The Heritage Foundation

CONGRESSIONAL TESTIMONY

H.R. 4827, Judiciary Accountability Act of 2021

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[4] Id., at 1.

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

I. The Separation of Powers Problem

Article III of the Constitution provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Duplicative and Unnecessary

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

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

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

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

- Simplification and expansion of the options for addressing wrongful workplace conduct as laid out in the updated (2019) EDR.[18]

- Additional prohibitions against Abusive Conduct that protect employees even when the

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

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

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

misconduct is not discriminatory.[19]

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

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

- Clarified confidentiality policies to remove potential barriers to reporting and to encourage reporting, even for chambers staff, who are bound by other confidentiality requirements in the course of their work.

- Multiple avenues to report workplace conduct concerns, including anonymously, to designated points of contact within or outside the employing office. This includes a multi-layer network of personnel—at the national, circuit, and local court levels—to provide confidential and impartial advice and guidance to judicial employees, managers, and judges.

- A formal Employment Dispute Resolution complaint process and an informal ("assisted resolution") complaint process with an increased user-friendly structure for both (including flow charts that explain EDR rights and options).

- Annual training for all EDR coordinators, judges, and judiciary employees on workplace conduct protections and processes.

- A broad range of publications, online resources, and in-person training programs from the Federal Judicial Center (FJC) to supplement court-sponsored training and materials.

- Data collection across the judiciary on the type and number of formal and informal EDR complaints, as well as judicial conduct and disability complaints and actions under the JC&D Act.

- Continuing operation of the Working Group, in collaboration with Judicial Conference committees and Administrative Office advisory groups, to maintain constant assessment of workplace policies and procedures.

In addition to the foregoing, and as with other government officials, federal judges, who are permitted

[19] Id. (EDR Plans prohibit Abusive Conduct, defined as "a pattern of demonstrably egregious and hostile conduct not based on a Protected Category that unreasonably interferes with an employee's work and creates an abusive working environment. Abusive conduct is threatening, oppressive, or intimidating." The Judicial-Conduct & Judicial-Disability Rules define misconduct to include treating judicial employees "in a demonstrably egregious and hostile manner." In this way, employees are now protected not only from discriminatory harassment, but also from any harassment that interferes with the work environment, no matter the motivation.)

[20] Id. EDR Plans prohibit the same conduct that would violate Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990 and Rehabilitation Act of 1973. And the JC&D Rules go further, defining misconduct to include discrimination, abusive or harassing behavior, and retaliation.

to "hold their Offices during good Behaviour,"[21] may be removed following impeachment and conviction for "Treason, Bribery, or other high Crimes and Misdemeanors."[22] Historically, the impeachment power has been used by Congress against judges in cases of serious ethical or criminal misconduct, including making false statements, showing favoritism toward litigants, being intoxicated on the bench, and abusing the contempt power.[23] No matter the judicial complaint procedure or other available employee remedies, impeachment always remains an avenue for the Senate should concerns about ethical or criminal conduct arise. Likewise, the Constitution does not immunize sitting federal judges from criminal prosecution prior to their removal from office by the impeachment process.[24] In short, misbehaving judges can be held accountable by the judiciary itself, by the Congress, and, in extreme cases, by the criminal justice system.

H.R. 4827, however, would modify 28 U.S.C. § 351(f)(1) by continuing the judicial complaint process even if a judge has retired, resigned, or died, meaning literally that H.R. 4827 would ensure that employee complaints would follow federal judges to the grave.

As the wave was cresting on the #MeToo movement, the Judicial Conference of the United States, led by Chief Justice Roberts, began a multi-year effort to amend and enhance procedures designed to secure the judiciary's commitment to a workforce free of discrimination and harassment with guarantees of security for judicial employees that often exceed those available to their civilian counterparts. Among those advances are the establishment of a national Office of Judicial Integrity;[25] circuit-wide Directors of Workplace Relations; multiple avenues for the reporting of misconduct; revised and enhanced workplace dispute policies; tightened ethics, reporting, and discipline rules; and more.

If these developments don't evidence the judiciary's commitment to a workplace that is consistent with the principles of employee respect and dignity, it's hard to imagine what would.

III. Affirmative Action Plan in the Judiciary

Even as the Supreme Court has just granted review in a pair of cases[26] in which the justices have been asked to overrule the use of racial preferences in admissions policies at institutions of higher education,

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

[22] U.S.C.A. Const. Art. II § 4, USCA Const. Art. II, § 4.

[23] Federal Bar Association, FedBar Blog, "Washington Watch: When Federal Judges Are Impeached," March 11, 2020, https://www.fedbar.org/blog/washington-watch-when-federal-judges-are-impeached/#:~:text=As%20with%20other%20government%20officials,Offices%20during%20good%20Behaviour.%E2%80%9D%20The. Also, federal courts have held that service during "good behavior" functions as a term limit only on federal judges: U.S. v. Isaacs, 493 F.2d 1124 (7th Cir. 1974), *cert. denied*, reh'g denied, 418 U.S. 955, *cert. denied*, 417 U.S. 976.

[24] *See* U.S. v. Claiborne, 727 F. 2d 842 (9th Cir. 1984), *stay denied*, 465 U.S. 1305, *cert. denied* 469 U.S. 829.

[25] H.R. 4827 proposes to establish an "Office of Judicial Integrity," sec. 5(a), although one already exists within the judiciary and this body has made no showing that such office is incapable of performing its duties impartially or effectively.

[26] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, No. 21A393 (2022); Students for Fair Admissions, Inc. v. University of North Carolina, No. 21-707 (2022).

it is rather ironic that this body would consider legislation that would require federal judges to produce annual reports on the diversity not only of their staffs, but also of those they interview for employment. This would create a backdoor effort to bring racial preferences and gender-based and sexual orientation–based hiring into the federal Judiciary.

Specifically, H.R. 4827, § 4 (f)(8) requires the proposed Judicial Integrity Commission to submit to Congress a report that includes the number of individuals who were interviewed and hired for positions within the judiciary during the previous year. The data are to be disaggregated by sex, sexual orientation, gender, race, ethnicity, and disability[27] with year-to-year trends identified. Moreover, the Special Counsel to the Equal Employment Opportunity Commission is required to provide an annual workplace culture assessment that includes indicators of positive and negative trends for maintaining a safe, respectful, diverse, and inclusive work environment.[28]

Such so-called diversity-driven efforts are in tension with Title VII of the Civil Rights Act of 1964 and the EEOC's guidance on the same,[29] which makes it illegal for covered employers to make employment decisions "because of" an individual's race, color, religion, sex, or national origin. The Supreme Court has construed Title VII's prohibition against discrimination to recognize reverse discrimination claims by non-minority groups.[30] But it has likewise clarified that race-conscious or gender-conscious decisions made pursuant to an appropriately tailored voluntary affirmative action plan designed to remedy the effects of discrimination in traditionally segregated job categories will not violate Title VII.[31]

Therefore, employers can adopt voluntary affirmative action plans to correct an imbalance in a traditionally segregated job category, but that plan cannot unnecessarily trample the interests of those outside the group that the plan is designed to protect. It also cannot involve a hiring quota or an inflexible hiring goal.[32]

H.R. 4827—because of its required reporting on both hiring and interviewing segregated by individual characteristics—appears to run afoul of the Supreme Court's assertion that diversity-driven hiring plans must be flexible enough to allow candidates to compete with other qualified candidates on a level playing field.

A federal judge searches for law clerks who share his or her judicial philosophy and those who have reached the highest levels of achievement and bring the sharpest minds to the task of helping the judge

[27] Notably, statistics on another protected class recognized by this nation's civil rights canon—religious Americans—are not requested.

[28] "Diverse" and "inclusive" are not defined in H.R. 4827, but the bill's failure to include religion among categories of otherwise protected categories in civil rights law—and particularly within employment under Title VII of the Civil Rights Act, 29 CFR Part 1608—presupposes that "diversity" would not include diversity of thought or belief.

[29] *See* CM-607, "Affirmative Action," published October 1, 1981, available at: https://www.eeoc.gov/laws/guidance/cm-607-affirmative-action'

[30] *See* McDonald v. Santa Fe Trail Transp., 427 U.S. 273 (1976).

[31] *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, Santa Clara Cty., 480 U.S. 616 (1987).

[32] *See* Gratz v. Bollinger, 539 U.S. 244 (2003).

to understand the current state of the law and to apply the law to the facts in particular cases. Those individuals are hired not by virtue of their identifying characteristics, but because of their suitability to the task of judicial interpretation and application. To hamstring federal judges by forcing a reporting on sufficient "diversity" efforts does the entire legal profession and the federal Judiciary a disservice.

If anyone can point me to a similar proposal that has been aimed not at the judiciary, but at the legislature, please tell me. I have found none.

Conclusion

It is hard to see how this bill is not a violation of the constitutional separation of powers. It certainly skates close to the constitutional line. It also duplicates the myriad existing structures within the judiciary that address and rectify workplace misconduct and imposes intrusive requirements on Judicial Conference procedures—even as the Chief Justice has clearly expressed and demonstrated the Conference's commitment to build on the vast progress it has already made.

A hundred years ago, Chief Justice William Howard Taft acknowledged that while criticism (and strident calls for reform) of the courts will always be inevitable, the judiciary must be left to manage its internal affairs, both to promote informed administration of the courts and to ensure their independence from the other political branches of government.[33] And as noted in his 2021 annual report, our current Chief Justice has acknowledged that for the past 100 years, the Judicial Conference has been both an enduring success and up to the task of effectively addressing employee misconduct.[34]

It is one of the chief merits of the American system of constitutional law that all of the powers entrusted to government are divided into three branches and that the functions appropriate to each of these branches of government are vested in separate bodies of public servants. But this system—as the Supreme Court has held—requires for its protection that the lines that separate and divide those branches be broadly and clearly defined.[35]

Passage of H.R. 4827 would threaten both the independence of the judiciary and the separation of powers and would irreparably blur those lines,

I thank the committee for inviting me to testify today and welcome any questions you might have.

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[33] Roberts, C.J., "2021 Year-End Report on the Federal Judiciary," December 2021, at 3, 5, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[34] Id. at 5.

[35] *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168 (1880).

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