Note

Unprotected but Not Forgotten: A Call to Action to Help Federal Judiciary Employees Address Workplace Sexual Misconduct

Theresa M. Green∗

INTRODUCTION

The federal judiciary employs more than 30,000 people,[1] but none of them are currently protected by Title VII of the Civil Rights Act of 1964 (Title VII)—the primary federal statute that prohibits discrimination, harassment, and retaliation in the workplace based on, among other things, a person's sex.[2] While other employees[3]—including other federal employees[4]—can challenge sexual misconduct under Title VII,[5] the statute's protections do not apply to the federal judiciary.[6] In other words,

---

∗ J.D. Candidate 2023, University of Minnesota Law School. I would like to thank Professor Jill E. Hasday for her guidance on developing this Note. I am also grateful to the editors and staff of *Minnesota Law Review* Volumes 106 and 107 for their careful feedback. Lastly, my deepest gratitude to my parents, my sister Rachel, and brothers Michael and Andrew for their constant love and steadfast belief in me.

1. Letter from James C. Duff, Dir. of the Admin. Off., to Charles E. Grassley and Dianne Feinstein, Chairman and Ranking Member (respectively), Comm. on the Judiciary, U.S. Senate (Feb. 16, 2018) [hereinafter Letter Concerning the Workplace Conduct Working Group] ("There are over 30,000 employees in the Federal Judiciary.").

2. *See* 42 U.S.C. § 2000e-2(a).

3. Title VII applies to businesses in the private sector with fifteen or more employees. *See* 42 U.S.C. § 2000e(b).

4. Title VII prohibits discriminatory practices against certain federal employees. *See* 42 U.S.C. § 2000e-16(a).

5. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM AND VICTORIA A. LIPNIC 2–4 (June 2016) [hereinafter EEOC REPORT] (explaining how most individuals who experience workplace harassment may take legal action under Title VII to seek relief).

6. Title VII carves out an exception that insulates most of the federal judiciary from the statute's protections. *See* 42 U.S.C. § 2000e-16(a) (limiting protection of judiciary to those in the competitive service); *see also* 5 U.S.C.

federal judiciary employees do not have a legally protected right to be free from sexual harassment[7] and abuse in the workplace under Title VII.[8] In effect, federal judges and other judiciary officials may engage in unwelcome sexual conduct virtually unchecked.[9]

---

§ 2102(b) (defining "competitive service" as positions appointed by nomination for confirmation by the Senate).

7. I refer to "sexual harassment" and "sexual misconduct" interchangeably to mean unwelcome or offensive conduct in the workplace that is based on sex (including sexual orientation, pregnancy, and gender identity) and is detrimental to an employee's work performance, professional advancement, and/or mental health. *See* EEOC REPORT, *supra* note 5, at 3 (describing the problem of workplace sexual harassment). Such conduct "includes, but is not limited to, offensive jokes, slurs, epithets or name calling, undue attention, physical assaults or threats, unwelcome touching or contact, intimidation, ridicule or mockery, insults or put-downs, constant or unwelcome questions about an individual's identity, and offensive objects or pictures." *Id.* at 11. The EEOC provides that "[h]arassment does not have to be of a sexual nature . . . and can include offensive remarks *about* a person's sex." *Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/sexual-harassment [https://perma.cc/KD7P-EETE] (emphasis added). Furthermore, "[a]lthough the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted)." *Id.*

8. Without Title VII's protections, federal judiciary employees are also vulnerable to unregulated harassment and abuse based on race, color, religion, and national origin. *See* 42 U.S.C. § 2000e-2(a) (listing workplace protections, which do not apply to federal judiciary employees). It is impossible to separately conceptualize sex plus these other identities as mutually exclusive categories of experience. This is because abusers ground discriminatory, harassing, and retaliatory behaviors in prejudices about sex plus race, color, religion, and/or national origin, imposing distinct and specific forms of intersectional abuse. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 156 (1989) (describing how patriarchal assumptions about femininity interact with the realities of Black women's experience to create distinct prejudices).

9. Federal judges are governed by the Code of Conduct for United States Judges, which provides four canons of judicial ethics that federal judges must follow in the performance of their official duties and outside activities. *Code of Conduct for United States Judges*, 2 GUIDE TO JUDICIARY POLICY, pt. A, ch. 2 (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/Z6GX-C6CE]. However, for a discussion on how the current mechanisms meant to police sexual misconduct that violates the Code in the federal judiciary have failed to adequately address the issue. *See infra* Parts II.C–D.

Empowered by the #MeToo movement,[10] federal judiciary employees have bravely come forward to report sexual misconduct by their judicial employers and supervisors.[11] As an example, in a high-profile case that recently surfaced in the national media, former judiciary employees alleged sexual harassment by Ninth Circuit United States Court of Appeals Judge Alex Kozinski.[12] The allegations recount that Kozinski engaged in inappropriate sexual conduct and comments with these women,[13] including asking two of them to view pornography in his chambers on more than one occasion.[14] As these allegations demonstrate, sexual misconduct in the federal judiciary does not merely involve judges calling law clerks or other employees "Sweetie." Rather, it involves unquestionable and repeated sex-based harassment and abuse.

Given the gravity of sexual misconduct in the federal judiciary,[15] it is imperative that federal judiciary employees have adequate remedial measures to report and address it. Unfortunately, there are currently only two ways in which an employee can address sexual harassment in the federal judiciary, and neither is very effective. First, an employee may bring a claim against a federal judge for engaging in prejudicial conduct through the Judicial Conduct and Disability (JC&D) complaint

10. Survivor and activist Tarana Burke founded the #MeToo Movement in 2006 to provide resources and build a network to support survivors of sexual violence. *See History & Inception*, ME TOO, https://metoomvmt.org/get-to-know-us/history-inception [https://perma.cc/2BRW-ZS8L]. In 2017, the #MeToo hashtag went viral, driving home the scale of the sexual violence problem and empowering survivors to come forward for support. *Id.*

11. For an anecdotal overview of women's experiences of sexual misconduct by their employers in the federal judiciary, *see infra* Part I.A.

12. *See* Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html [https://perma.cc/GF2K-XXC6].

13. *Id.*

14. *Id.*

15. *See, e.g.*, Editorial Board, *#MeToo Makes Its Way to the Judiciary*, WASH. POST (Dec. 23, 2017), https://www.washingtonpost.com/opinions/metoo-makes-it-way-to-the-judiciary/2017/12/23/488946d4-e5d5-11e7-ab50-621fe0588340_story.html [https://perma.cc/MBK6-ERUY].

process.[16] However, this process is lacking for multiple reasons.[17] Second, an employee may file a complaint internally through the judiciary's Employment Dispute Resolution (EDR) program.[18] But this method is also defective, in part because of its lack of accessibility, visibility, and "user-friendliness," as well as its inconsistent scope of coverage.[19]

The flawed nature of these two processes necessitates finding a better solution. It is imperative to provide federal judiciary employees with effective remedial measures for workplace sexual misconduct.[20] This Note argues in support of two approaches that would mitigate the judiciary's sexual harassment problem. First, to expand Title VII's protections to apply to the federal judiciary. And second, to extend *Bivens* to permit plaintiffs to bring implied causes of action for damages under the Fifth Amendment. Each proposal standing on its own would not fully tackle

16. This involves filing a complaint under the Judicial Conduct and Disability Act of 1980, which Congress enacted to provide procedures whereby the federal judiciary can self-regulate and correct non-impeachable offenses of judicial misconduct and disability. *See* REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 27–28 (June 1, 2018) [hereinafter WORKING GROUP REPORT]. The Act states that any employee may file a complaint against a federal judge who "has engaged in conduct prejudicial to the effective and expeditious administration of the business and nature of the courts . . . ." 28 U.S.C. § 351(a). *See also Rules for Judicial-Conduct and Judicial-Disability Proceedings*, 2 GUIDE TO JUDICIARY POLICY, pt. E, ch. 3, 2–3 (2019), https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf [https://perma.cc/X225-VREC] [hereinafter *Rules for Judicial-Conduct*] (defining judicial employees broadly to include not only law clerks but also unpaid staff and other groups).

17. *See infra* Part II.B. (explaining how the Judicial Conduct and Disability Act's framework fails to adequately address sexual harassment).

18. *See Workplace Conduct in the Federal Judiciary*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/workplace-conduct-federal-judiciary [https://perma.cc/DG2U-G2BM] (stating that current and former judiciary employees and interviewed applicants for positions within the judiciary can request an assisted resolution or file a formal complaint under a court's Employment Dispute Resolution Plan).

19. *See* WORKING GROUP REPORT, *supra* note 16, at 33–35.

20. This Note limits its analysis to the federal judiciary's failure to protect employees from sex-based discrimination, harassment, and retaliation, but it is certainly also necessary to provide federal judiciary employees with effective protections against discrimination, harassment, and retaliation based on race, color, religion, national origin, gender identity, and sexual orientation. Some of these identities are also protected by Title VII. *See* 42 U.S.C. § 2000e-2(a).

the judiciary's sexual harassment problem, so both should be pursued.[21]

This Note first implores Congress to expand Title VII to the federal judiciary. In the interest of protecting vulnerable employees working in some of the most important corners of the federal government, Congress should amend Title VII to apply to federal judiciary employees. Such an amendment would remarkably improve federal judiciary employees' avenues for relief against workplace sexual misconduct. Although there are rationalizations that stand to challenge an extension of Title VII to the federal judiciary, arguments in favor of reform are more persuasive.[22] Furthermore, the fact that Congress has already expressed interest in confronting the federal judiciary's sexual misconduct problem, as can be seen through proposed legislation introduced in 2021,[23] indicates that Congress is already energized to act.

However, given the statute's deficiencies, expanding Title VII would not completely cure the federal judiciary of its sexual harassment problem. Therefore, this Note also encourages federal courts to expand the *Bivens* doctrine to provide federal judiciary employees with enforceable constitutional protections against workplace sex-based abuse. In *Bivens v. Six Unknown Named Agents*, the Supreme Court of the United States permitted a plaintiff to enforce his Fourth Amendment constitutional rights through a private cause of action for damages, even though no statutory cause of action existed.[24] In essence, the Court recognized that the plaintiff had an implied private cause of action to enforce his rights under the Fourth Amendment. The Court extended the *Bivens*' holding from the Fourth Amendment to the Fifth Amendment in *Davis v. Passman*, where a congressional staff member alleged that a United States Congressman

---

21. These two solutions have been theorized together in a blog post, and I have conducted thorough research to expand on these ideas. *See* Amy Coll & Dylan Hosmer-Quint, *The Federal Judiciary Has a Harassment Problem—But There's a Fix*, BLOOMBERG L.: U.S. L. WK., (Nov. 19, 2021), https://news.bloomberglaw.com/us-law-week/the-federal-judiciary-has-a-harassment-problem-but-theres-a-fix [https://perma.cc/PH5G-2KM2].

22. *See infra* Parts IV.B–C (arguing that an extension of Title VII to the federal judiciary would survive judicial review).

23. Judiciary Accountability Act, S. 2553, 117th Cong. (2021).

24. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971).

discriminated against her based on her sex in violation of the Fifth Amendment.[25]

In bringing a *Bivens* action to address sexual misconduct in the federal judiciary, a federal judiciary employee would hypothetically argue that because the Fifth Amendment's due process clause requires equal protection of the laws, there exists a federal constitutional right to be free from discrimination, harassment, and retaliation based on sex that can be enforced through a private cause of action.[26] This method would finally provide federal judiciary employees with constitutional protections against workplace sexual harassment.[27] Notably, plaintiffs have already begun to bring similar causes of action under this theory,[28] which demonstrates plaintiffs' desperation to find a better way to challenge judicial sexual misconduct rather than the two current remedial processes.

The biggest hurdle to this proposed expansion of doctrine is the opposition that federal courts currently shed on *Bivens*. The Supreme Court has gone as far as to recently state that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity."[29] However, despite the federal courts' hesitation to extend *Bivens* further,[30] it is paramount that federal courts make an exception to allow federal judiciary employees to bring *Bivens* actions to

---

25. 442 U.S. 228, 248–49 (1979).

26. *See* Stacy N. Cammarano, *How Can We Challenge Sexual Harassment in the Federal Judiciary?*, KATZ, MARSHALL & BANKS, LLP (Jan. 9, 2018), https://www.kmblegal.com/employment-law-blog/how-can-we-challenge-sexual-harassment-federal-judiciary [https://perma.cc/JF5D-4Q4L].

27. Because Title VII does not apply to the federal judiciary, and the federal Constitution does not provide protections to federal judiciary employees, such employees have no explicit statutory or constitutional right to be free from discrimination, harassment, or retaliation in the federal court system. *See supra* note 6.

28. In Strickland v. United States, a former federal judiciary employee asked the United States Court of Appeals for the Fourth Circuit to extend *Bivens* to permit her to bring a cause of action under the Fifth Amendment. 32 F.4th 311, 320–21 (4th Cir. 2022).

29. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

30. *See, e.g.*, Hernández v. Mesa, 140 S. Ct. 735, 739 (2020) ("As we made clear in many prior cases . . . the Constitution's separation of powers requires us to exercise caution before extending *Bivens* to a new 'context' . . . ."); *Ziglar*, 137 S. Ct. at 1856 (2017); Wayne A. Babcock, Davis v. Passman*: Will* Bivens *Survive?*, 41 U. PITT. L. REV. 131, 144–51 (1979) (discussing hostility toward extending *Bivens* that the United States Court of Appeals for the Fifth Circuit exhibited in Davis v. Passman, 571 F.2d 793 (5th Cir. 1978)).

challenge sexual misconduct in light of the lack of adequate remedial avenues otherwise available.

This Note grapples with the fact that, just like any other workplace, sexual harassment is a frequent, persistent issue within the federal judiciary. Providing employees with sufficient statutory and constitutional protections against sex-based misconduct is essential to ensuring that no person in the federal judiciary is treated as "above the law."[31] Expansions of Title VII and *Bivens* would together offer a more viable solution to achieve justice for aggrieved federal judiciary employees. The reign of unwelcome and virtually unchecked sexual harassment by powerfully insulated federal judges and other judiciary officials must finally be reckoned with.

This Note proceeds in four Parts. Part I reveals the prevalence of wrongful sexual conduct within the federal judiciary and the increasing need for federal courts and Congress to rise to the occasion to protect federal judiciary employees. Part II argues that the current mechanisms by which federal judiciary employees can address sexual harassment are inadequate. Part III suggests a statutory solution to finally provide federal protections against employment discrimination to federal judiciary employees: expanding Title VII to the federal judiciary. Part IV proposes a legal solution to additionally address sexual misconduct more adequately in the federal judiciary: allowing employees to bring causes of action for sex-based discrimination, harassment, and retaliation under the Fifth Amendment by way of the *Bivens* doctrine. This Note ultimately calls upon Congress and the federal courts to expand Title VII and *Bivens* to comprehensively help federal judiciary employees address workplace sexual misconduct.

---

31. *Cf.* United States v. Lee, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.").

I. MASKED BY LIMITED DATA, SEXUAL MISCONDUCT IS NOT ONLY PREVALENT IN BUT ALSO REINFORCED BY THE FEDERAL JUDICIARY

Like in any other workplace,[32] sexual misconduct is a frequent, persistent issue within the federal judiciary. But limited data misconstrues the seriousness of the issue: with low numbers of formal reports of sexual harassment and abuse by employees in the federal court system,[33] it is difficult to recognize just how pervasive unwelcome sexual conduct is behind closed chamber doors. However, recent reports of women[34] sharing their experiences of unwanted sexual conduct and comments while employed in the federal judiciary indicates that the federal judiciary is not immune to the widespread workplace sexual harassment problem.[35]

---

32. *See* EEOC REPORT, *supra* note 5, at 6 (reporting that almost a third of the approximately 90,000 charges of employment discrimination received by the EEOC in 2015 included an allegation of harassment). Other recent data on employed women found that thirty-eight percent had experienced sexual harassment in their workplace. *See Sexual Violence & the Workplace: Overview*, NAT'L SEXUAL VIOLENCE RES. CTR. 2 (2013), https://www.nsvrc.org/sites/default/files/2013-04/publications_nsvrc_overview_sexual-violence-workplace.pdf [https://perma.cc/TCY9-6JJL] (providing statistics and a snapshot of the issues of sexual violence in the workplace and how sexual violence impacts a survivor's employment and economic security); *see also* Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018), https://www.npr.org/sections/I-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment [https://perma.cc/TCY9-6JJL].

33. For a discussion on the limited data pertaining to formal reports against federal judges and other judicial officials for sexual misconduct, *see* Part I.C.

34. This Note focuses primarily on the sexual harassment reports made by women employees in the federal judiciary. But it is critical to acknowledge that the EEOC has reported that, of the charges alleging sexual harassment in the fiscal year 2021, 16.3% were filed by men. *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 - FY 2021*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2021 [https://perma.cc/K3UY-CKVB].

35. John G. Roberts, Jr., *2017 Year-End Report on the Federal Judiciary* SUP. CT. 11 (2017), https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf [https://perma.cc/3XJZ-MZCH] ("Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune."); Adam Liptak, *Courts Must Better Police Themselves on Harassment, Chief Justice Says*, N.Y. TIMES (Dec. 31, 2017), https://www.nytimes.com/2017/12/31/us/politics/john-roberts-courts-sexual-harassment

By elevating the stories of law clerks and other federal judiciary employees who have survived sex-based harassment and abuse while employed in the federal court system, Section A emphasizes the prevalence of sexual harassment in the federal judiciary. Next, Section B demonstrates how the unique nature and characteristics of the federal judiciary reinforce a systemic sexual abuse of power in the federal court system. Lastly, Section C discusses the limited data on sexual misconduct in the federal judiciary and concludes that the sparse number of formal reports of sexual misconduct disguises the seriousness of the federal judiciary's sexual harassment problem.

A. #METOO ENTERS THE FEDERAL JUDICIARY

Inspired by the #MeToo movement,[36] federal judiciary employees have begun to publicly share their experiences of workplace sexual misconduct[37] in an effort to speak out against the

.html [https://perma.cc/NZ22-9P8U] (reporting on Chief Justice John Roberts's 2017 Year-End Report on the federal judiciary which highlighted that the judicial branch is "not immune" to the problem of sexual harassment); Catie Edmondson, *Former Clerk Alleges Sexual Harassment by Appellate Judge*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/judge-reinhardt-sexual-harassment.html [https://perma.cc/G29Q-TUDC] (reporting on Olivia Warren's testimony alleging sexual harassment by Judge Stephen Reinhardt during her clerkship in his chambers); Zapotosky, *supra* note 12 (reporting on the stories of six women who reported allegations of sexual harassment by Judge Alex Kozinski in 2017); Mihir Zaveri, *Federal Judge in Kansas City Is Reprimanded for Sexual Harassment*, N.Y. TIMES (Sept. 30, 2019), https://www.nytimes.com/2019/09/30/us/judge-carlos-murguia-sexual-harassment.html [https://perma.cc/LL6E-YKGZ] (reporting the reprimand of federal Judge Carlos Marguia for sexually harassing female employees).

36. *See #MeToo Makes Its Way to the Judiciary*, *supra* note 15 (reporting on how the #MeToo movement made its way to the federal judiciary in 2017 when high-profile allegations of sexual harassment by Ninth Circuit Judge Alex Kozinski made national news).

37. *See, e.g.*, Olivia Warren, *Enough Is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 HARV. L. REV. F. 446, 448 (2021) (reflecting on the sexual harassment she endured while clerking for Judge Stephen Reinhardt on the United States Court of Appeals for the Ninth Circuit); Ann E. Marimow, *Comments About Body Parts. Questions About Pregnancy. Court Filing Alleges Ongoing Harassment in Judiciary*, WASH. POST (Aug. 26, 2021), https://www.washingtonpost.com/politics/courts_law/federal-courts-harassment-judges/2021/08/26/ebad861e-05b5-11ec-a266-7c7fe02fa374_story.html [https://perma.cc/9AD5-HAFA] (reporting on the allegations of sexual harassment filed by over twenty current and former federal judiciary employees in support of a case from the Fourth Circuit that brings to light the prevalence of sexual misconduct in the judiciary and the deficiencies regarding the internal reporting procedures for employees).

judiciary's systemic sexual abuse of power and encourage other survivors to come forward.[38] High-profile cases, including complaints against former federal Judges Alex Kozinski[39] and Stephen Reinhardt[40] from the United States Court of Appeals for the Ninth Circuit, reveal the seriousness and pervasiveness of sexual misconduct in federal chambers. Multiple federal judiciary employees—including former Reinhardt clerk Olivia Warren, whose testimony has sparked congressional interest in resolving the sexual abuse problem in the federal judiciary[41]—have come forward to report their experiences of sexual harassment and abuse that occurred behind closed chamber doors.[42]

The sexual misconduct that these very brave former and current federal judiciary employees have reported varies, but it nonetheless has created an abusive and hostile working environment and would likely constitute illegal conduct in most other employment settings.[43] Employees have described how one male judge instructed a female employee on "what to wear" to his chambers,[44] how another male judge publicly brushed a female employee's breasts for the allegedly "valid" reason of adjusting

38. *See* Warren, *supra* note 37, at 450 ("My singular goal was to make a public record so that people in similar situations could access it and feel less isolated: this is the gift other women's words had given me. I wanted to speak publicly – I refused to entertain any possibility of closed-door testimony – because I wanted everyone to have equal information about the potential perils of being fed into the machinery of clerking.") (internal citations omitted).

39. *See* Zapotosky, *supra* note 12 (reporting on the sexual misconduct accusations against Judge Alex Kozinski in 2017).

40. *See* Edmondson, *supra* note 35 (reporting on the sexual harassment allegations against Judge Stephen Reinhardt in 2020).

41. Marimow, *supra* note 37 ("Last month, a bipartisan group of lawmakers in the House and Senate introduced legislation that would ensure anti-discrimination rights for judicial branch employees, establish whistleblower protections, and create a special counsel to investigate and report on misconduct complaints within the federal judiciary . . . . The legislation was inspired in part by the February 2020 testimony on Capitol Hill of Olivia Warren, a former law clerk to the late appeals court Judge Stephen R. Reinhardt.").

42. I would like to explicitly recognize, if it is not clear enough from the framing of this Note, that those who have come forward are incredibly brave, and that what happened to them is not okay.

43. Recall that Title VII applies to businesses in the private sector with fifteen or more employees. *See* 42 U.S.C. § 2000e(b).

44. Marimow, *supra* note 37 ("One law clerk kept a written log of comments the judge she worked for made about her legs and hair, and his instructions on 'what to wear.'").

her nametag at a legal conference,[45] and how yet another male judge coerced women employees into his chambers to show them pornography and to ask whether they thought it was photoshopped or found the pornography sexually arousing.[46] In addition, one judge allegedly described a female law clerk as his "slave" and called her into his office alone to share a list of the women he and his friends had slept with in college.[47] Another judge told a woman employee—in front of her colleagues at a legal conference—that she should exercise naked in the court's gym.[48]

Some reports involve judges asking invasive personal questions about marriage, pregnancy, and family planning during job interviews.[49] For example, one federal judge reportedly asked a

45. Catherine Crump, *Clerkships Are Invaluable for Young Lawyers. They Can Also Be a Setup for Abuse.*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/15/when-women-law-clerks-are-harassed-they-often-have-nowhere-to-turn [https://perma.cc/DL9A-RAM5] ("I observed an instance of what seems typical of Kozinski's alleged pattern of behavior and its lack of consequences. At a legal conference, I saw him invade the personal space of a young female law student in a clearly inappropriate way and briefly touch her chest as he reached over to adjust her crooked nametag.").

46. Zapotosky, *supra* note 12 ("A former clerk for Judge Alex Kozinski said the powerful and well-known jurist, who for many years served as chief judge on the U.S. Court of Appeals for the 9th Circuit, called her into his office several times and pulled up pornography on his computer . . . .").

47. *#MeToo Makes Its Way to the Judiciary*, *supra* note 15 ("One-time Kozinski clerk Heidi Bond recalled the judge describing her as his 'slave' and calling her into his office alone to share a list of the women he and his friends had slept with in college.").

48. At a reception, the clerk had commented amongst a group of other clerks that "the gym in the 9th Circuit courthouse was nice because other people were seldom there," to which the judge replied, that "if that were the case, she should work out naked." Zapotosky, *supra* note 12. Even after the group attempted to change the subject, the judge "kept steering the conversation toward the idea of [the clerk] exercising without clothes." *Id.* The clerk later disclosed that "what was humiliating about it" was that "[i]t wasn't just clear that [the judge] was imagining [her] naked, he was trying to invite other people – [the clerk's] professional colleagues – to do so as well." *Id.*

49. In other employment settings, the EEOC counsels against asking questions that may be neutral on their face but have been frequently used to discriminate against women under Title VII, such as questions related to marital status, number of dependents and pregnancy, and plans for more children and child care arrangements. *Pre-Employment Inquiries and Marital Status or Number of Children*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/pre-employment-inquiries-and-marital-status-or-number-children [https://perma.cc/N8UY-GC2H].

woman who was engaged at the time of her clerkship interview to "confirm that she would not become pregnant during her one-year clerkship."[50] In another interview, an appellate judge asked a woman whether she ever planned to marry and bear children.[51] The judge made it clear that "if [she] did, he would think twice about hiring [her]," since "[h]e didn't want to waste this clerkship on a woman who wouldn't use it."[52]

Other reports depict extreme sexual humiliation. As an illustration, one former female clerk recounted how her judge constantly sexually berated her during her clerkship. Before Congress, the woman explained how she showed up to chambers on the first day of her federal appellate clerkship to find a graph of breasts taped to her work computer that the judge had hand-drawn, apparently in an effort to guess what her breasts looked like.[53] She explained that "[t]he graph of boobs over my computer made it immediately apparent that this would not be the most valuable learning experience I could have as a lawyer. I knew that day that it would be a harmful year, although I could not yet see how bad it would get."[54] The clerk also testified that "[o]ften, [her judge's] remarks included expressing surprise that [she] even had a husband because [she] was not a woman who any man would be attracted to. In that vein, [her judge] often speculated that [her] husband must be a 'wimp,' or possibly gay."[55] Her judge went as far as to "suggest[] that [her] 'wimp' husband must either lack a penis, or not be able to get an erection in [her] presence," essentially "impl[ying] that [her] marriage had not been consummated."[56]

In addition, at least one federal judiciary employee has come forward to report quid pro quo harassment. The employee, a

---

50. Marimow, *supra* note 37.

51. Nancy Gertner, *Sexual Harassment and the Bench*, 57 JUDGES J. 24, 24 (2018).

52. *Id.*

53. *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the H. Subcomm. on Cts., Intell. Prop. & the Internet*, 116th Cong. 5–6 (2020) (Testimony of Olivia Warren) [hereinafter *Testimony of Olivia Warren*]. The former clerk explained, "I was good at law school, largely because I am someone who likes absurdly detailed plans, predictability, and being polite; I am from Wisconsin, after all. But my careful plotting of my future fell apart on my first day in Judge Reinhardt's chambers." Warren, *supra* note 37, at 448.

54. Warren, *supra* note 37, at 448

55. *Testimony of Olivia Warren*, *supra* note 53, at 7.

56. *Id.*

woman attorney in the Fourth Circuit Court of Appeals, received a "quid pro quo" e-mail from her supervisor who had reportedly been stalking her. In the context of the supervisor's sexual interest in the employee and his email's direct references to her request for a promotion, the employee reasonably interpreted it as quid pro quo sexual harassment.[57] In describing her supervisor's stalker-like behavior and unwelcomed interest in her personal and professional life, she reported how her supervisor insisted that he mentor her (and her alone) and drive her home in inclement weather, and that on more than one occasion he appeared to purposely leave the office at the same time as her.[58] The supervisor read all of the woman's law review articles and began to take up her hobbies after she expressed her personal interests. For example, "[w]henever [the employee] told [her supervisor] that she liked a certain type of music, she noticed that he would play that music the next time she was in his car" and "[a]fter she told him she liked hiking, he began telling her about hikes he went on by himself."[59]

As more reports of sexual misconduct continue to surface in the federal judiciary, it is clear this anecdotal evidence exposes only a fraction of the sexual abuse of power enjoyed by some federal judges and other judiciary officials.

B. A CULTURE OF "WORSHIPFUL SILENCE": HOW THE UNIQUE NATURE OF THE FEDERAL JUDICIARY REINFORCES A SYSTEMIC, SEXUAL ABUSE OF POWER IN THE FEDERAL COURT SYSTEM

Federal judiciary employees who have come forward have explained that they are afraid to make formal reports because they believe that staying quiet is necessary to preserve their chances of success in the legal field. For example, one former clerk explained that

> [o]ne of the reasons [she] did not feel safe reporting to the judiciary is that no one could confirm how far [her] information would go, and thus, if someone with allegiance to [her abusing judge] retaliated against [her], neither [she] nor anyone else would ever know if it was connected to [her] disclosure.[60]

---

57. *See* Complaint at paras. 76–86, Roe v. United States, 510 F. Supp. 3d 336 (W.D.N.C. 2020) (No. 1:20-cv-00066), 2020 WL 1056242, at *15–16.

58. *Roe*, 510 F. Supp. 3d at 342 (describing the First Assistant to the Public Defender's insistence that he mentor Roe and drive her home, habit of leaving the office at the same time as her, and retaliation against her when she did not entertain his interest); *see also* Complaint, *supra* note 57, at para. 71.

59. Complaint, *supra* note 57, at para. 71.

60. Warren, *supra* note 37, at 452.

Similarly, twenty current and former federal judiciary employees recently "offered firsthand accounts of a [reporting] system that they say still lacks protections and procedures to hold officials accountable."[61] Thus, these employees not only critique the judiciary's reporting processes and mishandling of sexual misconduct complaints, but they also contend that the federal judiciary's culture reinforces systemic sexual harassment.[62]

Given the uniqueness of the federal judiciary as a workplace, there are multiple factors that deter employees, especially women, from reporting sexual harassment against judges or other high-level judicial branch officials.[63]

Such dissuasion ultimately allows the abuse to fester. In particular, the following characteristics all come together to make it difficult—perhaps nearly impossible—to fully address sexual misconduct in the federal judiciary: the imbalance of power between judges and high-branch officials, and employees, especially law clerks;[64] the isolation and autonomy of federal judicial chambers, such that "[i]t is as if each chamber is a fiefdom,

---

61. Marimow, *supra* note 37; *see also id.* ("[These] allegations of harassment and discrimination are part of an unusually personal court filing submitted Thursday that points to gaps in the federal judiciary's system for handling workplace misconduct complaints – despite policies put in place in recent years to address such problems.").

62. *#MeToo Makes Its Way to the Judiciary*, *supra* note 15 ("Mr. Kozinski also left her with the impression that judicial confidentiality – the principle that neither clerks nor judges should share what takes place in a judge's chambers – barred her from speaking out about his misconduct. Another 9th Circuit clerk harassed by Mr. Kozinski, Emily Murphy, felt similarly adrift: As Mr. Kozinski was the circuit's chief judge at the time, any complaint she filed would go to him.").

63. *See generally* Gertner, *supra* note 51, at 27–28 (describing the unique setting, training, and formal reporting procedures in the federal judiciary that challenge the effectiveness of addressing sexual misconduct in the workplace); Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 632–33 (2020) (analyzing the contributing forces that reinforce sexual harassment in the federal judiciary); Jaime A. Santos, *When Justice Behaves Unjustly: Addressing Sexual Harassment in the Judiciary*, 54 CT. REV. 156, 157 (2019) (listing contributing factors that make sexual harassment possible in the federal judiciary); *see also* Crump, *supra* note 45 ("In general, judicial clerkships can place young women in a particularly vulnerable position – the job, by its nature, requires young clerks to work in close and secluded quarters with judges who have the power to make or break their careers.").

64. *See* Litman & Shah, *supra* note 63, at 616 ("The judiciary has always had significant power disparity between judges and clerks."); Santos, *supra* note 63 ("There is a massive power differential between judges and employees, and

with its own rules and norms";[65] the "atmosphere of secrecy" and confidentiality of federal judicial chambers;[66] the high turnover of new clerks "every year or two";[67] the federal judiciary's fear of destroying the public's confidence in it and subsequent desire to keep things hushed;[68] the prestige that federal clerkships carry to make or break legal careers;[69] and the belief that victims will not be believed or that reporting misconduct will not actually lead to anything resembling justice.[70] Indeed, "employment within the judiciary (and particularly within judicial chambers) has all of the hallmarks of a workplace environment that makes harassment more likely, and that makes speaking up against harassment nearly impossible[.]"[71] In other words, the structure of the federal judiciary itself reinforces a systemic sexual abuse

---

a strict hierarchical structure in which chambers employees have a single supervisor.").

65. Gertner, *supra* note 51, at 25; *see also id.* ("[F]ew judges interact with the clerks of other judges or know how other judges conduct themselves in their chambers."); Litman & Shah, *supra* note 63, at 618 ("Judicial chambers are entirely isolated. For security purposes, even court staff cannot walk in and out of chambers without a key card."); Santos, *supra* note 63, at 157 ("Judicial chambers are almost entirely autonomous, and chambers employees are often isolated from others for most or all of the day.").

66. *See* Litman & Shah, *supra* note 63, at 615 ("There is an atmosphere of secrecy that surrounds clerking, one that is bolstered by a clerk's duty of confidentiality . . . . Clerkships are premised on secrecy: even after the handbook's clarification, clerks are permitted, but not required, to report instances of harassment. This misplaced emphasis ensures that secrecy and confidentiality pervade the clerkship experience.") (emphasis omitted). Relatedly, for an analysis of the unprecedented leaked Supreme Court draft opinion in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), and its anticipated long-term negative consequences for the Court, see Chad G. Marzen & Michael Conklin, *Information Leaking and the United States Supreme Court*, BYU J. PUB. L. (forthcoming), https://ssrn.com/abstract=4132816 (click on "Download This Paper").

67. Santos, *supra* note 63 ("In many jurisdictions, there is significant turnover in chambers, with new clerks joining every year or two.").

68. *Id.* ("The judiciary generally has a strong desire to avoid any public disclosure of wrongdoing in the interests of maintaining public confidence.").

69. Crump, *supra* note 45 ("In general, judicial clerkships can place young women in a particularly vulnerable position—the job, by its nature, requires young clerks to work in close and secluded quarters with judges who have the power to make or break their careers.").

70. *See* WORKING GROUP REPORT, *supra* note 16, at 12 ("Victims are hesitant to report harassment and other inappropriate behavior for a variety of reasons, including lack of confidence that they will be believed, fear that no action will be taken, and concerns that a complaint will subject them to retaliatory action or affect future job prospects.").

71. Santos, *supra* note 63.

of power. Some have even described the cultural abuse of power in the federal courts as that of "worshipful silence."[72]

As a result of these unique factors, federal judiciary employees—especially law clerks who tend to be freshly graduated law students at the very beginning of their legal careers[73]—have serious considerations to contemplate before formally reporting instances of workplace sexual misconduct. Reporting on a judge or judicial official can have far-reaching, irreversible consequences for one's legal career.[74] These include losing access to critical networking connections, being labeled as a "problem" employee, and getting ostracized by esteemed corners of the legal field.[75] For example, some prestigious clerkships with federal judges have a reputation of serving as "gateways" to even more prestigious clerkships, such as those with the Supreme Court.[76] The striking

72. Crump, *supra* note 45 ("In a heart-rending column, Slate's legal correspondent, Dahlia Lithwick recounted years of Kozinski leering at her and subjecting her to inappropriate sexual comments, and her feelings of guilt for not reporting the 'open secret' of his behavior sooner. This isn't just a story, though, of one bad judge. Clerkships are plagued by what Lithwick calls a culture of 'worshipful silence' that leaves young lawyers feeling helpless in the face of abusive treatment.").

73. *See* Santos, *supra* note 63 ("Law clerks are typically employed at the beginning of their career, when they are most vulnerable and the risk of retaliation is perhaps most acute.").

74. *See, e.g.*, Crump, *supra* note 45 ("What client wants to hire a lawyer if the first hit associated with her name was not about her legal victories, but about the lawyer's own victimization by a federal judge? It's no wonder that neither of the two former clerks who blew the whistle on Kozinski practices law full time. One writes romance novels. The other is a law professor."); Dylan Hedtler-Gaudette & Sarah Turberville, *Sexual Harassment by Judge's Operating with Impunity Shows Courts Need Their Own #MeToo*, PROJECT ON GOV'T OVERSIGHT (Feb. 19, 2020), https://www.pogo.org/analysis/2020/02/sexual-harassment-by-judges-operating-with-impunity-shows-courts-need-their-own-me-too [https://perma.cc/7N6S-FF5C] ("For a law clerk, at the precipice of his or her legal career, alienating a federal judge can spell doom for their life in the law.").

75. *See, e.g.*, Gertner, *supra* note 51, at 25 ("[T]he judge is a mentor, sometimes a confidant, the person who performs wedding ceremonies, posts pictures of their clerks' families, and organizes reunions. The judge's recommendations are critical to the clerk, not just in the year or two after the clerkship, but often throughout her legal career. It is not unusual for judges—like me, in fact—to say that the relationship with one's clerks was a high point of the job."); *see also* Crump, *supra* note 45 ("[F]or clerks who might consider going public, they almost certainly ask themselves what law firm would be eager to hire a young woman who had accused a prominent judge of sexual harassment.").

76. *See, e.g.*, Zapotosky, *supra* note 12 ("Kozinski, who served as the chief judge on the 9th Circuit from 2007 to 2014, remains a prominent judge, well

power imbalance makes it possible that "[a] judge can both help a clerk find a job and tank a clerk's prospects with just one call."[77] Thus, fear of retaliation for reporting harassment and abuse may persuade clerks that reporting is simply not worth the risk.[78]

While some of these factors commonly influence employees' decisions to report sexual harassment in any workplace,[79] the federal judiciary represents the extreme. At least in other workplaces there is more data regarding sexual harassment reports,[80] indicating that at least some employees feel safe enough to come forward to report.[81] Because of the federal judiciary's striking lack of data on sexual misconduct,[82] it is apparent that the culmination of the judiciary's special characteristics creates a unique work environment that reinforces systemic sexual abuse unlike other workplaces.

C. LIMITED DATA DISGUISES THE SERIOUSNESS OF THE SEXUAL HARASSMENT PROBLEM IN THE FEDERAL JUDICIARY

Given the unique characteristics of the federal judiciary, it is extremely rare for an employee to assert a sexual harassment complaint against a federal judge or other judiciary official.[83] This normalized, forced silence further perpetuates the harm: low numbers of reports of sexual harassment mistakenly create

known in the legal community for his colorful written opinions. His clerks often win prestigious clerkships at the Supreme Court.").

77. *See* Litman & Shah, *supra* note 63, at 616.

78. *See id.* ("Judges can fire clerks at will and clerks fear retaliation because losing a clerkship may reflect poorly on their competence and employability, particularly for candidates early in their careers.").

79. *See* EEOC REPORT, *supra* note 5 (discussing the severe rates of underreported harassment in the workplace and its connection to fear of backlash or retaliation).

80. *See id.* (outlining sex-based harassment in the workplace in general).

81. *But see id.* at 21–22 (noting that, on average, between eighty-seven to ninety-four percent of employees do not file formal harassment complaints).

82. *See infra* Part I.C.

83. *See, e.g.*, Litman & Shah, *supra* note 63, at 632 ("[P]eople who are likely to speak out against harassment are frequently siphoned off from the pool of clerkship candidates."); Santos, *supra* note 63, at 158 ("The reasons for lack of progress thus far are many . . . . How can the judiciary structure its avenues for reporting misconduct to actually encourage reporting despite significant power dynamics in play and employee's fear of retaliation?").

the impression that it is not as severe of an issue as it is.[84] Despite the evidence above suggesting that sexual harassment is a serious issue in the federal judiciary, there is not much data reflecting this reality.[85]

In 2018 the federal judiciary established the Workplace Conduct Working Group ("Working Group")[86] to evaluate the judiciary's standards of conduct and procedures for investigating and correcting inappropriate, harassing behavior.[87] Accordingly, the Working Group set out to collect data on sexual harassment in the federal judiciary, namely through formal reports made through the JC&D process and EDR program.[88] After assessing

84. Litman & Shah, *supra* note 63, at 631 ("This system reproduces itself."); Warren, *supra* note 37, at 449 ("Lots of people are harassed in chambers, in lots of different ways: we keep learning this, but in the face of repeated revelations, we refuse to imagine that there might be a bigger problem that we can't see.") (footnote omitted); Hedtler-Gaudette & Turberville, *supra* note 74 ("Warren's story exposes a major accountability gap in the federal judiciary: The very branch of government charged with enforcing federal discrimination and harassment laws does not police its own.").

85. Chief Justice John Roberts recently stated that in 2018, the federal judiciary Workplace Conduct Working Group "recognized the seriousness of several high-profile incidents, but found that inappropriate workplace conduct is not pervasive within the Judiciary." John G. Roberts, Jr., *2021 Year-End Report on the Federal Judiciary*, SUP. CT. 4 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf [https://perma.cc/JMP9-3L4M]. *But cf. Sexual Violence & the Workplace: Overview*, *supra* note 32, at 2 ("The connections between sexual violence and the workplace are understudied. However, existing research can help inform advocacy and prevention efforts."). A lack of public access to records concerning judicial misconduct further exacerbates the problem. *See* Zachary Johnson, *#CourtsToo: Constitutional Judicial Accountability in the #MeToo Era*, 46 J. LEGIS. 346, 353 (2019) ("Problems have also been caused because of the public's general inability to access records concerning judicial misconduct.").

86. *Federal Judiciary Workplace Conduct Working Group Formed*, U.S. CTS. (Jan. 12, 2018), https://www.uscourts.gov/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed [https://perma.cc/2KWP-WB9A]. The Working Group consists of eight judges and court administrators, including members of the Administrative Office of the United States Courts, the Federal Judicial Center, and six different courts from five circuits. WORKING GROUP REPORT, *supra* note 16, at 1–2.

87. In response to the rise of formal reports of sexual misconduct in the federal judiciary, a group of current and former law students rallied together to create Law Clerks for Workplace Accountability, whose "mission is to ensure that the federal judiciary provides a harassment-free workplace for all employees." *See* @ClerksForChange, TWITTER, https://twitter.com/clerksforchange [https://perma.cc/Y7DJ-4JFM].

88. *See* WORKING GROUP REPORT, *supra* note 16, at 4.

formal reports and seeking input from other outlets, including submissions to an electronic mailbox from former and current federal judiciary employees, advisory groups, surveys, and interviews with employees,[89] the Working Group determined that inappropriate conduct was "not pervasive in the Judiciary."[90] Specifically, the Working Group asserted that "of the inappropriate behavior that does occur, incivility, disrespect, or crude behavior is more common than sexual harassment."[91] The data revealed that of the 1,303 judicial misconduct complaints filed in the fiscal year 2016 under the JC&D process, none of them were filed by law clerks or judiciary employees, and none of them that were referred for further investigation involved sexual harassment.[92] Instead, these complaints were filed in large part by "dissatisfied litigants and prison inmates" and were "related to a judge's decision."[93] The director of the federal judiciary declared that these data points reflect what "has been true in most years."[94] But data from 2020[95] reveals that there were twelve complaints alleging "[u]nwanted, [a]busive, or [o]ffensive [s]exual [c]onduct" between October 2019 and September 2020.[96]

While this data might persuade some that sexual misconduct is not a real issue in the federal judiciary, a quick comparison to national data on workplace sexual harassment in general suggests otherwise.[97] In 2016, the Equal Employment Opportunity Commission ("EEOC") reported that of the 90,000 charges

89. *See id.*

90. *Id.* at 6.

91. *Id.* at 7.

92. Letter Concerning the Workplace Conduct Working Group, *supra* note 1, at 17–18; *Table S-22: Report of Complaints Commenced and Action Taken Under Authority of 28 U.S.C. §§ 351-64 During the 12-Month Period Ending September 30, 2016*, U.S. CTS. (2016), https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2016.pdf [https://perma.cc/J6AD-U32Y].

93. Letter Concerning the Workplace Conduct Working Group, *supra* note 1, at 17.

94. *Id.* at 18.

95. This appears to be the first year that the federal judiciary even included a category in its report to specifically collect data on sexual misconduct. *Table S-22: Report of Complaints Commenced and Action Taken Under Authority of 28 U.S.C. §§ 351-64 During the Period from 10/1/2019 to 9/30/2020*, U.S. CTS. (2021), https://www.uscourts.gov/sites/default/files/jb_s22_0930.2020.pdf [https://perma.cc/8D39-PNXK].

96. *Id.* Eleven of the complaints were filed in the Eighth Circuit Court of Appeals. *Id.*

97. *Compare* EEOC REPORT, *supra* note 5, at 15–17 (discussing rates of sex-based harassment in the workplace) *with* WORKING GROUP REPORT, *supra* note

of employment discrimination that the agency received, 28,000 of them—nearly one-third—alleged harassment by private sector or government employers.[98] Within that pool of reports, forty-five percent alleged harassment based on the employee's sex in the private sector, and forty-four percent alleged harassment based on the employee's sex in the federal government.[99] Thus, this data demonstrates that workplace sexual misconduct, whether or not it is formally reported, is an issue in virtually every place of employment. The federal judiciary is no exception. The fact that a very small number of federal judiciary employees have filed formal claims related to sexual harassment should not be mistaken as evidence that wrongful sexual conduct is not an issue in the federal court system.[100] Instead, this strikingly low data should be alarming, for it ultimately demonstrates that there are serious, underlying issues that either prevent or discourage clerks and other federal judiciary employees from reporting sexual misconduct.[101] The unique nature of the federal judiciary as a place of employment, which reinforces systemic sexual harm, likely facilitates this silence.[102] Data show that in general only about one-third of individuals who experience workplace harassment will even discuss the harassment with a supervisor, and only about six percent to thirteen percent will file

16, at 6–7 (claiming that sexual misconduct is "not pervasive" in the judicial branch).

98. EEOC REPORT, *supra* note 5, at 6.

99. *Id.* at 14–15.

100. It is worth noting here that the #MeToo movement generally, which empowered survivors of gender-based violence all around the world to speak up about their trauma, did not really gain traction until 2017, after the Working Group Report was published. Catherine Powell, *How #MeToo Has Spread Like Wildfire Around the World*, NEWSWEEK (Dec. 15, 2017), https://www.newsweek.com/how-metoo-has-spread-wildfire-around-world-749171 [https://perma.cc/65DS-8LL7].

101. The EEOC reports that when it comes to harassment in the workplace, "the extent of non-reporting is striking." EEOC REPORT, *supra* note 5, at 15. In fact, "[t]he least common response of either men or women to harassment is to take some formal action - either to report the harassment internally or file a formal legal complaint." *Id.* at 16 (emphasis omitted) (citing Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, *in* THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 484 (J. Barling & C.L. Cooper eds., 2008)). Mostly, individuals take other measures, like avoiding the harasser, denying or downplaying the issue, or attempting to "ignore, forget, or endure the behavior." *Id.*

102. *See supra* Part I.B.

a formal complaint.[103] This is due, in large part, to anticipation or fear of retaliation, whether social or professional.[104] Thus, the lack of formal reports is very likely due to federal judiciary employees' fear of what could happen if they ever reported their abuser.

This Part concludes that, although masked by limited data, sexual misconduct is pervasive in the federal judiciary, where unique characteristics reinforce its prevalence in the federal courts. Understanding this reality is necessary to grasp the focus of Part II of this Note, which argues that the two avenues available to federal judiciary employees to address sexual misconduct in the workplace are defective, thus paving the way to amend Title VII and expand the *Bivens* doctrine to provide a solution to this problem, as discussed in Parts III and IV.

II. FEDERAL JUDICIARY EMPLOYEES HAVE NO ADEQUATE REMEDIAL MECHANISMS BY WHICH TO ADDRESS WORKPLACE SEXUAL HARASSMENT

One of the contributing factors to the lack of formal reporting is the profound flaws in the reporting mechanisms that already exist.[105] This Part argues that the current mechanisms by which federal judiciary employees can address workplace sexual harassment are deficient. The lack of Title VII protections for

---

103. EEOC REPORT, *supra* note 5. Data on sexual violence indicates that, on average, only about twenty-two percent to thirty-three percent of survivors of sexual violence report to formal authorities. Rachel E. Morgan & Alexandra Thompson, *Criminal Victimization, 2020*, U.S. DEP'T OF JUST. (Oct. 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cv20.pdf [https://perma.cc/SQR2-XKHF]. Only about one-third of sexual assaults are reported to police, meaning that more than two out of three go unreported. *The Criminal Justice System: Statistics*, RAPE, ABUSE, & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/M682-3L34]. Notably, data shows that of the sexual violence crimes not reported to police from 2005–10, twenty percent of survivors said that fear of retaliation discouraged them from reporting. *Id.*

104. *See supra* Part I.B.

105. *See, e.g.*, Coll & Hosmer-Quint, *supra* note 21 ("[J]udiciary employees don't receive the benefit of the anti-discrimination protection Title VII offers . . . ."); Stacy N. Cammarano, *No Justice for Those Harassed by Judges*, HERALD NEWS (May 9, 2018), https://www.heraldnews.com/story/opinion/2018/05/09/no-justice-for-those-harassed/12216891007 [https://perma.cc/VM8D-9JT4] ("[Federal judiciary employees'] only recourse is an internal complaint process that offers victims no remedy for misconduct and only the remote prospect of disciplinary action against a judge who harasses them.").

federal judiciary employees and the deficiencies of the two current methods to make formal reports together create an impossible situation for federal judiciary employees to address workplace sexual misconduct.

A. TITLE VII DOES NOT PROTECT FEDERAL JUDICIARY EMPLOYEES

None of the roughly 30,000 current federal judiciary employees[106] are protected by Title VII, which is the primary federal statute that prohibits discrimination, retaliation, and harassment in the workplace based on, among other things, an employee's sex.[107] While other employees[108]—including federal employees[109]—can file sex-based claims under Title VII,[110] the statutes' protections do not apply to the federal judiciary. Specifically, Title VII applies only to judiciary positions in the competitive service[111] or positions appointed "by nomination for confirmation by the Senate when specifically included [] by statute."[112] In other words, due to a strange quirk in the law, Title VII does not provide federal judiciary employees with a legal remedy for workplace sexual misconduct.

The reasoning behind this insulation of most of the judiciary from Title VII is not entirely clear.[113] But it is almost certain that

---

106. *See* WORKING GROUP REPORT, *supra* note 16, at 6 ("The Judicial Branch employs 30,000 individuals in a broad range of occupations.").

107. *See* 42 U.S.C. § 2000e-2(a) ("It shall be unlawful employment practice for an employer . . . to fail to refuse to hire or to discharge any individual, or otherwise discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . . ."); 42 U.S.C. § 2000e-16(a) ("All personnel actions affecting employees or applicants for employment . . . in those units of the [f]ederal [g]overnment *having positions in the competitive service* . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.") (emphasis added).

108. Title VII applies to employers with fifteen or more employees. 42 U.S.C. § 2000e(b).

109. While Title VII applies to some parts of the federal government, it does not apply to the federal judiciary. *See* 42 U.S.C. § 2000e-16(a) (listing federal employees who are protected from discrimination).

110. Recall that in addition to sex, many other employees can also file claims for discrimination, harassment, and/or retaliation based on race, color, religion, or national origin under Title VII. 42 U.S.C. § 2000e-2(a).

111. "Competitive service" is defined as "all civil service positions in the executive branch," with limited exceptions. 5 U.S.C. § 2102(a).

112. 42 U.S.C. § 2000e-16(a); 5 U.S.C. § 2102(b).

113. Coll & Hosmer-Quint, *supra* note 21 ("[F]or reasons that defy logic, Title VII does not cover judiciary employees.").

judicial immunity and separation of powers plays a role.[114] Congress very likely excluded the federal judiciary from Title VII to respect judicial immunity[115] and to avoid upsetting the carefully preserved balance of separation of powers.[116] By excluding the federal judiciary from congressional regulation of workplace issues, Congress avoids conflict with the courts, and the judiciary can maintain its independence.[117] This is especially notable given that one of the federal judiciary's most safely guarded principles is its independence from the other two branches of government.[118] Indeed, the federal judiciary recognizes that not only is "[d]ecisional independence . . . essential to due process, promoting impartial decision-making, free from political or other extraneous influence," but that "courts also require ample institutional independence."[119] In other words, the federal judiciary perceives a need for independence in its "power to manage its internal affairs" because doing so "insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and co-equal branch of government."[120] Thus, the theory goes, if Congress had included the federal judiciary within Title VII's scope when it enacted the federal statute,

114. *Cf.* Gertner, *supra* note 51, at 28 ("Given the unique nature of the judiciary, the reticence of clerks to talk about their experiences, and the reluctance of one judge to criticize another, the best approach may [not be Title VII].").

115. *See* Bradley v. Fisher, 80 U.S. 335, 347–54 (1872) (emphasizing factors that, in the Supreme Court's view, justify absolute immunity for judges); *see also* Sup. Ct. v. Consumers Union of the U. S., Inc., 446 U.S. 719, 734–35 (1980) (discussing the immunity of judges from liability for acts performed in their official capacity).

116. *See generally* Frank J. Battisti, *The Independence of the Federal Judiciary*, 13 B.C. INDUS. & COM. L. REV. 421, 424–38 (1972) (discussing the controversy that has arisen when Congress has attempted to interfere with the courts).

117. *Id.* at 421 ("A hallmark of our federal system is the independence of the judiciary. This independence is occasionally threatened by those who, while meaning well, would undermine the very attribute that makes the judicial system of this nation without peer.").

118. *See id.*; *see also* Roberts, *supra* note 85, at 1 ("During his nine-year tenure, [Chief Justice Taft] proved visionary on a matter of vital concern to the entire Judiciary: safeguarding and fortifying the independence of the Branch.").

119. Roberts, *supra* note 85, at 1.

120. *Id.*; *see also* Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 281–87 (1980) (warning of other issues that may arise by remedy of official damage liability).

the fear would be that the legislative branch would be unconstitutionally interfering in the federal judiciary's internal matters.[121]

But these fears are unfounded. Judges are obviously not exempt from criminal laws.[122] Why should sexually harassing behavior be regarded as any different? Moreover, the oft argued justification that excluding the courts from Title VII insulates courts from "inappropriate political influence" and preserves public trust in the courts lacks any clear nexus to the exclusion of the federal judiciary from Title VII.[123] Instead, the insulation of the courts from Title VII's accountability serves to undermine the public's trust in the judiciary.[124] Why should the public trust courts that uphold laws that they are not held to themselves? Regardless, the insulation of the federal judiciary from alleged congressional interference, while ostensibly honoring judicial immunity and separation of powers principles, should not outweigh efforts to eradicate the serious sex-based abuse being committed against federal judiciary employees.

B. THE JUDICIAL CONDUCT AND DISABILITY ACT'S FRAMEWORK FOR DISCIPLINING JUDICIAL MISCONDUCT FAILS TO ADEQUATELY ADDRESS SEXUAL HARASSMENT

Without Title VII's traditional employment protections, federal judiciary employees have few viable avenues to challenge

---

121. Roberts, *supra* note 85, at 5 ("As Chief Justice, Taft took vital steps to ensure that the Judicial Branch itself could take the lead in fulfilling that duty. The Congress of his era appreciated the judiciary's need for independence in our system of separate and co-equal branches, and it provided a sound structure for self-governance.").

122. Federal judges are appointed for life and removable by Congress through impeachment, which is rare and mainly limited to serious unethical or criminal conduct. *See* U.S. CONST. art. III, § 1; *id.* art. II § 4; *see also Judges and Judicial Administration – Journalist's Guide*, U.S. CTS., https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide [https://perma.cc/7D7Q-ANDU] ("Article III judges can be removed from office only through impeachment by the House of Representatives and conviction by the Senate.").

123. *Contra* Gertner, *supra* note 51, at 5 (arguing that Title VII's protections would not be conducive to the federal judiciary because of its structure within our government).

124. *See generally* Coll & Hosmer-Quint, *supra* note 21 (questioning why Title VII does not extend to the federal judiciary and suggesting that Congress should extend Title VII's protections to judiciary employees); Cammarano, *supra* note 105 (pointing out that Title VII does not extend to the federal judiciary and thus insulates judges from accountability).

sexual harassment.[125] Besides utilizing the federal judiciary's internal EDR program,[126] federal judiciary employees can file a formal complaint through the Judicial Conduct & Disability (JC&D) program.[127] Under the Judicial Conduct and Disability Act of 1980, any employee may file a judicial misconduct complaint against a federal judge[128] that "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability."[129] A person alleging misconduct may submit their written complaint to the clerk of the court of appeals for their respective circuit.[130] Then, the chief judge of that circuit decides whether to dismiss the complaint or convene a special committee to investigate.[131] During this review stage, the chief judge may communicate with the complainant or the accused judge.[132] If the chief judge does not dismiss the complaint, a special committee investigates and reports its findings to the circuit judicial council.[133] The circuit judicial council "may conduct additional investigation, dismiss the complaint, impose sanctions, or refer the complaint to the United

125. *See* discussion *infra* Part II.B.

126. *See infra* Part II.C.

127. *See Judicial Conduct & Disability*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability [https://perma.cc/27PE-MRA8] (explaining briefly the JC&D process for filing a formal complaint against a judge).

128. 28 U.S.C. § 351(d)(1) ("[T]he term 'judge' means a circuit judge, district judge, bankruptcy judge, or magistrate judge . . . .").

129. 28 U.S.C. § 351(a).

130. *Id.*

131. *Id.* § 351(b); *id.* § 353(a) ("If the chief judge does not enter an order under section 352(b) [to dismiss the complaint], the chief judge shall promptly . . . appoint himself or herself and equal numbers of circuit and district judges of the circuit to a special committee to investigate . . . ."). If the conduct complained of is that of the chief judge, the circuit judge in regular active service who is next senior in date of commission shall review the complaint. *Id.* § 351(c). *See also Rules for Judicial-Conduct*, *supra* note 16, at 20–21; *Final Report*, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S. 219 (Dec. 7, 2021) [hereinafter PRESIDENTIAL COMM'N], https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/W4HB-L86F] (outlining the procedures for review under the Judicial Conduct and Disability Act).

132. *See Rules for Judicial-Conduct*, *supra* note 16, at 20 ("The chief judge . . . may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter . . . .").

133. *See* PRESIDENTIAL COMM'N, *supra* note 131.

States Judicial Conference."[134] If a complainant is dissatisfied with the disposition of the circuit council, they can petition for review by the Committee on Judicial Conduct and Disability of the Judicial Conference.[135] However, review by the committee is discretionary.[136]

Despite the potential for the JC&D process to handle sexual harassment in the federal judiciary, it is effectively defective for multiple reasons. First, it is unclear whether this method was ever intended by Congress to serve as an avenue for employees to report sexual misconduct.[137] The Judicial Conduct and Disability Act makes no explicit prohibition of sex-based misconduct.[138] Second, the JC&D process only applies to federal judges, which implies that employees cannot use this process to make reports against other judiciary officials.[139] Relatedly, the Judicial Conduct and Disability Act also excludes justices from the Supreme Court from its reach, meaning that a judiciary employee cannot use the JC&D process to report misconduct by a Supreme Court justice.[140] Third, bringing an ethical claim against a judge does not provide a way to address the misconduct

134. *Id.*; *see also Rules for Judicial-Conduct*, *supra* note 16, at 41–42 (listing permissible outcomes of the judicial council's investigation). The Judicial Conference of the United States is the national governing body for the federal courts. *See* 28 U.S.C. § 331 (establishing the Judicial Conference).

135. *See Rules for Judicial-Conduct*, *supra* note 16, at 45–47 (detailing the procedures for the Committee on Judicial Conduct and Disability to review errors of law, clear errors of fact, or abuse of discretion); *see also* PRESIDENTIAL COMM'N, *supra* note 131, at 220.

136. *See* PRESIDENTIAL COMM'N, *supra* note 131, at 220 (noting that review by the committee is discretionary); *Rules for Judicial-Conduct*, *supra* note 16, at 47 ("[T]here is no right to such review [by the Committee on Judicial Conduct and Disability] in any party.").

137. Although this procedure was utilized in response to public allegations of sexual misconduct by Judge Kozinski of the Ninth Circuit Court of Appeals, it's not clear whether the JC&D process is meant to be utilized in this way. *See* Cammarano, *supra* note 26.

138. *See* 28 U.S.C. §§ 351–64.

139. *See id.* § 351(a) ("Any person alleging that a *judge* has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such *judge* is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.") (emphasis added).

140. *See* 28 U.S.C. § 351(d) (failing to include Supreme Court justices from the statute's definition of "judges"); *see also* PRESIDENTIAL COMM'N, *supra* note 131, at 216 ("[T]he Judicial Conduct and Disability Act excludes the Justices from its reach.").

without risking the employee's career and reputation.[141] This is because of the JC&D process's necessity of alerting the accused individual of the complaint.[142] Furthermore, absent impeachment, the most remedial action that a reviewing judicial council can take through the JC&D process is meager.[143] Specifically, all the council can definitively do is "censur[e] or reprimand[] the subject judge, either by private communication or by public announcement," or "order[] that no new cases be assigned to the subject judge for a limited, fixed period[.]"[144] In addition, the Judicial Conduct and Disability Act notably fails to provide a statutory cause of action to compensate the employee for any damage to her career or emotional suffering caused by the abuse.[145] Finally, considering the federal judiciary's motivation to avoid public disclosure of internal wrongdoing to maintain public confidence in itself,[146] it seems most likely that any censure or reprimand of a judge by the council would be private instead of public. For example, if the council does determine that censure or reprimand of a federal judge for sexual misconduct is appropriate, it is most likely that the public would play virtually no role

141. *See* Cammarano, *supra* note 26 (noting that one of the defects of bringing an ethical claim under the Judicial Conduct and Disability Act is that it does not provide a way to address the sexual misconduct without notifying the judge and risking the reporting employee's career and reputation).

142. *Id.*

143. *See, e.g.*, *id.* ("The most [the judicial council] can do absent an act of Congress is redistribute the judge's cases."); *Rules for Judicial-Conduct*, *supra* note 16, at 41–42 (listing the limited remedial action available to "ensure the effective and expeditious administration of the business of the courts").

144. *Rules for Judicial-Conduct*, *supra* note 16, at 41; *see also* Cammarano, *supra* note 26 ("Even if a judicial employee successfully pursues an internal complaint, the possible outcomes are limited and provide no relief to the employee. Federal judges are appointed for life and can be removed only by Congress. Thus, if the judicial council conducts an ethics investigation and finds that the judge engaged in sexual harassment, the most it can do absent an act of Congress is redistribute the judge's cases.").

145. *See* Cammarano, *supra* note 26 ("One of its defects is that it does not provide a way to address the harassment—for example by moving the employee to a different position—without alerting the judge and risking the employee's career and reputation. Meanwhile, there is no statutory cause of action to compensate the employee for either the damage to her career or the suffering the hostile workplace caused.").

146. Santos, *supra* note 63 ("The judiciary generally has a strong desire to avoid any public disclosure of wrongdoing in the interests of maintaining public confidence.").

in demanding accountability.[147] Thus, the JC&D process lacks transparency within the federal judiciary and the public, which stymies any real efforts to hold the federal judiciary publicly accountable.[148]

The allegations of sexual misconduct by former federal judge Alex Kozinski demonstrate the deficiencies with the JC&D process. After federal judiciary employees reported Kozinski's sexual harassment, the Ninth Circuit followed the JC&D procedures.[149] But before the investigation progressed, Kozinski promptly retired, almost certainly because he was alerted of the complaints filed against him as standard under the JC&D procedures.[150] Because he was a federal judge, by retiring Kozinski not only escaped further public investigation into his sexual misconduct, but also set himself up to receive his full salary for the rest of his life.[151] Therefore, Kozinski's scandal most clearly illustrates the problematic features of the JC&D process: these procedures, which are meant to hold federal judges accountable for misconduct, permit judges who abuse their employees to retire with continuing financial benefits, virtually unscathed, after allegations go public. This is not justice.

---

147. *See Rules for Judicial-Conduct*, *supra* note 16, at 41 ("[T]he judicial council may . . . take remedial action . . . including: censuring or reprimanding the subject judge, either by *private* communication or by public announcement.") (emphasis added).

148. *See also* WORKING GROUP REPORT, *supra* note 16, at 31–32 (recommending increasing public transparency in the JC&D process).

149. Cammarano, *supra* note 26 ("[T]his is the procedure the Ninth Circuit followed in response to the public allegations about Judge Kozinski, which triggered his resignation.").

150. *See Rules for Judicial-Conduct*, *supra* note 16, at 20 (explaining that the chief judge investigating the complaint may communicate with the accused judge).

151. Federal judges receive their salaries for the rest of their lives when they retire, so long as they are not impeached by Congress. 28 U.S.C. § 371(a); *Judges and Judicial Administration*, *supra* note 122; *see also* Cammarano, *supra* note 105 ("Although 15 women eventually spoke out about Kozinski's misconduct, and the U.S. Court of Appeals for the 9th Circuit launched an inquiry, Kozinski retired before the internal investigation progressed."). Notably, Kozinski remained eligible for his "$217,600 annual pension, a figure based on the standard appellate judge salary." Joan Biskupic, *Judicial Council Takes No Action Against Former Judge Alex Kozinski*, CNN (Feb. 5, 2018), https://www.cnn.com/2018/02/05/politics/alex-kozinski-sexual-misconduct-case-dropped/index.html [https://perma.cc/ML7M-ZDQJ].

C. THE JUDICIARY'S INTERNAL EDR PROCEDURES ALSO FAIL TO ADEQUATELY ADDRESS SEXUAL HARASSMENT IN THE FEDERAL JUDICIARY

In addition to utilizing the JC&D process, federal judiciary employees may also report complaints for discrimination, harassment, and retaliation internally through the federal judiciary itself.[152] In filing a complaint through the federal judiciary's Employment Dispute Resolution Plan (EDR), an employee may report alleged misconduct to any one of a handful of individuals, including her supervisor, a human resources professional, the unit executive, an EDR Coordinator, a chief judge, the chief circuit judge, the circuit director of workplace relations, or the National Office of Judicial Integrity.[153] To allege that a judge or official engaged in wrongful sexual conduct through this formal complaint process, an employee can file her complaint with one of the EDR Coordinators specified above, who then must immediately provide a copy of the complaint to the chief circuit judge (or the next most-senior circuit judge if the allegation is against the chief circuit judge).[154] The circuit judge then oversees the EDR complaint process, including the decision whether to investigate or dismiss the complaint.[155] As for remedies, the EDR process specifies that "[a]llowable [r]emedies" include: "placement of the Complainant in a position previously denied; placement of the Complainant in a comparable alternative position; reinstatement to a position from which the Complainant was previously removed; prospective promotion of the Complainant; priority consideration of the Complainant for a future promotion or position; back pay and associated benefits, when the statutory criteria of the Back Pay Act are satisfied; records modification and/or expungement; granting of family and medical leave; any reason-

152. *Model Employment Dispute Resolution Plan*, 12 GUIDE TO JUDICIARY POL'Y 1 (2022), https://www.uscourts.gov/about-federal-courts/workplace-conduct-federal-judiciary [https://perma.cc/5FJ2-ATB4] (click on "Model Employment Dispute Resolution Plan").

153. *Workplace Conduct in the Federal Judiciary*, *supra* note 18 (providing that federal judiciary employees may report workplace harassment and other wrongful conduct to the National Office of Judicial Integrity, directors of workplace relations in each of the circuits, and Employment Dispute Resolution Coordinators); *Model Employment Dispute Resolution Plan*, *supra* note 152, at 3.

154. *Model Employment Dispute Resolution Plan*, *supra* note 152, at 6–7.

155. *Id.* at 7–9.

able accommodation(s); and any other appropriate remedy to address the wrongful conduct."[156] In other words, monetary damages are unavailable, and the EDR plan does not "impose disciplinary or similar action" against the accused individual.[157]

In 2019, under recommendations from the Working Group,[158] the federal judiciary implemented workplace conduct-related amendments to improve the EDR plan, including changes to the judges' and judicial employees' codes of conduct.[159]

Now, the codes of conduct explicitly prohibit misconduct that was allegedly "already . . . implicit" in the judiciary's codes of conduct, such as "unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault."[160] In addition, the federal judiciary has emphasized that the sworn confidentiality of employment in the federal judiciary is not meant to deter any employee from reporting misconduct by any person.[161] In other words, if a judge sexually harasses a clerk while discussing a case, the clerk should still feel empowered to report the misconduct, even if the report contains confidential information from the case.

---

156. *Id.* at 10–11 (footnote omitted).

157. *Id.* at 11, 11 n.3.

158. In addition, the federal judiciary received public comments on the proposed amendments to the Code and Judicial Conduct and Disability Rules from Law Clerks for Workplace Accountability. *See Public Comment on Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules*, U.S. CTS., https://www.uscourts.gov/rules-policies/judiciary-policies/proposed-changes-code-and-jcd-rules/public-comment-proposed [https://perma.cc/TT8X-2QA9] (listing all public comments received).

159. *See, e.g.*, *Code of Conduct for United States Judges*, *supra* note 9, at 2 (stating relevant revisions).

160. *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 [https://perma.cc/AP7L-Y53M]*; see also Code of Conduct for United States Judges*, *supra* note 9, at 11; *Code of Conduct for Judicial Employees*, 2 GUIDE TO JUDICIARY POL'Y, pt. A, ch. 3 5–6 (2022), https://www.uscourts.gov/sites/default/files/guide-vol02a-ch03.pdf [https://perma.cc/UK5V-3UQJ]; *Rules for Judicial-Conduct*, *supra* note 16, at 7.

161. *Workplace Conduct in the Federal Judiciary*, *supra* note 18 ("The federal Judiciary is committed to a workplace free from discrimination, sexual or other discriminatory harassment, and abusive conduct. It is also committed to ensuring that every employee has clear avenues to obtain confidential advice, report misconduct, and seek and receive remedial action."); *see also Rules for Judicial-Conduct*, *supra* note 16, at 50.

Despite these attempts to amend the federal judiciary's mechanisms for addressing sexual misconduct, the EDR process is still inadequate.[162] Namely, the EDR plan leaves the door open for intimidation, bullying, and a lack of impartiality by judges and others involved in the complaint process.[163] Indeed, the EDR plan arguably provides incentives for judges to not report their colleagues.[164] Furthermore, the EDR procedures are not standardized across the federal courts, meaning that circuits can implement different procedures.[165] These inconsistencies across jurisdictions open the door to more confusion for judiciary employees trying to navigate the complaint process. More alarmingly, it remains unclear just how seriously the federal judiciary

162. *See, e.g.*, Complaint, *supra* note 57, at para 8–10; *see also* Gertner, *supra* note 51 ("There is no question that the judiciary can do better, not just in making its procedures more transparent but also in giving them meaningful content."); Nina Reddy, *Harassment, Accountability, and the Erosion of Judicial Legitimacy*, CTR. FOR AM. PROGRESS (Aug. 5, 2019), https://www.americanprogress.org/issues/courts/news/2019/08/05/473160/harassment-accountability-erosion-judicial-legitimacy [https://perma.cc/322S-8T3C] ("[T]he judiciary is under scrutiny for its alarming lack of diversity, *its inability to hold judges accountable for misconduct*, and the elitism reflected in its hiring practices. Because the Supreme Court's legitimacy hinges on the public's faith, it is critical that the judiciary address these issues to restore the sense that it is an impartial institution.") (emphasis added); Sean Sullivan & Matt Zapotosky, *Senators Concerned that Federal Courts Fall Short in Handling Sexual Misconduct*, WASH. POST (June 13, 2018), https://www.washingtonpost.com/powerpost/senators-concerned-that-federal-courts-fall-short-in-handling-sexual-misconduct/2018/06/13/54a27fdc-6f3a-11e8-afd5-778aca903bbe_story.html [https://perma.cc/6382-Q2P3]; Mihir Zaveri, *After Judge's 'Troubling' Behavior, Lawmakers Question Court Misconduct Rules*, N.Y. TIMES (Feb. 6, 2020), https://www.nytimes.com/2020/02/06/us/politics/judiciary-harassment-letter-carlos-murguia.html [https://perma.cc/FW35-EB6Q].

163. A case recently heard by the Fourth Circuit demonstrates the deficiencies of this procedure. In Strickland v. United States, the plaintiff, a former judiciary employee, alleged that the federal agencies and individuals who investigated her sexual harassment complaint against one of her supervisors mishandled the complaint, thus depriving her of equal protection and due process. 32 F.4th 311 (4th Cir. 2022).

164. For a discussion on the unique characteristics of the federal judiciary that create structural and power imbalances which further perpetuate harm pertaining to sexual misconduct in the workplace, see Part I.B.

165. *See* Cammarano, *supra* note 105 ("Such [EDR] programs are not standardized across the judiciary, and, in some circuits, they do not apply to law clerks.").

is taking its sexual misconduct problem and its duty to self-police.[166] These factors, in combination with the unique characteristics of the federal judiciary as a workplace,[167] reinforce the small likelihood that federal judiciary employees will use the EDR plan to report sexual misconduct and that they will actually achieve some form of justice.[168]

Therefore, neither the JC&D nor the EDR procedures adequately police the federal judiciary's sexual misconduct problem. Not only is sexual harassment in the federal judiciary still pervasive, but the procedures available to federal judiciary employees to seek redress for unwelcome sexual conduct are effectively flawed. Serious structural reform of both procedures could improve federal judiciary employees' protections against workplace harassment, but in the meantime federal judiciary employees require a better solution to address these issues.

III. EXPANDING TITLE VII: A LEGISLATIVE SOLUTION TO THE FEDERAL JUDICIARY'S SEXUAL MISCONDUCT PROBLEM

This Part implores Congress to amend Title VII to provide federal judiciary employees with statutory protections against workplace discrimination, harassment, and retaliation based on sex. As explained above, federal judiciary employees do not currently have effective protections through which they can legally redress workplace sexual misconduct.[169] It is therefore essential

166. For example, recently, leaders of the federal judiciary actively removed a question asking if employees had "witnessed wrongful conduct in the workplace" on a training registration form that was sent to thousands of judiciary staffers who work for federal judges, after nearly three dozen law clerks and judge assistants affirmed that they had "witnessed wrongful conduct in the workplace." Ann E. Marimow, *Federal Courts Drop Survey Question About Workplace Misconduct, But Not Before Judges' Staffers Said They'd Witnessed Such Problems*, WASH. POST (Jan. 14, 2022), https://www.washingtonpost.com/politics/courts_law/federal-court-workplace-misconduct/2022/01/13/1c4a0b6e-7481-11ec-bc13-18891499c514_story.html [https://perma.cc/TV65-T8EV].

167. *See supra* Part I.B.

168. Cammarano, *supra* note 105 ("In the past 20 years, only one judge has been impeached on charges of sexual misconduct, and the handful of other judges who have been investigated under the Judicial Conduct and Disability Act have resigned, nearly all retaining their salaries for life. These mechanisms do not deter judges, and they do not compensate employees for their suffering or the damage to their careers.").

169. For a discussion on the inadequacies of the EDR and JC&D processes, see Parts II.B–C.

that Congress take action to protect these employees from this systemic sexual abuse.[170]

A. EXTENDING TITLE VII WOULD PROVIDE FEDERAL JUDICIARY EMPLOYEES WITH STRONG STATUTORY PROTECTIONS AGAINST WORKPLACE SEXUAL MISCONDUCT

Expanding Title VII to federal judiciary employees would finally provide them with the workplace statutory protections they deserve. At long last, federal judiciary employees would be legally empowered to challenge workplace sexual misconduct under Title VII.[171] Amending Title VII would significantly improve federal judiciary employees' ability to achieve justice for sexual harassment and abuse. What's more, Title VII's provisions would protect federal judiciary employees who report misconduct from retaliatory action, by virtue of Title VII's explicit prohibition against employers' retaliation against employees who report unlawful behavior under the statute.[172] Given the special characteristics of the federal judiciary that deter employees, especially women, from reporting unwelcome sexual behavior, it is critical that Congress take action through such an expansion of Title VII.[173] For the sake of protecting a uniquely vulnerable class of employees from wrongful sexual conduct, Congress should extend Title VII to federal judiciary employees.

Although there are certainly arguments counseling against an extension of Title VII to the federal judiciary, the following Sections argue that the necessity of providing federal judiciary

---

170. For anecdotal evidence of how sexual harassment has silently persisted, virtually unchecked, see Part I.A. For a discussion on how the unique characteristics of the federal judiciary arguably encourage the systemic sexual abuse to continue, see Part I.B.

171. Title VII empowers "persons aggrieved" to file a charge of unlawful employment practices with the Equal Employment Opportunity Commission and later bring a civil action, if certain circumstances exist. *See* 42 U.S.C. § 2000e-5(b)–(f). Title VII applies to employers with fifteen or more employees. 42 U.S.C. § 2000e(b).

172. Title VII prohibits employers from retaliating against employees "with respect to [their] compensation, terms, conditions, or privileges of employment" on the basis of sex. *See* 42 U.S.C. § 2000e-2(a). For a discussion on how the EDR and JC&D processes have failed federal judiciary employees in protecting themselves against sexual harassment and misconduct, see Parts II.B–C.

173. Part I.B. discusses how special workplace characteristics of the federal judiciary discourage employees from reporting misconduct. Such characteristics include the imbalance of power between judges and other employees, the isolation and autonomy of judicial chambers, and the confidentiality of judicial work. *See supra* Part I.B.

employees with sufficient statutory protections outweighs those concerns. The fact that Congress has expressed an interest in confronting the judiciary's sexual misconduct problem[174] indicates that Congress is already energized to act. Moreover, the fact that the #MeToo movement's entrance into the federal judiciary has not inspired significant sexual harassment reforms in the federal courts raises cause for concern. This strongly suggests that Congress should take steps to fill that void. Indeed, "[w]hen the judiciary fails to discipline itself, it leaves governance to external forces like lawmakers and journalists."[175]

B. CONGRESS'S PREVIOUS EXCLUSION OF THE FEDERAL JUDICIARY FROM TITLE VII'S REACH SHOULD NOT DETER CONGRESS FROM AMENDING THE STATUTE NOW

Even though Congress excluded the federal judiciary when it first enacted Title VII as part of the Civil Rights Act of 1964, this should not discourage Congress from amending the statute to meet the present needs of federal judiciary employees. It goes without saying that one of the biggest barriers to expanding Title VII is the fact that Congress wrote the statute to explicitly exclude most federal judiciary employees from the statute's reach.[176] One could argue this exclusivity evinces clear congressional intent to not include federal judiciary employees under Title VII's protections. This argument is bolstered by the separation of powers concerns that likely influenced Congress to write the statute with such exclusivity in 1964.[177]

Regardless of which concerns may have motivated Congress to exclude federal judiciary employees from Title VII in 1964, modern-day circumstances outweigh those concerns. Present evidence of sexual abuse in the federal judiciary necessitates removing federal judiciary employees from the current statutory exceptions to Title VII protections.[178] Furthermore, since 1964, Congress has amended Title VII on multiple occasions. In 1972,

---

174. *See, e.g.*, Judiciary Accountability Act of 2021, S. 2553, 117th Cong. (2021).

175. Renee Knake Jefferson, *Judicial Ethics in the #MeToo World*, 89 FORDHAM L. REV. 1197, 1209 (2021).

176. *See* 42 U.S.C. § 2000e-16(a).

177. For a discussion on the probability that Congress excluded the federal judiciary from Title VII's reach in an effort to avoid upsetting the carefully preserved balance of separation of powers, see Part II.A.

178. *See supra* Part I.A.

Congress extended Title VII to cover federal, state, and local government employers and employees, with some exceptions.[179] In 1991, Congress amended Title VII to provide for punitive damages in cases of intentional violations in Title VII cases.[180] In 2009, Congress amended Title VII by eliminating the established statutory charge filing period for pay discrimination claims, thus making it possible for plaintiffs to challenge past pay discrimination.[181] These amendments demonstrate Congress's willingness to amend Title VII when necessary to provide greater protections to employees. The gravity of present circumstances indicates it is time to reexamine Title VII's exemption of the federal judiciary now.

C. CONCERNS REGARDING THE THREAT TO JUDICIAL INDEPENDENCE ARE INSIGNIFICANT IN LIGHT OF THE FEDERAL JUDICIARY'S SEXUAL HARASSMENT PROBLEM

It is apparent that Congress excluded the federal judiciary from Title VII's reach, in part, because of concerns regarding judicial independence. In other words, it is likely that Congress declined to extend Title VII's protections to the federal judiciary out of respect for the judicial branch's co-equal powers.[182] It is also likely that permitting plaintiffs to pursue Title VII claims against judges and other judicial officials would open the door to a flood of litigation,[183] and would spotlight aspects of the federal judiciary that it would rather resolve internally, out of the public eye.[184]

---

179. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; *see also* Clarence Mitchell, *An Advocate's View of the 1972 Amendments to Title VII*, 5 COLUM. HUM. RTS. L. REV. 311, 312 (1973).

180. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *see also* Marjorie Cohn, *The Civil Rights Act of 1991*, 49 NAT'L LAWS. GUILD PRAC. 33, 35 (1992). The Civil Rights Act of 1991 not only provides for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, but also for violations of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. *Id*. at 36.

181. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

182. For more discussion on how the separation of powers may have motivated Congress in determining the scope of Title VII, see Part II.A.

183. *See, e.g.*, Schuck, *supra* note 120, at 343 ("[T]he Court's recent *Thiboutot* decision will open up areas of litigation under § 1983—suits against local and state officials based upon statutory and regulatory violations in federal-state programs—that have been largely untapped . . . .").

184. The federal judiciary has displayed sensitivity toward congressional attempts to get involved in its internal affairs and makes it clear that it perceives itself as an entity capable of resolving its issues internally. *See* Roberts, *supra*

But the federal judiciary is not regulating itself. Instead, it is harboring harassers.[185] Therefore, it is necessary for Congress to step in. Notably, Congress has regulated other aspects of the federal judiciary in the past without overstepping its power.[186] This includes funding the courts' operation through its spending power and establishing by statute the Administrative Office of the U.S. Courts, "the judicial councils of the circuits, the judicial conferences of the circuits, and the Judicial Conference of the United States."[187] Congress has also "delegated its authority to make rules for the courts to the courts themselves," such as in the Judiciary Act of 1789.[188]

Moreover, the unique nature of sexual misconduct, as opposed to other types of judicial misconduct, warrants special protection. The Judicial Conduct and Disability Act does not explicitly regulate judicial misconduct that is sexual in nature.[189] Rather, the Act regulates any kind of judicial misconduct. The distinction between general judicial misconduct and sexual judicial misconduct is noteworthy. On the one hand, it makes sense in some ways to shield federal judges and other branch officials from legal action pertaining to certain kinds of judicial misconduct—perhaps those relating to ethics or disability. But sexual misconduct is a different issue entirely and should be treated as such. Sexual harassment is sensitive, deeply personal, and can have more serious and traumatizing repercussions on victims than other kinds of judicial misconduct. It is for this reason that Congress should expand Title VII to permit federal judiciary employees to pursue Title VII claims for workplace sexual harassment.

D. EXTENDING TITLE VII ALONE WOULD NOT SOLVE THE FEDERAL JUDICIARY'S SEXUAL HARASSMENT PROBLEM

Unfortunately, even if Congress clearly expands Title VII, it is possible—perhaps even likely—that the federal courts would

---

note 85, at 5 ("recognizing the need for the Judiciary to manage its internal affairs" through self-governance).

185. *See* Jefferson, *supra* note 175, at 1201.

186. *See* Johnson, *supra* note 85, at 358.

187. *Id.*; *see also* ELIZABETH B. BAZAN, JOHNNY KILLIAN & KENNETH R. THOMAS, CONG. RSCH. SERV., RL32926, CONGRESSIONAL AUTHORITY OVER THE FEDERAL COURTS 4 (2005).

188. Johnson, *supra* note 85, at 358.

189. It is also arguable whether the Act was ever intended to be used as an avenue to report sexual misconduct. *See* Part II.B.

interpret any amendments narrowly.[190] In other words, federal courts would likely restrict an expansion of Title VII to the federal judiciary in some way, which would still make it difficult for federal judiciary employees to achieve justice for sexual misconduct. The Court's narrowing of previous amendments to Title VII best illustrates this concern. For example, in the years since Congress passed the Civil Rights Act of 1991, thus amending Title VII and codifying the disparate impact claim as an additional cause of action under the statute, federal courts have taken steps to narrow the disparate impact cause of action.[191] Similarly, since Congress amended Title VII in 1972 to redefine "religious discrimination" to include an employer's refusal to reasonably accommodate an employee's religious observance or practice unless such accommodation poses an "undue hardship on the conduct of the employer's business,"[192] the Supreme Court has construed the reasonable accommodation requirement narrowly, reading "undue hardship" to mean any accommodation that poses more than a de minimis cost on an employer.[193] Furthermore, given the unique characteristics of the federal judiciary as

190. *See* Henry L. Chambers, Jr., *Reading Amendments and Expansions of Title VII Narrowly*, 95 B.U. L. REV. 781, 798 (2015) ("Congress probably ought to assume that the Court will narrowly interpret expansions of Title VII even when Congress is clear.").

191. *See id.* at 789–93. For example, in Ricci v. DeStefano, the Supreme Court held that a city had improperly engaged in disparate treatment in violation of Title VII when it refused to promote white firefighters in an effort to avoid disparate impact liability findings in another threatened lawsuit by Black and Hispanic firefighters, who had disproportionately failed the required tests for promotion. 557 U.S. 557, 561–63 (2009). In effect, the *Ricci* Court narrowed the disparate impact cause of action by "essentially treat[ing] the putative disparate impact claim as if it were to be analyzed under the *Wards Cove* disparate impact standard rather than under the 1991 Act's disparate impact standard." Chambers, *supra* note 190, at 793. In addition, the Court's analysis appeared to "put[] the [disparate impact] cause of action at odds with Title VII's disparate treatment cause of action by suggesting that the awareness of race, which occurs whenever an employer realizes that a disproportionate impact exists, may trigger disparate treatment liability if the employer acts on the knowledge of the disproportionate impact." *Id.*

192. 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

193. *See, e.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (holding that undue hardship is more than a de minimis cost and that employers

a workplace, it is also possible that federal judiciary employees would continue to feel discouraged to come forward.[194] What's more, Title VII fails employees in other employment contexts, such as unpaid interns,[195] so it could fail employees in the federal judiciary in similar ways, too.

It is apparent that merely extending Title VII to federal judiciary employees would not solve the federal court system's sexual misconduct problem. In other words, expanding Title VII has potential to benefit federal judiciary employees, but it should not be pursued alone. Such expansion should be adopted in conjunction with *Bivens* actions to provide employees with as much protection from sexual harassment and abuse as possible.

IV. THE *BIVENS* DOCTRINE: A LEGAL SOLUTION TO ADDRESS SEXUAL HARASSMENT IN THE FEDERAL JUDICIARY

Because the other avenues through which federal judiciary employees may challenge sexual misconduct are currently inadequate,[196] it is essential that federal courts allow federal judiciary employees to pursue *Bivens* suits to legally redress their harms. Extending the *Bivens* doctrine to sexual misconduct in the federal judiciary would provide an appropriate remedy for employees' potential harms.

A. THE *BIVENS* DOCTRINE PROVIDES PLAINTIFFS WITH THE UNIQUE ABILITY TO BRING IMPLIED CAUSES OF ACTION FOR DAMAGES UNDER THE CONSTITUTION

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the United States Supreme Court held that the Fourth Amendment contains an implied cause of action that al-

---

are not required to deprive other employees of their contractual rights to accommodate an employee's religious needs). In other words, the Court has equated "undue hardship" with a "relatively minor justification," a small burden for employers to meet that inevitably makes it difficult for employees to prevail on religious accommodation claims. Chambers, *supra* note 190, at 793–98.

194. *See supra* Part I.B.

195. Taylor J. Freeman Peshehonoff, *Title VII's Deficiencies Affect #MeToo: A Look at Three Ways Title VII Continues to Fail America's Workforce*, 72 OKLA. L. REV. 479, 493–94 (2020).

196. *See supra* Parts II.B–C.

lows aggrieved parties to bring suits for damages against individual federal officials for unconstitutional behavior.[197] *Bivens* arose from the unlawful search and seizure of petitioner Webster Bivens.[198] In 1965, agents of the Federal Bureau of Narcotics entered Bivens's apartment without a warrant, searched it, and arrested Bivens for alleged narcotics violations.[199] In "search[ing] the apartment from stem to stern," the agents humiliated Bivens by "manacl[ing] [him] in front of his wife and children, and threaten[ing] to arrest the entire family."[200] Nearly two years later, Bivens brought suit against the agents for humiliation, embarrassment, and mental suffering.[201] He argued that the defendants breached his right to be free from unreasonable searches and seizures, which he could enforce through a private action for damages.[202] The District Court dismissed his complaint on the ground that it failed to state a cause of action, and the Second Circuit Court of Appeals affirmed, holding that the Fourth Amendment does not authorize a private suit for damages.[203]

After granting a writ of certiorari, the Supreme Court reversed the dismissal of the complaint. Relying on decisions that implied private actions for damages into federal statutes[204] and the authority of the landmark *Marbury v. Madison* decision,[205] the Court found that even though there was no statute or provision in the Constitution that provided a cause of action for

197. 403 U.S. 388, 396 (1971) (citing Bell v. Hood, 327 U.S. 678, 684 (1946)) ("[T]he Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But 'it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'").

198. *Id*. at 389.

199. Brief for Petitioner at 2–3, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301), 1970 WL 116899 at *2–3; *Bivens*, 403 U.S. at 389.

200. *Bivens*, 403 U.S. at 389.

201. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 276 F. Supp. 12, 13–14 (E.D.N.Y. 1967).

202. *Id.* at 14.

203. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 409 F.2d 718, 719 (2d Cir. 1969).

204. *Bivens*, 403 U.S. at 397 (citing J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964), and citing Jacobs v. United States, 290 U.S. 13, 16 (1933)).

205. *Id.*; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

Bivens's case, the Fourth Amendment impliedly "gives rise to a cause of action for damages."[206] In other words, the Court held that the Fourth Amendment guarantee against unreasonable searches and seizures is a constitutional right that an individual can enforce against federal agents. Notably, some members of the Court appeared to sympathize with the fact that "[f]or people in Bivens' [sic] shoes, it is damages or nothing."[207]

Through this decision, the Supreme Court established precedent that allows plaintiffs to seek damages for unconstitutional conduct by federal officials in what has now become known as "*Bivens* actions." As the Supreme Court later clarified, "*Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official."[208] "The core premise underlying *Bivens* was that enforcing constitutional rights is incredibly important—so important that it justified finding an implied cause of action in the Constitution itself."[209]

B. THE SUPREME COURT HAS EXTENDED *BIVENS* TO IMPLY CAUSES OF ACTION UNDER THE FIFTH AMENDMENT BUT HAS ALSO LIMITED THE DOCTRINE'S REACH OVER TIME

Bivens holds enormous potential in transforming the way that individual federal agents are held accountable. It uniquely empowers plaintiffs to bring implied causes of action to enforce constitutional rights against federal agents for unlawful conduct. Recognizing the need to fill gaps where it is "damages or nothing"[210] for aggrieved persons, the Supreme Court has developed a test to structure extension of the doctrine to imply causes of action under other constitutional rights, including the Fifth Amendment's right to due process. Regrettably, however, the Court has grown more hostile to extending *Bivens* to new contexts over time.

---

206. *Bivens*, 403 U.S. at 389.

207. *Id.* at 409–10 (Harlan, J., concurring in judgment).

208. Butz v. Economou, 438 U.S. 478, 504 (1978).

209. Alexander J. Lindvall, *Gutting* Bivens*: How the Supreme Court Shielded Federal Officials from Constitutional Litigation*, 85 MO. L. REV. 1013, 1019 (2020) (citing Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2007 CATO SUP. CT. REV. 23, 25 (2007)).

210. *Bivens*, 403 U.S. at 409–10 (Harlan, J., concurring in judgment).

1. Extending *Bivens* to Create New Causes of Action for Constitutional Claims

Since *Bivens*, federal courts have permitted plaintiffs to seek damages for unconstitutional conduct by federal officials, even where there is no explicit statutory cause of action.[211] But because implied causes of action are disfavored, the Supreme Court has been reluctant to extend *Bivens* "to any new context or new category of defendants."[212] In the thirty years of *Bivens* jurisprudence, the Court has only extended *Bivens*'s holding twice: in *Davis v. Passman*[213] and in *Carlson v. Green*.[214]

In 1979, the Supreme Court extended *Bivens* to a Fifth Amendment claim in *Davis v. Passman*.[215] In 1974, Otto E. Passman, a United States Congressman from Louisiana, hired Shirley Davis as his deputy administrative assistant.[216] Despite Davis's hard work and dedication to the job,[217] Passman subsequently fired her.[218] Passman had apparently changed his mind about hiring a woman, as he wrote in Davis's termination letter that "it was essential that the understudy to [his] Administrative Assistant be a man."[219] Davis brought suit in federal court, seeking backpay damages and alleging that "Passman's conduct

---

211. Babcock, *supra* note 30, at 131–33; *id.* at 131 n.4; *see, e.g.*, Dellums v. Powell, 566 F.2d 167, 194–95 (D.C. Cir. 1977) (granting a cause of action under the First Amendment); Gentile v. Wallen, 562 F.2d 193, 196–97 (2d Cir. 1977) (granting a cause of action under the Fourteenth Amendment's Due Process Clause); U.S. *ex rel.* Moore v. Koelzer, 457 F.2d 892, 894 (3d Cir. 1972) (granting a cause of action under the Fifth Amendment); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156–57 (4th Cir. 1974) (granting a cause of action under the Fifth Amendment); Yiamouyiannis v. Chem. Abstracts Serv., 521 F.2d 1392, 1393 (6th Cir. 1975) (granting a cause of action under the First Amendment based on reasoning used in other Fourth Amendment cases).

212. Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)).

213. Davis v. Passman, 442 U.S. 228, 255 (1979).

214. Carlson v. Green, 446 U.S. 14, 14 (1980).

215. *Davis*, 442 U.S. at 248 (citing *Bivens*, 403 U.S. at 397).

216. *Id.* at 230.

217. Notably, Passman wrote in the termination letter that Davis was "able, energetic and a very hard worker." *Id*.

218. *Id.*

219. *Id.*; *see also* Brief for Petitioner at 4, Davis v. Passman, 442 U.S. 228 (1979) (No. 78-5072), 1978 WL 207321 at *4 ("You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man.").

discriminated against her 'on the basis of sex in violation of the United States Constitution and the Fifth Amendment thereto.'"[220]

The Supreme Court agreed with Davis, holding that Davis had "a cause of action under the Fifth Amendment, and . . . her injury may be redressed by a damages remedy."[221] The Court found it compelling that "there [were] . . . available no other alternative forms of judicial relief."[222] Furthermore, the Court noted that its "system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law[.]"[223] The Court emphasized that "no man in this country is so high that he is above the law . . . . All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."[224] The Court recognized that the Fifth Amendment contained an implied cause of action that allowed Davis to sue for damages against Passman's discriminatory conduct.[225] Because the Fifth Amendment's Due Process clause requires equal protection of the laws, the Court declared there exists a "federal constitutional right to be free from gender discrimination."[226] To be clear, this meant that the Court explicitly recognized an implied cause of action for damages against a federal agent for unlawful, sex-based discriminatory conduct.

In the year after *Davis*, the Supreme Court extended *Bivens* to an Eighth Amendment claim in *Carlson v. Green*.[227] *Carlson* arose after the death of Joseph Jones, Jr., a federal prison inmate who died after suffering personal injuries after prison officials allegedly failed to provide him proper medical attention.[228]

---

220. *Davis*, 442 U.S. at 231; *see also* Brief for Petitioner, *supra* note 219, at *4.

221. *Davis*, 442 U.S. at 248–49.

222. "For Davis, as for Bivens, 'it is damages or nothing.'" *Id.* at 245 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971)); *see also* Brief for Petitioner, *supra* note 219, at *4 ("Plaintiff has no federal or state remedy, under statute or common law, to redress her injuries.").

223. *Davis*, 442 U.S., at 246 (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

224. *Id.* (quoting United States v. Lee, 106 U.S. 196, 220 (1882)).

225. *Id.*

226. *Id.* at 235.

227. 446 U.S. 14, 23–24 (1980).

228. Brief for Respondent at *3, Carlson v. Green, 446 U.S. 14 (1980) (No. 78-1261), 1979 WL 199272.

Jones's mother, who filed suit on behalf of her deceased son, argued that the prison officials violated her son's due process, equal protection, and Eighth Amendment rights.[229] Jones's mother alleged that the prison officials were well aware of "Jones' chronic asthmatic condition," but "nonetheless kept him in that facility against the advice of doctors [and] failed to give him competent medical attention for some eight hours after he had an asthmatic attack."[230] Jones's mother claimed damages for the federal officials' constitutional violations.[231]

The Supreme Court agreed, inferring a private right of action for damages under the Eighth Amendment.[232] In recognizing the inadequacy of the plaintiff's only other alternative to relief, a Federal Tort Claims Act (FTCA) claim against the United States, the Court concluded that "[b]ecause the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy."[233] The Court also found it "crystal clear" that Congress intended the FTCA and *Bivens* to serve as "parallel" and "complementary" sources of liability.[234]

The Court's extensions of *Bivens* in *Carlson* and *Davis* indicate that the Court has been willing to imply private causes of action under the Constitution where there is otherwise a nonexistent or inadequate cause of action to seek legal redress from individual federal officials' unconstitutional acts. Because of *Davis*, federal employees can theoretically bring private actions for conduct that violates equal protection even absent a statutory remedy.

---

229. *Carlson*, 446 U.S. at 16.

230. *See id.* at n.1.

231. *Id.*; *see also* Brief for Respondent, *supra* note 228, at *7.

232. *Carlson*, 446 U.S. at 17–23.

233. The Court considered four factors, "each suggesting that the *Bivens* remedy is more effective than the FTCA remedy," and concluded that the "FTCA is not a sufficient protector of the citizens' constitutional rights." *Id.* at 20, 23. Therefore, "without a clear congressional mandate . . . [the Court could] not hold that Congress relegated respondent exclusively to the FTCA remedy." *Id.* at 23; *see also* Brief for Respondent, *supra* note 228, at *7–8.

234. *Carlson*, 446 U.S. at 19–20 ("FTCA was enacted long before *Bivens* was decided, but when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, 28 U.S.C. § 2680(h), the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action . . . .").

2. The Supreme Court Has Limited *Bivens*' Reach Since *Davis* and *Carlson*

Despite the Supreme Court's willingness to extend *Bivens* in *Davis* and *Carlson*, the Court has become increasingly wary of extending *Bivens* any further. In fact, the Court has recently issued opinions suggesting that *Bivens* has been gutted.[235] Since *Carlson*, ten merits rulings have declined to recognize a damages remedy under *Bivens*.[236]

To illustrate this, in 1983 the Supreme Court refused to extend *Bivens* to First Amendment claims. In *Bush v. Lucas*, an aerospace engineer sought damages for violation of his First Amendment rights through defamation and demotion by his superior.[237] The Court rationalized that Congress was better suited to resolve issues between the United States and its employees.[238] Similarly, in 2017 the Court refused to extend *Bivens* to a suit brought by six undocumented men who were detained and subjected to abusive treatment by federal officials after the September 11th terrorist attacks.[239] In *Ziglar v. Abbasi*, the respondents challenged "the conditions of their confinement and the reasons or motives for imposing those conditions" and sought damages under *Bivens*.[240] However, the Court again refused to extend *Bivens*, finding that the case bore too little resemblance to the *Bivens* suits the Court recognized in the past.[241] In 2020, the Court again refused to extend *Bivens*. In

235. *See* Lindvall, *supra* note 209, at 1015 (arguing that *Bivens* has been gutted, thus implying that many federal officials will not be held accountable through the courts for their disturbing and unconstitutional behavior in the absence of a statutory cause of action).

236. *See, e.g.*, Hernández v. Mesa, 140 S. Ct. 735 (2020); Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Minneci v. Pollard, 565 U.S. 118 (2012); Wilkie v. Robbins, 551 U.S. 537 (2007); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001); FDIC v. Meyer, 510 U.S. 471 (1994); Schweiker v. Chilicky, 487 U.S. 412 (1988); United States v. Stanley, 483 U.S. 669 (1987); Bush v. Lucas, 462 U.S. 367 (1983); Chappell v. Wallace, 462 U.S. 296 (1983).

237. *Bush*, 462 U.S. at 368.

238. *Id.* at 379–80 (quoting United States v. Gilman, 347 U.S. 507, 509 (1954)).

239. *Ziglar*, 137 S. Ct. at 1851–52 (2017).

240. *Id.* After *Ziglar*, "[s]cholars predicted that *Abbasi* would be the death knell for *Bivens* claims that did not mirror the fact pattern of *Bivens*, *Davis*, and *Carlson*." *See* Alex Langsam, Note, *Breaking* Bivens*?: Falsification Claims After* Ziglar v. Abbasi *and Reframing the Modern* Bivens *Doctrine*, 88 FORDHAM L. REV. 1395, 1409 (2020) (citing Benjamin C. Zipursky, Ziglar v. Abbasi *and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167 (2018)).

241. *Ziglar*, 137 S. Ct. at 1860.

Hernández v. Mesa, parents sought damages under *Bivens* for the wrongful death of their son, who was shot and killed by a United States federal agent while playing along the Mexican-American border.[242] But the Supreme Court declined to extend *Bivens* to the cross-border shooting, citing potential effects on foreign relations and national security as rationale.[243] The Court reasoned that creating new causes of action is Congress's responsibility, not courts'.[244]

These cases represent the Supreme Court's slow but steady retreat from *Bivens*. Nevertheless, the Court's retreat should not preclude its extension of the doctrine to permit federal judiciary employees to redress sexual harassment and abuse. Even though an extension of *Bivens* is unlikely, the severity of sexual misconduct in the federal judiciary necessitates finding a better solution for federal judiciary employees.

C. *BIVENS* SUITS CHALLENGING SEXUAL MISCONDUCT IN THE FEDERAL JUDICIARY WOULD PASS THE SUPREME COURT'S TEST TO DETERMINE WHETHER TO EXTEND *BIVENS* TO A NEW CONTEXT

This subpart makes three primary arguments to support its logic that *Bivens* suits challenging sexual misconduct in the federal judiciary would pass the Supreme Court's test to determine whether to imply new causes of action under the Constitution. First, such *Bivens* suits would be materially similar to previously recognized *Bivens* actions.[245] Second, any "special factors counselling hesitation in the absence of affirmative action by Congress" would be outweighed by the need for more adequate measures for judiciary employees to seek legal redress for harassment.[246] And third, Congress has not provided an alternative remedy that it has explicitly declared to be a substitute for recovery directly under the Constitution that is equally effective.[247]

---

242. 140 S. Ct. 735, 739–40 (2020).

243. *Id.* at 744, 746.

244. The Court wrote that "when a court recognizes an implied claim for damages on the ground that doing so furthers the 'purpose' of the law, the court risks arrogating legislative power." *Id.* at 741–42. The Court also stated that over time it has come "to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power." *Id.*

245. *See infra* Part IV.C.1.

246. *See infra* Part IV.C.2.

247. *See infra* Part IV.C.4.

1. The Supreme Court Has Established a Test to Determine Whether to Create New Causes of Action Under *Bivens*

In cultivating the *Bivens* doctrine, the Supreme Court has developed a test to determine whether to imply new causes of action in other contexts through its *Bivens* holding. The analysis first considers whether a *Bivens* action falls outside of the current *Bivens* context, or is "novel."[248] The appropriate inquiry is whether the case is meaningfully different from other *Bivens* cases recognized by the Supreme Court.[249] A reviewing court must then consider whether there are "any special factors counselling hesitation before authorizing a new kind of federal litigation."[250] Finally, the court must consider whether "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective."[251]

Bivens actions pertaining to sexual misconduct in the federal judiciary would pass this established test. The following subparts argue that such suits would be substantially similar to previously authorized *Bivens* actions; that any "special factors counselling hesitation" are not substantial enough to bar an extension of the doctrine in such contexts; and that there is no equally effective substitute for recovery.

2. *Bivens* Suits Challenging Sexual Misconduct in the Federal Judiciary Would Be Materially Similar to *Bivens* Actions Previously Recognized by the Supreme Court

Assuming that *Bivens* suits alleging sexual misconduct in the federal judiciary are "new contexts," they would not differentiate meaningfully from *Bivens*, *Carlson*, and *Davis*.[252] Such suits would be sufficiently similar to recognized *Bivens* suits in that they would provide an otherwise nonexistent cause of action for federal judiciary employees against federal officials who have

248. Ziglar v. Abbasi, 137 S. Ct. 1843, 1859 (2017).

249. *Id.*

250. Bush v. Lucas, 462 U.S. 367, 367 (1983). Since *Bush v. Lucas*, the Supreme Court has held that "[b]efore a *Bivens* remedy may be fashioned . . . a court must take into account any 'special factors counselling hesitation.'" Chappell v. Wallace, 462 U.S. 296, 298 (1983) (quoting *Bush*, 462 U.S. at 367).

251. Carlson v. Green, 446 U.S. 14, 18–19 (1980).

252. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); *Carlson*, 446 U.S. at 14; Davis v. Passman, 442 U.S. 228 (1979).

acted unconstitutionally via unwanted sexual conduct.[253] Perhaps most meaningful is the fact that there are substantial similarities between *Bivens* actions in the context of federal judiciary sexual misconduct and *Davis*.[254] Not only would federal judiciary employees argue that federal courts should recognize an implied private cause of action under the Fifth Amendment as argued in *Davis*, but they would also argue for the courts to recognize such an action through the constitutional right to be free from sex discrimination, as also argued in *Davis*.[255]

Plaintiffs have recognized these meaningful similarities and are already attempting to bring suits under related theories. In *Strickland v. United States*, the Fourth Circuit considered whether to extend *Bivens* to permit a former federal judiciary employee to sue for damages under the Fifth Amendment.[256] The plaintiff experienced sexual harassment, discrimination, and retaliation while working as a researching and writing attorney in the Fourth Circuit.[257] After the plaintiff's attempts to make use of the federal judiciary's EDR process proved futile,[258] she brought an action against the federal agencies and individuals who mishandled her complaint.[259] The plaintiff alleged

253. Julie Goldscheid, *Sexual Assault by Federal Actors, #MeToo, and Civil Rights*, 94 WASH. L. REV. 1639, 1661–64 (2019) (arguing that *Bivens* actions based on sexual assault against federal actors should be deemed to fall within the purview of already-recognized *Bivens* claims). For a discussion demonstrating how there is no explicit cause of action for employees to bring against federal judiciary officials to challenge sexual misconduct in the workplace, see Part II.A.

254. *Davis*, 442 U.S. at 228.

255. *Id.*

256. Strickland v. United States, 32 F.4th 311, 320–21 (4th Cir. 2021).

257. *See* Brief of Plaintiff-Appellant at 2, Roe v. United States, 510 F. Supp. 3d 336 (W.D.N.C. 2020), *appeal docketed*, No. 21-1346 (4th Cir. Mar. 31, 2021), 2021 WL 3723178, at *2 ("Jane Roe suffered sex discrimination, including sexual harassment by her supervisor, while employed as an assistant federal public defender at the Federal Defender Office . . . for the Western District of North Carolina.").

258. *See id.* ("Roe diligently pursued review of her claim and requested remedies from the [Federal Defender Office] and Fourth Circuit that would allow her to work free of sex discrimination. At every turn, she was stonewalled.").

259. *See id.* ("The Fourth Circuit's internal complaint process, known as the [EDR Plan], failed to provide a fair process, meaningful review of her claim, or remedies to stop the harassment. The design of the EDR Plan and its implementation were deeply unfair and grossly inadequate. Through the EDR process, defendants ratified, facilitated, and aggravated the hostile work environment, which became so intolerable that Roe was forced to resign and lose her career as a federal public defender.").

violations of her rights to due process and equal protection under the Fifth Amendment.[260]

Strickland parallels significantly with *Davis*. Like Davis, Strickland sought damages under an implied cause of action through the Fifth Amendment's right to be free from gender-based discrimination and harassment.[261] Although the Fourth Circuit declined to extend *Bivens* to Strickland's case,[262] *Davis* and prominent authorities in the legal field would have supported the extension of *Bivens* to this new context.[263] Furthermore, this Note's proposal to extend *Bivens* to actions against sexual misconduct in the federal judiciary still stands. While Strickland asked to extend *Bivens* to sue the federal officials who mishandled her sexual misconduct complaint, this Note implores federal courts to extend *Bivens* so that plaintiffs can directly sue federal judiciary officials for sexual misconduct. The strong similarities between this Note's proposed judicial sexual misconduct suits and *Davis* especially signify that extending *Bivens* to such contexts should be permissible.

3. "Special Factors Counseling Hesitation" Do Not Outweigh the Need to Provide Federal Judiciary Employees with Constitutional Protections Against Workplace Sexual Harassment

While there may be "special factors counseling hesitation"[264] that could discourage courts from extending *Bivens*, these factors are not meaningful enough to justify failing to provide federal judiciary employees with strong constitutional protections against workplace sexual misconduct. Any "special factors counselling hesitation in the absence of affirmative action by Congress" should be outweighed by the need for more adequate procedures for federal judiciary employees who seek legal redress for sexual harassment.[265]

---

260. *Roe*, 510 F. Supp. 3d at 342.

261. *See* Complaint, *supra* note 57, at para. 5.

262. Strickland v. United States, 32 F.4th 311, 371–74 (4th Cir. 2021).

263. *See, e.g.*, Brief of Members of Congress as Amici Curiae in Support of Neither Party, Roe v. United States, 510 F. Supp. 3d 336, 349 (W.D.N.C. 2020), *aff'd in part, rev'd in part and remanded sub nom.*, Strickland v. United States, 32 F.4th 311 (4th Cir. 2021).

264. Bush v. Lucas, 462 U.S. 367, 367 (1983).

265. Carlson v. Green, 446 U.S. 14, 18–19 (1980).

First, federal courts could find that the fact that Congress intentionally excluded the federal judiciary from the reach of Title VII should dissuade federal courts from extending *Bivens* to provide federal judiciary employees with greater workplace protections.[266] In other words, because Congress had the opportunity to provide protections to federal judiciary employees and chose otherwise, such silence is evidence of congressional intent to purposefully exclude them from bringing certain causes of action.[267] Therefore, one could argue federal courts should be careful to create new causes of action via *Bivens* since doing so could run afoul of congressional intent. But it is also true that "in the absence of congressional action, the courts should not sit idly by while federal officials violate constitutional rights."[268] Indeed, "[w]hen presented with a constitutional case or controversy, the courts have a 'virtually unflagging obligation to exercise their jurisdiction' to ensure the Constitution is properly and meaningfully enforced."[269] "As the ultimate arbiters of the Constitution,"[270] "[i]t is emphatically the province and duty of the judicial department to say what the law is."[271] Accordingly, federal courts are equipped with the power to extend *Bivens* to allow federal judiciary employees to bring causes of action against federal officials so that they may redress workplace sexual misconduct.

Second, federal courts could argue that permitting federal judiciary employees to bring causes of action against judges and other judiciary officials would problematically interfere with the internal affairs of the federal court system.[272] By this logic, one would argue that the other procedures available for employees

266. For an explanation of how federal judiciary employees are excluded from Title VII's protections, see *supra* Part II.A.

267. *See, e.g.*, Lindvall, *supra* note 209, at 1062 (raising the counterargument to *Bivens* that perhaps Congress, not the federal judiciary, should be the one to authorize suits against federal officials); *see also* Schuck, *supra* note 120, 285–87.

268. Lindvall, *supra* note 209, at 1062.

269. *Id.* (first quoting Deakins v. Monaghan, 484 U.S. 193, 203 (1988); then quoting Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1493 (2017) (internal citations omitted)).

270. *Id.*

271. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

272. For criticism from the federal judiciary on congressional attempts to regulate sexual misconduct in the federal court system, see Roberts, *supra* note 85, at 5, where Chief Justice John G. Roberts writes about the importance of "recognizing the need for the judiciary to manage its internal affairs."

to challenge sexual misconduct already address the problem. But judicial autonomy does not include within its purview the ability to sexually harass one's employees without consequence. Moreover, data and anecdotal evidence above[273] demonstrate that current remedial mechanisms are deficient, making it nearly impossible to achieve justice for aggrieved employees.[274] Permitting federal judiciary employees to bring *Bivens* actions would not significantly infringe on the judiciary's internal affairs so much as it would ensure that federal judges and judiciary officials are not treated as above the law. Indeed, such implied causes of action would be a small price to pay to protect the physical safety and emotional well-being of federal judiciary employees. Further, the Code of Conduct for United States Judges already holds federal judges to a higher standard of ethical conduct than non-judge lawyers,[275] suggesting that it is in the best interest of the federal judiciary to engage in efforts to reform judicial misconduct to uphold the integrity of the judiciary.

One could also make the critique that bringing a *Bivens* suit would not remedy the flaws in the current remedial processes, namely because the same concerns for retaliation from reporting sexual incidents would still discourage employees to come forward. However, this concern, while relevant, does not merit the abandonment of *Bivens* for federal judiciary employees. *Bivens* suits would permit plaintiffs to pursue *legal* action against their harassers and perpetrators—which is not available through the EDR program or sufficiently possible through the JC&D process. Also, with *Bivens,* federal judicial clerks could at least bring a *Bivens* suit after their clerkship is over, which could help mediate retaliation issues.

In sum, while concerns about congressional intent, infringement on the internal affairs of the federal judiciary, and the effectiveness of *Bivens* actions may constitute "special factors counseling hesitation," they should not discourage federal courts

273. For anecdotal evidence on sexual misconduct in the federal judiciary, see *supra* Part I.A. For data on sexual misconduct in the federal judiciary, see *supra* Part I.C.

274. For more discussion on how the current procedures available to federal judiciary employees to report and address unlawful sexual conduct in the federal courts are inadequate and deficient, see Parts II.C–D.

275. *See Code of Conduct for United States Judges*, *supra* note 9, at 3 (emphasizing not only that federal judges must comply with the law, but they also must act to promote public confidence in the integrity of the judiciary).

from extending *Bivens* here. There are no policy concerns implicated in this context.[276] These factors do not justify a continuing lack of protections for federal judiciary employees from workplace sexual misconduct.

4. Congress Has Not Provided an Alternative, Effective Remedy

In the absence of an effective alternative remedy that Congress has explicitly declared to be a substitute for recovery directly under the Constitution, federal judiciary employees should be permitted to bring *Bivens* suits to challenge sexual misconduct in the courts. Notably, the only current legislative substitute for recovery is an ethical claim against a judge or judicial official under the Judicial Conduct and Disability Act of 1980.[277] But Congress has not explicitly declared this pathway to be used by federal judiciary employees to address sexual misconduct, and there is speculation as to whether Congress ever contemplated the Act to be used to assert such claims.[278] Thus, it is apparent that Congress has not provided an alternative, equally effective remedy to be a substitute for recovery directly under the Constitution. Nevertheless, "Congress's refusal to pass . . . [a statute that specifically allows for suits against federal officials] does not give the courts a hall pass when it comes to performing their judicial duties."[279] This reality favors an extension of *Bivens* to sexual misconduct in the federal judiciary.

While it is true that federal judiciary employees could instead utilize one of the two procedures already available to address sexual misconduct, these procedures are insufficient.[280] In effect, the EDR and JC&D processes are virtually useless forms of redress. To address the problem of sexual harassment more feasibly in the federal court system, federal judiciary employees must have better remedial options. *Bivens* would provide such a

276. *See* Goldscheid, *supra* note 253, at 1661 ("Sexual assault by federal officers do [sic] not implicate policy concerns; there is no arguably defensible policy authorizing sexual assault by federal officers.").

277. *See* Judicial Conduct and Disability Act of 1980 28 U.S.C. §§ 351–64

278. Cammarano, *supra* note 105 (questioning whether the Judicial Conduct and Disability Act was intended to be utilized by federal judiciary employees to report sexual misconduct in the workplace).

279. Lindvall, *supra* note 209, at 1063.

280. For a discussion on how federal judiciary employees can file ethical claims for misconduct through the Judicial Conduct and Disability Act of 1980 or the judiciary's own internal reporting procedures through its Employment Dispute Resolution Plan, see *supra* Parts II.C–D.

solution. It is worth noting that no matter what remedial mechanism is utilized—the JC&D process, EDR program, or *Bivens*—federal judiciary employees face a multitude of factors unique to the federal judiciary that dissuade them from reporting workplace sexual misconduct.[281] However, at least through *Bivens* federal judiciary employees would be able to legally challenge unlawful conduct and pursue damages as a remedy.

D. THE FEDERAL JUDICIARY'S OBJECTION TO PROPOSED LEGISLATIVE SOLUTIONS FAVORS ALLOWING FEDERAL JUDICIARY EMPLOYEES TO BRING *BIVENS* SUITS

The judiciary's objection to a recently proposed legislative solution also supports permitting federal judiciary employees to bring *Bivens* suits. Recent congressional hearings revealed the pervasiveness of wrongful sexual conduct in the federal court system and the need for congressional action to address it.[282] Inspired in part by former Reinhardt clerk Olivia Warren's testimony, Congress has grown more aware of the federal judiciary's systemic sexual misconduct problem and is now actively working to find a solution.[283] Specifically, in July 2021 Congress introduced legislation that would ensure that the 30,000 people employed by the federal judiciary would finally have statutory rights and protections against workplace discrimination, harassment, and retaliation based on sex.[284] The bill, aptly named the Judiciary Accountability Act of 2021, explicitly states that "[a]ll personnel actions . . . affecting covered employees . . . shall be made free from any discrimination based on . . . sex (including

281. *See, e.g.*, *supra* Part I.B.

282. *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2020), https://www.youtube.com/watch?v=3wu6ePBNFhI; *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the S. Judiciary Comm.*, 115th Cong. (2018), https://www.judiciary.senate.gov/meetings/confronting-sexual-harassment-and-other-workplace-misconduct-in-the-federal-judiciary [https://perma.cc/95AW-G872].

283. *Nadler & Johnson Introduce Bipartisan, Bicameral Legislation to Hold Judiciary Accountable to Workers*, HOUSE COMM. ON THE JUDICIARY (July 29, 2021), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4685 [https://perma.cc/9BYD-2QA3].

284. *Id.*; Jackie Speier & Ally Coll, *All Rise: It's Time for the Judiciary to Live by the Anti-Discrimination Laws It Enforces*, ROLL CALL (Aug. 17, 2021), https://www.rollcall.com/2021/08/17/all-rise-its-time-for-the-judiciary-to-live-by-the-anti-discrimination-laws-it-enforces [https://perma.cc/P47L-XRKN].

sexual orientation or gender identity) . . . ."[285] The bill also provides protections for whistleblowers from retaliation and establishes a Commission on Judicial Integrity, which would consist of sixteen members who would oversee a workplace misconduct prevention program as consistent with prevailing best practices.[286]

Despite the Judiciary Accountability Act of 2021's potential to provide accountability for sexual misconduct, the federal judiciary outright opposes the bill. In a letter to Congress, the judiciary expressed its opposition, writing that "the bill fails to recognize the robust safeguards that have been in place within the Judiciary to protect Judiciary employees, including law clerks, from wrongful conduct in the workplace, including protections against discrimination, harassment, retaliation, and abusive conduct."[287] The letter also stressed that the "the bill interferes with the internal governance of the Third Branch; creates structures that compete with existing governing bodies and authorities within the judiciary; and imposes intrusive requirements on Judicial Conference procedures."[288] More recently, Chief Justice John G. Roberts "politely told Congress" that "liv[ing] up to their ethical responsibilities and . . . creating a harassment-free workplace" is "work that judges can do on their own."[289] The federal judiciary's opposition is unsurprising, especially given its history of sensitivity to any infringement on its independence from the

285. Judiciary Accountability Act of 2021, S. 2553, 117th Cong. (2021).

286. *Id.*

287. *Letter from Roslynn R. Mauskopf, Secretary, Judicial Conference of the United States, to Henry C. "Hank" Johnson, Jr., Chairman, Committee on the Judiciary of the United States House of Representatives*, JUD. CONF. OF THE U.S. (Aug. 25, 2021), https://www.uscourts.gov/sites/default/files/house_letter_jaa.pdf [https://perma.cc/Y94D-5DGN]; *see also Judiciary Informs Congress of Its Opposition to Bill*, US CTS. (Aug. 25, 2021), https://www.uscourts.gov/news/2021/08/25/judiciary-informs-congress-its-opposition-bill [https://perma.cc/FU4X-VLMZ]; Marimow, *supra* note 37.

288. *Letter from Roslynn R. Mauskopf, Secretary, Judicial Conference of the United States, to Henry C. "Hank" Johnson, Jr., Chairman, Committee on the Judiciary of the United States House of Representatives*, JUD. CONF. OF THE U.S. (Aug. 25, 2021), https://www.uscourts.gov/sites/default/files/house_letter_jaaz.pdf [https://perma.cc/Y94D-5DGN].

289. Robert Barnes, *Roberts Says Federal Judiciary Has Some Issues but Doesn't Need Congressional Intervention*, WASH. POST (Dec. 31, 2021), https://www.washingtonpost.com/politics/courts_law/chief-justice-roberts-report-federal-judiciary/2021/12/31/9c1f5c30-6a64-11ec-96f3-b8d3be309b6e_story.html [https://perma.cc/KQ5E-Z973].

other two branches of government.[290] Indeed, Chief Justice Roberts has stressed that "[t]he 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 co-equal branch of government."[291] The judiciary's opposition to the bill might also be explained by current backlash attacking the federal judiciary's credibility.[292]

Nevertheless, the judiciary's discomfort with congressional interference should not justify the continued lack of adequate protections for federal judiciary employees against sex-based misconduct. The federal judiciary is currently failing to self-police.[293] If the federal judiciary truly desires to preserve insulation of its internal matters from Congress, expanding *Bivens* to the federal judiciary's sexual misconduct problem would provide an avenue for it to address its affairs without congressional intervention. Regardless, if Congress fails to enact the Judiciary Accountability Act of 2021, federal judiciary employees will continue to suffer from a lack of explicit statutory protections against workplace sexual harassment. Therefore, courts should not only permit federal judiciary employees to bring *Bivens* actions to challenge workplace sexual misconduct, but Congress should also expand Title VII to the federal judiciary. Pursuing legislative and legal solutions together would provide stronger mechanisms through which federal judiciary employees can redress their harms.

---

290. Battisti, *supra* note 116, at 421 (expressing concern for legislative attempts to infringe on the judiciary's independence through enactment of judicial misconduct legislation).

291. Roberts, *supra* note 85, at 1.

292. A recent study reported that over half of the country disapproves of the Supreme Court of the United States. *See Supreme Court*, GALLUP (JAN. 5, 2022), https://news.gallup.com/poll/4732/supreme-court.aspx [https://perma.cc/X53A-2HY3] (demonstrating that in a September 2021 poll, fifty-three percent of participants disapproved of the way that the Supreme Court is "handling its job," with thirty-two percent having "not very much" confidence, and fourteen percent having no confidence at all in the Court). More recently, reports indicate that public confidence in the Supreme Court has sunk to a "new low." Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/39XX-4RCZ].

293. *See, e.g.*, *supra* Part I.A.

CONCLUSION

Sexual misconduct in the federal judiciary is not going anywhere. Systemic sexual abuse of power will continue to persist virtually unchecked unless Congress acts or federal courts rise to the occasion to hold their fellow colleagues accountable. There is no perfect solution. Sexual harassment in any workplace—let alone the federal judiciary—is an extremely sensitive issue that is difficult to address. But the remedial measures available now cannot stand. The prevalence of sexual misconduct in the federal judiciary, lack of Title VII protections for federal judiciary employees, and failure of current working avenues to report workplace sexual misconduct require a better solution to address the issue. Expanding Title VII's protections to federal judiciary employees presents one part of the solution. Permitting federal judiciary employees to bring implied causes of action through *Bivens* to assert their right to be free from workplace sexual misconduct would further help remedy this serious problem. These proposals should be pursued together. They would not only provide federal judiciary employees with workplace protections that are available to employees in other employment contexts, but also more importantly ensure that no one in the federal judiciary is treated as above the law. Congress has already demonstrated its willingness to take an active stance against the sexual abuse of power reinforced by the federal judiciary. If federal courts wish to preserve their credibility in the public eye, they must also take an active stance to condemn the abuse. Expanding Title VII and *Bivens* would signal an important intention to finally tackle the federal judiciary's sexual misconduct problem.