THE ROLE OF ACCOUNTABILITY IN PRESERVING JUDICIAL INDEPENDENCE: EXAMINING THE ETHICAL INFRASTRUCTURE OF THE FEDERAL JUDICIAL WORKPLACE

SUSAN FORTNEY*

I
INTRODUCTION

For decades, public opinion polls revealed that respondents trusted the judiciary more than the other branches of government in the United States.[1] However, public trust and confidence in the judiciary is steadily declining, as indicated by an April 2023 poll in which 62% of respondents reported that they did not have "very much confidence or [had] no confidence at all in the Supreme Court."[2] Although various developments may have contributed to the loss of public confidence in the judiciary, the continuous barrage of news stories related to judges' alleged misconduct has likely played a role in the judiciary's loss of luster and the waning confidence in the U.S. Supreme Court. The title of a recent article by Ali Masood, "Judging the judges: Scandals have the potential to affect the legitimacy of judges – and possibly the federal judiciary, too" suggests that such scandals have "a strong potential to undermine public perceptions."[3] The

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* Stephen Alton University Professor & Law Professor, Texas A&M University School of Law. Professor Fortney thanks Sierra Ross for her excellent research assistance. She also thanks the Duke journal members, as well as Professors Bruce Green, Leslie Levin, and the other contributors to this symposium issue for their insights.

1. *See* Frank Newport, *Americans Trust Judicial Branch Most*, *Legislative Least,* GALLUP (Sept. 26, 2012), https://news.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx [https://perma.cc/KQ27-5CYV] (noting that the data reflected the same general pattern with the judicial branch on the top of the trust ranking since 2009).

2. Tori Otten, *Poll: Two-Thirds of Americans Don't Have Confidence in Supreme Court*, THE NEW REPUBLIC (Apr. 24, 2023, 11:57 AM), https://newrepublic.com/post/172144/poll-two-thirds-americans-dont-confidence-supreme-court [https://perma.cc/GVF9-MRUD]. "This is the lowest number since this poll was first conducted in 2018, when almost twice as many people said they had confidence in the court." *Id. See also* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/N2MN-626J] (noting that public confidence in the Supreme Court has been lower over the past 16 years than it was before).

3. Ali S. Masood et al., *Judging the Judges: Scandals have the potential to affect the legitimacy of judges and possibly the federal judiciary, too,* THE CONVERSATION (June 2, 2023), https://theconversation.com/judging-the-judges-scandals-have-the-potential-to-affect-the-legitimacy-of-judges-and-possibly-the-federal-judiciary-too-205817 [https://perma.cc/79CW-JKZD].

alleged misconduct ranges from Justice Clarence Thomas's financial dealings not reported on required disclosure forms to allegations of sexual assault against Justice Brett Kavanaugh. Investigative studies have also disclosed serious ethical lapses and missteps by the very jurists charged with exercising good judgment and the highest standards of professional conduct.[4]

Such negative publicity may spur jurists to act. This occurred after news reports exposed accusations that Judge Alex Kosinski, a prominent judge on the U.S. Court of Appeals for the Ninth Circuit, had subjected a number of judiciary employees and interns to inappropriate conduct and comments.[5] Following these news articles and a directive from Chief Justice John Roberts,[6] John Duff, who serves as the Director of the Administrative Office of the U.S. Courts and the Secretary of the Judicial Conference of the United States ("Judicial Conference"), appointed a Federal Judiciary Workplace Conduct Working Group ("Working Group").[7] Based on its study, deliberations, and data gathering, the Working Group released a forty-five-page report, plus appendices ("2018 Working Group Report") that recommended more than thirty specific changes.[8]

The judiciary moved quickly on the recommendations. Within fifteen months after receiving the 2018 Working Group Report, the Judicial Conference, the Administrative Office of the U.S. Court, the Federal Judicial Center, and the courts themselves acted on nearly all of the Working Group's recommendations.[9] The Working Group continued its examination of workplace concerns. In March

4. *See, e.g.*, James V. Grimaldi, Coulter Jones & Joe Paolazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL STREET JOURNAL (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 [https://perma.cc/JJC5-TEAM] (reporting on the results of an investigation that found that federal judges improperly failed to recuse themselves from 685 court cases around the nation since 2010).

5. Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct,* WASH. POST (Dec. 8, 2017, 5:27 PM), 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 [https://perma.cc/DZ9F-3K29] (reporting on the allegations of six women who were former law clerks and externs in the 9th Circuit) [hereinafter *Prominent Appeals Judge Accused*].

6. The 2017 year-end report of the Chief Justice Roberts stated that "events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune." C.J. JOHN ROBERTS, 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2017), https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf [https://perma.cc/A5VQ-V8QG].

7. FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP, REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 1 (2018), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [https://perma.cc/D7V9-CVY2] [hereinafter 2018 WORKING GROUP REPORT].

8. *Id.* at 1, 20–45.

9. FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP, STATUS REPORT FROM THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 3 (2019), https://www.uscourts.gov/file/document/workplace-conduct-working-group-status-report-september-2019 [https://perma.cc/3398-ERUM].

2022, it issued a second report that made nine additional recommendations to improve the judiciary's workplace policies and procedures.[10]

Nevertheless, questions persist on whether the existing procedures and policies adequately protect judiciary employees and promote ethical conduct. Most fundamentally, critics challenge the judiciary's reliance on internal processes for workplace complaints, asserting that the current regime does not provide meaningful remedies to employees harmed by misconduct.[11] Unlike employees in other branches of the federal government, federal civil rights and employment statutes do not protect most federal judiciary employees.[12] Although Congress enacted legislation to extend workplace protections to employees of the legislative and executive branches, the judicial branch largely remains exempt from the reach of federal antidiscrimination laws.[13] As a result, most employees of the judicial branch are currently unable to bring civil claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits discrimination based on race, color, religion, sex—including sexual orientation or gender identity—or national origin. To give employees of the federal judiciary the same rights provided to other federal government workers under the Congressional Accountability and Presidential and Executive Office Accountability Acts, critics of the current regime maintain that Congress should make the judiciary subject to Title VII and other employment discrimination statutes.[14]

Members of Congress have responded to calls for deeper examination of judicial handling of workplace misconduct. Following congressional hearings related to ethics reforms and the critical need for stronger workplace protections for court employees,[15] a group of legislators introduced the Judicial

10. FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP, REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, 20–6 (2022), https://www.uscourts.gov/sites/default/files/report_of_the_workplace_conduct_working_group_-_march_2022_0.pdf [https://perma.cc/4RSG-RMUK] [hereinafter 2022 WORKING GROUP REPORT]. The Working Group indicated that the recommendations were designed "to better measure how well the Judiciary's systems are functioning, to further strengthen policies and procedures, and to expand communication and training." *Id.* at 3.

11. *See infra* notes 58–60 and accompanying text. For one critic's identification of the problems with the current regulatory regime, see Aliza Shatzman, *Someone Is Actually Suing the Judiciary Over Sexual Harassment*, ABOVE THE LAW (Dec. 19, 2023, 11:17 AM), https://abovethelaw.com/2023/12/someone-is-actually-suing-the-judiciary-over-sexual-harassment/ [https://perma.cc/GF4E-HR26].

12. Lynn K. Rhinehart, *Is There Gender Bias in the Judicial Law Clerk Selection Process*, 83 GEO L. J. 575, 595–96 (1994).

13. In 1995 Congress enacted the Congressional Accountability Act to make Congress subject to eleven workplace laws, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Age Discrimination in Employment Act of 1967. Pub. L. No. 104-1, 109 Stat, 3 (1995) (codified at 2 U.S.C. §§ 1301–1438). Subsequently, Congress passed the Presidential and Executive Office Accountability Act to extend the same eleven statutes to employees of the White House, the Executive Office of the President and the official residence of the Vice President. Pub. L. No. 104-331, 110 Stat. 4053 (codified at 3 U.S.C. §§ 401–471).

14. *See infra* notes 64–67.

15. 168 Cong. Rec. E1149 (daily ed. Nov. 16, 2022) (statement of Rep. Jerrold Nadler).

Accountability Act of 2021 ("JAA") in both the House and Senate.[16] The proposed legislation provided federal judicial employees statutory rights and protections from discrimination, sexual harassment, retaliation, and other forms of workplace misconduct.[17]

Members of the judiciary responded by insisting that the judiciary is best prepared to address and improve protections for employees. The month after Rep. Hank Johnson introduced the JAA, Judge Roslyn Mauskopf, the Secretary of the Judicial Conference, sent Rep. Johnson a letter criticizing the bill and the manner it was proposed without consulting the judiciary.[18] Subsequently, other judges joined Secretary Mauskopf in expressing concerns related to both the content and approach of the JAA, noting how the legislation unreasonably infringes on the judiciary's independence.[19]

The developments in Congress and reaction by jurists point to a fundamental divide between the judicial and legislative branches. The members of Congress who introduced the JAA and other legislation related to judicial conduct and ethics insist that the judiciary has woefully failed to keep its own house in order.[20] These members believe that the internal judiciary processes are inadequate and that judicial employees should be provided the same rights, protections, and remedies available to other government and private sector workers.[21] Judges who opposed the enactment of the JAA maintained that the internal judiciary policies

16. Press Release, Congressman Hank Johnson, Congressman Johnson Leads Introduction of Bipartisan, Bicameral Legis. to Hold Judiciary Accountable to Workers (July 29, 2021), available at https://hankjohnson.house.gov/media-center/press-releases/congressman-johnson-leads-introduction-bipartisan-bicameral-legislation [hereinafter Johnson Press Release].

17. *Id*. at 1. For the full text of the bill see Judiciary Accountability Act of 2021, H.R. 4827, 117th Cong. (2021) [hereinafter JAA]. Following introduction of the JAA in the House on July 29, 2021, the bill was referred to the House Judiciary Committee on July 29, 2021, and then sent to the House Subcommittee on the Constitution, Civil Rights and Civil Liberties, as well as the House Subcommittee on Courts, Intellectual Property, and the Internet on November 1, 2022. All Actions: H.R.4827 — 117th Congress (2021-2022), CONG. GOV., https://www.congress.gov/bill/117th-congress/house-bill/4827/all-actions [https://perma.cc/4N25-TC5F] (last visited June 29, 2023). Although the bill died in the legislative session in which it was introduced, sponsors may reintroduce it or include its provisions in another bill. H.R. 4827 (117th): Judiciary Accountability Act of 2021, H.R. 4827, 117th Cong. (2021).

18. Letter from Roslynn R. Mauskopf, Sec'y, Jud. Conf. of the U.S., to Henry C. "Hank" Johnson, Jr., Rep., U.S. H.R. (Aug. 25, 2021), available at https://www.uscourts.gov/sites/default/files/house_letter_jaa.pdf. The second sentence of the Judge Mauskoph's letter captured her reaction to the introduction of the JAA, as follows: "At the outset, it is disappointing that a bill encompassing such a significant overhaul of the oversight, supervision, and management of the Judicial Branch of government was introduced without input from the Judicial Branch." *Id.* at 1.

19. In communicating that the Judicial Conference opposes the JAA, Secretary Mauskoph, concisely stated, "the bill interferes with the internal government of the Third branch; creates structures that compete with existing governing bodies and authorities within the Judiciary; and imposes intrusive requirements on Judicial Conference procedures." *Id.*

20. *Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. of the Judiciary*, 117th Cong. 2 (2022) [hereinafter 2022 JAA Hearing] (statement of Rep. Henry C. "Hank" Johnson, Chair, Subcomm. on Cts., Intell. Prop., & the Internet).

21. *Id*. at 5–6 (statement of Rep. Jerrold Nadler, Chair, H. Comm. on the Judiciary).

and procedures were equipped to handle workplace concerns and that the judiciary was taking steps to improve the handling of discrimination and any other workplace misconduct.[22]

The diametrically opposed positions of the proponents and critics of the JAA raise questions on its constitutionality and advisability as well as the impact of enacting further legislation that builds on the JAA. Answering these questions requires examinations of both the concerns the JAA sought to address and the impact of changing the judiciary's current approach of relying on internal channels to handle workplace misconduct. This Article seeks to tackle these issues and foster understanding of the most effective strategies to prevent and address harassment and other discrimination in the federal judicial workplace.

To provide context on the nature and extent of the problem, Part II introduces the serious problem of harassment and discrimination in the judiciary, the creation of the Federal Judiciary Workplace Conduct Working Group, and key findings from the Working Group's report and recommendations. Following a discussion of changes made after the Working Group had released its report, Part III examines areas of concern that persist and proposed legislation to change the approach used to address workplace misconduct in the judiciary. After discussing the key provisions of the JAA, Part IV uses an ethical infrastructure analytical framework to evaluate the judiciary's response to workplace misconduct concerns and proposed changes. Finally, the Article identifies the areas in which the current regime is inadequate and then discusses how legislators and members of the judiciary should work together to formulate an approach that balances judicial independence and accountability.

II
SEXUAL HARASSMENT IN THE JUDICIARY AND THE JUDICIARY'S RESPONSE

For decades, state supreme courts and judicial conduct commissions have determined that judges who commit acts of sexual misconduct are subject to discipline for violations of applicable codes of conduct.[23] Despite this risk of discipline, commentators have recognized that the problem of sexual misconduct in the judiciary persists and that the structure of the judiciary contributes to an environment that allows harassment to occur and go unreported.[24]

The #MeToo movement helped expose the deleterious problem of sexual harassment and discrimination in the judiciary. Within a year of the tweet posted

22. *Id*. at 196–97 (statement of J. Julie Robinson, Judicial Conference of the United States).

23. *See* Cynthia Gray, *Sexual Harassment and Judicial Discipline*, JUDGES' J. 14, 15–18 (2018) (summarizing past judicial disciplinary cases involving sexual harassment).

24. *See, e.g.*, Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV 599, 615–20 (2020) (examining risk factors for sexual harassment in the judiciary, including power disparities that disincentivize reporting misconduct).

by actress Alyssa Milano that effectively propelled the movement,[25] *The Washington Post* published two stories chronicling sexual misconduct accusations against Judge Alex Kozinski.[26] The stories themselves reveal the damaging effects of sexual harassment in the judiciary and why sexual harassment often go unchallenged. Notably, people subject to a judge's harassment and bullying may feel pressure to remain silent and not report misconduct because they fear retaliation by powerful judges.[27] Even after leaving judicial employment, victims of sexual harassment may continue to be reluctant to disclose misconduct because of possible effects on their professional standing and trajectory within the legal profession.[28] These concerns likely explain why most people who reported alleged harassment by Judge Kozinski asked that their identities not be disclosed. Not surprisingly, the people whose names and allegations appeared in *The Post*'s articles about Judge Kozinski did not practice law, but instead worked in other fields.[29]

The Washington Post articles also referred to another aspect of judicial service that affects the likelihood of individuals disclosure of information related to their experiences as judicial employees. As explained by one former clerk, "Kozinski had so vigorously stressed the idea of judicial confidentiality—that what is discussed in chambers cannot be revealed to the outside—that she questioned even years later whether she could share what had happened with a therapist."[30]

After at least fifteen individuals allegedly subject to sexual harassment overcame their reluctance to report and publicly alleged sexual harassment, Judge Kozinski responded. Though he first denied wrongdoing, he then abruptly

25. For a discussion of the history of the #MeToo movement and subsequent efforts to address sexual misconduct in the judiciary, see Zachary Johnson, #*CourtsToo: Constitutional Judicial Accountability in the #MeToo Era*, 46 J. LEGIS 346, 347–49 (2020).

26. *Prominent Appeals Judge Accused, supra* note 5; Matt Zapotosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html [https://perma.cc/JMH2-XX72] [hereinafter *Nine More Women Say Judge Subjected Them to Inappropriate Behavior*].

27. As stated in one of the articles reporting on allegations involving Judge Kozinski, "Many of Kozinski' s accusers have talked only on the condition that their names and other identifying information not be published out of fear that he might retaliate against them or the institution for which they work." *Id.* "One woman's husband confirmed that his wife had told him about the episode and they felt they were unable to do anything, given Kozinski's position." *Id.*

28. *See Prominent Appeals Judge Accused, supra* note 5 (noting that the former law clerk "feared that not leaving [the clerkship] with a good recommendation from [Kozinski] might jeopardize her career").

29. The first news story reported that six women alleged that Judge Kozinski subjected them to a range of inappropriate sexual conduct or comments. Of the six, the article disclosed the names of two women: one who works as a romance novelist and the other who serves as a law professor. *See Prominent Judge Accused*, *supra* note 5. The second story included the names of two other individuals who alleged that Kozinski had subjected them to inappropriate sexual conduct or conduct. One works as a law professor and the other as a journalist. *See Nine More Women Say Judge Subject Them to Inappropriate Behavior, supra* note 26.

30. *Prominent Appeals Judge Accused , supra* note 5.

resigned.[31] This resignation halted the judicial misconduct inquiry originally commenced by the Chief Judge of the Ninth Circuit and subsequently transferred to the Second Circuit.[32] This resignation shed light on the ability of judges retiring or resigning to avoid scrutiny and accountability for alleged misconduct.[33]

Despite Judge Kozinski's resignation and the judiciary's loss of authority to pursue a formal judicial ethics inquiry against the judge, the judicial branch's leaders could not ignore the allegations. Following the negative publicity and public outcry, Chief Justice Roberts addressed the issue of workplace misconduct in his 2017 annual report on the federal judiciary, writing:

> Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune. The judiciary will begin 2018 by undertaking a careful evaluation of whether its standards and its procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee.[34]

Pursuant to this directive, Director Duff "established the Working Group to review the safeguards currently in place within the judiciary to protect employees from inappropriate conduct in the workplace".[35]

The Working Group consisted of eight experienced judges and court administrators from diverse units in the judiciary.[36] On June 1, 2018, the Working Group issued its *Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States* ("2018 Working Group

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31. Maura Dolan, *9th Circuit Judge Alex Kozinski Steps Down After Accusations of Sexual Misconduct*, L.A. TIMES (Dec. 18, 2017), https://www.latimes.com/politics/la-pol-ca-judge-alex-kozinski-20171218-story.html [https://perma.cc/96JQ-V2KK] (noting that at least fifteen women accused Judge Kozinski of inappropriate behavior, from showing them pornography to improperly touching them).

32. After the complaint was transferred to a Judicial Council for the Second Circuit, that council concluded the proceeding, stating that it did not have statutory authority to consider the complaint because Judge Kozinski relinquished the office of United States circuit judge by retiring. Judicial Council of the Second Circuit, *In re Complaint of Judicial Conduct* (Feb. 5, 2018), https://www.ca2.uscourts.gov/judges/misconduct_orders/17-90118-jm.pdf [https://perma.cc/39U8-6CSB].

33. Increasingly, commentators and courts have criticized allowing judges to avoid public accountability by retiring or resigning. *See, e.g.*, Veronica Root Martinez, *Avoiding Judicial Discipline,* 115 NW. U. L. REV 953, 963–76 (2020); Gray, *supra* note 23, at 18 (referring to many decisions expressing an unwillingness to allow a judge to escape the consequences of misconduct by "racing to resign"). "These courts consider it 'a travesty if a judge could avoid the full consequences of his misconduct by resigning from office after removal proceedings had been brought against him.'" *Id.* (citing In re People, 250 S.E. 2d 890, 914 (N.C. 1978)).

34. C.J. JOHN ROBERTS, CHIEF JUSTICE'S YEAR-END REPORTS ON THE JUDICIARY, 2017 YEAR-END REPORT, 11 (2017) [hereinafter CHIEF JUSTICE 2017 YEAR-END REPORT].
https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf [https://perma.cc/XG3N-NSUY].

35. Press Release, U.S. CTS., Federal Judiciary Workplace Conduct Working Group Formed (Jan. 12, 2018), available at https://www.uscourts.gov/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed. Chief Justice Roberts directed the Working Group to examine whether changes may be needed to the judiciary's codes of conduct, its guidance to employees—including law clerks—on issues of confidentiality and reporting instances of misconduct, its educational programs, and its rules for investigating and processing misconduct complaints. *Id.*

36. 2018 WORKING GROUP REPORT, *supra* note 7, at 1–2.

Report").[37] In announcing the 2018 Working Group Report, Director Duff stated:

> Our benchmark is simple: Even one case of workplace harassment is too many. We are committed to a workplace in which every employee not only is free from harassment or inappropriate behavior, but also works in an atmosphere of civility and respect. If inappropriate behavior occurs, our goal is to ensure every employee has clear avenues to obtain confidential advice, report misconduct, and seek and receive remedial action free from retaliation.[38]

To help accomplish the Working Group's goal, the 2018 Working Group Report issued a number of recommendations based on research and consultations with people within the judiciary, including judges and employees, as well as subject matter experts and authoritative reports. Notably, the 2018 Working Group Report relied heavily on the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in Workplace Report ("EEOC Report"), published in June 2016.[39] Five recommendations from the EEOC Report provided criteria for evaluating information that the Working Group received from in-person interviews, electronic submissions, advisory council input, and other sources.[40]

In assessing the data collected, the Working Group concluded that "inappropriate conduct, although not pervasive in the Judiciary, is not limited to a few isolated instances."[41] It further noted that "incivility, disrespect, and rude behavior were more common examples of inappropriate conduct than sexual harassment."[42]

The Working Group also recognized that elements of the judicial workplace could increase the risk of misconduct or impose obstacles to effectively addressing inappropriate behavior.[43] The 2018 Working Group Report specifically identified the "power disparities" between judges and law clerks or

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37. *Id.* at 1. According to the Executive Summary of the Working Group Report, the Working Group "consulted with Administrative Office staff to collect information and formulate recommendations, meeting collectively on four occasions and collaborating continuously through telephonic and electronic means." FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP, EXECUTIVE SUMMARY (2018) https://www.uscourts.gov/sites/default/files/executive_summary_of_federal_judiciary_workplace_conduct_working_group_0.pdf [https://perma.cc/MMV5-BCTU].

38. James C. Duff, *The Federal Judiciary Workplace Working Group*, JUDGES' J., Fall 2018, at 8.

39. "The EEOC Study analyzes the prevalence of harassment, employee responses, risk factors, and steps that can be taken to prevent and remedy inappropriate conduct." 2018 WORKING GROUP REPORT, *supra* note 7 at 2. The EEOC Report provided the Working Group with a current and reliable empirical baseline to understand the problem of workplace harassment and to focus its inquiries. *Id.* at 6.

40. *See id.* at 7 (identifying the following five key steps that employers can take to end harassment: (1) demonstrate committed and engaged leadership, (2) require consistent and demonstrated accountability, (3) issue strong and comprehensive policies, (4) offer trusted and accessible complaint procedures, and (5) provide regular, interactive training tailored to the organization).

41. *Id.* at 6–7.

42. *Id.* at 7. Because incivility is often an antecedent to workplace harassment, the Working Group stated that the Judiciary should promote "respect and civility in the workplace generally." *Id.* (citing the EEOC Study).

43. *Id.* at 3–4.

other employees that may deter judicial employees from challenging or reporting objectionable conduct.[44] In addition, the 2018 Working Group Report noted that "judicial decision-making is subject to a high degree of confidentiality and that clerks and other chambers employees may mistakenly believe that the obligation to preserve confidentiality extends to not reporting misconduct."[45]

After discussing the unique features and challenges of the judicial workplace, the 2018 Working Group Report made thirty detailed recommendations related to three general areas: substantive standards, procedures for addressing inappropriate behavior, and educational efforts for judges, supervisors, and employees.[46] The Working Group concluded its report by urging the Judicial Conference to undertake an ongoing program to "promote a culture of mutual understanding and respect."[47]

Thereafter, the Judicial Conference, the Administrative Office of the Courts, the Federal Judicial Center, and the federal courts themselves acted on nearly all of the Working Group's recommendations.[48] These changes included creating a national Office of Judicial Integrity and approving revisions to the Codes of Conduct for United Stated Judges and Codes of Conduct for Judicial Employees, as well as the Rules for Judicial-Conduct and Judicial-Disability Proceedings.[49]

After reviewing many of these changes, Chief Justice Roberts directed the Working Group to monitor the progress and success of efforts to ensure that the judiciary is an exemplary workplace.[50] Pursuant to this directive, the Working Group issued a Report to the Judicial Conference on March 16, 2022 (2022 Working Group Report).[51] The 2022 Working Group Report summarized steps the judiciary had taken since the Working Group was formed. [52] In addition, the report included nine recommendations for additional improvement.[53] The

44. *Id.* at 3. In discussing the large power differentials between judges and employees, a retired federal judge notes that the relative isolation of individual chambers is another institutional characteristic of the judicial workplace which contributes to the likelihood that harassment might occur. Nancy Gertner, S*exual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88, 92 (2018).

45. 2018 WORKING GROUP REPORT at 3–4.

46. *Id.* at 20–45.

47. *Id.* at 45.

48. U.S. CTS., STATUS REPORT FROM THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, 3 (2019) [hereinafter 2019 Working Group Report].

49. *Id.* at 1, 3. For a description of the specific changes, *see id.* at 1–21. *See infra* note 126 (explaining the function of the Codes of Conduct and Rules for Judicial Conduct and Judicial-Disability Proceedings).

50. C.J. JOHN ROBERTS, CHIEF JUSTICE'S YEAR-END REPORTS ON THE FEDERAL JUDICIARY, 2018 YEAR-END REPORT, 10 (2018) https://www.supremecourt.gov/publicinfo/year-end/2018year-endreport.pdf [https://perma.cc/N47Y-R2JL] ("The job is not finished until we have done all that we can to ensure that all of our employees are treated with fairness, dignity, and respect.").

51. 2022 WORKING GROUP REPORT, *supra* note 10.

52. *Id*. at 2.

53. The 2022 WORKING GROUP REPORT referred the following recommendations for consideration by appropriate committees of the Judicial Conference: (1) Conduct a nationwide climate survey, (2)

Working Group issued the 2022 Working Group Report three days before a subcommittee in the House of Representatives had been scheduled to examine workplace harassment in the judiciary and the potential need for legislative intervention.[54]

The reactions to the Working Group's reports and the changes made pursuant to its recommendations have varied along largely predictable lines. Judges and others associated with the federal judiciary have commended the Working Group's contributions and the implementation of the group's recommendations.[55] Some members of Congress and commentators outside the judiciary, meanwhile, have questioned the Working Group's reactionary approach[56] as well as the group's failure to provide judicial employees the same protections afforded to other federal workers.[57] The following Part highlights particular areas of concern and the proposed legislation intended to address the shortcomings in the judiciary's handling of workplace misconduct.

III
CONGRESSIONAL ACTIONS AND THE JUDICIAL ACCOUNTABILITY ACT OF 2021

Critics of the judiciary's handling of workplace issues found champions in Congress interested in examining the adequacy of the judiciary's reliance on internal mechanisms for handling workplace misconduct.[58] Despite the changes made pursuant to the Working Group's recommendations, these legislators

augment annual Employee Dispute Resolution-related data collection, (3) enhance the formal complaint process, (4) develop an express policy regarding romantic relationships between employees and person who serve in supervisory or evaluative positions, (5) assess incorporation of additional monetary remedies as part of the Employee Dispute Resolution process, (6) publish an annual judiciary workplace conduct report, (7) expand outreach and engagement, (8) strengthen annual Employee Dispute Resolution training, and (9) develop a system for reviewing judiciary workplace conduct policies. *Id.* at 21–26.

54. Nate Raymond, *Federal judiciary group recommends reforms to address workplace misconduct*, REUTERS (Mar. 16, 2022), https://www.reuters.com/legal/government/federal-judiciary-group-recommends-reforms-address-workplace-misconduct-2022-03-16/ [https://perma.cc/Z25R-933A].

55. *See, e.g.*, Hon. M. Margaret McKeown, *The Judiciary Steps Up to the Workplace Challenge*, 116 NW. U. L. REV. ONLINE 275, 305 (2021) (suggesting that the federal judiciary's efforts to change the workplace landscape with respect to harassment and bullying "should be given a fair chance to blossom and take root").

56. In describing the Working Group's proposals as "passive," a law faculty member who previously served as a federal judge described the proposals as follows: "[t]hey rely on the victims of sexual harassment to raise the issue, training them about how to do so. It is—in effect—an adversary model for sexual harassment remedies. If the issue isn't raised, it doesn't exist." Gertner, *supra* note 44 at 98 (2018).

57. *See, e.g.*, Theresa M. Green, *Unprotected but not Forgotten: A Call to Action to Help Federal Judiciary Employees Address Workplace Sexual Misconduc*t, 107 MINN. L. REV. 359 (2022) (asserting that federal judiciary employees should be provided effective remedial measures for workplace sexual misconduct, including protections under Title VII of the Civil Rights Act of 1964).

58. As described in the 2018 WORKING GROUP REPORT, judicial employees subject to harassment or other forms of workplace misconduct have two forms of redress, a written complaint under the Judicial Conduct and Disability Act, or a formal report under the Employment Dispute Resolution plans. 2018 WORKING GROUP REPORT, *supra* note 7, at 9.

appear to be unconvinced that the judiciary is doing enough to protect its employees. After two congressional hearings related to the problem of discrimination, sexual harassment, and other forms of workplace misconduct in the judiciary, five representatives introduced the JAA in the House, while four senators introduced companion legislation.[59] The JAA's sponsors emphasized the bill's significance in providing judiciary employees strong statutory rights and protections against discrimination, sexual harassment, and other forms of workplace misconduct.[60] Representatives of public interest and judiciary reform groups echoed the sentiments of JAA bill sponsors in referring to the JAA as a critical step in providing more than 30,000 federal judiciary employees the basic statutory protections guaranteed in most other workplaces in the United States and making the judiciary more accountable and a "fairer, safer and more equitable workplace for employees." [61] The purpose statement for the JAA stated that the bill would "amend Title 28 of the United States Code to protect employees of the Federal judiciary from discrimination, and for other purposes."[62] Although that description of the scope of the legislation appears to be relatively narrow, both proponents and critics of the JAA have used the term "overhaul" when referring to the impact of enacting the JAA.[63] The overhaul can be seen in the manner in which the JAA would fundamentally change the handling and oversight of workplace misconduct complaints, as well as the remedies for judiciary employees who have faced harassment or other

59. Representative Henry C. (Hank) Johnson, joined by Representatives Jackie Speier, Jerrold Nadler, Norma Torres, and Nancy Mace, introduced the JAA in the U.S. House of Representatives and Senators Mazie Hirono, Sheldon Whitehouse, Patty Murray and Dick Durbin introduced the bill in the U.S. Senate. Johnson Press Release, *supra* note 16.

60. On the introduction of the legislation, the lead sponsor of the bill, Representative Henry C. "Hank" Johnson, Chair of the Judiciary Subcommittee on Courts, Intellectual Property and the Internet, made the following observation:

> All workers deserve and should expect basic workplace rights that protect them from harassment, discrimination, and other forms of misconduct . . . . The fact that federal judiciary employees are denied these basic rights is just flat wrong and must be remedied. The irony is the judiciary metes out justice but there is no justice for judiciary employees. This isn't about punishing judges; it's about protecting workers and offering them the same basic workplace rights we all enjoy.

Id.; *see also,* Sen. Hirono's Statement on Judiciary Accountability Act, Press Release, July 31, 2021 (referring to the "small, limited steps" that the judiciary has taken to protect employees and the value of the JAA in filling the "void left by the judiciary's inaction").

61. *See, e.g.*, Johnson Press Release, *supra* note 16 (quoting Emily Martin, Vice President of Education and Workplace Justice, National Women's Law Center, who stated, "The people we've entrusted with enforcing and upholding the rule of law must be accountable to [the federal anti-discrimination law and protections against workplace harassment] and the Judicial Accountability Act of 2021 is a crucial and necessary step to achieving fairer, safer, and more equitable workplaces, by ensuring the federal judiciary is not above the law.").

62. Judiciary Accountability Act of 2021, H.R. 4827, 117th Cong. (2021), Purpose.

63. Lead House sponsor of the JAA stated, "The Judiciary Accountability Act will provide an overhaul of accountability on these issues by promoting protections for Judiciary employees and protecting the integrity of our Judicial Branch." Johnson Press Release. *Cf.* 2022 JAA Hearing, *supra* note 20, at 161 (statement of Sarah Perry) (opposing the JAA and stating that "this bill, which would overhaul the entire judiciary, threatens to taint its integrity and its independence").

discrimination.

Most notably, the JAA changed options available to judiciary employees by extending statutory antidiscrimination protections to judiciary employees.[64] The JAA expressly provided that all personnel actions affecting covered judiciary employees shall be free from discrimination based on race; color; religion; sex, including sexual orientation; gender identity; or national origin.[65] The JAA also extended to judiciary employees protections under the Age Discrimination in Employment Act of 1967[66] and the federal statutes prohibiting discrimination based on disabilities.[67] By giving employees the ability to sue civilly and recover compensatory and other damages, the JAA provided these workers, including law clerks, an alternative remedy to the current internal processes for filing workplace complaints alleging sexual harassment and other discriminatory conduct.

The JAA also created different offices and positions related to the reporting, investigations, handling, and monitoring of workplace misconduct complaints. To oversee a workplace misconduct program and policy, the JAA created a Commission on Judicial Integrity.[68] The JAA also established the Officer of Judicial Integrity (OJI) and the appointment of a Judicial Integrity Officer (JIO), after consultation with the Judicial Conference of the United States.[69]

Other noteworthy provisions relate to changes in the processes and procedures for handling and monitoring judicial misconduct complaints. The JAA established the Office of Special Counsel for Equal Employment Opportunity.[70] Among other duties, the Special Counsel would conduct investigations of alleged workplace misconduct and any policies or procedures promulgated under the JAA that "may require oversight or other action within

64. H.R. 4827, § 2(a).

65. H.R. 4827, § 2(a)(1).

66. H.R. 4827, § 2(a)(2).

67. The Act referred to "disability" within the meaning of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. H.R. 4827, § 2(a)(3).

68. H.R. 4827, § 4(a). The Commission's duties would include overseeing a nationwide confidential reporting system, a comprehensive training program on workplace behavior and bystander intervention, and a system for independently investigating reports of workplace misconduct. H.R. 4827, § 4(f). The JAA also described the Commission's responsibilities for data collection and dissemination, such as making publicly available biennial workplace climate assessments and conducting annual audits of the workplace misconduct prevention program. *Id.* The Commission would also oversee public reporting of anonymized data on workplace complaints, as well as disaggregated data on persons interviewed and hired for full-time positions, including judicial clerkships. H.R. 4827, § 4(f)(7)–(11). In addition to those offices, the JAA established an Office of Employee Advocacy to assist judicial branch employees in matters relating to workplace discrimination and harassment. H.R. 4827 § 7(a).

69. H.R. 4827, § 5(a), (5)(b)(1). The OJI would administer various aspects of the workplace prevention program, including the training program, the confidential reporting system, data reporting, tracking complaints, investigations, as well as remedies for workplace misconduct. H.R. 4827, § 5(d)(1)–(3).

70. H.R. 4827, § 6(a).

the judicial branch."[71]

In another noteworthy move to improve the likelihood that aggrieved and concerned persons will report misconduct, the JAA expressly prohibited retaliation against whistleblowing[72] by giving them the right to sue for legal or equitable relief.[73] In a related move, the JAA changed the statutory definition of judicial misconduct by establishing discrimination and retaliation as judicial misconduct.[74]

The JAA also addressed an exit strategy used by jurists facing misconduct complaints.[75] Under the judiciary's interpretation of its authority, a judge may avoid discipline by resigning or retiring.[76] The JAA would amend statutory provisions related to the jurisdiction to continue a professional misconduct complaint following the resignation, retirement from office, or death of a judge.[77]

Representatives of public interest groups, jurists, and commentators responded to the JAA in ways similar to their reactions to the Working Group Reports.[78] Testimony provided in a March 2022 congressional hearing entitled

71. H.R. 4827, § 6(e)(1). The JAA also authorized the Special Counsel to conduct workplace climate assessments, audit workplace misconduct and complaints, and investigate alleged misconduct in the judicial branch. *See* H.R. 4827, § 6(e)(2).

72. "No justice, judge, covered employee, or contractor or subcontractor of an office or agency in the judicial branch . . . may discharge, demote, threaten, suspend, harass, or in any other manner discriminate against a covered employee . . . because of any lawful act done by the covered employee or perceived to have been done by the covered employee or any person perceived to be associated with or assisting the covered employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding any possible violation of Federal law, rule, or regulation or misconduct by a justice, judge, contractor or subcontractor with an office or agency of the judicial branch . . . ." H.R. 4827, § 3(a).

73. H.R. 4827, § 3(b). Currently, employees in the federal judiciary have no statutory protection against retaliation. Johnson Press Release, *supra* note 16. In a letter submitted in connection with House Subcommittee hearing on the JAA, dozens of organizations indicated that they "strongly support efforts to enact protection for whistleblowers in the government, no matter which branch of government those individuals happen to serve." 2022 JAA Hearing, *supra* note 20, at 30.

74. H.R. 4827, § 8(a).

75. Martinez, *supra* note 33, at 963–76 (2020) (discussing how a number of investigations into federal judges were commenced but not concluded with a determination on the merits because the judge resigned or left the court).

76. For example, following findings of misconduct by Carlos Murguia, a U.S. District Court Judge in Kansas, the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States stated that it was required to conclude the judicial conduct proceedings against the Judge Murguia because his resignation and removal of judicial functions ended the Committee's statutory review authority. Comm. on Judicial Conduct and Disability of the Judicial Conf. of the United States, *In re Complaints Under the Judicial Conduct and Disability Act* (2020), https://www.uscourts.gov/sites/default/files/c.c.d._no._19-02_march_3_2020_0.pdf [https://perma.cc/2AF9-R9Q9].

77. H.R. 4827, § 8(d) (expressly stating that the resignation, retirement from office or death of a judge subject to a misconduct complaint shall not be grounds for dismissal of the complaint or the conclusion that the complaint is no longer necessary).

78. *Compare* Aliza Shatzman, *The Conservative Case for the Judiciary Accountability Act*, HARVARD L. SCH. J. ON LEGIS., Oct. 19, 2022, https://journals.law.harvard.edu/jol/2022/10/19/the-conservative-case-for-the-judiciary-accountability-act/ [https://perma.cc/5C9M-RBUS] (criticizing the Working Group's reliance on internal processes for

"Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change" provides a cross section of the observations of those who support and oppose the JAA.[79]

Not surprisingly, people connected to the federal judiciary insist that Congress is overreaching and encroaching on judicial independence. In a joint statement provided on behalf of the Judicial Conference, Judges Margaret McKeown of the Ninth Circuit and Julie Robinson of the District of Kansas asserted that the judiciary's internal governance system is "a necessary corollary to judicial independence."[80] They reported that "the Judicial Conference has serious concerns that the changes proposed in the JAA would "infringe on judicial branch self-governance, undermine the integrity of the branch, threaten the independence of judicial decision making, implicate judicial autonomy, or impair the administration of justice.'"[81] Pointing to current protections for judiciary employees,[82] improved workplace protections and procedures,[83] and the Working Group's additional recommendations,[84] the judges asserted that the "[j]udiciary's process for protecting employees is demonstrating its promise and should be given time to build upon the significant strides made to date."[85]

Sarah Perry, a Senior Fellow with the Heritage Foundation, was the only other hearing witness who categorically opposed the JAA.[86] She echoed the sentiments expressed by the judges, expressed other concerns related to the JAA, and elaborated on provisions that she felt breached the separation of powers

adjudicating workplace disputes), *with* 2022 JAA Hearing (statement of Aliza Shatzman) *supra* note 20, at 23 (questioning the adequacy of internal processes).

79. Over fifty witnesses provided written and/or oral testimony and responded to questions posed by the House Subcommittee members. 2022 JAA Hearing, *supra* note 20.

80. 2022 JAA Hearing, *supra* note 20, at 212 (combined written statement of Judge M. Margaret McKeown, U.S. Circuit Judge for the Ninth Circuit, and Judge Julie A. Robinson, U.S. District Judge for the District of Kansas, submitted on behalf of the Judicial Conference of the U.S.). The Combined Written Statement emphasized the value of the decentralized approach that the judiciary uses to deal with workplace concerns. *Id.*

81. *Id.* (referring to JAA provisions creating a "judiciary" entity that is centralized at the national level and not operated under the judiciary's supervision or direction).

82. In her oral testimony Judge McKeown stated:

> [J]udiciary employees are protected from the same conduct that would violate 10 enumerated employment laws and policies, including title VII of the Civil Rights Act of 1964, the Age Discrimination and Employment Act, the Americans with Disabilities Act, the Rehabilitation Act, and whistleblower protections.

2022 JAA Hearing, *supra* note 20, at 194 (oral testimony of Judge McKeown) at 194. Beyond the protections in these statutes, Judge McKeown also testified that the judiciary provides expanded protections against abusive conduct. *See id.* (noting that the Working Group found that while inappropriate conduct is not pervasive, incivility, disrespect, and abusive behavior is more common than sexual harassment).

83. *See id.,* at 201–208 (discussing numerous substantive and procedural improvements, including those changing the definition of misconduct, clarifying confidentiality protections, and expanding avenues to report misconduct).

84. *Id.* at 210.

85. *Id.* at 218.

86. 2022 JAA Hearing, *supra* note 20, at 163 (statement of Sarah Perry).

doctrine.[87]

In opening the 2022 JAA hearing, Rep. Johnson acknowledged the separation of powers issue in stating: "Self-rule by the Article III branch is perfectly reasonable, [but] . . . it has to be the equivalent of a statute [and] . . . be accountable [and] transparent."[88] The first testimony came from Professor Aziz Huq, a leading constitutional law and federal courts scholar who spoke about how the JAA addressed various constitutional questions like its impact on the separation of powers.[89] After a thorough examination of the Constitution's text under Articles I and II, Supreme Court decisions, other authority, and the historical record of Congress's horizontal power to regulate the operation of the federal judiciary, Professor Huq stated, "I am aware of no decisive authority or judicial decision suggesting that Congress lacks power to enact the Judicial Accountability Act, or a like measure, under the broad aegis of the Necessary and Proper Clause."[90] He concluded:

> Neither text nor precedent support a pertinent limit on Congress's capacity here. To the contrary, it may well be that the proposed measure is a needful step in restoring public confidence in our national judiciary, especially among young people who enter law school and who may seek employment in federal judicial institutions.[91]

Following Professor Huq's testimony, a diverse group of experts, advocates promoting more accountability in the judiciary, former and current judiciary employees, and their counsel, presented written and oral testimony in support of the JAA. They offered detailed accounts of how they had been victimized both in the federal workplace and in attempting to navigate the internal grievance

87. After pointing to the JAA establishing a Commission on Judicial Integrity with non-judicial appointees and a Special Counsel for equal employment opportunity, Sarah Perry explained that the JAA does not satisfy the conditions that only permit a breach if (1) explicitly authorized by the Constitution or (2) it shown to be necessary to the harmonious operation of workable government. *Id.* at 163.

88. 2022 JAA Hearing, *supra* note 20, at 4 (statement of Henry C. "Hank" Johnson).

89. 2022 JAA Hearing, *supra* note 20, at 8–16 (written statement of Professor Aziz Huq). In his written statement, Professor Huq, the Frank and Bernice J. Greenberg Professor of Law at the University of Chicago Law School, makes the following points to aid the House committee's deliberations about the JAA:

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

Id. at 9.

90. *Id.* at 15–16.

91. *Id*.

channels that they believed to protect the accused more than the person alleging misconduct.

The manner in which witnesses testified also illustrates the dilemma faced by judiciary employees subject to misconduct in the workplace. Many would like to hold wrongdoers accountable but fear retribution for filing complaints, even when the internal judiciary process is supposed to preserve the confidentiality of reporters. Because of the personal and professional costs associated with reporting workplace misconduct in the judiciary, the majority of the witnesses shared their experiences through anonymous accounts provided by their attorneys. All supported enacting or even expanding the JAA.

In stark contrast to the perspectives of federal judges and judiciary administrative personnel, supporters of the JAA testified that legislative action was necessary because the judiciary had failed to keep its own house clean and to offer meaningful remedies for injured employees. The testimony of Laura Minor, former Equal Employment Opportunity Officer for the Administrative Office of the U.S. Courts, captured the sentiments of many who advocated for congressional action to provide basic workplace protection to judiciary employees. In addition to providing specific observations on the inadequacy of the judiciary's procedures,[92] she testified that she had repeatedly told the judiciary's leadership about the issues that she saw and how frequently employees would leave after facing misconduct or attempting to report it.[93] As she stated, "In almost every case, the employees were worse off because of their experiences—they were more hurt, more cynical, and more worn down."[94] Minor noted, "At every step of the way, I saw the institution circle the wagons—a myopic focus on protecting the institution instead of making it better."[95] She further characterized what she called a "culture of silence":

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92. In her oral testimony, Minor outlined four specific observations about the judiciary's inadequate procedures:

> (1) Complaints were frequently chalked up to bad management instead of discrimination or harassment, which minimized misconduct and allowed management to ignore patterns.
>
> (2) Management would immediately question the veracity of any allegation and then fixate on questioning the complainant's competence. Employees who reported misconduct were very quickly labeled problem employees.
>
> (3) The lack of knowledge, training, resources, and awareness was glaring. Even when a complaint presented a clear case of sexual harassment, someone in management said there was nothing particularly attractive about the complainant, an irrelevant assessment used to diminish the misconduct.
>
> (4) Management lacked any interest in system change, I asked for transparency through statistics about reporting and workforce demographics. I was told that was not possible.

2022 JAA Hearing, *supra* note 20 at 147–48 (statement of Laura Minor).

93. 2022 JAA Hearing, *supra* note 20, at 154 (statement of Laura Minor).

94. *Id.* After sharing her efforts to assist persons going through the internal complaint process, she referred to a "cycle that discourages people from speaking out of fear of retaliation or losing out on opportunities." *Id.*

95. *Id*. at 152–53.

> [T]he lack of effective reporting practices and procedures is merely a symptom of a larger problem: the root cause of the judiciary's inability to effectively address misconduct is its culture, a culture that no amount of self-policing can fix. Based on my 23 years of experience in the judiciary, the culture of the judiciary makes it incapable of holding people accountable for discrimination and harassment. The irony is that while judges are responsible for holding many of us accountable, they do not hold each other accountable.[96]

These observations point to the role that culture and climate play in determining whether sexual harassment is likely to occur.[97] Gender and employment experts emphasize the importance of culture and climate in workplace safety and preventing harassment.[98] As concisely stated in a report from the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace, "culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment."[99] A consensus study report of the National Academies of Sciences, Engineering and Medicine states, "Organizational climate is the single most important factor in determining whether sexual harassment is likely to occur in a work setting."[100] These assessments of the critical role of climate also align with the scholarly literature on the influence of climate and culture on ethical conduct in organizations generally[101] and in preventing or perpetuating specific workplace discrimination.[102]

Part IV discusses the influence of climate and culture in applying the theoretical model of ethical infrastructure. After explaining the components of model, Part IV uses ethical infrastructure as an analytical framework for

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96. *Id.* at 156 (stating that the "judiciary is far more interested in protecting the status quo than addressing the real problems their employees face").

97. "While organizational climate is focused on the shared perceptions within an organization, organizational culture is defined as the 'the collectively held beliefs, assumptions, and values held by organizational members.'" NAT'L ACAD. OF SCI., ENG'G, MED., CONSENSUS STUDY REP. ON SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE AND CONSEQUENCES IN ACAD. SCI., ENG'G AND MED. 123 (2018) (citations omitted), https://www.ncbi.nlm.nih.gov/books/NBK507206/pdf/ Bookshelf NBK507206.pdf [https://perma.cc/6GN7-9LQZ] [hereinafter NATIONAL ACADEMIES REPORT ON SEXUAL HARASSMENT].

98. *See, e.g.*, Suzanne Goldberg, *Harassment, Workplace Culture, and the Power and Limits of the Law*, 70 AM. U. L. REV. 419, 450 (noting that "workplace culture can be a significant determinant of whether harassment and other discriminatory behaviors are likely to thrive); Debbie Shotwell, *Sexual Harassment: Focus on Culture, Not Compliance*, CORP. COMPLIANCE INSIGHTS, Nov. 7, 2019 (boiling down harassment as a "culture issue" not a "compliance issue").

99. U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, 3 (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace [https://perma.cc/DN9Z-64UK]. "Employers should foster an organizational culture in which harassment in not tolerated, and in which respect and civility are promoted." *Id.* at 6.

100. NAT'L ACAD. REP. ON SEXUAL HARASSMENT, *supra* note 97, at 121.

101. *See, e.g.*, Linda Klebe Trevino, Kenneth D. Butterfield & Donald L. McCabe, *The Ethical Context in Organizations Influences on Employee Attitudes and Behaviors*, 8 BUSINESS ETHICS Q. 447 (1998) (analyzing the connections between ethical climate and culture). *See also* NAT'L ACAD. REP. ON SEXUAL HARASSMENT, *supra* note 97 (describing the differences between culture and climate).

102. Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 627 (2005) (defining culture and making the case for taking work culture seriously as an antidiscrimination concern).

examining the judiciary's response to workplace misconduct concerns and changes proposed by the JAA.

IV
THE ETHICAL INFRASTRUCTURE OF THE FEDERAL JUDICIARY WORKPLACE

A. Understanding the Role of Ethical Infrastructure in Organizations

Legal and business ethicists have varied in their approaches to studying ethical infrastructure. Professor Ted Schneyer first used the term "ethical infrastructure" to refer to a law firm's organization, policies, and operating procedures that cut across particular lawyers and tasks.[103] Business ethics and organizational studies scholars expanded the conceptualization of ethical infrastructure to go beyond a company's formal policies, procedures, and organizational structure. In a seminal article, Professors Ann E. Tenbrunsel, Kristin Smith-Crowe, and Elizabeth E. Umphress explained, "The ethical infrastructure consists of formal and informal systems . . . as well as the climate that support these systems."[104] The authors define formal systems as those that are documented, standardized, and visible to anyone inside or outside the organization.[105] Conversely, informal systems are "those indirect signals regarding appropriate ethical conduct that are received by the organizational members."[106] Formal and informal systems include three mechanisms: communication systems that convey ethical principles, surveillance systems that monitor adherence to these principles, and sanctioning systems that punish misconduct and reward ethical behavior.[107] This multidimensional model provides a comprehensive approach for examining an organization's ethical infrastructure and effectiveness in dealing with sexual harassment and other misconduct.[108]

Formal communication systems officially convey to employees the organization's expectations and standards for ethical conduct.[109] Such formal systems include written policy statements, codes of conduct, and training

103. Ted Schneyer, *Professional Discipline for Law Firms*, 77 CORNELL L. REV. 1, 10 (1991).

104. Anne E. Tenbrunsel, Kristina Smith-Crowe & Elizabeth E. Umphress, *Building Houses on Rocks: The Role of the Ethical Infrastructure in Organizations*, SOC. JUST. RES. 285, 287 (2003).

105. *Id*. at 288.

106. *Id.*

107. *Id.* at 287–99.

108. *See* Susan Saab Fortney, *Preventing Sexual Harassment and Misconduct in Higher Education: How Lawyers Should Assist Universities in Fortifying Ethical Infrastructure,* 103 MINN. L. R. HEADNOTES 28 (urging higher education institutions to systematically examine their ethical infrastructure related to sexual harassment and misconduct).

109. Tenbrunsel, Smith-Crowe & Umphress, *supra* note 104, at 289 (noting that formal systems provide employees with guidelines for ethical behavior by explicitly communicating rules and procedures for performing jobs in an ethical manner).

programs.[110] For example, organizational leaders may use a policy statement to communicate leadership's commitment to providing a workplace environment that is safe and free of harassment and other illegal conduct. In addition to communicating the organization's values and expectations for employee conduct related to such concerns such as whistleblowing, workplace safety, and harassment, codes of conduct also build employees' confidence and trust in their organization, increase employee morale, regulate behavior, attract employees, and promote a positive image to outsiders.[111] Depending on the nature and scope of the code of conduct in setting forth minimum standards of conduct, failures to comply with code provisions may subject organizational employees to discipline.

After adopting formal standards of conduct, organizations may implement training programs to enhance employee awareness and understanding of the standards. Human resources experts and researchers recognize that a well-designed program that engages trainees can positively impact employee conduct.[112] On the other hand, poorly designed online training amounting to a check-the-box exercise accomplishes little and may even be detrimental.[113]

Once standards have been communicated throughout an organization, leadership should implement measures to monitor whether employees are acting in accordance with the ethics standards. Using the ethical infrastructure analytical framework introduced above, formal surveillance systems refer to officially condoned policies, procedures, and routines aimed at monitoring and detecting ethical and unethical behavior.[114] For example, formal surveillance systems include performance evaluations of individuals and formal procedures for reporting ethical and unethical conduct.[115] Exit interviews also provide important information on the treatment of departing employees and their perceptions of ethical conduct within the organization.[116] Management can also use climate surveys and other data gathering mechanisms to monitor employee conduct and experiences.[117]

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110. Fortney, *supra* note 108, at 34.

111. *Id.* (citing G.R. Weaver, *Corporate Codes of Ethics: Purpose, Process, and Content Issues*, 32 BUS. SOC. 44–58 (1993)).

112. *See* David Desplaces & John R. Ogilvie, *Scenario-Based Training for Sexual Harassment Prevention,* 20 J. BEHAV. AND APPLIED MGMT. 69 (July 2020) (assessing the impact of various training approaches).

113. Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire*, 98 HARV. BUS. REV. 44 (May-June 2020).

114. Tenbrunsel, Smith-Crowe & Umphress, *supra* note 104, at 288.

115. *Id.* Commonly, reporting systems focus on detecting and addressing misconduct that may violate organizational policies or applicable laws.

116. *See* Christopher Lyle McIlwain, *The Top Ten Ways of Avoiding Sexual Harassment Liability,* 61 THE ALABAMA LAWYER 144, 200 (May 2000) ("All employees whose employment is terminated voluntarily or involuntarily should undergo an exit interview which would include questions designed to elicit information regarding any negative experiences while employed.").

117. Increasingly, organizations such as higher education institutions are using climate surveys and other data to monitor the prevalence of harassment and to evaluate institutions' prevention and response strategies. *See* Donna Scott Tilley et al., *Factor Analysis of the Administrator-Research Campus Climate*

Through formal surveillance and monitoring systems, leaders learn about ethical conduct to reward, and unethical conduct that merits punishment, sanctions, or some type of remedial action.[118] Formal sanctions serve the purpose of holding "members of the community and leadership—at every level—accountable for meeting behavior and cultural expectations."[119] To be meaningful, sanctions should be scaled to the severity of the misconduct and avoid actions that could operate to look like a reward, such as an early retirement with full benefits.[120]

Underlying the formal systems involved in communicating, monitoring, and sanctioning conduct are informal systems that signal what ethical principles are truly valued by the organization and its members.[121] Professors Tenbrunsel, Smith-Crowe, and Umphress argue that the formal systems are embedded within the informal counterparts, which are in turn embedded within the organizational climate that support ethical infrastructure.[122] They maintain that formal systems, informal systems, and the organizational climates vary in their perceived degree of commitment to ethical principles, with organizational climates being the most effective in influencing ethical behavior.[123]

B. Examining the Ethical Infrastructure of the Federal Judiciary Workplace

The joint written statement that Judges Robinson and McKeown submitted on behalf of the Judicial Conference describes protections provided to employees of the judiciary and improvements made pursuant to the 2018 Working Group

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Collaborative (ARC3) Survey, 47 HEALTH EDUCATION & BEHAVIOR 54S, 55S (2020) (describing a number of campus climate surveys currently in use).

118. *See* Tenbrunsel, Smith-Crowe & Umphress, *supra* note 104, at 290 ("[T]o produce desirable behaviors or reduce undesirable behavior, one needs to monitor those behaviors and distribute rewards and punishments accordingly.").

119. *See* Barbara L. Voss, *Disrupting Cultures of Harassment in Archaeology: Social-Environmental and Trauma-Informed Approaches to Disciplinary Transformation*, 86 AM. ANTIQUITY 447, 456 (2021) (citations omitted) (drawing on research reviews).

120. *Id.* (citing Erika Marin-Spiotta, Blare Schneider & Mary Anne Holmes, *Steps to Building a No-Tolerance Culture for Sexual Harassmen*t, EOS (January 28, 2016) available at https://eos.org/opinions/steps-to-building-a-no-tolerance-culture-for-sexual-harassment [https://perma.cc/2D6M-3ERM]).

121. Tenbrunsel, Smith-Crowe & Umphress, *supra* note 104, at 291. Informal communication systems would include informal hallway conversations and informal training in which organization members are "shown the ropes." *Id.* Informal surveillance systems could take the form of unofficial channels of reporting misconduct and informal sanctioning systems could take the form of group pressure or ostracism. *Id.* at 292.

122. *Id*. at 287.

123. As stated by Professors Tenbrunsel, Smith-Crowe and Umphress:

> Formal systems, which are the most visible, are the most likely to be perceived as artificial, reflecting the lowest degree of ethical principles. Informal systems, which represent "what people really think and how people really behave," convey a higher degree of commitment to ethical values than do formal systems. Organizational climate, because it demonstrates an underlying conviction to ethical principles through the incorporation of ethical principles in the everyday treatment of its employees, represents the highest degree of commitment to ethical principles.

Id. at 301 (citation omitted).

Report.[124] A review of the steps taken by the federal judiciary since 2018 reveals numerous changes related to formal systems for communicating standards of conduct.

Within the federal judiciary, the Code of Conduct for U.S. Judges ("Judicial Conduct Code") provides guidance on standards of conduct for judges and judicial nominees.[125] Unlike the Judicial Conduct Code, which is largely advisory in nature,[126] the Rules for Judicial-Conduct and Judicial-Disability Proceedings ("Judicial Conduct Rules") provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Judicial Conduct Act.[127] In this sense, the Judicial Conduct Rules and Judicial Conduct Code function together to formally communicate standards of conduct.

To clearly communicate that sexual misconduct, as well as other misconduct such as abusive treatment of others, violates acceptable standards of conduct, the Judicial Conference acted on the Working Group's recommendations and revised both the Judicial Conduct Code [128] and the Rules for Judicial Conduct and Judicial Disability Proceedings. Rule 4(a)(2) in the Judicial Conduct Rules now clarifies that "cognizable misconduct" includes the following:

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124. 2022 JAA Hearing, *supra* note 20, at 201–08 (combined written statement of The Honorable M. Margaret McKeown, U.S. Circuit Judge for the Ninth Circuit, and The Honorable Julie A. Robinson, U.S. District Judge for the District of Kansas, submitted on behalf of the Judicial Conference of the U.S.).

125. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 1, Commentary (2019). The Judicial Conference has also adopted a separate Code of Conduct for Judicial Employees, available at https://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/code-conduct-judicial-employees [https://perma.cc/Z9G2-356L], and a Code of Conduct for Federal Public Defender Employees, available at https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies/code-conduct-federal-public-defender-employees/ [https://perma.cc/2XGT-6EQZ].

126. Although Commentary in the Judicial Conduct Code states that it may provide standards of conduct for application in proceedings under the Judicial Council Reform and Judicial Conduct and Disability Act of 1980 (Judicial Conduct Act), the Code Commentary expressly states that "the Code is designed to provide guidance to judges and nominees for judicial office" and "[n]ot every violation of the Code should lead to disciplinary action." CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 1, Commentary (2019).

127. JUDICIAL CONFERENCE COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY, RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 2, Commentary (2019). The Judicial Conduct Rules subject judges to misconduct complaints for conduct "prejudicial to the effective and expeditious administration of the business of the court." *Id.* at Rule 4.

128. Canon 3 B(4) now states:

> A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge should not engage in any form of harassment of court personnel. A judge should not retaliate against those who report misconduct. A judge should hold court personnel under the judge's direction to similar standards.

CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3B(4). The Judicial Conference also added the following language to the Commentary: "harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others." CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3B(4), Commentary. The Judicial Conference adopted similar amendments to the Code of Conduct for Judicial Employees. 2019 Working Group Report, *supra* note 48, at 6.

(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 and hostile manner; or

(C) creating a hostile work environment for judicial employees.[129]

Rule 4(a) (3) also clarifies that cognizable misconduct includes "intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability."[130]

Another change involving formal communication of standards relates to the changes to the Model Employee Dispute Resolution (EDR) Plan. As amended, the Model EDR Plan expressly covers "abusive conduct," defined as "a pattern of demonstrably egregious and hostile conduct not based on a Protected Category that unreasonably interferes with an employee's work and creates an abusive working environment."[131]

In order for judges and judiciary employees to communicate the changes in standards and to train judges and employees on policies and procedures related to workplace concerns, the federal judiciary has redoubled training systems.[132] According to the Working Group:

Training and awareness at all levels is vastly greater than in 2018, including nationwide, circuit, and local workplace conduct training programs aimed at judges and Judiciary employees, as well as additional programs on promoting civility and respect, and other initiatives designed to prevent misconduct from occurring and foster an exemplary workplace.[133]

These training efforts, coupled with the changes in the language of codes, rules, and the Model EDR plan, represent commendable efforts to improve formal communication of standards of conduct within the judiciary.

Consistent with this focus on developing formal systems, the federal judiciary has taken some steps to improve formal surveillance systems designed to monitor

129. JUDICIAL CONFERENCE COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY, RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 4(a)(2).

130. *Id.* at Rule 4(a)(3).

131. 2022 WORKING GROUP REPORT, *supra* note 10, at 15. The Working Group characterized this move as one of the "most impactful policy enhancements to the Model EDR Plan" in extending protections beyond similar protections under federal employment laws" and affording "Judiciary employees a specific standard and meaningful avenues for addressing workplace concerns that previously lacked recognition." *Id.*

132. *See* 2022 JAA Hearing, *supra* note 20, at 195 (testimony of Judge McKeown, U.S. Circuit Judge for the Ninth Circuit) (referring to the judiciary's emphasis on training at all levels to ensure employees are aware of their rights and protections).

133. *Id.* at 3. In addition to offering voluntary training opportunities, all courts and employee offices must conduct annual training for all judicial employees and judges on workplace conduct protections and processes. 2022 JAA Hearing, *supra* note 20, at 220 (Fact Sheet on Workplace Protections in the Federal Judiciary, Tab D following the combined written statement of The Honorable M. Margaret McKeown, U.S. Circuit Judge for the Ninth Circuit, and The Honorable Julie A. Robinson, U.S. District Judge for the District of Kansas, submitted on behalf of the Judicial Conference of the U.S.) [hereinafter Fact Sheet on Workplace Protections].

adherence to adopted standards of conduct and policies. In an effort to make it safer for employees to report misconduct, the judiciary has expanded opportunities to obtain guidance outside the court or unit where employees work.[134] Workplace conduct specialists in the newly created Office of Judicial Integrity, headed in each circuit by a judicial integrity officer and director of workplace relations, play a role in guiding employees and monitoring workplace conduct.[135]

Judicial employees now have multiple avenues to report workplace conduct concerns, including anonymous reporting and consultation of points of contact within or outside their employing offices.[136] To further remove barriers to reporting, clarify confidentiality obligations, and emphasize the responsibility of all judges and judiciary employees to take appropriate action upon learning of potential misconduct, the judiciary revised codes of conduct.[137] By providing employees multiple avenues and methods for reporting harassment beyond the supervisory chain-of-command and access to human resources personnel capable of providing guidance and assistance, the judiciary has adopted a promising practice that the Equal Employment Opportunity Commission (EEOC) recommended for preventing harassment in the federal sector.[138]

To gauge the prevalence of harassment, retaliation, and other unwelcome work-related conduct, the EEOC also recommends that the federal employers conduct climate and exit surveys and review data on complaints.[139] In response to this guidance, the Working Group has recommended augmenting its data collection, including regularly conducting nationwide climate surveys.[140]

Although the judiciary has taken steps to improve and enhance particular formal systems related to communicating and monitoring standards of conduct, it has not yet changed formal sanctions systems related to disciplining misconduct and providing remedies to persons harmed. Interestingly, the Working Group's 2022 Report recommended in advance of congressional hearings on the JAA that the judiciary consider incorporating additional monetary remedies into the EDR framework.[141] Despite this move, leaders in the federal judiciary nevertheless opposes extending Title VII rights and other statutory protections to federal

134. 2022 WORKING GROUP REPORT, *supr*a note 10, at 8 (noting that a "key goal" of the judiciary's program is "to make it safer for all employees to come forward when inappropriate behavior is identified").

135. *Id.* at 2.

136. Fact Sheet on Workplace Protections, *supra* note 133, at 220.

137. 2022 WORKING GROUP REPORT, *supr*a note 10, at 2. "The Working Group stressed that the 'confidentiality obligations [of Judiciary employees] must be clear so both judges and judicial employees understand these obligations never prevent any employee— including a law clerk—from revealing abuse or misconduct by any person.'" *Id.* at 14.

138. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PROMISING PRACTICES FOR PREVENTING AND ADDRESSING HARASSMENT IN THE FEDERAL SECTOR 9 (2023).

139. *Id.* at 4.

140. 2022 WORKING GROUP REPORT, *supra* note 10, at 21–22.

141. *Id.* at 24. This report was released three days before the hearing on the JAA. Raymond, *supra* note 54.

judiciary employees.

The glaring absence of consequences for wrongdoers, limitations on remedies, difficulties in navigating the internal complaints processes, and lack of public accountability appear to be most problematic aspects of the existing internal regime. Reliance on sanctioning as a component of ethical infrastructure fails when alleged wrongdoers are able to avoid discipline by resigning and retiring.[142] To hold perpetrators accountable, the judiciary should support procedural changes that eliminate judges' ability to leave the bench and circumvent mechanisms designed to address misconduct.[143]

The experience of Caryn Devins Strickland, a former federal public defender who testified at the JAA hearing, illustrates the devasting impact of the lack of accountability, procedural safeguards, and the judiciary's refusal to provide remedies to employees subjected to harassment.[144] Her testimony chronicled her efforts to pursue her complaint under the EDR plan and how she was "stonewalled at every turn" and left with no remedy.[145]

When Laura Minor testified at the hearing, she commended Strickland for the latter's efforts to address misconduct in the judiciary.[146] Minor also emphasized the importance of providing federal judiciary employees with more concrete enforcement mechanisms than the current procedures, which lack clarity, impartiality, and any discernable remedy.[147] She also asserted that the JAA would help "chip away at judicial exceptionalism" and "jumpstart a cultural change" within the judiciary.[148]

As suggested by the Minor testimony, the JAA provisions enabling judiciary employees to seek judicial review under Title VII and other federal employment statutes would likely contribute to improvements in procedural safeguards for aggrieved employees.[149] In addition to impacting the formal sanctions systems, providing employees with meaningful remedies would also contribute to a cultural shift within the judiciary. More accountability and transparency

142. *See* Jennifer L. Berdahl & Jana L. Raver, *Sexual Harassment*, *in* APA HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY 641, 657 (2011) (noting that organizations need to make sure that perpetrators are "appropriately penalized")

143. *See supra* notes 75–77 (identifying JAA provisions related to resignation and retirement) and Martinez, *supra* note 33, at 972–79 (proposing steps to address limitations that permit judges to resign or retire prior to the completion of investigations into misconduct complaints).

144. 2022 JAA Hearing, *supra* note 20, at 128, 135–42 (written statement by Caryn Devins Strickland).

145. 2022 JAA Hearing, *supra* note 20, 126-127 (oral statement by Caryn Devins Strickland). After dismissal of Ms. Strickland's claims in federal district court, the Court of Appeals for the 4th Circuit remanded the case, concluding that the Fifth Amendment Equal Protection Clause "secures a federal judiciary employee's right to be free from sexual harassment in the workplace." Strickland v. U.S., 32 F.4th 311, 359 (4th Cir. 2022). *See* Shatzman, supra note 11 (reviewing facts of the Strickland case and procedural concerns related to the current judiciary procedures).

146. 2022 JAA Hearing, *supra* note 20, at 155 (testimony of Laura Minor).

147. *Id.* at 157.

148. *Id.*

149. In the Congressional hearing on the JAA, witnesses described in detail the flawed internal judiciary processes for handling workplace concerns and the denial of basic procedural protections. *See, e.g.*, 2022 JAA Hearing, *supra* note 20, at 107, 114–23 (testimony of Caitlyn Clark).

measures should also impact the climate within the organization and help erode tendencies to "circle the wagons."[150] Applying the ethical infrastructure framework, such changes are more effective than formal and informal systems in influencing ethical behavior because organizational climates for ethics, respect, and justice demonstrate an underlying conviction to ethical principles.[151]

V
CONCLUSION

Members of the judiciary and Congress have made public pronouncements about the importance of providing judicial employees with an exemplary workplace.[152] However, these proponents part ways on the best course of action for actually providing a harassment- and discrimination-free workplace. Judges and other officials in the judicial branch maintain that they are best positioned to administer an internal grievance process and are committed to improving the internal systems for handling workplace concerns. Apparently, these assertions have not persuaded Members of Congress who maintain that judiciary employees should be afforded the same protections available to employees in other sectors of the federal government. These members sponsored the JAA in an effort to extend Title VII and other protections to these employees.

An examination of the provisions in the JAA and the steps taken by the judiciary reveal that Members of Congress and the judiciary have focused on different components of ethical infrastructure in designing approaches to address workplace misconduct. To date, the judiciary has largely dealt with the problem by taking steps to improve formal systems of communicating, and to some degree monitoring, standards of conduct.[153]

The judiciary has continued to resist fortifying sanctions systems to provide meaningful remedies to employees subject to harassment and other workplace misconduct. This refusal has led to a congressional push for additional remedies. Employment experts familiar with the federal workplace recognize that providing judicial review for employees will not only strengthen formal sanctions systems, but also help change the judicial workplace's climate and culture. Within the context of ethical infrastructure, such changes will have the most effect in

150. When questioned about transparency, Laura Minor, a former EEO Officer for the Administrative Office opined that there is "very little transparency" and what "happened over and over – over the years is that whenever an issue comes up, they circle the wagons and they keep everything inside." 2022 JAA Hearing, *supra* note 20, at 190 (testimony of Laura Minor).

151. *See* Tenbrunsel, Smith-Crowe & Umphress, *supra* note 104, at 300–01 (discussing the relative strength of the elements of ethical infrastructure).

152. *E.g.*, Chief Justice's 2017 Year-End Report, *supra* note 34; Johnson Press Release, *supra* note 16.

153. *See supra* notes 125–138 and accompanying text. In describing the judiciary's changes in policies and procedures as "nibbles around the edges," Laura Minor, a former Equal Employment Opportunity Officer for the Administrative Office, testified: "The culture and the structural barriers that exist within the judiciary will make those fail, as they have for so many years." 2022 JAA Hearing, *supra* note 20, at 189 (testimony of Laura Minor)

influencing ethical conduct.[154] As applied to workplace conduct, experts emphasize that culture and climate have the greatest impact on determining whether harassment is likely to occur.[155]

Since Congress enacted the Congressional Accountability Act,[156] Members of Congress and the judiciary appear to be talking past one another rather than working together to formulate an approach to address their respective concerns related to mechanisms for protecting federal judiciary employees.[157] Moving forward, the federal judiciary should work with concerned Members of Congress to forge a path that enables the judiciary to rely on and improve internal processes, while extending statutory protections to enable federal judicial employee to seek judicial review after exhausting the administrative complaint process in the judiciary.[158] Members of the judiciary and Congress could explore the possibility of giving judiciary employees a right to seek judicial review, while preserving some features of the internal processes that may be suitable for the judiciary and consistent with best practices for handling workplace complaints.[159] With provisions giving judicial employees a right to pursue claims in court, proponents of the JAA may agree to eliminate provisions in the JAA that duplicate existing judiciary processes and raise questions related to unnecessary congressional oversight.

Candid discussions between Members of Congress and the judiciary, approached with problem-solving intentions, could reveal areas of particular concern to jurists. For example, leaders in the judiciary may not oppose extending some statutory protections to allow for civil remedies and judicial review,

154. Tenbrunsel, Smith-Crowe & Umphress, *supra* note 104, at 300–01.

155. *See supra* notes 98–102 and accompanying text.

156. *See* Robert M. Agostisi & Brian P. Corrigan, *Do as We Say or Do as We Do?: How the Supreme Court Law Clerk Controversy Reveals a Lack of Accountability at the High Cour*t, 18 HOFSTRA LABOR & EMPLOYMENT L. J. 625, 633–34 (2001) (discussing the Judicial Conferences response and resistance to a provision in the Congressional Accountability Act (CAA) that required the Judicial Conference to draft a report which included recommendations it had for legislation providing employees of the judicial branch protections consistent with those extended to congressional employees through the CAA). The resulting Report from the Judicial Conference, however, resisted the enactment of such legislation, citing the "fundamental need to preserve judicial independence" and arguing against the need for Congress to "micro-manage or unnecessarily bureaucratize the day-to-day management of the Courts." 2022 JAA Hearing, *supra* note 20, at 175–76 (statement of Ally Coll) (citing a Judicial Conference Report).

157. *See* Letter from Honorable Roslynn R. Mauskoph, Secretary of the Judicial Conference of the United States, to the Honorable Henry C. "Hank" Johnson, Jr., Chair of the Committee on the Judiciary Subcommittee on Courts, Intellectual Property and the Internet, United States House of Representatives (Aug.25, 2021), https://www.uscourts.gov/sites/default/files/house_letter_jaa.pdf [https://perma.cc/JHD4-6N23] (criticizing how the JAA made significant changes affecting the "oversight, supervision, and management of the Judicial Branch . . . without input from the Judicial Branch").

158. *See Federal EEO Complaint Processing Procedures*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/publications/federal-eeo-complaint-processing-procedures [https://perma.cc/H3P2-PVQ9] (requiring a federal sector complainant to first exhaust the regulatory administrative process before filing a civil action under Title VII of the Civil Rights Act of 1964 or the Rehabilitation Act of 1973).

159. For example, members of the judiciary tout the decentralized approach to handling complaints and the multiple avenues for employees to obtain assistance and report concerns.

provided that the law would not apply to the selection of judiciary temporary employees, such as law clerks, or the appointment of judges.[160] In working together, Members of Congress and the judiciary could formulate approaches to address holes in the current system, such as the lack of data on the climate of the judicial workplace.

Discourse and engagement may help members of the judiciary recognize the connection between accountability, independence, and public support. To date, judges have relied on the doctrine of judicial independence and their ability to police themselves in opposing statutory workplace protections for judicial employees. The genesis of the JAA suggests such opposition by judges fosters the perception of judicial exceptionalism and "gives ammunition to those seeking to impose ever great restrictions on judicial independence."[161] Apparently, the federal judiciary's resistance to accountability measures contributed to legislators including in the JAA numerous oversight provisions that went beyond providing judiciary employees protections under Title VII and other employment statutes.[162] Judicial opposition to extending protections to employees also undermines public support critical to maintaining judicial independence.[163]

In praising the judiciary's changes in workplace policies and procedures, Chief Justice Roberts referred to the judiciary's "ethos of accountability."[164] By rethinking its steadfast resistance to providing judiciary employees the same rights available to others, the judiciary communicates that it is willing to take this ethos into action. Failure to do so may further erode public confidence and trust in a judiciary that opposes extending basic civil rights to persons who labor within its walls. On the other hand, providing statutory protections to judiciary employees may foster more public confidence and trust because, in the words of Justice Louis Brandeis, "government officials must be subject to the same rules of conduct that are commands to the citizen."[165]

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160. *See* Michael Conklin, *Good for the Goose but Not for the Gander: Biden's Promise to Appoint a Black Female to the Supreme Court and Title VII Principles,* 9 TEX. A&M L. REV. ARGUENDO 35 (2002) (analyzing how an extension of Title VII to the judiciary might apply to appointments to the Supreme Court).

161. *See* Laura A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always be Trusted to Police Themselves and What Congress Can Do About It,* 97 KY. L.J. 439, 441 (2009) (stating that judges' "reluctance to police their own fosters a perception of institutional bias").

162. *See supra* notes 68–71and accompanying text (discussing JAA provisions creating various offices and positions with oversight authority).

163. *See* Alison Higgins Merrill, Nicholas D. Conway, & Joseph Daniel Ura, *Confidence and Constraint: Public Opinion, Judicial Independence, and the Roberts Cour*t, 54 WASH. U. J. L. & POL'Y 209 (2018) (drawing on the growing body of research in political science and related fields indicating that declining public support undermines judicial independence).

164. CHIEF JUSTICE JOHN G. ROBERTS, JR., 2018 YEAR END REPORT ON THE FEDERAL JUDICIARY 5 (2017), https://www.supremecourt.gov/publicinfo/year-end/2018year-endreport.pdf [https://perma.cc/P335-E3T4].

165. As stated by Justice Louis Brandeis in a dissent in Burdeau v. McDowell, 256 U.S. 465, 477 (1921), "At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen."