress on several initiatives. In addition to actions we already have taken to revise law clerk and employee guidelines and handbooks, seek online comments from current and former Judiciary employees, and refine our data collection relating to misconduct complaints, we resolved to work with the Judicial Conference of the United States to:

1. Improve law clerk and employee orientations with increased training on workplace conduct rights, responsibilities, and recourse that will be administered in addition to, as well as separately from, other materials given in orientations.

2. Provide "one click" website access to obtain information and reporting mechanisms for both Employment Dispute Resolution (EDR) and Judicial Conduct and Disability Act (JC&D) claims for misconduct.

3. Create alternative and less formalized options for seeking assistance with concerns about workplace misconduct, both at the local level and in a national, centralized office at the Administrative Office of the U.S. Courts to enable employees to raise concerns more easily.

4. Provide a simplified flowchart of the processes available under the EDR and JC&D.

5. Create and encourage a process for court employee/law clerk exit interviews to determine if there are issues and suggestions to assist court units in identifying potential misconduct issues.

6. Establish a process for former law clerks and employees to communicate with and obtain advice from relevant offices and committees of the Judiciary.

7. Continue to examine and clarify the Codes of Conduct for judges and employees.

8. Improve communications with EDR and JC&D complainants during and after the procedures.

9. Revise the Model EDR Plan to provide greater clarity to employees about how to navigate the EDR process.

10. Establish qualifications and expand training for EDR Coordinators.

11. Lengthen the time allowed to file EDR complaints.

12. Integrate sexual harassment training into existing Judiciary programs on discrimination and courtroom practices.

We also have added instructive programs on our policies and procedures for the upcoming meetings of the chief district court judges at the Federal Judicial Center (FJC) on March 16, 2018, as well as at FJC workshops and upcoming circuit conferences of judges throughout the country this spring. There also will be judge training at the FJC national workshops for district judges this summer.

Following our March 1, 2018, Working Group meeting we were pleased to meet with your respective staff to summarize these developments. We were grateful both for their time and helpful suggestions for making further improvements in our policies and practices. We will continue to work closely with them and will keep you informed of our progress.

Sincerely,

James C. Duff
Director

cc: Judiciary Workplace Conduct Working Group

APPENDIX 6

Press Release, Judicial Conference Receives Status Report on Workplace Conduct Review (Mar. 13, 2018)

Judicial Conference Receives Status Report on Workplace Conduct Review

Published on March 13, 2018

Nearly 20 reforms and improvements have been implemented or are under development to help address workplace conduct concerns in the federal judiciary, James C. Duff, Chair of the Federal Judiciary Workplace Conduct Working Group **(/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed)**, reported today at the biannual meeting of the Judicial Conference.

In introducing Duff before he delivered his report, Chief Justice John G. Roberts, Jr., who is the Conference's presiding officer, told the group, "I would like to reiterate what I stated in my year-end report. I have great confidence in the men and women who comprise the federal judiciary. I am sure that the overwhelming number have no tolerance for harassment and share the view that victims must have a clear and immediate recourse to effective remedies. The Work of this group will help our branch take the necessary steps to ensure an exemplary workplace for every court employee."

Duff, who is Director of the Administrative Office of the U.S. Courts, by statute also serves as the Secretary to the Judicial Conference.

"Any harassment in the judiciary is too much," Duff said in his report to the Conference. He told the Conference that the Working Group hopes to simplify and develop additional options, at both the national and local levels, for employees to seek assistance with workplace conduct matters.

Duff reported that the Working Group has held two meetings since its formation in January, and will meet again in early April. Representatives of current and former law clerks and a cross-section of current judiciary employees met with the Working Group at its most recent meeting and had what Duff described as "an informative and productive discussion."

The Working Group also is receiving input via a mailbox **(/workplace-conduct-comment)** on uscourts.gov, through which current and former judiciary employees can submit comments relating to the policies and procedures for protecting all judiciary employees from inappropriate workplace conduct. Similarly, the Working Group has reached out to more than 250 current employees who serve on various groups and councils.

Duff wrote to Senators Charles Grassley, Chair, and Diane Feinstein, Ranking Member, of the Senate Judiciary Committee on March 8, 2018 **(/file/24080/download)**, and February 16, 2018 **(/file/24043/download)**, to provide them status reports on the Working Group and an in-depth explanation of the employee dispute and judicial conduct resolution procedures.

In addition, some circuits and districts have established similar initiatives, and the Working Group is coordinating closely with them.

All final recommendations will be made public. Some will be shared in the course of the Group's review. Others will be announced after the Judicial Conference considers and acts on them. It is anticipated that the Working Group will submit its report in May 2018.

The following either have been accomplished or are in progress:

- Provided a session on sexual harassment during the ethics training for newly appointed judges in February.
- Established an online mailbox and several other avenues and opportunities for current and former judiciary employees to comment on policies and procedures for protecting and reporting workplace misconduct.
- Added instructive in-person programs on judiciary workforce policies and procedures and workplace sexual harassment to the curricula at Federal Judicial Center programs for chief district and chief bankruptcy judges this spring and upcoming circuit judicial conferences throughout the country this spring and summer.
- Removed the model confidentiality statement from the judiciary's internal website to revise it to eliminate any ambiguous language that could unintentionally discourage law clerks or other employees from reporting sexual harassment or other workplace misconduct.
- Improve law clerk and employee orientations with increased training on workplace conduct rights, responsibilities, and recourse that will be administered in addition to, as well as separately from, other materials given in orientations.
- Provide "one click" website access to obtain information and reporting mechanisms for both Employment Dispute Resolution (EDR) and Judicial Conduct and Disability Act (JC&D) claims for misconduct.
- Create alternative and less formalized options for seeking assistance with concerns about workplace misconduct, both at the local level and in a national, centralized office at the Administrative Office of the U.S. Courts, to enable employees to raise concerns more easily.
- Provide a simplified flowchart of the processes available under the EDR and JC&D.
- Create and encourage a process for court employee/law clerk exit interviews to determine if there are issues and suggestions to assist court units in identifying potential misconduct issues.
- Establish a process for former law clerks and employees to communicate with and obtain advice from relevant offices and committees of the judiciary.
- Continue to examine and clarify the Codes of Conduct for judges and employees.
- Improve communications with EDR and JC&D complainants during and after the claims process.
- Revise the Model EDR Plan to provide greater clarity to employees about how to navigate the EDR process.

- Establish qualifications and expand training for EDR Coordinators.
- Lengthen the time allowed to file EDR complaints.
- Integrate sexual harassment training into existing judiciary programs on discrimination and courtroom practices.
- Review the confidentiality provisions in several employee/law clerk handbooks to revise them to clarify that nothing in the provisions prevents the filing of a complaint.
- Identify specifically the data **(/statistics/table/s-22/judicial-business/2016/09/30)** that the judiciary collects about judicial misconduct complaints to add a category for any complaints filed relating to sexual misconduct. The data shows that of the 1,303 misconduct complaints filed in fiscal year 2016, more than 1,200 were filed by dissatisfied litigants and prison inmates. No complaints were filed by law clerks or judiciary employees and no misconduct complaints related to sexual harassment.

The 26-member Judicial Conference is the policy-making body **(/about-federal-courts/governance-judicial-conference/about-judicial-conference)** for the federal court system. By statute, the Chief Justice of the United States serves as its presiding officer and its members are the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade. The Conference meets twice a year to consider administrative and policy issues affecting the court system, and to make recommendations to Congress concerning legislation involving the Judicial Branch.

APPENDIX 7

Summary of Judicial Conduct and Disability Act

EXECUTIVE SUMMARY: JUDICIAL CONDUCT AND DISABILITY ACT

Filing a Judicial Conduct or Disability Complaint Against a Federal Judge

The Judicial Conduct and Disability Act of 1980 ("Act"), 28 U.S.C. §§ 351–364, and the Rules for Judicial-Conduct and Judicial-Disability Proceedings ("Rules") govern the complaint process.

Initiation of Complaint

Under the Act and the Rules, any person may file a complaint alleging a federal judge has committed misconduct or has a disability that interferes with the performance of his or her judicial duties. 28 U.S.C. § 351(a). Alternately, a circuit chief judge may identify a complaint where the circuit chief judge finds probable cause to believe that misconduct has occurred or that a disability exists and no informal resolution is achieved or is feasible. *Id.* § 351(a); R. 5(a). A circuit chief judge must identify a complaint where the circuit chief judge finds clear and convincing evidence that misconduct has occurred or that a disability exists and no informal resolution is achieved or is feasible. *Id.*

Covered Judges

A federal judge includes a judge of a United States district court, a judge of a United States court of appeals (including the Court of Appeals for the Federal Circuit), a judge of a United States bankruptcy court, United States magistrate judges, a judge of the Court of Federal Claims, and a judge of the Court of International Trade. 28 U.S.C. § 351(d)(1); R. 4.

Misconduct

"Misconduct" is "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a); R. 3(h)(1). A "disability" is a temporary or permanent condition, either mental or physical, that makes the judge "unable to discharge all the duties" of the judicial office. *Id.*' R. 3(e). Examples of judicial misconduct may include the following:

- using the judge's office to obtain special treatment for friends or relatives;
- accepting bribes, gifts, or other personal favors related to the judicial office;
- having improper discussions with parties or counsel for one side in a case;
- treating litigants, attorneys, or others in a demonstrably egregious and hostile manner;

- engaging in partisan political activity or making inappropriately partisan statements;
- soliciting funds for organizations;
- retaliating against complainants, witnesses, or others for their participation this process; or
- violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure.

R. 3(h)(1). This list does not include all the possible grounds for a complaint.

Judicial misconduct may also include actions taken by a judge outside his or her official role as a judge only if "the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people." R. 3(h)(2). Judicial misconduct does not include an allegation that is directly related to the merits of a decision or procedural ruling. R. 3(h)(3).

Circuit Chief Judge's Review

In most instances, the chief judge of the circuit where the complainant filed their complaint will consider the complaint. 28 U.S.C. § 352(a); R. 11. A circuit chief judge generally will not consider a complaint against him- or herself. R. 25(b). In determining what action to take, the circuit chief judge may conduct a limited inquiry into the facts alleged, which may include witness interviews and the review of additional information. 28 U.S.C. § 352(a); R. 11(b). After considering the complaint, the circuit chief judge will (a) dismiss or conclude the complaint, or (b) appoint a special committee of judges to investigate the complaint. 28 U.S.C. § 352(b); R. 11(c)–(f).

(a) Circuit Chief Judge Dismissal or Conclusion of Complaint; Review by Judicial Council

The circuit chief judge must dismiss a complaint where it alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in the inability to discharge the duties of judicial office; is directly related to the merits of a decision or procedural ruling; is frivolous; is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists; is based on allegations that are incapable of being established through investigation; or has been filed in the wrong circuit. 28 U.S.C. § 352(b)(1); R. 11(c). There are other circumstances where a circuit chief judge may dismiss a complaint, as explained in the Rules and the Commentary on the Rules. *See* Rule 11(c). The circuit chief judge may conclude a complaint if the subject judge voluntarily takes corrective action or if intervening events have made further action unnecessary. 28 U.S.C. § 352(b)(2); R. 11(d)–(e).

If the circuit chief judge dismisses or concludes a complaint, the complainant may petition the judicial council of the circuit for review of that order. 28 U.S.C. § 352(c); R. 11(g)(3). A complainant must petition the judicial council within 42 days from the date of the circuit chief judge's order. R. 18(b). After considering a petition for review, the judicial council can affirm the circuit chief judge's dismissal or conclusion of the complaint, return the matter to the circuit chief judge for additional inquiry or for appointment of a special committee, or take other action, as discussed in the Rules. R. 19(b). If the judicial council unanimously affirms the circuit chief judge's dismissal or conclusion of a complaint, the complaint is terminated and the complainant has no right to further review. 28 U.S.C. § 352(c); R. 19(e). If one or more judicial council members dissents from the circuit chief judge's dismissal or conclusion of a complaint, the complainant may request review by the Committee on Judicial Conduct and Disability, as discussed in further detail below. R. 19(e).

(b) Circuit Chief Judge Appointment of Special Committee; Review by Judicial Council and Committee on Judicial Conduct and Disability

If the circuit chief judge refers a complaint to a special committee, that special committee will investigate the complaint and report on it to the circuit judicial council. 28 U.S.C. § 353(a); R. 11(g)(1); A special committee generally will consist of the circuit chief judge and an equal number of circuit and district judges. R. 12(a). A special committee conducts an investigation as extensive as it considers necessary, which may include interviews, hearings and oral arguments, and expeditiously files a comprehensive written report with the judicial council of the circuit, which presents both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council. 28 U.S.C. § 353(c); R. 13–17.

After the judicial council considers a special committee's report, it will generally issue an order on a complaint. 28 U.S.C. § 354(a); R. 20. The order may dismiss the complaint, or the order may conclude the complaint because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary. 28 U.S.C. § 354(a)(1)(B); R. 20(b)(1)(A)–(B). If the order does not dismiss or conclude a complaint, the order may sanction the judge by:

- censuring or reprimanding the judge, either by private communication or by public announcement;
- ordering that no new cases be assigned to the judge for a limited, fixed period;
- in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the judicial council, including the initiation of removal proceedings;
- in the case of a bankruptcy judge, removing the judge from office;
- in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements be waived;

- in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge so that an additional judge may be appointed;
- in the case of a circuit chief judge or district chief judge, finding the judge temporarily unable to perform chief-judge duties, with the result that those duties devolve to the next eligible judge; and
- recommending corrective action.

28 U.S.C. § 354(a)(2); R. 20(b)(1)(D). The judicial council may take other action, such as requesting the special committee conduct an additional investigation. R. 20(c).

Federal judges appointed under Article III of the U.S. Constitution hold office for life pending good behavior. Only Congress can remove an Article III judge from office. 28 U.S.C. § 354(a)(3)(A). If the judicial council finds an Article III judge's conduct may warrant impeachment, it must refer that finding to the Judicial Conference. 28 U.S.C. § 354(b). On referral, the Judicial Conference will determine whether to certify the matter to Congress, which will then decide whether to initiate impeachment proceedings. 28 U.S.C. § 355(b).

When a judicial council issues an order after it considers a special committee's report, in most circumstances a complainant may petition the Committee on Judicial Conduct and Disability for review of that order. 28 U.S.C. § 357(a); R. 21(b)(1). A complainant must file that petition for review within 42 days from the date of the judicial council's order. R. 22(c). There is ordinarily no oral argument or personal appearance before the Committee on Judicial Conduct and Disability. R. 21(e). In its discretion, the Committee on Judicial Conduct and Disability may permit written submissions. *Id.* The Committee on Judicial Conduct and Disability will conduct further investigation only in extraordinary circumstances. R. 21(d). A complainant has no right to review of any order issued by the Committee on Judicial Conduct and Disability.

Confidentiality and Publication

The complaint process is confidential, with limited exceptions. 28 U.S.C. § 360(a); R. 23. Generally, orders regarding a complaint will be made public only after final action on the complaint has been taken and the complainant has no additional right of review. *Id.* § 360(b); R. 24. Such orders will be made publicly available in the clerk's office of the relevant regional circuit and on that court's website. Any decision by the Committee on Judicial Conduct and Disability will be available on www.uscourts.gov and in the clerk's office of the relevant regional circuit. R. 24(b). Public orders usually will not disclose the name of the complainant and will disclose the name of the subject judge only where the complaint is finally disposed of by remedial action by the circuit judicial council (other than a private censure or reprimand), as described in the Act and the Rules. *See* R. 24(a).

APPENDIX 8

Summary of Model Employment Dispute Resolution Plan

EXECUTIVE SUMMARY: THE MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN

General

The Model Employment Dispute Resolution (EDR) Plan sets forth the Judicial Conference's recommended policies and procedures for providing judiciary employees with rights, protections, and remedies similar to those provided under the Family Medical Leave Act of 1993 (FMLA), Uniformed Services Employment and Reemployment Rights Act (USERRA), Title VII of the Civil Rights Act of 1964 (Title VII), Age Discrimination in Employment Act of 1967, Americans with Disabilities Act (ADA)/Rehabilitation Act of 1973 (Rehab Act), Occupational Safety and Health Act of 1970 (OSHA), Worker Adjustment and Retraining Notification Act (WARN), and Employee Polygraph Protection Act of 1988 (EPPA).

Judicial Conference policy requires all courts to adopt and implement a plan based on the Model EDR Plan. Although courts are not required to adopt and implement the Model EDR Plan in its entirety, any modifications to the Model EDR Plan must be approved by the judicial council of its circuit.

Coverage

The Model EDR Plan, or similarly adopted plans, are intended to be the Judicial Branch employees' exclusive remedy for alleged violations of the FMLA, USERRA, Title VII, ADEA, ADA/Rehab Act, OSHA, WARN, and EPPA. The Model EDR Plan applies to all:

- Article III judges and other judicial officers of the U.S. courts of appeals, district courts, bankruptcy courts, Court of Federal Claims and Court of International Trade, as well as to judges of any court created by an Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States;

- Employees of the U.S. courts of appeals, district courts, bankruptcy courts, Court of Federal Claims and Court of International Trade, as well as to judges of any court created by an Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States; and

- Staff of judges' chambers, court unit heads and their staffs, circuit executives and their staffs, federal public defenders and their staffs, and bankruptcy administrators and their staffs (including applicants and former employees).

The Model EDR Plan does not apply to interns or externs providing gratuitous service, or applicants for bankruptcy judge or magistrate judge positions.

EDR Process

The Model EDR Plan sets forth the procedural stages[1] of the EDR process, which includes:

- Informal Dispute Resolution
  - Counseling and/or
  - Mediation

- Formal Complaint

- Hearing and Decision
  - Conducted by the chief judge or a designated judicial officer (i.e. a judge appointed under Article III of the Constitution, a U.S. bankruptcy judge, a U.S. magistrate judge, a judge on the Court of Federal Claims, or a judge of any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the U.S.) including, where appropriate, a judicial officer from outside the court where the complaints arose or the parties are employed.

- Review of the Decision
  - Review of the presiding judicial officer's decision
  - Review by a judicial officer

Remedies

Remedies may be provided to successful complainants. Remedies are tailored as closely as possible to the specific violation. Remedies include retrospective relief to correct a past violation; and/or prospective relief to ensure compliance with rights protected under the Model EDR Plan. Compensatory and punitive damages are prohibited under the Model EDR Plan. Payment of attorney's fees are also impermissible, except as authorized under the Back Pay Act.

EDR Coordinators

EDR Coordinators are court employees who are designated by the court to serve as the EDR Coordinator for that court. EDR Coordinators are responsible for:

- Providing information to the court and its employees regarding the rights and protections afforded under their EDR Plan;
- Coordinating and shepherding the proper EDR complaint procedures;
- Maintaining the court's official files of claims and related matters initiated and processed under the court's EDR Plan;
- Coordinating employee counseling, and serving as a counselor, in the initial stage of the claims process. The EDR Coordinator's responsibilities during the counseling stage are:

[1] The procedural rights set out in the Model EDR Plan correspond to those established under the administrative EEO process available to federal employees in the executive branch, and are similar to the counseling and mediation requirements imposed on legislative branch employees in its administrative hearing process under the Congressional Accountability Act of 1995 (CAA).

  - Obtaining preliminary information from the aggrieved employee, including a written statement about the allegations, requested relief, and any jurisdictional matters;
  - Advising the aggrieved employee of his/her rights and responsibilities under the EDR Plan;
  - Explaining procedures available under the EDR Plan;
  - Providing a copy of the request for counseling to the relevant unit executive and chief judge of the court;
  - Obtaining pertinent information from the employing office or others as needed to evaluate the matter, consistent with the employee's right to confidentiality;
  - Making an initial effort to reach a voluntary, mutually satisfactory resolution;
  - Reducing to writing record of all contacts made by the EDR Coordinator during the counseling phase.
  - Notifying the employee, in writing, of the end of counseling and of his/her right to continue to pursue a claim.
- Collecting, analyzing, and consolidating statistical data and other information relating to the court's EDR process.

Wrongful Conduct

- Under the Model EDR Plan, employees are encouraged to report discrimination, harassment, and retaliation though the wrongful conduct process. Chief judges and unit executives are to assure that allegations of wrongful conduct are promptly investigated.

APPENDIX 9

Federal Judicial Center Trainings Related to Fair Employment Practices and Workplace Civility

The Federal Judicial Center has compiled the following resource list to aid court units in training and education related to prohibited discrimination, which includes workplace harassment. As we acquire or develop additional relevant resources, we will add them to the list.

The FJC offers several in-district training programs delivered by FJC-trained facilitators. Each of the in-district programs listed below addresses, in some way, either sexual harassment and other forms of prohibited discrimination or techniques to ensure that employees develop the skills to foster a respectful workplace. To schedule an in-district training program, contact Phyllis Drum at **pdrum@fjc.gov** or (202) 502-4134. The FJC covers the costs of participant materials and trainer travel and subsistence.

The list also includes training videos that can be used as local resources to hold discussions and conduct training on issues related to prohibited discrimination, including sexual harassment. In addition, we include a number of video resources that address topics such as overcoming bias, valuing diversity, facilitating teamwork, effective feedback, leadership in challenging situations, and strategies to enhance respectful communications. Efforts to incorporate these behaviors may also serve to foster an environment less tolerant of prohibited discrimination. To request a video from the list below, click on the hyperlinked title, which will take you to a page where you can read a more comprehensive description and place an order. A downloadable version of this list is available **here**.

Sexual and Workplace Harassment
In-District Programs
Preventing Workplace Harassment (Employee Version, 4 hours)
This program focuses on employee awareness of workplace harassment. Participants learn what workplace harassment is and what it is not, the kinds of behavior that may be interpreted as workplace harassment, how a workplace can become a hostile environment, and how to minimize the occurrence of workplace harassment. Participants learn how to deal with harassment if it arises and what to do if they are involved in a workplace harassment investigation.

Preventing Workplace Harassment (Management Version, 4 hours)
This program emphasizes managers' responsibility to maintain an environment free of hostility, where courtesy and mutual respect are the basis for communication and conflict resolution. Participants learn what workplace harassment is and what it is not, the kinds of behavior that may be interpreted as workplace harassment, and how a workplace can become a hostile environment. Managers also learn how to minimize the occurrence of workplace harassment, how to handle an allegation or incident, what to do during an investigation, how to handle a false or spiteful claim of workplace harassment, and how organizations can minimize the occurrence of harassment.

Videos Available from FJC Current Collection
Court Web: What You Do Not Know About Harassment Could Hurt You! (2017, 5523-V/17, 1 hour 12 mins.)

While covering behaviors that should always be avoided, this webcast focuses heavily on some of the gray areas where people without bad intent have offended others. The webcast also ad-dresses how employees—including leaders—should respond to harassing or other unacceptable behavior.

It's Still Not Just About Sex Anymore: Harassment & Discrimination in the Workplace (2016, 5559-V/16, 21 mins.)
This program will educate employees about the many forms of workplace harassment and dis-crimination. It provides dramatizations of harassment behaviors, demonstrating how these behaviors can lead to formal charges and result in serious consequences for the individuals involved. The program also teaches what is and is not acceptable in today's workplace and what each individual's responsibilities are toward his or her colleagues.

Sexual Harassment: The "Takeaway" for Managers (2016, 5511-V/16, 12 mins.)
This program for managers defines sexual harassment according to the law and explains why it's important to take a proactive approach to this problem. The program includes short vignettes that illustrate and dramatize the material presented. This program focuses on four key learning points: the legal definition of sexual harassment; a proactive response; the importance of documentation; and the fear of retaliation.

Videos Available from FJC Archives
Harassment and Diversity: Respecting the Differences—Employee Version (2007, 5163-V/07, 16 mins.)
Harassment is not only about sex and gender. It can also involve various cultural differences, race, religion, age, disabilities, and other protected characteristics. The video focuses on employee sensitivity and awareness. It teaches why a harassment policy that emphasizes a respect for coworker differences is not only required by the law, but is also the right thing to do.

Harassment & Diversity: Respecting Differences—Manager Version (2005, 5164-V/05, 20 mins.)
Managing in a diverse workplace can be a challenge, but every manager has the responsibility to maintain a harassment-free workplace. Diversity in business should be celebrated, but our differences can carry the potential for harassment. Cultural backgrounds, age, religious beliefs, nationalities, and physical abilities are all targets for workplace discrimination, but they are also categories that are protected under law. The video shows an all-too-common situation, where friction between employees grows from "just kidding around" into illegal harassment, and ex-plains that your company should have a zero-tolerance harassment policy that protects every employee.

Harassment Hurts: It's Personal (2009, 5100-V/09, 21 mins.)
Harassment Hurts: It's Personal explores the pain and cost of harassment, covering such topics as age, race, sexual orientation, political affiliation, pregnancy, ethnicity, and sexual harassment. This program explains harassment and uses personalized stories and detailed legal and policy definitions to cover all types of harassment in organizations and

workplaces. This program explores issues of harassment, their ramifications, and their remedies.

Also included is *Opening Lines: Exploring Sexual Harassment*, which can be used as a new-employee orientation tool or as a meeting opener or closer for any harassment, respect, or diversity training. You can use it as a quick and concise refresher course for your organization's anti-harassment policy or to just introduce the fundamental and important concepts of respect, diversity, and inclusion in the workplace.

In This Together: An Engaging Look at Harassment and Respect (2000, 5508-V/00, 18 mins.)
This video looks at harassment and respect in the workplace. Seven front-line employees from a variety of organizations speak directly to their peers as they discuss the issues of respect and harassment. The program features insightful looks at real situations that will help employees to make better choices.

It's UP to YOU: Stopping Sexual Harassment for Employees (2005, 5459-V/05, 23 mins.)
This program uses real-world situations to help employees understand and stop sexual harassment behavior.

It's UP to YOU: Stopping Sexual Harassment for Managers (2005, 5460-V/05, 27 mins.)
This program uses real-world situations to help managers understand and stop sexual harassment behavior.

Let's Get Honest: A Sexual Harassment Training Package (2006, 4992-V/06, 41 mins.)
Program One: Let's Get Honest. This video offers honest solutions to a variety of workplace issues, ranging from flirting and dating to clueless behavior and predatory harassment.

Program Two: He Said, She Said. In this video, seven scenarios challenge employees' beliefs and perceptions regarding sexual harassment and inappropriate behavior at work. As the stories unfold, employees explore the facts, read between the lines, and hear from witnesses and experts.

The Right Side of the Line: Creating a Respectful and Harassment-Free Workplace (2005, 4845-V/05, 22 mins.)
Everyone in an organization is responsible for creating a respectful and harassment-free workplace. This program addresses harassment in all its forms, giving employees the tools to resolve situations before they escalate. The program helps participants take a proactive approach to creating and maintaining respectful organizational cultures in order to remain legally compliant, to ensure adherence to organizational policies, and to thrive and prosper. The video contains six vignettes that address situations that are unprofessional, prohibited by policy, and unlawful. Through these vignettes, employees

learn what to do and how to respond if they are victims of, or witnesses to, any form of harassment or discrimination.

Respectful Workplaces
In-District Programs
Code of Conduct (2.5 – 3 hours)
This program helps court employees deal with a range of ethical issues. It is divided into two segments: a review of the Code of Conduct for Judicial Employees, and discussion of ethics scenarios.

Dealing with Difficult Situations (4 hours)
This program helps supervisors and managers decide how to promptly and appropriately respond to some difficult employee relations problems. Participants discuss the issues involved and evaluate possible responses to a number of situations, including accusations of discrimination; charges of sexual harassment; possible substance abuse on the job; personal problems that interfere with performance; and equitable allocation of resources.

Meet on Common Ground: Speaking Up for Respect in the Workplace (4 hours)
This program explores thorny workplace situations that involve disrespect. Participants learn a four-step approach to resolving differences and fostering a respectful and tolerant workplace: Make time to discuss the situation; Explore differences; Encourage respect; and Take responsibility.

Personality Temperament Instrument Training (4 hours)
In this program, participants complete an instrument that identifies four common personality types. Through individual and group exercises, participants explore the four personality types and examine ways the different types can communicate and interact effectively with each other in the workplace.

Videos Available from FJC Current Collection
Consciously Overcoming Unconscious Bias (2014, 5512-V/14, 8 mins.)
This program shows how unconscious bias, micro-inequities, and micro-affirmations overlap in the workplace and helps participants to recognize their own biases and the micro-inequities that express them. The program shares helpful tips, like Listening, Including, Valuing, and Engaging, (or L-I-V-E) to improve participants' workplaces.

Diversity 101: The Complete Series (2016, 5560-V/16, 36 mins.)
This series, composed of eight short vignettes, teaches the core components of diversity, inclusion, and respect in the workplace. It covers issues such as unconscious/hidden bias, intolerance, crude jokes, and disrespectful comments, which can surface in any organization.

Diversity: Respect at Work (2013, 5297-V/13, 16 mins.)
This program helps employees understand, accept, and value differences. The program shows participants how to: realize that open-mindedness can benefit the bottom line; understand, identify, and manage biases; recognize that disrespect can happen even

without the offender knowing it; create a more inclusive workplace; adopt a "think before you speak" mindset; and resolve conflicts respectfully.

How To Be a Terrible Team Member (2015, 5507-V/15, 44 mins.)
Teamwork is defined as the combined actions of a group of people, especially when they are effective and efficient. Total harmony is not necessarily a defining trait of the most effective teams, as creative conflict about the work, when well managed and focused, has a decidedly positive effect on team efforts and outcomes. The trick is learning how to identify which traits and behaviors contribute to creative thinking, problem-solving, learning, and growth and which hinder those things. This program identifies nine damaging work styles that are barriers to effective teamwork.

Leadership Feedback: What employees want to tell you . . . but don't! (2014, 5457-V/14, 17 mins.)
This program is based on extensive interviews with actual employees who gave candid feedback about the leaders they worked for. Because the interviews were anonymous, employees were free to honestly discuss which leadership behaviors were motivating—or demotivating. Six key issues of leader–employee interaction emerged from this research and are illustrated in the video. For each issue, the video shows two scenarios—one with an ineffective leader, the other with an effective one.

Leading More with Less (2011, 5196-V/11, 17 mins.)
This program demonstrates six critical leadership skills that can inspire employees through difficult times. The video demonstrates both right and wrong leadership examples and the effect they have on employees.

Manager's Moments: How to Excel in Tricky Situations (2015, 5456-V/15, 34 mins.)
To keep teams motivated and running smoothly, managers need to recognize potentially troublesome employee situations and quickly take action. This program offers practical wisdom to busy professionals on everyday management challenges. The topics include: How to Curb Employee Gossip; How to Deal with Difficult Peers; How to Manage Upward; How to Manage Time Thieves; and How and When to Delegate.

Managing the Workplace Bully (2013, 5510-V/13, 19 mins.)
This video addresses the issue of abusive conduct at work, providing practical solutions that help managers put an end to bullying behavior in their subordinates—and also in themselves. Five realistic scenes in a range of workplaces show what to do when someone seeks help or there is repeated conflict among employees.

Ouch! Your Silence Hurts (2009, 5107-V/09, 10 mins.)
Many people say they want to speak up when they see others stereotyped, disrespected, or demeaned, but all too often they stand by silently because of discomfort or the fear of saying the wrong thing. This video motivates bystanders to use their voice to speak up for respect on behalf of someone else.

Ready, Set, Change! Reacting Smarter, Adapting Faster, Engaging Together (2012, 5513-V/12, 29 mins.)
This program helps employees positively and productively navigate through change—big or small.

The Respectful Communicator: The Part You Play (2011, 5294-V/11, 15 mins.)
Effective communication is at the heart of organizational performance. In a diverse workplace, a number of things can undermine successful communication, including a perceived lack of respect or inclusion. This program shows how taking a few extra steps can keep misunderstandings to a minimum. The program includes how improved interpersonal communication can improve productivity and morale; provides practical learning on the sometimes abstract concepts of respect and inclusion; and illustrates how to communicate clearly (without demeaning, devaluing, or offending others)

The Respectful Workplace: It Starts with You (2011, 5295-V/11, 18 mins.)
This program explores respect in the workplace through four important skill points. Wrong-way scenes depict the negative impact of disrespect while right-way scenes inspire positive, respectful, inclusive behavior.

What To Say When (2012, 5387-V/12, 4–6 mins.)
Problems with workplace communication can lead to low productivity, high stress, and tension between coworkers. This four-DVD series includes thirty learning modules. Each module offers strategies that participants can use to better manage workplace relationship challenges.

Videos Available from FJC Archives
Drop by Drop (2008, 5102-V/08, 19 mins.)
This program demonstrates how small slights, subtle discriminations, and tiny injustices can add up to big problems in your workplace. Minor negative gestures are called "micro-inequities" and they occur in organizations every day. These small communications of disrespect, prejudice, and inequality aren't overt, but they can be destructive. The video instructs how to show regard for all races, religions, cultures, and ages and how to be open to information about different cultures, customs, and perspectives.

Generations and Work (2010, 5458-V/10, 34 mins.)
This video addresses accepting people who are different and understanding how to interact with them in ways that increase satisfaction and productivity. It contains four interactive learning experiences: Working with Millennials; Engaging All the Generations; Succeeding with Younger Workers; and Connecting Across Differences. Using workplace and on-the-street interviews, vignettes, and expert commentaries, the program addresses such topics as, coaching, work processes, technology, feedback, change, productivity, and sales.

Not Everyone Gets a Trophy (2010, 5157-V/10, 29 mins.)
This video aims to equip managers with the knowledge and tools they need to effectively manage young, inexperienced employees. With humor and entertaining examples, the

program addresses the challenges of managing younger workers and defines what it means for managers, employees, and organizations when young workers join the team.

Ouch! That Stereotype Hurt (2007, 5034-V/07, 30 mins.)
Staying silent in the face of demeaning comments, stereotypes, or bias allows these attitudes and behaviors to thrive, undermining the ability to create an inclusive workplace where all employees are welcomed, treated with respect, and able to do their best work. This program teaches employees how to speak up.

APPENDIX 10

Letters from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley (Jan. 12, 2018; Jan. 22, 2018)

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

January 12, 2018

Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

Thank you for your letter of December 6, 2017, concerning allegations about the mechanisms for reporting fraud, waste, or abuse, and prohibited personnel practices at the Administrative Office of the United States Courts (AO). Judge Timothy Tymkovich, Chief Judge of the Tenth Circuit, and I also thank your staff, Mike Davis, Kasey O'Connor, and Steven Kenny, for meeting with us on November 17, 2017, prior to receiving your letter to discuss these and other matters, and again with them on December 12, 2017, along with Katherine Nikas, after I received your letter, to review the subjects of it. I also appreciate the additional time you allowed us over the holidays to prepare this response because of the volume of material we are providing. As we discussed with your staff, in addition to addressing your questions in this letter, we will submit in a separate letter a general discussion of the Judicial Branch's extensive and effective processes and safeguards that already provide, at significant taxpayer expense, the protections you propose in S. 2195, the Judicial Transparency and Ethics Enhancement Act of 2017.

At the outset, and as Judge Tymkovich and I raised with your staff in November, we appreciate that your interest in the Judiciary's practices has contributed to improvements we have made in our processes and procedures over the years, including in the past month since our meetings.

I. BACKGROUND OF OVERSIGHT OF JUDICIAL BRANCH PROCESSES

The Federal Judiciary puts very significant resources and effort into independent oversight and programs to prevent fraud, waste, or abuse of

government resources. The Judicial Branch has processes and procedures for individuals to raise claims of fraud, waste, or abuse; judicial misconduct; discrimination; harassment, or other wrongful conduct. Additionally, the Judicial Branch provides non-retaliation protections to its employees. In response to your staff's observations, as of December 20, 2017, the public website (uscourts.gov), and the Judiciary's internal webpages where fraud, waste, or abuse reporting is discussed have been updated. We also have published our policies on fraud, waste, or abuse reporting and fair employment practices on uscourts.gov. We appreciate your observations and welcome any others.

II. RESPONSES TO QUESTIONS

1. Please provide a description of the current process for contractors and Pre-Act and Post-Act employees seeking to report waste, fraud, abuse, and prohibited personnel practices, including a description of current protections for employees who report; and copies of all policies, procedures, internal manuals or memoranda, and training guidance related to this process and protections. Please explain how conflicts of interest are accounted for.

Fraud, Waste, or Abuse

As the Director, I am responsible for the operations of the AO and its components, including the authority to investigate allegations of fraud, waste, or abuse. The policy (enclosure 1) provides for the investigation of allegations made by AO employees or contractors of fraud, waste, or abuse regarding AO staff and its activities. The Deputy Director of the AO provides initial oversight and resolution of AO allegations. As stated in the policy, I report the filing and action taken on fraud, waste, or abuse allegations made regarding the AO, courts, and federal public defender organizations (FPDO) to the Judicial Conference Committee on Audits and AO Accountability (AAOA Committee), thus allowing independent review of all such allegations reported to the AO. There are six federal judges from six different courts on the AAOA Committee who have no management role in the AO and therefore provide an independent oversight role.

The policy and our process do not distinguish between allegations made by AO employees, whether they are Pre- or Post-Act, or contractors. The status of an employee's employment rights has no bearing on fraud, waste, or abuse reporting or review. If any conflicts of interest arise, they are handled case by case. We have policy and mechanisms to delegate review responsibilities within the AO.

When investigating, the AO, pursuant to its policy, offers confidentiality to any complainant who reports fraud, waste, or abuse unless disclosure becomes unavoidable. If disclosure is unavoidable, the complainant would be notified prior to disclosure unless such notification would be contrary to law. Allegations can and have been reported anonymously. As described in our policy, we treat all allegations according to the same procedures regardless of source.

There is a page on the AO's intranet website informing any employee, or contractor working for the AO who has access to the Judiciary intranet, how to report allegations through an email address or online form. Allegations by an employee, contractor or the public can also be reported by using the email link found on the public uscourts.gov website. A copy of the webpages and the form used for reporting are in enclosure 2.

Annually, the Deputy Director of the AO sends a memorandum to employees reminding them of their responsibility to report fraud, waste, or abuse. The AO's Personnel Act also prohibits (whistleblower) retaliation against employees who report fraud, waste, or abuse.

Prohibited Personnel Practices

As reflected in the attached sections of the *AO Manual*, Volume 4, Chapter 3 (enclosure 3), individuals have several established, formal processes described through which to pursue their concerns. Where prohibited personnel practices include a discrimination allegation, employees may use the Fair Employment Practices Complaint Process (FEP-CP). The FEP-CP provides explicit, clear directions on how to report concerns and how to proceed once a claim is filed. In addition to providing sections of the *AO Manual* describing our process, I have attached a flow chart (enclosure 4) outlining the current process for filing a claim with the Fair Employment Practices (FEP) Office.

The FEP-CP allows for informal counseling, an opportunity to file a formal complaint, and an opportunity to request a hearing after an investigation. It is important to point out that the investigation is conducted by a trained neutral investigator from outside the AO and that the hearing officer, if the matter proceeds to a hearing, must be an independent, non-government attorney with specialized subject matter expertise and must also be a neutral party. Throughout the process, professionals are available in multiple AO offices if there are questions or concerns. No investigations are closed without thorough review and at any time in the process a claimant may be represented by counsel.

Although there are not different processes for Pre-Act and Post-Act employees seeking to report fraud, waste, or abuse, there are differences in the FEP appeal right procedures for Pre-Act employees. These differences are provided in the *AO Manual*, Volume 4, Chapter 3, § 330.60 (see enclosure 3).

Training

The table below provides a list of recent and currently available trainings and guidance for AO employees seeking to report fraud, waste, or abuse, and prohibited personnel practices.

Trainings and Guidance for Employees Seeking to Report Waste, Fraud, Abuse, and Prohibited Personnel Practices			
Format; Target Audience	**Title**	**Topic(s)**	**Description**
In-Person; AO Staff	Fair Employment Practices Process Training	Prohibited Personnel Practices	This town hall focused on the Fair Employment Practices process, discrimination, harassment, and how to report violations.
In-Person; AO Staff	AO Harassment Training	Prohibited Personnel Practices	This training was provided to AO managers and covered sexual harassment in the workplace, the relevant guidelines, and responsibilities of AO managers.
Web-Based; AO Staff	Virtual Town Hall: Updated HR Volume of *AO Manual*	General Human Resources	The virtual town hall was held to address questions about the updated volume of the *AO Manual*. Updates to the HR volume included: prohibited personnel practices, merit principles, whistleblowing, and Fair Employment Practices procedures.
In-Person; AO Staff	Town Hall Question and Answer Session: *AO Manual* Fair Employment Practices Chapter	Fair Employment Practices	This town hall featured staff from the FEP Office and the Office of General Counsel to facilitate discussion and answer any questions on the draft Fair Employment Practices Chapter of the *AO Manual*.
Web-Based; AO Staff	Guidance on Sexual Harassment	Prohibited Personnel Practices	This training provides the applicable definitions, guidance, and employee responsibilities related to sexual harassment in the workplace.

Format; Target Audience	Title	Topic(s)	Description
Web-Based; AO Staff and Contractors with Access to AO Web	Guidance on Fraud, Waste, and Abuse Reporting	Fraud, Waste, or Abuse	This guidance provides an outline of policies and procedures for reporting fraud, waste, or abuse and the AO's processes for responding to complaints, including prohibition against retaliation.
Web-Based; AO Staff	Annual Reporting Requirements	Fraud, Waste, or Abuse	Annual memorandum from the Deputy Director to all employees reminding them of their responsibility to report fraud, waste, or abuse with links to helpful instructions.

2. What internal safeguards exist at the local, regional, and national levels to deter waste, fraud, and abuse of judicial resources? Please explain and provide all relevant policies or procedures governing the administration of these safeguards.

The Judicial Branch has a wide range of policies and procedures at the local, regional, and national levels that deter fraud, waste, or abuse of judicial resources. They include broad, organization-wide strategies, national policies, and local procedures. These safeguards evolve and improve based on experience and ongoing assessment of risks. Informed by the results of past investigations, audits, program reviews, and industry and government best practices, we have made improvements to reduce the risk for fraud, waste, or abuse.

The core safeguards are listed below. The first section of the chart discusses specific policies and procedures. The second section discusses other, more general policies and procedures that also contribute to deterring fraud, waste, or abuse.

Reporting and Follow-up on Allegations and Other General Safeguards

Safeguard	Description
Core Safeguards	
Monitoring of Policies, Procedures, and Internal Controls	See responses to question #3 for details of Financial Audit Programs, and question #4 for details of reporting to AAOA Committee.
Codes of Conduct	The respective codes of conduct for judges, court staff, FPDO, and the AO speak to the integrity of the Judiciary, procurement integrity, and the use of government property among a number of other matters that emphasize accountability and good stewardship of Judiciary resources.
Fraud, Waste, or Abuse Policies	The Judiciary has policies for the courts, the federal public defenders, and the AO that address how to report allegations of fraud, waste, or abuse (enclosure 5).
Fraud, Waste, or Abuse Reporting Intranet Pages	The Judiciary intranet pages provide information regarding how to report fraud, waste, or abuse; points of contact for such reporting; and a form to submit concerns regarding fraud, waste, or abuse including an option to submit anonymously. Based on the concerns your staff raised, we have updated these pages to more clearly explain the reporting and investigative procedures.
Fraud, Waste, or Abuse Reporting Reminders	Annually, the chair of the AAOA Committee sends a memorandum to chief judges and all court unit executives asking them to remind their staff of the means to report fraud, waste, or abuse (enclosure 6). The Deputy Director of the AO annually sends a memorandum to all AO employees reminding them of their obligation to report fraud, waste, or abuse (enclosure 7).
Internal Control Policy	The Judiciary's internal control program requires that the AO and each unit have financial and administrative procedures. The executive is required to keep the procedures current and conduct a comprehensive review annually. The procedures are also reviewed by auditors during the organization's cyclical audit.
Internal Control Self Assessments	The Judiciary's internal control program requires an annual self-assessment of the organization's internal controls. The auditors review the completed assessments during the organization's cyclical audit.
Program Reviews	AO staff conduct voluntary and mandatory reviews of Judiciary programs (e.g., clerk's office, jury administration, probation office, human resources administration) and such reports serve to improve operations in the specific office, and may also identify best practices that are shared broadly. These are reported to the AAOA Committee and noted in question #4.

Safeguard	Description
Internal Control Tools	The AO has developed guidance systems and best practices to help executives and financial managers identify internal control risks.
Reporting & Follow-up on Allegations	As described in the response to question #4, the AO provides an extensive semi-annual report to the judges on the AAOA Committee, which has an independent role in monitoring and reviewing reports of fraud, waste, or abuse, as well as financial audits and special investigations. Their oversight and the judges' expectation that management at the AO and the courts will complete appropriate investigative activities is a deterrent. The AO also provides investigation reports and other information regarding the allegations to the Office of Audit so that the relevant internal controls and activities can be reviewed during a future audit to ensure that weaknesses in internal controls have been addressed.
Strategic Planning	The Judiciary's Strategic Plan emphasizes standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; and effective and efficient use of resources. The AO's Strategic Direction emphasizes strengthening AO accountability through improvements to internal control, audit, and risk management initiatives.
General Safeguards	
Financial Reporting Requirements	Financial reporting requirements are in place and designed to ensure accountability for funds, including managing, expending, and receipting funds. Monthly, quarterly, and annual reports are required to be filed by court units and FPDOs; reports are reviewed, and financial statements are audited in accordance with Judiciary policy.
Financial System Controls	Financial system controls are in place to ensure that only authorized persons can process transactions, which are safeguards that prevent unauthorized personnel from executing transactions outside their approvals. These safeguards also assist executives in ensuring the appropriate separations of duties.
Formal Delegations of Authority	Delegations are designed to ensure that persons with the appropriate training and knowledge carry out certain responsibilities. Judiciary delegations are defined for every administrative area, including certifying officers, contracting officers, and personnel actions.
Local Budget and Financial Management Policies and Procedures	The AO, courts, and FPDOs are required to establish local budget and financial management policies and procedures to ensure that funds are expended in accordance with local governance rules.

Safeguard	Description
Local Fraud, Waste, or Abuse Policies	Courts have implemented local fraud, waste, or abuse policies and procedures based on their local governance processes and procedures. The AO has posted examples of these policies and procedures on the Judiciary's intranet page for courts to reference.
Training	Training is provided regarding some of the specific safeguards above, some of which is mandatory for certain authorities such as certifying officer, contracting officer, etc. For a more extensive discussion of training, see response to question #5.

3. Please provide a description of the financial audit processes – internal and external – for individual courts and the AOUSC, including the frequency of audits and details of the processes utilized.

Judiciary Audit Program

The Director of the AO has the statutory responsibility under 28 U.S.C. § 604(a)(8) to disburse appropriations and other funds for the maintenance and operations of Judiciary organizations, as well as the responsibility under 28 U.S.C. § 604(a)(11) to audit accounts and vouchers of the courts. The Director of the AO has assigned the responsibility for administering the Judiciary's audit program to the AO's Office of Audit. This Office of Audit, along with the Office of Management, Planning and Assessment, was once called the "Office of Inspector General." The office titles have changed over time, but the important functions remain.

The Office of Audit is organized as an independent internal audit office as defined under the Government Accountability Office's Generally Accepted Government Auditing Standards (GAGAS). The AO's Office of Audit conducts financial-related performance audits and contracts with independent external audit firms to perform financial statement audits and other attest engagements that require a level of independence, as defined in professional auditing standards, which must be provided by independent certified public accounting (CPA) firms. Audits are conducted in accordance with GAGAS and Generally Accepted Auditing Standards.

The Judiciary is not only responsible for appropriated funds, but also for filing fee receipts and funds held in trust for retirees, crime victims, and parties involved in disputes. The Judiciary also makes statutory payments to bankruptcy trustees and the recipients of Criminal Justice Act grants. Judiciary responsibilities for these funds include the proper handling of transactions

involving these funds as well as the safeguarding of these assets while they are held.

The Judiciary's audit programs reflect its wide-ranging responsibilities for the handling of appropriated and non-appropriated funds at the national and local levels. The Judiciary produces a series of financial reports and statements reflecting these responsibilities, and it audits them on a regular basis. In many cases, expenditure transactions will be examined at multiple levels. For example, an expenditure may be reviewed at the national level in an appropriations audit and at the local level in a cyclical court audit, where the actual disbursement was initiated.

1. Cyclical Financial Audits

Independent CPA firms conduct cyclical financial audits of court units and FPDOs with contractual oversight provided by the Office of Audit. The audit cycle is four years for smaller and lower-risk units, and two and one-half years for higher-risk units, including large courts. Audit reports include an auditor's opinion on financial statements and a report on internal controls over financial reporting and compliance with Judiciary policies and procedures for all offices. The audits also review certain administrative functions, including procurement, property management, financial systems access, and other areas.

2. Change-of-Court Unit Executive and Other Special Request Audits

Staff from the AO's Office of Audit conduct financial-related performance audits to document the transfer of accountability when a court has a change in its court unit executive, or when there is an executive change such as a bankruptcy administrator. Courts may also request audits when there is a change in the financial administrator, to follow up on prior audit issues, or to examine a particular area or process where a court has identified potential risk.

3. National Financial Statement Audits

The Office of Audit oversees the work of external auditors as they conduct financial statement audits, performance audits and other attest engagements of certain Judiciary appropriations, AO financial systems, and national programs.

Judiciary Appropriations. The Office of Audit contracts with an independent CPA firm to conduct financial audits for Judiciary

appropriation accounts, which fund the operations of the U.S. courts, defender programs, and the AO. The primary objectives of the audits are to: 1) determine whether the financial statements related to these appropriation accounts are presented fairly in all material aspects; 2) assess internal controls over financial reporting; and 3) assess compliance with significant and applicable laws and regulations. To assess internal controls, the CPA firm examines key financial reporting internal control policies and processes at the AO and at the court unit or federal public defender level, and reviews controls over information technology relevant to the preparation and presentation of financial statements. Appropriations audits are conducted on a two-year cycle.

Retirement Funds. The Office of Audit contracts with independent CPA firms to conduct annual financial statement audits of the Judiciary's four retirement funds: the Judicial Survivors' Annuities System, which provides death benefit coverage for survivors of participating justices and judges; the Judicial Officers' Retirement Fund, which provides retirement and disability benefits for participating federal bankruptcy and magistrate judges; the Court of Federal Claims Judges' Retirement System, which provides retirement benefits for participating United States Court of Federal Claims judges; and the Judicial Retirement System, which provides retirement benefits to participating Article III judges retiring under 28 U.S.C. §§ 371(a) and 372(a), and judges of the territories.

Registry Investments. Courts are required to deposit and invest registry funds safely until the resolution of a case, at which time the courts return the deposits, plus interest, to the appropriate parties. The Court Registry Investment System (CRIS) was established by a district court in 1988 to relieve individual courts from the risks and administrative burdens associated with investment of registry funds locally. This voluntary program was transferred to the AO in 2011 and the AO now manages registry funds for 166 district and bankruptcy courts. Financial statements for CRIS are audited annually by an independent CPA firm under contract with the Office of Audit.

Public Access to Court Electronic Records (PACER). The Office of Audit contracts with an independent CPA firm to perform annual financial audits of the PACER program receipts. PACER is an electronic public access service that allows registered users to obtain case and docket information online from federal appellate, district, and bankruptcy courts and the PACER Case Locator. As mandated by Congress, the Judiciary's

electronic public access program is funded entirely through user fees set by the Judicial Conference.

Central Violations Bureau (CVB). The Office of Audit contracts with an independent CPA firm to perform annual financial audits of CVB receipts. The CVB is a national center responsible for processing violation notices (tickets) issued and payments received for most petty offenses and some misdemeanor cases charged on a federal violation notice.

4. **Audit of AO Administrative Functions**

Contract Audits. The Office of Audit contracts with independent CPA firms to conduct performance audits of the AO's contract administration and reporting functions. The primary objectives of the reviews are to determine whether (1) operational safeguards and internal controls over the contracting process were adequate to ensure compliance with procurement and programmatic requirements of the contract, and (2) costs charged to the contract were allowable and supported. A selection of contracts are audited in most years.

Other Administrative Functions. Office of Audit staff or independent CPA firms may conduct audits of other AO administrative functions, such as procurement or property management.

5. **Audits of Community Defender Organization Grantees**

An independent CPA firm under contract with the Office of Audit conducts financial audits of Criminal Justice Act (CJA) grants to the 17 community defender organizations (CDOs). Each CDO is audited annually. The objectives of the audits are to:

- evaluate internal accounting controls;
- evaluate grant activity for compliance with grant agreements, Judiciary policy, and other relevant policies;
- assure that personnel are authorized and paid at authorized levels;
- review property inventory and procurements;
- review reporting to the AO's Defender Services Office;
- review budgetary restrictions; and
- review the return of unused funds.

6. **Audits of Chapter 7 Bankruptcy Trustees**

The Office of Audit also contracts with an independent CPA firm to conduct performance audits of Chapter 7 bankruptcy trustees. The audits are performed with oversight provided by the Office of Audit in support of the bankruptcy administrators located only in the states of North Carolina and Alabama, which are under the Judicial Branch. This audit program began in fiscal year 1994 and is similar to the Department of Justice's program for audits of Chapter 7 trustees in the other 48 states which are under the United States Trustee Program. The audits are conducted on a three-year cycle. The primary objectives are to evaluate whether the trustees have a system of internal controls to protect estate funds and assets, adhere to specific case administration and financial compliance requirements, and present financial information in accordance with Judicial Conference policy.

7. **Audits of Chapter 13 Bankruptcy Trustees**

Financial audits and agreed-upon procedures (AUP) engagements of Chapter 13 bankruptcy trustees are conducted by another independent CPA firm under contract with the Office of Audit in support of the bankruptcy administrators in North Carolina and Alabama. The audits evaluate whether the trustee's annual report fairly presents the position of the trusteeship during the audit period. Chapter 13 bankruptcy trustees are audited annually. The audit reports include the auditor's opinion on the trustee's annual report, and a report on internal controls and compliance with relevant laws, regulations, and Judiciary policy. This centrally managed audit process is similar to the Department of Justice's program for audits of Chapter 13 trustees in the other 48 states.

Chapter 13 bankruptcy trustees also undergo AUP engagements each year. The AUP engagements are an other attest engagement provided by independent public accounting firms, and a separate report is issued for these engagements. AUPs report on various prescribed procedures as developed by management to assess the Chapter 13 trustee's compliance with relevant program policy and requirements. AUPs have a lesser scope than an audit, because they provide no assurance on the processes or items under review.

8. **Debtor Audit Program**

The Office of Audit contracts with an independent CPA firm to conduct debtor audits of Chapter 7 and Chapter 13 bankruptcy filings by individuals in the states of North Carolina and Alabama. Some filings selected for audit are randomly selected from filings, while others are selected from cases with debtors who have high incomes or high expenses, compared to the statistical norm in the district. A filing may also be targeted for audit by a bankruptcy administrator if it exhibits characteristics that may be associated with fraud or undisclosed assets.

9. **Previous Audits or Attestation Engagement Follow-Up Activities**

As outlined in the GAGAS standards, auditors should evaluate and determine whether audited entities have taken appropriate corrective actions to address prior findings. The Office of Audit tracks and follows up on implementing corrective actions in court units, defender organizations, and the AO to ensure that audit findings are addressed. Findings identified in final audit reports are tracked and listed as "open" until documentation is submitted that describes actions implemented to address the issue. The tracking system also includes the audit recommendations associated with each finding. One finding may have multiple recommendations. The Office of Audit marks the item as "closed" if the implemented actions as described address all of the related recommendations and would resolve the condition.

4. Please provide all financial audits, program reviews, and special investigations reported by the AOUSC to the Judicial Conference Committee on Audits and Administrative Office Accountability from FY 2013 – FY 2017.

The AAOA Committee meets twice per year to oversee and review the AO's audit, review, and investigative assistance activities. At each meeting, the AO reports on all audits, program reviews, and investigative activities for the period ending March 31 (for the Committee's June meetings) or September 30 (for the Committee's January meetings). Attached are ten summaries of the reports that have been provided to the AAOA Committee for its January 2013 meeting through its June 2017 meeting (enclosure 8).

5. Please provide a description of all in-person or web-based training for chief judges and unit executives offered by the Federal Judicial Center (FJC) and the AOUSC on their management and oversight responsibilities.

The AO and the FJC regularly provide a broad range of training and educational programs to Federal Judiciary staff on judicial administration, court administration, and organizational leadership and management topics.

The AO delivers online and in-person training programs on topics pertaining to the administrative responsibilities of judges, court unit executives (CUEs), and other Judiciary staff. Staff at the AO also appear at forums of private, affiliated organizations such as the Federal Court Clerks Association and the National Conference of Bankruptcy Clerks to discuss court administration topics. Because the AO develops and administers new procedures pertaining to court administration, it is primarily responsible for training in the management and oversight responsibilities requested in your letter. Typical training topics include budget management, internal controls, information technology and security, procurement, and human resources management.

The FJC was established in 1967 with the mandate to provide orientation and continuing education programs on judicial administration, specialized areas of the law, and organizational leadership and management skills. The FJC regularly provides online and in-person orientation and continuing education programs to judges and employees of the federal courts. FJC programs cover certain judicial administration topics (e.g., criminal litigation and procedure, complex litigation, case management, alternative dispute resolution, and juries), court management and leadership topics (e.g., court administration, change leadership, and organizational culture), and specialized areas of the law (e.g., national security, law and technology, and the environment). The FJC also coordinates educational programs for federal public defenders and probation and pretrial services officers.

The following table is a list of in-person and web-based trainings offered by the AO and the FJC in 2016 and 2017 for chief judges and court unit executives in their management and oversight responsibilities. As described above, "management" training is offered in many forms, but in responding to this question, we focused on training that emphasized "management and oversight" in administrative responsibilities and accountability.

Core Management and Oversight Trainings			
Format; Target Audience	**Title**	**Topic(s)**	**Description**
In-Person; Court Unit Executive	Court Unit Executives and Chief Deputies Training	General Court Management	This four-day training convened CUEs and chief deputies for a biennial conference. Topics included records management, court reporting, public access to court electronic records, audit issues and top audit findings, maintaining a robust internal control environment, travel policy, procurement and contract management, property management, budget execution, human resources and employee relations, work measurement, and information technology topics.
In-Person; Court Unit Executive	New Court Unit Executive and Chief Deputy Orientation	General Court Management	This orientation is held annually to familiarize new CUEs and chief deputies with the AO and the FJC, and the myriad of services provided. Participants have the opportunity to meet directly with AO staff and attend topic-specific breakout sessions with AO subject matter experts. Topics included finance and budget, human resources, internal control and audit, and the court review program.

Core Management and Oversight Trainings			
Format; Target Audience	**Title**	**Topic(s)**	**Description**
In-Person; Court Unit Executive	Internal Control Self-Assessment Tool Training	Internal Controls	The Internal Control Evaluation (ICE) System is a software application that helps court unit executives and federal public defenders evaluate compliance with specific internal control requirements. In-person training on this system takes 1.5 days and is designed to introduce the system to new staff and instruct them on how the tool can be used to support a sound internal control environment.
In-Person; Court Unit Executive	Financial Forum	Budget Management, Internal Controls	The Financial Forum is a recurring event, hosted by the AO, that provides training to financial personnel, unit executives, and staff in the areas of financial management, accounting and software programs used within the Judiciary, and fosters working relationships between AO and court staff. Recent topics have included: applying internal controls in a court environment; audit basics and lessons learned; and protecting your customers' credit card information.

Core Management and Oversight Trainings			
Format; Target Audience	**Title**	**Topic(s)**	**Description**
In-Person; Court Unit Executive	District and Bankruptcy Operational Practices Forum	Internal Controls	AO staff delivered a presentation at this forum on internal controls, the self-assessment tool developed by the AO, and the roles of judges and unit executives in the maintaining effective internal controls.
In-Person; Court Unit Executive	New Federal Defender and Administrative Officer Orientation	General Court Management; Internal Controls	This multi-day training includes management, human resources, budget and accounting, audit issues and top audit findings, internal controls, travel, procurement and contract management, property management, human resources and employee relations, work measurement, code of conduct, and information technology topics. It includes meetings with each offices assigned budget analyst and other AO staff.
In-Person; Court Unit Executive	Resources, Budget, and Finance Educational Workshop	Internal Controls	AO staff delivered a presentation on audit processes, internal control policy, and internal control tools to a joint conference of the Federal Court Clerks Association and the National Conference of Bankruptcy Clerks in Washington DC.

Core Management and Oversight Trainings			
Format; Target Audience	**Title**	**Topic(s)**	**Description**
In-Person; Court Unit Executive	Federal Defender Conference	General Court Management; Internal Controls	The annual three-day federal defender conference includes sessions on management and internal controls. Previous agendas have included sessions on audit compliance, employee disputes resolution, developing FPDO internal policy manuals, Community Defender Organization (CDO) employment law, fair employment practices, and managing FPDO budgets.
In-Person; Court Unit Executive	Human Resource Leadership-Employee Relations	Prohibited Personnel Practices	This in-person course uses workplace scenarios to reinforce concepts and principles related to managing employee relations and human resources policies and best practices.
Web-based; Court Unit Executive	Appropriations Law for US Courts	Procurement	This course introduces the basic principles of appropriations law and Judiciary policy for spending appropriated funds.
Web-based; Court Unit Executive	Judiciary Executive Procurement Oversight Seminar	Procurement	This course provides an overview of procurement in the Judiciary. Topics include key procurement policies, procedures, guidance, tools, and minimum internal control requirements.

Core Management and Oversight Trainings			
Format; Target Audience	**Title**	**Topic(s)**	**Description**
Web-based; Court Unit Executive	Internal Control Self-Assessment Tool Training	Internal Controls	The ICE System is a software application that helps court unit executives and FPDOs evaluate compliance with specific internal control requirements. In addition to in-person training on this system, there are four electronic learning modules that guide the participant through exercises using key system functionality and measures user comprehension after each module.
Web-Based; Court Unit Executive	Court Registry Investment System	Financial Management	The CRIS is a national investment program managed by the AO for Registry Funds. CRIS is designed to manage risks to the clerks of court charged with investing and protecting the funds. The AO makes available resources and tutorials on managing these funds.

Core Management and Oversight Trainings			
Format; Target Audience	**Title**	**Topic(s)**	**Description**
Web-based; Court Unit Executive	Managing Employee Dispute Resolution Issues in the Judiciary	Prohibited Personnel Practices	Employment Dispute Resolution (EDR) coordinators perform an important role in the courts. They serve as the conduit for reporting, processing, and conducting investigations for some types of employee disputes. Unlike standard human resource procedures, the EDR coordinator handles claims where bias, retaliation, harassment, and other fair employment practices become involved. This course addresses the nine laws covered by the EDR Plan, provides resources for an EDR coordinator, including a checklist of duties, and provides real-life case scenarios with follow-up question and answers.

Core Management and Oversight Trainings			
Format; Target Audience	**Title**	**Topic(s)**	**Description**
Web-Based; Court Staff	Individualized Guidance on Prohibited Personnel Practices	Prohibited Personnel Practices	The FEP Office prepares individualized guidance to courts on a weekly basis on topics related to equal employment opportunity, EDR claim processing, implicit bias, court demographics, and related topics. This was accomplished in direct court –to-FEP Office consultations with legal staff; judicial orientation sessions for new chief judges and judicial nominees; and in-person and videoconference training sessions for court personnel.

Core Management and Oversight Trainings			
Format; Target Audience	**Title**	**Topic(s)**	**Description**
In-Person; Chief Judge	New Chief Judge Orientation	General Court Management	The AO sponsors a 1.5 day New Chief Judge Orientation Program that addresses the administrative, management, and governance responsibilities of a chief judge and introduces the chief judge to the AO and FJC staff and resources available to assist them. During the program, the FEP Office reviews the court's employee dispute resolution plan and the Office of Audit reviews the court's last audit report. Staff from the Budget, Accounting, and Procurement Office, and the Human Resources Office also provide briefings. Court unit executives are invited to attend the program with their chief judge.
In-Person; Chief Judge	Chief Judge Education Program	General Court Management	The FJC's chief judge education programs emphasize the leadership and management roles of chief judges, as well as topics that relate to specific administrative responsibilities, including internal controls.

Core Management and Oversight Trainings			
Format; Target Audience	**Title**	**Topic(s)**	**Description**
In-Person; Chief Judge	Conference for Chief Judges of the U.S. District Courts	General Court Management	This two-day FJC conference examined the leadership and management roles of chief district judges. The conference also gave the chief judges the opportunity to learn about best practices from their peers and distinguished speakers. The conference agenda was developed in collaboration with a planning committee of current and former chief judges.
In-Person; Chief Judge	Conference for Chief Judges of the U.S. Bankruptcy Courts	General Court Management	The FJC held this two-day program for chief judges of bankruptcy courts to equip bankruptcy judges to best lead their courts now and in the future through competency in key management areas.
In-Person; Chief Judge	Leadership Seminar for New Chief Judges	Ethics; General Court Management	This FJC program is a four-day leadership seminar held biannually for chief judges who have held that position for less than two years. It covers leadership and management topics, including court leadership, strategic planning, and organizational culture.

Core Management and Oversight Trainings			
Format; Target Audience	**Title**	**Topic(s)**	**Description**
In-Person; Judge	New Judge Nominee Orientation	Ethics, General Court Management, Prohibited Personnel Practices	The AO sponsors a one day Article III Judge Nominee Orientation Program that addresses the administrative, management, and governance responsibilities of a judge and introduces the judge to the AO and FJC staff and resources available to assist them. During the program, the FEP Office reviews the court's employee dispute resolution plan.

Thank you for the opportunity to set forth our oversight processes and procedures both at the AO and throughout the Judicial Branch as a whole to expose and prevent fraud, waste, or abuse and prohibited personnel practices. We will be pleased to meet with you and your staff to answer further questions or respond to suggestions for improvements you may have as we have done in the past.

Sincerely,

James C. Duff
Director

Enclosures

cc: Honorable Dianne Feinstein
Honorable John G. Roberts, Jr.
Honorable Timothy M. Tymkovich

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

January 22, 2018

Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

During productive meetings Chief Judge Timothy Tymkovich and I had with your staff in November and December, we were encouraged to write to you to address generally the Judicial Branch's opposition both to S. 2195, the Judicial Transparency and Ethics Enhancement Act of 2017 (IG bill), which was introduced on December 6, 2017, and to previous whistleblower proposals that would allow aggrieved employees to file lawsuits directly into federal district courts to address retaliation.

At the outset, I want to thank you for your and the Judiciary Committee's attention to the management of the Judicial Branch. Your observations and questions over the years have contributed to improvements we have made within the Judicial Branch. For example, and as described in more detail below, after meetings with your staff in 2015, the Judicial Branch ensured that all 94 districts and all 13 of its circuits now include whistleblower protection in their Employment Dispute Resolution (EDR) Plans that prohibit any retaliatory action against employees who report violations of laws or regulations, waste, or gross mismanagement. These improvements, along with existing practices and procedures, are among the many reasons – in addition to our Constitutional concerns – why we believe an Inspector General (IG) over the Judicial Branch and yet additional whistleblower litigation options are not only unnecessary, but would themselves constitute an unwarranted and unjustifiable expense of public funds.

As set forth in detail in my separate letter to you of January 12, 2018, the Judicial Branch devotes tremendous resources and effort each year to provide for external, independent auditing of its finances and to provide mechanisms for exposing fraud, waste, or abuse. Given that the extensive internal controls are already in place in the Judicial Branch, any other approach would not improve oversight and would only create

substantial additional public expense. In short, we have the same goals as you do and we already have in place effective and cost efficient methods of achieving those goals.

I. THE ADMINISTRATIVE OFFICE PERFORMS CORE FUNCTIONS OF AN INSPECTOR GENERAL WITH INDEPENDENT OVERSIGHT.

Some historical perspective of financial oversight mechanisms within the Judicial Branch may be helpful. Prior to the Administrative Office's (AO) creation, the Department of Justice handled administrative matters and legislative issues before Congress on behalf of the Judicial Branch. As the federal Judiciary grew, the inherent conflicts of interests between the branches in administering the courts became more evident and problematic. When Congress created the AO in 1939, it provided the framework for independent management oversight of the Judicial Branch. Since the creation of the AO, the administrative management and legislative interface for the Judicial Branch has been handled within the Judicial Branch, in coordination with the Judicial Conference of the United States and its committees of judges. In December 1984, Chief Justice Warren E. Burger and AO Director William E. Foley designated what had been the "Office of Management Review" in the AO as the "Office of Inspector General." In October 1985, the office was again renamed to the Office of Audit and Review. The oversight functions of that office have largely remained in place ever since and are now performed by the AO's Office of Audit, Office of the Deputy Director and other offices within the AO.

The Director of the AO has the statutory responsibility under 28 U.S.C. § 604(a)(8) to disburse appropriations and other funds for the maintenance and operations of Judiciary organizations, as well as the responsibility under 28 U.S.C. § 604(a)(11) to audit accounts and vouchers of the courts. As Director of the AO, I have assigned the responsibility for administering the Judiciary's audit program to the AO's Office of Audit. Additionally, the Audits and Administrative Office Accountability (AAOA) Committee of the Judicial Conference of the United States provides independent oversight of the AO's Office of Audit and the Judiciary's auditing.

Specifically, the Office of Audit is organized as an independent internal audit office as defined under the Government Accountability Office's Generally Accepted Government Auditing Standards (GAGAS). The AO's Office of Audit conducts financial-related performance audits and contracts with independent external audit firms to perform financial statement audits and other attest engagements that require a level of independence, as defined in professional auditing standards, which must be provided by independent certified public accounting (CPA) firms. Audits are conducted in accordance with GAGAS and Generally Accepted Auditing Standards.

The Judiciary's audit programs reflect its wide-ranging responsibilities for the handling of appropriated and non-appropriated funds at the national and local levels. The Judiciary produces a series of financial reports and statements reflecting these responsibilities, and it audits them on a regular basis. In many cases, expenditure transactions will be examined at multiple levels. For example, an expenditure may be reviewed at the national level in an appropriations audit and at the local level in a cyclical court audit where the actual disbursement was initiated.

My letter of January 12, 2018, provides not only details of specific types of audits performed, but also details of our program reviews, special investigations, fraud, waste, or abuse procedures and our fair employment practices, procedures and protections. As also stated in that letter, after conversations with your staff, we have made improvements in publicizing those procedures on our website, at uscourts.gov. There is no need to create another IG over the already existing functions performed at the AO with independent outside auditors and, as explained below, by the Judicial Conference committees.

II. THE JUDICIARY HAS IMPLEMENTED WIDESPREAD WHISTLEBLOWER PROTECTION FOR ITS EMPLOYEES.

In 2012, the Judicial Conference of the United States adopted changes to its Model Employment Dispute Resolution Plan to include specific protections against whistleblower retaliation. Every judicial district and judicial circuit has now adopted whistleblower protections, and similar whistleblower protections are also in place for employees of the AO and Federal Judicial Center (FJC). These provisions allow for employees who allege whistleblower retaliation to obtain review and employment remedies (such as reinstatement and back pay) through an administrative process within the Judicial Branch, generally culminating in review by the chief judge of the court in which the retaliation is alleged to have occurred, with review of that ruling by the Circuit Judicial Council. These protections are parallel to those provided to Executive Branch employees, whose sole remedy is also administrative (through the Merit Systems Protection Board (MSPB) and then the appellate courts). Thus, court employees who believe they have been retaliated against for whistleblowing may seek redress under the EDR Plans through a process that entitles court employees to a hearing before an Article III judicial officer.

In addition to providing a forum for relief for employees alleging retaliatory action, the establishment of this formal process also allows us to better assess the scale of perceived whistleblower retaliation in our branch. As we expected, that scale is small: since the model whistleblower protection plan was promulgated in 2013, only two whistleblower complaints have been asserted under EDR and in neither case was there a finding that retaliatory action was taken against a whistleblower.

Therefore, we are concerned that the IG bill contains a provision which would create a private civil cause of action for Judicial Branch personnel who assert that they suffered employment retaliation as a result of having been a "whistleblower" (whistleblower litigation option)[1]. This proposal would be unprecedented. It is not consistent with the treatment of whistleblowers in either of the other branches of government, and it may disrupt Judicial Branch operations. A separate, simultaneous path of litigation could lead to conflicting, wasteful, and duplicative proceedings.

A. THE PROPOSAL IS UNNECESSARY: THERE ARE EXISTING EDR WHISTLEBLOWER PROTECTIONS.

When you first introduced this provision years ago, many court employees lacked whistleblower protection equivalent to that provided in the Executive Branch through the Merit Systems Protection Board. A statutory whistleblower provision is now duplicative, and thus unnecessary, because Judicial Branch employees already have whistleblower protection with all of the due process and procedural protections available in a civil action, including the right to have their claim heard by an Article III judicial officer. Substantively, the Judicial Branch modeled its EDR whistleblower protection provision directly on the Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8) (WPA) covering Executive Branch employees.[2] The EDR provision prohibits retaliation against

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[1] The proposed language in a succession of prior legislation, reads:
Whistleblower protection. –
(1) IN GENERAL.-
No officer, employee, agent, contractor, or subcontractor of the judicial branch may discharge, demote, threaten, suspend, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding any possible violation of Federal law or regulation, or misconduct, by a judge, justice, or any other employee in the judicial branch, which may assist in the investigation of the possible violation or misconduct.
(2) CIVIL ACTION. -
An employee injured by a violation of paragraph (1) may seek appropriate relief in a civil action.

Similar language is proposed in S. 2195, the Judicial Transparency and Ethics Enhancement Act and its iterations in prior Congresses.

[2] The Judicial branch EDR provision reads:
Any employee who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or threated to take an adverse employment action with respect an employee (excluding applicants for employment) because of any disclosure of information to (A) the appropriate federal law enforcement authority, or (B) a supervisory or managerial official of the employing office, a judicial officer of the court, or the Administrative Office of the United States Courts, by the latter employee, which that employee reasonably and in good faith believes evidences a violation of any law, rule or regulation, or other conduct that constitutes gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety, provided that such disclosure of information (1) is not specifically prohibited by law, (2) does not reveal case-sensitive information, sealed material, or the deliberative processes of the federal judiciary (as outlined in Guide to Judiciary Policy, Vol. 20, Ch. 8), and (3) does not reveal information that would endanger the security of any federal judicial officer.

an employee who reports violations of law, gross mismanagement or waste of funds, or health and safety violations. It does require that the employee appropriately report the misconduct to an appropriate authority: law enforcement, the Administrative Office, a judicial officer, or a supervisor. The EDR provision does not protect an employee who wrongfully discloses judicial deliberations, case-sensitive information, or sealed material. This is a crucial omission in the proposed whistleblower litigation option.

Procedurally, the EDR claims process is modeled directly on the Congressional Accountability Act. An aggrieved employee is entitled to conduct discovery, to have a transcribed hearing before an Article III judicial officer, and to seek appellate review by the Article III judicial officers of the Circuit's Judicial Council. Employees may seek to disqualify the presiding judicial officer if they have any concerns about a potential conflict of interest. To ensure impartiality and that potential misconduct is investigated, any EDR allegation against a judicial officer must be handled by the circuit Judicial Council. Providing a statutory right to bring a civil action simply replicates these rights and protections already afforded Judicial Branch employees – without any obvious benefit to either party.

Our objections to the whistleblower litigation option are focused on this duplication as well as the need to protect the independence of the Judicial Branch. The language in the provision covering Judicial Branch employees fails to provide the Judicial Branch with the following protections necessary to its essential functions (though these same protections are afforded to the Executive Branch in the WPA).

B. THE PROPOSAL FAILS TO REQUIRE EXHAUSTION OF ADMINISTRATIVE REMEDIES.

The whistleblower litigation option fails to require Judicial Branch employees first to exhaust their EDR administrative remedies, though all federal courts have EDR whistleblower protection and claim procedures. The Judicial Branch is a co-equal branch of government and is entitled to mutual recognition and congressional respect of its internal administration and employment procedures. The Executive Branch has been afforded such respect: In contrast to the whistleblower litigation option, the WPA covering the Executive Branch requires employees to exhaust administrative procedures by first bringing whistleblowing claims to the Office of Special Counsel. 5 U.S.C. § 1214(a)(3). Principles of comity require that the Judicial Branch be entitled to the same respect.

C. THE PROPOSAL FAILS TO REQUIRE GOOD FAITH OR REASONABLE BELIEF.

The whistleblower litigation option lacks any requirement that the employee act in good faith or possess a reasonable belief they are reporting illegality or misconduct. The WPA requires that the whistleblower "reasonably believes" his or her disclosure evidences a violation of law or misconduct. 5 U.S.C. § 2302(b)(8)(A). Indeed, we are aware of no federal whistleblower protection provision that does not include a requirement that the employee have a good faith or reasonable belief they are disclosing a violation of law or misconduct. Yet the whistleblower litigation option for the Judicial Branch contains no similar protection for the Judicial Branch.

In sum, we oppose the proposed statutory whistleblower litigation option because it is unnecessarily superfluous to the existing Judicial Branch EDR whistleblower protection, it fails to require exhaustion of administration remedies, and it does not require the employee to have any good faith or reasonable belief the disclosure evidences wrong-doing.

III. CIRCUIT COUNCILS AND JUDICIAL CONFERENCE COMMITTEES CAREFULLY ADMINISTER LEGAL PROCESS WITH STATUTORY GUIDELINES FOR ADDRESSING JUDGES' MISCONDUCT.

With regard to the oversight of judicial conduct matters, the Judicial Conference's Judicial Conduct and Disability Committee operates under a statutory structure created in the Judicial Conduct and Disability Act of 1980. The structure functions efficiently and effectively as witnessed in recent incidents involving allegations of judicial misconduct. The structure provides for an investigatory process that protects privacy interests while the alleged wrong-doing is investigated. It also provides for several stages of review by up to four separate bodies of judges, which protects against the possibility of any politically motivated charges or outcomes.

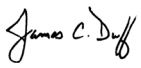
Under the Judicial Conduct and Disability Act, any person may file a misconduct complaint with the Chief Judge of a circuit, who in turn may appoint an investigatory committee of judges to examine the allegations and make a recommendation for independent consideration by the Circuit's Judicial Council. In matters involving an investigation, the complainant may then seek review by the Judicial Conference's Judicial Conduct and Disability Committee, which may then refer the matter to the entire Judicial Conference for a determination of whether the matter needs to be referred to the Congress for consideration of impeachment. The Chief Justice of the United States can resolve any potential conflicts by transferring complaints to different circuits. There are numerous examples of how complaints under the Judicial Conduct and Disability Act are addressed thoroughly and expeditiously.

The imposition of an Inspector General's investigatory powers and procedures overlapping the Judicial Branch's already functioning process is unnecessary and would only add procedural and constitutional attacks in collateral litigation by investigated judicial officers.

* * * *

We would be pleased to talk with you, your staff, and the Committee to answer any questions you may have or to clarify further these policies and practices within the Judicial Branch. We have found that increased dialogue with your staff about these issues has been productive and helpful. We all have the same interests in providing the best, most efficient services to the American people and, in doing so, protecting both the employees of the Judicial Branch and the independence of the Judicial Branch.

Sincerely,



James C. Duff
Director

cc: Honorable Dianne Feinstein
Honorable Timothy M. Tymkovich

TAB H

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Northwestern University Law Review Online
November 2, 2021

Essay

Hon. M. Margaret McKeown[a1]

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THE JUDICIARY STEPS UP TO THE WORKPLACE CHALLENGE

ABSTRACT--As the #MeToo movement swept the country, the federal judiciary faced its reckoning in light of allegations against several judges. In short order, with the backing of Chief Justice Roberts, workplace issues took center stage. This Essay highlights workplace risks relevant to the judiciary, then details the significant changes adopted by the federal judiciary to foster a healthy, harassment-free, and productive work environment. Major undertakings include the establishment of a national Office of Judicial Integrity; circuit-wide Directors of Workplace Relations; multiple avenues to report misconduct, including anonymous reporting; revamped employment dispute policies; revised ethics, reporting, and discipline rules; and targeted workshops and trainings. While realizing the full potential of these reforms will require continued focus and deliberate attention across our workplace of 30,000 employees nationwide, the federal judiciary--with the backing of Chief Justice Roberts--remains committed to a workplace that treats everyone with respect and dignity.

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*276 INTRODUCTION

In October 2017, more than a decade after activist and sexual violence survivor Tarana Burke began using the phrase "me too," the hashtag "#MeToo" went viral on Twitter.[1] Revelations of sexual harassment, violence, bullying, and other misconduct flooded social media and the press as survivors shared stories and support.[2]

As the #MeToo movement gained momentum, stories of harassment and assault surfaced across industries, implicating some of the most powerful *277 individuals in sectors as varied as entertainment,[3] banking,[4] fashion,[5] food,[6] and technology.[7] Hollywood became front and center with accusations against influential film producer Harvey Weinstein.[8] Once allegations of misconduct became ubiquitous, these industries and others were forced to grapple with pervasive sexual misconduct.

The federal judiciary was not immune. In December 2017, the United States Court of Appeals for the Ninth Circuit learned of multiple allegations of sexual misconduct against then-Judge Alex Kozinski.[9] He resigned ten days later.[10]

As an independent branch of the United States government, the judiciary is tasked with making decisions and taking actions that affect everyone in the country. The judiciary's effectiveness is dependent on its highly accomplished judges and the respect and regard citizens have for the institution. With approximately 2,300 judges, the federal judiciary includes the United States Supreme Court, circuit courts of appeals, district courts, bankruptcy courts, other specialized courts, and federal defenders, and it ***278** operates clerks' offices, libraries, pretrial services, probation departments, and administrative units.[11] With over 30,000 employees nationwide in workplaces of different sizes,[12] the judiciary is committed to a workplace that treats everyone with respect, recognizes everyone's dignity, and fosters inclusivity. As an institution, the judiciary has the responsibility to address workplace misconduct and recognizes that a sea change in approach is in order.

In response to the allegations against Kozinski, the federal judiciary recognized the need to do more to prevent and combat harassment, and it took action. Even before Kozinski's swift resignation following the allegations, Ninth Circuit Chief Judge Sidney R. Thomas appointed the Ad Hoc Committee on Workplace Environment (Ninth Circuit Committee), which was charged with conducting a comprehensive review of workplace practices and policies in the Ninth Circuit and making recommendations for improvement.[13] Other circuits followed suit.[14] And in his 2017 Year-End Report on the Federal Judiciary, Chief Justice John G. Roberts of the United States Supreme Court tasked the Director of the Administrative Office of the U.S. Courts (the AO) with forming a working group to undertake "a careful evaluation of whether [the federal judiciary's] standards of conduct and its procedures for investigating and correcting inappropriate behavior [were] ***279** adequate to ensure an exemplary workplace for every judge and every court employee."[15] The following month, in January 2018, the federal courts established the Federal Judiciary Workplace Conduct Working Group (National Working Group), a national counterpart to the Ninth Circuit Committee.[16]

Now, more than three years later, there have been substantial changes in workplace policies and visible improvements in the workplace environment. Ethics and discipline rules have been significantly revised, the national Office of Judicial Integrity and circuit Directors of Workplace Relations were established, and employees now have new avenues to seek confidential advice and guidance with multiple formal, informal, and anonymous reporting options and a judiciary that is more prepared to take prompt, fair action. This Essay catalogues many of these procedural and process improvements while recognizing that transforming workplace conduct is not instantaneous or simply a matter of revising policies. Most importantly, with the backing of Chief Justice Roberts, the issue has taken center stage in the judiciary, which is mindful that fostering an exemplary workplace is an ongoing process and that the judiciary must be vigilant about addressing continuing and novel challenges.

This Essay begins with a description of the EEOC's research on sexual harassment, which provides a foundation to explore the risk factors that are present in an institution such as the judiciary. The most salient factor is the power disparity that exists between judges and their clerks and staff, coupled with an often-isolated workplace. By leveraging that research, plus surveys and outreach to relevant stakeholders including current and former law clerks, court employees, and law schools, the past three years have resulted in major institutional changes. Though allegations of sexual harassment catalyzed the initial action, the changes extend more broadly to include *proactive* improvements to the workplace climate. And although the initial allegations stemmed from law clerks, the judiciary's response embraced the voices of the entire 30,000-plus employee workforce.

This Essay then surveys the key structural changes in workplace policies, procedures, and practices, ranging from the appointment of a national Judicial Integrity Officer and circuit Directors of Workplace Relations to revision of confidentiality policies, the ethics and disciplinary ***280** codes, and employment dispute resolution policies. These changes seek to address the calls to interrogate the institutional structures that led to this moment, such as those made by Professor Leah Litman and Deeva Shah in their Essay, *On Sexual Harassment in the Judiciary*.[17]

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Finally, while this Essay reflects on the strides the judiciary has made over the past three years, it also recognizes that there is no such thing as "victory." The policies and practices, the people who implement them, and the leaders who insist upon them must constantly assess performance, listen to constructive feedback on our efforts, [18] and address new and remaining challenges. [19]

This Essay does not attempt to distance the federal judiciary from the harassment events that have been publicly debated or from the genuine risk factors present. Rather, it endeavors to highlight in considerable detail the ways in which the judiciary has systematically evaluated, identified, and responded to workplace misconduct, including sexual harassment and bullying.

I. LINKING THE NATURE OF HARASSMENT IN EMPLOYMENT GENERALLY WITH EMPLOYMENT IN THE JUDICIARY

A. EEOC Report on Risk Factors for Harassment in the Workplace

Five years ago, in the face of rising claims of sexual harassment nationwide and before the Kozinski allegations surfaced, the Co-Chairs of the EEOC's Select Task Force on the Study of Harassment in the Workplace (the Select Task Force) published a report documenting the persistence of workplace harassment and offering potential solutions (EEOC Report). [20] This report was the culmination of eighteen months spent examining the complex issues associated with harassment in the workplace. [21] During that time, the Select Task Force examined tens of thousands of charges and complaints received by the EEOC; reviewed research; and convened experts ***281** from law, sociology, psychology, employment, and more to better understand workplace harassment and how to prevent it. [22]

It is well understood that harassment harms its targets and, when mishandled or overly cumbersome, reporting can cause additional harm, as these individuals may experience psychological distress from the reporting process itself and from the fear and reality of adverse job repercussions. [23] It is therefore important to emphasize *prevention* and to develop systems that will minimize these harms.

The Select Task Force thus endeavored to identify risk factors--"elements in a workplace that might put a workplace more at risk for harassment"--in order to "give employers a roadmap for taking proactive measures to reduce harassment in their workplaces." [24]

The EEOC Report catalogued a nonexhaustive, nonexclusive list of organizational conditions that are risk factors, including: "homogenous workforces," "workplaces where some workers do not conform to workplace norms," "cultural and language differences in the workplace," "coarsened social discourse outside the workplace," "workforces with many young workers," "workplaces with 'high value' employees," "workplaces with significant power disparities," "workplaces that rely on customer service or client satisfaction," "workplaces where work is monotonous or consists of low-intensity tasks," "isolated workspaces," "workplace cultures that tolerate or encourage alcohol consumption," and "decentralized workplaces." [25] The EEOC Report explains that most workplaces will contain some of these factors, and the presence of risk factors alone does not guarantee that harassment is occurring in that workplace. [26] But the presence of risk factors--especially multiple risk factors--does suggest that a workplace "may be fertile ground for harassment." [27]

B. Understanding the Risk Factors for the Judiciary

The nature of the federal judiciary informs how these risk factors map onto the judicial environment. Judicial independence is a foundational tenet of the judiciary as the third branch of government. [28] Judicial decision- ***282** making is, and must be, independent of the executive and legislative branches and from political or other outside influences. [29] This independence is essential to ensure that judicial decisions remain legitimate, impartial, and transparent. [30]

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Stemming from the need to protect and ensure judicial independence, the federal judiciary has several unique features. First, under the Constitution, federal judges have lifetime tenure, or more accurately, "hold their Offices during good Behaviour." [31] The life tenure of federal judges is intended to insulate them from shifting political winds and outside pressures in reaching their decisions and to further support their independence. [32]

Second, federal courts operate under a regionalized governance structure developed to support the core tenet of judicial independence and maintain a certain level of autonomy within the courts at the district and circuit levels. [33] While the Judicial Conference of the United States makes national policy for the federal courts, district courts and circuit courts manage their own employees, and individual judges have significant autonomy in how they organize and manage their personal staff and interact with other court employees. [34] In addition, the judiciary is distributed across a wide variety of geographic regions serving vastly different communities across the country.

Although the unique features of the federal judiciary provide important benefits, they also create several risk factors for harassment as described by the EEOC and others. [35] While life tenure guards the integrity of the judiciary, it nonetheless contributes to a power disparity between judges and employees--particularly law clerks and others who work in the judges' chambers. Research conducted in university settings has shown that "[h]ierarchical work environments ... where there is a large power differential between organizational levels and an expectation [] not to question those higher up, tend to have higher rates of sexual harassment than ***283** organizations that have less power differential between the organizational levels." [36] Sexual harassment is more pervasive in these environments because high-status employees may be more likely to exploit lower status employees, who may not understand the complaint mechanisms or may fear retaliation in response to reporting. [37]

This research informs potential areas of concern within the federal judiciary. Though the individual workplace environments of the 30,000 judiciary employees have widely diverse characteristics, judicial chambers (which employ about one-fifth of these individuals) [38] are a focal point for power disparity. Federal judges oversee their chambers, often with one judicial assistant and several law clerks. Law clerks, many at the beginning of their legal careers and typically in one- or two-year positions, depend on judges for future job opportunities, recommendations, and networking connections. [39] Other chambers employees, like judicial assistants, often work for a single judge during their career and are thus dependent on that judge for their livelihood and for recommendations for future job opportunities. Judges thus have expansive power over their chambers and the employees who work there.

In addition to having a potential power disparity between their employees, some judicial chambers can be relatively isolated workplaces. This is a byproduct of a geographically dispersed judiciary and judges' autonomy in managing their chambers. [40] As the EEOC noted, harassment is more likely to occur in situations where employees may be physically isolated from their colleagues or where coworkers are less likely to report harassment. [41]

Understanding the unique facets of the judiciary and how they relate to the EEOC Report risk factors was, and remains, central in the work of the National Working Group and the Ninth Circuit Committee tasked with improving the workplace. These risk factors served as a road map for the judiciary's efforts, discussed next, to implement reforms designed to respond to harassment in the workplace.

***284 II. REFORM IN THE FEDERAL JUDICIARY**

A. Benchmarking the Need for Reform

Though some academics and former employees have expressed concern that the legal profession has not examined and reformed the structures that have allowed for harassment in the past, [42] the first step in the judiciary's process was a top-to-bottom review of its employment structure and policies. [43] Responding to Chief Justice Roberts's push to address workplace conduct, the judiciary's priority was "to examine the sufficiency of the safeguards

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currently in place within the Judiciary to protect all court employees from inappropriate conduct in the workplace" and to recommend any necessary changes and reforms.[44] As a complement to this review, beginning in early 2018 and still ongoing, the judiciary conducted extensive outreach and consultation with judges, employees (including court unit executives, managers, and supervisors), advisory committees within the judicial branch, law clerks, interns, externs, and volunteers to obtain valuable feedback from an employee perspective.[45] This outreach included expansive efforts to reach current and former law clerks and employees through focus groups, surveys, and anonymous email reporting.[46] Additionally, the judiciary solicited reviews from other stakeholders and interested constituencies including law schools, the EEOC, Law Clerks for Workplace Accountability, and employment experts from outside of the judiciary.[47]

The results of these research and outreach efforts reflected some common themes. While the vast majority of employees were satisfied with their workplaces and did not report pervasive inappropriate conduct, three key areas emerged as opportunities for improvement:

***285** • Multiple options for discussing and reporting workplace concerns;

• Coverage and clarity of workplace policies and procedures; and

• Training on workplace conduct issues.[48]

More specifically, some employees articulated their reluctance to report workplace concerns through then-available channels, the lack of information about policies or work expectations, the need for more specific training and education, and a desire for a more collegial and interactive workplace environment to counteract feelings of isolation.[49] Others indicated a need for establishing, improving, and communicating policies related to antibullying and sexual harassment and a need to change the overall judicial culture to one where judges took more responsibility to stop and prevent inappropriate behavior.[50] And other stakeholders raised the desire for informal and confidential avenues outside the local chain of command to address inappropriate conduct.[51] In terms of training topics, antibullying, civility, leadership, and bystander intervention were commonly requested.[52]

This extensive feedback plus additional research served as a blueprint for the judiciary's approach to changes and improvement in these areas. The National Working Group's 2018 Report to the Judicial Conference of the United States included recommendations that were based on the EEOC Report and other research, input from several circuits' workplace conduct working groups, and the feedback from employees, former law clerks, and interest groups.[53] Over the fifteen months following this report, the judiciary engaged in an intensive effort to revise policies and implement changes that would improve the workplace by generating confidence in a confidential and fair system to prevent, reduce, and address inevitable workplace issues. The National Working Group issued a 2019 Status Report that summarized the progress and extensive revisions that the judiciary implemented, and the key reforms are outlined in detail below.[54] Each structural change, policy amendment, and revision was, of necessity, approved by the appropriate ***286** governing body, and that process, too, led to wide acceptance and adoption of the reforms.

B. Judiciary Workplace Reforms

Judiciary policies regarding workplace conduct live in three places: the Model Employment Dispute Resolution Plan (Model EDR Plan) (procedures for reporting and resolving complaints related to all employees, including

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judges),[55] the ethics codes for the judiciary (the Code of Conduct for United States Judges and the separate Code of Conduct for Judicial Employees), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (JC&D Rules) (rules governing misconduct complaints against judges).[56] The different policies are meant to function both independently as well as interdependently, as they complement each other. In response to the findings and recommendations of the National Working Group and the circuit committees, each of these three policy areas has been overhauled. In March 2019, the Judicial Conference of the United States approved revisions to the ethics codes and the JC&D Rules.[57] Individual courts began revising their EDR plans soon after the reports of sexual harassment, and the revised Model EDR Plan was approved in September 2019.[58]

1. Revamped Confidentiality Policy

Considering the sensitive and confidential nature of information entrusted to the judiciary, it is a given that employees are bound by various confidentiality obligations. Through law clerk and employee feedback, the National Working Group and circuit committees learned, however, that there was confusion and ambiguity about whether those obligations impeded the reporting of harassment.[59] The National Working Group stressed that the "confidentiality obligations [of judiciary employees] must be clear so both judges and judicial employees understand these obligations never prevent ***287** any employee--including a law clerk--from revealing abuse or misconduct by any person."[60] Not surprisingly, research demonstrates that "[d]eveloping and disseminating clear anti-harassment policies is crucial"[61] because lack of clarity in these policies can stymie reporting.[62]

To dispel any ambiguity, policies were immediately revised to make clear that, although information received in the course of judicial business remains confidential, reports of workplace harassment and misconduct are not subject to confidentiality restrictions.[63] The Code of Conduct for Judicial Employees was revised to clarify that the "general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee or former employee from reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person."[64] The law clerk handbook was similarly revised, the JC&D complaint process was amended to include a new provision, and related commentary emphasizing that nothing in the confidentiality provisions in the JC&D Rules or the Code of Conduct for Judicial Employees prevents a judicial employee from reporting or disclosing misconduct or disability.[65]

2. Creation of the Office of Judicial Integrity and Directors of Workplace Relations

The most frequent recommendation from current and former employees "was for a clearly identifiable and independent person of high stature to whom they could report misconduct and discuss other workplace concerns."[66] Key to this position, employees noted, was that it be outside of the supervisory chain of command.[67] And yet, employees did not favor reporting to an entity or person outside the judiciary. Two of the most significant changes in response to these comments were the AO's establishment of the Office of Judicial Integrity, and the Ninth Circuit Committee's appointment of the first Director of Workplace Relations.[68] ***288** Other circuits soon adopted this approach, and now there is a director (or analogous role) for every circuit.[69]

The national Office of Judicial Integrity, headed by the national Judicial Integrity Officer, serves as an independent resource outside of the courts' traditional chain of command.[70] It provides confidential help, information, referral, and guidance in complaint options to address workplace harassment, abusive conduct, or other misconduct. This office also monitors recurring workplace issues to identify trends and conduct systemic reviews.

Modeled in part after an organizational ombudsman, each Director of Workplace Relations is an independent circuit-wide position that acts as a confidential resource within the circuit. They confidentially talk through issues with employees (including clerks, supervisors, managers, court unit executives, and judges), provide information about policies and procedures, set out options for early-stage resolution and the complaint process, offer guidance, receive reports of workplace issues, and monitor the workplace environment for trends and patterns.[71]

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Directors serve all court units within a circuit--court of appeals, district and bankruptcy courts, probation and pretrial offices, and federal public defender offices. They do not report directly to any chief judges or judges, nor do they report to other court unit supervisory personnel such as the clerk of court, chief probation or pretrial officer, or chief federal public defender. Instead, directors report to the Circuit Executive yet maintain considerable autonomy. [72]

The Directors of Workplace Relations and the Judicial Integrity Officer bring relevant and wide-ranging experience to their roles with backgrounds as former federal circuit court law clerks, Title IX officers, mediators, and ***289** EEOC attorneys. [73] One of the benefits of this diverse collective experience is that it provides the judiciary with an internal group of experts who can see the workplace from a bird's eye view and who are well-positioned to collaboratively assess trends and feedback for additional improvements to the judiciary's policies, processes, and structures for addressing workplace issues. The Judicial Integrity Officer and directors from across the nation serve on the national Directors of Workplace Relations Advisory Group and meet frequently to discuss emerging issues, share information, and develop best practices. They draw on direct and indirect feedback to continue improving: it is an iterative process of making changes, assessing their effectiveness, adjusting as necessary, and disseminating information to national, circuit, and local court unit leadership as appropriate.

The creation of these new positions not only addresses one of the top employee requests, but it also serves to mitigate at least two other risk factors identified by the EEOC--decentralization and isolation. Because these individuals are available to employees in all court units, they function as centralized and uniform resources for employees to learn about their rights and options without fear that their local leadership will be informed of their confidential conversations. [74] And, importantly, the directors look beyond individual employees and workplaces to identify institutional trends.

3. Multiple Avenues for Advice, Reporting, and Resolution

Another key change was the development of multiple avenues to report, discuss, and resolve workplace concerns. The EEOC recommends that an anti-harassment policy include a "clearly described complaint process that provides multiple, accessible avenues of complaint." [75] This recommendation is supported by research that demonstrates the efficacy of providing both ***290** formal and informal dispute resolution options in combatting workplace harassment. [76] "Increasing informal, confidential options within the complaint-response system is important ... to create more supportive environments for those who have experienced sexual harassment." [77] Employees feel more confident pursuing grievances when informal advice and multiple communication channels are available to them. [78] In accordance with these recommendations and the supporting research, the judiciary undertook significant reforms to its complaint processes in 2019.

Prior to the 2019 reforms, a clerk or other employee seeking to report a judge's misconduct primarily had two formal options: to file a complaint via an EDR Coordinator or file a formal JC&D complaint with the clerk's office or the Chief Circuit Judge. [79] EDR Coordinators are locally designated employees within each court unit who, in addition to their full-time jobs, provide guidance and administrative support for individuals and employing offices participating in the judiciary's internal employment dispute resolution process. [80]

While nothing prevented a law clerk or other employee from reporting to another judge or supervisor, some employees did not see that as a realistic option. [81] Outside of chambers, other judicial employees who wanted to report misconduct of judges or other employees had the options of reporting directly to a supervisor or manager, to human resources, or to EDR Coordinators.

Having only formal options hindered reporting. Employee feedback reflected a reluctance to report workplace concerns out of fear of retaliation from superiors and harm to their future career prospects. [82] Employees further expressed concerns about "whether details of their complaint would be kept private, reported misconduct would

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be adequately investigated, and ***291** reporting would lead to a satisfactory resolution." [83] Employees likewise expressed a desire for a confidential reporting avenue outside of the direct chain of command. [84]

The changes were tailored to all of these concerns. Now employees can *explicitly* pursue multiple options: confidential informal advice, assisted resolution, and formal complaint. [85] To further assure that employees understand the reporting routes available, materials were developed to communicate the procedures. One such example is the following chart, created internally--a graphic outline of these options:

***292 FIGURE 1: OPTIONS FOR WORKPLACE ADVICE AND COMPLAINTS IN THE FEDERAL JUDICIARY.**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

"Informal Advice" is an option that allows an employee to receive confidential advice and guidance from a *local* EDR Coordinator, a *circuit* Director of Workplace Relations, or the *national* Judicial Integrity Officer. [86] This confidential guidance may include providing information on the employee's rights, providing perspective on the conduct, discussing ways to respond to the conduct, and providing an outline of potential options for resolution. [87] A primary purpose of informal advice is to confidentially provide employees with relevant information so they can make informed decisions about how to proceed with their concerns. As explained by the ***293** EEOC, engaging in a reporting process can cause psychological distress. [88] The aim of the informal advice channel is to reduce the psychological distress of reporting. Accordingly, the conversations remain confidential unless the employee seeks or requests further action. [89] In this way, employees pursuing the "Informal Advice" option generally control the level of confidentiality that attaches to their conversations. [90]

The "Assisted Resolution" avenue available under the EDR is an interactive and flexible process that may include discussions with the source of the conduct, preliminary investigations including interviewing the witness, and resolution by agreement. [91] Consistent with the EEOC Report, this option gives employees an informal method to resolve a workplace matter, typically at an early stage.

Finally, filing a formal complaint remains an option as well. The conduct of a judge or an employee may be the subject of an EDR complaint, while a complaint under the JC&D process is limited to complaints against judges. [92] Through formal resolution, a complainant may pursue remedies such as back pay, reinstatement, promotion, records modification, granting of family and medical leave, any reasonable accommodations, and any other appropriate remedy to address the wrongful conduct. [93]

The Office of Judicial Integrity and Directors of Workplace Relations are key channels in the multiple avenues of reporting and receiving confidential guidance now available to judiciary employees. In addition to these newly created roles, the judiciary has also retained and revamped the EDR Coordinator role as a point of contact for employees who wish to report and resolve workplace concerns at a local level. [94]

Early evidence indicates that the creation of multiple and confidential informal avenues for reporting has been successful in removing barriers to ***294** reporting. Multiple Directors of Workplace Relations have reported that they spend more of their time on confidential informal advice than anything else--albeit on a range of workplace issues, not only harassment. [95] Those confidential conversations have provided opportunities for a variety of interventions that would not have been possible if employees were not comfortable coming forward. The interventions have included informal actions to stop the inappropriate behavior, targeted trainings, policy revisions, mediations and facilitated conversations, and investigations. [96] These informal, confidential, and flexible options mitigate some of the impacts of the power disparities inherent in the judiciary.

These reporting avenues are not mutually exclusive and can be pursued simultaneously. And pursuing these options does not preclude the filing of a formal complaint. The net result is that structural barriers are removed,

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confidentiality is protected to the greatest extent possible, and it is anticipated that employees will gain confidence in the system.

4. Major Revision of Harassment-Related Policies

a. Promoting Civility and Prohibiting Abusive Conduct

The Codes of Conduct and JC&D Rules now make clear that all judiciary employees, including judges, have an affirmative duty to promote civility both in the courtroom and throughout the courthouse. The Code of Conduct for judges emphasizes that its canons regarding civility--requiring that judges be patient, dignified, respectful, and courteous--extend not just to those coming before the court but also to all court personnel including chambers employees.[97] In a similar vein, the JC&D Rules now expressly protect judicial employees from "demonstrably egregious and hostile" treatment.[98]

The codes of conduct for both judges and judiciary employees now expressly cover sexual harassment, discrimination, abusive behavior, and retaliation for reporting or disclosing judicial misconduct. A new section in the JC&D Rules, entitled "Abusive or Harassing Behavior," provides that cognizable misconduct includes "engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault" as well as ***295** creating a hostile work environment.[99] These changes expand the workplace-conduct obligations for federal judges and employees.

The judiciary's policies have long protected against "discrimination and harassment based on race, color, national origin, sex, gender, pregnancy, religion, and age (40 years and over)," but they were expanded in 2019 to include gender identity and sexual orientation within the definition of "protected categor[ies]."[100] As a consequence of employee feedback and consistent with the reality of today's workplace, the Model EDR Plan also added "[a]busive conduct" as a form of wrongful conduct, defined as "a pattern of demonstrably egregious and hostile conduct not based on a [p]rotected [c]ategory that unreasonably interferes with an [e]mployee's work and creates an abusive working environment."[101] Judiciary employees are thus now protected not only from discriminatory harassment but also from any form of harassment that unreasonably interferes with the work environment, regardless of motivation. Indeed, the revised Model EDR Plan includes a clear policy statement setting forth "wrongful conduct" prohibited in the workplace, including discrimination; "sexual, racial, and other discriminatory harassment;" abusive conduct; retaliation; and violations of specific employment laws.[102] This expansion of wrongful conduct was significant in that the judiciary not only recognized harassment but also the closely related misconduct of abusive behavior.

b. Retaliation Protection and Bystander Reporting Obligation

The concern about "closed-door" interactions and a victim's reluctance to report misconduct is understandable, so the Working Group recommended that the JC&D Committee "provide additional guidance ... on a judge's obligations to report or disclose misconduct and to safeguard complainants from retaliation" and "reinforce the principle that retaliation for reporting or disclosing judicial misconduct constitutes misconduct."[103] In response, the Judicial Conference expanded the JC&D Rules to define judicial misconduct "to include retaliation for reporting or disclosing judicial misconduct or disability."[104] It "also added a new provision that includes a judge's failure to bring 'reliable information reasonably likely to constitute judicial misconduct' to the attention of the relevant chief district judge or chief circuit ***296** judge within the definition of cognizable misconduct."[105] Because sexual harassment and abusive behavior fall within such misconduct, judges now have an affirmative obligation in specific circumstances to come forward. This change is significant as the information ultimately must be shared with chief circuit judges who, apart from an individual complainant, have the authority to initiate a complaint against a judge.[106]

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Before recent changes, judges were advised to "take appropriate action" against misconduct.[107] The Code of Conduct for judges was amended to put teeth into this standard. As the commentary to the amended Code provision states:

> Public confidence in the integrity and impartiality of the Judiciary is promoted when judges take appropriate action based on reliable information of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence.[108]

That commentary also clarifies that these provisions are read in conjunction with the JC&D Rules on misconduct.[109] The Code of Conduct for employees was correspondingly revised, emphasizing employees' "duty to promote appropriate workplace conduct, prohibit workplace harassment, take appropriate action to report and disclose misconduct, and prohibit retaliation for reporting or disclosing misconduct."[110] These changes coupled with increased training and widespread dissemination of related information have resulted in judges, law clerks, and employees coming forward to report inappropriate comments and conduct. Virtually all of these have been resolved through informal means, further investigation, mediation, and/or remedial action.

c. Complete Overhaul of Model EDR Plan

Before recent amendments, a reading of the existing Model EDR Plan revealed that it was dense, required exhaustion of mediation before filing a complaint, and was more procedurally complicated.[111] A wholesale revision to the plan resulted in a streamlined, easy-to-understand document that ***297** encourages the reporting of workplace misconduct and provides multiple, more flexible options for resolving claims. As discussed above, the revised Model EDR Plan encourages reports of wrongful conduct by making clear that confidentiality requirements do not prohibit reporting workplace misconduct.[112] Revisions made to the Model EDR Plan increased the time to file a formal EDR complaint from 30 to 180 days from the alleged wrongful conduct or the time an employee becomes aware of such wrongful conduct and extended "EDR coverage to all paid and unpaid interns and externs."[113]

The revised Model EDR Plan provides that the appropriate chief judge be notified of claims against a judge and that the chief judge oversees a request for assisted resolution or a formal complaint process that includes allegations against a judge or court unit executive.[114]

Importantly, the revised Model EDR Plan offers a process that is impartial and free of conflicts of interest.[115] It provides that those managing or presiding over an EDR process must recuse if they participated, witnessed, or were otherwise involved in the conduct giving rise to the claim.[116] It also requires recusal if the matter creates an actual or perceived conflict of interest.[117] Where appropriate, it allows for a judge from a different court to be brought in to preside over a complaint.[118] And, it further prohibits judges and unit executives from serving as EDR Coordinators.[119]

To ensure its efficacy, in January 2020, the Office of Judicial Integrity and EDR Working Group issued an internal EDR interpretive guide and handbook for all employees, managers, and judges, so that EDR claims can be processed in a uniform, conflict-free manner nationwide.[120]

d. Revisions to the JC&D Rules

In addition to the revisions discussed above, the JC&D Rules were further revised to eliminate barriers to reporting and increase accountability ***298** for judges, including clarification that confidentiality requirements do not limit disclosure of misconduct.

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The National Working Group emphasized the judiciary's "institutional interest in determining, apart from any disciplinary action, what conditions enabled the misconduct or prevented its discovery, and what precautionary or curative steps should be undertaken to prevent its repetition." [121] By law, Congress has provided that a judge who no longer holds a judicial commission is not subject to disciplinary proceedings under the Judicial Conduct and Disability Act. [122] But that does not mean that the judiciary is stymied from a "look back" to learn from a misconduct complaint. To this end, the judicial conduct rules now highlight the authority of both the Judicial Conference and the relevant judicial council to evaluate the underlying circumstances that contributed to the misconduct, thus promoting appropriate review of what precautionary or curative steps need be undertaken to prevent its recurrence. [123] In addition, the judiciary may make referrals to law enforcement and licensing authorities even after a judge resigns. [124]

Finally, the amendments were designed to increase transparency. For example, certain disclosures are allowed for details of a complaint that are already in the public realm (thus minimizing the need for confidentiality during the complaint proceedings), such as when key facts about the matter, such as a judge's identity, have been publicly released. [125]

299** ***e. Congressional Outreach

Over the last several years, the judiciary has communicated often with various congressional offices and committees regarding its continuing work on workplace environments. This ongoing dialogue has included judiciary representatives providing testimony and documentation for congressional hearings, [126] providing written answers to questions for the record, [127] keeping Congress apprised of the judiciary's substantial efforts through its 2018 and 2019 reports, and responding to specific inquiries. [128] These responses capture the policy and procedural changes described in this Essay. In addition, the judiciary has acknowledged areas for improvement and reviewed how reported incidents are investigated and resolved. [129]

III. TRAINING AND EDUCATION

Survey responses and other feedback revealed that, prior to 2018, many employees were unaware of policies prohibiting misconduct, their rights under those policies, or to whom they could turn with workplace misconduct concerns. In addition, some judges, managers, and supervisors were unsure of their obligations and responsibilities if they observed or otherwise became aware of misconduct. [130] In response, the judiciary has greatly expanded its training and educational opportunities consistent with the EEOC Report's recommendation that training is "an essential component of an anti-harassment effort." [131]

The revised Model EDR Plan now requires annual EDR training to be provided for all employees, including judges and law clerks. [132] That training ***300** includes "bystander intervention," which encourages those who recognize or witness misconduct to take action. [133] This may include reporting through the multiple channels available for assistance. [134] Judges, in particular, are advised that they are *required* to take appropriate action if they learn of wrongful conduct by any judicial employee, and they are *required* to report a fellow judge's misconduct to the chief judge. [135]

The Office of Judicial Integrity has developed a uniform national training and certification curriculum for EDR Coordinators. All EDR Coordinators in the judiciary must now be trained and certified on the information and skills necessary to fulfill their function. This training is in addition to the annual training required for all employees. [136]

The Federal Judicial Center regularly organizes educational programs for judges, court unit executives, managers and supervisors, and judiciary staff. [137] It has conducted trainings and programs on respect in the workplace,

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civility, and implicit bias, and provided trainings and resources on other workplace topics. [138] Expanded training, such as on bystander intervention and the development of "soft skills" for managers and supervisors, is anticipated to supplement the traditional discrimination and harassment training programs already conducted. This expanded training will focus on broader themes and topics that promote a civil, respectful, and collaborative work environment. [139]

Because of their unique roles and often short tenure, the Ninth Circuit has developed special initiatives targeting law clerks--expanded law clerk orientation agendas that include sessions on discrimination and harassment policies and employee dispute procedures, and sample chambers checklists on workplace expectations. Both endeavors encourage more transparency and communication about appropriate expectations of law clerks. [140] Training ***301** for new judges begins at seminars following their confirmation hearings. [141] And specialized workplace conduct training is offered for chief judges and others in supervisory roles focusing on their unique responsibilities as court leaders with respect to workplace conduct. [142] A number of training and educational opportunities are offered online and through meetings, symposia, conferences, informal sessions with employees, reading clubs, and newsletters. [143] The Judicial Integrity Officer, chief judges, and Directors of Workplace Relations are seeing the impact of increased communications and training through additional inquiries and reports. Indeed, multiple employees have stated that these trainings alerted them to the inappropriate nature of certain behaviors and to the resources available to address them. And Directors of Workplace Relations have reported seeing an increase in the number of misconduct reports after holding trainings. [144]

Increased education about the workplace makes employees aware of their rights, makes judges aware of their obligations and responsibilities, reinforces behavioral expectations, and sends a clear message that these issues matter and are taken seriously. Increased training also reduces the negative impacts of isolated workplaces. When employees, including clerks, are informed--early, clearly, and repeatedly--of their rights and options *and* of the expectations and obligations placed on judges, the judiciary's commitment to a fair and transparent workplace is reinforced.

IV. LOOKING TO THE FUTURE

A. Internal Efforts

The judiciary is steadfast in its commitment to enduring improvements. The Office of Judicial Integrity and the network of Directors of Workplace ***302** Relations and EDR Coordinators continue to track and respond to workplace conduct trends, serve as resources for court employees, collaborate on best practices, and increase awareness of the judiciary's flexible reporting processes. Indeed, direct feedback on these resources has resulted in suggested changes, as recounted in this Essay. The National Working Group continues to meet, review relevant policies and procedures, identify areas for improvement, and aggressively recommend changes to existing structures while working closely with various other judicial committees.

The judiciary also is expanding the ways it collects feedback from employees, from post-training surveys regarding employees' awareness of available resources to anonymous comment boxes and both court-wide and unit-focused climate surveys. Several circuits have previously conducted either climate surveys or law clerk exit surveys which have provided valuable feedback for the development of workplace initiatives. [145] As Professor Litman and Shah note, and the EEOC recommends, workplace surveys are a means to uncover potential problems, including harassment. [146] Climate surveys and other feedback mechanisms "can alert organizations to the extent of the problem and provide[] them with an opportunity for early intervention." [147]

At the national level, all judiciary employees can provide information anonymously to the Office of Judicial Integrity through its online reporting mechanism, which allows employees to relay concerns without any attributable or identifying information. The Ninth Circuit implemented a similar tool for conveying anonymous information. [148] While the ability to respond directly is limited with anonymous complaints, information is

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aggregated and reviewed for patterns, trends, and other information that may provide insight on potential training needs or other interventions.

Several circuits have developed or are developing various types of law clerk and employee engagement groups, facilitating closer engagement and interaction between chambers and court units. [149] These opportunities provide useful assistance to employees and simultaneously serve as a source of feedback to Directors of Workplace Relations about current concerns and the unique needs of each group. For example, the Ninth Circuit launched the Law Clerk Resources Group, comprised of former law clerks, to help current law clerks navigate their clerkships and provide them the opportunity to ***303** discuss questions and concerns about their chambers experience with peers. [150] Similarly, the D.C. Circuit created a Law Clerk Advisory Group. [151] Expanding on these models, the First Circuit includes law clerks, probation and pretrial services employees, and Clerk's Office staff on its Workplace Conduct Committee. [152]

B. Partnerships

The Office of Judicial Integrity and Directors of Workplace Relations also serve as conduits and liaisons for outside stakeholders, such as law schools, clerkship programs and associations, and other organizations that interact with the judiciary. Judiciary representatives are collaborating with organizations like the National Association of Law Placement and the Association of American Law Schools and are connecting with law school administrators. [153]

Law school faculty and administrators have a unique window into their students' and graduates' experiences. They can be valuable partners to the judiciary in identifying and addressing workplace misconduct during or after clerkships or other assignments. [154] In August 2021, the Director of the Administrative Office reached out to nearly 200 law schools to update them on the judiciary's efforts and to seek their assistance in "identify[ing] and correct[ing] any workplace conduct that falls short of [the judiciary's] high standards." [155] The letter urges law schools to contact the Office of Judicial Integrity or a Circuit Director of Workplace Relations if they "receive a report of or hear about potential workplace misconduct in the Federal ***304** Judiciary." [156] Confidentiality protections in place for this reporting should enhance follow-up by law schools and the judiciary.

CONCLUSION

Recent news reports highlight that no industry is immune from workplace harassment. [157] As the EEOC and others have recognized, the institutional structures of some workplaces may increase the likelihood of misconduct while at the same time decreasing the likelihood of its detection. Professor Litman and Shah point out that the federal judiciary possesses several risk factors for harassment, and the surfacing of allegations against federal judges underscores the pressing need to address these institutional structures. [158]

In evaluating the work that needs to be done to combat workplace harassment, Professor Litman and Shah call on the legal profession, including the judiciary, to engage in a "sustained, public reflection about how our words, actions, attitudes, and institutional arrangements allow harassment to happen, and about the many different ways that we can prevent and address harassment." [159] After more than three years of intensive efforts to change the workplace landscape with respect to harassment and bullying, this Essay reflects on the ways in which the federal judiciary has begun this difficult but necessary work and acknowledges that it will take ongoing vigilance and attentiveness. Leadership will continue reflection and reform with the goal to gain the workforce's trust and confidence in the fairness of the policies and their implementation.

As one of the EEOC Report's authors testified to Congress, "two essential components of a successful effort to shape workplace culture are leadership from the top and a focus on the unique needs of a particular ***305** workplace." [160] The leadership has come directly from Chief Justice Roberts, chief circuit and district judges, and workplace managers. As efforts to date demonstrate, the federal judiciary appreciates the gravity of the issue and is dedicated to continued reform and innovation tailored to the judicial structure and environment. That

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effort should be given a fair chance to blossom and take root, while at the same time looking ahead to continued refinements and innovations. Although from 2020 to the present, the pandemic slowed certain court operations and modified in-person interactions, the judiciary's workplace reforms continued unabated. The focus remains on preventing workplace harassment and providing employees with necessary advice, guidance, and procedures to address harassment and other abusive workplace conduct. This commitment to ensuring an exemplary workplace begins with Chief Justice Roberts and extends to all 30,000 plus people employed by the federal court system who deserve a respectful workplace. [161]

Footnotes

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1 *See*TARANA BURKE, UNBOUND: MY STORY OF LIBERATION AND THE BIRTH OF THE ME TOO MOVEMENT 6-10 (2021); *see also History & Inception*, ME TOO., https://metoomvmt.org/get-to-know-us/history-inception/ [https://perma.cc/DW6F-4L9J]; Abby Ohlheiser, *The Woman Behind 'Me Too' Knew the Power of the Phrase When She Created It--10 Years Ago*, WASH. POST (Oct. 19, 2017), https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/ [https://perma.cc/HG47-GXBA].

2 *See* Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook html [https://perma.cc/RJ28-KVQN].

3 *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations html [https://perma.cc/K4K4-L35Q]; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), https://www newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories [https://perma.cc/6K24-V73T].

4 *See* Bethany McLean, *"We All Wear All Black Every Day": Inside Wall Street's Complex, Shameful, and Often Confidential Battle with #MeToo*, VANITY FAIR (Feb. 27, 2018), https://www.vanityfair.com/news/2018/02/inside-wall-street-complex-shameful-and-often-confidential-battle-with-metoo [https://perma.cc/YM8A-C5S4].

5 *See* Emilia Petrarca, *Fashion's #MeToo Movement Is Loudest on Instagram: Models Are Sharing Devastating Stories of Abuse in DMs*, THE CUT (Apr. 5, 2018), https://www.thecut.com/2018/04/fashions-me-too-movement-instagram-sexual-harassment html [https://perma.cc/WQ9U-2VLU].

6 *See* Maura Judkis & Emily Heil, *Rape in the Storage Room. Groping at the Bar. Why Is the Restaurant Industry So Terrible for Women?*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e_story html [https://perma.cc/AAP2-4DN2].

7 *See* Alyssa Newcomb, *#MeToo: Sexual Harassment Rallying Cry Hits Silicon Valley*, NBC NEWS (Oct. 23, 2017, 2:30 PM), https://www nbcnews.com/tech/tech-news/metoo-sexual-harassment-rallying-cry-hits-silicon-valley-n813271 [https://perma.cc/KTS5-GAPC].

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8 *See generally* Kantor & Twohey, *supra* note 3 (documenting allegations against Weinstein by employees and members of the film industry).

9 *See* Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story html?utm_term=.33f68db99ef1 [https://perma.cc/S95P-PKSL].

10 Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), https://www nytimes.com/2017/12/18/us/alex-kozinski-retires html [https://perma.cc/XZ3S-3MNM].

11 This number was compiled from data provided on judicial statistics. *See, e.g.*, *Judicial Business 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/judicial-business-2020 [https://perma.cc/HK6G-MC7G] (noting the number of Article III judges, bankruptcy judges, and magistrate judges); *Judges of the United States Court of International Trade*, U.S. CT. OF INT'L TRADE, https://www.cit.uscourts.gov/judges-united-states-court-international-trade [https://perma.cc/UN38-CXQQ] (noting the sixteen Court of International Trade judges); *Judges - Biographies*, U.S. CT. OF FED. CLAIMS, https://uscfc.uscourts.gov/judicial-officers [https://perma.cc/Q3V3-KBWS] (noting twenty-four judges on the Court of Federal Claims).

12 *See* James C. Duff, *Annual Report 2018: Director's Message*, U.S. CTS., https://www.uscourts.gov/statistics-reports/annual-report-2018 [https://perma.cc/B9TP-APA5].

13 *See* Press Release, U.S. Cts. for the Ninth Cir., Ninth Circuit Committee to Review Workplace Environment Policies (Jan. 12, 2018), http://cdn.ca9.uscourts.gov/datastore/ce9/2018/01/14/R3_Ninth_Circuit_Workplace_Environment_Committee_Announcement.pdf [https://perma.cc/FS46-BSMZ].

14 This Essay focuses primarily on the Ninth Circuit and national responses. Since 2017, other circuits have formed their own groups and committees and implemented similar reforms designed to address workplace issues. *See, e.g.*, Press Release, U.S. Cts. for the D.C. Cir., Chief Judges Announce Adoption of Workplace Conduct Policies (Nov. 28, 2018), https://www.dcd.uscourts.gov/sites/dcd/files/NewsRelease_WorkplaceConductPolicies11282018.pdf [https://perma.cc/MLB7-WLXS]; Press Release, Off. of the Cir. Exec., U.S. Cts. for the First Cir., First Circuit Court of Appeals Forms Workplace Conduct Committee, Appoints Christine Guthery Director of Workplace Relations (Mar. 5, 2019), https://www.ca1.uscourts.gov/sites/ca1/files/Workplace%20Conduct%C20Press%C20Release%202.pdf [https://perma.cc/Q7UE-GZFZ]. By 2021, all circuits had Directors of Workplace Relations or similar roles. *See Director of Workplace Relations Contacts by Circuit*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/workplace-conduct/director-workplace-relations-contacts-circuit [https://perma.cc/2TX5-XX83].

15 JOHN G. ROBERTS, 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2017) [hereinafter 2017 YEAR-END REPORT], https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx [https://perma.cc/YL57-ELL5].

16 *See Federal Judiciary Workplace Conduct Working Group Formed*, U.S. CTS. (Jan. 12, 2018), https://www.uscourts.gov/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed [https://perma.cc/P6GB-MFJ6].

17 Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 601 (2020).

18 *See, e.g.*, Olivia Warren, *Enough Is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 HARV. L. REV. F. 446, 453 (2021).

19 The COVID-19 pandemic intervened during the period following the adoption of the structural and policy changes. While most court proceedings went remote and employees worked from home, the courts took

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the opportunity to solidify the structural changes adopted earlier and enhance training and education on workplace policies and procedures.

20 CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EEOC, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACEE ii (2016) [hereinafter EEOC REPORT], https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf [https://perma.cc/PTP6-WBEB].

21 *Id.* at iv.

22 *See id.* at iv, 3, 6-8.

23 *See id.* at 16-17.

24 *Id.* at 25.

25 *Id.* at 26-30 (capitalization altered).

26 *See id.* at 25.

27 *Id.*

28 *See*JUD. CONF. OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, at 4 (1996) [hereinafter JUDICIAL CONFERENCE REPORT] ("The judiciary's internal governance system is a necessary corollary to judicial independence.").

29 *See id.*

30 *See id.*

31 U.S. CONST. art. III, § 1.

32 *See*JUDICIAL CONFERENCE REPORT, *supra* note 28, at 4.

33 *See id.* ("The judiciary's internal governance system is a necessary corollary to judicial independence.").

34 *See id.* ("From the beginning of the federal court system, the hallmarks of judicial branch governance have been local court management and individual judge autonomy, coupled with mechanisms for ensuring accountability ....").

35 *See, e.g.*, THE NAT'L ACADS. OF SCIS., ENG'G & MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 65 (Paula A. Johnson, Sheila E. Widnall & Frazier F. Benya eds., 2018) [hereinafter NATIONAL ACADEMIES REPORT] (recognizing that hierarchical relationships and isolated environments create higher levels of risk for sexual harassment); *see also* Litman & Shah, *supra* note 17, at 616-20.

36 NATIONAL ACADEMIES REPORT, *supra* note 35, at 48.

37 *See*EEOC REPORT, *supra* note 20, at 28.

38 This information is drawn from an internal judiciary human resources database.

39 *See, e.g.*, Litman & Shah, *supra* note 17, at 616 ("A judge can both help a clerk find a job and tank a clerk's prospects with just one call.").

40 *See*EEOC REPORT, *supra* note 20, at 29.

41 *See id.*

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42 *See* Litman & Shah, *supra* note 17, at 601; Warren, *supra* note 18, at 453.

43 *See*FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 3-5 (2018) [hereinafter WORKING GROUP REPORT], https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [https://perma.cc/JF28-2JYX].

44 *Id.* at 1.

45 *See*NINTH CIR. AD HOC COMM. ON WORKPLACE ENV'T, NINTH CIRCUIT AD HOC COMMITTEE ON WORKPLACE ENVIRONMENT REPORT 4, 6-7 (2019) [hereinafter NINTH CIRCUIT COMMITTEE REPORT], https://cdn.ca9.uscourts.gov/assets/workplace/committee-report/Ninth-Circuit-Workplace-Environment-Committee-Report.pdf [https://perma.cc/6AHF-PTLK]; *see also*WORKING GROUP REPORT, *supra* note 43, at 3-4, 6-7.

46 NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 1, 6-10.

47 *Id.* at 6; WORKING GROUP REPORT, *supra* note 43, at 4. Law Clerks for Workplace Accountability is an organization comprised of "current and former law clerks" who "believe that significant changes are necessary to address the potential for harassment of employees who work in the federal court system." @ClerksForChange, TWITTER (July 20, 2018, 12:01 PM), https://twitter.com/ClerksForChange/status/1020171891003162624 [https://perma.cc/K8V3-SMD3].

48 *See*WORKING GROUP REPORT, *supra* note 43, at 5-7; NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7-8.

49 *See*NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7-8.

50 *See id.* at 9.

51 *See*WORKING GROUP REPORT, *supra* note 43, at 17; NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7.

52 *See*NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 8 (reporting that survey respondents "recommended developing and implementing trainings on harassment, bullying, implicit bias, leadership, and management techniques"); WORKING GROUP REPORT, *supra* note 43, at 41-42.

53 *See*WORKING GROUP REPORT, *supra* note 43, at 4-7.

54 *See*FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., STATUS REPORT FROM THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 1-4 (2019) [hereinafter 2019 STATUS REPORT], https://www.uscourts.gov/sites/default/files/working_group_status_report_to_jcus_september_2019.pdf [https://perma.cc/2WSC-G9A9].

55 Although titled a *model* plan, the Model EDR Plan, with certain modifications, is the actual plan of the individual courts.

56 The Judicial Conference of the United States promulgated the JC&D Rules under the Judicial Conduct and Disability Act, 28 U.S.C. § 358. RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROCS. r. 1 cmt. (JUD. CONF. OF THE U.S. 2019) [hereinafter JC&D RULES], https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf [https://perma.cc/5RD5-7JFV].

57 *Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules*, U.S. CTS., https://www.uscourts.gov/rules-policies/judiciary-policies/proposed-changes-code-conduct-judges-judicial-conduct-disability-rules [https://perma.cc/2U34-KB7B].

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58 JUD. CONF. OF THE U.S., MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN 14 (2019) [hereinafter MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN], https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a_oji-2019-09-17-post-model-edr-plan.pdf [https://perma.cc/D4D6-VW6Z].

59 *See*WORKING GROUP REPORT, *supra* note 43, at 15.

60 2019 STATUS REPORT, *supra* note 54, at 6.

61 NATIONAL ACADEMIES REPORT, *supra* note 35, at 143.

62 *See*EEOC REPORT, *supra* note 20, at 38.

63 *See*WORKING GROUP REPORT, *supra* note 43, at 27.

64 2019 STATUS REPORT, *supra* note 54, at 6 (quoting CODE OF CONDUCT FOR JUD. EMPS. Canon 3D(3) (JUD. CONF. OF THE U.S. 2019)).

65 *See* 2019 STATUS REPORT, *supra* note 54, at 2, 9 (citing JC&D RULES, *supra* note 56, at r. 23(c)); *see also*JC&D RULES, *supra* note 56, at r. 4 cmt., 6 cmt.

66 NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 2.

67 *See id.* at 7.

68 *See id.* at 7, 14-15; WORKING GROUP REPORT, *supra* note 43, at 17-18, 36-38.

69 The D.C. Circuit has two Workplace Relations Coordinators rather than one director, but the positions are considered analogous. *See Director of Workplace Relations Contacts by Circuit*, *supra* note 14 (providing contact information for the directors and including the D.C. Circuit's Workplace Relations Coordinators).

70 *See Workplace Conduct in the Federal Judiciary*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/workplace-conduct-federal-judiciary [https://perma.cc/LFT2-S8KT].

71 *See*MARY ROWE, TIMOTHY HEDEEN & JENNIFER SCHNEIDER, INT'L OMBUDSMAN ASS'N, WHAT DO ORGANIZATIONAL OMBUDS DO? AND NOT DO? 1-5 (2020), https://mitsloan.mit.edu/shared/ods/documents?PublicationDocumentID=7572 [https://perma.cc/M3BT-42CV]; *see also* Marsha L. Wagner, *The Organizational Ombudsman as Change Agent*, 16 NEGOT. J. 99, 103-05 (2000).

72 *See, e.g.*, Press Release, U.S. Ct. of Appeals for the Sixth Cir., Sixth Circuit Announces Appointment of First Director of Workplace Relations (May 8, 2020), https://www.ca6.uscourts.gov/sites/ca6/files/Announcement%20of%C20Director%C20of%C20Workplace%20Relations.pdf [https://perma.cc/857X-8R6N].

73 *See, e.g.*, Press Release, U.S. Ct. of Appeals for the First Cir., *supra* note 14 (appointing Christine Guthery as Director of Workplace Relations, who had been the Assistant Director of the First Circuit Gender, Race, and Ethnic Bias Task Force); Press Release, U.S. Ct. of Appeals for the Third Cir., Third Circuit Forms Workplace Conduct Committee and Announces Appointment of First Director of Workplace Relations (Sept. 10, 2019), https://www.ca3.uscourts.gov/sites/ca3/files/DWR_Announcement.pdf [https://perma.cc/5CRV-T6GB] (appointing Julie Todd as Director of Workplace Relations, who was an Administrative Judge for the EEOC); Press Release, U.S. Ct. of Appeals for the Sixth Cir., *supra* note 72 (appointing Kelly Roseberry as Director of Workplace Relations, who had served in the Wyoming government including as Interim Administrator for the Workforce Standards Division, the Deputy Administrator for Labor Standards, and the Executive Secretary for the Wyoming Medical Commission); Press Release, U.S. Cts. for the Ninth Cir., Ninth Circuit Announces Appointment of First Director of Workplace Relations (Nov. 13, 2018), http://cdn.ca9.uscourts.gov/datastore/general/2019/02/15/PR_11132018.pdf [https://perma.cc/FL9D-GVDN] (appointing Yohance Edwards as

Director of Workplace Relations, who was the associate director and deputy Title IX officer at the University of California, Berkeley).

74 *See*EEOC REPORT, *supra* note 20, at 87-88.

75 *Id.* at 38.

76 NiCole T. Buchanan, Isis H. Settles, Angela T. Hall & Rachel C. O'Connor, *A Review of Organizational Strategies for Reducing Sexual Harassment: Insights from the U. S. Military*, 70 J. SOC. ISSUES 687, 690 (2014); Paula McDonald, Sara Charlesworth & Tina Graham, *Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment*, 53 ASIA PAC. J. HUM. RES. 41, 44, 48 (2015); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCH. 497, 503 (1991).

77 NATIONAL ACADEMIES REPORT, *supra* note 35, at 141. Tarana Burke's personal story also serves to emphasize the importance of ensuring that informal support and resources are available for those who have experienced abuse. *See*BURKE, *supra* note 1, at 153-59, 214-17.

78 McDonald et al., *supra* note 76, at 44.

79 WORKING GROUP REPORT, *supra* note 43, at 9-10; 2019 STATUS REPORT, *supra* note 54, at 8, 13.

80 WORKING GROUP REPORT, *supra* note 43, at app. 8; MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at app. 1.

81 WORKING GROUP REPORT, *supra* note 43, at 12-13.

82 NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7.

83 *Id.*

84 *Id.*

85 2019 STATUS REPORT, *supra* note 54, at 13-14.

86 *Id.* at 14.

87 MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at app. 5.

88 EEOC REPORT, *supra* note 20, at 16-17; *cf.*BURKE, *supra* note 1, at 156-59, 218-24 (describing the psychological difficulties experienced by the author in articulating the abuse she had suffered).

89 MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 4.

90 The only time a conversation cannot be kept completely confidential is when the employee raises an issue that indicates reliable information of a threat to an individual's safety or security, or of a threat to the integrity of the judiciary. *Id.* Materials are provided to employees alerting them to the level of confidentiality they can expect according to their circumstances. *See id.* at 4, app. 2 at 3.

91 *Id.* at 5.

92 NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at app. 1 at 8 n.3 (citing 28 U.S.C. §§ 351-364).

93 MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 10-11. Back pay and associated benefits are available when the statutory criteria of the Back Pay Act are satisfied. Those criteria "include: (1) a finding of an unjustified or unwarranted personnel action; (2) by an appropriate authority; (3) which resulted in the withdrawal or reduction of all or part of the [e]mployee's pay, allowances, or differentials." *See id.* at 11 & n.2 (citing 5 U.S.C. § 5596(b)(1)).

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94 2019 STATUS REPORT, *supra* note 54, at 15-16.

95 This observation is drawn from conversations between the author and circuit Directors of Workplace Relations and representatives of the Office of Judicial Integrity.

96 This observation is likewise drawn from conversations between the author and circuit Directors of Workplace Relations and representatives of the Office of Judicial Integrity.

97 2019 STATUS REPORT, *supra* note 54, at 5 (citing CODE OF CONDUCT FOR U.S. JUDGES Canons 2A cmt., 3 intro., 3B(4), 3B(4) cmt. (JUD. CONF. OF THE U.S. 2019)).

98 JC&D RULES, *supra* note 56, at r. 4(a)(2)(B).

99 *Id.* at r. 4(a)(2).

100 2019 STATUS REPORT, *supra* note 54, at 9, 13 (citing JC&D RULES, *supra* note 56, at r. 4(a)(2), 4(a)(3)).

101 MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 2-3 (emphasis omitted); *see also*NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 13.

102 MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 1-2.

103 WORKING GROUP REPORT, *supra* note 43, at 31.

104 2019 STATUS REPORT, *supra* note 54, at 8 (citing JC&D RULES, *supra* note 56, at r. 4(a)(4)).

105 2019 STATUS REPORT, *supra* note 54, at 8-9 (citing JC&D RULES, *supra* note 56, at r. 4(a)(6) & cmt., 23 cmt.).

106 Judicial Conduct and Disability Act, 28 U.S.C. § 351(b); JC&D RULES, *supra* note 56, at r. 5.

107 2019 STATUS REPORT, *supra* note 54, at 5.

108 *Id.* at 6 (quoting CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 97, at Canons 3B(6) & cmt.).

109 CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 97, at Canon 3B(6) cmt.

110 2019 STATUS REPORT, *supra* note 54, at 6-7 (citing CODE OF CONDUCT FOR JUD. EMPS., *supra* note 64, at Canons 3C, 3D).

111 WORKING GROUP REPORT, *supra* note 43, at 33, app. 8; 2019 STATUS REPORT, *supra* note 54, at 13-14.

112 2019 STATUS REPORT, *supra* note 54, at 12.

113 *Id.* at 11.

114 This notification process ensures that reporting goes to an individual who is superior in rank to the person about whom the complaint is made. If the complaint relates to the chief judge, then the notice goes to a different judge. MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 7.

115 *Id.* at 4.

116 *Id.*

117 *Id.*

118 *Id.* at 7.

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119 *Id.* at 12.

120 *See generally* EDR WORKING GRP. & OFF. OF JUD. INTEGRITY, EMPLOYMENT DISPUTE RESOLUTION INTERPRETIVE GUIDE & HANDBOOK: A GUIDE TO THE 2019 MODEL EDR PLAN (2020), https://www.tnwb.uscourts.gov/PDFs/conduct/EDR_HANDBOOK_2020.pdf [https://perma.cc/SF4Y-9BBX] (providing guidance on navigating the EDR).

121 WORKING GROUP REPORT, *supra* note 43, at 39.

122 *See* Judicial Conduct and Disability Act, 28 U.S.C. § 351(d)(1); JC&D RULES, *supra* note 56, at r. 1(b); *see also In re* Complaints Under the Jud. Conduct & Disability Act, C.C.D. No. 19-02, at 10 (U.S. Jud. Conf. Mar. 3, 2020).

123 JC&D RULES, *supra* note 56, at r. 11 cmt. (noting that "the Judicial Conference and the judicial council of the subject judge have ample authority to assess potential institutional issues related to the complaint .... Such an assessment might include an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence" (citations omitted)). Thus, for example, despite the resignation of then-Judge Carlos Murguia, the Committee on Judicial Conduct and Disability issued a written decision noting "the instructive value of providing guidance regarding the statutory standard for Congressional referral for consideration of impeachment." *In re* Complaints Under the Jud. Conduct & Disability Act, C.C.D. No. 19-02, at 8. The Committee concluded that "the underlying misconduct" related to sexual misconduct and harassment was "serious enough to have warranted our deliberations over a referral to Congress for its consideration of impeachment." *Id.* at 9. The Committee further observed that despite the former judge's resignation, "[c]oncluding a misconduct proceeding upon a judge's resignation serves important institutional and public interests, including prompting subject judges who have committed misconduct to resign their office." *Id.* at 10.

124 JC&D RULES, *supra* note 56, at r. 23 cmt.

125 2019 STATUS REPORT, *supra* note 54, at 10; JC&D RULES, *supra* note 56, at r. 23(b)(8) & cmt.; *see, e.g.*, *id.* at r. 24.

126 *See Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018) (responses to questions for the record of James C. Duff, Dir., Admin. Off. of the U.S. Cts.), https://www.judiciary.senate.gov/meetings/confronting-sexual-harassment-and-other-workplace-misconduct-in-the-federal-judiciary [https://perma.cc/5WLB-56Y7]; *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2020), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2791 [https://perma.cc/FJ9U-EJUR].

127 *See Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary, supra* note 126.

128 *See* Letter from James C. Duff, Sec'y, Jud. Conf. of the U.S., to Jerrold Nadler, Chairman, Comm. on the Jud., Henry C. Johnson, Chairman, Comm. on the Jud., Mary Gay Scanlon, Vice Chair, Comm. on the Jud., and James Sensenbrenner, Jr., Rep., U.S. House of Representatives (Mar. 3, 2020), https://judiciary.house.gov/uploadedfiles/letter_from_the_judicial_branch_responding_to_hjc_inquiry_regarding_judiciary_workplace_misconduct.pdf [https://perma.cc/5BHZ-3PPD].

129 *See* WORKING GROUP REPORT, *supra* note 43, at 10-13; 2019 STATUS REPORT, *supra* note 54, at 1-4.

130 *See* WORKING GROUP REPORT, *supra* note 43, at 19-20, 25-28, 40-41.

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131 EEOC REPORT, *supra* note 20, at 45.

132 MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 13.

133 WORKING GROUP REPORT, *supra* note 43, at 20, 42.

134 *See id.*

135 JC&D RULES, *supra* note 56, at r. 4(a)(6).

136 *See*EDR WORKING GRP. & OFF. OF JUD. INTEGRITY, *supra* note 120, at 35; MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 12.

137 *See Education Programs*, FED. JUD. CTR., https://www fjc.gov/education/education-programs [https://perma.cc/XRT6-TK8Y]; WORKING GROUP REPORT, *supra* note 43, at 18-19.

138 *See Programs and Resources for All Court Employees*, FED. JUD. CTR., https://www.fjc.gov/education/programs-and-resources-all-court-employees [https://perma.cc/E3Y4-22FL]; 2019 STATUS REPORT, *supra* note 54, at 3.

139 *See* 2019 STATUS REPORT, *supra* note 54, at 19-21; *Programs & Resources for Executives*, FED. JUD. CTR., https://www.fjc.gov/education/programs-and-resources-executives [https://perma.cc/PA2R-BHEU].

140 NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 3.

141 *See Programs and Resources for Judges*, FED. JUD. CTR., https://www.fjc.gov/education/programs-and-resources-judges [https://perma.cc/BNE2-AGBT]; WORKING GROUP REPORT, *supra* note 43, at 41.

142 *See* 2019 STATUS REPORT, *supra* note 54, at 2; *Programs & Resources for Executives*, *supra* note 139.

143 For example, workplace issues are addressed in online and in-person training for law clerks, meetings of chief judges (both district and appellate courts), yearly educational meetings with district and bankruptcy court judges, the national symposium for court of appeals judges, targeted training for pretrial and probation units, and individual district meetings with lawyers and judges. Other examples include the Ninth Circuit's internal newsletter *9th to 5*, and law clerk training via the Interactive Orientation for Federal Law Clerks and Maintaining an Exemplary Workplace.

144 This positive relationship between training and reporting should be unsurprising and has been observed in other environments. *See* Jamie Mansell, Dani M. Moffit, Anne C. Russ & Justin N. Thorpe, *Sexual Harassment Training and Reporting in Athletic Training Students*, 12 ATHLETIC TRAINING EDUC. J. 3, 7 (2017) ("[A]thletic training students who never received any training were 6 times less likely to know what to do in harassing situations.").

145 *See* 2019 STATUS REPORT, *supra* note 54, at 18; NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 1, 6-10, 16.

146 Litman & Shah, *supra* note 17, at 635; *see*EEOC REPORT, *supra* note 20, at 67.

147 Buchanan et al., *supra* note 76, at 697.

148 *See*NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 1, 9-10.

149 *See infra* notes 150-152 and accompanying text.

150 Jessica Mach, *Stakeholders Credit 9th Circuit's Harassment Policy Changes, But Say More Needs to Be Done*, DAILY J. (Mar. 11, 2020), https://www.dailyjournal.com/articles/356634-stakeholders-credit-9th-circuit-s-harassment-policy-changes-but-say-more-needs-to-be-done [https://perma.cc/6ZPU-MQKY].

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151 *Law Clerk Advisory Group*, U.S. CT. OF APPEALS D.C. CIR., https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Workplace+Conduct+-+Law+Clerk+Advisory+Group [https://perma.cc/4QYJ-EZSP].

152 *See First Circuit Workplace Conduct Committee Appoints Three New Members*, U.S. CT. OF APPEALS FOR THE FIRST CIR. (July 17, 2019), https://www.ca1.uscourts.gov/news/first-circuit-workplace-conduct-committee-appoints-three-new-members [https://perma.cc/2HAC-4SFN].

153 For example, the judiciary has been in correspondence with these organizations and a representative participated in national meetings of both groups along with appearing at the American Academy of Appellate Lawyers. Judiciary representatives have also spoken at bar associations and civic groups. *See, e.g.*, NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 10, 17.

154 *See*NAT'L ASS'N OF L. PLACEMENT, COURTING CLERKSHIPS: THE NALP JUDICIAL CLERKSHIP STUDY § 3 (2000), https://www.nalp.org/courtingclerkships?s=judicial%20clerkship%20study [https://perma.cc/XQK3-H75V] (discussing findings regarding the role of law school faculty and administrators in judicial clerkship placement).

155 Letter from Roslynn R. Mauskopf, Dir., Admin. Off. of the U.S. Cts., to law school clerkship directors (Aug. 5, 2021) (on file with author).

156 *Id.*

157 *See, e.g.*, Jesse McKinley, *Cuomo Faces New Claims of Sexual Harassment from Current Aide*, N.Y. TIMES (Apr. 7, 2021), https://www nytimes.com/2021/03/19/nyregion/alyssa-mcgrath-cuomo-harassment.html [https://perma.cc/K5MX-W2Z9] (detailing recent allegations of sexual harassment against former New York state Governor Andrew Cuomo).

158 Litman & Shah, *supra* note 17, at 620-25; *see also* Zapotosky, *supra* note 9 (detailing allegations of harassment against former judge Alex Kozinski); *see also, e.g.*, Mihir Zaveri, *Federal Judge in Kansas Resigns After Reprimand for Sexual Harassment*, N.Y. TIMES (Feb. 19, 2020), https://www.nytimes.com/2020/02/19/us/judge-carlos-murguia-sexual-harassment html [https://perma.cc/395J-Q927] (same against former judge Carlos Murguia); Catie Edmondson, *Former Clerk Alleges Sexual Harassment by Appellate Judge*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/judge-reinhardt-sexual-harassment html [https://perma.cc/2H5Q-4V52] (same against former judge Stephen Reinhardt). The events recounted against these judges occurred before the judiciary undertook the extensive workplace initiatives outlined in this Essay.

159 Litman & Shah, *supra* note 17, at 599.

160 *Protecting Federal Judiciary Employees from Sexual Harassment Discrimination and Other Workplace Misconduct*, *supra* note 126, at 2 (statement of Chai R. Feldblum, Partner & Dir. of Workplace Culture Consulting, Morgan, Lewis & Bockius LLP).

161 2017 YEAR-END REPORT, *supra* note 15, at 11 (noting the federal judiciary's commitment to ensuring "an exemplary workplace for every judge and every court employee").

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TAB I

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

August 25, 2021

Honorable Henry C. "Hank" Johnson, Jr.
Chair
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write concerning the Judiciary Accountability Act, H.R. 4827, introduced on July 29, 2021. At the outset, it is disappointing that a bill encompassing such a significant overhaul of the oversight, supervision, and management of the Judicial Branch of government was introduced without input from the Judicial Branch. Unfortunately, the bill fails to recognize the robust safeguards that have been in place within the Judiciary to protect Judiciary employees, including law clerks, from wrongful conduct in the workplace, including protections against discrimination, harassment, retaliation, and abusive conduct. Further, the bill interferes with the internal governance of the Third Branch; creates structures that compete with existing governing bodies and authorities within the Judiciary; and imposes intrusive requirements on Judicial Conference procedures. For these reasons, the Judicial Conference of the United States opposes the bill. The Judiciary will provide a more detailed response to the Committee after further study, and I request that you not take further action on the bill, pending our review.

The Judiciary has been and remains committed to an exemplary workplace for all Judicial Branch employees. In recent years, we have taken numerous steps to strengthen policies, procedures, and organizational structures to help foster a safe and respectful workplace. The attached Fact Sheet provides a brief overview of some of our current protections, but I will highlight some here.

Our Employment Dispute Resolution (EDR) system has long provided Judiciary employees enforceable protections against all the same conduct covered under Title VII, Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), as well as the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. Judicial Branch employees are also already provided with whistleblower

protection. Indeed, Judiciary employees now have expanded enforceable protections against "abusive conduct," even when the misconduct is not discriminatory or based on protected categories.

Judiciary employees have multiple avenues to report workplace conduct concerns, including anonymously and to points of contact outside of their employing office. Confidentiality policies have been clarified to remove potential barriers and encourage reporting. The Codes of Conduct and Judicial Conduct and Disability Rules have been changed, among other things, to emphasize that judges and judiciary employees have a responsibility to take appropriate action upon learning of potential workplace misconduct, even if they are a bystander.

We have put in place scores of local EDR coordinators, Circuit Directors of Workplace Relations, and the national Office of Judicial Integrity, to assist employees with confidential reporting and address workplace conduct inquiries and complaints. We have enhanced and expanded training for all Judiciary employees, including judges and chambers staff, on the EDR process, employment laws, wrongful conduct, and unconscious bias, among other relevant topics for the workplace. We have actively engaged internal and external stakeholders, including judges, Judiciary employees, and law schools, among others, to hear and address issues of mutual concern.

Contrary to assertions that federal Judiciary employees are denied basic workplace rights and are provided no protection from workplace harassment, discrimination, and retaliation, the Judiciary has in place the protections and mechanisms to provide for an exemplary workplace, and to allow all employees to obtain confidential advice, report misconduct, and seek and receive remedial action. While we have accomplished much, we recognize there is additional work to do. We are committed to doing so and are presently engaged in that effort.

The Federal Judiciary Workplace Conduct Working Group was established in 2018 to examine the sufficiency of safeguards currently in place within the Judiciary to protect Judiciary employees from inappropriate conduct in the workplace. In its first six months it conducted extensive investigation and research, and published a 45-page report that contained numerous findings and 24 recommendations to the Judicial Conference of the United States for enhancing protections, improving working conditions, and refining procedures. That Group continues to meet to assess those safeguards and recommend further improvements.

It is critical that our current practices and improved policies be included and accurately reflected in any consideration of the Judiciary Accountability Act. Moreover, any mechanism addressing workplace conduct must recognize the Judiciary as a separate and co-equal branch of the United States government under the Constitution and allow

the Branch, through the decentralized administration of the federal courts, to govern itself. The Judicial Branch must retain autonomy over internal administration, including matters of employee and workplace management, as is the case in the other two branches.

I look forward to communicating further with you on this critical topic.

Sincerely,

Roslyn R. Mauskopf

Roslynn R. Mauskopf
Secretary

Enclosure

cc: Honorable Jerrold Nadler
Honorable Jim Jordan
Honorable Darrell Issa
Honorable Jackie Speier
Honorable Norma J. Torres
Honorable Nancy Mace

Mr. JOHNSON of Georgia. Thank you, Judge Robinson.

We will now go to questions and I will proceed under the five-minute Rule with, first, deferring to the gentlelady from North Carolina, Ms. Ross, for five minutes.

Ms. ROSS. Thank you very much, Mr. Chair, and thank you to the Witnesses for testifying and for your service.

I just have two questions. The first question is I don't know if you listened to the testimony from Ms. Clark and Ms. Strickland, who were in the panel before you came on.

They spoke about their experiences with persistent harassment and with the inability to secure meaningful redress through the judiciary's internal system.

We also received an anonymous statement from a former law clerk echoing the same difficulties. After hearing about these Witnesses' testimony today and knowing that the system really is failing them, how can we protect them in the future from this kind of abuse and lack of redress?

Judge MCKEOWN. Thank you for the question.

Let me first say that I very much appreciate the courage of the Witnesses who have come forward to testify. The judiciary has taken this call to action seriously, not only today but before.

I think it's important to focus on what has changed in the judiciary since many of the processes described by some of the Witnesses. So, we acknowledge that our work is not done, but we have provided new avenues for reporting. We have provided trained investigators, trained mediators, and trained advisors in the judiciary.

It is a question not only of rules and procedures, we understand. It is also a question of culture and we have worked hard not only with the judges, but, also, with the many employees of the judiciary to understand that things have changed, that this is not the past, that we, too, the judiciary, like others who took the wakeup call from the #MeToo movement, that we can't look just at the past but we have to look forward.

So, we have outlined in our written testimony the very many things along with the recent report that the judiciary has done. So, the work is not done, as Judge Robinson indicated. We have further recommendations that we trust will be accomplished.

Ms. ROSS. My second question is that the Judicial Conference has vocally opposed the expansion of Federal civil rights laws to judiciary employees for at least 25 years.

How can the Judicial Conference reconcile opposing granting their own colleagues the basic protections that they apply and interpret every day for the rest of society?

Judge ROBINSON. The Judicial Conference has not opposed our employees—our 30,000-plus employees—having the same protections that all other people enjoy under title VII and all the other employment statutes, age based, disability based, etc, and, in fact, our employees have those same protections. The difference, of course, is that—

Ms. ROSS. They can't enforce them.

Judge ROBINSON. They are enforceable. They are not—our employees do not fall under title VII, but our employees have a formal EDR process that allows them to seek judicial adjudication much

earlier in the process than, for example, the two other branches of government where those employees have to go through an administrative process, get exhaustion, perhaps be subjected to formal mediation before they can even seek a judicial resolution.

Our employees, a very first step should they choose to, can seek judicial adjudication of their complaint.

Ms. ROSS. With all due respect, it didn't appear that it was as fair a process as it would be for a private litigant from the testimony that we received today.

Thank you, Mr. Chair, and I yield back.

Mr. JONES. [Presiding.] Thank you, Congresswoman Ross. The Chair recognizes himself for five minutes.

Judge McKeown, Judge Robinson, thank you so much for joining us today and for your incredible service to our nation.

Judge McKeown, beginning with your confirmation in 1998, you served on the Ninth Circuit alongside Judge Alex Kozinski. In 2017, Kozinski resigned in the wake of numerous reports that he had coerced women who clerked for him into looking at pornography with him, made sexually degrading comments about them in front of other judicial employees, referred to them as, quote, "slaves" and engaged in other forms of verbal and physical harassment.

According to a number of survivors, Kozinski's misconduct was an open secret across the Ninth Circuit. Did you ever witness Judge Kozinski Act inappropriately in anyway toward any of his employees?

Judge MCKEOWN. No, sir, I did not.

Mr. JONES. Let me be clear. Until the allegations became public, you never had any reason to think that your colleague, Judge Kozinski, acted inappropriately toward any of his employees?

Judge MCKEOWN. No, I did not. I do not think it's fair to say it's an open secret. I served with Judge Kozinski over many years. I would acknowledge that he is an unusual personality in his approach.

It was not until those brave individuals came forward and told our chief judge and various reporters about these allegations of harassment that we had first heard about those.

I might add that as soon as those allegations were made, our chief judge filed a misconduct complaint against Judge Kozinski. He then called me before Judge Kozinski had responded or resigned and said he wanted a workplace committee, that we should start our work immediately, which we did, and then Judge Kozinski resigned.

Mr. JONES. Thank you, Judge. So, in the nearly 20 years you worked with him you never even heard a rumor that he had done anything like that, correct?

Judge MCKEOWN. I don't know if I would say I'd never heard a rumor. I'd just heard rumors about antics, but not about the kind of allegations that these individuals came forward with.

Mr. JONES. You also served on the Ninth Circuit alongside the late Judge Stephen Reinhardt from 1998 until his death in 2018.

Last Congress, when this Subcommittee held its first hearing on sexual harassment and discrimination in the Federal judiciary, Olivia Warren courageously testified about how Judge Reinhardt

harassed and abused her during her clerkship for him. More than half of Judge Reinhardt's clerks acknowledged this behavior and supported Ms. Warren's testimony.

Did you ever witness Judge Reinhardt Act inappropriately toward any of his employees?

Judge MCKEOWN. I did not, and I was, certainly, shocked to hear the allegations, and I, of course, credit those allegations to the Witness. As you know, Judge Reinhardt died within three months of Judge Kozinski's resignation and I believe that the clerk in question was a clerk at that time, and the workplace procedures that we have now instituted and put in place did not exist at that time.

Mr. JONES. Right. Judge, thank you, Judge, and I want to get to those procedures, but just want to clear something up. So, until the allegations became public, you never had any reason to think that your colleague, Judge Reinhardt, acted inappropriately toward any of his employees?

Had you heard a rumor like you had heard about Judge Kozinski, for example?

Judge MCKEOWN. No.

Mr. JONES. Okay.

Judge McKeown, the Ninth Circuit never completed a comprehensive investigation of the harm that Judge Kozinski or Judge Reinhardt inflicted on the people who worked for them, even after Witnesses publicly described the sexual harassment and discrimination that those judges perpetrated.

Why didn't that comprehensive investigation occur?

Judge MCKEOWN. The undertaking that we went forth immediately was quite comprehensive. First, we took a survey of our 6,000 employees to find out their views, their comments, the pervasiveness or otherwise, of harassment and discrimination.

We reached out to law clerks. We held focus groups. We also reached out to outside groups such as the Law Clerk Accountability Group. We can—

Mr. JONES. Judge, I'm so sorry to interrupt. I just want to clarify. Isn't it true that your disciplinary jurisdiction terminated upon Judge Kozinski's resignation and Judge Reinhardt's death, respectively?

Judge MCKEOWN. That's true, but under the new procedures, the Judicial Conduct and Disability Committee has very express authorization to now do a look back. We didn't have the authorization, but we went ahead and we did what we considered an important look back to see what had happened and why.

Mr. JONES. Thank you so much. So, I just want to be very clear, as we conclude. No law expressly authorizes the Judicial Conference to promulgate the model employment dispute resolution plan and, to me, and I think to many of the folks who have testified today in this extended hearing, that is a deficiency.

So, I just want to urge some perspective around that and, of course, to thank, again, our incredible jurists for their participation in today's panel.

With that, this hearing has concluded.

[Whereupon, at 12:35 p.m., the Subcommittee was adjourned.]

APPENDIX

Representing Members From:

AGRICULTURE
OIG
Forest Service
CENTRAL INTELLIGENCE AGENCY
COMMERCE
Export Enforcement
OIG
NOAA Fisheries Law Enforcemer
DEFENSE
Air Force - OSI
Army - CID
Defense Criminal Investigative Service
Naval Criminal Investigative Service
OIG
Police
EDUCATION - OIG
ENERGY
National Nuclear Security Administration
OIG
ENVIRONMENTAL PROTECTION AGENCY
CID
OIG
FEDERAL DEPOSIT INSURANCE CORPORATION
OIG
FEDERAL HOUSING FINANCE AGENCY – OIG
FEDERAL RESERVE SYSTEM
Federal Reserve Board
Federal Reserve Police
FEDERAL LAW ENFORCEMENT TRAINING CENTER
GENERAL SERVICES ADMINISTRATION - OIG
HEALTH & HUMAN SERVICES
Food & Drug Administration
OIG
HOMELAND SECURITY
Border Patrol
Coast Guard Investigative Service
Immigration & Customs Enforcement
Customs & Border Protection
Federal Air Marshal Service
Federal Protective Service
U.S. Secret Service
Transportation Security Administration
OIG
HOUSING & URBAN DEVELOPMENT - OIG
INTERIOR
Bureau of Indian Affairs
Bureau of Land Management
Fish & Wildlife Service
National Park Service
OIG
U.S. Park Police
JUSTICE
Alcohol, Tobacco, Firearms & Explosives
Bureau of Prisons
Drug Enforcement Administration
Federal Bureau of Investigation
U.S. Marshals Service
OIG
U.S. Attorney's Office-CI
LABOR - OIG
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION – OIG
NUCLEAR REGULATORY COMMISSION – OIG
NATIONAL SECURITY AGENCY – Police
OFFICE OF PERSONNEL MANAGEMENT - OIG
PENTAGON FORCE PROTECTION AGENCY
POSTAL SERVICE
Postal Inspection
Postal OIG
Postal Police
RAILROAD RETIREMENT BOARD
SOCIAL SECURITY ADMINISTRATION - OIG
SMALL BUSINESS ADMINISTRATION - OIG
SMITHSONIAN INSTITUTE - OIG
STATE DEPARTMENT
Bureau of Diplomatic Security
OIG
TRANSPORTATION - OIG
TREASURY
FINCEN & OIG
Internal Revenue Service – CI
Mint
TIGTA
U.S. CAPITOL POLICE
U.S. PROBATION & PRETRIAL SERVICES
U.S. SUPREME COURT POLICE
VETERANS AFFAIRS
Office of Inspector General
VA Police
RETIREES

National President
LAZARO "LARRY" COSME
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Retirement Director
STAN SCHWARTZ
Public Affairs Officer
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Phone: 202-870-5503 ▪ www.fleoa.org

March 16, 2022

The Honorable Hank Johnson
Chairman, Subcommittee on
Courts, Intellectual Property,
and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Darrell Issa
Ranking Member, Subcommittee
on Courts, Intellectual Property,
and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman and Ranking Member Issa:

I am writing to you on behalf of the more than 31,000 members of the Federal Law Enforcement Officers Association (FLEOA) to provide our views for Thursday's Subcommittee hearing on "Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change." Within the Judiciary, FLEOA is proud to represent U.S. Probation and Pretrial Services Officers. In addition to the important issues you will be considering during this hearing, we would ask that you also consider the lack of overtime pay protections and support for these vital federal law enforcement employees.

Federal Probation and Pretrial Services Officers serve in judicial districts across the country, working day in and day out on behalf of both the individuals under supervised release and the federal judicial system. With the implementation of the "FIRST STEP Act" and the impact on operations resulting from the coronavirus pandemic, their jobs have been made infinitely more difficult as they aid formerly incarcerated individuals with re-entry into the communities and other critical services. As individual officer caseloads have increased exponentially over the past three years without a corresponding increase in staffing or resources, it is not uncommon for many officers to work excessive amounts of overtime in carrying out their important duties. These caseloads—along with the 24-7 in-person and electronic monitoring requirements—have taken their toll and caused many officers to take early retirement or look for employment with other federal, state, or local law enforcement agencies.

Unlike every other branch of federal law enforcement, Probation and Pretrial Services Officers are not currently eligible to receive any form of overtime compensation. While the Judicial Conference has approved a policy for providing some officers with a minimal amount of compensatory time in limited circumstances, even this policy is not uniformly applied across judicial districts. And because they fall under the Judicial Branch, our members are also not eligible and do not receive overtime pay protections under the Fair Labor Standards Act or Law Enforcement Availability Pay (LEAP), which is the standard form of overtime pay for law enforcement employees across the federal government.

To make their job even more difficult, Probation and Pretrial Services Officers often have to rely on state and local resources to meet the needs of those under supervision. There are no universal federal job, training, education, housing, or medical care programs available for those formerly incarcerated on the federal level. Which means that our members often have to resort to local contacts or call in favors to address the needs of those under their supervision.

It is for these reasons and others that we encourage this Subcommittee to explore the lack of a functional overtime compensation system for federal Probation and Pretrial Services Officers. Given the increased workloads, non-standard working hours, and a requirement to be on call 24 hours a day seven days a week, it is wholly inappropriate for Probation and Pretrial Services Officers to be the only federal law enforcement officers ineligible for overtime protections. It is an untenable position to ask these officers to supervise individuals without any functional overtime system and past time for them to be included under the Law Enforcement Availability Pay system.

Thank you in advance for your consideration of our concerns in this matter. FLEOA stands ready to work with you to ensure that U.S. Probation and Pretrial Services Officers have the support they

need to carry out their duties. Please do not hesitate to contact me if I can provide any additional information or assistance.

Sincerely,

Larry Cosme

Larry Cosme
National President

CC: Members, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet.

○