

ARTICLE

THE D.C. COURTS ARE ARTICLE I FEDERAL COURTS, AND THEY SHOULD BE REGULATED THAT WAY.

ALIZA SHATZMAN*

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* Aliza Shatzman is the President and Co-Founder of The Legal Accountability Project, a nonprofit aimed at ensuring that as many law clerks as possible have positive clerkship experiences, while extending support and resources to those who do not. Ms. Shatzman earned her B.A. from Williams College and her J.D. from Washington University School of Law. Ms. Shatzman regularly writes and speaks on the subject of judicial accountability. Her scholarship on this subject has previously appeared in numerous publications, including the *UCLA Journal of Gender & Law*, *Harvard Journal on Legislation*, *Yale Law & Policy Review*, *NYU Journal of Legislation & Public Policy*, *Slate*, *Above the Law*, *Law360*, *Ms. Magazine*, and *Balls & Strikes*.

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INTRODUCTION

The Superior Court of the District of Columbia (D.C. Superior Court) and the District of Columbia Court of Appeals (D.C. Court of Appeals) (collectively “the D.C. Courts”) have failed to address gender discrimination, harassment, retaliation, and other judicial misconduct in D.C.’s local courts. In the fifty-two-year history of the D.C. Courts and the D.C. Commission on Judicial Disabilities and Tenure (CJDT)—the local judicial conduct commission—a D.C. judge has never been reprimanded, disciplined, or removed from office for gender discrimination, harassment, or retaliation.¹ That is a red flag that judicial disciplinary mechanisms in D.C. are broken. Law clerks in every jurisdiction are actively dissuaded by members of the legal community from reporting the misconduct of their powerful superiors—let alone filing complaints against the judges who mistreated them. Would-be complainants fear reputational harm and retaliation from judges, who wield enormous power over their careers. In the rare instances in which law clerks file complaints, they are often dismissed, either before or after a preliminary investigation.² The legal community’s toxic culture of deifying judges and disbelieving law clerks sends a powerful message to mistreated young attorneys: do not bother coming forward, because your career and reputation will be destroyed.

1. See generally D.C. COMM’N ON JUD. DISABILITIES & TENURE, <https://cjdt.dc.gov/> (last visited Nov. 12, 2022).

2. See generally *Caseload Statistics Data Tables*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> (last visited Nov. 12, 2022); see also 2017 ANN. REP. D.C. COMM’N ON JUDICIAL DISABILITIES & TENURE. In 2017, the most recent year for which a Commission on Judicial Disabilities and Tenure (CJDT) report is available online, the CJDT received seventy misconduct complaints. *Id.* at 10. After initial review, the CJDT determined in twenty-eight of these cases “that no further inquiry was warranted”; it “dismissed [twenty-one] matters for lack of jurisdiction”; and it dismissed “seven matters for lack of merit.” *Id.* It dismissed three where “the complainants failed to provide additional information requested.” *Id.* One was “withdrawn by the complainant.” *Id.* “Of the [thirty-one] matters investigated, [eleven] were dismissed for lack of merit, [ten] were dismissed for lack of jurisdiction, two were disposed of with informal conferences with each of the two judges involved,” and “two complaints were disposed of informally with a letter to each of the two judges concerned.” *Id.*

In the D.C. Courts, institutional failures in laws and leadership have perpetuated judicial misconduct. Unlike other local jurisdictions, the D.C. Courts are regulated by Congress; therefore, Congress must fix these deficiencies.³ Distinct from Article III federal judges, as well as many Article I judges, who are regulated by the Judicial Conduct and Disability Act,⁴ D.C. Courts' judges are regulated by the CJDT,⁵ a toothless commission that does not take judicial misconduct seriously. Characteristics of both D.C. Courts' judges and the Commission tasked with overseeing them suggest amending the Judicial Conduct and Disability Act to cover the D.C. Courts.⁶ This would be a powerful step toward rectifying the lack of oversight in the D.C. Court System that has allowed D.C. Courts' judges to evade scrutiny over their dealings with law clerks and avoid accountability for committing misconduct.

We cannot legislate away harassment. Larger cultural change in the legal community is necessary. However, extending the Judicial Conduct and Disability Act rules to the D.C. Courts, and finally giving D.C. Courts' law clerks clear policies, procedures, and due process rights when filing complaints against judges, is an important step toward protecting the next generation of attorneys by ensuring that their workplaces are safe and free from discrimination and harassment.⁷

This Article argues that Congress should amend the Judicial Conduct and Disability Act to cover the D.C. Courts because the D.C. Courts are Article I federal courts regulated by Congress. Furthermore, the Judicial Conduct and Disability Act already covers a variety of Article I Courts.⁸ Additionally,

3. *Committee Jurisdiction*, H. COMM. ON OVERSIGHT & REFORM, <https://oversight.house.gov/about/committee-jurisdiction> (last visited Nov. 12, 2022); *see also* STAFF OF H. COMM. ON RULES, 117TH CONG., TEXT OF THE HOUSE AMENDMENT TO THE SENATE AMENDMENT TO H.R. 2471537 (Comm. Print 2022), <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR2471SA-RCP-117-35.pdf>; *see also* S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS. FULL COMM. & SUBCOMM. JURISDICTIONS FOR THE 117TH CONG., <https://www.hsgac.senate.gov/imo/media/doc/JurisdictionHSGAC%20and%20Subcommittees-117th%20Congress.pdf>; S. 3179, 117th Cong. (2022) [hereinafter S. HOMELAND SEC. COMM. JURISDICTION] (Federal Payment for Judicial Commissions).

4. 28 U.S.C. § 351.

5. *The Commission's Jurisdiction*, D.C. COMM'N ON JUD. DISABILITIES & TENURE, <https://cjdt.dc.gov/page/commission%E2%80%99s-jurisdiction> (last visited Nov. 12, 2022).

6. *See infra* Part I.

7. *See Workplace Conduct in the Federal Judiciary*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/workplace-conduct-federal-judiciary> (last visited Nov. 12, 2022).

8. *See Judicial Conduct and Disability*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability> (last visited Nov. 12, 2022) (noting that the Judicial Conduct and Disability Act already covers several Article I courts including the Court of

covering the D.C. Courts under the Judicial Conduct and Disability Act would remove judicial misconduct investigations from the jurisdiction of the CJDT, whose vague statutes have enabled it to mishandle misconduct investigations for decades, and whose commissioners have historically enjoyed a lack of oversight from Congress.⁹

This Article highlights personal experience with gender discrimination, harassment, and retaliation during her D.C. Superior Court clerkship and in the years following it to demonstrate the urgent need for reform. It then explains the CJDT judicial complaint process as well as the mechanics and jurisdiction of Judicial Conduct and Disability Act. It concludes by arguing that, due to characteristics of D.C. Courts' judges, deficiencies in the CJDT complaint process, and Congress's political intransigence toward regulating the D.C. Courts, the best way to expand judicial accountability in D.C.'s local court system is to amend the Judicial Conduct and Disability Act to cover the D.C. Courts.

I. CASE STUDY: MY EXPERIENCE WITH GENDER DISCRIMINATION, HARASSMENT, AND RETALIATION DURING MY D.C. SUPERIOR COURT CLERKSHIP AND IN THE YEARS FOLLOWING IT UNDERSCORE WHY CHANGES ARE URGENTLY NEEDED.

A. *D.C. Superior Court Clerkship*

I decided to clerk in D.C. Superior Court during the 2019–2020 term because I aspired to be a homicide prosecutor in the D.C. U.S. Attorney's Office, and I knew that D.C. Assistant U.S. Attorneys (AUSAs) appeared before D.C. Superior Court judges. I hoped to get a crash course in trial lawyering and judicial decisionmaking. Unfortunately, my clerkship shattered these career aspirations and set me on a totally different career path.

Beginning just weeks into my clerkship, the judge for whom I clerked began to harass me and discriminate against me because of my gender. He would kick me out of the courtroom, telling me that I made him “uncomfortable” and he “just felt more comfortable” with my male co-clerk.¹⁰ He told me I was “bossy,”

Federal Claims and the Bankruptcy Courts)

9. *See id.* *See also* D.C. Mun Regs. tit. 28, § 2010.2 (stating that an “investigation may be carried out in a manner the Commission deems as appropriate.”).

10. Corroborative documentation for this statement and the following statements is on file with the author. My clerkship experience is also summarized in a congressional Statement for the Record. *Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change: Hearing Before the H. Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117th Cong. (statement of Aliza Shatzman, Former D.C. Superior Court Law Clerk).

“aggressive,” “nasty,” “a disappointment,” and that I had “personality issues.”¹¹ The day I found out I passed the D.C. Bar Exam—a major accomplishment for any young attorney—he called me into his chambers, got in my face, and told me, “You’re *bossy*! And I know bossy because my *wife* is bossy!”¹²

I was devastated. I cried on the walk to work; cried in the courthouse bathroom; and cried myself to sleep at night. I wanted to be reassigned to a different judge, but the D.C. Courts lacked an Employee Dispute Resolution (EDR) Plan in place that might have enabled me to be reassigned—it was implemented one year after my clerkship ended.¹³

In March 2020, during the COVID-19 Pandemic, I moved back to Philadelphia to stay with my parents and worked remotely. The judge ignored me for six weeks. My calls, emails, and texts went unanswered. Finally, he called me in late April 2020 and told me he was ending my clerkship early because I made him “uncomfortable” and “lacked respect for” him but he “didn’t want to get into it.”¹⁴ I called Human Resources (HR) for the D.C. Courts, but they told me there was nothing they could do because “HR doesn’t regulate judges” and that “judges and law clerks have a unique relationship.”¹⁵ Then they asked me whether I knew that I was an “at-will employee.”¹⁶

After confiding in another D.C. Courts judge, I drafted a judicial complaint that I intended to file with the CJDT. I decided to wait to file it until I had secured a new job, because I feared the judge would retaliate against me.

11. *Id.*

12. *Id.*

13. One year after I was separated from my clerkship, the D.C. Courts announced a new Employee Dispute Resolution (EDR) Plan, modeled on the U.S. Courts’ Model EDR Plan. This plan allows for a judicial reassignment, among other remedies. See Press Release, D.C. Cts., District of Columbia Courts Announce New Employment Dispute Resolution Plan (May 20, 2021), <https://newsroom.dccourts.gov/press-releases/district-of-columbia-courts-announce-new-employment-dispute-resolution-plan>; see also *Employment Dispute Resolution Plan and Commitment to a Fair and Respectful Workplace*, D.C. CTS., <https://www.dccourts.gov/about/learn-more/employee-dispute-resolution-plan> (last visited Nov. 12, 2022).

14. Documentation on file with the author.

15. Documentation on file with the author.

16. “At-will means that an employer can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability.” *At-Will Employment - Overview*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 15, 2008), <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx>.

B. *Post-Clerkship Period*

It took me a year to get back on my feet after my clerkship abruptly ended. I eventually secured my dream job as a Special Assistant U.S. Attorney (SAUSA) in the D.C. United States Attorney's Office (USAO) and moved back to Washington, D.C. I was two weeks into training at the D.C. USAO when, on July 16, 2021, I received devastating news that changed my life. I was told by D.C. USAO leadership that the judge I had clerked for made negative statements about me during my background investigation; that I "would not be able to obtain a security clearance;" and that my job offer was revoked—after I already started working there.¹⁷ A few days later, an interview offer for a different position with the D.C. USAO was also revoked, based on the judge's same negative reference. I was only two years out of law school, and the judge seemed to have limitless power to ruin my reputation and destroy my career.

I added some sections to my judicial complaint about the negative reference, which I had not yet seen but believed was gender-based. On July 19, 2021, I filed a judicial complaint with the CJDT. I hired attorneys.¹⁸ During the summer and fall of 2021, I participated in the investigation into the now-former judge.¹⁹

C. *CJDT Investigation*

The CJDT initially told me that my complaint interested them "for several reasons," but they would not tell me what those reasons were. Partway through the investigation, an attorney in whom I confided alerted me that the judge was on administrative leave, pending an investigation into other misconduct. After the judge was involuntarily retired from the D.C. bench and I was able to read the CJDT's involuntary retirement order, I discovered that the then-judge had already agreed to take leave, pending an investigation, at the time he filed the negative reference about me. The USAO was not alerted of the circumstances surrounding the negative reference until it was too late.

17. Documentation on file with the author.

18. That summer, the I also filed a Freedom of Information Act (FOIA)/Privacy Act request, seeking a copy of the negative reference, that led to the revocation of my job offer, statements that I would be denied a security clearance, and the revocation of my interview offer. That FOIA/Privacy Act request was denied in full. Documentation on file with the author. *See* FOIA, 5 U.S.C. § 552; Privacy Act of 1974, 5 U.S.C. § 552a.

19. The judge for whom I clerked was "involuntarily retired" from the D.C. bench in 2021 pursuant to D.C. Code § 1526(b) for reasons other than allegations that he mistreated his clerks. Documentation on file with the author.

As devastating as the mistreatment I experienced during my clerkship was, the CJDT's investigation was worse. It was isolating and unnecessarily secretive, and I regularly felt re-victimized. I had confided in only a few close friends. I had not even told my parents. Most of my interactions during that several-month period were with my attorneys. I had no reason to be anything less than fully truthful. As far as I knew when I filed my complaint, the judge was still on the bench, and the CJDT was unlikely to discipline him, let alone remove him from office. He would have the power to retaliate against me. I would probably struggle to find another legal job in D.C. In fact, structures and institutions in the legal community are set up to discourage law clerk reporting. There were many downsides, and few upsides, to coming forward.

Unfortunately, the CJDT representatives with whom I interacted immediately seemed skeptical of my claims.²⁰ During my first conversation with the special counsel investigating my complaint, she spent several hours needling me about why I could not adjust to the judge's unique work style of harassing me. She told me that I "must have done something wrong because the judge hired [me] in the first place." She did not ask me any questions about the negative reference, even though it was thoroughly detailed in my thirty-page complaint—and despite the fact that it was my impetus for filing my complaint at that time. I was asked one question by a CJDT commissioner about whether I believed I had been retaliated against. I answered affirmatively. No follow-up questions were asked.

I provided the CJDT with a list of witnesses to interview. They would not confirm who the witnesses were. Weeks would go by where we would not hear from the CJDT. I waited in excruciating silence, suspecting I would receive bad news. Because this was a judicial misconduct investigation and not litigation, the processes were enormously secretive, and the judge received every possible protection. I had no discovery opportunities. I would not know—let alone be able to refute—anything that was said about me. I should not have been surprised that the system is set up to protect misbehaving judges, no matter how much misconduct they commit. It was the then-judge's friends and colleagues in the D.C. legal community deciding whether to discipline him.

20. I primarily interacted with the Special Counsel, a commissioner, and the Executive Director.

In late September, more than two months after I filed my complaint against the then-judge, I was alerted that the CJDT intended to dismiss my complaint. The CJDT provided no further explanation. Unlike the federal Judicial Conduct and Disability Act rules, CJDT rules do not require the investigator to issue findings of fact or an explanation when they dismiss a complaint.²¹ I had no right to appeal.²²

We continued to engage in private settlement negotiations with the then-judge and his legal team, through which I eventually obtained a copy of the negative reference that had caused the revocation of my SAUSA job offer; the USAO's statements that I would be denied a security clearance; and the revocation of an AUSA interview offer. It was outrageous and misleading. The Senate-confirmed judge appeared to believe that he was above the law: because he was a judge, no one would question him. And no one at the USAO had questioned him about the reference.²³ They looked at the negative reference, which was distinct from everything else in my application, and tossed me aside, with no regard for the implications of their decision on my life, reputation, and career.

In January 2022, pursuant to the terms of our settlement agreement, the former judge issued a "clarifying statement" to the USAO addressing some but not all of his outlandish claims about me.²⁴ However, it was too late. The damage had been done. I was blackballed from what I thought was my dream job at the USAO.

Some judges—including my former supervisor—appear to believe, and act as if, they are above the law. In fact, the Judiciary is excluded from Title VII of the Civil Rights Act of 1964²⁵—meaning that judges are exempt from the antidiscrimination laws they enforce—sending misbehaving judges the message that they are accountable to no one.

The CJDT's vague, unclear, and nonexistent rules enable them to evade scrutiny over and avoid accountability for their mishandling of investigations into complaints like mine.²⁶ Secrecy protects abusers. Judicial conduct

21. See U.S. CTS., GUIDE TO JUDICIARY POLICY: vol. 2, pt. E, CH. 3: RULES FOR JUDICIAL CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 35–36 (2019) [hereinafter GUIDE TO JUDICIARY POLICY: CH. 3], https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf; see generally, D.C. Mun Regs. tit. 28.

22. See *Filing a Complaint*, D.C. COMM'N ON JUD. DISABILITIES AND TENURE, <https://cjdtdc.gov/node/603922> (last visited Nov. 2, 2022) (explaining that the complaint process ends with a dismissal).

23. Documentation on file with the author.

24. Documentation on file with the author.

25. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C., 42 U.S.C. and 52 U.S.C.).

26. See generally D.C. Mun Regs. tit. 28, §§ 2000–99.

commissions are set up to protect misbehaving judges, not mistreated law clerks. I had no window into the overly secretive processes; no insight into the reasons why my complaint was dismissed; and no right to appeal. I could not even interact with most of the commissioners—they had no opportunity to engage with me and assess my credibility. I felt that I should have at least been permitted to address the commissioners directly—forcing them to directly confront me before making an enormous decision about my life.

As the following Sections illustrate, the Judicial Conduct and Disability Act is far from perfect—in many instances lacking impartiality and confidentiality—and the vast majority of law clerk complaints are dismissed.²⁷ However, under the Judicial Conduct and Disability Act, the Chief Judge who reviews the law clerk’s complaint must issue findings of fact, even if the complaint is dismissed; the law clerk has appeal rights; and the rules and procedures for the clerk to follow are clearly delineated.²⁸ This is the bare minimum due process afforded to complainants.²⁹ These policies should be extended to D.C. Courts law clerks as well.

27. See U.S. CTS., TABLE S-22, JUDICIAL COMPLAINTS—COMPLAINTS COMMENCED, TERMINATED, AND PENDING WITH ALLEGATIONS AND ACTIONS TAKEN UNDER AUTHORITY OF 28 U.S.C. § 351-364 DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2021 (2021), https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2021.pdf. During the 2020–2021 term, eleven of the 1,282 complaints filed were initiated by judicial employees, and zero complaints resulted in corrective action. *Id.* During the 2019–2020 term, five of the 1,253 judicial complaints filed were initiated by judicial employees. See U.S. CTS., TABLE S-22, REPORT OF COMPLAINTS COMMENCED AND ACTION TAKEN UNDER AUTHORITY OF 28 U.S.C. § 351-364 DURING THE PERIOD FROM 10/1/2019 TO 9/30/2020 (2020), https://www.uscourts.gov/sites/default/files/jb_s22_0930.2020.pdf. In total, 857 complaints were dismissed in whole or in part. *Id.* Troublingly, only five of the 1,253 complaints resulted in corrective action taken, all of which were either censures or reprimands. See *id.*; see also Joan Biskupic & Aaron Kessler, *CNN Investigation: Sexual Misconduct by Judges Kept Under Wraps*, CNN (Jan. 26, 2018, 12:35 PM), <https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html> (analyzing data on judicial orders related to misconduct complaints between 2006 and 2017). The CNN analysis revealed that very few judges are disciplined; none of the complaints are made public; and “judicial orders are dumped onto circuit court websites as a series of numbered files,” rendering the data confusing and unsearchable. *Id.*

28. See GUIDE TO JUDICIARY POLICY: CH. 3, *supra* note 21 at 35–40, https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf (outlining the procedural due process afforded to complainants during judicial misconduct investigations, such as the right to provide relevant evidence, submit written arguments, be represented by counsel, and appeal).

29. See *Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/due_process (last visited Nov. 12, 2022).

II. JUDICIAL DISCIPLINE IN THE D.C. COURTS

A. *What Are the D.C. Courts?*

There are two types of federal courts.³⁰ Under Article III of the Constitution, federal judges are appointed by the President and confirmed by the Senate.³¹ They hold their offices “during good behavior” which, in practice, grants them life tenure.³² Under Article I of the Constitution, Congress is also empowered to create some federal courts, sometimes referred to as legislative courts or Article I tribunals.³³ These include: the territorial courts in Guam, the U.S. Virgin Islands, and the Northern Mariana Islands; the U.S. Court of Military Appeals; the U.S. Court of Veterans Appeals; the U.S. Court of Federal Claims; the U.S. Tax Court; the U.S. Bankruptcy Court; and the D.C. Courts.³⁴ The judges in most Article I courts are

30. *See Court Role and Structure*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Nov. 12, 2022); *see also* JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL DEPARTMENT OF THE UNITED STATES 45 (2009) (contrasting Article I tribunals and Article III courts, both of which are created by Congress and are inferior to the Supreme Court, by recognizing the flexibility of Article I courts to extend federal jurisdiction to states and “handle matters outside the scope of the judicial power”).

31. U.S. CONST. art. III.

32. *See About Federal Judges*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/about-federal-judges> (last visited Nov. 12, 2022).

33. U.S. CONST. art. I. Most, but not all, Article I judges are Senate-confirmed. For example, bankruptcy judges are not Senate-confirmed: they are appointed by circuit court judges for fourteen-year terms, yet they are covered under the Judicial Conduct and Disability Act. *See* Craig A Gargotta, *Who Are Bankruptcy Judges and How Did They Become Federal Judges?*, FED. LAW., Apr. 2018, at 11, <https://www.fedbar.org/wp-content/uploads/2018/04/Bankruptcy-Brief-pdf-1.pdf>.

34. *See Legislative Courts*, JUSTIA <https://law.justia.com/constitution/us/article-3/06-legislative-courts.html> (annotating U.S. CONST. art. III, § 1) (last visited Nov. 12, 2022) (“Legislative courts . . . are created by Congress pursuant to its general legislative powers . . .”). Furthermore,

[i]n creating legislative courts, Congress is not limited by the restrictions imposed in Article III concerning tenure during good behavior and the prohibition against diminution of salaries. Congress may limit tenure to a term of years, as it has done in acts creating territorial courts and the Tax Court; it may subject the judges of legislative courts to removal by the President; and it may reduce their salaries during their terms.

Id. (first citing *McAllister v. United States*, 141 U.S. 174 (1891); then citing *United States v. Fisher*, 109 U.S. 143 (1883), and *Williams v. United States*, 289 U.S. 553 (1933)). *See* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91–358, 84 Stat. 475 (codified as amended at D.C. CODE § 11–101 (1973)); D.C. CTS., D.C. COURTS TIMELINE, <https://www.dccourts.gov/sites/default/files/DCCts-timeline.pdf> (depicting history of the D.C. Courts); Steven M. Schneebaum, *The Legal and Constitutional Foundations for the District of Columbia Judicial Branch*,

appointed by the President and confirmed by the Senate for ten or fifteen-year terms, with the exception of the D.C. Courts, they are federal courts and federal judges, and their law clerks are federal clerks.³⁵ The D.C. Courts are not technically federal courts, not because of the Article I versus Article III distinction, but because D.C. is not a state—the D.C. Courts are D.C.’s local courts, and D.C. judges hear cases on local issues.³⁶

The D.C. Courts were established by Congress in 1970.³⁷ Under the 1973 District of Columbia Home Rule Act,³⁸ Congress specifically prohibited the D.C. Council from passing any laws that would alter the composition or jurisdiction of the D.C. Courts.³⁹ The Judicial Nomination Commission (JNC) recommends D.C. judges for nomination by the President.⁴⁰ They are confirmed for fifteen-year terms by the U.S. Senate.⁴¹ They are then considered—often as merely a formality—for reappointment by the CJDT.⁴²

11 U.D.C. L. REV. 13 (2008) (explaining the structure of the D.C. Courts).

35. See *Legislative Courts*, *supra* note 34.

36. See D.C. Code §§ 11-921(a), 922(a), 923(a) (giving the Superior Court of the District of Columbia jurisdiction over all civil and criminal cases in D.C., as well as a discretionary certification to the Superior Court for civil actions commenced in the U.S. District Court for D.C. whose judgments will not exceed \$10,000).

37. See *Legislative Courts*, *supra* note 34.

38. See District of Columbia Self-Government and Government Reorganization (D.C. Home Rule Act), Pub. L. 93-198, 87 Stat. 774 (1973) (codified at D.C. CODE §§ 1-201.01–07.71).

39. See *id.* (vesting no authority in the D.C. Council to alter Chapter III of the Home Rule Act).

40. See D.C. CODE §§ 1-204.33 (2022); *JNC Members*, D.C. JUD. NOMINATION COMM’N, <https://jnc.dc.gov/page/jnc-members> (last visited Nov. 12, 2022) (outlining the Judicial Nomination Commission’s (JNC’s) seven members composition: two appointed by the Mayor, including one non-lawyer; two by the Board of Governors of the D.C. Bar; one non-lawyer by the D.C. Council; one by the President of the United States; and one judicial member appointed by the Chief Judge of the United States District Court for the District of Columbia). Each member of the JNC “is appointed for a six-year term, except the member appointed by the President, who is appointed for a five-year term. Members may serve until the appointment of a successor.” *Id.*

41. See D.C. CODE §§ 1-204.31(c). Unlike Article III judges, who are confirmed by the Senate Judiciary Committee, D.C. judicial nominations are considered by the Senate Homeland Security and Governmental Affairs Committee. See, e.g., *Nominations of Loren L. Alikhan and John P. Howard III to be Associate Judges, District of Columbia Court of Appeals, and Adrienne Jennings Noti to be an Associate Judge, Superior Court of the District of Columbia: Hearing before S. Homeland Sec. & Governmental Affs. Comm.*, 117th Cong. (2021).

42. See *Judicial Reappointments*, D.C. COMM’N ON JUD. DISABILITIES & TENURE, <https://cjdt.dc.gov/service/judicial-reappointments> (last visited Nov. 12, 2022); see also D.C. Mun. Regs. tit. 28, §§ 2030–31 (noting judicial evaluation categories include: Well Qualified, Qualified, or Unqualified). In practice, most D.C. judges who seek re-appointment are reappointed by the CJDT. See Charles A. Miller, *Who Should Appoint Judges of the D.C. Courts?*,

This affords D.C. judges de facto life tenure, since most judges will not serve for more than thirty years (two terms). The Code of Judicial Conduct is the standardized set of rules that guide D.C. judges.⁴³ Additionally, the D.C. Courts are funded by the federal budget.⁴⁴

The D.C. Courts are best thought of as a hybrid of both a state and a federal court.⁴⁵ However, D.C. judges are Senate-confirmed, like Article III federal judges.⁴⁶ Only the CJDT can remove a misbehaving D.C. judge.⁴⁷ After a D.C. judge's Senate confirmation, it is a high bar to remove that judge from the bench, prior to the end of their fifteen-year term.⁴⁸ Other local or state court jurisdictions do not face such significant hurdles to removing misbehaving judges from the bench.⁴⁹

11 U.D.C. L. REV. 25, 26–27 (2008) (explaining that the majority of D.C. judges are found to be “well-qualified” by the CJDT and re-nominated for a second fifteen-year term).

43. See generally, D.C. CODE OF JUD. CONDUCT (2021).

44. See *Financial Services and General Government*, H. COMM. ON APPROPRIATIONS, <https://appropriations.house.gov/subcommittees/financial-services-and-general-government-117th-congress> (last visited Nov. 12, 2022) (noting Committee's jurisdiction over D.C.); see also *Financial Services and General Government Appropriations Act*, H.R. 4345, 117th Cong. (2021) (Fiscal Year (FY) 2022 appropriations).

45. The D.C. Courts are local courts—since D.C. is not a state—and D.C. also houses several federal courts, including the United States District Court for, see U.S. DIST. CT. D.C., <https://www.dcd.uscourts.gov> (last visited Nov. 12, 2022), and the United States Court of Appeals for the District of Columbia Circuit, see U.S. CT. OF APPEALS D.C. CIR., <https://www.cadc.uscourts.gov/internet/home.nsf/content/home+page> (last visited Nov. 12, 2022). The United States Court of Appeals for the Federal Circuit is also located in DC, see U.S. CT. OF APPEALS FOR THE FED. CIR., <https://cafc.uscourts.gov> (last visited Nov. 12, 2022).

46. *About Federal Judges*, *supra* note 32.

47. See *Judicial Misconduct Investigations*, D.C. COMM'N ON JUD. DISABILITIES & TENURE, <https://cjdtdc.gov/service/judicial-misconduct-investigations> (last visited Nov. 12, 2022).

48. *Judges and Judicial Administration - Journalists Guide*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide> (last visited Nov. 12, 2022).

49. The author has engaged in conversations with state court judges and representatives from judicial conduct commissions in a variety of jurisdictions. Documentation on file with the author.

B. District of Columbia Commission on Judicial Disabilities and Tenure

In 1970, the same year Congress created the D.C. Courts, they also created the CJDT to regulate D.C. judges.⁵⁰ The CJDT handles both judicial misconduct investigations and judicial reappointments.⁵¹ The seven-commissioner CJDT is staffed by judges; attorneys who interact with judges; several non-attorneys; and an unelected, un-appointed Special Counsel, who is hired by the seven commissioners and who wields enormous power.⁵² This dual function creates the potential for a conflict of interest for the CJDT, since the same individuals who rubber-stamp D.C. Courts judges reappointment for their second fifteen-year terms are also tasked with investigating their misconduct.⁵³

50. See D.C. Court Reform and Criminal Procedure Act, D.C. CODE § 11-1525(a) (1970). The CJDT's authority was later clarified in 1973 under the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 431(d)(3), 87 Stat. 774, and its authority has been expanded several times since then. The CJDT most recently amended several of its rules on June 3, 2021. See *Rules Governing the Commission*, D.C. COMM'N ON JUD. DISABILITIES & TENURE, <https://cjdt.dc.gov/publication/rules-governing-commission> (last visited Nov. 12, 2022).

51. See *Judicial Misconduct Investigations*, *supra* note 47; see also *Judicial Reappointments*, *supra* note 42. The CJDT is also empowered to consider recommendations for senior status and retired judges. See D.C. CODE § 11-1504 (2021); see also § 11-1521 (2022). This differentiates the D.C. Court system from state court systems like Maryland, Virginia, New York, and New Jersey, which separate judicial appointments and judicial misconduct investigations into two distinct commissions. See, e.g., *Judicial Nominating Commission*, MD. MANUAL ON-LINE, <https://msa.maryland.gov/msa/mdmanual/26excom/html/22jnom.html> (March 11, 2022); *Commission on Judicial Disabilities*, MD. CTS., <https://www.courts.state.md.us/cjd> (last visited Nov. 12, 2022); *Commission on Judicial Nomination*, N.Y. STATE, <https://cjn.ny.gov> (last visited Nov. 12, 2022); *About Us*, N.Y. STATE COMM'N ON JUD. CONDUCT, <https://cjc.ny.gov/General.Information/Gen.Info.Pages/About.us.html> (last visited Nov. 12, 2022); N.J. CTS., CN 12246, THE NEW JERSEY COURTS A GUIDE TO THE JUDICIAL PROCESS, 7, 9 (2019); *RULE 2:15 - Advisory Committee on Judicial Conduct*, N.J. CTS., <https://www.njcourts.gov/attorneys/rules-of-court/advisory-committee-judicial-conduct> (last visited Nov. 12, 2022) (listing court rules regarding Advisory Committee on Judicial Conduct). In Virginia, state court judges are elected by a majority vote of the General Assembly, see VA. CTS., VIRGINIA COURTS IN BRIEF (2021), <https://www.vacourts.gov/courts/cib.pdf>, while the Judicial Inquiry and Review Commission handles judicial misconduct investigations, see *Judicial Inquiry and Review Commission*, VA. COURTS, <https://www.vacourts.gov/agencies/jirc/home.html> (last visited Nov. 12, 2022).

52. See *FY20 – FY21 Performance Oversight Hearing: Before the D.C. Comm'n on Jud. Disabilities & Tenure* 1, 3 (2021) [hereinafter Sanford Oversight Testimony] (statement of Jeannine C. Sanford, Chairperson, Comm'n on Jud. Disabilities & Tenure), <https://dccouncil.us/judiciary-public-safety-4/jps-performance-oversight-responses-2021-cjdt>.

53. Appointments to the CJDT are made by: the President of the United States (1), the D.C. Bar Board of Governors (2), the D.C. Mayor (2), the D.C. Council (1), and the Chief Judge of the District Court for the District of Columbia (1). See *Commission Membership*, D.C. COMM'N

The CJDT enforces the Code of Judicial Conduct, by which both D.C. Superior Court and D.C. Court of Appeals judges are bound.⁵⁴ The CJDT has the power to investigate formal complaints against judges, including complaints about bias, prejudice, and harassment.⁵⁵ The CJDT begins with a preliminary investigation, after which they can either dismiss the complaint or proceed with a formal hearing.⁵⁶ A CJDT preliminary investigation “may be carried out in a manner that the Commission deems appropriate,” leaving a substantial amount open to investigators’ interpretation.⁵⁷ CJDT investigations “may include interviewing witnesses, reviewing court records and documents, and gathering other information and materials as the issues may warrant.”⁵⁸ Troublingly, this is the extent of the CJDT’s public explanation of its investigatory process in its Rules and Statutes.⁵⁹ Furthermore, the CJDT is not required to make findings of fact when it dismisses a complaint, nor is there an appeal process for complainants when complaints are dismissed.⁶⁰ D.C. judges have appeal rights, but complainants do not.⁶¹ This is distinct from the Judicial Conduct and Disability Act, in which the complaint reviewer must lay out reasons for the dismissal, and both parties have appeal rights.⁶²

ON JUD. DISABILITIES & TENURE, <https://cjdtdc.gov/page/commission-membership>.

54. Although D.C. judges are also evaluated by the Bar’s Judicial Evaluation Committee in their second, sixth, tenth, and thirteenth years of service, judges are only evaluated by “attorneys who appeared before the judge,” which does not necessarily present a full picture of the judge’s conduct. *Judicial Service in the District of Columbia Courts Frequently Asked Questions*, D.C. JUD. NOMINATION COMM’N, <https://jnc.dc.gov/page/judicial-service-district-columbia-courts-frequently-asked-questions> (last visited Nov. 12, 2022). These evaluations are only presented to the judge, which impedes accountability. These evaluations should be annual, and they should be publicly available. *See also Judicial Evaluation Survey*, DC BAR, <https://www.dcbbar.org/for-lawyers/membership/judicial-evaluation-survey> (last visited Nov. 12, 2022).

55. *See* D.C. CODE OF JUD. CONDUCT r. 2.3 (2021); *see also Judicial Misconduct Investigations*, *supra* note 47.

56. *See* D.C. Mun. Regs. tit. 28, §§ 2010, 2010.1–4, 2013, 2015 (2019) The CJDT has subpoena power. § 2018.

57. § 2010.2.

58. *See Judicial Misconduct Investigations*, *supra* note 47.

59. *See* § 2010.

60. *See id.* § 2010.1–2010.4. “After investigation, if the Commission determines that a proceeding should not be instituted, the Commission shall so inform the judge if he or she was previously informed of the pendency of the complaint by either the complainant or the Commission and shall give notice to the complainant . . . that there is insufficient cause to proceed.” § 2010.4.

61. *See Judicial Misconduct Investigations*, *supra* note 47 (“A judge aggrieved by any order of removal or retirement may seek judicial review by filing a notice of appeal with the Chief Justice of the Supreme Court of the United States.”).

62. *See* GUIDE TO JUDICIARY POLICY: CH. 3, *supra* note 21, at 20–23 (explaining rules on dismissing complaints).

In practice, CJDT investigations are filtered through an unelected, unappointed Special Counsel.⁶³ CJDT rules do not specify the Special Counsel's role.⁶⁴ Based on my personal experience, the Special Counsel makes determinations about complaints before the complainant can interact with CJDT commissioners and make arguments to them directly. Furthermore, complainants during the CJDT's preliminary investigation stage cannot question witnesses. In fact, complainants do not even know which witnesses have been contacted.

In circumstances in which the CJDT decides to hold a formal hearing, following the hearing, the CJDT issues findings of fact and a decision.⁶⁵ The CJDT can issue a "public reprimand" or a "public censure" "with the judge's consent."⁶⁶ Historically, the CJDT has failed to discipline misbehaving judges.⁶⁷ Over the past fifty-two years, they have issued fewer than twenty formal determinations related to judicial misconduct or disabilities, and only one resulted in the removal of a judge—via involuntary retirement—from the bench.⁶⁸ Furthermore, if a judge voluntarily retires, the CJDT ceases its investigation into their misconduct, because former judges are no longer subject to the CJDT's jurisdiction.⁶⁹

63. §§ 2000.5, 2010, 2099.

64. CJDT rules include a brief definition of the Special Counsel: "[A]ny member of the District of Columbia Bar retained to assist the Commission." § 2099.1.

65. *See id.* § 2022. Furthermore, "[i]f the record is to be made public, the Commission shall file its decision, including a transcript of the entire record, with the District of Columbia Court of Appeals." § 2022.6. According to both the CJDT's FY 2020–2021 Oversight Performance Responses, and the CJDT's formal Determinations section of its website, it is rare for the CJDT to issue a formal order regarding judicial misconduct. *See* Sanford Oversight Testimony, *supra* note 52, at 4. According to its Oversight Responses, in 2020, the CJDT received seventy complaints. It immediately dismissed thirty-one—twenty-six for lack of jurisdiction and five for lack of merit. The CJDT investigated thirty-five complaints. It dismissed thirty-two following an investigation. One complaint resulted in some disciplinary action, and two were disposed of informally through a "conference or letter to judge." *See generally* D.C. COMM'N ON JUD. DISABILITIES & TENURE, <https://cjdt.dc.gov> (last visited Nov. 12, 2022). Furthermore, if the CJDT decides to discipline a judge without holding a formal hearing, records are not necessarily maintained. Documentation on file with the author.

66. *See Judicial Misconduct Investigations*, *supra* note 47.

67. D.C. COUNCIL, TENURE COMMISSION RESPONSES TO COUNCIL QUESTIONS (2020) [hereinafter COMMISSION RESPONSES], <https://dccouncil.us/judiciary-public-safety-3/jps-performance-oversight-responses-2020-cjdt> (showing a dismissal rate of investigated complaints of over 90% in FY20 and over 80% to date in FY21).

68. Documentation on file with the author. Additionally, two CJDT determinations resulted in "unfavorable" recommendations for D.C. judges seeking senior status.

69. *See generally* D.C. COMM'N ON JUD. DISABILITIES & TENURE, *supra* note 43 (last visited Nov. 12, 2022). *See also* Amy Brittain, *D.C. Superior Court Judge Stepped Down After Questions About Sexual*

The CJDT's rules and policies, statutes, and informal procedures are opaque and confusing. The CJDT can evade oversight over and accountability for its actions because its guidelines are unclear, and its decisions are under-scrutinized. While secrecy may be necessary during an investigation, so as not to bias or prejudice the parties, a judicial conduct commission's overreliance on secrecy tends to railroad complainants.⁷⁰

*C. Political Considerations to Regulating the D.C. Courts:
When Politics Prevent Reform*

Because Congress regulates the D.C. Courts and the CJDT, reforms will need to come from Congress—particularly, from the House Oversight Committee and the Senate Committee on Homeland Security and Government Reform.⁷¹ Unfortunately, general congressional intransigence, coupled with the attitude among congressional Democrats that Congress should not further regulate the District of Columbia, make this particularly

Assault Allegation, WASH. POST (Oct. 3, 2020), <https://www.washingtonpost.com/investigations/2020/10/03/judge-truman-morrison-sexual-assault-allegation> (last visited Nov. 12, 2022). Furthermore, a judge who steps down, or retires voluntarily, can hold onto his lifetime pension in D.C., similar to the policy for federal judges. See D.C. CODE § 11-1570 (2004).

70. See John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 226–40 (1994) (critiquing the Judiciary's overreliance on secrecy during judicial misconduct investigations to protect misbehaving judges). Troublingly, the CJDT's most recent Annual Report of Commission activities was published in 2018 (documenting FY 2017's complaints, investigations, and outcomes). See *Publications*, D.C. COMM'N ON JUD. DISABILITIES & TENURE, <https://cjdt.dc.gov/publications> (listing the publication date as August 3, 2018) (last visited Nov. 12, 2022). Thus, D.C. attorneys, law clerks, and litigants cannot access complete information about judicial complaints and investigations for the years 2018 through the present. This leaves the public unaware of the scope of misconduct within the D.C. judiciary. The CJDT should publish updated reports about judicial complaints and their outcomes. For the public to have confidence in the D.C. judiciary, it is necessary to understand the sources of judicial complaints, whether they are being investigated, and how they are resolved. In 2017, there were seventy misconduct complaints filed against D.C. judges, thirty-one misconduct investigations, and no formal disciplinary processes. See *id.* The data does not indicate how many of these complaints were filed by judicial employees. See *id.* at 10–11. In 2019 and 2020, the CJDT provided extremely limited data about the number of judicial complaints filed and their dispositions—but not annual reports—in response to questions from the D.C. Committee on the Judiciary and Public Safety. See Letter from Cathae J. Hudgins, Exec. Dir., D.C. Comm'n on Jud. Disabilities & Tenure, to Charles Allen, Chair, Comm. on the Judiciary & Pub. Safety, D.C. Council (Feb. 6, 2019), <https://dccouncil.us/wp-content/uploads/2019/02/JPS-Performance-Oversight-Responses-2019-CJDT.pdf>; COMMISSION RESPONSES, *supra* note 67.

71. See *Committee Jurisdiction*, *supra* note 3; S. HOMELAND SEC. COMM. JURISDICTION, *supra* note 3.

challenging.⁷² Oversight over the D.C. Courts and CJDT are areas where increased congressional regulation of D.C. is necessary to correct a historic lack of oversight and lack of accountability. However, due to political headwinds, as well as a likely shift in congressional power after the 2022 midterm elections, the best course of action would be to extend the Judicial Conduct and Disability Act to two additional Article I courts, the D.C. Courts. This would be a better course of action than engaging in the tricky political dealmaking and stakeholder engagement necessary to push forward D.C. Courts-specific legislation or CJDT statutory changes.

III. JUDICIAL DISCIPLINE IN THE FEDERAL COURTS

The federal Judiciary is exempt from Title VII of the Civil Rights Act of 1964.⁷³ Judiciary employees—including law clerks and federal public defenders—cannot sue their harassers and seek damages for harms done to their careers, reputations, and future earning potential.⁷⁴ Existing methods

72. Between 2021 and 2022, I had numerous discussions with congressional offices about amending the Judiciary Accountability Act (JAA) to cover the D.C. Courts. This spurred conversations about specific legislation to address Title VII gaps and the other workplace protections contained in the JAA, as well as reforms to the CJDT’s statutes. Unfortunately, it became clear that congressional Democrats were unlikely to further regulate D.C. Courts. Documentation on file with the author.

73. 42 U.S.C. § 2000e. A variety of federal courts scholars explained that Article I courts are exempt from Title VII in the same way Article III federal courts are exempt from Title VII. Documentation on file with the author. This makes the Judiciary distinct from the other two branches of the federal government, whose employees are protected by Title VII pursuant to the Congressional Accountability Act, 2 U.S.C. §§ 1301–02, and Presidential and Executive Office Accountability Act, Pub. L. No. 104-331, 110 Stat. 4053 (1996) (codified as amended in scattered sections of 2 U.S.C., 3 U.S.C., 5 U.S.C. & 28 U.S.C.). At the time, the Judicial Conference opposed extending Title VII protections to judiciary employees, in part because “[t]he judiciary currently provides its employees with protections similar to those enumerated in” the statutes. JUD. CONF. OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, 2 (1996) (invoking “judicial independence”). Additionally, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No-FEAR Act), Pub. L. No. 107-174, 116 Stat. 566 (codified as amended at 5 U.S.C. § 2301 note), strengthened anti-discrimination laws for federal agencies.

74. The Judiciary Accountability Act (JAA) would address the lack of workplace protections in the federal Judiciary and extend Title VII protections to federal Judiciary employees, including law clerks and federal public defenders. Judiciary Accountability Act of 2021, H.R. 4827, 117th Cong. (1st Sess. 2021); Judiciary Accountability Act of 2021 S. 2553, 117th Cong. (1st Sess. 2021). Additionally, it would amend the definition of “judicial misconduct” in Title 28 of the U.S. Code to include discrimination and retaliation; clarify that if a judge retires, resigns, or dies, the misconduct investigation into them will not cease;

of redress for mistreated federal law clerks—which are woefully inadequate⁷⁵—include formal judicial complaints under the Judicial Conduct and Disability Act and internal workplace dispute resolution complaints under the EDR Plan.⁷⁶

A. *What is the Judicial Conduct and Disability Act and
Who Does It Cover?*

1. *Judicial Conduct and Disability Act*

Law clerks, attorneys, and litigants can file complaints against federal judges under the Judicial Conduct and Disability Act alleging “conduct prejudicial to the effective and expeditious administration of the business of the courts” or that a judge has become, by reason of a disability, “unable to discharge all the duties” of the judicial office.⁷⁷ Rule 4 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings defines several types of misconduct, including (1) abusive or harassing behavior;⁷⁸ (2) discrimination;⁷⁹ and (3) retaliation.⁸⁰ Judicial misconduct complaints are

standardize EDR Plans; and create a confidential reporting system. H.R. 4827 §§ 4, 5, 8; S. 2553 §§ 4, 5, 8. Furthermore, it would require the federal Judiciary to conduct workplace culture assessments, as well as collect and report data on the outcomes of judicial misconduct complaints and diversity in law clerk and federal public defender hiring. H.R. 4827 §§ 4, 6; S. 2553 §§ 5, 6. Congress should pass the JAA this year.

75. I do not intend to suggest that extending the Judicial Conduct and Disability Act to the D.C. Courts would be sufficient protection for mistreated D.C. Courts law clerks, nor that the Act provides sufficient protection for federal clerks. The arguments advanced in this Article offer one small step toward judicial accountability for uniquely vulnerable D.C. Courts clerks.

76. Neither of these provides sufficient redress for mistreated clerks.

77. See 28 U.S.C. § 351 (2021). For an explanation of the Judicial Conduct and Disability Act’s genesis, see Sahl, *supra* note 70, at 208–11. See *Judicial Conduct & Disability*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability> (last visited Nov. 12, 2022). See also U.S. CTS., GUIDE TO JUDICIARY POLICY, VOL. 2, PT. A, CH. 2: CODE OF CONDUCT FOR UNITED STATES JUDGES, (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_unitGed_states_judges_effective_march_12_2019.pdf.

78. See GUIDE TO JUDICIARY POLICY: CH. 3, *supra* note 21, at 7 (defining abusive or harassing behavior as, “(A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault; (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious or hostile manner; or (C) creating a hostile work environment for judicial employees”).

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

80. See *id.* at 8 (defining retaliation as “retaliating against complainants, witnesses, judicial

reviewed by the Chief Judge of the circuit in which the complaint is brought, who decides whether to dismiss each complaint⁸¹ or convene a Special Committee to review it.⁸² The Special Committee is empowered to investigate and conduct hearings,⁸³ after which they issue reports detailing their findings and recommendations.⁸⁴ Once the Chief Judge issues an order, either the complainant or the judge can seek review by the Judicial Council.⁸⁵ The Judicial Council, whose members include circuit and district judges, has the power to dismiss the complaint; conclude the proceeding; refer the complaint to the Judicial Conference; or take remedial actions, including: censuring or reprimanding the judge, ordering that no new cases be assigned to the judge, requesting that the judge retire voluntarily, or certifying that the judge has a disability.⁸⁶ There is no statute of limitations for filing a judicial

employees, or others for participating in this complaint process, or for reporting or disclosing judicial misconduct or disability”).

81. *See id.* at 20–23. In certain circumstances, parties can petition for a review of the dismissal. *Id.* at 22–23. If the Chief Judge dismisses a complaint, he or she is required to lay out the reasons for the dismissal. *Id.* at 22. Parties must be notified of the right to petition for review of the dismissal. *Id.*

82. *Id.* at 22. The Special Committee is composed of circuit and district judges from the misbehaving judge’s circuit: it likely includes judges who work in the courthouse where the judge who is the subject of the complaint and the law clerk complainant work. *Id.* at 28. Many, including the author, have voiced skepticism about current judges reviewing complaints against their judicial colleagues, and whether a Special Committee composed of judges from the circuit is the proper forum to review complaints. *See generally* Sahl, *supra* note 74. Furthermore, judicial misconduct proceedings should be more transparent. *Id.* at 256–57. Secrecy protects misbehaving judges while undermining public confidence in the judiciary. *Id.*

83. *See* GUIDE TO JUDICIARY POLICY: CH. 3, *supra* note 21, at 28–33. This investigatory power includes subpoena power. *Id.* at 31.

84. *See id.* at 36–37. The U.S. Courts website lists Judicial Conduct and Disability Orders. *See Judicial Conduct and Disability Orders*, U.S. CTS., <https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies/code-conduct-judicial-employees/judicial-conduct-disability-opinions>. However, the orders are only identified by number, rather than by judge, making them difficult to search. *See id.* Furthermore, even after opening each order on the website, it is difficult to discern which judge many of the orders refer to. This is just another example of the Judiciary protecting misbehaving judges in every possible way, even by trying to obfuscate the identities of those who have committed misconduct.

85. *See* GUIDE TO JUDICIARY POLICY: CH. 3, *supra* note 21, at 36–38.

86. *See id.* at 43–45. Very few complaints advance all the way to impeachment by the House and conviction by the Senate, which is the only way that a federal judge can be removed from office. In fact, fewer than twenty federal judges have been impeached, and fewer than ten have been convicted. The Constitution provides that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.” U.S. CONST. art. III, § 1. However, some scholars have pointed out that this should not necessarily

complaint pursuant to the Judicial Conduct and Disability Act.⁸⁷ However, if enough time has passed that a fair investigation of the complaint is “impracticable,” the complaint is dismissed.⁸⁸

2. Covered Judges

The Judicial Conduct and Disability Act covers the entire Article III Judiciary.⁸⁹ This includes federal magistrate judges, who serve eight-year terms and are selected by District Court judges.⁹⁰ It also covers several Article I Courts.⁹¹ These include bankruptcy courts judges, who serve fourteen-year terms, are selected by District Court judges, and are not Senate-confirmed;⁹² and Court of Federal Claims judges, who are appointed by the President and confirmed by the Senate for fifteen-year terms.⁹³

be equated with “life-tenure.” See Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 89 (2006). See also *Judges and Judicial Administration—Journalist’s Guide*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide> (explaining that Congress rarely uses its impeachment power to remove misbehaving federal judges from office). The Judicial Council must refer a complaint to the Judicial Conference, the national policymaking body for the federal courts, if it determines that the judge engaged in conduct that “might constitute grounds for impeachment” by Congress. GUIDE TO JUDICIARY POLICY: CH. 3, *supra* note 21, at 42; see also *Judicial Conference Approves Package of Workplace Conduct Reforms*, U.S. CTS. (Mar. 12, 2019), <https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms>; Ann E. Marimow, *Federal Judiciary Leaders Approve New Rules to Protect Court Employees from Workplace Harassment*, WASH. POST (Mar. 12, 2019), https://www.washingtonpost.com/local/legal-issues/federal-judiciary-leaders-approve-new-rules-to-protect-court-employees-from-workplace-harassment/2019/03/12/588a7208-44c3-11e9-8aab-95b8d80a1e4f_story.html.

87. See GUIDE TO JUDICIARY POLICY: CH. 3, *supra* note 21, at 18.

88. See *id.*

89. See *id.* at 4. The Court of International Trade is both a specialty court and an Article III Court, and its judges have life tenure. See 28 U.S.C. § 363.

90. See GUIDE TO JUDICIARY POLICY: CH. 3, *supra* note 21, at 4; see also ADMIN. OFF. OF THE U.S. CTS., A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGES SYSTEM (2009) [hereinafter].

91. See GUIDE TO JUDICIARY POLICY: CH. 3, *supra* note 21, at 4.

92. See Hon. Craig A Gargotta, *supra* note 33.

93. See *About the Court*, U.S. CT. OF FED. CLAIMS, <https://www.uscfc.uscourts.gov/about-court> (last visited Nov. 12, 2022).

3. *Challenges with the Judicial Conduct and Disability Act*

Judicial conduct commissions are empowered to discipline misbehaving judges—which they rarely do—not to support victimized clerks.⁹⁴ Additionally, because judicial complaints are reviewed by judges in the circuit where the respondent judge presides and the law clerk works, clerks are often concerned about both a lack of impartiality on the part of the reviewers, as well as a lack of confidentiality during the investigation.⁹⁵ Furthermore, law clerks are often discouraged from filing judicial complaints due to the reputational harm associated with complaining about a life-tenured federal judge, particularly if the law clerk plans to practice in the circuit where the judge works.

IV. ARGUMENT: THE JUDICIAL CONDUCT AND DISABILITY ACT SHOULD BE AMENDED TO COVER THE D.C. COURTS.

The Judicial Conduct and Disability Act should be amended to cover the D.C. Courts for three reasons. First, the Judicial Conduct and Disability Act already covers several Article I Courts, so this would be a logical improvement to existing legislation. Second, extending the Judicial Conduct and Disability

94. Law clerks can also participate in internal EDR. *See* U.S. CTS., GUIDE TO JUDICIARY POLICY VOL. 12, APP. 2A, MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN 1 (2022). The terms “employment” and “employee” are used interchangeably when referring to EDR plans. *See generally id.* The Chief Judge of the courthouse oversees EDR complaints against federal judges and appoints a presiding officer—a judge from within the courthouse where the victimized law clerk and misbehaving judge both work—to facilitate the EDR process. *Id.* at 7. The complaint then proceeds through an investigation, and potentially a hearing. *Id.* at 9–10. After filing a formal EDR complaint, available remedies include: placing the complainant in a previously denied or alternative comparable position; reinstatement to a position from which the complainant was previously removed; promotion of the complainant; and priority consideration of the complainant for a future promotion or position. *Id.* at 10–11. Interestingly, the EDR Plan covers more judges than the Judicial Conduct and Disability Act does. In addition to the Article III Judiciary, EDR Plans, like the Ethics in Government Act of 1978, 5 U.S.C. app. §§ 101–505, cover “any court created by an Act of Congress.” § 109(10).

95. *See* Brief for Named and Unnamed Current and Former Employees of the Federal Judiciary Who Were Subjected to or Witnessed Misconduct as Amici Curiae supporting Appellant Jane Roe, at 35–39, *Jane Roe v. United States*, No. 21-1346, 2022 WL 1217455, (4th Cir. 2021) [hereinafter *Jane Roe Amicus Brief*], (discussing the effects of harassment on former clerks’ and public defenders’ lives). Furthermore, other judges—particularly the accused judge’s supervisor—should not investigate judicial complaints. Judicial misconduct investigations should be handled outside the judiciary’s chain of command. A neutral third party, such as a special counsel, should investigate all judicial complaints. However, such a special counsel should exercise true independence, and should not be—or appear to be—connected to the judiciary.

Act rules to the D.C. Courts would correct outrageous deficiencies in local policies that have enabled judges to get away with misconduct for decades, without engaging in the challenging politics of amending the CJDT's statutes. Finally, this type of legislative action would avoid the political headwinds inherent in advancing D.C.-related legislation through Congress.

Several Article I Courts⁹⁶—including the Court of Federal Claims and the Bankruptcy Courts—are already covered under the Judicial Conduct and Disability Act.⁹⁷ The Judicial Conduct and Disability Act also covers Article III federal magistrate judges, despite the fact that these judges share more characteristics with state court judges than they do with D.C. Courts judges.⁹⁸ Specifically, federal magistrate judges do not have life tenure, but rather serve eight-year terms; and they are neither appointed by the President nor Senate-confirmed.⁹⁹ D.C. Courts judges, in contrast, are appointed by the President and confirmed by the Senate for fifteen-year terms.¹⁰⁰

Second, as outlined in previous sections, the CJDT has historically mishandled judicial misconduct investigations, including complaints filed by law clerks against judges. Radical reforms are urgently needed to transform the Commission from a rubber-stamping protective-camp for harassers, to one that fairly reviews and adjudicates complaints. Extending the Judicial Conduct and Disability Act rules to the D.C. Courts would eliminate the need for the CJDT to investigate judicial misconduct.¹⁰¹ The CJDT has proven itself unable to correct deeply-rooted structural deficiencies. The Commission's refusal to change, coupled with the challenges of effectively amending its statutes and rules through Congress, cut in favor of alternative methods of revising the judicial complaint process in the D.C. Courts.

Third, D.C. Courts- or CJDT-specific legislation is unlikely to pass in this Congress—let alone in a divided Congress in 2023. D.C. Courts law clerks cannot wait any longer for urgently needed reforms. Amending the existing Judicial Conduct and Disability Act circumvents congressional intransigence pertaining to D.C.-specific legislation.

96. I would also advocate for covering additional Article I Courts, as well as the Article IV territorial courts in Guam, the U.S. Virgin Islands, and the Northern Mariana Islands, under the Judicial Conduct and Disability Act.

97. See *supra* note 94 (discussing the Ethics in Government Act's coverage of any court created by Congress).

98. See Guide to Judiciary Policy, Ch. 3, *supra* note 21, at 3–4.

99. See Magistrate Judges History, *supra* note 90.

100. See *DC Judiciary*, D.C. JUD. NOMINATION COMM'N, <https://jnc.dc.gov/node/488242> (last visited Nov. 12, 2022).

101. The restructured Commission could solely review judicial requests for reappointment and senior status.

CONCLUSION

Misconduct in the D.C. Courts did not start or end with my misbehaving former supervisor. Based on my conversations with D.C. law clerks, other judges on the D.C. bench have either committed misconduct, or have protected their judicial colleagues' misconduct.¹⁰² I hope the CJDT's mishandling of judicial complaints like mine does not chill future complaints by D.C. Courts law clerks against the judges who harassed them. Law clerks should feel empowered to speak out and stand up for themselves, and work to remove abusers from positions of power. The CJDT appeared to believe that dismissing my complaint would silence me—and I suspect the former judge hoped it would as well. While it caused me to feel shame, it has not halted my advocacy on behalf of law clerks. And even if I knew the outcome would be the same, I would still choose the same course of action: I believe the then-judge should have been forced to confront his misconduct and face questions about the allegations detailed in my complaint.

The Judicial Conduct and Disability Act is flawed, partially because other judges, rather than neutral third parties, are empowered to investigate—and are notoriously unwilling to discipline—their judicial colleagues. However, its clearly delineated rules and procedures would be an enormous improvement over D.C.'s CJDT practices, which are vague and unclear, to the extent they exist at all. The insular nature and opacity of the D.C. Courts, CJDT, and associated institutions protect misbehaving judges. Standardizing the judicial complaint process for D.C. Courts law clerks would encourage more current and former clerks to assert themselves in an area of the law where secrecy abounds. My experience with gender discrimination, harassment, and retaliation during my clerkship and in the years following it, as well as the CJDT's mishandling of my complaint, illustrate that judicial misconduct investigations should be removed from the CJDT's purview. Some D.C. institutions, like the CJDT, are broken beyond repair. D.C. Courts law clerks should not be forced to suffer the consequences of institutional failures.

102. Pursuant to D.C.'s Code of Judicial Conduct, judges are expected to report a colleague's misconduct or poor health. *See* D.C. CODE OF JUDICIAL CONDUCT r. 2.14, 2.15.