UNTOUCHABLE JUDGES?
What I've Learned About Harassment in the Judiciary, and What We Can Do to Stop It

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Introduction

If you're going to go up against a judge, you'd better win, I thought to myself.[1] It was just before 11:00am on a Monday morning in July 2021. I was about to send an email to the District of Columbia Commission on Judicial Disabilities and Tenure (CJDT),[2] the regulatory body for D.C. judges. The email contained a lengthy Complaint about my former supervisor, then an Associate Judge in the Superior Court of the District of Columbia (D.C. Superior Court).

As I attached my Complaint to the email—which barely scratched the surface of the severe and pervasive gender discrimination and harassment I suffered over the course of eight months as a law clerk—I reflected on the past few years. I considered how hard I had worked in law school—the late nights, the challenging courses, the relationship-building, and my singular focus on a future career as a federal prosecutor. Then I reflected on the four internships I had done with the U.S. Department of Justice, in preparation for a career in law that now seemed to be over before it had even started.

I was eager to make a good impression when I started the D.C. Superior Court clerkship in August of 2019. I hoped to develop a relationship with a lifelong mentor. I wanted to learn as much as possible by watching the attorneys who appeared before the Court so that I could eventually become an Assistant U.S. Attorney (AUSA). The judge for whom I clerked was a former AUSA himself. He had an undergraduate degree from the same university where I attended law school. At least one female law school professor—a personal friend of the judge's—had made calls on my behalf

1. This Article is for every law clerk who has ever been harassed in the workplace—those who have spoken out, and those who have not.

2. According to the Columbia Commission on Judicial Disabilities and Tenure's (CJDT) website:

> CJDT has the authority to remove a judge for willful misconduct in office, for willful and persistent failure to perform judicial duties, and for conduct prejudicial to the administration of justice, or which brings the judicial office into disrepute. The Commission also has the authority to retire a judge involuntarily if the Commission determines that the judge suffers from a mental or physical disability which is or is likely to become permanent and which prevents, or seriously interferes with, the proper performance of duties. In addition, the Commission may, under appropriate circumstances, censure or reprimand a judge publicly.

About CJDT, Comm'n on Jud. Disabilities & Tenure, https://cjdt.dc.gov/page/about-cjdt [https://perma.cc/RA62-FS8T].

to help me secure the clerkship. I thought the position would be a good fit.

Just weeks into my clerkship, the judge threw me out of the courtroom, ordering me to switch places with my male co-clerk, barking that I "made him uncomfortable" and he "just felt more comfortable" with my male co-clerk.[3] The judge later snapped that he was "trying to punish" me because he "knew how much I liked to be in court." I feared that if I tried to advocate for myself, the judge would fire me. Therefore, I accepted the abuse, returned to my desk, and tried to hide the tears welling up in my eyes.

In October 2019, the judge escalated the situation. The judge called me into his inner chambers at least weekly—almost always when my male co-clerk was not around—to berate me for being "bossy"[4] and "aggressive"[5] and "nasty"[6] and a "disappointment" and whichever other gendered adjectives[7] he could come up with to criticize my personality, since I did not conform to gender

3. Corroborative evidence for this quote, as well as the quotes that follow, is on file with the author. The author does not attempt to document every instance of gender discrimination, harassment, retaliation, or misconduct that occurred during her clerkship and in the years following it. The examples detailed herein are meant to highlight 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. The author's story is also summarized in a congressional Statement for the Record. *See Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. (March 17, 2022), https://docs.house.gov/meetings/JU/JU03/20220317/114503/HHRG-117-JU03-20220317-SD005.pdf [https://perma.cc/WCW7-A9V2] (statement for the record of Aliza Shatzman).

4. *See* Chris Wofford, *Women are 'Bossy' and Men are 'Decisive,'* eCornell #IMPACT (Jan. 24, 2018), https://ecornell-impact.cornell.edu/women-are-bossy-and-men-are-decisive [https://perma.cc/2PFH-TMAS] (discussing the negative implications of gender stereotypes in the workplace).

5. *See* Pragya Agarwal, *Not Very Likeable: Here Is How Bias Is Affecting Women Leaders*, Forbes (Oct. 23, 2018, 5:42 PM), https://www.forbes.com/sites/pragyaagarwaleurope/2018/10/23/not-very-likeable-here-is-how-bias-is-affecting-women-leaders/?sh=5a056772295f (discussing workplace biases and the "likeability problem").

6. *See* Arwa Mahdawi, *'Nasty woman' is an insult we know all too well*, Guardian (Oct. 20, 2016), https://www.theguardian.com/commentisfree/2016/oct/20/nasty-woman-insult-hillary-clinton (explaining that "nasty" is a sex stereotype).

7. *See* David G. Smith, Judith E. Rosenstein & Margaret C. Nikolov, *The Different Words We Use to Describe Male and Female Leaders*, Harv. Bus. Rev. (May 25, 2018), https://hbr.org/2018/05/the-different-words-we-use-to-describe-male-and-female-leaders (discussing the positive words used to describe men and negative words used to describe women in performance reviews).

stereotypes about women in the workplace.[8] The judge mistreated me, in big ways and in small ones, nearly every day of my clerkship.[9]

One late October incident is burned into my memory. It occurred just hours after I learned that I had passed the District of Columbia Bar Exam. That morning started off with a thrill—I was officially an attorney! However, later that afternoon, the judge called me into his inner chambers and began to detail what he referred to as my "personality issues."[10] The judge raised his voice, his face turning red, wagging his finger, visibly frustrated: "You're *bossy*! And I know bossy because my *wife* is bossy!" I knew this type of language was misogynistic, but I didn't know what to do about it. I pressed the pen I was holding into the palm of my hand, trying to regain control over my emotions, avoiding the judge's gaze. I knew if I looked up at the judge, in that moment, I would burst into tears.

Throughout my clerkship, I cried on the walk to work every morning, fearing the mistreatment that was in store for me that day. I ran to the bathroom every day during work to cry, hyperventilate, splash water on my face, and tell myself I needed to stick it out for the year—I needed one year of legal experience to be eligible for

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8. The leading case on gender nonconformity in the workplace is *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the Court found:

> [E]ven if we knew that [Ms.] Hopkins had 'personality problems,' this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man. It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.

Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

9. Olivia Warren, during her testimony before the House Judiciary Committee about the harassment she experienced as a law clerk on the Ninth Circuit, described the impact of such pervasive harassment, stating that "there may have been a day in which I was not harassed . . . but I cannot remember one after searching my memory." *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. 11 (2020), https://www.congress.gov/116/meeting/house/110505/witnesses/HHRG-116-JU03-Wstate-WarrenO-20200213-U2.pdf [https://perma/cc/DVB5-JZM5] [hereinafter *Olivia Warren House Judiciary Testimony*] (testimony of Olivia Warren).

10. In the author's experience, skeptics tend to frame workplace misconduct as a mere "personality issue" between the employer and the employee.

most government jobs. I cried myself to sleep at night, agonizing about whether I could force myself to return to work the next day. I stared out my apartment window in the evenings, doubting that things would ever get better.

Some evenings, the judge demanded that I stay late, until after my co-clerk had left, so he could berate me when no one was around to witness it. I could feel the fear building inside me on those nights, my whole body on edge, as I watched my co-clerk pack up and leave chambers. I wished my colleague would stand up for me, but I suspected he would remain loyal to the judge.

I did not know who I could confide in at the courthouse—whether there was anyone I could trust.[11] I worried that attorneys and law clerks would turn this around on me. I feared they would blame me for not being able to make things work with the judge. I had internalized the gendered criticism and harassment and bullying.[12] I wondered if I was worthless. I feared walking into chambers and being alone with the judge. I felt overwhelming dread, every moment of the clerkship.

I wished there was someone to whom I could report the misconduct without fear of retaliation. I wanted to be reassigned to

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11. Since the author has begun to speak publicly about her clerkship experience, attorneys have reached out to her privately to apologize for not dissuading her from clerking for the judge.

12. *See* District of Columbia Courts Joint Committee on Judicial Administration Personnel Policies, No. 410, Sexual Harassment, D.C. Courts, https://www.dccourts.gov/sites/default/files/divisionspdfs/POLICY_NO_0410_SEXUAL-HARASSMENT.pdf [https://perma.cc/HF4H-LDMY] (defining sexual harassment as

> "verbal or physical conduct that includes but is not limited to: 1. Unwelcome sexual advances; 2. Requests for sexual favors; and 3. Any written or verbal conduct of a sexual nature when: a. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of an individual's employment; b. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions; or c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment whether or not the conduct is specifically directed against a particular individual.").

See also District of Columbia Courts Joint Committee on Judicial Administration Personnel Policies, No. 420, Anti-Bullying, D.C. Courts, https://www.dccourts.gov/sites/default/files/divisionspdfs/POLICY_NO_0420_ANTI-BULLYING.pdf [https://perma.cc/V5PD-A8YX] (defining bullying as "repeated mistreatment of one or more persons by one or more perpetrators that takes one or more of the following forms: A. verbal abuse; B. offensive conduct/behaviors (including nonverbal) which are threatening, humiliating, or intimidating; or C. interference which prevents work from getting done").

a different judge for the remainder of the clerkship.[13] But I knew that if I did report, the judge could retaliate against me and fire me at any time.[14] After all, it would be my word against his. He was a U.S. Senate confirmed judge, and I was just a law clerk a few months out of law school. My legal career could easily be over before it had even started.

The judge ignored me for the first six weeks of the COVID-19 pandemic after the courthouse transitioned to remote work. While it was a welcome respite from the near daily harassment 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 co-clerk, indicating that the judge had told him to tell me that the orders I had drafted were approved. Finally, in late April, after weeks of almost total silence, the judge told me that he was "ending my clerkship term of appointment" four months early. He stated over the phone 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 perceived the judge to mean that he did not approve of the fact that I did not present in the way that he felt women should in the workplace—because I was assertive, confident, and voiced my opinions.

I spoke with multiple attorneys in the ensuing days about potential legal action. Attorneys warned me that a lawsuit would be all-consuming, and they advised me that I should first try to secure an agreement from the judge for a neutral reference. In my final phone conversation with the judge, he stated that he would provide a neutral reference if contacted during a background investigation.[15] I mistakenly relied on the judge's statements. I worried that

13. The author still has not been able to get a clear and definitive answer from anyone at the D.C. Courts about whether she could have been reassigned to a different judge at the time the harassment was occurring. Several individuals affiliated with the D.C. Courts have publicly and privately touted the Employee Dispute Resolution (EDR) plan, which was created one year after the author's clerkship ended, and now provides some opportunities for reassignment. *See infra* note 20 (D.C. Courts press release); see also *infra* Part 2 for a discussion about EDR within the D.C. Courts.

14. The judge created a culture of fear in chambers, causing the author to live with the constant anxiety that she might make a mistake and provoke the judge's ire.

15. The author regrets that she did not get this agreement in writing. The author's biggest concern at the time was that the judge not disparage her during government background checks as the author searched for a new job.

if I asked him for a written agreement, I would anger him, and he would decide to fire me for cause, rather than just ending my clerkship early. I decided not to take legal action at that time because I foolishly believed that the judge did not intend to interfere with my future career prospects.

After the judge alerted me that he was ending my clerkship early, I reached out to multiple individuals in Human Resources (HR) for the D.C. Courts, hoping that HR could assist me with workplace harassment.[16] HR gave me the runaround and then dismissed me, telling me in multiple phone calls that there was "nothing they could do" because "HR doesn't regulate judges" and that "judges and law clerks have a unique relationship."[17] "Didn't I know that I was an 'at-will' employee?" they asked me.[18] No one ever mentioned my Equal Employment Opportunity (EEO) rights or directed me to the D.C. Courts' EEO Officer.[19] I asked repeatedly to be reassigned to a different judge for the remainder of my scheduled clerkship period.[20] HR said that "the D.C. Courts doesn't handle [requests for judicial reassignment]." I later found out that

16. According to the HR website,

> The Human Resources Division must also implement the personnel policies adopted by the Joint Committee on Judicial Administration and maintain employees' official personnel records. The Division serves as the focal point for compliance with Federal and local statutes prohibiting discrimination in employment and promoting equal opportunity for women and members of minority groups who seek employment or participate in Court programs.

Human Resources, D.C. Courts, https://www.dccourts.gov/about/learn-more/human-resources [https://perma.cc/3END-MFTQ].

17. Documentation on file with the author.

18. *Id.*

19. The author spoke with the D.C. Courts EEO Office multiple times in July 2021. It was relayed to the author that the judge took issue with her "demeanor" and "attitude." Furthermore, the judge claimed that the author was "only complaining now because [the author's] job offer was revoked." Email correspondence on file with the author.

20. One year after the author was separated from her clerkship, the D.C. Courts announced a new EDR plan, modeled on the U.S. Courts' Model EDR Plan. This plan would have allowed for a judicial reassignment, among other remedies. *See District of Columbia Courts Announce New Employment Dispute Resolution Plan*, D.C. Courts (May 20, 2021), https://newsroom.dccourts.gov/press-releases/district-of-columbia-courts-announce-new-employment-dispute-resolution-plan [https://perma.cc/Q32K-V4GW]; *see also Employment Dispute Resolution Plan*, D.C. Courts, https://www.dccourts.gov/about/learn-more/employee-dispute-resolution-plan#:~:text=The%20District%20of%20Columbia%20Courts'%20EDR%20Plan%20is%20another%20way,to%20our%20comprehensive%20personnel%20policies [https://perma.cc/QY3F-6ZKP]. The D.C. Courts appear to be touting this EDR plan as a catchall solution for judicial harassment.

this was not necessarily true.[21] However, at the time of my separation, I was not represented by counsel. Since the separation occurred while we were working remotely, I struggled to advocate for myself.

I reached out to several administrators and professors at my law school. I felt that the law school should care about the negative clerkship experience of one of their alumni, and I wanted to ensure that the school did not send future students to clerk for the judge. However, I was dismayed by the law school's tepid response: it felt like they were trying to protect the school's reputation.[22] It became clear that rumors about the judge's misconduct had been circulating among law school faculty and administrators for several years. I thought about confiding in more people, but I worried they would not be supportive, exacerbating an already painful situation. After all, as at least one law school administrator later pointed out, the person I was complaining about was not just any employer—he was a Senate-confirmed judge.

After confiding in another D.C. judge, I drafted a judicial complaint in May of 2020, but I decided not to file it until I had secured a new job. I feared that the judge would retaliate against me, especially since I was job searching in the jurisdiction in which he presided. I reasoned that once I had a new job, I would be safer to file a complaint. I hoped that a future government employer would not discourage me from reporting the misconduct.

Early in my law school career, I realized that I wanted to be an AUSA in DC. Between my second and third years of law school, when it was time to apply for clerkships, I focused on applying for clerkships in D.C. Superior Court, because that is the jurisdiction in which D.C. AUSAs practice. Even after my devastatingly painful clerkship experience, I still wanted to become an AUSA. I was determined not to give up on my dream, despite the roadblocks the judge had thrown in my career path.

However, I struggled to find a job during the pandemic due to the circumstances under which my clerkship had concluded. My

21. The author later found out from another judge that the Chief Judge of D.C. Superior Court could theoretically have signed off on a judicial reassignment at the time of the author's separation—it would have meant agreeing to add an additional employee to an existing judge's chambers, and adding a few months' salary to that judge's budget.

22. In her House Judiciary Committee testimony and her Harvard Law Review article, Olivia Warren discusses her law school's disappointing response when she tried to report the harassment she suffered during her clerkship. *See Olivia Warren House Judiciary Testimony, supra* note 9, at 14–15; Olivia Warren, *Enough Is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 HARV. L. REV. 446, 453 (2021).

clerkship had ended four months early, and I did not list my previous supervisor as a reference. Potential employers asked questions, and, given the raw emotions I still felt about my clerkship, it was difficult to answer them in interviews. I typically described my clerkship as a valuable experience, but it felt disingenuous to hide the harassment I experienced. I knew that potential employers could always call the judge and ask for his feedback. Despite the judge's supposed agreement to provide a neutral reference, I was highly skeptical of what he might say.

After a challenging pandemic job search, I finally landed my dream job at the D.C. U.S. Attorney's Office (USAO). However, even after I left the court system, my experience of harassment in the judiciary continued to follow me. I was still haunted by the memories of my clerkship. At times, I blamed myself, wondering if I had done something to provoke the judge's ire. I replayed each moment of my clerkship in my mind, going over every interaction I had with the judge, wishing my clerkship had not ended so poorly. I questioned my self-worth. And I was about to experience the far-reaching effects of a malicious judge intent on working against me.

I quickly fell in love with my new position, relieved to have finally put my negative clerkship experience behind me. I spent one morning shadowing domestic violence prosecutors in remote court, excitedly 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 office 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 D.C. Courts, as I told her about both the harassment I had experienced during my clerkship, and the judge's recent misconduct.[23] 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, after so many years of hard work and sacrifice. It seemed like the

23. The author reached out to another D.C. judge immediately after she was alerted of the judge's negative reference. This judge suggested that the author speak with the D.C. Courts EEO Officer. Even though the author had not worked for the D.C. Courts for over a year, because the EEO Office had some jurisdiction over the judge, it was suggested that the EEO Office might be able to help, at least informally.

judge's statements 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 office 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 office refused to reconsider. The damage had been done.[24]

I emailed HR and requested a written explanation about the revoked job offer and the security clearance issue. It took them over a week to provide this letter. Several days later, the office called me and invited me to interview for a different position with the office. I was thrilled about the opportunity, and I spent the week meticulously preparing for the interview. However, days before the scheduled interview, I received a letter from the office. The USAO stated that my job offer had been revoked due to the negative reference during my background investigation. They also canceled the scheduled interview based on the same negative reference. I was heartbroken by the judge's seemingly limitless power to destroy my career, ruin my reputation, and prevent me from ever obtaining a government job.

I teared up yet again as my fingers hovered over my keyboard while I drafted my email to the CJDT on that July morning. I thought about how, unlike the brave law clerks who had come forward to report harassment in the judiciary in the past,[25] I did not have the luxury of a job that I loved or the support of my colleagues.[26] In fact, my dream job had just been snatched away, and

24. Since the author has begun sharing her story about the far-reaching ramifications of the former judge's negative reference, numerous individuals have remarked that this situation should not follow the author around—it should follow the *judge* around. Correspondence on file with the author.

25. The author first became aware of other law clerks speaking out about harassment in the judiciary when she listened to the April 27, 2020 episode of the Strict Scrutiny podcast entitled *Workplace Misconduct and the Federal Courts*, hosted by Leah Litman and Jaime Santos. *See Workplace Misconduct and the Federal Courts*, Strict Scrutiny Podcast (Apr. 27, 2020), https://strictscrutiny.simplecast.com/episodes/workplace-misconduct-and-the-federal-courts-91BKn__a.

26. In Olivia Warren's testimony before the House Judiciary Committee, she mentions her supportive employer and colleagues as reasons why she felt empowered to testify. *See generally 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 [hereinafter *Protecting Federal*

I had no security to fall back on. Yet, I was more certain than ever that I had been the victim of sustained gender discrimination, harassment, and retaliation. I hoped the D.C. judicial regulatory body could help me finally stop this judge from harassing clerks, court employees, attorneys, and litigants, and maybe even remove him from his position of power. Finally, I hit send. I exhaled. Then I realized, *I need to find an attorney*.[27]

Title VII of the Civil Rights Act of 1964[28] protects employees against discrimination on the basis of race, color, religion, sex (including both gender and gender identity)[29] and national origin.[30] However, the federal judiciary—including judges, law clerks, and permanent court employees—are specifically excluded from Title VII.[31] As a consequence of this exclusion, law clerks cannot file suit under Title VII against judges alleging gender discrimination, harassment, and retaliation.[32] Acknowledging that more than 30,000 federal judiciary employees are currently unprotected by antidiscrimination laws,[33] members of the U.S. House of Representatives and U.S. Senate Judiciary Committees introduced the Judiciary Accountability Act (JAA) in July 2021.[34] This proposed

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Judiciary Employees Hearing Video]. In addition to the support that Ms. Warren received from her colleagues, some of Judge Reinhardt's former clerks also publicly supported Ms. Warren. *See* Kathryn Rubino, *70+ Former Reinhardt Clerks Come Out in Support of Sexual Harassment Accuser*, Above the Law, (Feb. 21, 2020, 10:02 AM), https://abovethelaw.com/2020/02/Reinhardt-clerks.

27. The author is grateful for her attorneys' assistance. This process has taught her that, even as an attorney, the legal system is difficult to navigate alone. However, many victimized law clerks seeking legal counsel are not so fortunate. See *infra* Part III for a discussion about the challenges—financial and otherwise—of finding counsel in law clerk litigation. Attorneys moved by this story and others like it should consider offering to serve as counsel for law clerks seeking judicial accountability.

28. 42 U.S.C. §§ 2000e-2000e-17.

29. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1741–43 (2020).

30. *See* 42 U.S.C. § 2000e.

31. *See generally id.*

32. *See* Nancy Gertner, *Sexual Harassment and the Bench*, 71 Stanford L. Rev. 88, 89, 98 (2018) (retired judge arguing that Title VII should not apply to the judiciary because of "the unique nature of the judiciary, the reticence of clerks to talk about their experiences, and the reluctance of one judge to criticize another").

33. *See* Ally Coll & Dylan Hosmer-Quint, *The Federal Judiciary Has a Harassment Problem—But There's a Fix*, Bloomberg L. (Nov. 19, 2021, 1:00 AM), https://news.bloomberglaw.com/us-law-week/the-federal-judiciary-has-a-harassment-problem-but-theres-a-fix.

34. *See* Judiciary Accountability Act, H.R. 4827, 117th Cong. (2021) [hereinafter JAA]. There is an identical Senate bill. *See* S. 2553, 117th Cong. (2021).

legislation begins to address the exclusion of federal judges from accountability mechanisms by designating judiciary employees as covered employees protected by Title VII.[35] However, even within this promising legislation, a startling loophole exists—D.C. judges are not currently covered under the JAA, enabling D.C. judges to evade accountability and mistreat their clerks with impunity. The D.C. Courts are currently excluded from the JAA because they are not Article III federal courts. However, D.C. judges are Senate-confirmed, and they enjoy many of the same protections as federal judges—they are difficult to discipline, and difficult to remove. Furthermore, D.C. judges, the D.C. Courts, and D.C. Courts employees—including law clerks—resemble federal judges, a federal courthouse, and federal employees in many important respects.[36] In fact, the D.C. Courts serve as the hub of the D.C. legal community. D.C. attorneys treat imperious D.C. judges, despite their unique status, like federal judges, offering them the same respect and unconditional deference.[37]

35. *See* H.R. 4827 § 10(2)(A)-(B) (defining "covered employee"). Judges are impliedly "employers" subject to Title VII in the JAA. *See infra* Part V for a summary, analysis, and suggested reforms to the JAA.

36. In addition to being appointed by the President and confirmed by the Senate, D.C. judges, and the D.C. Courts, enjoy many federal benefits. Congress created the D.C. Courts, and it later clarified, under the Home Rule Act, that the D.C. Council could not alter the composition or jurisdiction of the D.C. Courts. *See infra* Part II. The D.C. courthouses receive federal resources—and they look more like federal courthouses than state courthouses. *See infra* Part III. Many of the courthouse policies and procedures—including the newly-adopted EDR plan—are modeled after the federal courts' plan. *See infra* Part III. Law clerks look like federal employees—they receive SF-50 employment confirmation (for federal service) at the end of their clerkships, and they receive health insurance through the Federal Employee Benefits Plan. *See infra* Part V. Furthermore, D.C. judges interact closely with the local federal prosecutor's office, whose AUSAs appear before D.C. judges and prosecute local offenses. *See infra* Part V; *see also* D.C. Code § 11–1726 (2022) (noting that both non-judicial and judicial "employees of the District of Columbia courts shall be treated as employees of the Federal Government" for purposes of compensation). *See also Clerking on the D.C. Court of Appeals*, D.C. Courts, https://www.dccourts.gov/court-of-appeals/judges/clerkships [https://perma.cc/2CUV-AAGS] (noting that "[c]ompensation of judicial law clerks in the District of Columbia Courts is generally based on the federal judiciary salary plan").

37. In conversations with D.C. attorneys, many individuals have referred to D.C. Superior Court and D.C. Court of Appeals judges as "federal judges" or "like federal judges." Furthermore, in a D.C. Bar amicus brief advocating for congressional representation for D.C. residents, amici described D.C. judges as "federal judges appointed by the President [who] decide key D.C. law issues." 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

Drawing on the author's own experience of gender discrimination, harassment, and retaliation during her clerkship and in the years following it, this Article analyzes the deficits in current federal and D.C. judicial reporting systems to demonstrate the urgent need for reform. This Article focuses on federal policies, because those would be affected by the JAA, while also addressing D.C. policies, based on the author's personal experience. This Article then analyzes the strengths and weaknesses of the JAA and specifically argues that D.C. judges should be covered under the proposed legislation.[38] Finally, the author reflects on her attempts to report the misconduct, how the system failed her when she tried to report, and her efforts to seek justice for herself and accountability for the misbehaving former judge.

Part I discusses the scope of harassment in the judiciary and argues that there are many reasons why harassment and other forms of judicial misconduct are underreported. Part II summarizes the benefits and drawbacks of clerkships, as well as the governing structures that facilitate harassment. Part III introduces and critiques existing mechanisms of judicial discipline, i.e., the ways in which both federal and D.C. judges may be investigated and reprimanded for misconduct. Part IV addresses the existing legal avenues for private litigation by clerks against state court judges. Part V summarizes the JAA; analyzes the legislation in light of the author's own experience seeking judicial accountability; and offers a variety of proposed reforms to the bill, most notably an argument for amending the JAA to include the D.C. Courts. Part VI engages with several legislative alternatives to the JAA.

I. Scope of the Problem: Harassment in the Judiciary is Pervasive

Judges hold positions of public trust,[39] but for law clerks and other judiciary employees experiencing harassment and suffering

Curiae in Support of Petitioners and Reversal at 19–20, Castañon v. United States, 142 S. Ct. 56 (2021) (No. 20-1279), https://www.supremecourt.gov/DocketPDF/20/20-1279/175729/20210414150102962_20-1279%20Amici%20Brief.pdf [https://perma.cc/73XF-4D4M]. See *infra* Parts II, III, and for discussions about the similarities and differences between local D.C. judges and federal judges.

38. The author provided these suggested reforms to House and Senate offices involved with drafting the JAA in the summer and fall of 2021. The author appreciated the staffers' receptivity to her suggestions, as well as their willingness to allow her to share her experiences as a law clerk.

39. *See* Jud. Conf. of the U.S., Strategic Plan for the Federal Judiciary (2020), https://www.uscourts.gov/sites/default/files/

in silence, judges seem untouchable. Senate confirmed judges—who wield the power to take away individuals' liberty, and who make decisions every day that affect fundamental aspects of people's lives—should be held to the highest ethical standards, not the lowest. Harassment in the judiciary is prevalent because of the enormous power imbalance between judges and law clerks.[40] This problem persists because of the lack of accountability mechanisms—both a lack of reporting systems that are accessible to law clerks, and the judiciary's repeated failure to punish judges who harass and mistreat their clerks. Similar to the federal court system, the lack of effective reporting channels, both within the D.C. Court system and adjacent to it via the CJDT, makes this problem difficult to combat.

As one former law clerk described the relationship between judge and clerk, "[i]ndividuals lucky enough to be hired to work with judges are typically law students, for whom judges are more demigods than they are employers."[41] According to another former clerk, in testimony before the House Judiciary Committee, "[f]or those who experience harassment in the workplace, that ideal of what a judge *should* be and what they *can* be is devastating,

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federaljudiciary_strategicplan2020.pdf [https://perma.cc/VC2P-CXE5] (underscoring that the "ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence in the judiciary").

40. Sexual harassment is defined as an "[u]nwelcome sexual advance[] . . . and other . . . conduct of a sexual nature" having the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (alteration in original). Not all workplace harassment is sexual in nature—it can also be sex-based. *See Sex-Based Discrimination*, EEOC, https://www.eeoc.gov/sex-based-discrimination#:~:text=Sex%20discrimination%20involves%20treating%20someone,%2C%20gender%20identity%2C%20or%20pregnancy [https://perma.cc/N5SB-MGYJ] ("Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy.").

41. *See Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the Senate Comm. on the Judiciary*, 115th Cong. 2 (2018), https://www.judiciary.senate.gov/imo/media/doc/06–13–18%20Santos%20Testimony.pdf [https://perma.cc/X7SV-KWDE] [hereinafter *Jaime Santos Senate Judiciary Testimony*] (testimony of Jaime A. Santos) ("When a law clerk experiences or witnesses harassment, it can be devastating on a personal and professional level. And it is incredibly difficult to speak up against someone who has the unmatched power of a life-tenured federal judge."). For a more cynical assessment of the relationship between judge and law clerk, see generally Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707 (1991).

personally and professionally."[42] Furthermore, that former clerk stated, the "power dynamic alone—with judges seeming larger-than-life—can make it feel nearly impossible to speak up against a life-tenured federal judge."[43]

Harassment occurs in the judiciary,[44] as in all workplaces, but it is notoriously underreported.[45] In 2018, the Administrative Office

42. *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. 3 (2020), https://docs.house.gov/meetings/JU/JU03/20200213/110505/HHRG-116-JU03-Wstate-ShahD-20200213-U1.pdf [https://perma.cc/L6LH-APQ3] (testimony of Deeva V. Shah).

43. *Id.*

44. *See* Jaime A. Santos, *When Justice Behaves Unjustly: Addressing Sexual Harassment in the Judiciary*, 54 Ct. Rev.: J. Am. Judges Ass'n, 156, 156 (2018). Furthermore, approximately 70 percent of individuals who are harassed in the workplace do not report the harassment. *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace 16 (2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf [https://perma.cc/QYT6-QFZZ]. According to a 2019 ABA study of law firm attorneys, 50 percent of women reported experiencing unwanted sexual conduct at work. *See* Am. Bar Ass'n, Profile of the Legal Profession 87 (2021), https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf [https://perma.cc/B7W3-Z6PZ]. Furthermore, one in four women did not report the sexual harassment due to fear of retaliation. *Id.* Additionally, 16 percent of female respondents reported that they lost work opportunities after rejecting unwanted sexual advances. *Id.* For a thorough discussion about workplace harassment, see Gretchen Carlson, Be Fierce: Stop Harassment and Take Your Power Back (2017).

45. The federal judiciary has published some data about judicial complaints for the years 1996 to present. *See Caseload Statistics Data Tables*, U.S. Courts, https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn&pn=All&t=687&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D= [https://perma.cc/S6FQ-ZG8R]. During the 2020–2021 term, 11 of the 1282 complaints filed were initiated by judicial employees, and no complaints resulted in corrective action. *See id.* However, the U.S. Courts only began to delineate "judicial employee" as a separate category of complainant in 2020, making it difficult to assess how many complaints were filed by law clerks. During the 2019–2020 term, 5 of the 1253 judicial complaints filed were initiated by judicial employees. *See* U.S. Courts, Table S-22: Report of Complaints Commenced and Action Taken Under Authority of 28 U.S.C. 351–364 During the Period from 10/1/2019 to 9/30/2020 (2021), https://www.uscourts.gov/sites/default/files/jb_s22_0930.2020.pdf [https://perma.cc/X2X5-QB3J]. In total, 857 complaints were dismissed in whole or in part. *Id.* Troublingly, only 5 of the 1253 complaints resulted in corrective action taken, all of which were either censures or reprimands. *Id.* at 2. *See also* Joan Biskupic & Aaron Kessler, *CNN Investigation: Sexual Misconduct by Judges Kept Under Wraps*, CNN (Jan. 26, 2018, 12:35 PM), https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html (thoroughly analyzing

(AO) for the United States Courts published a report about judiciary workplace conduct.[46] At a Senate Judiciary Committee hearing about harassment in the judiciary, referencing the report, the AO Director suggested that "[i]n many years, including 2016, there have been zero" complaints about sexual harassment in the judiciary.[47] However, as multiple witnesses pointed out during an October 2018 Judicial Conference hearing on the same subject, this dearth of complaints was likely due to inadequate avenues of reporting.[48]

data on judicial orders related to misconduct complaints between 2006 and 2017). The CNN analysis revealed that very few judges are disciplined; none of the complaints are made public; and "judicial orders are dumped onto circuit court websites as a series of numbered files," rendering the data confusing and unsearchable. *Id.* Furthermore, of the 4823 orders reviewed, more than a third of them—1719—were only a single page in length. Another 1552 were only 2 pages long. So, more than two-thirds of all orders arising from misconduct complaints—68 percent—clocked in at just 2 pages or less. Of the rest, 26 percent were between 3–5 pages, and another 6 percent between 6–9 pages. Less than 1 percent of the documents examined from the roughly 10 years (39 total) contained orders that were 10 pages or more in length. *Id.*

46. U.S. Courts, Fed. Judiciary Workplace Conduct Working Grp., 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 [https://perma.cc/B7AB-QRFL].

47. *See Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 2 (2018), https://www.judiciary.senate.gov/imo/media/doc/06-13-18%20Duff%20Testimony%20(with%20Attachments).pdf [https://perma.cc/8PFR-CEVS] [hereinafter Duff Statement] (statement of James C. Duff, Director, Administrative Office of the U.S. Courts); *see also Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018), https://www.judiciary.senate.gov/imo/media/doc/Duff%20Responses%20to%20QFRs1.pdf [https://perma.cc/GV75-M2X5] [hereinafter Duff Responses] (responses to questions for the record of James C. Duff). Mr. Duff also claimed that sexual harassment "is not as prevalent [in the judiciary] as in other workplaces," rating it perhaps a "3 or 4 out of 10" in severity level. *Id.*

48. In fact, several students from Yale Law School's Student Working Group, who testified during the hearing, suggested broadening reporting timelines and extending the 180-day EDR reporting window. They noted that it was "unrealistic" to expect law clerks to report on their judges immediately. The witnesses also questioned the lack of informal reporting processes within the courts, and they urged the judiciary to "create a culture of reporting" by creating multiple channels of reporting. *See Proposed Changes to Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules: Hearing Before the Jud. Conf. Comm.*, 115th Cong. (2018), https://www.uscourts.gov/sites/default/files/lisa_hansmann_witness_statement_proposed_changes_code_rules_0.pdf [https://perma.cc/2X22-J34Y] [hereinafter Hansmann Testimony] (testimony of Yale Law School student Lisa Hansmann); *Proposed Changes to Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules: Hearing*

Judiciary leadership occasionally pays lip service to the problem of "inappropriate behavior in the judicial workplace," while refusing to embrace the reforms necessary to address the problem.[49]

The scope of harassment within the judiciary is enormous, and it spans the political (and gender) spectrum. Liberal lions of the judiciary are not immune from harassing and mistreating their clerks, nor are female judges excluded from these problematic behaviors.[50] In fact, loyalty to a judge's particular political alignment, liberal or otherwise, is one reason that individuals within the legal and political community may defend an abusive judge rather than support victimized clerks.[51] The severe impact of harassment

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Before the Jud. Conf. Comm., 115th Cong. (2018), https://www.uscourts.gov/sites/default/files/chandini_jha_witness_statement_proposed_changes_code_rules_0.pdf [https://perma.cc/EC79-P6D8] [hereinafter Jha Testimony] (testimony of Yale Law School student Chandini Jha); *Proposed Changes to Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules: Hearing Before the Jud. Conf. Comm.*, 115th Cong. (2018), https://www.uscourts.gov/sites/default/files/andy_deguglielmo_witness_statement_proposed_changes_code_rules_0.pdf [https://perma.cc/8E7H-22J2] [hereinafter DeGuglielmo Testimony] (testimony of Yale Law School student Andy DeGuglielmo).

49. Chief Justice Roberts dedicated a few paragraphs of his 2021 Year-End Report on the Federal Judiciary to mentioning this problem, while declining to embrace the JAA, claiming that courts can police themselves, and insisting that the judiciary is an "exemplary workplace." *See* Chief Justice John G. Roberts, Jr., U.S. Sup. Ct., 2021 Year-End Report on the Federal Judiciary 4–5 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf [https://perma.cc/KW2M-TS8D].

50. *See infra* notes 67–75 for a discussion of "liberal lion" Judge Reinhardt's misconduct. The author has also spoken with several former clerks who described their experiences of harassment by female judges. Documentation on file with the author.

51. Some of the loyalty that notoriously misbehaving judges enjoy comes from political alignment. For example, the judge might be a liberal lion and his defenders might be committed progressives, or the judge might be a conservative firebrand and his defenders might be advocates for conservative causes. In fact, the author's judge was known as a "progressive sentencer," but his political leanings did not immunize him from gender discrimination and workplace misconduct. The judge's empathy seemed to extend to male criminal defendants, and no one else. Politics is not a good enough reason to keep harassers on the bench. Importantly, it is not a judge's rulings, but rather, how they treat employees—especially when no one is watching—that speaks to who they really are. Furthermore, by lionizing judges, the legal community is sacrificing countless victimized law clerks' careers. In a March 2020 blog post soon after Olivia Warren's House Judiciary Committee testimony, *Harvard Law Review* editors reassessed the journal's problematic practice of deifying misbehaving judges in memoriam pieces. *Recent Event: House Judiciary Committee Hearing on Harassment and the Judiciary*, Harv. L. Rev. Blog (Mar. 25, 2020), https://blog.harvardlawreview.org/recent-event-house-judiciary-committee-hearing-on-harassment-and-the-judiciary [https://perma.

on survivors cannot be overstated, and the effects of mistreatment can extend for many years.[52]

A. *High-Profile Judges Accused of Misconduct*

Beginning in 2017, high-profile allegations of harassment publicly emerged against former Ninth Circuit judges, including Judge Alex Kozinski[53] and Judge Stephen R. Reinhardt.[54] Several brave law clerks came forward to blow the whistle on devastating mistreatment, much of which had been an open secret for decades.[55] These stories are worth highlighting because, even after becoming aware of them, the judiciary has refused to take meaningful action. Misconduct occurs in courthouses across the country.[56] Based on the author's conversations with former clerks from a variety of judicial districts, mistreated clerks—including the author herself—draw strength from hearing about similar experiences, and may subsequently feel empowered to come forward themselves.

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52. See *infra* Conclusion for a discussion about the emotional trauma the author suffered, as well as the effects on her career and reputation, due to both the harassment she experienced and her decision to report it.

53. *See infra* notes 57–66.

54. *See infra* notes 67–75.

55. In AO Director James Duff's responses to questions for the record at a 2018 Senate Judiciary Committee hearing, he claimed that, while Kozinski was known as a "controversial figure," neither he nor anyone within the judiciary was aware of Kozinski's misconduct prior to the December 2017 allegations against him. *See* Duff Responses, *supra* note 47, at 3–5. However, several members of the Senate Judiciary Committee, including then-Senator Kamala Harris and Senator Dianne Feinstein, who represent California, where the Ninth Circuit is located, pointed out that they as California politicians and attorneys themselves had long been aware of Kozinski's reputation for misconduct. Furthermore, they speculated that if they knew about Kozinski's reputation, members of judiciary leadership, as well as Kozinski's Ninth Circuit colleagues, were likely aware of his bad behavior as well. *See* Duff Statement, *supra* note 47.

56. Judicial misconduct encompasses a wide variety of misbehavior, including delayed rulings, mistreating litigants, failure to recuse, and conflicts of interest. All of these are serious issues that have far-reaching effects on litigants. *See, e.g.*, James V. Grimaldi, Coulter Jones & Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, Wall St. J. (Sept. 28, 2021, 9:07 AM), https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421; *see also Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules: Hearing Before the Subcomm. on the Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. (Oct. 26, 2021), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4752.

In 2017, The Washington Post reported that several of Judge Kozinski's former clerks, including Heidi Bond,[57] as well as other individuals who came in contact with Judge Kozinski on the Ninth Circuit,[58] made accusations that the judge had "subjected them to a range of inappropriate sexual conduct or comments."[59] Ms. Bond described instances in which Judge Kozinski showed her and another clerk pornography, "asking if . . . it aroused her sexually."[60] Another Ninth Circuit clerk described an incident in which Judge Kozinski approached her and began asking her about exercising while naked.[61] Several Kozinski clerks indicated that they did not file complaints because they understood that not leaving with good references could destroy their careers.[62] They also indicated that they were not sure where to go to report the misconduct.[63] Additionally, Judge Kozinski told clerks that their law clerk oaths of confidentiality prevented them from reporting misconduct.[64] Judge

57. *See* Letter from Heidi S. Bond, Former Law Clerk, U.S. Ct. App. for the 9th Cir., to the S. Comm. on the Judiciary (June 11, 2018), http://www.courtneymilan.com/metoo/workinggroupletter.pdf [https://perma.cc/VSX4-ES42] [hereinafter Letter from Heidi S. Bond]. In her letter, Ms. Bond identifies five "red flags" that should have triggered an investigation into then-Judge Kozinski's misconduct sooner. *Id.* at 2–7. For example, she describes how clerks were expected to remain in chambers "until 1:30 AM every day, whether there was work to be done or not. Kozinski would regularly call close to the time to check to make sure we were present." *Id.* at 2. Kozinski also forbid his clerks from interacting with clerks from other chambers. *Id.* at 2–3. Ms. Bond also flagged that "Kozinski had an unusually large number of clerks leave partway through their term because the work environment was unbearable," and she argued that the judiciary should be required to keep track of and report data on judges who have a notably high number of clerks leaving partway through their clerkships. *Id.* at 4.

58. *See* Dahlia Lithwick, *He Made Us All Victims and Accomplices*, Slate (Dec. 13, 2017, 3:11 PM), https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html (describing the relationship between judge and law clerk as one of "worshipful silence").

59. *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 .

60. *Id.*

61. *Id.*

62. *Id.*

63. One former clerk stated, "I was afraid . . . I mean, who would I tell? Who do you even tell? Who do you go to?" *Id.*

64. *See* Alison Frankel, *Breaking the Law Clerks' Code of Silence: The Sexual Misconduct Claims Against Judge Kozinski*, Reuters (Dec. 13, 2017, 1:57 PM), https://www.reuters.com/article/us-otc-kozinski-idUSKBN1E72YX. *See also* Letter from Heidi S. Bond, *supra* note 57, at 4–5.

Kozinski has since retired.[65] However, he has attempted to re-enter public life, by publishing op-eds, participating in interviews, and speaking out in favor of his protégé, U.S. Supreme Court Justice Brett Kavanaugh.[66]

In February 2020, Olivia Warren, former Ninth Circuit law clerk to Judge Stephen R. Reinhardt, testified before the House Judiciary Committee about her harrowing experience of sexual harassment in chambers.[67] Ms. Warren described how, on her first day, she noticed a sine curve drawing taped above her computer, with dots added to resemble breasts.[68] The judge asked Ms. Warren if the drawing was "accurate," meaning whether it resembled her own breasts.[69] Ms. Warren also described how women were repeatedly graded by the judge based on their attractiveness.[70] Apparently Judge Reinhardt was enraged by the #MeToo

65. *See* Matt Zapotosky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct Allegations*, Wash. Post (Dec. 18, 2017), https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html?utm_term=.28aa64b012fb&itid=lk_inline_manual_11.

66. *See* Matt Zapotosky, *Judge Who Quit Over Harassment Allegations Reemerges, Dismaying Those Who Accused Him*, Wash. Post (July 24, 2018), https://www.washingtonpost.com/world/national-security/judge-who-quit-over-harassment-allegations-reemerges-dismaying-those-who-accused-him/2018/07/23/750a02f2-89db-11e8-a345-a1bf7847b375_story.html. For an overview of the misconduct investigations into Justice Kavanaugh, see Robin Pogrebin & Kate Kelly, The Education of Brett Kavanaugh: An Investigation 83 (2019) ("The closeness between Kavanaugh and Kozinski was evident in 2015 . . . sitting next to each other onstage at the Mayflower Hotel . . . Kavanaugh also laughed heartily when Kozinski joked that 'being a judge means never having to say you're sorry.'").

67. Olivia Warren's compelling testimony is worth reading (*see Olivia Warren House Judiciary Testimony*, *supra* note 9) and watching (*see Protecting Federal Judiciary Employees Hearing Video*, *supra* note 26) in full.

68. *Olivia Warren House Judiciary Testimony, supra* note 9, at 5.

69. *Id.* at 5–6. Following her clerkship, Ms. Warren tried to report the harassment to the Ninth Circuit, but she could not receive assurances about confidentiality. She also reached out to her alma mater, Harvard Law School, but she was disappointed by their response. It took her several weeks to get a meeting with the administration. She still has not been assured that steps have been taken to protect future clerks from the type of harassment she experienced. When she spoke with the administration, she "emphasized that students rarely hear about negative clerkship experiences for many of the systemic reasons that I have explained, and described how misled I felt by the institutional push to clerk." *Id.* at 14–15.

70. *Id.* at 6–7. Furthermore, "at times he used homophobic slurs: for example, a gay female clerk was repeatedly referred to by the judge as a 'dykester,' which he found funny." *Id.* at 7. Based on the author's conversations with several other Ninth Circuit clerks, Judge Reinhardt reportedly reserved a shelf in his office for pictures with his "pretty clerks." Documentation on file

movement, and he told Ms. Warren that "the allegations of sexual harassment that came out against people like Louis CK and Harvey Weinstein were made by women who had initially 'wanted it,' and then changed their minds."[71] The judge became further enraged by sexual harassment allegations against his friend Judge Kozinski: he told Ms. Warren that he would never again hire female clerks because "women could not be trusted."[72]

Ms. Warren also addressed the psychological impact that the harassment took on her.[73] She indicated that:

> [T]he harassment that I suffered during my first legal job and the frustrations that I felt in attempting to navigate how to report that misconduct indelibly colored my view of the judiciary and its ability to comprehend and adjudicate harm. I do not believe it is unreasonable to be concerned about the impact of this kind of harm on the pipeline to the legal profession: I worry that others who have similarly experienced harassment are leaving the profession or changing their goals in ways that deprive all of us of the valuable contributions they could have provided to the law had they not been harassed.[74]

Stories about judicial harassment and misconduct are not rare.[75] However, it is rare for such stories to become public. Judge

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with the author.

71. *Olivia Warren House Judiciary Testimony, supra* note 9, at 8.

72. *Id.* at 8–9. At a 2018 Senate Judiciary hearing, then-Senator Kamala Harris questioned AO Director James Duff about whether he was aware that other male judges were threatening to avoid sexual harassment complaints by no longer hiring female law clerks. *See Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018), https://www.judiciary.senate.gov/meetings/confronting-sexual-harassment-and-other-workplace-misconduct-in-the-federal-judiciary [https://perma.cc/6W5C-ALU2] [hereinafter *Confronting Sexual Harassment* Hearing Video]. Mr. Duff evaded the question. *Id.*

73. *Olivia Warren House Judiciary Testimony*, *supra* note 9, at 17.

74. *Id.* at 17–18.

75. In a 2021 Harvard Law Review article, Ms. Warren argues that, even after her testimony, there has been "public silence," and the judiciary remains in desperate need of oversight and reform. *See* Olivia Warren, *supra* note 22, at 446–55. Reflecting on what she learned from testifying before Congress, Ms. Warren stated:

> Perhaps the biggest surprise has been a renewed sense of confidence. I did not go into chambers a shrinking violet . . . But as much as I fought to keep Judge Reinhardt's words from staining my psyche, the refrain of "stupid little girl" and the constant attacks on who I was and who cared about me and who I would become inevitably slipped in to undermine my sense of self. For all of that harm and doubt, there is now new, competing evidence of my own capacity. Watching my testimony reminded me that I am a capable attorney because I lawyered my own case, largely alone

Kozinski is an unusual example of a judge who stepped down amid a far-reaching misconduct investigation.[76] As a result, the investigation into his misconduct ceased, and he continues to receive a lifetime pension.[77] Some judges similarly step down for "personal reasons" before an investigation ever becomes public.[78] Others—for whom being a judge defines their identity—try to ride out the investigation, believing that they are untouchable.[79]

Additionally, in Judge Reinhardt's case, even though "many of the more profane aspects of life in [his] Chambers were fairly well-known,"[80] he was never investigated. Olivia Warren took the brave step of testifying before the House Judiciary Committee only after the judge's death. Neither of these judges were held accountable for the gross misconduct they committed while on the bench. That is an egregious slap in the face to these judges' many victims. Furthermore, it sends a powerful message to the many law clerks who have experienced—or are currently experiencing—harassment in the judiciary, that the judiciary will protect abusers and disbelieve victims. While there is nothing that the judiciary can do to fully make things right for victimized law clerks, the very least they can do is remove more of these harassers from the bench, revoke their lifetime pensions and state bar memberships, and take other

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> and in secret, for two and a half years: making a contemporaneous record; gathering available evidence; reporting to neutral third parties; learning complex, overlapping procedural systems and trying to act within them; and finally thinking strategically about other ways to bring light to a wrong.

Id. at 452.

76. *See supra* notes 57–66.

77. The law differentiates between judicial retirement and judicial resignation. If a judge retires, he can continue to collect his lifetime pension; if he resigns, he relinquishes his pension. *See* Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. Pa. L. Rev. 1, 4–5 (2012). *See also* 28 U.S.C. §§ 371–74 (defining judicial retirement and resignation); *Retiring to Avoid Consequences: Judges Exploit a Loophole to Maintain Pensions in Spite of Misconduct*, Fix the Court (Oct. 1, 2021), https://fixthecourt.com/2021/10/retiring-to-avoid-consequences-judges-exploit-a-loophole-to-maintain-pensions-in-spite-of-misconduct.

78. For a thorough analysis of reasons why judges step down, see generally Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service–and Disservice–1789–1992*, 142 U. Pa. L. Rev. 333 (1993).

79. The judge for whom the author clerked can be described this way. His identity was inextricably linked with his powerful position as a judge. Many speculated to the author that the judge would never retire, and that he would insist on riding out the investigation into his misconduct.

80. *Protecting Federal Judiciary Employees* Hearing Video, *supra* note 26.

forceful steps to demonstrate that harassment in the judiciary will no longer be tolerated.

B. *Detrimental Effects of Harassment*

Judicial harassment can have many negative effects on prospective clerks, current clerks, and former clerks. For prospective clerks, the fear of harassment may cause members of marginalized groups to opt out of clerking entirely.[81] Because clerking opens many professional doors for young attorneys, deciding not to clerk can have long-term negative ramifications—including reputational and financial repercussions—for one's career. Some judges with reputations for abusive behavior are feeder judges to prestigious legal jobs or higher-level clerkships.[82] Those who refrain from applying to these judges therefore foreclose themselves from valuable opportunities.[83]

For current clerks facing harassment in the workplace, the long-term harm can be severe.[84] If they choose to remain silent,

81. *See Workplace Misconduct and the Federal Courts, supra* note 25 (discussing the phenomenon of opting out).

82. For a discussion about feeder judges, see Josh Blackman, *Which Circuit Judges and Circuit Courts Feed the Most SCOTUS Clerks?*, Volokh Conspiracy (Aug. 12, 2021, 5:42 PM), https://reason.com/volokh/2021/08/12/which-circuit-judges-and-circuit-courts-feed-the-most-scotus-clerks; *see also* Alexandra G. Hess, *The Collapse of the House that Ruth Built: The Impact of the Feeder System on Female Judges and the Federal Judiciary, 1970–2014*, 24 Am. U. Wash. ColL. J. Gender, Soc. Pol'y & L. 61 (2015) (analyzing the lack of female appellate "feeder" judges).

83. Following the December 2017 allegations against Judge Kozinski, Dahlia Lithwick, a former Ninth Circuit clerk and current Slate jurisprudence reporter and "Amicus" podcast host, reflected on the issue of female prospective clerks avoiding misbehaving judges—and thereby missing out on valuable job opportunities. *See* Lithwick, *supra* note 58.

84. *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. (2020), https://docs.house.gov/meetings/JU/JU03/20200213/110505/HHRG-116-JU03-Wstate-LithwickD-20200213.pdf [https://perma.cc/25EF-EF9U] [hereinafter Lithwick Statement] (statement of Dahlia Lithwick); Ms. Lithwick reports on judicial misconduct. According to Ms. Lithwick:

> My experience is that in some of the cases that I have reported on and learned of, the abuse can do horrific damage, careers can be short-circuited, and trauma can be lasting. This abuse transcends race and gender in some cases, and calls the integrity of the entire judiciary into question. I am very aware of the fact that judges rely on a certain amount of blind reverence and mystification in order to preserve public legitimacy. But when secret-keeping and abuse are eventually revealed it is the judiciary as a whole that suffers.

Id. at 2. Ms. Lithwick also clarified in her statement that harassment in the

they can suffer from substantial psychological trauma.[85] Sustained and pervasive harassment can be heart-wrenching and devastating. It can cause even the most confident of law clerks to begin to internalize the criticism and question their own self-worth.[86] It is exceeding difficult for law clerks to do their jobs, in high-pressure, fast-paced environments, when they are being mistreated at work every day.[87] If the law clerks choose to report, they may face long-term reputational damage.[88] This results not only from having a judge working against them, but also from current and prospective colleagues, as well as other members of the judiciary, viewing them in a negative light and considering them to be "not [] team player[s]" for reporting the misconduct.[89] It is not unusual for other clerks or other members of the legal profession to try to convince victimized clerks not to report mistreatment. I was personally dissuaded from reporting the mistreatment I experienced. However, if no one reports judicial misconduct, it will continue to occur, and misbehaving judges will never face discipline.

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judiciary is fundamentally about judges exercising power over clerks. *Id.* at 1. Specifically, "this is not a sex or abuse problem, but rather a power problem, and also that this is fundamentally a problem of closed systems that rely, often reasonably, on secrecy and discretion on the part of every member of a judicial chambers." *Id.*

85. *See Olivia Warren House Judiciary Testimony*, *supra* note 9, at 17–18, for a discussion about the effects of harassment on her life; *see also* Brief for Named and Unnamed Current and Former Employees of the Federal Judiciary Who Were Subjected to or Witnessed Misconduct as Amici Curiae in Support of Appellant Jane Roe, at 35–39, Jane Roe v. United States, No. 21-1346, 2022 WL 1217455, (4th Cir. 2021), https://www.keker.com/Templates/media/files/2021_8_26%20Jane%20Roe%20Stories%20Brief%20(filed).pdf [https://perma.cc/2T9Z-7ZX4] [hereinafter *Jane Roe Amicus Brief*] (discussing the effects of harassment on former clerks' and public defenders' lives).

86. See *supra* Introduction, for a discussion about how the harassment the author suffered caused her to question her own self-worth. See also *Olivia Warren House Judiciary Testimony*, *supra* note 9, at 17–18, for a discussion of the effects of harassment.

87. See *supra* Introduction, for a discussion about the challenges the author faced in the workplace, as she tried to do her job in the face of mistreatment.

88. *See id.*

89. *See* Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 Geo. J. Legal Ethics 1041, 1059 (2011) ("Women and minorities who experience bias are often reluctant to complain about it publicly. They don't want to 'rock the boat,' seem 'too aggressive' or 'confrontational,' look like a 'bitch,' or be typecast as an 'angry black.' When lawyers do express concerns, the consequences are frequently negative, so many are advised to: '[L]et bygones be bygones,' or just 'move on.'") (alteration in original). The author recalls the judge calling her "not a team player" on multiple occasions. Documentation on file with the author.

For former clerks grappling with the effects of harassment in the judiciary, they may choose to opt out of the legal profession entirely.[90] Those who opt out may fear additional harassment if they continue to pursue legal careers.[91] They may also struggle to find jobs in the legal profession.[92] This could be because the judges who harassed them are continuing to retaliate against them in the job market—for example, by speaking negatively about them to prospective employers, or by instigating vicious and false rumors about poor performance during the clerkship.[93] Former clerks might also struggle with backlash from the legal community after bravely choosing to report the misconduct.[94]

Unfortunately, the majority of the legal profession insists on a culture of silence and blind deference to the judiciary. If clerks who belong to marginalized groups opt out after experiencing harassment, the legal profession will continue to be dominated by white men—including abusers, their defenders, and their enablers.[95] This

90. *See Workplace Misconduct and the Federal Courts*, *supra* note 25 (discussing the phenomenon of opting out). Furthermore, according to an October 2019 study by the American Bar Association (ABA) about women "Walking Out the Door" from law firms, 88 percent of men reported that gender diversity was widely acknowledged as a law firm priority, whereas only 54 percent of women agreed. *See* Am. Bar Ass'n, *supra* note 44, at 85. Furthermore, while 74 percent of men reported that their law firms "successfully retained experienced women," only 47 percent of women agreed. *Id.* Additionally, 71 percent of men reported that they were satisfied with the recognition they received at work, while only 50 percent of women agreed. *Id.* at 86. Further, 62 percent of men reported satisfaction with opportunities for advancement at their law firms, whereas only 45 percent of women agreed. *Id.*

91. *See Jane Roe Amicus Brief, supra* note 85, at 35–36. This appellate brief describes former law clerks' and former public defenders' experiences of workplace harassment by federal judges and federal public defenders. *See id.* at 6–17. Many amici submitted their stories anonymously, due to ongoing fears of retaliation. *Id.* at 17. Several amici—as well as Jane Roe, the Appellant—were driven from their dream jobs in the profession after experiencing mistreatment. *Id.* at 35–36.

92. *See id.* at 24–29.

93. *See id.*

94. *See id.*

95. *See, e.g.*, Nat'l Ass'n of Women Laws., 2019 Survey Report on the Promotion and Retention of Women in Law Firms (2019), https://www.nawl.org/p/cm/ld/fid=1163 [https://perma.cc/ZK6X-CE7W]. *See also* Renee Nicole Allen, Alicia Jackson & DeShun Harris, *The "Pink Ghetto" Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. Det. Mercy L. Rev. 525 (2019); *U.S. Attorney Listings*, Off. of the U. S. Att'ys, https://www.justice.gov/usao/us-attorneys-listing [https://perma.cc/22EE-WYN7] (indicating that the majority of U.S. Attorneys are male). For a thorough analysis of (the lack of) diversity in the legal profession and its implications, *see generally* Meera E. Deo, Unequal Profession: Race and Gender in Legal Academia (2019).

is a substantial loss for the legal profession, as well as an enormous waste of harassment victims' legal training and talents. In order to foster a professional culture that reflects society's diversity—including diversity among those who ascend to the bench—the legal profession should support those who come forward. Furthermore, fellow attorneys should make it possible for lawyers, no matter their identity, to not just survive but thrive in the legal community.

II. Structural and Institutional Failures that Perpetuate Harassment

Various structures and institutions contribute to a system in which judicial harassment flourishes. This Part explores several aspects of the legal profession that contribute to the problem. Part A considers the structure of clerkships—both generally in the federal courts, and specifically within the D.C. Court system, including the courthouse where I clerked—and argues that these workplaces are particularly conducive to harassment and in desperate need of oversight. Part B discusses how law schools contribute to the problem and suggests several reforms.

A. *Structure of the Courts and Clerkships*

1. Clerkships: Workplaces Conducive to Harassment

The structure of a clerkship makes this type of workplace particularly conducive to harassment. The dangerous combination of life tenure and the protection against workplace harassment lawsuits causes judges to behave as if they are untouchable. The longer they are on the bench, the more entrenched this god-like complex becomes. Several factors about the nature of clerkships make them conducive to workplace harassment: (1) significant power disparities between judges and law clerks; (2) the nature and stature of judges as "high-value employees;" (3) the fact that each judge's chambers is an isolated workspace; (4) the structure of each judge's chambers as a decentralized workplace with little to no oversight; and (5) "homogenous workforces" among the law clerk population.[96]

96. *See* Feldblum & Lipnic, *supra* note 44, at 84–88. *See also* Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 Nw. U.L. Rev. 599, 615–20 (2020). This is not to say that a more diverse law clerk population would fix the problem of harassment in the judiciary. In fact, the author was told by her judge's non-white outgoing clerks during her clerkship interview that the judge "liked to hire clerks who might not otherwise get hired—meaning minorities and women." However, that did not stop the judge from harassing his female clerks when they did not conform to gender stereotypes. Additionally, the expectation that clerks with marginalized identities educate their judges or workplaces is unfair and ineffective, and this

The organizational structure and physical layout of judicial chambers also makes harassment more likely. These issues are exacerbated in geographically remote locations; for example, judicial districts with only one judge, or courthouses in more isolated areas of the country. Each judge's chambers is small and secluded: one or two clerks, perhaps a Judicial Assistant, and a judge share a few small offices, separated from all other chambers by locked doors.[97] Most of the clerk's daily interactions will be with her judge and her co-clerk. Judges face little oversight in their day-to-day dealings with their clerks.[98] Each judge's chambers is like its own little "fiefdom"—an isolated kingdom where the judge exerts total authority over his employees, and where he is accountable to no one.[99] Many judges are notorious for the attitude, "not my chambers, not my business,"[100] creating a silo effect that precludes a network of support across judges' chambers.[101]

The immense power disparity between judges and law clerks can make it exceedingly difficult to speak up about workplace misconduct or harassment.[102] Judges have lifetime appointments (or fifteen-year appointments, in the case of D.C. judges), whereas law clerks are fresh out of law school, and will only be employed by the court for one or two years. Clerks depend on positive references

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adds to the immense pressure to succeed and conform that these clerks already face.

97. Congressional offices are structured a bit like judicial chambers: they are isolated and decentralized, have only a few employees, and the member of Congress lacks meaningful oversight. In recent years, Congress has wrestled with workplace misconduct allegations and has made meaningful reforms. Now, members of Congress and staffers involved in making those reforms are urging the Judiciary to adopt them as well. *See* Rep. Jackie Speier & Ally Coll, *All Rise: It's Time for the Judiciary to Live by the Anti-Discrimination Laws it Enforces*, Roll Call (Aug. 17, 2021, 6:00 AM), https://www.rollcall.com/2021/08/17/all-rise-its-time-for-the-judiciary-to-live-by-the-anti-discrimination-laws-it-enforces.

98. Federal judges cannot be punished by, for example, having their salaries decreased. *See* U.S. Const. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Service, a Compensation, which shall not be diminished during their Continuance in Office.").

99. *See* Litman & Shah, *supra* note 96, at 619.

100. *See Jaime Santos Senate Judiciary Testimony*, *supra* note 41, at 4.

101. In her 2018 letter to the Senate Judiciary Committee, Heidi Bond explained how Kozinski's practice of isolating his clerks—specifically forbidding them from interacting with other judges' clerks—facilitated a culture of harassment. *See* Letter from Heidi S. Bond, *supra* note 57, at 2–3.

102. The author spoke with one clerk who told her that, "no matter how bad things got in chambers, I told myself that [the judge] could set my career on fire." Documentation on file with the author.

from their judges in order to secure their next jobs.[103] Few effective disciplinary mechanisms exist for judges who harass their clerks. It is often the victims—the clerks—who get blamed if they choose to speak up.[104] Law clerks considering reporting misconduct likely fear retaliation and retribution by the judge, including termination. A guaranteed option for reassignment to a different judge for the remainder of the clerkship period would lessen these concerns. Clerks considering whether to report misconduct may fear that other clerks will circle the wagons around the judge (a high-value employee), no matter how much misconduct he has committed.[105] Other clerks might defend the misbehaving judge because of aligning political affiliations, because they believe the judge has redeeming qualities that make it worth protecting his legacy and reputation, or because they are too scared of the professional ramifications associated with whistleblowing.[106] Clerks might also fear

103. *See* Litman & Shah, *supra* note 96, at 616 ("A judge can both help a clerk find a job and tank a clerk's prospects with just one call."). See also *supra* Introduction for a discussion about the ramifications of a negative reference from the judge the author clerked for, and the enormous amount of power that judges have over law clerks' careers. Testimony from an October 2018 Judicial Conference hearing revealed, "An unfavorable reference letter, or even the judge's refusal to write one, can compromise or destroy career aspirations." *See Comments on the Proposed Changes to the Code of Conduct for U.S. Judges and Rules for Judicial Conduct and Disability Rules: Hearing Before the Jud. Conf. Comm. on Codes of Conduct and Comm. on Jud. Conduct and Disability*, U.S. Courts 3 (Oct. 30, 2018), https://www.uscourts.gov/sites/default/files/renee_newman_knake_witness_statement_proposed_changes_code_rules_0.pdf [https://perma.cc/PPS2-FGNA] [hereinafter *Renee Newman Knake Judicial Conference Testimony*] (testimony of Renee Newman Knake).

104. After the author reported the misconduct of her D.C. judge, she was told by one attorney that "the right professional decision would have been *not* to report." Furthermore, multiple individuals—including several female attorneys—told the author that she had a "personality issue," and they blamed her for not being able to make things work with the judge.

105. *See* Veronica Root Martinez, *Combatting Silence in the Profession*, 105 Va. L. Rev. 805, 834 (2019) (arguing that the legal profession "should adopt policies and practices that (i) address covert discrimination throughout the profession and (ii) encourage individual attorneys to stop remaining silent and instead give voice to their experiences of discrimination, harassment, and bias").

106. Diversity on the bench is an important goal, and increasing the diversity of lived experiences and career paths among judges will lead to better, fairer outcomes for litigants. *See Diversity of the Federal Bench*, Am. Const. Soc'y, https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench [https://perma.cc/BD4S-P7WM]; Rachel Weiner & Spencer S. Hsu, *New Federal Judges in D.C., Va. And Md. Show Biden's Push to Diversify Bench*, Wash. Post (Oct. 27, 2021, 6:33 PM), https://www.washingtonpost.com/local/legal-issues/new-federal-judges-in-dc-va-and-md-show-bidens-push-to-

that other judges will unquestioningly stand by their colleague, as judges have a vested professional interest in protecting their own.[107]

Much has been made of the persistent lack of diversity among law clerks—there is not just a dearth of female clerks, but also too few LGBTQ, disabled, and non-white clerks.[108] Clerkships pay less than jobs in private practice and require clerks to relocate to new places for a year or two, perhaps separated from their loved ones.[109] These characteristics serve as barriers for many law students who might be interested in clerking but whose large student loans or family responsibilities make it difficult to make such sacrifices. As a result, the majority of federal law clerks and federal judges are white and male.[110] If the vast majority of the judges and clerks are

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diversify-bench/2021/10/27/b0915abc-3691-11ec-9bc4-86107e7b0ab1_story.html; Nate Raymond, *Biden Nominates 10 More Federal Judges Amid Diversity Push*, Reuters (Sept. 30, 2021, 2:55 PM), https://www.reuters.com/legal/legalindustry/biden-nominates-10-more-federal-judges-amid-diversity-push-2021-09-30. However, a diverse bench will not solve the problem of judicial harassment. *See The Importance of a Diverse Federal Judiciary: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2021), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4486. The Senate Judiciary Committee should prioritize a hearing on the JAA over confirmation of more judges.

107. In Olivia Warren's February 2020 congressional testimony, she described Judge Reinhardt's Ninth Circuit colleagues, and his network of former clerks, as unquestioningly loyal and supportive. *See Olivia Warren House Judiciary Testimony*, *supra* note 9, at 11–12.

108. *See Racial/Ethnic Representation of Class of 2019 Judicial Clerks*, Nat'l Ass'n for L. Placement (Feb. 2021), https://www.nalp.org/0221research [https://perma.cc/7SAQ-MWC8] (indicating that nearly 80 percent of federal clerkships among 2019 graduates were obtained by white applicants). The D.C. Courts recently published law clerk hiring data in their 2020 Equal Employment Opportunity Report. In 2020, there were 3 Asian clerks, 2 African American clerks, 0 Hispanic or Latino clerks, 13 white clerks, and 1 multiracial clerk on the D.C. Court of Appeals. *See* D.C. Courts, 2020 Annual EEO Report 27 (2020) https://www.dccourts.gov/sites/default/files/divisionspdfs/2020-EEO-Report.pdf [https://perma.cc/7KVY-2CWR]. Of these clerks, 11 were female and 8 were male. *Id.* Among D.C. Superior Court law clerks in 2020, there were 7 Asian clerks, 17 African American clerks, 10 Hispanic or Latino clerks, 73 white clerks, and 1 "unidentified race" clerk. *Id.* at 30. Of these clerks, 69 were female and 39 were male. *Id.* This report also notes that there were no EEO complaints filed with the D.C. Courts in 2020. *Id.* at 3.

109. *See Judiciary Salary Plan Pay Rates*, U.S. Courts, https://www.uscourts.gov/careers/compensation/judiciary-salary-plan-pay-rates [https://perma.cc/3NVC-72BH]; *see also* Litman & Shah, *supra* note 96, at 612 (discussing the financial drawbacks of clerking).

110. *See A Demographic Profile of Judicial Clerks – 2006–2016*, Nat'l Ass'n for L. Placement (Oct. 2017), https://www.nalp.org/1017research (indicating that the majority of federal law clerks are male); *see also Racial/Ethnic Representation of Class of 2019 Judicial Clerks*, *supra* note 108, for recent

white and male, this puts the lone law clerk who is not a white male at increased risk of victimization.[111] Furthermore, simply increasing diversity within the law clerk population without also disciplining misbehaving judges will not solve the problem. It might even set up marginalized groups for worse victimization.

2. The D.C. Court System: A Workplace that Lacks Oversight

The unique structure and deeply entrenched political nature of the D.C. Courts enable D.C. judges to evade oversight and avoid accountability.[112] The same troubling features that insulate D.C. judges from scrutiny also make D.C. Courts law clerks particularly vulnerable to harassment and mistreatment, without clear avenues to report it. D.C. Courts judges benefit from many of the same protections as other Senate-confirmed judges during their terms of appointment, yet it is unclear whether D.C. Courts law clerks are protected by Title VII, and D.C. judges are excluded from local civil

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law clerk hiring data. In fact, according to the ABA, nearly four out of five (79.7 percent) of federal judges are white, and 72.2 percent are male. *See* Am. Bar Ass'n, *supra* note 44, at 68, 81. Furthermore, among state supreme court judges, 62 percent are male, and only 17 percent are non-white. *Id.* at 72. However, women represent 54.1 percent of law students. *Id.* at 84. Diversity on the bench could be increased if more current judges took "senior status," making room for younger, more diverse judges to take their places. *See* Marin K. Levy, *The Promise of Senior Judges*, 115 Nw. U.L. Rev., 1227, 1240–45 (2021).

111. According to a 2016 Equal Employment Opportunity Commission (EEOC) Report, "sexual harassment of women is more likely to occur in workplaces that have primarily male employees, and racial/ethnic harassment is more likely to occur where one race or ethnicity is predominant." *See* Feldblum & Lipnic, *supra* note 44, at 26.

112. When Congress created the D.C. Court system, it did not want to relinquish federal control over the courts. Congress created a unique system whereby, for every judicial vacancy, three names are provided to the White House by the JNC. The President selects one judge from the group of three, and that judge is confirmed by the Senate for a fifteen-year term. *See Judicial Nomination Commission*, DC.gov, https://jnc.dc.gov/node/488242 [https://perma.cc/KCZ8-BL4Q]. Then, the judge can seek reappointment for a second fifteen-year term. *See id.* The reappointment function is handled by the CJDT, the same regulatory body that is tasked with investigating and disciplining judicial misconduct. *See The Commission's Jurisdiction*, Comm'n on Jud. Disabilities and Tenure, https://cjdt.dc.gov/node/574322 [https://perma.cc/82RD-RVEA]. While D.C. is a progressive town, and Democrats are involved in the judicial appointments process via the JNC, Republican senators are able to block many judicial appointments. *See* Meagan Flynn & 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, 9:52 AM), https://www.washingtonpost.com/dc-md-va/2022/01/01/dc-judges-vacancy-senate/?wpisrc=nl_sb_smartbrief.

rights laws.[113] D.C. judges' Senate-confirmed status makes them difficult to discipline and difficult to remove from the bench.[114] Additionally, various entities that might reasonably be expected to exert some oversight over D.C. judges—HR, the EEO Office, and even the Chief Judges of the D.C. Superior Court and the D.C. Court of Appeals—are able to disclaim responsibility for misbehaving D.C. judges.

The D.C. Courts—specifically, the Superior Court of the District of Columbia[115] and the District of Columbia Court of Appeals[116]—are Article I courts (or legislative courts) that were established by Congress in 1970.[117] There are two types of federal

113. See *infra* Part IV for a discussion about why § 1983 is insufficient for harassment claims against D.C. judges, as well as a discussion about why D.C. judges are not subject to the D.C. Human Rights Act.

114. D.C. Courts judges do not enjoy life tenure, so they can be removed during their terms of office. *See* James Durling, *The District of Columbia and Article III*, 107 Geo. L.J. 1205, 1212 (2019) (explaining that D.C. judges do not have life tenure and "can be removed outside of the impeachment process"). However, because of both the pervasive public perception in D.C. that D.C. Courts judges are federal judges—due in part to their Senate-confirmed status—and the deification of D.C. judges in the D.C. legal community, the D.C. judicial regulatory body has been historically unwilling to discipline, let alone remove, D.C. judges from the bench. Documentation on file with the author.

115. The D.C. Superior Court is divided into several divisions, including Criminal, Civil, Family Court, Domestic Violence, Probate, and Tax. *See Superior Court*, D.C. Courts, https://www.dccourts.gov/superior-court [https://perma.cc/ZW7T-YPPR]. Superior Court judges "rotate" to a new division each year. *See* D.C. Courts, 2022 Judicial Assignments (2022), https://www.dccourts.gov/sites/default/files/2022-02/2022_Judicial_Assignments.pdf [https://perma.cc/XZ99-SDRE]. The intent of annual rotations is that judges become "generalists." However, these frequent transitions lead to confusion. The rotation system also disadvantages litigants, whose cases are constantly shuffled around to new judges, who require time to get up to speed on their new assignments. D.C. Superior Court should revise its policies so that judges rotate every two years instead.

116. The D.C. Court of Appeals is the highest court in D.C. and is the equivalent of a state supreme court. *See More About the Court of Appeals*, D.C. Courts, https://www.dccourts.gov/court-of-appeals/learn-more [https://perma.cc/924R-RLHC]. Randomly selected three-judge panels review both appeals of D.C. Superior Court decisions and D.C. government agency decisions. *See id.* Additionally, the D.C. Court of Appeals oversees the D.C. Bar and "has the power to approve the rules regarding attorney discipline." *See id.* The D.C. Court of Appeals consists of one Chief Judge, eight Associate Judges (although there are currently several vacancies), and several Senior Judges. *See District of Columbia Court of Appeals Judges*, D.C. Courts, https://www.dccourts.gov/court-of-appeals/judges [https://perma.cc/F8BD-SQWR].

117. *See Legislative Courts*, Justia, https://law.justia.com/constitution/us/article-3/06-legislative-courts.html [https://perma.cc/GQK7-YDCM] (annotating U.S. Const. art. III, § 1) ("Legislative courts . . . are created by

courts. Under Article III of the U.S. Constitution, federal judges are appointed by the President and confirmed by the Senate.[118] They hold their offices "during good behavior" which, in practice, grants them life tenure, except in certain limited circumstances.[119] However, under Article I of the Constitution, Congress also has the power to create some federal courts, which are sometimes referred to as legislative courts or Article I tribunals.[120] These include: the territorial courts in Guam, the U.S. Virgin Islands, and the Northern Mariana Islands; the U.S. Court of Military Appeals; the U.S. Court of Veterans Appeals; the U.S. Court of Federal Claims; the U.S. Tax Court; the U.S. Bankruptcy Court; and the D.C. Courts.[121] The judges in most Article I courts are appointed by the President and confirmed by the Senate for fifteen-year terms, but, with the exception of the D.C. Courts, they are federal courts and federal judges, and their law clerks are federal clerks.[122] The D.C. Courts are not

Congress pursuant to its general legislative powers.") (last visited Jun. 6, 2022). Furthermore, "[i]n creating legislative courts, Congress is not limited by the restrictions imposed in Article III concerning tenure during good behavior and the prohibition against diminution of salaries. Congress may limit tenure to a term of years, as it has done in acts creating territorial courts and the Tax Court; it may subject the judges of legislative courts to removal by the President [McAllister v. United States, 141 U.S. 174 (1891)]; and it may reduce their salaries during their terms [United States v. Fisher, 109 U.S. 143 (1883); Williams v. United States, 289 U.S. 553 (1933)]." *Id.* Other examples of Article I courts include the U.S. Court of Military Appeals, the U.S. Court of Veterans Appeals, the U.S. Court of Federal Claims, the U.S. Tax Court, and the bankruptcy courts. *Id.* at n.57. *See also* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91–358, 84 Stat. 475 (codified at D.C. Code § 11–101 (1973)); D.C. Courts, D.C. Courts Timeline, https://www.dccourts.gov/sites/default/files/DCCts-timeline.pdf [https://perma.cc/6FFN-HZWL]; Steven M. Schneebaum, *The Legal and Constitutional Foundations for the District of Columbia Judicial Branch*, 11 U.D.C. L. Rev. 13 (2008) (explaining the structure of the D.C. Courts).

118. *See About Federal Judges*, U.S. Courts, https://www.uscourts.gov/judges-judgeships/about-federal-judges#:~:text=Article%20III%20of%20the%20Constitution,confirmed%20by%20the%20U.S.%20Senate [https://perma.cc/9958-GSC9].

119. *See id.*

120. See *Legislative Courts, supra* note 117 for an explanation of Article I courts. Most, but not all, Article I judges are Senate-confirmed. For example, bankruptcy judges are not Senate-confirmed: they are appointed by Circuit Court judges for fourteen-year terms, yet they are covered under the Judicial Conduct and Disability Act. *See* Hon. Craig A Gargotta, *Who Are Bankruptcy Judges and How Did They Become Federal Judges?*, The Federal Lawyer (Apr. 2018), https://www.fedbar.org/wp-content/uploads/2018/04/Bankruptcy-Brief-pdf-1.pdf.

121. *See id.* at n.57.

122. *See id.*

technically federal courts, not because of the Article I versus Article III distinction, but because D.C. is not a state—the D.C. Courts are DC's local courts, and D.C. judges hear cases on local issues.

Under the 1973 District of Columbia Home Rule Act, Congress specifically prohibited the D.C. Council—DC's local legislative body—from passing any laws that would alter the composition or jurisdiction of the D.C. Courts.[123] D.C. judges are appointed by the Judicial Nomination Commission (JNC).[124] They are confirmed for fifteen-year terms by the U.S. Senate.[125] They are then considered—often as merely a formality—for reappointment by the CJDT.[126] This affords D.C. judges de facto life tenure, since most judges will not serve for more than thirty years (two terms). D.C. judges are

123. *See* District of Columbia Self-Government and Government Reorganization (D.C. Home Rule) Act, Pub. L. 93–198, 87 Stat. 774 (1973).

124. *See Judicial Nomination Commission*, *supra* note 112. However, while the D.C. Courts are controlled by Congress, the regulatory bodies in charge of judicial appointments, reappointments, and misconduct investigations—the JNC and the CJDT—are themselves overseen and funded by the D.C. Council. *See* Charles Allen, Council of D.C., Rules of Organization and Procedure for the Committee on the Judiciary and Public Safety § 202 (2021). Despite these power-sharing challenges, conversations between the author and congressional offices revealed that the House Oversight Committee is empowered to exert some oversight authority over the CJDT (and likely the JNC as well). Documentation on file with the author.

125. *See Judicial Nomination Commission*, *supra* note 112. However, unlike Article III judges, who are confirmed by the Senate Judiciary Committee, D.C. judicial nominations are considered by the Senate Homeland Security and Governmental Affairs Committee. *See, e.g.*, *Nominations of Loren L. Alikhan and John P. Howard III to be Associate Judges, District of Columbia Court of Appeals, and Adrienne Jennings Noti to be an Associate Judge, Superior Court of the District of Columbia: Hearing before S. Homeland Sec. & Gov't Affs. Comm.*, 117th Cong. (2021), https://www.hsgac.senate.gov/hearings/nominations-of-loren-l-alikhan-and-john-p-howard-iii-to-be-associate-judges-district-of-columbia-court-of-appeals-and-adrienne-jennings-noti-to-be-an-associate-judge-superior-court-of-the-district-of-columbia.

126. *See Judicial Reappointments*, Comm'n on Jud. Disabilities &Tenure, https://cjdt.dc.gov/service/judicial-reappointments [https://perma.cc/XY5Q-TM9X]; *see also* Comm'n on Jud. Disabilities & Tenure, Notice of Final Rulemaking §§ 2030–31 (2019), https://cjdt.dc.gov/sites/default/files/dc/sites/cjdt/publication/attachments/commission-rules.pdf [https://perma.cc/WKW4-BKFZ] (judicial evaluation categories include: Well Qualified, Qualified, or Unqualified). In practice, the vast majority of D.C. judges who seek reappointment are reappointed by the CJDT. *See* Charles A. Miller, *Who Should Appoint Judges of the D.C. Courts?*, 11 U.D.C. L. Rev. 25, 26–27 (2008) (explaining that the majority of D.C. judges are found to be "well-qualified" by the CJDT and re-nominated for a second fifteen-year term).

guided by the Code of Judicial Conduct.[127] Additionally, the D.C. Courts are funded by the federal budget.[128]

The Commission on Judicial Disabilities and Tenure (CJDT) handles both judicial misconduct investigations and judicial reappointments.[129] The seven-commissioner CJDT is staffed primarily by judges and attorneys who interact with judges, as well as an unelected, un-appointed Special Counsel, who is hired by the seven commissioners and who wields enormous power.[130] Commissioners are appointed to the CJDT through on a convoluted, politicized process, and they handle their duties on a part-time basis.[131] This differentiates the D.C. Court system from similar state court systems

127. *See* D.C. Courts, Code of Judicial Conduct, 2018 Edition (updated Mar. 2021), https://www.dccourts.gov/sites/default/files/2018%20Edition%20of%20the%20Code%20of%20Judicial%20Conduct%20(2021%20Supp.).pdf [https://perma.cc/4G4Q-XXQ2] ("On November 21, 2019, the Joint Committee on Judicial Administration [] approved amendments to the Comments to Rules 2.3 and 2.15 concerning (1) sexual harassment and (2) discrimination based on gender identity and expression.").

128. *See Financial Services and General Government*, H. Comm. on Appropriations, https://appropriations.house.gov/subcommittees/financial-services-and-general-government-117th-congress [https://perma.cc/4PJF-FWS2]; *see also* Financial Services and General Government Appropriations Act, H.R. 4345, 117th Cong. (2021) (Fiscal Year 2022 appropriations).

129. *See Judicial Misconduct Investigations*, Comm'n on Jud. Disabilities & Tenure, https://cjdt.dc.gov/service/judicial-misconduct-investigations [https://perma.cc/JYD8-9G7P]; *see also Judicial Reappointments*, *supra* note 126; D.C. Code §§ 1–204.31(d)(1), 1-204.33 (2022). The CJDT is also empowered to consider recommendations for senior status and retired judges. *See* D.C. Code § 11–1504 (2021); *The Commission's Jurisdiction*, *supra* note 112. *See also* D.C. Code § 11–1521 (2022).

130. Appointments to the CJDT are made by: the President of the United States (1), the D.C. Bar Board of Governors (2), the D.C. Mayor (2), the D.C. Council (1), and the Chief Judge of the District Court for the District of Columbia (1). *See Commission Membership*, Comm'n on Jud. Disabilities & Tenure, https://cjdt.dc.gov/page/commission-membership [https://perma.cc/KMN2-P9HQ].

131. *See id.*

like Maryland,[132] Virginia,[133] New York,[134] and New Jersey,[135] which separate judicial appointments and judicial misconduct investigations into two separate and distinct commissions. This dual reappointment and misconduct investigatory function creates the appearance of a conflict of interest for the CJDT. The CJDT is not capable of adequately performing both roles.

The D.C. Courts are unique because they are best thought of as hybrid state/federal courts. The D.C. Courts are local courts, since D.C. is not a state—and D.C. also houses several federal courts.[136] However, D.C. judges are Senate-confirmed, like federal judges. Like a federal judge, a D.C. judge's "boss" for removal purposes is the President of the United States.[137] Only the CJDT (or the White House) can remove a misbehaving D.C. judge: the Chief Judges of D.C. Superior Court and the D.C. Court of Appeals are not empowered to remove D.C. judges from office because they are Senate-confirmed.[138] After a D.C. judge's Senate confirmation, it is a high bar to remove that judge from the bench, prior to the end of

132. *See Judicial Nominating Commission*, Md. Manual On-line, https://msa.maryland.gov/msa/mdmanual/26excom/html/22jnom.html [https://perma.cc/28S3-2NZ8]; *see also Commission on Judicial Disabilities*, Md. Courts, https://www.courts.state.md.us/cjd [https://perma.cc/UX3R-RBR9].

133. In Virginia, state court judges are elected by a majority vote of the General Assembly. *See Virginia Courts in Brief*, Va. Courts, https://www.vacourts.gov/courts/cib.pdf [https://perma.cc/RNX5-GK96]. The Judicial Inquiry and Review Commission handles judicial misconduct investigations. *See Judicial Inquiry and Review Commission*, Va. Courts, https://www.vacourts.gov/agencies/jirc/home.html [https://perma.cc/RG8S-DGKT].

134. *See Commission on Judicial Nomination*, N.Y. State, https://cjn.ny.gov [https://perma.cc/J87C-GMZM]; *see also About Us*, N.Y. State Comm'n on Jud. Conduct, https://cjc.ny.gov [https://perma.cc/LVN4-X96T].

135. *See* N.J. Courts, The New Jersey Courts: A Guide to the Judicial Process (2019), https://www.njcourts.gov/forms/12246_guide_judicial_process.pdf [https://perma.cc/CJN6-YVJL]; *see also Advisory Committee on Judicial Conduct*, N.J. Courts, https://www.njcourts.gov/attorneys/acjc.html?lang=eng [https://perma.cc/6TDB-LEPK].

136. DC's federal courts are the United States District Court for the District of Columbia, *see* United States District Court, District of Columbia, https://www.dcd.uscourts.gov [https://perma.cc/KRB7-QGTQ], and the United States Court of Appeals for the District of Columbia Circuit, *see* United States Court of Appeals, District of Columbia Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/content/home+page [https://perma.cc/E5JK-ZWRA]. The United States Court of Appeals for the Federal Circuit is also located in DC, *see* United States Court of Appeals for The Federal Circuit, https://cafc.uscourts.gov [https://perma.cc/36KU-Y6DW].

137. *See* Durling, *supra* note 114, at 1212 (explaining that D.C. judges, unlike federal judges, can be removed other than through congressional impeachment).

138. *See id.*

his or her fifteen-year term. Other local or state court jurisdictions do not face such significant hurdles to removing misbehaving judges from the bench.

The political nature of DC's judicial appointments process has subjected it to criticism, and there have been many calls for reform.[139] One suggested reform is that Congress relinquish control of the D.C. Courts.[140] Judicial nominating power would be handled by the Mayor of DC, who serves a governor-type function, since D.C. is not a state.[141] This would mean that D.C. judges would no longer be Senate-confirmed—instead, they would be approved by the D.C. Council. Similar to D.C. magistrate judges, they could be appointed for a four-year term, with the option of reappointment.[142] However, D.C. judges under this revised system should be limited to two terms. D.C. judges should no longer receive de facto life tenure. D.C. judges' Senate-confirmed status renders them particularly unaccountable for judicial misconduct: removing this protected status would be one step toward addressing the problem of misconduct in the D.C. judiciary.

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139. *See* Ann E. Marimow, *Two Judges, One Courthouse and an Unusual Accusation of Unethical Conduct*, Wash. Post (Nov. 8, 2021, 2:27 PM), https://www.washingtonpost.com/politics/courts_law/judge-emmet-sullivan-ethics-allegation-laurence-silberman/2021/11/08/81d83056-400a-11ec-a3aa-0255edc02eb7_story.html (Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit filed a misconduct complaint against Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia, arguing that judges should not be involved with the JNC's judicial appointments process); *see also* Flynn & Brice-Saddler, *supra* note 112 (discussing the politicized nature of D.C. judicial appointments and its harmful effects on both judicial caseloads and litigants).

140. *See* Miller, *supra* note 126, at 28–32 (explaining the arguments for and against transferring judicial appointments authority to the Mayor of DC). Congresswoman Eleanor Holmes Norton (D-D.C.) has proposed legislation to restructure the D.C. Courts. *See* District of Columbia Courts Vacancy Reduction Act, H.R. 4778, 117th Cong. (2021); *see also* Press Release, Congresswoman Eleanor Holmes Norton, U.S. House of Representatives, Norton Announces Markup of Her D.C. Courts Reduction Act, Thursday (Nov. 2, 2021), https://norton.house.gov/media-center/press-releases/norton-announces-markup-of-her-dc-courts-vacancy-reduction-act-thursday [https://perma.cc/9QV8-GJHC].

141. *See* Miller, *supra* note 126, at 28.

142. Currently, D.C. magistrate judges are appointed by the Chief Judge of the Superior Court of the District of Columbia and confirmed by a majority of Superior Court judges. *See* D.C. Code § 11–1732(a) (2021). Magistrate judges serve for four-year terms, with the option to be "reappointed for terms of four years." D.C. Code § 11–1732(d) (2021).

B. *Law Schools enable judicial misconduct.*

I did what law school career centers suggest students do: I accepted the first clerkship I was offered, in September of my third year of law school. Law schools, including mine, employ whole teams of faculty and staff members, as well as copious online and in-person resources, dedicated to helping students secure judicial clerkships.[143] Some of this is well meaning—clerkships open lots of doors for young lawyers, and there are many benefits to clerking. Having a clerkship on an applicant's resume helps the applicant get a prestigious next job or second clerkship, and having a judge as a lifelong mentor opens up many future opportunities.[144] Furthermore, a clerkship is often a prerequisite for corporate, public interest, and government legal positions. In addition, law clerks improve their writing, hone their critical thinking skills, and develop their legal research skills. Clerks learn how to best persuade a judge, which is a critical skill for those who hope to become trial attorneys and advocate in front of judges every day. Clerks also learn by observing the attorneys who appear before the Court—both the good and the bad.

However, the law school push toward judicial clerkships has a darker side. During a 2018 Senate Judiciary Committee hearing[145] and a 2020 House Judiciary Committee hearing[146] about harassment in the judiciary, testimony by former clerks and other witnesses revealed that law schools encourage students to clerk at the expense of their wellbeing. Former clerks testified that law schools are often aware of problem judges and may steer female applicants away from such judges.[147] However, some of these problem judges are also the feeder judges to more prestigious Circuit Court and Supreme Court clerkships, thereby virtually foreclosing female applicants from these opportunities.[148]

143. *See, e.g.*, *Clerkships*, Wash. U. Sch. of L. Career Ctr., https://sites.law.wustl.edu/WashULaw/CCD_Blog/category/clerk [https://perma.cc/LSV2-ZMSJ].

144. *See* Nicholas Alexiou, *To Clerk or Not to Clerk…It's Actually Not Much of a Question*, Above the Law (June 7, 2018, 11:33 AM), https://abovethelaw.com/2018/06/to-clerk-or-not-to-clerk-its-actually-not-much-of-a-question [https://perma.cc/E98Q-2KLN].

145. *See generally Confronting Sexual Harassment* Hearing Video, *supra* note 72.

146. *See generally Protecting Federal Judiciary Employees* Hearing Video, *supra* note 26.

147. *See id.*; *Confronting Sexual Harassment* Hearing Video, *supra* note 72.

148. *See Confronting Sexual Harassment* Hearing Video, *supra* note 72; *Protecting Federal Judiciary Employees* Hearing Video, *supra* note 26; see also Blackman, *supra* note 82 for a discussion about "feeder judges."

The toxic relationship between law schools and judges can be quite insidious, and clerks may not discover the harmful effects of this outsized push toward judicial clerkships until it is too late. Law students rely on law professors to make calls to judges on their behalf to help them secure clerkships, and they trust their professors not to lead them into harm's way.[149] Judges rely on law schools to send them strong clerkship applicants. As a result, law schools are incentivized to maintain good relationships with judges. In fact, as more stories about judicial harassment have come to light, so too have allegations that law schools are not responsive when alumni reach out to law school administrations to report on their negative clerkship experiences.[150]

Law schools may be aware of problem judges but, because the clerkships are so prestigious, they may encourage students to apply for clerkships with notoriously misbehaving judges anyway.[151] While some law schools unofficially keep track of judges with a history of misconduct,[152] they are currently not required by the American Bar Association (ABA) to report any data on students' poor clerkship experiences.[153] In fact, since law school rankings are affected by the

149. *See* Dara E. Purvis, Opinion, *When Judges Prey on Clerks*, N.Y. Times (Dec. 12, 2017), https://www.nytimes.com/2017/12/12/opinion/law-schools-alex-kozinski.html.

150. *See Jaime Santos Senate Judiciary Testimony*, *supra* note 41, at 9–10 (discussing the deafening silence from law schools in the wake of judicial misconduct allegations and alleging that law schools are enabling bad behavior among judges); *see also Olivia Warren House Judiciary Testimony*, *supra* note 9, at 14–15, discussing Harvard Law School's disappointing response when she reached out to the administration to report the harassment she experienced.

151. After the author's clerkship, she confided in several law school professors and mentors. The author was disappointed that one school official later reached out to ask whether she would be willing to offer career advice to a current student interviewing with the same judge who had harassed her during her clerkship.

152. Some law schools keep "blacklists" of judges who mistreat or fire clerks, and others keep internal databases with notes like "call me" to warn students about misbehaving judges. Documentation on file with the author.

153. On October 30, 2018, the U.S. Courts held a hearing to discussed proposed changes to the Judicial Code of Conduct. The hearing featured testimony from several Yale Law School students involved in the Law Student Working Group, who suggested that law schools should have data collection and reporting obligations. *See* United States Courts, *Public Hearing on Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules*, YouTube (Oct. 30, 2018), https://www.youtube.com/watch?v=xqzk1k13SeA; *see also Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules: Hearing Before the Jud. Conf. of the U.S.* (2018), https://www.uscourts.gov/sites/default/files/rita_gilles_witness_statement_proposed_changes_code_rules_0.pdf [https://perma.cc/6T88-W835] [hereinafter Gilles Testimony] (testimony of Yale Law School

number of students who secure clerkships, law schools may have a perverse incentive to not collect and report such data.[154]

Some argue that the ABA should require law schools to collect and share clerkship data, which would be compiled in a central repository, as a condition of the schools' accreditation.[155] Clerkship applicants could consult this repository, which could be organized by circuit, by courthouse, and by judge.[156] Such a repository could replace the "ad hoc whisper networks" which are currently one of the only ways that potential clerks can know to look out for and avoid judges with reputations for abusing their clerks.[157] However, while a repository might be a valuable resource, it is ultimately not the job of other law clerks to warn prospective clerks about misbehaving judges; it is the judge's job not to harass and mistreat his clerks. Even after warnings about misbehaving judges, some applicants will assume they can handle it. But they should not have to. Furthermore, law schools should stop advising students to unquestioningly accept the first clerkship they are offered. If, after a clerkship interview, something does not feel right, or if the applicant learns something troubling about the judge, there is nothing wrong with turning down a clerkship offer.

Law school information sharing and disclosure obligations would help to protect clerks. Law schools should have a vested interest in the happiness of their graduates, not just the fancy clerkships on their resumes. Additionally, prospective clerks deserve to know the truth about clerkships—while they can be valuable credentials, clerkships can also be horrible experiences.[158] A balanced

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student Rita Gilles).

154. *See* Staci Zaretsky, *The Law Schools Where the Most Graduates Got Federal Clerkships (2019)*, Above the Law (June 16, 2020, 4:42 PM), https://abovethelaw.com/2020/06/the-law-schools-where-the-most-graduates-got-federal-clerkships-2019; *see also Workplace Misconduct and the Federal Courts*, *supra* note 25 (discussing the fact that law school rankings are tied to the number of students who secure clerkships).

155. *See* Leah Litman & Aziz Huq, *How to Stop Judges from Sexually Harassing Law Clerks*, Wash. Post (June 9, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/06/09/law-school-clerks-harassment-reform. This proposed system is similar to systems employed for lodging, documenting, and tracking complaints against police officers.

156. *See id.*

157. *See id.* Additionally, the People's Parity Project, an advocacy organization that describes itself as seeking to "un-rig the legal system" and advocates against harassment in the judiciary, has published a guidebook for clerks. *See A Student's Guide to Judicial Clerkships: How to Look Out for Yourself in a Broken System*, People's Parity Project (Apr. 6, 2020), https://www.peoplesparity.org/clerkshipsguide [https://perma.cc/45VC-LU3F].

158. See *Workplace Misconduct and the Federal Courts*, *supra* note 25,

evaluation about the benefits and drawbacks of clerking requires that both perspectives be shared.

III. Disciplining Judges

Both the federal courts[159] and the D.C. Courts[160] have policies regarding judicial misconduct and disability.[161] The policies can be separated into two distinct buckets: (1) complaints with judicial disciplinary commissions, filed with the goal of investigating and disciplining misbehaving judges; and (2) employee dispute resolution processes, which attempt to provide some redress to aggrieved employees. However, based on both the author's personal experience and her conversations with other former clerks, these policies are inadequate in light of the sensitivity of the issues, the scope of the problem of harassment in the judiciary, the lack of effective remedies available, and the enormous long-term negative effects that harassment can have on law clerks' careers and reputations. The judiciary must have mechanisms both to punish judges who harass their clerks, and to prevent judges from harassing their clerks. These policies mean nothing if violators are not punished. Vulnerable judiciary employees do not need toothless reforms—they need to know that their workplaces are safe, and that inappropriate behavior will be swiftly addressed.

The following Subparts provide an overview and critique of existing judicial discipline policies. The Subparts analyze the policies' strengths and weaknesses in light of persistent judicial misconduct,

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for a discussion with People's Parity Project organizers Sejal Singh and Emma Janger about the importance of former law clerks speaking truthfully about their negative clerkship experiences.

159. *See Workplace Conduct in the Federal Judiciary*, U.S. Courts, https://www.uscourts.gov/about-federal-courts/workplace-conduct-federal-judiciary [https://perma.cc/GVB2-JN6B].

160. *See Employment Dispute Resolution Plan*, *supra* note 20; *see also Filing a Complaint*, Comm'n on Jud. Disabilities & Tenure, https://cjdt.dc.gov/service/filing-complaint [https://perma.cc/C5FT-3KHK].

161. These plans have been criticized for being opaque; not guaranteeing meaningful confidentiality; not being impartial; and offering limited remedies. *See Jane Roe Amicus Brief*, *supra* note 85, at 17–35. Judicial discipline policies lump together judicial misconduct and judicial disabilities. Judicial disability regulations—specifically, policies dealing with judges who, by reason of a disability, are no longer able to conduct their judicial functions—may seem distinct from judicial misconduct. In reality, judicial misconduct and judicial disability sometimes intersect. For example, these guidelines address instances in which a judge is, by reason of disability, no longer able to serve as a judge, but refuses to retire or resign. Additionally, a judge may conceal his health condition while on the bench—in violation of his judicial duty of candor—creating an issue of both judicial disability and judicial misconduct.

as well as propose greater accountability mechanisms within and beyond the existing policies. Subpart A discusses and critiques judicial accountability processes in the federal courts—specifically, the formal judicial complaint process pursuant to the Judicial Conduct and Disability Act[162] and internal workplace dispute resolution via the U.S. Courts Model Employee Dispute Resolution (EDR) Plan.[163] These federal processes do not apply to D.C. Courts clerks, because the D.C. Courts are not federal courts. Subpart B discusses and critiques two similar processes in the D.C. Courts: judicial complaints with the Commission on Judicial Disabilities and Tenure (CJDT),[164] and an EDR Plan modeled after—but not identical to—the U.S. Courts' Model EDR Plan.[165] Subpart C suggests additional methods for judicial discipline, namely disbarment and revocation of misbehaving judges' lifetime pensions.

A. *Judicial Discipline in the Federal Courts*

1. Judicial Conduct and Disability Act

Federal judges are governed by the Judicial Conduct and Disability Act of 1980[166] and the Code of Conduct for United States Judges.[167] The Judicial Conduct and Disability Act lays out the process by which anyone can file a complaint alleging "conduct prejudicial to the effective and expeditious administration of the business of the courts" or that a judge has become, by reason of a disability,"unable to discharge all the duties" of the judicial office.[168] Discussions of judicial misconduct typically focus on harassment and retaliation; much less is made of the disability provision of the Judicial Conduct and Disability Act. That is not to say that the disability provision is not important—when a judge insists on presiding

162. *See* 28 U.S.C. §§ 351–364 (2002).

163. *See* Jud. Conf. of the U.S., Model Employment Dispute Resolution Plan (2019), https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a_oji-2019-09-17-post-model-edr-plan.pdf (last revised Mar. 8, 2022). The terms "employment" and "employee" are used interchangeably when referring to EDR plans.

164. *See Filing a Complaint*, *supra* note 160.

165. *See Employment Dispute Resolution Plan*, *supra* note 20.

166. *See* 28 U.S.C. §§ 351–364 (2021). For an explanation of the Judicial Conduct and Disability Act's genesis, see John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 Notre Dame L. Rev. 193 (1994).

167. *See* Guide to Judiciary Policy, Ch. 2: Code of Conduct for United States Judges, U.S. Courts (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/EFW6-85Y7].

168. *See Judicial Conduct & Disability*, U.S. Courts, https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability [https://perma.cc/BJ6J-PSF5].

over cases while not fit to do so, he or she can wreak severe emotional and financial harm on litigants, as well as place litigants in physical danger in domestic violence and child abuse cases.

Rule 4 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings defines several types of misconduct, including (1) abusive or harassing behavior;[169] (2) discrimination;[170] and (3) retaliation.[171] Misconduct complaints are reviewed by the Chief Judge of the circuit, who decides whether to dismiss each complaint[172] or convene a Special Committee to review it.[173] The Special Committee is composed of circuit and district judges from the misbehaving judge's circuit: it likely includes judges who work in the courthouse where the judge who is the subject of the complaint and the law clerk complainant work.[174] The Special Committee has the power to investigate and conduct hearings,[175] after which they issue reports detailing their findings and recommendations.[176] Once the Chief

169. *See* Guide to Judiciary Policy, Ch. 3: Rules for Judicial-Conduct and Judicial-Disability Proceedings, U.S. Courts 7 (2019), https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf [https://perma.cc/37GN-ABQA] (defining abusive or harassing behavior as, "(A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault; (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious or hostile manner; or (C) creating a hostile work environment for judicial employees").

170. *See id.* at 7–8 (defining discrimination as "intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability").

171. *See id.* at 8 (defining retaliation as "retaliating against complainants, witnesses, judicial employees, or others for participating in this complaint process, or for reporting or disclosing judicial misconduct or disability").

172. *See id.* at 20–23. In certain circumstances, parties can petition for a review of the dismissal. *Id.* If the Chief Judge dismisses a complaint, he or she is required to lay out the reasons for the dismissal. *Id.* Parties must be notified of the right to petition for review of the dismissal. *Id.*

173. *Id.* at 22.

174. *Id.* at 28–30. However, many have voiced skepticism about current judges reviewing complaints against their judicial colleagues, and whether a Special Committee composed of judges from the circuit is the proper forum to review complaints. *See generally* Sahl, *supra* note 166. Furthermore, judicial misconduct proceedings should be more transparent. *Id.* at 256–57. Secrecy protects misbehaving judges while undermining public confidence in the judiciary. *Id.*

175. *See* Guide to Judiciary Policy, Ch. 3: Rules for Judicial-Conduct and Judicial-Disability Proceedings, *supra* note 169, at 28–33. This investigatory power includes subpoena power. *Id.* at 31.

176. *See id.* at 36–37. The U.S. Courts website lists Judicial Conduct and Disability Orders. *See Judicial Conduct and Disability Orders*, U.S. Courts, https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies/code-conduct-judicial-employees/judicial-conduct-disability-opinions [https://perma.

Judge issues an order, either the complainant or the judge can seek review by the Judicial Council.[177] The Judicial Council, whose members include circuit and district judges, has the power to dismiss the complaint; conclude the proceeding; refer the complaint to the Judicial Conference; or take remedial actions, including: censuring or reprimanding the judge, ordering that no new cases be assigned to the judge, requesting that the judge retire voluntarily, or certifying that the judge has a disability.[178] The Judicial Council must refer a complaint to the Judicial Conference,[179] the national policy-making body for the federal courts, if it determines that the judge engaged in conduct that "might constitute grounds for impeachment"[180] by Congress. In some cases, either the complainant or the judge can petition for review by the Committee on Judicial Conduct and Disability.[181] Unlike EDR, there is no statute of limitations for filing a judicial complaint pursuant to the Judicial Conduct and Disability Act; however, if enough time has passed that a fair investigation of the complaint is "impracticable," the complaint is dismissed.[182]

Very few complaints advance all the way to impeachment by the House and conviction by the Senate, which is the only way that a federal judge can be removed from office.[183] In fact, fewer than

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cc/9Y6W-5YNJ]. However, the orders are only identified by number, rather than by judge, making them difficult to search. *See id.* Furthermore, even after opening each order on the website, it is difficult to discern which judge many of the orders refer to. This is just another example of the judiciary protecting misbehaving judges in every possible way, even by trying to obfuscate the identities of those who have committed misconduct.

177. *See* GUIDE TO JUDICIARY POLICY, CH. 3: RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, *supra* note 169, at 37–38.

178. *See id.* at 43–45.

179. *See Governance & the Judicial Conference*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/governance-judicial-conference [https://perma.cc/RG3V-BQ23] (explaining the Judicial Conference's functions pursuant to 28 U.S.C. § 331); *see also Judicial Conference Approves Package of Workplace Conduct Reforms*, U.S. COURTS (Mar. 19, 2019), https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms [https://perma.cc/33FE-JLRB]; 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.

180. *See* GUIDE TO JUDICIARY POLICY, CH. 3: RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, *supra* note 169, at 42.

181. *See id.* at 45–47.

182. *See id.* at 18.

183. The U.S. Constitution provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."

twenty federal judges have been impeached, and fewer than ten have been convicted.[184] Congress should ideally expand its use of the impeachment power to remove misbehaving judges. However, each judicial impeachment proceeding currently expends substantial congressional time and resources.[185]

Law clerks do not proceed through the formal judicial complaint process to seek any sort of relief, monetary or otherwise, for themselves. Judicial regulatory bodies are empowered to discipline misbehaving judges, not to support victimized clerks. A judicial regulatory body should not be the primary—let alone the sole—forum to address law clerk grievances. Additionally, because judicial complaints are reviewed by judges in the circuit where the crooked judge presides and the law clerk works, clerks are often concerned about both a lack of impartiality on the part of the reviewers, as well as a lack of confidentiality during the investigation. Furthermore, law clerks are often discouraged from filing judicial complaints due to the reputational harm associated with complaining about a life-tenured federal judge, particularly if the law clerk plans to practice in the circuit in which the judge works.

It is extremely problematic for a judge—particularly the misbehaving judge's boss—to investigate judicial complaints. Judicial misconduct investigations should be handled outside of the judiciary's chain of command.[186] A neutral third party, such as a special counsel, should investigate all judicial complaints. However, such a

U.S. Const. art. III, § 1. However, some scholars have pointed out that this should not necessarily be equated with "life-tenure." *See* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 Yale L.J. 72 (2006); *see also Judges and Judicial Administration—Journalist's Guide*, U.S. Courts, https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide [https://perma.cc/4LXC-BRTK] (explaining that Congress rarely uses its impeachment power to remove misbehaving federal judges from office).

184. *See Judges and Judicial Administration—Journalist's Guide*, *supra* note 183.

185. *See* Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 Yale L. & Pol'y Rev. 33 (2012) (discussing the resources necessary for a judicial impeachment). Furthermore, one impeachment inquiry lasted over two years. *See* U.S. Senate, *The Impeachment Trial of Alcee L. Hastings (1989) U.S. District Judge, Florida*, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-hastings.htm#:~:text=Senate%20voted%20on%2011%20articles,ordered%20Hastings%20removed%20from%20office [https://perma.cc/9TFB-BWC7].

186. See *infra* Part VI for a discussion about the problematic nature of other insular organizations—such as the military and police unions—attempting to self-police. Effective reform proposals to address harassment and misconduct within these two organizations similarly propose removing misconduct investigations from the chains of military and police command.

special counsel should exercise true independence, and should not be—or appear to be—connected to the judiciary.

2. U.S. Courts Model Employee Dispute Resolution Plan

In addition to filing a formal complaint against a judge, judiciary employees can also participate in internal Employee Dispute Resolution (EDR).[187] Options for resolution through EDR include: informal advice, assisted resolution, or a formal complaint.[188] Employees can reach out to an EDR coordinator for informal advice on how to handle improper workplace conduct, or how to engage with either formal EDR or a formal complaint under the Judicial Conduct and Disability Act.[189] Additionally, employees can request assisted resolution (either mediation or "discussing the matter with the person whose behavior is of concern").[190] However, participating in these informal processes does not toll the 180 day deadline for filing a formal EDR complaint.[191] The Chief Judge of the courthouse oversees EDR complaints against federal judges and appoints a presiding officer—a judge from within the courthouse where the victimized law clerk and misbehaving judge both work—to facilitate the EDR process.[192] The complaint then proceeds through an investigation, and potentially a hearing.[193] After filing a formal EDR complaint, available remedies include: placing the complainant in a previously denied or alternative comparable position; reinstatement to a position from which the complainant was previously removed; promotion of the complainant; and priority consideration of the complainant for a future promotion or position.[194]

187. *See* JUD. CONF. OF THE U.S., *supra* note 163.

188. *See id.* at IV(A). Employees alleging "abusive conduct" must request assisted resolution before filing a formal complaint; however, requesting assisted resolution does not toll the 180-day deadline for EDR. *See id.* at IV(C)(2)(a), IV(C)(3)(b).

189. *See id.* at IV(C)(1).

190. *See id.* at IV(C)(2).

191. *See id.* at IV(C)(3)(a).

192. *See id.* at IV(C)(3)(d).

193. *See id.* at IV(C)(3)(e)-(g). EDR is a lengthy process: 30 days for a Response, *id.* at IV(C)(3)(e)(iv); 60 days for a hearing, *id.* at IV(C)(3)(g)(i); 60 days for a written final decision, *id.* at IV(C)(3)(g)(v); and 30 days for an appeal, *id.* at IV(C)(3)(i). For law clerks serving in one-year clerkships, the EDR process could overshadow the majority of their time with the courts.

194. *See id.* at IV(C)(3)(h). Other than the Back Pay Act, monetary damages are not available. Remedies under the Back Pay Act, including attorney's fees, may be ordered only when the statutory criteria of the Back Pay Act are satisfied, which include: (1) a finding of an unjustified or unwarranted personnel action; (2) by an appropriate authority; (3) which resulted in the

If a federal judge becomes the subject of both an EDR complaint and a judicial complaint under the Judicial Conduct and Disability Act, the Chief Judge of the Circuit, "will determine the appropriate procedure for addressing both."[195] Furthermore, the Chief Judge may "hold[] the EDR claim in abeyance and determin[e] how best to find any common issues of fact."[196] In effect, this renders it exceedingly difficult for federal law clerks to file both EDR complaints and formal complaints against judges. This forces clerks to choose between the two avenues, even though the goals of and potential remedies under EDR and formal judicial complaints are different.

While the U.S. Courts have created a Model EDR Plan, not every circuit and courthouse follows the plan, and there is no standardization among courthouses regarding EDR policies.[197] Furthermore, EDR has been heavily criticized.[198] It is difficult for law

withdrawal or reduction of all or part of the Employee's pay, allowances, or differentials. An order of back pay is subject to review and approval by the Director of the Administrative Office of the United States Courts. *See* 5 U.S.C. § 5596(b)(1); JUD. CONF. OF THE U.S., *supra* note 163, at IV(C)(3)(h)(ii). However, back pay criteria are rarely satisfied. *See* Lisa Nagele-Piazza, *Proposed Rule Would Limit Back Pay for Federal Workers*, SHRM (Oct. 13, 2020), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/proposed-rule-would-limit-back-pay-for-federal-workers.aspx.

195. *See* JUD. CONF. OF THE U.S., *supra* note 163, at IV(C)(3)(d).

196. *Id.*

197. *See* Cara Bayles, *Can US Courts Police Themselves on Workplace Misconduct?*, LAW360 (Sept. 22, 2021), https://www.law360.com/articles/1423474 (criticizing EDR plans for their lack of guaranteed confidentiality and lack of standardization among circuits).

198. In 2020, a former federal public defender from the Western District of North Carolina filed suit under the due process and equal protection clauses of the Fifth Amendment of the Constitution, as well as under 42 U.S.C. § 1985(3), challenging the U.S. Courts' Model EDR Plan. *See* Roe v. United States, 510 F. Supp. 3d 336 (W.D.N.C. 2020). The defendants included, among other individuals, the Judicial Conference of the United States, the U.S. Court of Appeals for the Fourth Circuit, the Judicial Council for the Fourth Circuit, and the Federal Defender's Office (FDO). *Id.* Plaintiff alleged that federal officials violated her equal protection rights by subjecting her to workplace sexual harassment. *See generally id.* The District Court granted defendants' motion to dismiss on December 30, 2020, holding that Roe's claims were barred by sovereign immunity. *See id.* Roe's appeal argued that her constitutional claims were not barred by sovereign immunity. *See* Brief of Plaintiff-Appellant at 24, Jane Roe v. United States, No. 21–1346, 2022 WL 1217455 (4th Cir. Aug. 20, 2021). The proposed JAA would cover federal public defenders' offices. *See infra* Part V; *see also* Brief for Legal Momentum et al. as Amici Curiae Supporting Plaintiff-Appellant at 26, Jane Roe v. United States, No. 21–1346, 2022 WL 1217455 (4th Cir. 2021) (explaining that 70 percent of harassment

clerks to navigate; it is judge-friendly; and confidentiality cannot be guaranteed.[199] Furthermore, an EDR complaint must be filed within 180 days of the alleged violation, which is an unreasonably restrictive timeframe that serves primarily to protect employers from workplace complaints.[200] The statute of limitations for filing an EDR complaint should be substantially lengthened to encourage law clerks to engage in workplace dispute resolution.

Another barrier to utilizing EDR is that law clerks seeking to participate in EDR often need to hire attorneys, which can be difficult and prohibitively expensive.[201] Attorneys within the anti-harassment advocacy space are looking to recruit more lawyers to represent these victimized law clerks, as they frequently receive requests from current and former clerks seeking legal representation.[202] Attorneys may be hesitant to represent law clerks for several reasons. First, they may be fearful about going up against judges in districts where they represent clients, out of concern that this will adversely affect their clients and they will be retaliated against. Second, some law firms may be precluded from the representation by a conflict of interest due to ongoing matters before the misbehaving judge. Finally, some attorneys may not want to take on a case for which monetary damages are not available, as is the case with EDR. I personally faced all three of these challenges when I was searching for attorneys after filing a formal complaint against my former supervisor. This

victims do not report the harassment, and 75 percent of those who do report, experience retaliation). On April 26, 2022, the Fourth Circuit Court of Appeals partially reversed the lower court's decision, holding that some of Plaintiff's claims against judiciary officials could move forward. *See* No. 21-1346, https://www.ca4.uscourts.gov/opinions/211346.P.pdf.

199. *See Jane Roe Amicus Brief*, *supra* note 85*; see also* Bayles, *supra* note 197.

200. *See* Jud. Conf. of the U.S., *supra* note 163, at IV(C)(3)(a).

201. Finding an attorney can take weeks or months of persistence, research, referrals, and intake meetings. Some of these intakes can cost over $300. The Times Up Legal Defense Fund, run by the National Women's Law Center, is one resource for women who have faced gender discrimination and are seeking legal representation. The Fund provides those seeking legal representation with a list of three attorney referrals, and it offers free intake. Many, but not all, employment discrimination attorneys work on a contingency fee basis, meaning that the client will not have to pay unless there is a financial settlement. In other instances, attorneys will take cases on a pro bono basis. *See* Times Up Legal Defense Fund, https://nwlc.org/times-up-legal-defense-fund (last visited Mar. 16, 2022).

202. *See* Broken Law Podcast, *Ep. 20: Confronting Harassment within the Federal Judiciary*, Am. Const. Soc'y (Oct. 19, 2021), at 35:48, acslaw.org/podcast/episode-20-confronting-harassment-within-the-federal-judiciary; *see also Sounds Legit*, Strict Scrutiny Podcast, (Sept. 20, 2021), at 37:44, strictscrutinypodcast.com/podcast/sounds-legit.

underscores the importance of increasing the number of attorneys willing to take on law clerk legal representation on a pro bono basis.

Similar to formal complaints under the Judicial Conduct and Disability Act, EDR complaints are also overseen by judges. The EDR process should be removed from the judiciary's chain of command. EDR should be overseen by representatives from the courthouse's EEO Office, some of whom have law degrees. EEO officers are not perfect—they are still affiliated with the courthouses where they work and likely have existing relationships with some judges—but they are more impartial than judges. Ending the practice of judges investigating their judiciary colleagues would be a real step toward reform.

B. *Judicial Discipline in the D.C. Courts*

Because the D.C. Courts are not federal courts, they employ their own unique judicial disciplinary processes. Options for victimized law clerks include complaints against judges filed with the CJDT, and/or internal EDR within the D.C. Courts. Based on the author's personal experience, some aspects of these processes render them even more inadequate—and more disadvantageous to law clerk complainants—than federal processes. At a minimum, D.C. policies should mirror federal policies.

1. District of Columbia Commission on Judicial Disabilities and Tenure

The CJDT enforces the Code of Judicial Conduct, which both D.C. Superior Court and D.C. Court of Appeals judges follow.[203] In 1970, the same year Congress created the D.C. Courts, they also created the CJDT to regulate D.C. judges.[204] The CJDT's authority was later clarified in 1973 under the District of Columbia

203. *See* D.C. Courts, *supra* note 127. Although D.C. judges are also evaluated by the D.C. Bar's Judicial Evaluation Committee in their second, sixth, tenth, and thirteenth years of service, judges are only evaluated "by attorneys who appeared before the judge," which does not necessarily present a full picture of the judge's conduct. *See* Jud. Nomination Comm'n, *Judicial Service in the District of Columbia Courts Frequently Asked Questions*, https://jnc.dc.gov/page/judicial-service-district-columbia-courts-frequently-asked-questions (last visited Mar. 16, 2022). These evaluations are only presented to the judge, which impedes accountability. These evaluations should be annual, and they should be publicly available. *See also* D.C. Bar, *Judicial Evaluation Survey*, https://www.dcbar.org/for-lawyers/membership/judicial-evaluation-survey (last visited Mar. 16, 2022).

204. *See* D.C. Court Reform and Criminal Procedure Act, D.C. Code § 11–1525(a) (1970).

Self-Government and Governmental Reorganization Act, and its authority has been expanded several times since then.[205]

The CJDT has the power to investigate formal complaints against judges, including complaints about bias, prejudice, and harassment.[206] The CJDT begins with a preliminary investigation, after which they can either dismiss the complaint or proceed with a formal hearing.[207] A CJDT investigation "may be carried out in a manner that the Commission deems appropriate," which is a very vague rule.[208] CJDT investigations "may include interviewing witnesses, reviewing court records and documents, and gathering other information and materials as the issues may warrant."[209] Troublingly, this is the extent of the CJDT's public explanation of its investigatory process. Furthermore, the CJDT is not required to make findings of fact when it dismisses a complaint, nor is there an appeal process for complainants when complaints are dismissed.[210]

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205. District of Colombia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, § 431(d)(3), 87 Stat. 774. The CJDT most recently amended several of its rules on June 3, 2021. *See* COMM'N ON JUD. DISABILITIES & TENURE, *supra* note 126.

206. The Code of Judicial Conduct defines "bias, prejudice, and harassment" as:

> (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
>
> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

See D.C. COURTS, *supra* note 127, at 13. *See also Judicial Misconduct Investigations*, supra note 129.

207. *See* COMM'N ON JUD. DISABILITIES & TENURE, *supra* note 126, *§* 2010, § 2010.1–2010.4, § 2013, 2015. The CJDT has subpoena power. *Id.* § 2018.

208. *Id*. § 2010.2. The CJDT is empowered to investigate whether [. . .] a judge may have been guilty of willful misconduct in office or willful and persistent failure to perform his or her judicial duties; or [. . .] a judge engaged in other conduct prejudicial to the administration of justice or which brings the judicial office into disrepute; or [. . .] a judge may have a mental or physical disability (including habitual intemperance) which is or is likely to become permanent and which prevents, or seriously interferes with, the proper performance of his or her judicial duties. *Id.* § 2010.1.

209. *See Judicial Misconduct Investigations*, *supra* note 129.

210. *See* COMM'N ON JUD. DISABILITIES & TENURE, *supra* note 126, § 2010.1–2010.4. "After investigation, if the Commission determines that a proceeding should not be instituted, the Commission shall so inform the judge if he or she was previously informed of the pendency of the complaint

While D.C. judges have appeal rights, complainants do not.[211] This is distinct from the federal courts' formal complaint process, in which the complaint reviewer must lay out reasons for the dismissal, and both parties have appeal rights.[212]

While the CJDT has not publicly explained its investigations process—either on its website or in its Notice of Final Rulemaking—my personal experience with the CJDT revealed that their processes are both disorganized and dishonest. CJDT investigations are filtered through an unelected, un-appointed Special Counsel. While CJDT rules include a brief definition of the Special Counsel ("any member of the District of Columbia Bar retained to assist the Commission"), they do not specify the Special Counsel's role at all.[213] One D.C. Bar member, who is unaccountable to the public, has the ultimate authority to make determinations about judicial complaints. The Special Counsel makes this determination before a complainant has the opportunity to interact with CJDT commissioners and make arguments to them directly. Furthermore, complainants during the CJDT's investigation stage cannot question any witnesses. In fact, complainants do not even know which witnesses have been contacted. While this is different from the federal complaint process, in which the Chief Judge reviews complaints against other judges, if the Special Counsel lacks the appearance of fairness, independence, and impartiality, this method of investigating judicial complaints is no better than the federal process.

In circumstances in which the CJDT decides to hold a formal hearing, following the hearing, the CJDT issues findings of fact and a decision.[214] The CJDT can issue a "public reprimand" or a "public

by either the complainant or the Commission and shall give notice to the complainant . . . that there is insufficient cause to proceed." *Id.* § 2010.4.

211. *See Judicial Misconduct Investigations*, *supra* note 129 ("A judge aggrieved by any order of removal or retirement may seek judicial review by filing a notice of appeal with the Chief Justice of the Supreme Court of the United States.").

212. *See* GUIDE TO JUDICIARY POLICY, CH. 3: RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, *supra* note 169, at 20–23 (explaining rules on dismissing complaints).

213. *See* COMM'N ON JUD. DISABILITIES & TENURE, *supra* note 126, § 2099.1.

214. *See id.* § 2022. Furthermore, "[i]f the record is to be made public, the Commission shall file its decision, including a transcript of the entire record, with the District of Columbia Court of Appeals." *Id.* § 2022.6. According to both the CJDT's Fiscal Year 2020–2021 Oversight Performance Responses, and the CJDT's formal Determinations section of its website, it is rare for the CJDT to issue a formal order regarding judicial misconduct. *See FY20-FY21 Performance Oversight Hearing Before the D.C. Comm'n on Jud. Disabilities & Tenure*, 117th Cong. (2021), https://dccouncil.us/judiciary-public-safety-4/jps-performance-oversight-responses-2021-cjdt [https://perma.cc/X8T2-RKCJ]

censure" "with the judge's consent."[215] While the CJDT is theoretically empowered to remove a judge from office, or involuntarily retire a judge, they rarely do that.[216] In the more than fifty years of the CJDT's existence, they have issued only sixteen formal determinations related to judicial misconduct or disabilities, and only one resulted in the removal of a judge—via involuntary retirement—from the bench.[217] Furthermore, if a judge voluntarily retires, the CJDT ceases its investigation into his or her misconduct, because former judges are no longer subject to the CJDT's jurisdiction.[218]

Unfortunately for D.C. complainants (including law clerks, attorneys, court employees, and litigants), the CJDT's rules, policies, and procedures are opaque and confusing. Even attorneys find them difficult to navigate. Just as D.C. judges evade accountability, the CJDT is able to evade oversight over and accountability for its actions because its guidelines are unclear, and its decisions are under-scrutinized. Furthermore, as is the case with the federal courts' Judicial-Conduct and Judicial-Disability Proceedings, the CJDT is not the appropriate forum for mistreated law clerks to seek redress for their grievances. The CJDT is not empowered to provide relief to victimized clerks; its function is to potentially discipline misbehaving judges, and its track record on judicial discipline is disappointing.[219]

The CJDT's proceedings are not public, which makes it difficult for interested parties to get a window into the CJDT's

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(statement of Jeannine C. Sanford, Chairperson, Comm'n on Jud. Disabilities & Tenure) . According to its Oversight Responses, in 2020, the CJDT received 70 complaints. It immediately dismissed 31—26 for lack of jurisdiction and 5 for lack of merit. The CJDT investigated 35 complaints. It dismissed 32 following an investigation. One complaint resulted in some disciplinary action, and 2 were disposed of informally through a "conference or letter to judge." *See generally* Comm'n on Jud. Disabilities & Tenure, https://cjdt.dc.gov (last visited Mar. 16, 2022).

215. *See Judicial Misconduct Investigations*, *supra* note 129.

216. *See generally*, Comm'n on Jud. Disabilities & Tenure, https://cjdt.dc.gov (last visited Mar. 16, 2022).

217. *See id.* Additionally, two CJDT determinations resulted in "unfavorable" recommendations for D.C. judges seeking senior status.

218. *See generally* Comm'n on Jud. Disabilities & Tenure, *supra* note 126. *See also* Amy Brittain, *D.C. Superior Court Judge Stepped Down After Questions About Sexual Assault Allegation*, Wash. Post (Oct. 3, 2020), https://www.washingtonpost.com/investigations/2020/10/03/judge-truman-morrison-sexual-assault-allegation. Furthermore, a judge who steps down, or retires voluntarily, can hold onto his lifetime pension in DC, similar to the policy for federal judges. *See* D.C. Code § 11–1570 (2004).

219. *See generally*, Comm'n on Jud. Disabilities & Tenure, https://cjdt.dc.gov (last visited Mar. 16, 2022).

effectiveness at investigating and disciplining misbehaving judges. CJDT proceedings should be more transparent. The CJDT should not be able to use confidentiality as a shield to hide its ineffective response to and mishandling of complaints against D.C. judges. While secrecy may be necessary during an investigation, so as not to bias or prejudice the parties, a regulatory body's overreliance on secrecy tends to railroad complainants.[220]

The CJDT is primarily overseen by the House and Senate Oversight Committees, and it is funded by the House and Senate Appropriations Committees: these congressional committees should exert desperately needed oversight.[221] Troublingly, the CJDT's most recent Annual Report of Commission activities was published in 2018 (documenting Fiscal Year 2017's complaints, investigations, and outcomes).[222] Thus, D.C. attorneys, law clerks, and litigants cannot access complete information about judicial complaints and investigations for the years 2018 through the present.[223] This leaves the public unaware of the scope of miscon-

220. See Sahl, *supra* note 166, at 226–40, for a critique of the judiciary's over-reliance on secrecy during judicial misconduct investigations as a way to protect misbehaving judges.

221. *See* H. Comm. on Oversight and Reform, Committee Jurisdiction, https://oversight.house.gov/about/committee-jurisdiction#:~:text=The%20Committee%20on%20Oversight%20and,the%20other%20standing%20House%20Committees; *see also* Consolidated Appropriations Act, 2022, at 537, https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR2471SA-RCP-117-35.pdf; S. Comm. on Homeland Security and Governmental Affairs, Full Comm. and Subcomm. Jurisdictions for the 117th Congress, https://www.hsgac.senate.gov/imo/media/doc/Jurisdiction-HSGAC%20and%20Subcommittees-117th%20Congress.pdf; *and see* S. 3179, Making appropriations for financial services and general government for the fiscal year ending September 30, 2022, and for other purposes, at 64. The CJDT receives supplemental funding and oversight from the D.C. Council. *See* Allen, *supra* note 124.

222. *See Publications*, Comm'n on Jud. Disabilities & Tenure, https://cjdt.dc.gov/publications (last visited Mar. 16, 2022). *See also* Comm'n on Jud. Disabilities & Tenure, 2017 Annual Report (2017) https://cjdt.dc.gov/sites/default/files/dc/sites/cjdt/publication/attachments/CJDT%20annual%20report.pdf [https://perma.cc/YZN8-KX9G]. In 2017, there were 70 misconduct complaints filed against D.C. judges, 31 misconduct investigations, and 0 formal disciplinary processes. *See id.* The data do not indicate how many of these complaints were filed by judicial employees. *See id.*

223. 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 D.C. Committee on the Judiciary and Public Safety. *See* Letter from Cathaee J. Hudgins, Exec. Dir., D.C. Comm'n on Jud. Disabilities & Tenure, to Charles Allen, Chair, Comm. on the Judiciary & Pub. Safety, Council of D.C. (Feb. 6, 2019), https://dccouncil.us/wp-content/uploads/2019/02/JPS-Performance-Oversight-Responses-2019-CJDT.pdf

duct within the D.C. judiciary. The CJDT should publish updated reports about judicial complaints and their outcomes. In order for the public to have confidence in the D.C. judiciary, it is necessary to understand the sources of judicial complaints, whether they are being investigated, and how they are resolved.

2. D.C. Courts Employee Dispute Resolution (EDR) Plan

Instead of, or in addition to, filing a formal complaint with the CJDT, a D.C. judiciary employee can participate in Employee Dispute Resolution (EDR).[224] However, when an employee has filed both a CJDT complaint and an EDR complaint, the Chief Judge confers with the CJDT in order to determine whether the two investigatory processes can run concurrently, or whether they would be duplicative.[225] The CJDT is a judicial disciplinary body and is not empowered to provide any relief to victimized clerks. EDR is intended to resolve workplace disputes, ideally by moving the aggrieved employee to a more hospitable work environment. While neither a judicial complaint nor EDR provides sufficient relief to law clerks, they serve different functions and result in different outcomes. A formal judicial disciplinary investigation could lead to real accountability for—and, in DC, perhaps even removal of—a misbehaving judge, whereas the EDR process is utilized to transfer the mistreated clerk to a more favorable workplace. Both processes should be available simultaneously to mistreated clerks.

Like the U.S. Courts' Model EDR Plan, D.C. Courts employees must contact the EEO Office within 180 days of the alleged violation to request EDR.[226] This timeframe is too short, and it likely contributes to the low number of EDR complaints. It takes victimized employees time to realize that their experiences qualify as workplace harassment, let alone to gather the courage to engage

[https://perma.cc/9JK2-3THL]; *see also JPS Performance Oversight Responses 2020 CJDT*, Council of D.C. (Feb. 11, 2020), https://dccouncil.us/judiciary-public-safety-3/jps-performance-oversight-responses-2020-cjdt [https://perma.cc/DQ6P-62ZE].

224. *See Employment Dispute Resolution Plan*, *supra* note 20.

225. *See id.* at 6.

226. *See id*. In July 2021, at the time the author was in contact with the D.C. Courts EEO Office, the D.C. Courts modeled themselves off the EEO process for federal sector employees, with a notably tighter timeframe. D.C. Courts' employees had to reach out to the EEO counselor within just 45 days of the alleged violation to request EDR. However, the EDR Plan has since been updated: employees now have 180 days to request EDR, similar to the U.S. Courts' Model EDR Plan.

in EDR. In fact, there were zero EDR complaints filed with the D.C. Courts EEO Office in 2020.[227]

EDR is grossly inadequate to address law clerks' concerns, for many reasons. First, in contrast to litigation remedies, law clerks cannot seek monetary compensation, even if they have been demoted, fired, or wrongfully refused a promotion.[228] Additionally, because EDR is not a formal legal proceeding, aggrieved clerks cannot receive formal legal agreements—for example, an agreement for a neutral or positive reference going forward—at the end of the proceeding. The most law clerks participating in EDR can hope for, in reality, is reassignment to a different judge. Unfortunately, for law clerks serving in one-year clerkships, the EDR process will likely overshadow the majority of their time at the courthouse.

In addition, the internal nature of the EDR process is troublesome, especially in small or remote courthouses, or courthouses with only a few judges. Similar to the federal courts' EDR plan, which is overseen by current judges, D.C. Courts EDR is overseen by retired judges in the jurisdiction in which the misbehaving judge and law clerk work. It is difficult for law clerks to trust the impartiality of the judges running these proceedings. The EDR process should be taken out of the hands of judges and should, at the very least, be overseen by employees from the EEO Office at the courthouse, if not an even more neutral arbiter. Additionally, law clerks are not guaranteed reassignment to a different judge after filing an EDR complaint, meaning that the clerk might file a complaint against her harasser and then be forced to continue working with him while engaging in EDR. Furthermore, law clerks have publicly voiced concerns that the EDR process is not confidential.[229] Finally, existing EDR plans do not provide for instances in which a judge

227. *See* D.C. Courts, 2020 Annual EEO Report (2020), https://www.dccourts.gov/sites/default/files/divisionspdfs/2020-EEO-Report.pdf [https://perma.cc/P8VQ-634G]. In 2020, there were 0 EEO complaints filed. *See id.* The low utilization rates for the EEO Office may be due to a combination of employee skepticism of their effectiveness at addressing workplace harassment, and the remote work situation due to the COVID-19 Pandemic. In contrast, in 2019, 29 employees sought assistance from the EEO Office. There were four EEO Complaints and one EEOC charge filed. *See* D.C. Courts, 2019 EEO Report (2019), https://www.dccourts.gov/sites/default/files/divisionspdfs/2019_EEO_Report.pdf [https://perma.cc/ZE66-3M3P].

228. In rare instances in which the criteria of the Back Pay Act are satisfied, employees can seek back pay. *See* 5 U.S.C. § 5596.

229. *See* Bayles, *supra* note 197. However, not all complainants seek confidentiality. In fact, some complainants feel that a public airing of the harms they suffered will enable them to heal and move forward. It is important to support and validate this perspective as well.

retires or resigns during the EDR process.[230] A judge's departure from the judiciary currently means that the Chief Judge and the EEO Office would no longer be able to exercise jurisdiction over the misbehaving judge.

C. *Additional Disciplinary Mechanisms*

Currently, judges in both federal and D.C. courts can evade discipline by retiring or resigning.[231] However, some argue that neither retirement nor resignation should allow misbehaving judges to bypass the disciplinary process.[232] Misconduct investigations into judges should continue even after they have stepped down.[233] In addition to or instead of investigations under the Judicial Conduct and Disability Act (for federal judges) or the CJDT (for D.C. judges), judges could also be referred to the appropriate State Bar Associations for investigation and discipline, including disbarment.[234] Currently, State Bar Associations handle disciplinary actions against bar members, but typically not against judges, even if the judge is a member of that State Bar Association.[235] Both

230. This was the case with the judge for whom the author clerked. The circumstances surrounding this particular judge's misconduct, as well as the D.C. Courts structures set up to protect him, exposed enormous flaws in the D.C. Courts' judicial accountability processes, including the EEO Office, the EDR process, D.C. Courts HR, and the CJDT.

231. See Burbank, Plager & Ablavsky, *supra* note 77, for a discussion about the different implications for a judge's lifetime pension for retirement versus resignation.

232. *See* Veronica Root Martinez, Essay, *Avoiding Judicial Discipline*, 115 Nw. U.L. Rev. 953, 954–85 (2020) (arguing that, not only should misconduct investigations under the Judicial Conduct and Disability Act continue after judges step down, but judges should also face congressional impeachment and disbarment by their state bar associations).

233. *See id.* at 961–63. The author specifically analyzed the investigations into three judges—Maryann Trump Barry, Alex Kozinski, and Brett Kavanaugh. *Id.* at 963–66.

234. Judges could also be subject to criminal prosecution for "crimes that involve abuse of judicial office." Maria Simon, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 Colum. L. Rev. 1617, 1665 (1994).

235. This reluctance by State Bar Associations to investigate and discipline judges is sometimes by rule and sometimes by custom. *See* Root Martinez, *supra* note 232, at 973–74 (explaining that State Bar Associations, by custom, typically do not investigate judges' misconduct, either because they endeavor to maintain professional relationships with judges, or because they have limited resources and assume that judicial regulatory bodies are better able to handle such investigations). In July 2021, when the author was preparing to file a CJDT complaint, she also reached out to the D.C. Bar inquire about attorney discipline, since she and the judge were both D.C. Bar members. However, the D.C. Bar's Office of Disciplinary Counsel (ODC) told the author that the D.C.

state bar rules and judicial codes of conduct should be amended to indicate that judges are subject to attorney discipline, including license suspension and disbarment, in the states where they preside over cases, as well as any other states where they are members of the state bar association. Furthermore, judges who retire or face disciplinary action should no longer be permitted to collect their lifetime pensions.[236] Both 28 U.S. Code Chapter 17, which addresses "resignation and retirement of justices and judges" (including their lifetime pensions), and judicial codes of conduct, should be amended to reflect this.[237] Life-tenured judges typically continue to receive lifetime pay, even after stepping down following misconduct allegations.[238]

IV. Existing Legal Recourse

Currently, federal law clerks cannot sue federal judges for gender discrimination or harassment. Neither of the major statutes through which employees can litigate civil rights violations—§ 1983 for state violations and Title VII for federal violations—applies to federal judges.

The federal statute 42 U.S.C. § 1983 enables litigants to bring tort claims against public officials for civil rights violations. While § 1983 does apply to state judges,[239] and it likely applies to D.C.

Bar did not handle complaints against judges, and it redirected the author to the CJDT. Correspondence on file with the author.

236. *See Retiring to Avoid Consequences: Judges Exploit a Loophole to Maintain Pensions in Spite of Misconduct*, *supra* note 77 (addressing the issue of judges continuing to collect their lifetime pensions following misconduct-related retirements). Furthermore, while federal judges' salaries cannot be reduced during their time in office, *see* U.S. Const. art. III § 1, D.C. judges' salaries can—and should—be reduced following a finding of misconduct.

237. The JAA specifies that the Commission on Judicial Integrity (CJI) shall, among other duties, revise the Code of Conduct for United States Judges every four years. *See* JAA § 4(g)(5) (amending 28 U.S.C. § 965). Both of these changes—on state bar discipline and revocation of lifetime pensions—could be reflected in the CJI's first revision to the Code of Conduct.

238. *See* Burbank, Plager & Ablavsky, *supra* note 77 (discussing the difference between judicial retirement and resignation and the implications for judges' lifetime pensions); *see also Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 4 (2018), https://www.judiciary.senate.gov/imo/media/doc/Santos%20Responses%20to%20QFRs.pdf [https://perma.cc/NZ3A-NUSB] [hereinafter Santos Responses] (responses to questions for the record of Jaime Santos; addressing the question of whether judges who harass their clerks should lose their taxpayer-funded pensions).

239. *See* Forrester v. White, 484 U.S. 219, 228–30 (1988) (holding that state judges are amenable to suit for gender discrimination, that a judge is not absolutely immune from suit in her or his capacity as an employer, and that

judges, there has never been a successful lawsuit under this statute against a D.C. judge by a former employee.[240] Furthermore, due to D.C. judges' unique Senate-confirmed status—as opposed to other state court judges who are subject to § 1983 but are not Senate-confirmed—§ 1983 is not sufficient legal protection.[241] Employees are reasonably skeptical about the likelihood of legal claims filed against powerful Senate-confirmed superiors, who are particularly insulated from scrutiny. Additionally, in every other state in which § 1983 applies to state court judges, litigants can also sue judges under state civil rights laws. However, D.C. judges are not subject to D.C. civil rights laws.[242]

Title VII of the Civil Rights Act of 1964 (Title VII) "prohibits employment discrimination based on race, color, religion, sex and national origin."[243] It has also been reinterpreted in several

the judge may be liable for unconstitutional conduct regarding the discharge, demotion, and treatment of employees).

240. Litigation by clerks against state judges is generally sparse. For two recent examples, see Marquez v. Hoffman, No. 18-CV-7315(ALC), 2021 WL 1226981 (S.D.N.Y. Mar. 31, 2021) (dismissing some but not all of the law clerk's claims under § 1983, New York State Human Rights Law, and New York City Human Rights Law) and Spence v. New Jersey, No. 119CV21490NLHKMW, 2021 WL 1345872 (D.N.J. Apr. 12, 2021) (dismissing some but not all of the law clerk's claims under Title VII and New Jersey Law Against Discrimination). One of the many benefits of covering D.C. judges under the JAA is that attorneys representing law clerks in lawsuits against D.C. judges could draw from the vast Title VII precedent from similar cases, rather than the exceedingly limited number of somewhat similar § 1983 claims. *See infra* Part V.

241. The author has spoken with many attorneys about covering D.C. judges under the JAA, including attorneys on the House and Senate Committees involved with drafting the legislation. None have expressed concern that the JAA would be duplicative, or that D.C. judges could not be covered under the JAA because they are already subject to § 1983. In fact, employment attorneys explained that litigants typically sue under multiple statutes—for example, Title VII and state civil rights laws—in their discrimination lawsuits. Documentation on file with the author.

242. D.C. has a relatively robust civil rights law, the D.C. Human Rights Act, that prohibits workplace discrimination. However, D.C. judges are not governed by the Act. *See* D.C. Code § 2-1401 (1977) and D.C. Code § 2-1402 (1977); *see also* Robertson v. Dist. of Columbia, 269 A.3d 1022, 1029-31 (D.C. 2022) (holding that D.C. judges are not subject to the D.C. Human Rights Act). In April 2022, Congresswoman Holmes Norton announced her intent to sponsor a bill that would protect D.C. Courts' employees, as well as employees of the D.C. Public Defender Service, under the D.C. Human Rights Act. *See* Office of Congresswoman Eleanor Holmes Norton, *After Court Ruling, Norton to Introduce Bill to Protect Employees of D.C. Courts and Public Defender Service from Discrimination*, (Apr. 5, 2022), https://norton.house.gov/media-center/press-releases/after-court-ruling-norton-to-introduce-bill-to-protect-employees-of-dc.

243. 42 U.S.C. §§ 2000e-2000e-(17)(b) (2000). Title VII applies to private

Supreme Court cases to include sexual harassment[244] and gender identity[245] as forms of sex-based discrimination.[246] The Equal

businesses with more than fifteen employees, as well as public sector employees. *See* 42 U.S.C. § 2000e. Furthermore, 42 U.S.C. § 2000e-2(a), addressing employer practices, states that:

> It shall be an unlawful employment practice for an employer—(*1*) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (*2*) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Additionally, 42 U.S.C. § 2000e-2(b), addressing employment agency practices, states that:

> It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(b). Finally, 42 U.S.C. § 2000e-3 makes it unlawful for employers to retaliate against employees for filing discrimination claims or participating in enforcement proceedings. 42 U.S.C. § 2000e-3.

244. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (defining sexual harassment as "unwelcome sexual advances [. . .] and other [. . .] conduct of a sexual nature" having the "purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment"); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993) (recognizing that what constitutes a sufficiently severe or pervasive work environment "is not, and by its nature cannot be, a mathematically precise test," and that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances" which "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance"). *See also Sexual Harassment*, Katz, Marshall & Banks, LLP, https://www.kmblegal.com/resources/sexual-harassment [https://perma.cc/873P-2W7E] (providing a thorough analysis of sexual harassment law, including an explanation of the "hostile work environment" standard and other U.S. Supreme Court precedent).

245. *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

246. Since the passage of Title VII, the EEOC, the agency that enforces Title VII, has classified two types of sexual harassment: "quid pro quo" and "hostile work environment. *See Policy Guidance on Current Issues of Sexual Harassment*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment [https://perma.cc/WDT8-7Q74]. Sexual harassment occurs when "submission to or rejection of [sexual] conduct by an individual is used as the basis for employment decisions affecting such individual." 29 C.F.R. § 1604.11(a)(2) (2022). Hostile work

Employment Opportunity Commission (EEOC), the agency that enforces Title VII, serves as a gatekeeper for all Title VII claims: both private-sector and federal-sector employees must first file a charge of discrimination with the EEOC before they can file a discrimination lawsuit against an employer.[247] Plaintiffs in federal antidiscrimination litigation can recover both compensatory and punitive damages in cases of intentional violations of Title VII, the ADA, and § 501 of the Rehabilitation Act of 1973.[248]

It is unclear whether D.C. Courts law clerks are protected by Title VII, because they are neither federal sector employees, nor D.C. government employees.[249] They are a unique subset of D.C. Courts employees.[250] Furthermore, D.C. law clerks' supervisors—D.C. judges—are arguably federal judges for Title VII purposes. To eliminate uncertainty for these uniquely vulnerable D.C. judiciary employees, the D.C. Courts should be covered under the Judiciary Accountability Act, as argued in the following section.

V. Judiciary Accountability Act of 2021

The Judiciary Accountability Act of 2021[251] (JAA) is intended to protect employees of the Federal judiciary from discrimination by designating judges as employers and judiciary

environment harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Vinson*, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d. 897, 904 (11th Cir. 1982)).

247. *See Filing A Charge of Discrimination with the EEOC*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/filing-charge-discrimination [https://perma.cc/6P6L-Y2DV]. It often takes federal sector employees more than 45 days to realize they have been discriminated against and to work up the courage to reach out to an EEO Office. This timeframe does not protect federal sector employees. Rather, it is structured to protect federal employers from Title VII lawsuits.

248. 42 U.S.C. § 1981a(a)(l)-(3) (plaintiff may recover compensatory and punitive damages from employer for intentional discrimination, subject to caps based on number of employees in the workplace).

249. Since the author has begun to argue publicly that the D.C. Courts should be covered under the Judiciary Accountability Act, some D.C. government agencies have responded by claiming that Title VII does apply to D.C. Courts law clerks because nothing in Title VII's language specifically excludes D.C. Courts law clerks. Documentation on file with the author. However, there is no case law on this subject. At a minimum, to address this troubling gray area in the law, D.C. government agencies should issue policy guidance clarifying whether D.C. law clerks are protected by Title VII.

250. *See* D.C. Code § 11-708 (1970).

251. H.R. 4827, 117th Cong. (2021); S. 2553 (2021). The JAA would amend Chapter 57 of Title 28 of the United States Code ("Judiciary and Judicial Procedure").

employees—including law clerks—as covered employees, thereby extending to them Title VII's protections against discrimination.[252] In some respects, the bill's protections would extend further than Title VII's protections.[253] The JAA is a vast improvement over proposals set forth by the Judicial Conference of the United States between 2018 and 2019, which included revisions to the Code of Conduct for United States Judges, creating more informal and flexible reporting mechanisms, and instituting workplace training.[254] The JAA would cover the federal judiciary, which is specifically excluded from Title VII.[255] Furthermore, the JAA would revise, but not replace, the formal judicial complaint process under the Judicial Conduct and Disability Act.[256]

The JAA protects covered employees against workplace misconduct. Under the JAA, a covered employee is defined as:

> any full-time or part-time employee (including an officer, a former employee, and an applicant for prospective employment) of a court of the United States, an office or agency described in chapter 15 or part III of title 28, United States Code, or a

252. *See* Press Release, Chairman Jerrold Nadler, House 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 [https://perma.cc/735K-C5D2]; *see also* Press Release, Congresswoman Jackie Speier, U.S. House of Representatives, Rep Speier Joins Rep Johnson in Introduction of Bipartisan, Bicameral Legislation to Hold Judiciary Accountable to Workers (July 29, 2021), https://speier.house.gov/press-releases?id=40231C86-7099-4FE4-8F1D-2946AA8F8335 [https://perma.cc/FEW9-YAQG].

253. Many scholars have commented that Title VII may not be the ideal vehicle to address modern day gender discrimination claims. Critics argue that Title VII is best equipped to tackle explicit, intentional discrimination, but that much twenty-first century gender (and race) discrimination can be categorized as either implicit or unintentional. *See, e.g.*, Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employmen*t, 81 Tex. L. Rev. 1177, 1188 (2003); Stephen M. Rich, *One Law of Race?*, 100 Iowa L. Rev. 201, 231 (2014); Samuel R. Bagenstos, *The Structural Turn and Limits of Antidiscrimination Law*, 94 Calif. L. Rev. 1, 3 (2004).

254. *See* U.S. Courts, Status Report from the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States (2019), https://www.uscourts.gov/sites/default/files/working_group_status_report_to_jcus_september_2019.pdf [https://perma.cc/GW5J-YXLX].

255. *See* 42 U.S.C. § 2000(e)-(e)17.

256. See *supra* Part III for a discussion about the formal judicial complaint process under the Judicial Conduct and Disability Act. Furthermore, the Office of Judicial Integrity (OJI) that the JAA creates would also strengthen—but not necessarily replace—existing EDR plans. *See* H.R. 4827, 117th Cong. § 5(d)(1)(E) (2021).

> defender organization described in section 3006A(g) of title 18, United States Code.[257]

The JAA also covers any individual who carries out the duties and functions of one of the aforementioned organizations but is not paid, including interns.[258] Furthermore, workplace misconduct is defined as "misconduct impacting the workplace and employment, including discrimination, harassment, retaliation, sexual assault, bullying, and conduct prohibited under sections 964 and 965 of title 28, United States Code."[259]

The JAA has three major parts to its framework: (1) it gives judiciary employees the right to sue; (2) it creates real accountability for judicial misconduct; and (3) it mandates that the judiciary collect and publish data in order to lift the shroud of secrecy surrounding clerkship hiring, judiciary workplace culture, and judicial complaints. This strong piece of proposed legislation would extend Title VII protections to more than 30,000 currently unprotected judiciary employees. It is inconceivable that this large swath of the workforce does not enjoy the same antidiscrimination protections as other federal—or private sector—employees. These judiciary employees, who go to work every day in the courts, should have the same right to their day in court as the litigants who appear before them. Furthermore, judges who preside over antidiscrimination cases should be subject to antidiscrimination laws themselves.

A. *JAA Overview*

1. Right to Sue

The JAA explains that "all personnel actions … shall be made free from discrimination based on (1) race, color, religion, sex (including sexual orientation or gender identity), or national origin, within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2)."[260] The JAA also prohibits discrimination based on age[261] or disability.[262] Judiciary employees would finally

257. *See* H.R. 4827 § 10 (2)(A). The bill would also extend protections to federal public defenders, who are also currently excluded from Title VII's protections. *See* Ann E. Marimow, *Comments on Body Parts. Questions About Pregnancy. Court Filing Alleges Ongoing Harassment in Judiciary*, WASH. POST (Aug. 26, 2021, 4:56PM), https://www.washingtonpost.com/politics/courts_law/federal-courts-harassment-judges/2021/08/26/ebad861e-05b5–11ec-a266–7c7fe02fa374_story.html (citing *Jane Roe Amicus Brief*, *supra* note 85).

258. *See* H.R. 4827 § 10(2)(B).

259. *Id.* § 10(4).

260. *Id.* § 2-964(a)(1).

261. S*ee id.*, § 2-964(a)(2) (citing the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a).

262. *See id.* § 2-964(a)(3) (citing § 501 of the Rehabilitation Act of 1973, 29

have the same right to sue as is currently available to other groups under Title VII—that is, litigants would first need to file charges with the EEOC, and then proceed through the administrative process.[263] The proposed bill also prescribes the same remedies as those available under Title VII, including compensatory damages.[264]

Under Section 965 of the JAA, whistleblowers would be protected against retaliation.[265] Specifically, no covered employee could be "discharge[d], demote[d], threaten[ed], suspend[ed], harass[ed], or in any other manner discriminate[d] against" in their terms and conditions of employment for providing information related to an investigation, or for participating in an investigation, into judicial misconduct.[266] Notably, Section 965 has a venue-shifting provision, meaning that whistleblowers can file suit "in any United States district court."[267]

The JAA would create an Office of Employee Advocacy (OEA)[268] within the judicial branch to provide legal assistance, consultation, and representation to covered employees.[269] The OEA would receive complaints from covered employees, give referrals to mental health care providers, and operate a hotline for employees' legal inquiries.[270]

2. Accountability for Judicial Misconduct

Section 6 of the JAA would create a Special Counsel for Equal Employment Opportunity (Special Counsel).[271] The Special Counsel would "conduct investigations of alleged workplace misconduct in the judicial branch."[272] The Special Counsel would

U.S.C. § 791, and §§ 102–104 of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12112–12114).

263. *See id.* § 2-964(a)(1).

264. *See id.* § 2 (amending 28 U.S.C § 964(b)(1)(A)). Compensatory damages would be administered and capped, as they are under Title VII, pursuant to § 1977 (42 U.S.C. 1981). *Id.* (amending 28 U.S.C. § 964(b)(1)(B)).

265. *Id.* § 3-965(a) (amending 28 U.S.C. § 965(a)).

266. *Id.*

267. *Id.* § 3-965(d) (amending 28 U.S.C.§ 965(d)).

268. *See id.* § 7.

269. *Id.* § 7(c)(1). Furthermore, "the relationship between the OEA and an employee to whom the OEA provides legal assistance, consultation, and representation under this section shall be the relationship between an attorney and client." *Id.* § (c)(3).

270. *Id.* §§ (c)(1)(A)-(E).

271. *See id.* §§ 6(a)-(e). The Special Counsel would offer investigatory support and additional oversight, as well as conduct audits and investigations of its own. *See id.* §§ 6(e)(1)-(5).

272. *Id.* § 6(e)(1). The Special Counsel's investigatory powers shall include subpoena power. *Id.* § 6(h)(1)(C).

also conduct a thorough annual "workplace culture assessment"[273] and make an annual report to Congress after completion of the assessment.[274] The JAA would also require that the Judicial Conference submit to Congress, on a biannual basis, a report about the number and type of complaints filed in each judicial circuit within the previous 180-day period.[275] The only data the judiciary currently collects is about formal complaints against judges, which represents a fraction of the number of judges engaging in misconduct.[276] Furthermore, the existing data are poorly-compiled and confusing to sift through for the average law clerk or litigant seeking information about misbehaving judges.[277] The additional data mandated by the JAA about both formal complaints and judiciary workplace culture will strengthen arguments about both the scope of harassment within the judiciary, and why existing policies are insufficient to combat it. Section 8 of the JAA expands the definition of "judicial misconduct" to include discrimination and retaliation.[278] The proposed legislation also clarifies the procedures for filing a complaint against a judge.[279] Importantly, the bill specifies that if a judge

273. *Id.* § 6(f). The first workplace culture assessment would survey judiciary employees from the past ten years. *Id.* § 6(f)(1)(H).

274. *Id.* § 6(g). A workplace culture assessment is extremely important, and it should include a thorough survey to identify the number and types of individuals who have been harassed by judges.

275. *See id.* § 8(c)(2)(A).

276. *See Caseload Statistics Data Tables*, *supra* note 45; *see also* Biskupic & Kessler, *supra* note 45.

277. *See supra* note 276.

278. The bill establishes discrimination and retaliation as judicial misconduct by amending § 358 of Title 28 of the U.S. Code ("Judiciary and Judicial Procedure"). Specifically, § 8 of the JAA states that the following shall be added:

> IN GENERAL.—Each judicial council and the Judicial Conference shall prescribe rules for the conduct of proceedings under this chapter, including the processing of petitions for review that—(*1*) ensure the independence, integrity, impartiality, and competence of proceedings under this chapter; (*2*) ensure the greatest possible public confidence in proceedings under this chapter and maintain public confidence in the Federal judiciary; (*3*) reflect that the judicial office is a position of public trust; and (*4*) effectuate sections *453* and the provisions of the Judiciary Accountability Act of *2021*.

See H.R. 4827 §§ 8(a)(1)-(4). Furthermore, the JAA adds the following language to the Judiciary and Judicial Procedure part of the U.S. Code: "workplace misconduct (as defined in the Judiciary Accountability Act of 2021) constitutes a violation of this chapter, including conduct prohibited under sections 964 and 965 of this title." *Id.* § 8(a)(4).

279. *Id.* §§ 8(b), (d) & (e). In addition, subsection (c) "expands" the definition of judge. *Id. §* 8(c).

retires, resigns, or dies, the complaint against the judge will not be dismissed, nor will the misconduct investigation cease.[280]

The JAA revises, but does not replace, the current formal judicial complaint process under the Judicial Conduct and Disability Act.[281] Formal complaints against judges would be filed with the Judicial Conference, and would then be transmitted to the appropriate circuit and Chief Judge for review.[282] After an initial review by the Chief Judge (the misbehaving judge's boss), if the Chief Judge decides to convene a special committee to review the complaint, the JAA specifies that this special committee shall be comprised of "equal numbers of circuit judges and district judges *from other circuits*; and . . . members of the Commission on Judicial Integrity."[283] This reflects a change from current Judicial Conduct and Disability Act procedures, in which the special committee reviewing the complaint is comprised of district and circuit judges from the circuit where the misbehaving judge works. While this is preferable to the misbehaving judge's immediate colleagues reviewing the complaint, it does not remove the formal complaint process from the judiciary's chain of command.

3. Collecting and Publishing Data and Reports

The JAA would require the judicial council of each federal circuit to submit an annual report detailing hiring data for the entire circuit, each court within each circuit, and each Federal Public Defender Organization associated with the circuit.[284]

Section 4 of the JAA would establish a Commission on Judicial Integrity (CJI).[285] Under the JAA, the CJI will supervise the other officers and committees established in Sections 5–7 of the JAA.[286] Criticism about the clerkship system often focuses on the lack of transparency and the lack of available data: the CJI's activities would begin to address these concerns.[287] One of the CJI's

280. *Id.* § 8(d)-(e) (amending 28 U.S.C. § 352). Currently, if a judge retires amid a misconduct investigation, not only will the investigation cease, but he will be able to retain his lifetime pension. *See* Plager & Ablavsky, *supra* note 77 (differentiating between retirement and resignation for judges' pension collection purposes).

281. *See supra* Part III.

282. *See* H.R. 4827 § 8(e).

283. *Id.* § 8(f)(1)(B)(i-ii) (emphasis added).

284. *See id.* § 2 (amending 28 U.S.C. § 964(c)).

285. Membership of the Commission on Judicial Integrity shall include two recent clerks, who clerked within four years of their selection, *id.* § 4(b)(4)(B).

286. *See id.* § 4(g).

287. See *supra* Parts II and III for critiques about both law schools' and the

proposed functions is to create a workplace prevention program that includes:

> A comprehensive workplace misconduct policy; a nationwide confidential reporting system that is readily accessible to current and former employees of the judicial branch of the Federal Government, law schools, and other potential complainants [. . .]; a comprehensive training program on work place behavior and bystander intervention; metrics for workplace misconduct response and prevention in supervisory employees' performance reviews; a system for independently investigating reports of workplace misconduct that ensures such investigations are comprehensive, timely, effective, and trusted; standards for the imposition of prompt, consistent, and proportionate disciplinary and corrective action if workplace misconduct is determined to have concurred; making publicly available, not less frequently than annually, anonymized reports of aggregate formal and informal complaints of workplace misconduct received and responsive actions taken; making publicly available annual reports of the number of individuals who were interviewed for full-time positions, including judicial clerkships [. . .] or [with] a defender organization [. . .] and who were hired for such positions, which shall be disaggregated by judicial circuit and judicial branch agency, by sex (including by sexual orientation and gender identity), by disability, by religion, and by the ethnic and the racial categories [. . .] with year-to-year trends of the most recent 10 years for which data are available [. . .]; making publicly available biennial workplace climate assessments that include surveys of current and former employees and interviews and focus groups of randomly selected current and former employees; conducting annual audits of the efficacy of the workplace misconduct prevention program; and ensuring that the elements of the workplace misconduct prevention program are easy to understand, easy to access and use, and are regularly communicated to all employees.[288]

The CJI would also be responsible for overseeing proposed revisions every four years to the Judicial Conduct and Disability Rules, the Code of Conduct for Judiciary Employees, the Code of Conduct for Federal Public Defender Employees, and the Code of Conduct for United States Judges.[289] Furthermore, it would ensure that the Judicial Conference, Congress, and the public are kept apprised of its work, of the workplace climate within the judiciary

judiciary's failure to collect data about judicial harassment, workplace culture, and misconduct complaints, respectively.

288. *Id.* §§ 4(f)(1)-(11).

289. *Id.* § 4(g).

"including the incidence of workplace misconduct," and the efficacy of the workplace misconduct prevention program.[290]

Section 5 of the JAA would restructure the existing Office of Judicial Integrity (OJI), giving it much broader authority.[291] Under the JAA, the OJI would administer a comprehensive workplace misconduct policy and prevention program, as well as a nationwide confidential reporting system.[292] It is the responsibility of the OJI to create and maintain an EDR program.[293] The OJI would be tasked with collecting data on—and publicly reporting the results of—anonymized workplace misconduct complaints and actions taken, as well as hiring data for clerkship positions, disaggregated by circuit, race, and gender.[294] The OJI would track complaints and investigations into workplace misconduct and compile data on the use of the confidential reporting system.[295] Finally, the OJI would report annually to Congress.[296]

B. *Proposed Amendments to the JAA*

The JAA offers robust reforms that would begin to address the lack of workplace protections within the judiciary. However, a variety of amendments to the JAA would strengthen it further, protect more employees from workplace misconduct, and provide for real judicial accountability.

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290. *Id.* § 4(g).

291. *Id.* § 5(a). Between 2018 and 2019, the Administrative Office (AO) of the United States Courts created a national OJI "to provide counseling and assistance regarding workplace conduct to all Judiciary employees [. . .] [and to] provide advice on a confidential basis to the extent possible." *See* U.S. Courts, Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States (June 1, 2018), at 37. The JAA would improve the OJI. Furthermore, the JAA would mandate that OJI representatives work in each courthouse, whereas the AO's OJI does not specify this. *See id.*

292. H.R. 4827 §§ 4(d)(1)(A)-(B). Under the Judicial Integrity Officer, there is a Director of workplace relations for (i) each judicial circuit; (ii) the Court of International Trade; (iii) the Court of Federal Claims; (iv) each Federal Public Defender Organization [. . .]; and (v) each judicial branch agency not described in clauses (i) through (iv); [and] at least 2 employee dispute resolution coordinators for (i) each judicial district; (ii) each judicial circuit; (iii) the Court of International Trade; and (iv) the Court of Federal Claims; and a sufficient number of employee dispute resolution coordinators for every other judicial branch agency. *Id.* § 4(c)(1)(B).

293. *Id.* § 4(d)(1)(D).

294. *Id.* §§ 4(d)(1)(F)-(G).

295. *Id.* §§ 4(d)(1)-(4).

296. *Id.* §§ 4(f)(1)(A)-(B).

1. D.C. Courts Should Be Covered Under the JAA

The most glaring loophole in the JAA is that the D.C. Courts, including the courthouse I clerked in, are not covered under the bill. The D.C. Courts should be included in the JAA both because they are similar to Article III federal courts, which are covered under the bill, and because at least one other Article I court is currently covered by the proposed legislation.[297]

Because Congress created the D.C. Court system, the D.C. Courts and D.C. judges are Article I courts and judges.[298] Other Article I courts—such as the U.S. Court of Federal Claims—are covered under the JAA.[299] There are no obvious distinguishing factors about the D.C. Court system that would require its exclusion from the JAA. Congress later clarified, under the D.C. Home Rule Act, that the D.C. Council could not alter the composition or jurisdiction of the D.C. courts, thereby preserving federal authority over the D.C. Courts.[300] Despite public criticism from D.C. legislators and D.C. residents,[301] Congress has retained oversight over the D.C. Courts. This oversight includes Senate confirmation of D.C. judges, meaning that the D.C. judiciary might be exempt from Title VII, in the same way the federal judiciary is exempt.[302] Thus, while the D.C. Courts are not technically Article III federal courts (they are DC's local courts), they are largely treated as such by Congress.

The D.C. Courts resemble federal courts in other ways, as well. The D.C. courthouses receive federal resources and are funded annually by the federal budget.[303] Many of the D.C. Courts poli-

297. The Senate Judiciary Committee tackled the issue of Article I courts' inclusion in a judicial security bill in 2021. *See* S. 2340, 117th Cong. § 4(3) (2021). Under the subheading "federal judge," the Committee also listed several Article I judges. *See id.* §§ 4(3)(A)-(E). The author would advocate for amending the JAA to cover the D.C. courts in a similar manner.

298. *See supra* notes 116–122 for an explanation about the D.C. Courts as Article I courts.

299. *See* H.R. 4827 §§ 5(c)(1)(B)-(C).

300. *See* District of Columbia Self-Government and Government Reorganization (D.C. Home Rule) Act, Pub. L. 93–198, 87 Stat. 744 (1973).

301. *See* Meagan Flynn, *Senate Moves to Confirm New D.C. Judges Amid Vacancy Crisis*, Wash. Post (Feb. 2, 2022, 4:15 PM), https://www.washingtonpost.com/dc-md-va/2022/02/02/dc-judges-confirmed-senate (explaining that D.C. judicial nominations continue to be a low priority for the U.S. Senate, despite the fact that there are more than a dozen current vacancies on the D.C. Courts, leading to an immense backlog and causing harm to litigants, victims, and defendants whose cases languish for years). Congresswoman Eleanor Holmes Norton (D-DC) has been sounding the alarm on this issue for years. *See id.*

302. *See* 42 U.S.C. 2000(e)-(e)17.

303. *See Financial Services and General Government*, *supra* note 128; *see also* H.R. 4345, 117th Cong. (2021); *Committee Jurisdiction*, House Comm. on

cies and procedures—including the newly-adopted EDR Plan—are modeled after the federal courts' Model EDR Plan.[304] Additionally, D.C. judges interact closely with the local federal prosecutor's office—the D.C. U.S. Attorney's Office, whose AUSAs appear before D.C. judges and prosecute local offenses.[305] Finally, D.C. judges follow the federal judiciary's salary plan: their salaries are identical to federal judges' salaries.[306]

D.C. Courts law clerks resemble federal law clerks and other federal employees.[307] First, D.C. law clerks receive certain employment forms designed for federal employees from the U.S. Office of Personnel Management at the end of their clerkships.[308] D.C. law clerks also receive health insurance through the Federal Employee Health Benefits Program.[309] Furthermore, in describing employees

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Oversight & Reform, https://oversight.house.gov/about/committee-jurisdiction [https://perma.cc/F8MZ-S4TJ]; *District of Columbia*, U.S. Senate Comm. on Homeland Sec. & Governmental Affs., https://www.hsgac.senate.gov/issues/district-of-columbia [https://perma.cc/ESM9-6GT6]; *and see* S. 3179, 117th Cong. (2021).

304. *See District of Columbia Courts Announce New Employment Dispute Resolution Plan*, *supra* note 20 ("The D.C. Courts EDR Plan closely follows the US Courts' Model EDR Plan, adopted by the Judicial Conference, for reporting and resolving allegations of wrongful conduct in the workplace.").

305. *See Superior Court Division*, U.S. Att'y's Off. for the D.C., https://www.justice.gov/usao-dc/superior-court-division [https://perma.cc/EB4Z-7VET].

306. *See Judicial Service in the District of Columbia Courts Frequently Asked Questions*, Jud. Nomination Comm'n, https://jnc.dc.gov/page/judicial-service-district-columbia-courts-frequently-asked-questions [https://perma.cc/X92H-YW5J]; *see also Judicial Compensation*, U.S. Courts, https://www.uscourts.gov/judges-judgeships/judicial-compensation [https://perma.cc/X37Y-C8MH] (indicating that District Judges earned an annual salary of $218,600 in 2021).

307. This Subpart focuses on law clerks, rather than other judicial employees or public defenders. However, other D.C. Courts employees, as well as public defenders from the D.C. Public Defender Service, deserve these same legal protections.

308. *See* Standard Form 50: Notification of Personnel Action, U.S. Off. of Personnel Mgmt., https://www.gsa.gov/cdnstatic/sf50.pdf?forceDownload=1 [https://perma.cc/KAX8-GEK4]. A Standard Form 50 contains employment information and is used by current and former federal employees. Furthermore, based on the author's conversations with government employers, a D.C. law clerk's one or two years of federal service are used to calculate the step grade and salary at which the federal employee is hired, if the D.C. law clerk subsequently secures federal employment in the Executive Branch or Legislative Branch. Documentation on file with the author.

309. *See Benefits of the D.C. Courts*, D.C. Courts, https://www.dccourts.gov/about/benefits-of-dccourts [https://perma.cc/P4AJ-5RHY]. Specifically:

> The District of Columbia Courts is an independent agency of the District of Columbia Government and is not under the authority

of the D.C. Courts, the D.C. Code states that both "[non-judicial and] judicial employees of the District of Columbia courts shall be treated as employees of the Federal Government" for purposes of compensation.[310] Both law clerks and judges in the D.C. courts therefore receive salaries according to the federal salary plan.[311]

If the D.C. Courts were covered under the proposed JAA, this would reduce the need for a separate Commission on Judicial Disabilities and Tenure (CJDT) to investigate judicial misconduct complaints, or at least reduce the burden on the CJDT, by sharing investigatory authority with a representative from the centralized Special Counsel's Office.[312] However, similar to the way that the JAA revises, but does not replace, the formal judicial complaint process under the Judicial Conduct and Disability Act, even if the JAA were amended to include the D.C. Courts, the CJDT would likely still exist in some form to investigate judicial misconduct complaints. D.C. complainants would benefit from the JAA's creation of an unbiased Special Counsel to help investigate complaints, to conduct audits, and to conduct workplace culture assessments of the D.C. Courts.[313] They would also benefit from the JAA's standardization of policies and procedures[314] and its mandate that data about misconduct complaints be published on a biannual basis.[315] It is outrageous that D.C. attorneys and law clerks cannot access recent comprehensive CJDT data on judicial misconduct complaints and investigations, thereby leaving the D.C. legal community in the dark about the scope of misconduct in the D.C. judiciary. Increased transparency would lead to increased confidence in the judiciary.

> of the City Mayor or the D.C. Council. D.C. Courts' appropriation comes directly from Congress. All D.C. Courts non-judicial employees receive federal benefits for the following programs: Life Insurance, Retirement Benefits, Health Insurance and Workers Compensation.

Id. See also Healthcare & Insurance, U.S. Off. of Personnel Mgmt., https://www.opm.gov/healthcare-insurance/healthcare/enrollment/new-federal-employee-enrollment [https://perma.cc/7FHW-8C6D].

310. *See* D.C. Code § 11–1726 (1970).

311. *See id.*

312. See *infra* Part III for a critique of the D.C. CJDT.

313. *See* H.R. 4827, 117th Cong. § 6 (2021). *See also supra* Part III for a critique of the CJDT Special Counsel. The Special Counsel provisions in the CJDT Rules should be revised and clarified.

314. The CJDT's policies and procedures are opaque and unclear. *See supra* Part III.

315. The CJDT last published an annual report about judicial misconduct complaints in August 2018, which aggregated its 2017 data. *See* Comm'n on Jud. Disabilities & Tenure, *supra* note 222. Since that time, some judges have left the bench, and new judges have joined the D.C. judiciary.

The strongest counterargument to covering D.C. judges under the JAA is that D.C. judges are likely subject to claims under § 1983, meaning that D.C. judiciary employees do have some limited legal recourse when they are harassed by judges.[316] However, there has never been a § 1983 lawsuit against a D.C. judge.[317] This suggests that mistreated D.C. judiciary employees do not believe they can successfully sue Senate-confirmed judges in the jurisdiction in which they practice, and where their judiciary colleagues would preside over their cases. Title VII offers decades of robust precedent, from which D.C. attorneys representing law clerks could structure their complaints. Furthermore, in every state in which local judges are subject to § 1983 claims, they are also subject to state civil rights laws.[318] D.C. judiciary employees are not protected by the D.C. Human Rights Act.[319]

The specific mechanics of including the D.C. Courts in the JAA are straightforward. For the same reasons D.C. Courts law clerks resemble federal law clerks, D.C. law clerks should be specifically included in the definition of covered employees in Section (10)(2)(A) of the JAA. Currently, a covered employee is defined in the JAA as "any full-time or part-time employee (including an officer, a former employee, and an applicant for prospective employment) of a court of the United States, an office or agency described in chapter 15 or part III of title 28, United States Code . . . ."[320] However, the D.C. Courts are not necessarily considered "a court of the United States," since the D.C. Courts are not federal courts (they are the equivalent of state courts or local courts, although D.C. is not a state).[321] Despite these wrinkles in the federal versus state court distinction, the JAA should be amended to specifically include D.C. Courts employees in its covered employees section to avoid uncertainty.

2. Statute of Limitations

While the JAA does not currently mention a statute of limitations, it does mention former employees in its definition of

316. *See supra* Part IV.

317. *See id.*

318. *See id.*

319. *See id.*

320. *See* H.R. 4827, 117th Cong. § 10(2)(A) (2021).

321. The D.C. Courts are best described as a hybrid of a state court and a federal court. D.C. also has federal courts—the United States District Court for the District of Columbia (which has its own set of magistrate judges). *See* U.S. Dist. Ct., D.C., https://www.dcd.uscourts.gov [https://perma.cc/PHF7-REE2]; U.S. Ct. of Appeals, D.C. Cir., https://www.cadc.uscourts.gov/internet/home.nsf/content/home+page [https://perma.cc/3JFN-22MX].

covered employees, suggesting that former judiciary employees have some window of time after their clerkships to file suit.[322] However, because the crux of the JAA is that it would subject judges to Title VII, absent a provision to the contrary, the statute of limitations for suing a judge under the JAA would likely be the Title VII statute of limitations (either 180 or 300 days)[323]—a troublingly restrictive timeframe.

A longer statute of limitations would benefit vulnerable law clerks and other judiciary employees. Three years—the statute of limitations for § 1983 tort claims in the District of Columbia[324]—would be an appropriate statute of limitations for the JAA. There are two ways that a statute of limitations could be clarified in this bill. The first would be to add a section directly addressing the statute of limitations. The second would be to define former employee with a timeframe in JAA Section 10 (Definitions). Some scholars argue that more restrictive timelines are beneficial because they increase employers' "peace of mind" and avoid disrupting "settled expectations."[325] However, there are many reasons why law clerks who are harassed by judges do not immediately file complaints[326]—let alone file suit—and a longer statute of limitations for filing suit under the JAA would alleviate some of the concerns that prevent law clerks from reporting misconduct.

Giving a clerk several years of space so that she feels safe to file a complaint would help any law clerk considering filing suit to get justice for herself, to hold the judge accountable for his misconduct, and to protect herself against the downstream, long-term negative effects of judicial misconduct on her career and reputation. A judge's recommendation can make or break a law clerk's career—and a negative, or even a lukewarm recommendation, can make it difficult for a law clerk to find her next job.[327] Furthermore,

322. *See* H.R. 4827 § 10(2)(A).

323. *See* 42 U.S.C. § 2000e(5)(e)(1).

324. § 1983 claims use the Statute of Limitations for tort claims in the state in which the tort was committed. *See* 42 U.S.C. § 1983. For the District of Columbia, the statute of limitations is three years after the alleged civil rights violation occurred. *See* D.C. CODE §§ 12–301(a)(3), (a)(8) (2022).

325. *See* Tyler T. Ochoa & Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitations*, 28 PAC. L.J. 453, 460 (1997).

326. These include fear of retaliation by the judge (including termination), reputational and career damage, and the fear that they will not be believed. *See supra* Part II (discussing why law clerks do not file complaints against judges).

327. See *Renee Newman Knake Judicial Conference Testimony*, *supra* note 103, for a discussion about the importance of judges' references for law clerks' careers. See also *supra* Introduction and *infra* Conclusion for a more detailed discussion about the author's experience with a negative reference from a

even once a former clerk has started a new job, she still faces the risk of what the judge might say about her to her new employer or to others in the legal community. This is especially true if she is practicing law in the jurisdiction in which she clerked, let alone if she has a judicial facing job as a trial attorney—for example, as a prosecutor or public defender—where she still interacts with her former judge's courthouse and colleagues on a daily basis.

The argument against a longer statute of limitations for the JAA is that the JAA's intent is to subject judges to Title VII, and Title VII already has a statute of limitations.[328] However, Title VII timelines are overly restrictive, and the JAA presents an opportunity to rectify this limitation for at least a subset of the workforce. Aligning with the Title VII statute of limitations is not a good enough reason to railroad vulnerable judiciary employees, who face unique considerations when deciding whether to complain about their life-tenured former employers.

3. EDR Standardization

The JAA specifies that an OJI and a Judicial Integrity Officer would create and administer an EDR program.[329] As witness testimony from a Senate Judiciary hearing,[330] a House Judiciary Hearing,[331] and a Judicial Conference hearing,[332] as well as the author's personal experiences and conversations with other former clerks have revealed, the EDR process is highly flawed.[333]

judge, and the far-reaching implications of this type of malicious conduct by a member of the judiciary.

328. The statute of limitations under Title VII is 45 days for federal sector employees, and 180–300 days for private sector employees. *See* 42 U.S.C. § 2000e(5)(e)(1).

329. *See* H.R. 4827, 117th Cong. § 5(d)(1)(E) (2021).

330. *See Jaime Santos Senate Judiciary Testimony*, *supra* note 41; *see also* Santos Responses, *supra* note 238; *Confronting Sexual Harassment and Other Workplace Misconduct in the Fed. Judiciary: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018) (testimony of Jenny R. Yang), https://www.judiciary.senate.gov/imo/media/doc/Yang%20Testimony.pdf [https://perma.cc/3SAA-EMTX]; *Confronting Sexual Harassment and Other Workplace Misconduct in the Fed. Judiciary: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018), https://www.judiciary.senate.gov/imo/media/doc/Yang%20Responses%20to%20QFRs.pdf [https://perma.cc/338L-PAZA] [hereinafter Yang Responses] (responses to questions for the record of Jenny R. Yang).

331. *See Olivia Warren House Judiciary Testimony*, *supra* note 9; *see also Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct*, *supra* note 42.

332. *See* United States Courts, *supra* note 153 (including testimony of Kendall Turner and Jaime Santos); *see also* Hansmann Testimony, *supra* note 48.

333. See *supra* Part III for a critique of existing federal and D.C. EDR policies.

The timelines for initiating EDR are too short, and they should be substantially lengthened to encourage favorable resolution of workplace issues.[334] Law clerks perceive EDR to be biased in favor of judges.[335] This is partially due to the close contact between judges, who have either lifetime or fifteen-year appointments, and EEO officials, who are permanent courthouse employees, as opposed to law clerks, who are only employed with the court for a short time and do not have those existing relationships.[336] Additionally, the Chief Judge of the courthouse oversees the EDR program, and often current or former judges oversee individual EDR cases. The heavy involvement of judges in administering EDR programs gives the appearance of a lack of impartiality.

EDR processes should be clear, detailed, robust, and easily accessible to employees.[337] Furthermore, the OJI should exert continuous oversight to ensure that all federal (and D.C.) courthouses administer and comply with a standardized EDR plan. One particularly important aspect of EDR that should be highlighted is the opportunity for judicial reassignment.[338] By the time a law clerk determines that the workplace is inhospitable and EDR is necessary, she should have the opportunity to be reassigned to a different judge for the remainder of the clerkship.[339] She should not have to

334. The timeframe for initiating EDR in the D.C. Courts EEO office is just 45 days, even shorter than the 180 days provided to federal law clerks for initiating EDR. *See Employment Dispute Resolution Plan*, *supra* note 20.

335. *See* Bayles, *supra* note 197 (reporting on flaws in the EDR process).

336. This Article focuses on law clerks, who are only employed by the court system for a short time. However, for more permanent judiciary employees, who would also benefit from the JAA, concerns about engaging in EDR—or filing a formal complaint against a judge—are even more complicated. These judiciary employees will continue to work in the courthouse in which they engaged in the complaint process, in close proximity to the powerful individuals about whom they complained.

337. The EDR process for the D.C. Courts EEO office is extremely unclear—one attorney referred to it as a "black hole." Documentation on file with the author. Even after lengthy correspondence with the D.C. Courts EEO Office, the author was still unable to get a clear sense of what EDR would entail—let alone what remedies were available to her as a former clerk.

338. The D.C. Courts are touting their new EDR plan, which provides the opportunity for judicial reassignment. *See District of Columbia Courts Announce New Employment Dispute Resolution Plan*, *supra* note 20. However, the author considers this to be too little, too late. The D.C. Courts should not have waited 51 years—between the D.C. Courts' inception in 1970 and the implementation of the EDR plan in 2021—to provide this important protection to vulnerable law clerks. Furthermore, the author is skeptical about whether judicial reassignment will be properly utilized—specifically, whether clerks' requests for reassignment will actually be granted.

339. Some have argued that the opportunity for judicial reassignment, or

continue working for her harasser after filing an EDR complaint against him. Law clerks agree to a one- or two-year commitment for a clerkship, and they make financial and personal decisions based on this understanding. A guaranteed aspect of the employer-employee agreement between judge and clerk should be that the clerk be able to complete the clerkship. Clerks should not fear that, if they report misconduct, they will lose their jobs. Fear of retaliation, including termination, is a major reason why law clerks who experience harassment decide to remain silent. As if the harassment were not devastating enough, the prospect of losing one's job—as well as one's health insurance and one's professional reputation—can feel like insurmountable barriers to reporting. Furthermore, it is unreasonable to expect a victimized law clerk to remain in a hostile work environment while engaging in a lengthy EDR process, since the process can take at least several months.[340]

Additionally, the JAA should compile data on employee use of EDR processes, separated by circuit and by courthouse, as well as the outcomes of these processes. Data should be publicized on at least an annual basis regarding the number of times judicial reassignment was requested, and the outcomes of these requests.[341] Law clerks have a right to know whether EDR plans in their workplaces are being properly utilized. Both the D.C. and the federal judiciary tout their EDR plans—and EDR is currently the exclusive remedy for mistreated clerks. However, if law clerks' requests for judicial reassignment while engaging in EDR are not granted, then EDR is ineffective, since reassignment is one of the only available remedies under EDR.[342]

The argument against standardizing EDR plans is that individual courthouses should have the freedom to implement whatever policies they deem best for their specific workplaces. However, EDR plans are already employer-friendly, and courthouses left to their own devices have repeatedly shown that they are not capable of instituting effective EDR plans without substantial oversight.

"transfer," should include transfer to a different courthouse within the circuit, or even a different circuit. *See* Santos Responses, *supra* note 238, at 7. However, transferring to a different circuit could complicate the EDR process, if the law clerk was reassigned to a different location while engaging in EDR and had to travel back and forth.

340. *See Employment Dispute Resolution Plan*, *supra* note 20.

341. The D.C. Courts have not provided data on how often employees' requests for judicial reassignment are granted or denied. This EDR data should be compiled and made publicly available for every federal courthouse, as well as for D.C. Superior Court and the D.C. Court of Appeals.

342. See *supra* Part III for a discussion about EDR.

4. Venue Shifting Provision

JAA Section 965, which protects whistleblowers from retaliation, provides for a venue shifting provision, meaning that whistleblowers can file suit "in any United States district court."[343] However, this venue shifting provision does not apply to the rest of the JAA, meaning that law clerks who file suit against judges alleging discrimination and harassment would be forced to do so in the jurisdiction, and even the courthouse, in which the judge practices. The negative implications of this are enormous. Such a lawsuit could mean that one of the judge's friends would preside over the case. At the very least, it would likely trigger recusal issues and conflict of interest issues, depending on which judge was assigned to the case.

The anxieties arising from the possibility of suing a judge in the jurisdiction, and perhaps even the courthouse, in which he practices, as well as the reputational risks to the law clerk, might cause clerks to hesitate before file claims against judges. Adding a venue shifting provision to the JAA would protect the integrity of law clerk lawsuits by allowing clerks to file suit in neighboring jurisdictions. Every law clerk should enjoy a fair hearing and a fair trial on her claims. This is jeopardized if she must risk the publicity, the whisper campaigns, and the conflict of interest issues that would arise by suing a judge in the jurisdiction in which he presides.

5. Offices of Employee Advocacy

The JAA creates an Office of Employee Advocacy (OEA) to provide legal advice and representation to judiciary employees.[344] This is a strong provision, assuming the OEA will exercise independence.[345] There are many hurdles to seeking legal representation in

343. H.R. 4827, 117th Cong. § 3(d) (2021) (amending 28 U.S.C. § 965(d)).

344. *See id.* § 5(c)(1). The OEA provision, proposed by Congresswoman Jackie Speier, was modeled after the OEA she introduced in Congress, as well as an OEA for the State Department, in recent years. *See* Press Release, Congresswoman Jackie Speier, Speier, Castro, and Engel Take on Harassment and Discrimination in the State Department (Sept. 30, 2020), https://speier.house.gov/2020/9/speier-castro-and-engel-take-on-harassment-and-discrimination-in-the-state-department [https://perma.cc/D6GC-5BJR].

345. Offices theoretically set up to protect employees—such as HR and the EEO Office—do not always exercise independence. In both the author's personal experience and her conversations with other former clerks, courthouse employees lie to law clerks about workplace policies, or withhold important information. For example, the author spoke with several former clerks who reportedly expressed interest in filing judicial complaints but were told by court employees that there is a 180-day statute of limitations for filing a formal judicial complaint, which is untrue. Documentation on file with the author.

lawsuits against judges, not to mention the financial barriers to legal representation, for clerks who earn entry-level salaries.[346] Many law firms in the jurisdiction might be hesitant to file suit against a judge, fearing for their firm's reputations, and still others might be conflicted out due to ongoing matters before the misbehaving judge. However, in contrast to the Office of Judicial Integrity provision, which specifies that representatives for workplace relations and employee dispute resolution will work in each circuit and in each courthouse,[347] the OEA section does not specify where OEAs will be located. There should be an OEA in each courthouse (including each Article I courthouse), and Section 7 should specify this.

6. Reimbursement of Treasury Department

In 2019, Congresswoman Jackie Speier (D-CA) introduced the Congressional Accountability Act (CAA) Enhancement Act, in which she reintroduced two provisions that had been dropped from similar Title VII legislation in the previous Congress.[348] One

346. See *supra* Part III for a discussion about barriers to accessing legal counsel. Notably, the JAA (H.R. 4827 § 8(i)(2)(b)) provides for reimbursement to complainants "upon request" in certain circumstances, using "funds appropriated to the Federal judiciary," for "those reasonable expenses, including attorneys' fees, incurred by that complainant during the investigation." H.R. 4827 § 8(i)(2)(b). While it is unfortunate that this only applies "if the complaint was not finally dismissed" (as many complaints are dismissed, and complainants still incur substantial costs), this is a strong provision. H.R. 4827 § 8(i)(2)(b). More funds should be available to reimburse complainants for legal fees. Complainants should not be forced to incur substantial financial costs associated with judges' misconduct.

347. *See* H.R. 4827 § 5(c)(1)(B).

348. *See* H.R. 5464, 116th Cong. (2019). In 1995, Congress passed the Congressional Accountability Act, which extended Title VII protections to congressional employees. *See* Congressional Accountability Act, 2 U.S.C. § 1301. At the time, the Judicial Conference opposed extending Title VII protections to judiciary employees, in part because "[t]he judiciary currently provides its employees with protections similar to those enumerated in" the statutes. Jud. Conf. of the U.S., Study of Judicial Branch Coverage Pursuant to the Congressional Accountability Act of 1995, 2–3 (1996) (invoking "judicial independence"). In response to several members of Congress being accused of sexual harassment in 2018, Congress determined that additional employment protections were needed, and passed the Congressional Accountability Act of 1995 Reform Act. *See* Congressional Accountability Act of 1995 Reform Act, Pub. L. 115–397, 132 Stat. 5297 (2018); *see also* Press Release, Amy Klobuchar, U.S. Senator, Klobuchar, Blunt Bipartisan Sexual Harassment Reform Measure Takes Effect with New Cong. (Jan. 7, 2019), https://www.klobuchar.senate.gov/public/index.cfm/2019/1/klobuchar-blunt-bipartisan-sexual-harassment-reform-measure-takes-effect-with-new-congress [https://perma.cc/DMZ6-C6VX]; Robin Opahl, *Here Are the 7 Congressmen Accused of Sexual Misconduct Since #MeToo*, Roll Call (Apr. 27, 2018, 2:00 PM), https://www.rollcall.

of the provisions would require members of Congress to reimburse the Treasury Department when settlements are paid out to victims of their misconduct.[349] Such a reimbursement provision should be added to the JAA, so that judges, and not taxpayers, are financially accountable for their misconduct. Many judges have judicial malpractice insurance, but that does not mean that they should not be personally financially accountable for their poor conduct.[350]

7. Retroactive Application

The JAA should apply retroactively to include judiciary employees who (1) are currently engaged in legal action against a judge; (2) have already filed a complaint against a judge; (3) have already contacted an EEO counselor regarding a judge; or (4) have initiated the EDR process against a judge.[351] The main argument against retroactively applying civil legislation is that individuals should be on notice of the laws that apply to them.[352] However, for clerks who have already initiated some kind of legal action, complaint, or employee dispute resolution against a judge, the judges involved are already on notice of proceedings against them, so a Title VII lawsuit would not necessarily be a surprise to them. Furthermore, both federal and D.C. judges are on notice, based on their judicial codes of conduct, that they are prohibited from harassing their clerks.[353] It is not the rules themselves, but rather a commitment to enforcing the rules, that might surprise them.

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com/2018/04/27/here-are-the-7-congressmen-accused-of-sexual-misconduct-since-metoo. Executive Branch employees are covered under Title VII, pursuant to a 1995 law. *See* Presidential and Executive Office Accountability Act, P.L. 104–331, 110 STAT. 4053. The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 strengthened antidiscrimination laws for federal agencies. *See Title VII of the Civil Rights Act of 1964*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964; Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. 107–174, 116 Stat. 566.

349. *See* Congressional Accountability Act Enhancement Act, H.R. 5464, 116th Cong. (1st Sess. 2019).

350. *See* David R. Cohen, *Judicial Malpractice Insurance—The Judiciary Responds to the Loss of Absolute Judicial Immunity*, 41 Case W. Rsrv. L. Rev. 267, 276–80, 285–88 (1990) (explaining that state court judges are subject to civil liability under § 1983 and that, in response, judges began to obtain judicial malpractice insurance).

351. *See* Cong. Rsch. Serv., Retroactive Legislation: A Primer for Congress (2019), https://sgp.fas.org/crs/misc/IF11293.pdf [https://perma.cc/AQ6E-NNWY].

352. *See* Jan G. Laitos, *Legislative Retroactivity*, 52 Wash. U. J. Urb. & Contemp. L. 81, 101 (1997).

353. *See* Guide to Judiciary Policy, Ch. 2: Code of Conduct for United States Judges, *supra* note 167; *see also* D.C. Courts, *supra* note 127.

If the JAA applied retroactively, it would capture at least some law clerks currently engaged in less effective means of legal action or dispute resolution.[354] Furthermore, from a fundamental fairness perspective, since judges have been excluded from Title VII for decades, they have been getting away with egregious workplace misconduct for decades. It is only fair that the JAA endeavor to remedy past harms for complainants currently attempting to seek justice for themselves and accountability for the judges who harassed them.

8. Data Transparency

The judiciary should lift the veil of secrecy surrounding both judicial complaints and clerkship hiring by eliminating most confidentiality protections for judges and making data transparent and publicly available. Under Section 8 of the JAA, the Judicial Conference would be required to publish some data about the types and outcomes of judicial complaints.[355] After a complaint is filed within a judicial circuit, the JAA specifies that the Judicial Conference would be notified within thirty days, and the complaint would be redacted, except for the identity of the judge.[356] At this stage, the judge's identity could only be redacted with the complainant's consent.[357] However, for the reports that the Judicial Conference submits to Congress, the judge's personal identifying information would be redacted.[358] Therefore, the publicly available data would not identify the judges against whom the complaints were filed, nor whether they were filed by judicial employees or some other source. Existing annual data about judicial complaints are exceedingly vague and secretive.[359] This ongoing insistence on confidentiality fails to address the problem of judicial misconduct. Judicial complaints should be public, regardless of their outcomes.[360]

354. *But see* Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (holding that the 1991 amendment to the Civil Rights Act, enabling litigants to seek damages, did not apply to a litigant whose case was pending appeal when the legislation was passed).

355. *See* H.R. 4827 § 8(2)(A).

356. *See id.* § 8(c)(1) (reports to Judicial Conference).

357. *See id.* § 8(c)(1)(C) (redaction of personally identifying information).

358. *See id.* §§ 8(2)(A)-(B). However, § 8(d) does specify that the complainant may disclose information related to their judicial misconduct complaint.

359. *See Caseload Statistics Data Tables*, *supra* note 45; *see also*, Biskupic & Kessler, *supra* note 45. Judiciary leadership has been notoriously unwilling to collect additional data—for example, to conduct a workplace culture assessment to determine how widespread harassment in the judiciary truly is. *See* Duff Responses, *supra* note 47, at 12–16.

360. *See* Sahl, *supra* note 166 (arguing that, while judges may prefer

Furthermore, prospective law clerks, as well as other interested parties, including attorneys and litigants, should be able to search a judicial misconduct database in which judges are identified by name. The anonymized data that the JAA mandates would help to strengthen arguments about the scope of the problem of judicial misconduct. However, without specific information about misbehaving judges, collecting this data does nothing to address, prevent, or punish misconduct by individual judges.

This proposed judicial misconduct database should also incorporate Heidi Bond's suggestion from her 2018 letter to the Senate Judiciary Committee, in which she argued that the judiciary should keep track of and publish data on judges with a high number of clerks who leave their clerkships before the end of their scheduled clerkship period.[361] This data would suggest that either law clerks are quitting partway through their clerkships because they are unhappy (or because they are experiencing harassment), or that the judges are suspiciously firing law clerks after committing to a one- or two-year clerkship term of appointment. This information would help law clerks to avoid misbehaving judges who might not otherwise be captured in judicial complaint data, and it would also help judiciary leadership to identify misbehaving judges requiring remedial action and punishment.

The argument against this level of public disclosure is that confidentiality protects judicial impartiality and independence.[362] This argument is unpersuasive. Federal judges are public figures, and they should be held publicly accountable for their actions. If they would like to publicly respond to allegations of judicial misconduct, they are free to do so. However, this oversized emphasis on confidentiality in the judicial complaint system protects misbehaving judges. Federal judges receive many benefits: life tenure, high salaries, and sometimes fame. However, when they accept their lifetime appointments, judges also accept a certain level of public scrutiny that accompanies their status as public figures. Judges' actions—including their treatment of employees and litigants—should be

secrecy, data transparency benefits the public). Specifically, "[p]roponents of the [Judicial Conduct and Disability] Act's confidentiality provisions begin by arguing that the vast majority of complaints against judges are not meritorious . . . [they] then argue that nonmeritorious complaints pose a serious threat to the privacy and reputations of individual judges." *Id.* at 225.

361. *See* Letter from Heidi S. Bond, *supra* note 57.

362. *See* Sahl, *supra* note 166, at 227 (explaining that advocates for confidentiality argue that judges will be "intimidated by the threat of complaints and will compromise their impartiality or independence by currying favor with litigants and other parties who might seek retribution").

subject to review. Furthermore, attorneys, law clerks, and litigants appearing before and interacting with judges have a right to know about judges' misconduct.

Similarly, Section 4 of the JAA empowers the CJI to collect and report similar data related to EDR complaints.[363] This data should also be nonconfidential and publicly available, for the same reasons that formal judicial complaints should be publicly available.

On the other hand, if the complainant in either a formal judicial complaint or an EDR complaint requests that the complaint remain confidential, that request should be strongly considered. Alternatively, the complainant's identity could be anonymized, such that the complaint would be public, but not the complainant's identity. However, as long as the judicial complaint process emphasizes secrecy above all else, it sends a message to complainants that they should be ashamed of what happened to them.

Similarly, data on clerkship hiring collected and reported by the CJI under Section 4 of the JAA should be public and should identify the individual judges who are not interviewing and hiring diverse law clerk populations.[364] For the same reasons that judges should not be able to hide behind confidentiality as a way to evade accountability for disciplinary complaints, judges should also not be permitted to conceal their hiring data. Judges who insist on hiring exclusively white, male clerks should, at the very least, be held publicly accountable for their racism and sexism.

9. Oversight of Law Clerk Hiring and Judge/Clerk Interactions

The JAA takes a meaningful step toward addressing weaknesses in law clerk hiring by compiling data on diversity in clerkship hiring, including data about the types of individuals interviewed and hired for clerkships.[365] However, the Chief Judge of each courthouse should be empowered to exercise meaningful oversight over law clerk hiring, by publishing explicit hiring guidelines and disciplining judges who refuse to embrace diversity in hiring.[366] This might be more difficult in small, remote courthouses with only a

363. *See* H.R. 4827, 117th Cong. §§ 4(f)-(g) (2021).

364. *See id.* § 4(f)(8).

365. *See id.* § 2(c) (amending 28 U.S.C. § 964(c)). Specifically, "[o]n an annual basis, the judicial council of each circuit shall submit to Congress a report that includes, for the previous year, hiring statistics for the circuit" and for the Federal Defender's Office within the circuit. *Id.*

366. For federal law clerk hiring, these policies would likely need to be communicated to OSCAR, the online clerkship application system. It would also be helpful for each courthouse to have a central law clerk supervisor whom clerks could seek out for advice.

few judges. However, many courthouses have more than just a few judges, and the smallest courthouses could be grouped with other courthouses in larger districts for oversight purposes. This would ensure that marginalized groups are not excluded from the clerkship hiring process. Law clerk hiring should be centralized, standardized, and regulated, similar to the hiring guidelines applied to many other government jobs.

The amount of authority that the Chief Judge exercises varies from courthouse to courthouse. For example, the Chief Judges in D.C. Superior Court and the D.C. Court of Appeals are not empowered with disciplinary authority. Because D.C. judges are Senate-confirmed, their "boss" for disciplinary purposes is the President of the United States, and not the Chief Judge of the courthouse.

The data compiled by the JAA's reporting requirements would enable the Chief Judge to ascertain which judges are not hiring enough nonwhite, nonmale clerks. The Chief Judge could then meet with these judges to address the problem. This type of oversight should be ongoing, and judges' law clerk hiring should be reviewed on at least an annual basis. There should also be formal disciplinary policies in place within each courthouse—for example, reassigning a judge's cases, or removing the judge's hiring power altogether—for judges who refuse to comply.

Judges should also face several levels of oversight—not just from judiciary leadership, but also from the Chief Judges in the courthouses where they work—over their interactions with employees. Courthouses are government employers, not private businesses, and judges should face oversight in their interactions with employees similar to the oversight that other government employers receive.

The argument against increased oversight in hiring and supervising is that judges have always enjoyed exclusive hiring and supervisory authority for their clerks. Judges and law clerks have a unique, close relationship.[367] Judges need clerks who they work well with, and who they can trust. They are in the best position to make these determinations. Especially for judges who have been on the bench for many years, they know what they are looking for in clerks. Using these arguments to support unconditional deference to judges' hiring and supervisory decisions contributes to the problem of a persistent lack of diversity in the law clerk population.[368]

367. *See supra* Introduction; *see also* Kozinski, *supra* note 41 (Judge Kozinski's view on the judge/law clerk relationship).

368. *See supra* Part I.

Other government employers face oversight in their hiring, and they are still able to find employees whom they can trust.[369]

C. *Opposition to the JAA*

The JAA, which was introduced in July of 2021, already faces opposition from the Judicial Conference of the United States.[370] The Judicial Conference alleges that the bill "interferes with the internal governance of the Third Branch" and that it would impose "intrusive" requirements on the Judiciary.[371] In letters to the House and Senate Judiciary Committees, the Secretary of the Judicial Conference pointed to strengthened EDR programs and a Federal Judiciary Workplace Conduct Working Group tasked with improving workplace policies.[372] The letter described the federal judiciary as an "exemplary" workplace.[373] More recently, Chief Justice Roberts echoed these sentiments, claiming that the courts are able to self-police.[374]

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369. Much of the federal government's hiring is standardized and overseen via the employment website USAJOBS. *See* USAJOBS, https://www.usajobs.gov (last visited May 1, 2022).

370. *See* Seth Stern, *U.S. Courts Oppose Harassment Shield Bill for Judiciary Workers*, Bloomberg L. (Aug. 26, 2021, 6:22 AM), https://news.bloomberglaw.com/us-law-week/u-s-courts-oppose-harassment-shield-bill-for-judiciary-workers [https://perma.cc/GG7M-WJRA].

371. *Id.*

372. *See* Letter from Hon. Roslynn R. Mauskopf, Sec'y, Jud. Conf. of the U.S., to Hon. Henry C. 'Hank' Johnson, Jr., Chair, Comm. on the Judiciary (Aug. 25, 2021), https://www.uscourts.gov/sites/default/files/house_letter_jaa.pdf [https://perma.cc/2SDW-HYEJ] [hereinafter Letter to Hon. Hank Johnson, Jr.]. An identical letter was sent to the Chair of the Senate Judiciary Committee, Senator Dick Durbin. *See* Letter from Hon. Roslynn R. Mauskopf, Sec'y, Jud. Conf. of the U.S., to Hon. Dick Durbin, Chair, Comm. on the Judiciary (Aug. 25, 2021), uscourts.gov/sites/default/files/senate_letter_jaa.pdf [https://perma.cc/7K8N-3DRC] [hereinafter Letter to Hon. Dick Durbin].

373. *See* Letter to Hon. Hank Johnson, Jr., *supra* note 372. Federal judges are generally opposed to congressional oversight, and some have publicly argued that the reforms currently in place are sufficient. *See* M. Margaret McKeown, *The Judiciary Steps Up to the Workplace Challenge*, 116 Nw. U.L. Rev. 275 (2021) (critiquing Litman & Shah, *supra* note 96).

374. *See* Chief Justice John G. Roberts, Jr., *supra* note 49. More recently, the Federal Judiciary Workplace Conduct Working Group released a Report to the Judicial Conference the night before a House Judiciary Subcommittee hearing to discuss the JAA, suggesting a few hollow "reforms," primarily to the EDR Plan. *See* Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States (Mar. 16, 2022), https://www.uscourts.gov/sites/default/files/report_of_the_workplace_conduct_working_group_-_march_2022_0.pdf. These reforms would not make the type of meaningful changes for which the author advocates. The following day, two Judicial Conference representatives, Judge M. Margaret McKeown and

Judiciary leadership's protestations are unpersuasive. The judiciary is a workplace crying out for reform. As explained in Parts I and II above, the judiciary has proven itself unable to self-regulate, and it is time for outside regulators to impose meaningful reforms. As misconduct allegations and investigations into other insular organizations like police unions[375] and the military[376] have shown, attempts to self-regulate often fail. Law clerks and other judiciary employees should not be held hostage by obstinate judiciary leadership, nor should they have to continue to suffer the consequences of these institutional failures.

1. Congressional Outreach and Likelihood of Success

For law students considering clerkships, young attorneys just starting their careers, seasoned trial attorneys who frequently interact with judges—including both those who look back on their clerkships fondly, and those who do not—and anyone else who cares about judicial legitimacy,[377] few reforms are more urgent or more necessary to address deficiencies in the legal community than passing the JAA. The JAA will not fix everything.[378] It is impossible to legislate away workplace harassment, and deeper cultural change is necessary. However, this legislation—and the public advocacy that it inspires—could create the necessary groundswell to make real and lasting change.[379]

Judge Julie A. Robinson, testified at the Subcommittee hearing, again offering the same unpersuasive claims. *See Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2022), https://docs.house.gov/meetings/JU/JU03/20220317/114503/HHRG-117-JU03-Wstate-RobinsonJ-20220317.pdf [https://perma.cc/Q2ZP-6EW4] (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).

375. *See* Nicole Dungca & Jenn Abelson, *When Communities Try to Hold Police Accountable, Law Enforcement Fights Back*, Wash. Post (Apr. 27, 2021), https://www.washingtonpost.com/investigations/interactive/2021/civilian-oversight-police-accountability.

376. *See* Bill Chappell, *Military Panel Urges Taking Sexual Assault Cases Out of Commanders' Control*, NPR (Apr. 23, 2021, 11:16 AM), https://www.npr.org/2021/04/23/990174459/military-panel-urges-taking-sexual-assault-cases-out-of-commanders-control.

377. Advocates have pointed out that attorneys are speaking out about this issue *because* they care about the judiciary, and because they believe that it is capable of changing. *See* Broken Law Podcast, *supra* note 202.

378. See generally *supra* note 253 for articles discussing whether Title VII is the appropriate vehicle for modern day gender discrimination claims.

379. Both the House and Senate Judiciary Committees expressed

Currently, the JAA is unlikely to be enacted, according to GovTrack.[380] Even if the JAA passes through the House, it could die in the Senate, where it needs sixty votes—including at least ten Republican votes—to overcome the filibuster. If congressional elections in November 2022 upset the balance of power in the House of Representatives, passing the JAA could become even more difficult. However, interested parties should keep speaking up, sharing their stories, and calling and writing to their members of Congress to voice their support for the JAA.[381]

Even if the JAA does not pass, shining a public spotlight on the issue of harassment in the judiciary is critical. Trial attorneys, law clerks, and court employees who witness or experience harassment or other misconduct by judges should speak up, file complaints, and exert the necessary public pressure to remove more harassers from the bench. Other judges also have an important role to play. Judges instinctively protect their own. However, judges who witness their colleagues' misconduct have a duty to speak up.[382] Public con-

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interest in holding hearings on the Judiciary Accountability Act in 2022. The House Judiciary Committee held a hearing on March 17, 2022. *See* Ann E. Marimow, *Former Judiciary Workers Urge Congress to Protect Court Employees from Discrimination and Harassment*, Wash. Post (Mar. 17, 2022), https://www.washingtonpost.com/politics/2022/03/17/court-workers-harassment-discrimination. The author participated in this hearing by submitting a Statement for the Record. The author appreciates the House Judiciary Committee's interest in the issue of harassment in the judiciary, and she urges the Senate Judiciary Committee to hold a similar hearing later this year. The hearing should feature testimony from law clerks who have experienced harassment. The best messengers on this issue are those who can speak from personal experience.

380. *See H.R. 4827: Judiciary Accountability Act of 2021*, GovTrack, https://www.govtrack.us/congress/bills/117/hr4827 [https://perma.cc/ESF6-6Q2G].

381. The author was heartened to see that two of the Judiciary Accountability Act's early co-sponsors were her home state representative, Congresswoman Madeleine Dean (D-PA), and her current representative, Congresswoman Eleanor Holmes Norton (D-DC).

382. *See* D.C. Courts, *supra* note 127 (delineating circumstances in which judges are obligated to report another judge's disability or impairment, or judicial misconduct, to "the appropriate disciplinary authority"). *See id*. at Rule 2.15, Comment 1; *see also id*. at Rule 2.14 ("A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program."); *id*. at Rule 2.15 ("(A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority . . . [and] (C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.").

fidence in the judiciary—and judicial legitimacy—depends on it. It hurts the reputations of all judges, even non-misbehaving judges, if the judiciary is known for rampant, unchecked misconduct.[383]

VI. Alternatives to the Judiciary Accountability Act

The JAA is a strong piece of legislation that not only extends Title VII protections to judiciary employees, but also puts forth a variety of other robust and desperately needed reforms. However, two alternatives to the JAA are worth briefly discussing. The first would be a D.C. Courts-specific bill, which would include all the provisions of the JAA. The second reform would be to wrest control of the D.C. Courts from Congress entirely, and give both oversight over the D.C. Courts, and control over D.C. judicial appointments, to the D.C. Council and the D.C. Mayor. This Subpart engages with both proposals.

A. *Congress Could Pass a D.C. Courts-Specific Bill*

One alternative to amending the JAA to cover the D.C. Courts would be to draft a separate bill that applies only to the D.C. Courts. This bill would include all the provisions of the JAA—the Title VII protections, plus the provisions on judicial accountability, an Office of Employee Advocacy, and the data collection requirements. Furthermore, it would address the concerns, outlined in previous sections, that (1) because the D.C. Courts are not federal courts, and (2) because House and Senate Oversight Committees, rather than the House and Senate Judiciary Committees, regulate the D.C. Courts, the D.C. Courts should not be subject to the JAA, which originated from the House and Senate Judiciary Committees.

This is a viable alternative. The biggest concern is that it will be difficult enough to pass the JAA, and it will be even more difficult to pass a second bill later. Furthermore, there has historically been skepticism in Congress of D.C.-specific legislation, which might make a D.C. Courts-specific bill more difficult to pass.[384]

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383. According to Comment 1 of the Code of Judicial Conduct, a judge has an obligation . . . to report to the appropriate disciplinary authority the known misconduct of another judge . . . that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge . . . ignoring or denying known misconduct among one's judicial colleagues . . . undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. *See id*. at Rule 2.15.

384. *See, e.g.*, District of Columbia Courts Vacancy Reduction Act, H.R. 4778, 117th Cong. (2021). *See also* Flynn & Brice-Saddler, *supra* note 112; Flynn, *supra* note 301 (explaining that both D.C.-related legislation, and D.C. judicial nominees, languish in Congress).

B. *Congress Could Relinquish Control of the D.C. Courts*

Alternatively, Congress could relinquish control over the D.C. Courts entirely.[385] Oversight over the courts could be vested in the D.C. Council, and judicial appointments could be controlled by the D.C. Mayor, in conjunction with the D.C. Council.[386] This would mean that D.C. judges would no longer be Senate-confirmed, wresting from these judges some of the protections that make them so difficult to discipline and remove.[387]

The District of Columbia Courts Vacancy Reduction Act,[388] which was sponsored by Congresswoman Eleanor Holmes Norton (D-D.C.), was marked up by the House Oversight Committee in November 2021.[389] This compromise bill would enable D.C. judicial nominees to be seated after a thirty-day congressional review period, without requiring Senate confirmation.[390] However, it would not alter the role of the Judicial Nomination Commission (JNC) or the White House in the nomination process; it would only bypass the Senate confirmation process.[391]

This is a good idea, but the bill should go much further: it should take nomination power away from the JNC and the White House and give it to the D.C. Mayor, perhaps with advice from the D.C. Council. The bill should also restructure the JNC and the CJDT, both of which engage with Congress, and both of which are in desperate need of oversight and reform. The D.C. Mayor and the D.C. Council should be in charge of nominating members to the JNC and commissioners to the CJDT.[392] Furthermore, both the

385. *See, e.g.*, District of Columbia Courts Home Rule Act, H.R. 2769, 116th Cong. (2019) ("To amend the District of Columbia Home Rule Act to permit the Council of the District of Columbia to enact laws with respect to the organization and jurisdiction of the District of Columbia courts.").

386. *See supra* notes 139–142 (discussing restructuring the D.C. Courts in light of persistent criticism and calls for reform).

387. If D.C. judges were no longer Senate-confirmed, removal authority could be vested in either the Chief Judges of the D.C. Superior Court and the D.C. Court of Appeals, the D.C. Council, the D.C. Mayor, a restructured judicial regulatory body, or some combination of these.

388. District of Columbia Courts Vacancy Reduction Act, H.R. 4778, 117th Cong. (2021). H.R. 4778.

389. *See* Press Release, *supra* note 140.

390. *See id.*

391. *See id.*

392. Currently, JNC members and CJDT commissioners are nominated through convoluted, politicized processes, with input from the White House, the D.C. Mayor, the D.C. Council, the D.C. Bar, and the District Court for the District of Columbia. *See JNC Members*, Jud. Nomination Comm'n, jnc.dc.gov/page/jnc-members [https://perma.cc/2F52-SJSP]; *see also Commission Membership*, *supra* note 130.

JNC and the CJDT should be staffed with private citizens, not with judges. Appointments to the JNC[393] and CJDT[394] should include both non-attorneys and attorneys with non-judicial facing positions. The JNC and the CJDT should no longer be cogs in D.C.'s judicial pipeline.

Additionally, both appointment and reappointment authority for D.C. judges should be handled by the newly structured JNC. The CJDT should serve a solely judicial misconduct investigatory function. Its commissioners should meet more than once a month to review complaints against judges. While CJDT commissioners serve only part-time, monthly meetings is not often enough, considering the time sensitive nature of the issues being raised, and the immense impact that judges have on complainants' lives. With great power, as the CJDT commissioners have, comes the responsibility to exercise it effectively. Additionally, the CJDT should include more than seven commissioners (plus a Special Counsel), and they should serve for shorter terms. CJDT commissioners can currently be reappointed at the end of their six-year terms, and several CJDT commissioners have served for multiple six-year terms.[395] The CJDT rules should be amended such that commissioners cannot be reappointed. New commissioners, who have fresh outlooks on judicial misconduct, are desperately needed.

Furthermore, the CJDT's proceedings and decisionmaking processes should be transparent, and the CJDT should provide clearer rules, policies, and procedures for both complainants and judges to follow.[396] This would increase public confidence in the CJDT.[397] At the very least, CJDT processes should be in line with the federal courts' processes, which are themselves overly and unnecessarily secretive.[398]

393. *See Nomination and Appointment of JNC Members*, Jud. Nomination Comm'n, https://jnc.dc.gov/page/nomination-and-appointment-jnc-members [https://perma.cc/CMQ5-LYPB] (describing the current appointment process to the JNC).

394. While the CJDT membership does include several non-attorneys, there appears to be a power disparity between attorney and non-attorney commissioners within the CJDT. For the current appointment process to the CJDT, see *Commission Membership*, *supra* note 130.

395. *See id.*

396. See *supra* Part III for a discussion and critique of CJDT policies and procedures.

397. Among D.C. attorneys with whom the author has spoken, the CJDT is perceived to be ineffective. When the author filed a complaint with the CJDT, multiple attorneys warned her that she would likely be disappointed by the CJDT's response. Documentation on file with the author.

398. See *supra* Part III for a discussion and critique of federal courts' disciplinary policies and procedures.

This type of bill is unlikely to pass through both chambers of Congress, for several reasons. First, similar to the concerns previously discussed about a D.C. Courts-specific JAA, many members of Congress are skeptical of D.C.-specific legislation. Furthermore, Congress has been historically unwilling to relinquish control of the D.C. Courts, and it is unlikely to change positions anytime soon.[399]

Despite the challenges posed by this type of legislation, members of Congress, as well as the public, should continue to advocate for both legislation that would wrest control of the D.C. Courts from Congress, as well as a D.C. statehood bill.[400] D.C. statehood would make the D.C. Courts Home Rule Act moot. If D.C. were to become a state, the newly created governor of D.C. would appoint D.C. state court judges, and they would no longer be Senate-confirmed.

Conclusion

In late fall of 2021, I sat at the same desk in my Washington, D.C. apartment where I had tearfully drafted and filed my CJDT Complaint against the former judge in July 2021.[401] I reflected on the past few months—about everything I had been through, and everything I had learned along the way.

I thought about how an email to a podcasting professor led me to my attorneys, who were willing to take on a tough but righteous fight when some attorneys thought that nothing could be done, and others were hesitant to go up against a judge in the jurisdiction in which he presided and they practice. I thought about all the things my attorneys had helped me with that I could not do for myself, even as an attorney. Three years of law school had not prepared me for what it would be like to be a complainant myself.

While the CJDT markets itself as accessible to the public, I could not have represented myself before the CJDT. I knew that mistreated law clerks (and litigants) who were unable to find counsel were shut out of the D.C. judicial complaint process. Complaints

399. In fact, the unique power sharing structure among the JNC, the White House, and the CJDT is partially the result of political friction between Congress and the D.C. Council.

400. *See* Washington, D.C. Admission Act, S. 51, 117th Cong. (2021).

401. The former judge was "involuntarily retired" by the CJDT in 2021, following an investigation. Documentation on file with the author. It is rare for the CJDT to take such serious disciplinary action against a Senate-confirmed judge. After the conclusion of the CJDT investigation, the author reached an agreement with the former judge. The former judge agreed to "clarify" some but not all of his outrageous statements made in the negative reference to the D.C. USAO. In exchange, the author agreed not to publicly identify the former judge by name.

against misbehaving D.C. judges went unspoken, and corrupt D.C. judges went unpunished, because the CJDT is inaccessible to many, and mishandles misconduct investigations for others.

The few members of the CJDT with whom I interacted seemed skeptical of my claims. Most of my conversations were with an unelected, un-appointed Special Counsel, who filtered my complaint to the CJDT commissioners. I could not make arguments directly to most of the commissioners, nor could they speak with me and personally ascertain my credibility. I could not question any witnesses—the CJDT would not even tell me who the witnesses were. Their processes were dysfunctional from start to finish, but I was grateful for my attorneys' support along the way.

Not being believed felt like a gut punch every single day. 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 understood that my complaint would not be anonymous. I had no reason to be anything less than fully truthful.[402] I was willing to accept the then-judge's ire, and to put myself at further risk of retaliation and reputational harm, as a result of filing a complaint. All I asked was that the CJDT consider corroborative evidence from additional witnesses. Yet the CJDT seemed to be searching for witnesses to disprove my claims.[403] It felt like the CJDT—staffed primarily with judges and attorneys who interact with judges—was set up to protect misbehaving judges, no matter how much misconduct they commit.[404] They protected the former judge until the bitter end. I understood that this was not unusual for a judicial investigation, considering that the then-judge's friends and colleagues in the D.C. legal community were the ones considering whether to discipline him.

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402. Workplace harassment cases are notoriously difficult to prove, since there are often very few witnesses. In a he said/she said dispute, when the "he" is in a position of power and the "she" cannot find witnesses willing to stick their necks out and assume professional risk by standing with her, it is easy for decisionmakers to side with the abuser. *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. Pa. L. Rev. 1 (2017).

403. False allegations are rare in gender discrimination and sexual harassment cases. Victims understand that there are enormous risks, and relatively few rewards, for complaining about a powerful superior. And yet, victims are notoriously disbelieved. *See generally* Deborah Epstein, *Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment*, 51 Seton Hall L. Rev. 289 (2020).

404. There are several non-attorney CJDT commissioners, but the author did not interact with them.

I was dismayed that this was the treatment the CJDT felt it owed to a law clerk coming forward to blow the whistle on judicial misconduct. I felt victimized all over again. I understood that the CJDT was not the ideal forum to seek relief, nor could it adjudicate my legal dispute with the then-judge. However, I had very few options. And once the judge was involuntarily retired from the bench, eliminating the CJDT's and D.C. Courts EEO Office's jurisdiction over him, I had even fewer.

I had reached out to dozens of attorneys who had appeared before the judge, searching for anyone who would come forward and speak with the CJDT. I subjected my own reputation in the D.C. legal community to scrutiny. I heard story after story about the judge's misconduct. Yet every attorney I spoke with said that they would never file a complaint about a sitting judge. They said that would be "career suicide" and the judge would definitely retaliate against them.[405] I heard these things and thought to myself, *these are the attorneys with the firsthand information about the judge. If they do not come forward, he will never be disciplined*.[406]

The CJDT later publicly claimed that they had conducted a thorough and fair investigation.[407] I knew this was untrue. The CJDT's investigation was incomplete at best, incompetent and nefarious at worst. The former judge later tried to weaponize the CJDT's language against me, in order to disclaim responsibility for his misconduct. The CJDT defended the former judge, at my expense. Based on my conversations with judges, court employees, and attorneys, I knew that the CJDT's investigation barely scratched the surface of the substantial misconduct the former judge committed during his five years on the bench.

Ever since I embarked on the judicial complaint process in July 2021, I often thought that I did not want to be an attorney anymore. I became convinced that our imperfect legal system was rigged against victims. My experiences had exposed enormous flaws not just in the justice system, but also in the legal community—a community in which I had been an enthusiastic participant. The silence among many in the face of despicable misconduct was deafening. I had followed all the conventions the legal profession expects—I had attended a top twenty law school, served as a law journal editor, interned in four different Department of Justice

405. Correspondence on file with the author.

406. *See* Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. Pa. L. Rev. 243, 258 (1993) ("Employees who work alongside the judge on a daily basis cannot be expected, except in the most unusual of circumstances, to step forward and complain about that judge's conduct.").

407. Documentation on file with the author.

offices, and obtained a prestigious clerkship—and yet, none of it seemed to matter. I did not want to participate in a system that perpetuates injustice, but I also did not want the judge to have the power to run me out of town, or to run me out of the profession.

Many attorneys tried to convince me not to speak publicly. Several female attorneys blamed me for not being able to make things work with the judge. They mirrored the judge's language and told me that I had a "personality issue." One attorney told me that I must have done *something* wrong, because the judge "hired me in the first place." I tried not to get upset, even though blaming the victim, especially by female attorneys, is deeply harmful to the profession, not to mention to victims. Others told me that what happened to me was not serious enough to be worth sharing.

I knew that my experience of harassment and retaliation by a member of the judiciary was not rare. However, my willingness to write and speak publicly about this mistreatment is very rare. I am not bound by a restrictive nondisclosure agreement (NDA), which would have protected the judge's reputation and legacy, while silencing me from standing up for myself and pointing out gross injustices.[408] And while it saddens me to think about the individuals in whom I had confided—and whom I trusted—during my clerkship, who stood by the judge, it does not lessen my resolve to speak out.

I often wondered how I had gotten from August 2019, when I started my clerkship as an eager aspiring prosecutor, clerking for a Senate-confirmed judge, to here. The disgraced former judge was no longer on the bench. He had been ordered by the CJDT into "involuntary retirement"[409] after an investigation.[410] And I was on

408. Nondisclosure agreements (NDAs) are overused in the legal profession, and they are not appropriate for law clerk legal disputes. *See generally* Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. Rev. 2507 (2018) (arguing that NDAs are overused and should be more highly regulating in sexual harassment cases); *see also* Joan C. Williams, Jodi L. Short, Margot Brooks, Hilary Hardcastle, Tiffanie Ellis, & Rayna Saron, *What's Reasonable Now? Sexual Harassment Law after the Norm Cascade*, 2019 Mich. State L. Rev. 139 (2019); Gilat Juli Bachar, *The Psychology of Secret Settlements*, 73 Hastings L.J. 1 (2022) (using data analysis to argue that harassment victims' willingness to sign NDAs is related to both their financial status and the severity of the harm).

409. *See* D.C. Code § 11–1526(b) (2022) (defining involuntary retirement).

410. The CJDT's judicial misconduct investigatory process is a burdensome and lengthy endeavor that is inaccessible to the typical pro-se or low-income survivor of harassment (which can include not just law clerks but also litigants and other judiciary employees). The CJDT process was very difficult for the author, an attorney herself, who had two excellent attorneys

a totally different career path. I felt miles away from my dream job as a homicide prosecutor, an aspiration that sustained me through so many exhausting nights in law school and so many horrible days as a law clerk.

I thought about the evening I received word that the judge's involuntary retirement was official. I read the judicial discipline order alone in my office. I found the outcome bittersweet and insufficient, considering the enormity of the former judge's misconduct. I was frustrated that so many stories about the judge's misbehavior had been told to me in confidence. I still hope these stories will eventually come to light.

I thought about the former judge's inflammatory negative reference to the D.C. USAO. The judge had already agreed to take administrative leave, pending an investigation, when he had filed the negative reference. The former judge had taken time out of his life to try to destroy my career and ruin my reputation. The USAO had unquestioningly taken his word. They did not ask any follow-up questions of the then-judge. They did not afford me the opportunity to defend myself. I wished the CJDT knew what the former judge had said about me in the reference when they were evaluating my gender discrimination and harassment claims, but they told me that the negative reference was outside the scope of their investigation and, as far as I know, they did not look into it.

The former judge has since agreed to "clarify" his malicious negative reference. He addressed some but not all of his inflammatory statements in a message to the USAO that accepted no responsibility for his actions. However, the D.C. USAO cannot "un-know" what the former judge said about me initially, and I may never be able to work as an AUSA in D.C.

There is nothing that the former judge can do to repair the damage he has done to my life, career, and reputation. Furthermore, the fact that he could dangle the reference—and the possibility that I might one day be able to secure an AUSA position after all—in order to exact concessions from me, is evidence of the scope of the problem of judicial misconduct. The former judge should never

representing her before the CJDT. The CJDT is not empowered to redress the continued emotional and financial harms that a complainant will continue to face while their CJDT complaint is pending. The CDJT is only empowered to potentially discipline—through public rebuke or removal—a misbehaving judge. Additionally, a complainant lacks several procedural protections during the process: there is no appeal process, nor is the CJDT required to issue written findings if it dismisses a complaint. Finally, due to the shroud of secrecy under which the CJDT operates, litigants are unlikely to realize that a judge is being investigated for misconduct and that they might want to file a complaint as well.

have filed the negative reference, both because he had previously agreed to provide a neutral reference and, more importantly, because his statements were untrue and misleading. The former judge expertly phrased his statements to maximally harm me, while limiting my ability to raise a tort claim against him. No employer—not even a Senate-confirmed judge—should be able to exert unchecked power over former clerks' lives, careers, and reputations, nor should they be able to disparage their clerks with impunity.

I thought about what I might be giving up by deciding to write and speak publicly. Some career opportunities would likely be foreclosed to me. Even after the former judge's "clarification," I might never secure my dream job as an AUSA. Government employers might decide that I was too controversial for government service, especially in a job where I would interact with judges every day.

I knew that it would make some in the legal profession uncomfortable to hear me speaking this way about a former judge. It might cause judges before whom I appeared to react harshly and retaliate against me. I probably will never understand the full extent to which I experience retaliation in the legal profession.[411]

I knew in July 2021, when I filed my CJDT complaint, and I believe even more strongly today, that my story is worth telling. I hope my story will spur some desperately needed change. 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. The legal profession must undergo a culture shift, so that future clerks are not treated the way I was treated by some of my peers. And Congress should exercise meaningful oversight over the D.C. Courts and adjacent institutions, because the systems that protect misbehaving judges and mishandle judicial misconduct complaints must be reformed. The legal community's insistence on a culture of silence and blind deference to the judiciary protects judges' reputations, while silencing victimized clerks. By sharing my story, perhaps other law clerks will not have to go through what I went through during my clerkship, and what I continue to experience from the former judge years afterward.

When a law clerk comes forward to allege gender discrimination, harassment, and other misconduct against a judge, it is easy for those seeking to protect the status quo to brush off the allegations as a mere "personality conflict" between judge and clerk. However,

411. In Olivia Warren's Harvard Law Review essay, she explains that she might never know the full extent to which she is being retaliated against in the legal community, nor the extent to which opportunities have been foreclosed to her. *See* Warren, *supra* note 22.

clerks' allegations of judicial misconduct are not simply evidence of judicial discretion or heavy-handedness. Gender discrimination, harassment, retaliation, and other forms of judicial misconduct are serious and life-altering for those affected. Judicial regulatory bodies must take these allegations seriously.

There should not be a threshold number of clerks' allegations required, for their concerns to be robustly investigated. It should not take a groundswell of support, for clerks' claims to be taken seriously. Clerks should never be left wondering, *was what happened to me during my clerkship serious enough?*

The JAA would make vital and necessary changes to protect law clerks and other judiciary employees from discrimination and harassment. It would provide judiciary employees with the right to sue their harassers and achieve justice for themselves; it would make real strides toward judicial accountability by investigating and punishing judges who harass their clerks; and it would finally aggregate and publicize data on issues that have remained shrouded in secrecy for decades. However, the work does not stop there. Law clerks, their advocates, and other members of the legal community interested in undoing the systems that protect misbehaving judges should believe and affirm clerks. Furthermore, they should endeavor to create safe work environments in order to allow everyone to bring their full, authentic selves to work. It is time to take meaningful action to unrig a system that has allowed judges to get away with misconduct for far too long. Some judges may think they are accountable to no one, and that they are untouchable, but their days of acting with impunity are numbered.