CLERK, UNPROTECTED: THE GENDERED PIPELINE TO SUPREME COURT CLERKSHIPS

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Judicial clerkships are amongst the most prestigious positions a lawyer can attain following law school. This prestige reaches its pinnacle at the Supreme Court, where clerks work alongside the nation's most elite legal minds. However, women are historically underrepresented in these positions. Despite the rise of women in the legal profession, men have continued to outnumber women in securing coveted Supreme Court clerkships.

This Note points to an underlying issue in the federal judiciary for an explanation regarding this disparity: The federal judiciary's unique workplace characteristics create an environment susceptible to abuse. Clerks are dissuaded from reporting misconduct because federal judges are connected, powerful, and established legal professionals who wield lifelong power over the clerks' careers. In addition, victimized clerks are unable to bring traditional workplace claims against judges since the federal judiciary is exempted from Title VII of the Civil Rights Act of 1964. This type of abuse is especially harmful when it takes place in feeder courts—federal appellate courts known to be stepping stones to Supreme Court clerkships.

This Note argues that the lack of remedies offered to clerks when they experience mistreatment causes women to avoid

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clerkship opportunities at feeder courts that would otherwise put them on track to Supreme Court clerkships. Because feeder courts generally provide the pool of potential clerks for Supreme Court Justices to choose their clerks from, when women avoid positions at feeder courts, it creates a smaller pool of women to be considered for Supreme Court clerkships. As a result, women are less likely to be selected for those positions. Thus, a gendered pipeline to Supreme Court clerkships is formed.

INTRODUCTION

Judicial clerkships in the federal judiciary are considered significant gold stars on a young lawyer's resume.[1] Viewed as one of the most prestigious jobs to have out of law school, federal clerkships often act as the key to opening doors to the top ranks of the legal profession.[2] Law schools often promote clerkships as "singular opportunities within the legal profession to develop close relationships with judges, to gain first-hand experience with the judicial system as a young lawyer, and . . . develop a robust professional network that can open professional doors and lead to further opportunities."[3] In these positions, clerks

1. Aliza Shatzman, *The Clerkships Whisper Network: What It Is, Why It's Broken, and How to Fix It*, 123 COLUM. L. REV. F. 110, 111 (2023).

2. *See* Jeremy D. Fogel et al., *Law Clerk Selection and Diversity: Insights from Fifty Sitting Judges of the Federal Courts of Appeals*, 137 HARV. L. REV. 588, 590 (2023).

3. *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 116th Cong. 3 (2020) [hereinafter *Testimony of Olivia Warren*] (statement of Olivia Warren).

essentially act as a go-to assistant, confidant, and general right hand for their judge.[4] Clerks research cases, prepare memoranda and case material, "serve as a 'sounding board,'" and assist the judge in writing opinions.[5] As one judge explained, clerkships are "the headiest environment to which any young lawyer could aspire and enjoy the luxury of open, robust, and unbridled debate about our nation's most pressing legal issues . . . ."[6]

This prestige applies most significantly to clerkships at the Supreme Court level. Such clerkships are widely considered "priceless ticket[s] to the upper echelons of the legal profession."[7] For example, "[f]ormer clerks have their pick of top-tier job offers and can command $350,000 hiring bonuses at law firms."[8] However, "amid the luster of being a [Supreme Court] law clerk, there's an uncomfortable reality"—this elite echelon of clerks has historically been dominated by men.[9] This reality has held true through the years even though women are now outnumbering men in law schools.[10] This may lead one to ask: where do all the women go?

To determine why men outpace women on the way to Supreme Court clerkships, this Note analyzes this issue in the context of another problem: The federal judiciary provides a perfect environment for harassment and abuse to quietly occur from the bench, leaving clerks unprotected and judges unpunished. In fact, the same judge who praised federal clerkships as "the headiest environment to which any young lawyer could aspire" has also since resigned from the bench after facing numerous allegations of sexual harassment toward his clerks.[11] At its core, this

4. Taylor P. Bernstein, Who Runs the World: The Impact of the Gender of Clerks on the Legal Profession (2019) (B.A. thesis, Bucknell University), https://digitalcommons.bucknell.edu/honors_theses/495 [https://perma.cc/2ZUH-7J8P].

5. *Id.* at 15.

6. Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 875 (1999).

7. Tony Mauro, *Shut Out: Mostly White and Male: Diversity Still Lags Among SCOTUS Law Clerks*, NAT'L L.J. (Dec. 11, 2017), https://www.law.com/nationallawjournal/2017/12/11/mostly-white-and-male-diversity-still-lags-among-scotus-law-clerks [https://perma.cc/MG8K-PJMB].

8. *Id.*

9. *Id.*; *see* Alex Badas et al., *The Role of Judge Gender and Ideology in Hiring Female Law Clerks*, 13 J.L. & CTS. 397, 398–99 (2025).

10. *See* Mauro, *supra* note 7 ("Twice as many men as women gain entry, even though as of last year, more than half of all law students are female.").

11. *See* Kozinski, *supra* note 6; Matt Zapotosky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct Allegations*, WASH. POST (Dec. 18, 2017), https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-

issue of judicial misbehavior is a "power problem," perpetuated through "closed systems that rely, often reasonably, on secrecy and discretion on the part of every member of a judicial chambers."[12]

This issue may be connected to the lack of women in Supreme Court clerkships because such abuse disproportionately affects female[13] law clerks.[14] Over the past century, the federal judiciary has witnessed a significant increase in the number of women employed, and leading, in the legal field.[15] However, despite how "women are continuing to make a substantial mark in the legal profession,"[16] harassment against women in law continues to be a persistent issue.[17] In the last ten years, dozens of women have come forward with stories of abuse, many in response to the #MeToo movement.[18] While these reports have come from women in various legal positions, many leading stories specifically shed light on harassment between judges and

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prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html [https://perma.cc/AU7D-HBHK].

12. *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. 1 (2020) [hereinafter *Statement of Dahlia Lithwick*] (statement of Dahlia H. Lithwick) .

13. While this Note often refers to "female" clerks, the author intends to use this term to refer to all employees in the federal judiciary who identify as women regardless of one's biological sex assigned at birth.

14. *See* Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 604 (2020).

15. *Profile of the Legal Profession 2024: Women in the Legal Profession*, ABA [hereinafter *Profile of the Legal Profession 2024*], https://www.americanbar.org/news/profile-legal-profession/women/?login [https://perma.cc/S3SP-7TAQ]; Clay Halton, *Gender Representation in the Judiciary*, INVESTOPEDIA (Mar. 28, 2024), https://www.investopedia.com/gender-representation-in-the-judiciary-5113183 [https://perma.cc/HHZ5-C284]; *40 Years Later, Pioneering Women Judges Savor Place in History*, U.S. CTS.: DATA & NEWS (Aug. 14, 2019), https://www.uscourts.gov/data-news/judiciary-news/2019/08/14/40-years-later-pioneering-women-judges-savor-place-history [https://perma.cc/6GN7-GWZ7]; Tatyana Monnay, *Women Exceed 50% of Law Firm Associates for First Time*, BL: BUS. & PRAC. (Jan. 9, 2024, at 12:30 PM), https://news.bloomberglaw.com/business-and-practice/women-exceed-50-of-law-firm-associates-for-first-time [https://perma.cc/TLZ3-3A2G].

16. *New ABA Report Spotlights Rise of Women in the Law*, ABA.: NEWS & INSIGHTS (Nov. 18, 2024), https://www.americanbar.org/news/abanews/aba-news-archives/2024/11/2024-profile-of-the-profession [https://perma.cc/8BLL-WTHN].

17. *See* KIERAN PENDER, INT'L BAR ASS'N, US TOO? BULLYING AND SEXUAL HARASSMENT IN THE LEGAL PROFESSION 97 (2019), https://www.ibanet.org/MediaHandler?id=B29F6FEA-889F-49CF-8217-F8F7D78C2479 [https://perma.cc/WCV4-3BKT].

18. *See* Litman & Shah, *supra* note 14, at 600–01.

their clerks. As a result, "female law students must approach the clerkship hiring process with a concern their male counterparts may not"—the risk of experiencing sexual harassment from the judges they choose to apply for.[19]

The federal judiciary is especially susceptible to workplace harassment. Various factors coalesce to create this type of environment. To begin, judges are almost completely insulated from punishment by the wide-ranging doctrine of absolute judicial immunity. This centuries-old principle shields judicial officers "from liability in a civil action for acts done by them in the exercise of their judicial functions."[20] In addition to judicial immunity, the federal judiciary is entirely exempt from Title VII of the Civil Rights Act of 1964.[21] Title VII is the leading federal provision protecting employees from employment discrimination, hostile workplaces, and retaliation or harassment of any kind from one's coworkers or employer.[22] Yet, due to a carveout in the legislation's text that specifies applicability only to "those units of the judicial branch of the Federal Government having positions in the competitive service,"[23] only judicial officers appointed and confirmed by the Senate have access to its protections—leaving clerks, and all other employees, completely defenseless.[24] Judiciary employees are historically isolated in this respect from other government employees, such as legislative aides or presidential assistants, who may bring claims under Title VII against their government employers.[25]

Furthermore, if clerks do bring claims of mistreatment, the judiciary's disciplinary processes are built to protect judges. When claims are submitted through the judiciary's internal

19. Leah Litman & Aziz Huq, *How to Stop Judges from Sexually Harassing Law Clerks*, WASH. POST (June 9, 2021), https://www.washingtonpost.com/outlook/2021/06/09/law-school-clerks-harassment-reform [https://perma.cc/KPL9-STRA].

20. Bradley v. Fisher, 80 U.S. 335, 347 (1871).

21. 42 U.S.C. § 2000e-16(a) (designating Title VII protections only to "those units of the judicial branch of the Federal Government having positions in the competitive service"); 5 U.S.C. § 2102(a)(1)(B) (defining "competitive service" as "positions to which appointments are made by nomination for confirmation by the Senate, unless the Senate otherwise directs"); 5 U.S.C. § 2103 (defining the "excepted service" from Title VII as "those civil service positions which are not in the competitive service," which does not include judiciary employees).

22. *See generally* 42 U.S.C. §§ 2000e–2000e-17.

23. *Id.* § 2000e-16(a).

24. 5 U.S.C. § 2102(a)(1)(B); *id.* § 2103.

25. Title VII specifically excludes the federal judiciary from the types of employers it covers. *See supra* note 21. *See generally* 42 U.S.C. §§ 2000e–2000e-17.

dispute resolution processes, those claims are evaluated by other judges in the same circuit where the potential misconduct took place.[26] Claims are even forwarded to the very judge being accused.[27] In other words, "[t]here are no effective safeguards to prevent workplace mistreatment, nor are there real remedies for victimized clerks."[28] Judicial immunity, Title VII exemption, and unreliable disciplinary processes work together to create a workplace where clerks are essentially unprotected.

Clerks are especially impacted by these various characteristics when *feeder courts* engage in misconduct. Feeder courts are certain distinguished federal courts that Supreme Court justices rely on to "feed," or send, them their best clerks.[29] In other words, a clerkship at a court or with a specific judge considered to be a feeder is generally more likely to lead to a Supreme Court clerkship.[30] Feeder courts and feeder judges are especially prestigious in the legal community because of their proximity to Supreme Court Justices.[31] Therefore, when feeder judges engage in misconduct, there is an even lower likelihood such misconduct will be reported because of their esteemed status.[32]

With judicial misconduct at this level kept in the shadows, potential clerks must rely on informal word-of-mouth communications with other lawyers to learn which judges to avoid. However, this is an unreliable method of ascertaining information since "[t]hose with information about judges who mistreat their clerks . . . may, but do not always, share information with prospective applicants."[33] As a result, "[d]espite multiple revelations of sexual harassment involving federal judges, applicants today have no reliable way of knowing whether they are walking into a hostile environment."[34] If potential clerks do receive information to avoid a certain feeder judge or court, prospective female clerks may ultimately avoid seeking out or accepting

26. *See generally* Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364.

27. *Id.* § 351(c).

28. Aliza Shatzman, *As a Clerk, I Couldn't Sue the Judge Who Harassed Me*, SLATE: NEWS & POL. (Mar. 17, 2022, at 12:02 PM), https://slate.com/news-and-politics/2022/03/judiciary-accountability-act-harassment-lawsuits.html [https://perma.cc/2JXA-CXWU].

29. *See* Litman & Shah, *supra* note 14, at 624, 626.

30. *Id.* at 626.

31. *See id.*

32. *See infra* Part III.

33. Shatzman, *supra* note 1, at 125.

34. Litman & Huq, *supra* note 19.

employment there altogether—despite their prestige—because there are essentially no remedies for clerks who face harassment.[35] And since feeder courts generally provide the pool of potential clerks for Supreme Court Justices to pull from, women are therefore less likely overall to be considered for clerkship positions at the highest level.[36]

The gender disparity in Supreme Court clerks is reflected by the numbers. While the amount of women holding Supreme Court clerkships has risen over time, "they are not claiming an equitable number of positions in most chambers and in most years."[37] For example, despite men and women reaching equal representation in law schools around the beginning of the twenty-first century, two men for every woman clerked at the Supreme Court throughout the early 2000s.[38] While the exact

35. *See* Aliza Shatzman, *Untouchable Judges? What I've Learned About Harassment in the Judiciary, and What We Can Do to Stop It*, 29 UCLA J. GENDER & L. 161, 184–85 (2022) ("Judicial harassment can have many negative effects on prospective clerks, current clerks, and former clerks. For prospective clerks, the fear of harassment may cause members of marginalized groups to opt out of clerking entirely."); STRICT SCRUTINY: *Workplace Misconduct and the Federal Courts* (Spotify, Apr. 27, 2020) (discussing how misconduct in the judiciary may lead to fewer women applying for elite clerkships, being dissuaded from pursuing clerkships, or opting out of the clerkship process altogether to pursue different work); *see also* Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE: NEWS & POL. (Dec. 13, 2017, at 3:11 PM), https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html [https://perma.cc/5SGE-RFU4]. In the aftermath of the 2017 Kozinski allegations, Lithwick reflects on the issue of prospective female clerks purposely avoiding clerkships with misbehaving judges despite future job opportunities. *See generally* Shatzman, *supra* note 1.

36. *See* Lawrence Baum & Corey Ditslear, *Supreme Court Clerkships and "Feeder" Judges*, 31 JUST. SYS. J. 26, 29, 43 (2010).

37. John J. Szmer et al., *Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrepancies in Clerk Selection*, 98 MARQ. L. REV. 261, 264 (2014).

38. Elizabeth D. Katz et al., *Women in U.S. Law Schools, 1948–2021*, 15 J. LEGAL ANALYSIS 48, 59 (2023); David H. Kaye & Joseph L. Gastwirth, *Where Have All the Women Gone? The Gender Gap in Supreme Court Clerkships*, 49 JURIMETRICS J. 411, 412–14 (2009) ("By the fall of 2006, a 'sharp drop in women' among the ranks of Supreme Court law clerks had become front page news. The number dropped from 16 out of 43 (37%) for the previous year to a mere 7 out of 37 (19%) for the 2006-07 year—practically a 50% decline."); *see also* Linda Greenhouse, *Women Suddenly Scarce Among Justices' Clerks*, N.Y. TIMES (Aug. 30, 2006), https://www.nytimes.com/2006/08/30/washington/women-suddenly-scarce-among-justices-clerks.html [https://perma.cc/G65C-WDPP] ("Just under 50 percent of new law school graduates in 2005 were women. Yet women account for only 7 of the 37 law clerkships for the new term, the first time the number has been in the single digits since 1994, when there were 4,000 fewer women among the country's new law school graduates than there are today."). *See generally* Szmer et al., *supra*

reason for this disparity has not been pinpointed, many scholars believe it is a result of the absence of women clerking for prominent feeder court judges "who, year in and year out, offer a reliable pipeline to the Supreme Court for their own favored law clerks."[39]

With this said, this Note argues that the lack of employment protections afforded to federal judiciary employees, in combination with other unique factors of the judiciary, discourages female law clerks from pursuing these prestigious feeder positions more so than their male counterparts. This creates a gendered pipeline to clerkships at federal appellate courts and eventually the Supreme Court.[40] First, this Note argues that systemic abuse in the federal judiciary is partly perpetrated by the protections afforded to judges, specifically through seemingly impenetrable judicial immunity justified by traditional notions of judicial independence.[41] Second, in addition to immunity, the judiciary's disciplinary protocol designates judges as the evaluator of claims against other judges.[42] The failure of courts to publicly discipline judges—or even punish judges at all—for claims of misconduct further discourages female clerks from coming forward.[43] Third, when these unique features compound, the result is a culture of abuse in the federal judiciary because bad actors on the bench are virtually untouchable. When this culture exists in feeder courts, it not only discourages injured clerks from coming forward with claims—it discourages clerks from seeking those jobs entirely.[44]

To conclude, this Note argues that the best solutions for this issue are to: (1) change the current judiciary employee reporting system and replace it with a uniform, national, anonymous

note 37; Tony Mauro, *Diversity and Supreme Court Law Clerks*, 98 MARQ. L. REV. 361 (2014).

39. Greenhouse, *supra* note 38. *See generally* Kaye & Gastwirth, *supra* note 38.

40. *See infra* Section III.B.

41. *See infra* Part I. *See generally Judicial Immunity at the (Second) Founding: A New Perspective on § 1983*, 136 HARV. L. REV. 1456 (2023) [hereinafter *Judicial Immunity at the (Second) Founding*].

42. *See infra* Section I.B; *see also* Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364.

43. *See* Joan Biskupic, *CNN Investigation: Sexual Misconduct by Judges Kept Under Wraps*, CNN: POL. (Jan. 26, 2018, at 12:35 PM), https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html [https://perma.cc/BK3J-TJRW].

44. *See infra* Section III.B.

system for submitting claims;[45] (2) enact the Transparency and Responsibility in Upholding Standards in the Judiciary Act;[46] and (3) revert to the Carter-era practice of nominating federal judges on a merit basis, rather than the current system of Congressional recommendation.[47]

I. THE INTERNAL INSULATION OF JUDGES, AND HOW IT ALLOWS ABUSE TO THRIVE

An essential driving force behind judicial abuse is the fact that judges are insulated behind a seemingly impenetrable shield of protection.[48] This shield is built upon three fundamental elements which this Part discusses below. First, Section I.A discusses how the doctrine of judicial immunity directly perpetuates these issues. Historically, judges have been afforded this immunity from liability as long as they can justify their actions as falling within the broad scope of their judicial authority.[49] However, even in the rare instances where a judge cannot stretch the protections of judicial immunity to cover their actions, claims against judges are nevertheless generally dismissed under the federal Judicial Conduct and Disability Act (JCDA).[50] Section I.B discusses the JCDA in detail and its insufficient dispute resolution process, which essentially takes a complaint against a judge and simply assigns it to other judges within the same circuit to review.[51] This process fails to give victims a meaningful review of their claims and is inherently set up to quietly dismiss such complaints behind closed doors.[52] Finally, even if a claim manages to receive meaningful attention from other judges, this process still fails to hold judges

45. *See* Shatzman, *supra* note 35, at 233–36.

46. *Id.* at 220–22.

47. *See generally* Nancy B. Arrington, *Judicial Merit Selection: Beliefs About Fairness and the Undermining of Gender Diversity on the Bench*, 74 POL. RSCH. Q., no. 4, 2020.

48. *See generally* Theresa M. Green, Note, *Unprotected but Not Forgotten: A Call to Action to Help Federal Judiciary Employees Address Workplace Sexual Misconduct*, 107 MINN. L. REV. 359 (2022).

49. *See generally* Bradley v. Fisher, 80 U.S. 335 (1871).

50. *See* Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364.

51. Stacy N. Cammarano, *No Justice for Those Harassed by Judges*, HERALD NEWS (May 9, 2018, at 11:12 AM), https://www.heraldnews.com/story/opinion/2018/05/09/no-justice-for-those-harassed/12216891007 [https://perma.cc/AXT2-EWJ8].

52. *Id.*

accountable because there are no true consequences for their actions. Section I.C explains how abusive judges can evade any form of meaningful punishment by resigning, retiring, or getting a silent slap on the wrist from fellow judges. On their own, each component is an example of how the internal structure of the federal judiciary is built to protect judges at all costs. Taken together, these three key elements insulate judges against claims of wrongdoing and stack the odds against a clerk who may want to come forward with a claim.

A. Doctrines of Judicial Immunity

One driver of systemic abuse within the federal judiciary is the fact that judges are seemingly untouchable from lawsuits for claims of wrongdoing, even when a valid cause of action may exist. Judges are insulated by a shield of immunity which protects members of the bench from an astonishing degree of liability.[53] More specifically, judges receive *judicial immunity*, a form of absolute impunity that may protect judges from damages liability for even egregious actions.[54] This centuries-old doctrine is a creature of common law, meaning that it was created and is enforced by judges themselves.[55] The Supreme Court formally recognized absolute judicial immunity in the 1871 case *Bradley v. Fisher*, holding that if a judge's action constitutes a judicial act taken within the court's jurisdiction, "the [judge] cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff."[56] Proponents of vast judicial immunity argue the doctrine is necessary to protect independent, unbiased adjudication of cases and to prevent an "undue influence on judicial decisions through fear of subsequent suits."[57] In the words of the Supreme Court, subjecting

53. *See Judicial Immunity at the (Second) Founding*, *supra* note 41.

54. *Id.* at 1460–61.

55. *See* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1357 (2021) ("[A]bsolute immunity for judges' exercise of judicial power was well established at common law around 1871."); Pierson v. Ray, 386 U.S. 547, 553–54 (1967) ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . .").

56. Bradley v. Fisher, 80 U.S. 335, 347 (1871).

57. S. P. STAFFORD, U.S. DEP'T of JUST., *Abstract*, *in* OVERVIEW OF JUDICIAL IMMUNITY (1977), https://www.ojp.gov/ncjrs/virtual-library/abstracts/overview-judicial-immunity [https://perma.cc/DY3S-RXN6].

judges to potential lawsuits would be "inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful."[58]

The Supreme Court has derived a two-part test from *Bradley* to determine when judicial immunity applies: First, immunity is granted only where "the judge was acting in his or her judicial capacity."[59] Second, a judge must be legally vested with power to conduct the act in question, because immunity does not extend to acts taken in the "clear absence of [a judge's] jurisdiction."[60] On both steps of this evaluation judges receive broad leeway and flexibility to show an official connection to their actions.[61] As a result, the line between what is and what is not a judicial act is extremely blurry.

In the test's first step, judicial immunity essentially grants freedom to judges to act without repercussion if their actions can be categorized as within their judicial capacity, or a *judicial act*.[62] "A judge's action will be considered a judicial act and therefore subject to absolute immunity if the parties dealt with the judge in his or her judicial capacity and the act is one normally performed by a judge."[63] In evaluating whether a judge's action constitutes a judicial act, courts consider various factors such as whether the offending action "is a normal judicial function," whether an encounter "occurred in the courtroom or . . . chambers," and whether the confrontation arose "directly out of a visit to the judge in [their] official capacity."[64] The Supreme Court also further defined the contours of a protected judicial act in *Forrester v. White*.[65] There, the Court held that whether a judge's act is covered by immunity is determined by the nature and function of the act, not just the fact that the actor is a judge; if a judge's act is truly judicial or adjudicatory in

58. *Bradley*, 80 U.S. at 347.

59. CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENTS § 11:6 (2d ed. 2024).

60. *Bradley*, 80 U.S. at 351–52.

61. *See* Stump v. Sparkman, 435 U.S. 349, 356 (1978) (holding judicial immunity "must be construed broadly").

62. *See Judicial Immunity at the (Second) Founding*, *supra* note 41, at 1460.

63. CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENTS, *supra* note 59, § 11:7.

64. Diaz v. Cantu, 123 F.4th 736, 746–47 (5th Cir. 2024).

65. Forrester v. White, 484 U.S. 219, 223–28 (1988).

nature, the Court held it would be covered by absolute judicial immunity.[66]

The Supreme Court's holding in *Mireles v. Waco* exemplifies just how attenuated alleged misconduct must be from any standard judicial function to forego immunity.[67] In *Mireles*, the plaintiff sued a judge for instructing officers to use excessive force to bring the plaintiff into court.[68] Despite acknowledging that "[o]f course, a judge's direction to police officers to carry out a judicial order with excessive force" was not a normally performed judicial act, nevertheless the court still found in favor of the judge.[69] The court found that regardless of the "unfairness and injustice" to the plaintiff, directing officers to bring a person before them was a "function normally performed by a judge"; the court reasoned that if only the act itself were scrutinized, not its "nature" or "function," then "*any* mistake of a judge . . . would become a 'nonjudicial' act"—thereby eliminating the reason judicial immunity exists.[70]

As for the second step of this test, judicial immunity only extends to acts taken within a judge's jurisdiction. A judge must have jurisdiction over the person and subject matter in question, "invested by law in the judge, or in the court which he holds . . . ."[71] If a judicial officer acts in complete absence of all jurisdiction, even if such action constitutes a valid judicial act, immunity will not apply.[72] The Supreme Court has held that "[w]here there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."[73] An easy example of a judge acting in clear absence of all jurisdiction would be something along the lines of "a probate court judge trying and

66. *Id.* at 223–27 ("[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.").

67. Mireles v. Waco, 502 U.S. 9, 13 (1991), *superseded by statute*, Federal Courts Improvement Act of 1996, § 309(c), Pub. L. No. 104-317, 110 Stat. 3847, *as recognized in*, Ballering v. All State AG & Lemon Law Dep'ts, No. 20-00530 LEK-RT, 2021 U.S. Dist. LEXIS 17238, at *17 n.5 (D. Haw. Jan. 29, 2021).

68. *Id.* at 10.

69. *Id.* at 12–13.

70. *Id.* at 10, 12–13 (emphasis added).

71. Bradley v. Fisher, 80 U.S. 335, 347, 352 (1871).

72. *Mireles*, 502 U.S. at 12 ("[A] judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.").

73. *Bradley*, 80 U.S. at 351–52.

sentencing a party for a criminal offense."[74] However, similar to defining judicial acts, determining exactly when a judge goes beyond the scope of their jurisdiction is not always this clear. Judges may even act "in excess of their jurisdiction" or act with "irregularity and error . . . [in] exercise of the jurisdiction" and still maintain protection from suit.[75]

For example, in *Stump v. Sparkman* the Supreme Court held that a judge was acting within his judicial capacity and jurisdiction when he ordered the sterilization of a mildly mentally disabled woman without her knowledge or consent.[76] The woman's mother presented a petition for sterilization, and the judge concluded that the operation would be in the woman's best interests due to her disability.[77] The judge ordered the sterilization during an ex parte proceeding without opening a formal case, holding a hearing for authorization, or appointing the woman (who was a minor at the time) with a guardian ad litem.[78] When the woman later sued the judge for violating her constitutional rights, the Supreme Court held that the judge was protected from liability since this action was within his general jurisdiction even if his approval of the petition was in error.[79] In addition, it was a judicial act because "[s]tate judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors . . . ."[80]

Notably, the Supreme Court has found that judges "will not be deprived of immunity because the action [they] took was in error, was done maliciously, or was in excess of [their] authority."[81] As long as an act was done in the judge's official capacity and not in the clear absence of all jurisdiction, they will enjoy immunity.[82] This was the case in *Mireles*, where the judge's malice in ordering officers to use excessive force did not dissuade the Supreme Court from granting the judge full protection from suit.[83] The Supreme Court maintains that extending immunity

74. *Judicial Immunity at the (Second) Founding*, *supra* note 41, at 1462.
75. *Bradley*, 80 U.S. at 351, 354.
76. *See* Stump v. Sparkman, 435 U.S. 349, 364 (1978).
77. *Id.* at 351–53.
78. *Id.* at 360.
79. *Id.* at 364.
80. *Id.* at 362.
81. *Id.* at 356.
82. *Id.* at 356–57.
83. Mireles v. Waco, 502 U.S. 9, 13 (1991), *superseded by statute*, Federal Courts Improvement Act of 1996, § 309(c), Pub. L. No. 104-317, 110 Stat. 3847, *as*

even when a judge acts maliciously and corruptly is actually "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[84]

Because courts have adopted a sweeping, all-encompassing definition of "judicial act," judges can easily argue that any of their actions fall within this category. As demonstrated by the holdings in *Stump* and *Mireles*, "[e]ven a somewhat tenuous relationship to the kinds of acts judges perform seems to suffice for purposes of finding a judicial act."[85] As a result of this principle, suing a judge for misconduct is inherently difficult because of the nearly impossible task of convincing the court the judge's actions were not judicial in nature.[86] For example, immunity has been extended in the following circumstances: (1) where a judicial officer used a dubious jury summons to bring political opponents into court and arrest them in retaliation;[87] (2) where a judge propositioned a woman for sex in exchange for a warrant for individuals the woman claimed had attacked her;[88] and (3) where a judge presiding over a felony child support case entered into a sexual relationship with the case's complaining witness, engaged in trysts with her in his chambers, and sexted her from the bench.[89] These cases demonstrate judicial immunity's extremely wide reach and the broad protections it awards to judges as long as their actions tenuously relate to their judicial capacities.

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recognized in, Ballering v. All State AG & Lemon Law Dep'ts, No. 20-00530 LEK-RT, 2021 U.S. Dist. LEXIS 17238, at *17 n.5 (D. Haw. Jan. 29, 2021).

84. Pierson v. Ray, 386 U.S. 547, 554 (1967).

85. *See Judicial Immunity at the (Second) Founding*, *supra* note 41, at 1461.

86. *Id.* at 1460–63.

87. *See* Jones v. King, 148 F.4th 296, 298–99 (5th Cir. 2025).

88. Tresa Baldas, *Immunity Lets Bad Judges Off Hook for Bad Behavior*, USA TODAY: NEWS, https://www.usatoday.com/story/news/nation/2014/07/28/bad-judges-immunity-civil-lawsuits/13259199 [https://perma.cc/XZ7Z-CDVT] (last updated July 28, 2014, at 10:17 AM) ("[The] case involved a judge accused of propositioning a woman for sex in exchange for him issuing a warrant for some individuals she claimed attacked her . . . a federal judge dismissed the lawsuit, concluding that even if the judge did ask her for sex, he was protected by the immunity doctrine. The judge, however, lost his job and was indicted on criminal charges. He just can't be sued for money.").

89. *See* King v. McCree, 573 Fed. Appx. 430, 442 (6th Cir. 2014) ("Judge McCree receives judicial immunity under existing Supreme Court law."); *see also* Tresa Baldas, *From the Archive: He Had Sex with a Witness in Chambers, but Judge Can't Be Sued*, DET. FREE PRESS (Dec. 22, 2014, at 12:25 PM), https://www.freep.com/story/news/local/michigan/detroit/2014/12/22/wade-mcree-archive/20762383 [https://perma.cc/CLN3-SSXK].

The difficulties parties face in circumventing judicial immunity are amplified in the context of clerkships. In theory, clerks could bring claims against misbehaving judges and argue that judicial harassment is outside the scope of a judicial act. But this option is extremely limited due to the definition of "judicial act" outlined in *Forrester*.[90] As stated, the Supreme Court determines whether a judge is acting within the bounds of judicial immunity by deciding whether the nature of the act itself was judicial.[91] Therein lies the particularly difficult issue for clerks, because the judge-clerk relationship operates almost entirely within the judicial sphere. While clerks are technically employees of judges, clerks essentially function as extensions of the judges they work for, and their responsibilities are centered around assisting judges in carrying out their official duties.[92] Courts have recognized how clerks are "probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function."[93] This intimate structure between clerks and judges blurs the line between circumstances where a judge is acting as a judge, versus an administrator or employer.

Moreover, common indicators used by courts to determine if a judge was acting in their judicial capacity—whether the offending action "is a normal judicial function," whether an encounter "occurred in the courtroom or . . . chambers," and whether the confrontation arose "directly out of a visit to the judge in [their] official capacity"—are also defining attributes of a clerkship.[94] A judge interacting with their clerks is undoubtedly a "normal judicial function," which occurs normally "in the courtroom or . . . chambers."[95] Likewise, clerks must

90. *See* Forrester v. White, 484 U.S. 219, 227 (1988) ("Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.").

91. *Id.*

92. David Lat, *Great Law Clerks Are Like General Counsel, Not Junior Associates*, BL: U.S. L. WEEK (Aug. 27, 2025, at 2:30 AM), https://news.bloomberglaw.com/us-law-week/great-law-clerks-are-like-general-counsel-not-junior-associates [https://perma.cc/TK9X-5HWB] ("Law clerks are sometimes described as extensions of their judges. And it's true that during their clerkships, clerks don't have independent professional identities—their efforts get turned into work product that goes out in the names of their judges.").

93. Oliva v. Heller, 839 F.2d 37, 40 (2d Cir. 1988).

94. Diaz v. Cantu, 123 F.4th 736, 746–47 (5th Cir. 2024).

95. *Id.* at 746.

"directly . . . visit . . . the judge in [their] official capacity" in order to complete their assignments.[96]

Combined, these factors show how easy it is to categorize an action done toward a clerk as a "judicial act" merely by virtue of a clerkship's inherent characteristics and the close working relationship between a clerk and their judge. As a result, a clerk seeking to bring a claim of misconduct against a member of the bench faces a heightened burden in establishing that the judge's action was out of the scope of their judicial capacity. Plaintiffs must convince another judge that a violation was initiated in complete isolation from any standard judicial task and therefore stemmed from the judge's capacity as an individual, rather than a judicial officer.[97]

In sum, absolute judicial immunity can protect judges from liability in situations of even egregious conduct if such conduct can be connected at all to an official judicial act.[98] This harms victims of abuse because it imposes an extremely heavy burden on potential plaintiffs to show that the misbehaving judge was acting outside their official capacity.[99] And as controlling precedent has shown, the Court is very slow to recognize a judge's actions as nonjudicial when they are at all connected to the judge's official capacity.[100] This is especially relevant in the clerkship context since clerks work intimately with judges, so it is not difficult for judges to justify an action toward a clerk as a judicial act.

96. *Id.* at 747.

97. *See* Bradley v. Fisher, 80 U.S. 335, 351 (1871).

98. *Id.* at 346–54.

99. *See Judicial Immunity at the (Second) Founding*, *supra* note 41, at 1461 ("'[C]lear absence of all jurisdiction' is a very high bar to meet.").

100. *See generally Bradley*, 80 U.S. at 351 (holding that "judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly"); Mireles v. Waco, 502 U.S. 9, 11 (1991), *superseded by statute*, Federal Courts Improvement Act of 1996, § 309(c), Pub. L. No. 104-317, 110 Stat. 3847, *as recognized in*, Ballering v. All State AG & Lemon Law Dep'ts, No. 20-00530 LEK-RT, 2021 U.S. Dist. LEXIS 17238, at *17 n.5 (D. Haw. Jan. 29, 2021) (finding that "judicial immunity is not overcome by allegations of bad faith or malice").

B. Lack of Remedies Available for Clerks and The Failure of "Judges Policing Judges" Policies

Along with the challenges clerks face from judicial immunity, federal judiciary employees are effectively barred from filing meaningful behavioral complaints.[101] This is because enforcement of judicial ethics and regulation of behavior in the judiciary is a self-policed, patchwork system with no neutral third-party oversight.[102] This internal method of checks and balances has been astutely referred to as a "judges policing judges" system.[103] In theory, this procedure should operate as a self-regulating accountability program. But in practice, as noted by outspoken judicial accountability advocate Aliza Shatzman, "judicial regulatory bodies are set up to protect misbehaving judges, not mistreated law clerks—but that is not unusual when the misbehaving judge's friends and colleagues are the ones deciding whether to discipline him."[104] In other words, the judiciary operates on a system where judges are responsible for policing the behavior of their fellow judges.

In addition, the federal judiciary is explicitly exempt from Title VII of the Civil Rights Act of 1964, which forbids discrimination and harassment against employees by their employers.[105] This protection does not extend to the federal judiciary or the thirty thousand employees employed within the branch.[106] Proponents of this exemption argue it is important to keep the judiciary as independent as possible from external forms of oversight and allow judges to carry out their jobs impartially without

101. *See generally* Shatzman, *supra* note 28.

102. Carrie Johnson, *Judicial System Fails at Policing Workplace Misconduct, Study Finds*, NPR (July 17, 2024, at 3:25 PM), https://www.npr.org/2024/07/17/nx-s1-5042340/judges-misconduct-self-policing-report [https://perma.cc/5M47-D354].

103. *See, e.g.*, Michael Berens & John Shiffman, *With 'Judges Judging Judges,' Rogues on the Bench Have Little to Fear*, REUTERS INVESTIGATES (July 9, 2020, at 10:00 AM), https://www.reuters.com/investigates/special-report/usa-judges-deals [https://perma.cc/LRR3-9TZX].

104. Aliza Shatzman, *We Should Tell the Truth About Judicial Clerkships*, ABOVE THE L. (May 10, 2022, at 12:47 PM), https://abovethelaw.com/2022/05/we-should-tell-the-truth-about-judicial-clerkships [https://perma.cc/7MVQ-ZBTU].

105. *See* 42 U.S.C. § 2000e.

106. *See id.*; Green, *supra* note 48, at 359, 380 ("The federal judiciary employs more than 30,000 people, but none of them are currently protected by Title VII of the Civil Rights Act of 1964 . . . ."); Johnson, *supra* note 102 ("The 30,000 people employed by the federal judicial branch are not protected by federal anti-discrimination laws, unlike other workers across the American landscape.").

fear of litigation.[107] This means judiciary employees, including law clerks, "cannot sue and seek damages for harms done to their careers, reputations, and earning potential."[108] Therefore, clerks who experience harassment, retaliation, or wrongful termination are barred from suing and seeking damages for injuries experienced by judicial misconduct under traditional statutory methods.[109]

To fill this Title VII-sized void, the federal judiciary employs two dispute resolution processes for employees to file complaints: the JCDA and the Employment Dispute Resolution Plan (EDR). The JCDA provides a mechanism for any person to file a complaint against a judge and is the process by which judges may be disciplined if found guilty of malfeasance.[110] On the other hand, the EDR is each court's internal complaint structure and exists only for judiciary employees to state claims.[111] Each system relies on judges to review the complaints asserted against other judges and evaluate the validity of such claims.[112]

1. Judicial Conduct and Disability Act

First, the JCDA is the federal law covering the external complaint and discipline process against members of the federal judiciary.[113] This statute describes the process a complaint goes through after a report of abuse has been filed.[114] Under this statute, any person can file a claim that a judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" with the clerk of the court of appeals for the circuit.[115] Once a complaint of this nature is submitted to the clerk of the court, it is forwarded to the chief judge

107. *See* Green, *supra* note 48, at 380–83.

108. Aliza Shatzman, *Judges Who Interpret Title VII Should Themselves Be Subject to It*, ABOVE THE L. (Sep. 5, 2023, at 2:14 PM), https://abovethelaw.com/2023/09/judges-who-interpret-title-vii-should-themselves-be-subject-to-it [https://perma.cc/ZG9Y-M6XC].

109. *See* Shatzman, *supra* note 35, at 217; *see also* Shatzman, *supra* note 28.

110. *See generally* Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364.

111. *See generally* 12 *Appendix 2A: Model Employment Dispute Resolution Plan*, *in* GUIDE TO JUDICIARY POLICY 1, 3, 5 (2022), https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a_oji-2019-09-17-post-model-edr-plan.pdf [https://perma.cc/V3TW-Q57Q].

112. *See infra* Section II.B.

113. *See generally* 28 U.S.C. §§ 351–364.

114. *Id.*

115. *Id.* § 351(a).

of that particular circuit (and if the chief judge is the focus of the complaint, it goes to the next senior circuit judge).[116] At this step, the reviewing judge has the option to dismiss the complaint if they think the complaint does not conform with statutory requirements, is too closely related to a judicial decision or procedural ruling, seems frivolous or lacks evidence, or if the chief judge believes the complaint can be disputed.[117] Finally, the reviewing judge may dismiss a complaint after a "limited inquiry" convinces them that the allegations "lack any factual foundation or are conclusively refuted by objective evidence," or if the judge believes responsive action is no longer necessary.[118] In very limited circumstances the reviewing judge may also adjourn a special committee to review the complaint, which ensures that more than one judge is alerted to the misconduct.[119] However, these situations are extremely rare.[120] A study conducted by CNN revealed that in both 2015 and 2016 there were over one thousand complaints filed against judges, but only four advanced to a special committee each year.[121] Similarly, there were roughly 1,500 complaints initiated in 2022, 2023, and 2024, respectively; yet only three were returned to a special committee in 2022, nine in 2023, and none in 2024.[122]

Most significantly, the complaint is also sent to the judge whose conduct is the subject of the complaint.[123] In other words, if a clerk were to submit a complaint of judicial abuse under this statute, the complaint would be reviewed by the boss and

116. *Id.* §§ 351(c), 352.
117. *Id.* § 352(b)(1).
118. *Id.*
119. *Id.* § 353.
120. Aliza Shatzman, *The Judiciary Accountability Act: Dismantling the Myth of the Untouchable Judge*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (Apr. 25, 2022), https://nyujlpp.org/quorum/shatzman-judiciary-accountability-act [https://perma.cc/4ASX-2EKT].
121. These numbers refer to all complaints filed against judges, not specifically harassment or misconduct claims. *See* Biskupic, *supra* note 43.
122. As stated above, these numbers refer to all complaints filed against judges, not specifically harassment or misconduct claims. *See Table S-22—Other Judicial Business*, ADMIN. OFF. OF THE U.S. CTS. (Sep. 30, 2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2022.pdf [https://perma.cc/WR6G-3KT8]; *Table S-22—Other Judicial Business*, ADMIN. OFF. OF THE U.S. CTS. (Sep. 30, 2023), https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf [https://perma.cc/QQL7-7WHX]; *Table S-22—Other Judicial Business*, ADMIN. OFF. OF THE U.S. CTS (Sep. 30, 2024), https://www.uscourts.gov/sites/default/files/2025-02/jb_s22_0930.2024.pdf [https://perma.cc/G9TN-DM5K].
123. *See* 28 U.S.C. § 351(c).

colleagues of the judge in question, and then the judge at issue.[124] This demonstrates how the JCDA insulates the dispute resolution process to ensure that a complaint is only reviewed by the judicial officers who harbor the most incentive to protect the misbehaving judge.

2. Employment Dispute Resolution Plan

The second dispute resolution process used by the federal judiciary is the EDR, which is the internal system used for judiciary employees to file workplace complaints. The Judicial Conference of the United States has created a Model EDR Plan which each circuit and courthouse may adopt and modify. The EDR is analogous to the federal judiciary's version of Title VII and provides the framework for employees to bring workplace disputes. The Judicial Conference of the United States adopted the EDR to "provide rights and protections to employees of the United States courts that are comparable to those provided to legislative branch employees."[125] In general, the EDR is supposed to function as protection from workplace harassment and disputes, focusing on the employment aspect of the judiciary.[126]

The EDR provides a three-step structure for addressing potential workplace misconduct. First, judiciary employees (including clerks) are instructed to seek "Informal Advice," which consists of informally bringing concerns to their judges or other administrators.[127] The second step consists of "Assisted Resolution."[128] Employees work with an EDR Coordinator or Circuit Director of Workplace Relations and discuss the conduct in question with the judge.[129] At this step, involved actors can initiate a preliminary investigation or voluntary mediation and try to resolve the conflict relatively informally.[130] If the allegations concern a judge, the chief judge of the appropriate district or circuit must be notified and assume responsibility for coordinating

124. *Id.*

125. 12 *Appendix 2B: Model Employment Dispute Resolution (EDR) Plan*, *in* GUIDE TO JUDICIARY POLICY 1 (2018), https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2b-model-edr-plan.pdf [https://perma.cc/6NZX-FHHF].

126. *See Appendix 2A: Model Employment Dispute Resolution Plan*, *supra* note 111, at 1–3.

127. *Id.* at 3, 5.

128. *Id.* at 3, 5–6.

129. *Id.* at 5–6.

130. *Id.* at 5.

the Assisted Resolution or any additional actions appropriate under the circumstances.[131] Finally, the third step in the EDR is to bring a formal complaint against a judge.[132] Similar to the JCDA, this complaint is first reviewed by the chief judge of the court and then assigned to a "Presiding Judicial Officer" (another judge in the same court) to oversee the EDR complaint process.[133] This process largely mirrors that of the JCDA, and if complaints are brought against the same judge for the same conduct in both forums, the chief circuit judge determines what action to take to address both.[134]

Similar to the JCDA, this dispute resolution process is also a virtually useless endeavor for clerks. First of all, studies show that despite the federal judiciary requiring each court to have an EDR plan and post relevant information on its websites for employees to know their rights, "only 26% of public judiciary websites fulfill all the requirements, and 11% of websites have no workplace conduct information at all."[135]

To make matters more difficult, not every circuit or courthouse has adopted the Model EDR Plan, so EDR processes may differ based on where a clerk is located.[136] This lack of guidance and clarity creates confusion among clerks and prevents a potential claimant from understanding the process before filing a claim.[137] In practice, employees "beg[in] learning the rules of the proceeding while in the middle of it," but by that point they "ha[ve] no way to confirm the accuracy of [the] rules or their application . . . ."[138] And in the case that clerks are brave enough to file formal complaints, the EDR is another self-policed disciplinary system that institutes a "judges policing judges"

131. *Id.* at 6.
132. *Id.* at 3, 6–11.
133. *Id.* at 7–11.
134. *Id.* at 7.
135. Press Release, Legal Accountability Project, Recent Report Highlights Flaws in Internal Federal Judiciary Dispute Resolution Processes and Need for Reform (July 23, 2024), https://www.legalaccountabilityproject.org/press-releases/blog-post-title-one-4hx79-82lj8-sk7nl-aarg5-prrc8-tcgfy-glm2x-jfrba-zymbc [https://perma.cc/B2PV-2FKB].
136. *See* Shatzman, *supra* note 35, at 207 ("While the U.S. Courts have created a Model EDR Plan, not every circuit and courthouse follows the plan, and there is no standardization among courthouses regarding EDR policies.").
137. *See, e.g.*, Brief for Named and Unnamed Current and Former Employees of the Federal Judiciary Who Were Subject to or Witnessed Misconduct as Amici Curiae in Support of Appellant Jane Roe at 28, Strickland v. United States, 32 F.4th 311 (4th Cir. 2022) (No. 21-1346) [hereinafter Jane Roe Amici Brief].
138. *Id.* at 23.

environment not built with justice for the clerk in mind.[139] The EDR "is a toothless process that is neither impartial nor confidential, since other judges in the courthouse where the complainant law clerk and misbehaving judge work are tasked with investigating and potentially disciplining their judiciary colleagues."[140] While the EDR is touted as the judiciary's version of Title VII, in practice the EDR is more reminiscent of the already unhelpful JCDA.

The structural failings of the judiciary's dispute resolution processes, coupled with confidentiality concerns, were exemplified in *Strickland v. United States*.[141] Plaintiff Caryn Devins Strickland was an attorney at a Federal Public Defender's office[142] where she experienced sexual harassment, discrimination, and retaliation from her male boss and coworkers.[143] Strickland filed a complaint through the EDR, but "[a]t every turn, she was stonewalled" because her claim was investigated internally, per EDR instruction.[144] Because her claim was not handled with impartiality nor confidentiality, Strickland filed suit alleging violations of her equal protection and due process rights.[145] The case was litigated up to the Fourth Circuit, which recognized that "[j]udicary employees who were responsible for the [attorney's] EDR process . . . made various missteps, . . . disrespected [the attorney's] expectations of confidentiality and

139. Kimberly Strawbridge Robinson, *Judges Policing Judges: True Disciplinary Actions Are Rare (1)*, BL: U.S. L. WEEK, https://news.bloomberglaw.com/us-law-week/judges-policing-judges-true-disciplinary-actions-are-rare [https://perma.cc/255P-734Y] (last updated Sep. 26, 2019, at 11:21 AM); *see* Berens & Shiffman, *supra* note 103.

140. *See* Shatzman, *supra* note 1, at 121.

141. Strickland v. United States, 32 F.4th 311, 320–21 (4th Cir. 2022).

142. *Id.* at 319. The plaintiff was an employee at the Federal Public Defender, not a judicial clerk, but the same EDR applies as the plaintiff was a member of the federal judiciary at the time. This case is therefore relevant since it highlights the same shortcomings a clerk would face if they were to bring a claim against a judge. *See Appendix 2A: Model Employment Dispute Resolution Plan*, *supra* note 111, at 1 ("This Plan applies to all Judges, current and former Employees (including *all law clerks*; chambers employees; paid and unpaid interns, externs, and other volunteers; *federal public defender employees*; and probation and pretrial services employees) . . . .") (emphasis added).

143. *See* Brief of Plaintiff-Appellant at 2, Roe v. United States, No. 21-1346, 2021 WL 3723178, at *2 (W.D.N.C. Aug. 20, 2021) ("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.").

144. *Id.*

145. *Id.*

failed to complete a thorough EDR investigation in a timely manner."[146] In addition, the court recognized that other "well-intentioned employees . . . were at times stymied by structural imperfections or a lack of clarity in the [EDR] Plan."[147] Nonetheless, the Fourth Circuit still denied Strickland's claims and found these shortcomings did not amount to a due process violation nor an equal protection violation.[148] In an amici brief filed for *Strickland*, a large group of current and former federal judiciary employees who "were subject to or witnessed harassment, discrimination, and retaliation" described how the EDR is flawed in structure and in practice:

> Confusion regarding confidentiality contributes to the ever-present fear of retaliation. The judiciary wields confidentiality as both a sword and a shield. In multiple instances, employees have been unable to keep the contents of their complaints confidential. Without clear delineation of what information will be kept confidential, employees face the almost-certain knowledge that their colleagues—and potential witnesses—will learn about the specifics of their complaint. But the judiciary also uses confidentiality to limit employee knowledge, by citing confidentiality concerns to preclude complainants from reviewing investigation reports or confronting witnesses. Employees are thus deterred from reporting because of the inevitable disclosure of their complaints, all while the judiciary strictly controls what—if any—information is available to that employee.
>
> The fear of retaliation is quite possibly the largest barrier to reporting harassment or discrimination within the judiciary. Although the plans define misconduct to include retaliation, that alone cannot dampen the threat of retaliation or its far-reaching consequences. On a professional level, judiciary employees face losing recommendations and tarnishing their reputations if they report misconduct.[149]

146. Strickland v. Moritz, 149 F.4th 378, 386 (4th Cir. 2025) (final decision after remand by the Fourth Circuit, filed using the plaintiff's real name rather than Jane Roe).

147. *Id.*

148. *Id.* at 407.

149. *See* Jane Roe Amici Brief, *supra* note 137, at 23–24.

Strickland's holding and accompanying amicus brief underscore the lack of clarity offered to clerks and other federal judiciary employees regarding their options when facing workplace misconduct. The decision also demonstrates how filing a complaint through the EDR is a largely futile effort. What incentives does a mistreated clerk have to use the EDR process when they face an inherently low chance of success, yet an extremely high risk of long-term career harm? Why would a clerk report a judge for retaliation and discrimination, just to experience more retaliation and discrimination for filing the claim itself?

3. What We're Left With: A Patchwork System with No Recourse for Clerks

This Note argues that a driving factor of the harassment faced by judiciary employees is the lack of protections and remedies that employees can utilize if or when they experience harassment. As previously indicated in this Part, the federal judiciary operates a patchwork reporting system with no single neutral, governing body overseeing the reporting systems used by the federal courts. The JCDA is supposed to act as a legal mechanism clerks can use to file complaints of misconduct against misbehaving judges.[150] However, this process is effectively meaningless because it is a self-policed, internal process that rarely holds judges accountable.[151]

Within both the JCDA and EDR processes, the priority is likely to protect the judge and the reputation of the court at the expense of the injured clerk. Such prioritization contributes to a clerk's fear of retaliation if they bring a claim through the judiciary's internal dispute resolution system. This fear is accentuated by the fact that the clerk's confidentiality is not a guarantee within the current disciplinary structure. In some cases, former judiciary employees who had engaged in the dispute resolution process described "how uninvolved colleagues were somehow aware of the details of [their] complaint despite the promise of confidentiality," and others detailed facing shame and ridicule from other employees after filing a complaint.[152]

When a clerk reports an incident of sexual harassment at the hands of a judge and the report is reviewed by that judge's

150. *See* Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364.
151. *See infra* Part III.
152. Jane Roe Amici Brief, *supra* note 137, at 28.

colleague rather than a neutral third party, where can this clerk turn to next? Further, how can a clerk anonymously or discreetly submit a complaint when the complaint goes to the abusive judge in question and their confidentiality is not guaranteed? The circular system of judges protecting other judges in the face of misconduct leaves clerks vulnerable with no real procedural options to hold an abusive judge accountable. In any situation, the clerk will be at risk of facing retaliation from their judge and having their claims ignored, dismissed, or mishandled by the other members of their court.[153] As this Note discusses in Section I.C, these fears are validated by studies finding that judiciary leadership will likely dismiss the complaint and rarely takes formal disciplinary action.[154] In practice, this system operates as more of a dummy system to point to as proof of judicial regulation rather than an actual source of any oversight. It is rare for a judge accused of sexual misconduct to be investigated, let alone disciplined in any way, when "the ultimate disciplinary authority over a judge rests with other judges."[155]

In total, clerks have no real disciplinary process to turn to when they are mistreated by judges. Neither the JCDA nor the EDR provide meaningful options for clerks to report harassment.

C. No Punishment for the "Bad Apples"[156]

As a result of the judiciary's faulty disciplinary processes, any punishments handed to judges responsible for misconduct are generally flawed and insufficient. Under the federal disciplinary statute, if the chief judge does not use their vast discretion to dismiss the complaint, they can form a special committee of other judges from the district and circuit to investigate the complaint.[157] If they choose to, the chief judge then has the authority to initiate this investigation into the facts and allegations included in the complaint "as extensive[ly] as [the judge] considers

153. *See generally* Ed Cohen, *Judges Prefer the Judiciary Police Itself, but There Are Concerns*, NAT'L JUD. COLL. (Jan. 11, 2022), https://www.judges.org/news-and-info/judges-prefer-the-judiciary-police-itself-but-there-are-concerns [https://perma.cc/9S5P-74ES] (discussing judges themselves expressing concerns that they are unfit to police their fellow judges' behavior).

154. *See* Biskupic, *supra* note 43.

155. Berens & Shiffman, *supra* note 103.

156. Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707 (1991).

157. *See* 28 U.S.C. § 353.

necessary."[158] In other words, an investigation does not need to be exhaustive but rather just as thorough as the court wants it to be.

Further, the punishments of judges are limited under this statute. In general, if a judge is found culpable, the statute holds that the circuit's judicial council may order a temporary hold on assigning any additional cases to a judge who is the subject of a complaint.[159] The judicial council consists of "the chief judge of the circuit . . . and an equal number of circuit judges and district judges of the circuit."[160] In addition, the statute provides that the council may censure or reprimand the judge either publicly or privately.[161] But this is essentially the extent of potential disciplinary action under the current structure. Because of their life tenure, Article III judges may only be removed from the bench via impeachment and therefore the council's authority to reprimand only extends so far.[162] Section 354(a)(3)(A) of the JCDA emphasizes this limitation: "Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior."[163] Thus, the consequences of bad behavior are limited to artificially lightening the workload of a judge or issuing a form of admonishment.

Additionally, a circuit's judicial council may simply choose to certify disability of an Article III judge pursuant to section 372(b) if the judge "is eligible to retire under this section [and] does not do so."[164] This process consists of the judicial council presenting a certificate to the president of the United States stating that the judge in question is "unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability."[165] Finally, the judicial council may "request[] that the judge voluntarily retire, with the provision that the length of service requirements under section 371 . . . shall not apply."[166]

In extremely rare situations, the judicial council could find that a judge at the center of a complaint may have engaged in

158. *Id.* § 353(c).
159. *Id.* § 354(2)(A)(i).
160. *Id.* § 332(a)(1).
161. *Id.* § 354(2)(A)(ii)–(iii).
162. *See* U.S. CONST. art. III, § 1.
163. 28 U.S.C. § 354(a)(3)(A).
164. *Id.* § 372(b).
165. *Id.*
166. *Id.* § 354(a)(2)(B)(ii).

conduct consisting of grounds for impeachment under Article II of the Constitution.[167] In such cases, the council must submit such findings to the Judicial Conference of the United States which serves as "the national policymaking body for the federal courts."[168] However, the Judicial Conference only "convenes twice a year to consider administrative and policy issues affecting the federal court system, and to make recommendations to Congress concerning legislation involving the Judicial Branch."[169] Therefore, it is unclear how reporting judicial misconduct through this system could make an immediate impact for mistreated clerks. The highest a claim may go is to the Judicial Conference, but how can a body that only meets twice a year create meaningful change for clerks who are suffering right now?

To summarize: Options are limited. A study published by CNN in 2018 demonstrates how rare it is for any serious action to be taken against a judge. In a twelve-month period, only four complaints out of the over one thousand total filed made it to the special committee stage of investigation.[170] The statistics were the same for the year prior as well.[171] Over the full ten-year period that CNN investigated, "fewer than 10 cases annually were deeply investigated and even fewer resulted in disciplinary action."[172] In a majority of the years throughout this time, "not a single judge was reprimanded, suspended, or otherwise sanctioned for misconduct."[173] As previously stated for Article III judges, the only way to be removed involuntarily from the bench is to be impeached and convicted by Congress.[174] However, this is extremely rare: Since 1804, only fifteen federal judges have been impeached.[175] Only one was impeached for harassment-related matters; the rest almost all dealt with issues of perjury.[176]

167. *Id.* § 354(b)(2)(A).
168. *Id.* § 354(b); *About the Judicial Conference of the United States*, U.S. CTS.: ADMIN. & POLICIES, https://www.uscourts.gov/administration-policies/governance-judicial-conference/about-judicial-conference-united-states [https://perma.cc/D5YY-4TWH].
169. *About the Judicial Conference of the United States*, *supra* note 168.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *See* U.S. CONST. art. III.
175. *Impeachment of Federal Judges*, FED. JUD. CTR.: HIST. OF THE FED. JUDICIARY, https://www.fjc.gov/history/judges/impeachments-federal-judges [https://perma.cc/96QM-8QTD].
176. *Id.*

These extremely low numbers demonstrate how seeking disciplinary action against judges—much less their removal—is not a pragmatic avenue for victims of judicial abuse because most claims get outright dismissed without further investigation.[177]

In most cases, judges who are accused of misconduct quietly retire or resign from the bench.[178] This takes advantage of a loophole in sections 351 and 352 of the JCDA, which requires all investigations of potential misconduct to immediately cease upon a judge's change in status since an investigation may only involve a sitting judge.[179] Similar protections are triggered if a judge retires under conditions related to misconduct.[180] If a judge is sixty-five or older when they retire from the judiciary and has served the required amount of time on the bench, they will continue receiving their entire salary for the rest of their life—even if retiring amidst allegations of abuse.[181] However, even if an accused judge is younger than sixty-five when they resign or are pushed out due to a disability and deemed unable to carry out their judicial duties, they will continue to receive their pensions.[182] In total, "[w]hen the subject of the complaint is no longer a judicial officer," they effectively become "beyond the reach of these procedures and the remedies they prescribe."[183] As of 2022, there were "at least six retired federal

177. *See id.* The only judge impeached for harassment-related reasons was former judge Samuel B. Kent of the U.S. District Court for the Southern District of Texas. Kent was the sole judge at his Galveston courthouse and was sentenced to nearly three years in prison for obstructing a judicial panel's investigation into charges against him for sexually assaulting two of his female employees. He was impeached shortly after his sentencing. *See also Samuel B. Kent*, LIBR. OF CONG.: RSCH. GUIDES, https://guides.loc.gov/federal-impeachment/samuel-kent [https://perma.cc/M3N2-G9ZK].

178. *Retiring to Avoid Consequences: Judges Exploit a Loophole to Maintain Pensions in Spite of Misconduct*, FIX THE CT. (May 2, 2019), [hereinafter *Retiring to Avoid Consequences*], https://fixthecourt.com/2019/05/retiring-to-avoid-consequences-judges-exploit-a-loophole-to-maintain-pensions-in-spite-of-misconduct [https://perma.cc/YH69-CUQM].

179. *See* 28 U.S.C. §§ 351, 352(b)(2).

180. *See Retiring to Avoid Consequences*, *supra* note 178.

181. *See generally* 28 U.S.C. § 371.

182. *Id.* §§ 351–364; *see* Veronica Root Martinez, *Avoiding Judicial Discipline*, 115 NW. U. L. REV. 953, 981–83 (2020).

183. *How Can We Hold Misbehaving Federal Judges Accountable?*, FIX THE CT. (Oct. 6, 2022), https://fixthecourt.com/2022/10/can-hold-misbehaving-federal-judges-accountable [https://perma.cc/MB8J-D5LR] (quoting the Judicial Council of the Second Circuit).

judges collecting six-figure pensions despite credible accusations of crimes ranging from sexual assault to tax fraud."[184]

The system's failure to initiate true accountability is exemplified by one of the most well-known cases of judicial abuse in recent decades: Alex Kozinski of the Ninth Circuit. Kozinski, a self-proclaimed "bad apple,"[185] was notorious for his "famously sexual sense of humor" and an inappropriate "pervasive chamberswide environment."[186] In 2008, Kozinski was investigated for misconduct when reports surfaced that he had maintained a public website displaying sexually explicit content.[187] Such content included photos of naked women painted to look like animals—which Kozinski defended as "funny" material.[188]

The investigation was opened in the Ninth Circuit and subsequently transferred to the Third Circuit, where a Special Committee was appointed to investigate the complaint pursuant to section 353 of the JCDA.[189] The committee was comprised of judges from various courts within the circuit.[190] After conducting their investigation and acknowledging the judge's "judicially imprudent" and careless behavior, the committee admonished Kozinski under section 354(2)(a)(iii) of the Act ("censuring or reprimanding such judge by means of public announcement") and subsequently dismissed the proceeding.[191] Nothing more was done to punish Kozinski, and he continued serving as the Chief Justice of the Ninth Circuit for nearly a decade.[192]

Nine years after this initial investigation, Kozinski came under public fire when more than fifteen women who had either

184. *Id.*

185. Kozinski, *supra* note 156.

186. Heidi Bond, *I Received Some of Kozinski's Infamous Gag List Emails. I'm Baffled by Kavanaugh's Responses to Questions About Them.*, SLATE (Sep. 14, 2018), https://slate.com/news-and-politics/2018/09/kavanaugh-kozinski-gag-list-emails-senate-hearings.html [https://perma.cc/A64S-JF9L].

187. Nina Totenberg, *Chief Justice Roberts Sends Kozinski Inquiry to Another Judicial Council*, NPR (Dec. 15, 2017, at 7:51 PM), https://www.npr.org/2017/12/15/571234947 [https://perma.cc/MF57-NEGG].

188. Scott Glover, *9th Circuit's Chief Judge Posted Sexually Explicit Matter on His Website*, L.A. TIMES (June 11, 2008, at 12:00 AM), http://www.latimes.com/local/la-me-kozinski12-2008jun12-story.html [https://perma.cc/95FH-MP2X].

189. *In re* Complaint of Judicial Misconduct, 575 F.3d 279, 279–81 (3d Cir. 2009).

190. *Id.* at 280–81.

191. *Id.* at 291.

192. Kozinski did not step down from the Ninth Circuit until almost a decade later in 2017. *See* Statement of Judge Alex Kozinski (Dec. 18, 2017), https://s3.documentcloud.org/documents/4332061/Alex-Kozinski-s-full-statement-announcing-his.pdf [https://perma.cc/7P3S-6GUN].

clerked for him or worked with him in some capacity came forward with claims of sexual harassment dating back to the 1980s.[193] A formal investigation was opened in the Ninth Circuit into Kozinski's misconduct, then subsequently transferred to the Second Circuit by Chief Justice Roberts to "ensure confidence in impartiality."[194] However, three days after the investigation and complaint were transferred, Kozinski resigned from the bench.[195] Under section 352(b)(2) of the Act, the investigation was automatically terminated due to his change in status, or an "intervening event."[196] Lastly, because he "retire[d] from the office after attaining the age and meeting the service requirements," Kozinski will continue to receive his annual pension ($217,600) for the remainder of his life.[197]

Kozinski's situation demonstrates how a complaint of misconduct moves through the disciplinary process structured under the JCDA and highlights the Act's failure to implement real accountability. Consider what could have occurred if a different party, rather than the judiciary itself, had investigated these original claims against Kozinski. Perhaps if a neutral third party comprised of nonjudicial employees had conducted Kozinski's initial 2008 misconduct investigation, their search could have uncovered evidence of his ongoing sexual misconduct. Since such misconduct was considered an "open secret" throughout the judiciary, this kind of investigation could have

193. Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), [hereinafter Zapotosky, *Prominent Appeals Court*], 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/A4Y3-RDNS]; Matt Zapotosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, WASH. POST (Dec. 17, 2017), [hereinafter Zapotosky, *Nine More Women*], https://washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html [https://perma.cc/248C-6C4M] (discussing later allegations against Kozinski, including an incident where Kozinski allegedly "grabbed and squeezed each of [a woman's] breasts as the two drove back from an event in Baltimore in the mid-1980s").

194. Totenberg, *supra* note 187.

195. *See id.*; Statement of Judge Alex Kozinski, *supra* note 192.

196. 28 U.S.C. § 352(b)(2).

197. *Id.* § 371; Joan Biskupic, *Judicial Council Takes No Action Against Former Judge Alex Kozinski*, CNN (Feb. 5, 2018, at 6:44 PM), https://www.cnn.com/2018/02/05/politics/alex-kozinski-sexual-misconduct-case-dropped [https://perma.cc/L9C2-6DTR].

potentially prevented nine additional years of abuse suffered by Kozinski's clerks and peers. It also demonstrates how in practice, judges do not suffer real consequences for their misconduct, even when such misconduct is highly egregious.

It is important to highlight these failings of the disciplinary process because they demonstrate additional ways federal judges are insulated from consequences. Even in the rare case that a clerk's complaint about abuse makes it to or through the disciplinary review process under the JCDA, Article III judges always have one more move to make to circumvent liability: removing themselves from the court, often taking full pensions along with them.[198] And as previously stated, clerks have no real path to filing claims against misbehaving judges since courts interpret the term "judicial act" to cover a broad array of a judge's activity under judicial immunity.[199] The ability of an abusive judge to end their own federal investigation under this statute only further empowers bad actors to continue harming their employees because it means there are no real consequences to deter such conduct.

II. "BRACE [YOUR]SELF FOR 'YOUR GRANDFATHER'S SEXISM'";[200] HOW THE FEDERAL JUDICIARY CREATES AN ENVIRONMENT PRONE TO ABUSE

In addition to lackluster disciplinary processes and nonexistent statutory protections, the federal judiciary also has unique workplace characteristics that when considered together create an environment especially ripe for harassment. These features are heightened in the context of clerkships and specifically within the relationship between judge and clerk.

First, Section II.A discusses the inherent power imbalance that exists between judges and clerks. Federal judges, protected by life tenure and salary assurances,[201] wield an extremely high degree of authority in comparison with the minimal power held by clerks. Because clerks are often at the very beginning of their legal careers, they are at the mercy of the judge to help mold their futures, give glowing recommendations, connect them to other judges, and establish a solid reputation in general. This

198. *See* 28 U.S.C. § 352(b)(2).
199. *See generally* Bradley v. Fisher, 80 U.S. 335, 347 (1871).
200. *Testimony of Olivia Warren*, *supra* note 3, at 4.
201. U.S. CONST. art. III, § 1.

power dynamic creates opportunities for a judge to take advantage of their clerks. Next, Section II.B discusses how clerkship confidentiality perpetuates systemic abuse within the federal judiciary. From day one of their clerkships, clerks are trained to keep secret everything they witness within a judge's chambers. Some judges demand absolute confidentiality to the point where clerks avoid coming forward with claims of misconduct in fear of breaching this strict agreement.[202] Furthermore, Section I.C discusses how the federal judiciary exhibits numerous conditions identified by the Equal Employment Opportunity Commission (EEOC) that suggest it may be a more "fertile ground for harassment."[203] Finally, Section I.D discusses how the factors described in Sections II.A–C culminate and create an environment prone to judicial abuse. This Part ends with discussing actual examples of judges found to have harassed their employees and how these allegations affected their careers.

A. The Power Imbalance Between Judges and Clerks

One of the defining features of a clerkship is the power imbalance between a clerk and their judge. To reiterate, federal judicial clerkships are amongst the most sought-after jobs for law school graduates, and one of the most impressive resume builders for hiring departments at top Big Law firms, prestigious U.S. Attorneys' offices, and law schools seeking new professors.[204] The prestige attached to federal clerkships is important in this context because it adds additional motivation for clerks to seek, accept, and stay at the job, regardless of the work environment of the chambers or the temperament of the judge. Law students are "persuaded that they are on a trajectory to bigger and better clerkships and lucrative signing bonuses, [and] are willing to endure almost any kind of abuse in the short term, in exchange for long term gains."[205] Viewed against this background, it is understandable why federal judicial clerkships create the perfect environment to foster abuse and specifically correlate with the power dynamic at the core of a judge-clerk relationship.

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202. Heidi Bond, *Judge Kozinski*, COURTNEYMILAN.COM, http://www.courtneymilan.com/metoo/kozinski.html [https://perma.cc/W42M-9ZXT] (detailing the experience of Heidi Bond, a former Kozinski clerk, in a personal blog post published during the #MeToo movement).

203. *See* Litman & Shah, *supra* note 14, at 616.

204. *See generally* Fogel et al., *supra* note 2, at 590.

205. *See Statement of Dahlia Lithwick*, *supra* note 12.

Various contributing factors create the overwhelming power imbalance between judges and their clerks. A former clerk describes the relationship between judge and clerk to be one "[of] worshipful silence" and different than any other remaining workplace relationship in America.[206] In general, judges wield an extraordinary amount of power and influence in comparison to, and over the careers of, their clerks.[207] Law clerks are often at the very beginning of their legal careers, either directly out of or a few years removed from law school.[208] On the other hand, federal judges are lifetime-tenured and presidentially appointed "titans of the profession" who have the power and connections to either propel a lawyer's career or end it before it even begins.[209] "[T]he 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."[210] Law schools add to this inherent stress and implore into the minds of future clerks about "the utmost importance of never letting the judge down," knowing their reputations are attached to the students they send to clerk.[211]

Finally, clerks experience uniquely intense pressure to withstand workplace harassment and impress their judge. This pressure exists because a judge's support is critical to a clerk's professional success not just in the years immediately following their clerkship, but throughout a clerk's entire legal career.[212] One former judge described this relationship as one where "judge and law clerk are in fact tethered together by an invisible cord for the rest of their mutual careers. The judge will forever appear on the clerk's resume as [their] first permanent professional employer . . . [and] the law clerk is the judge's emissary to the world."[213] Another judge emphasized the stakes of the

206. *See* Lithwick, *supra* note 35.

207. *See generally* Shatzman, *supra* note 35.

208. *See* Shatzman, *supra* note 1, at 111.

209. *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 116th Cong. 3 (2020) (statement of Deeva V. Shah).

210. 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/4SPC-WXHY].

211. *Testimony of Olivia Warren*, *supra* note 3, at 4.

212. Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88, 92 (2018).

213. Alexandra G. Hess, *The Collapse of the House that Ruth Built: The Impact of the Feeder System on Female Judges and the Federal Judiciary, 1970–2014*,

relationships with her clerks to an even higher degree: "The judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair."[214] This stark power differential inherently places clerks in positions of vulnerability within the judge-clerk relationship.

B. Clerkship Confidentiality

Another glaring characteristic that contributes to the abuse at the federal judiciary level is the extreme importance, and emphasis placed on, clerkship confidentiality. In general, "[t]here is an atmosphere of secrecy that surrounds clerking, one that is bolstered by a clerk's duty of confidentiality."[215] Confidentiality is a principal tenet throughout the judiciary, and one especially valued in the context of a judicial clerkship and the deliberations that take place between judges and their clerks.[216] Judges stress the need for clerkship confidentiality to such an extent that the first page of the judiciary's Law Clerk Handbook begins by describing the confidentiality requirements federal clerks must conform to: Clerks cannot "disclose confidential information received in the course of official duties, except as required in the performance of their duties."[217]

This realm of confidentiality is largely enforced by the judiciary itself, rather than by an external advisory institution.[218] The American Bar Association (ABA), which acts as the governing body of ethics for practicing attorneys, has a Judicial Division currently "attempting to draft a Model Code of Law Clerk Conduct that would parallel the Code of Judicial Conduct."[219] However, until such an ethics code is created, "judges have

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24 AM. U. J. GENDER SOC. POL'Y & L. 61, 70 (2015) (quoting Kozinski, *supra* note 156, at 1709).

214. Christopher D. Kromphardt, *Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court*, 98 MARQ. L. REV. 289, 295 (2014).

215. *See* Litman & Shah, *supra* note 14, at 615.

216. *Id.*

217. ALVIN B. RUBIN & ANTHONY DILEO, FED. JUD. CTR., LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 7 (3d ed. 2017), https://www.fjc.gov/sites/default/files/materials/35/Law_Clerk_Handbook.pdf [https://perma.cc/F8JV-LLRE].

218. *See generally* Marla Greenstein, *Judicial Ethics and Law Clerks*, ABA. (July 1, 2022), https://www.americanbar.org/groups/judicial/publications/judges_journal/2022/summer/judicial-ethics-and-law-clerks [https://perma.cc/B325-63XV].

219. *Id.*

differing expectations for law clerk conduct, especially as to law clerks' personal activities."[220] Therefore, unlike standard practicing lawyers who are bound by the confidentiality rules found in the Model Rules of Professional Conduct, a federal clerk's ethical obligations are largely dictated by the judge whom they are clerking for. For some judges, this may mean having "expectations that law clerks should be socially isolated from lawyers or free from political expression" in order to maintain their personal standards of confidentiality.[221]

While judicial confidentiality is understandably important to maintain a fair and impartial judiciary, misbehaving judges can, and have, taken advantage of the vague and far-reaching definition of confidentiality to silence clerks.[222] Former clerks have described how their judges "had so vigorously stressed the idea of judicial confidentiality" during their clerkships that even years after their clerkships concluded they were unsure whether they could be punished by the judiciary for disclosing the abuse they endured.[223] For example, a former Kozinski clerk recalled the judge telling her that "the beauty of judicial confidentiality was that it went two ways. As long as [she] never, ever told anyone what had happened in chambers with him, he would never tell anyone what had happened with [her]."[224] As a result, she recalled how "[f]or years, [she'd] been hiding a secret because [she] had been told that judicial confidentiality protected the Judge" in all respects—including his harassment.[225]

In recent years, after a slew of sexual harassment allegations arose that in part connected the abuse to confidentiality,

220. *Id.*

221. *Id.*

222. For example, Bond describes how Kozinski led her to believe that she could not disclose the harassment she suffered as a matter of clerkship confidentiality, yet nine years later he asked her to break that same confidentiality to speak to a reporter about clerking at the Supreme Court. *See* Bond, *supra* note 202 ("For years, I'd been hiding a secret because I had been told that judicial confidentiality protected the Judge—that it applied not just to chambers deliberations, but to his showing me porn in his office . . . . How dare he casually sell out the principle I'd been choking on for *years*?"); *see also* Letter from Heidi S. Bond, Former Law Clerk, U.S. Ct. App. for the 9th Circ., to the S. Comm. on the Judiciary 4 (June 11, 2018), https://www.courtneymilan.com/metoo/workinggroupletter.pdf [https://perma.cc/C576-ZXMJ] ("I was *actively misled* by a prominent and respected federal judge who regularly sent clerks to the Supreme Court, and the year after I left his chambers, became the Chief Judge of the Ninth Circuit.").

223. *See* Zapotosky, *Prominent Appeals Court*, *supra* note 193.

224. Bond, *supra* note 202.

225. *Id.*

the guidelines in the Law Clerk Handbook were finally changed to clarify that clerks could disclose information about their judge's misconduct or harassment without reprimand.[226] This change took place the same day Kozinski announced his retirement following the harassment claims asserted against him.[227] While this appears to be a step in the correct direction, it remains unclear how this change will actually benefit clerks in practice. Some critics argue that these clarifications are merely "window dressing changes to internal policies" rather than meaningful reform.[228] While the handbook is in place to protect clerks, judges themselves are still the ultimate evaluators of complaints brought against other judges. As such, clerks still face risks of retaliation when coming forward with claims because, despite what the handbook says, their complaints go to the same place in the end.

In total, clerks are constantly inundated with the importance of maintaining confidentiality and protecting the secrecy of their work.[229] This stress, coupled with the other unique features of a clerkship that already make reporting misconduct inherently difficult, compounds to make the risks of reporting judicial behavior for a clerk even greater.

C. Traditional Workplace Harassment Indicators in the Third Branch

Clerkships in the federal judiciary also maintain traditional characteristics that the EEOC has identified as being indicative of workplaces at higher risk of harassment.[230] In 2016, the

226. *See* Litman & Shah, *supra* note 14, at 615.

227. Tony Mauro, *Newly Amended Law Clerk Handbook Affirms Harassment Complaints Are Permitted*, NAT'L L.J.: NEWS (Dec. 19, 2017, at 12:03 AM), https://www.law.com/nationallawjournal/2017/12/19/newly-amended-law-clerk-handbook-affirms-harassment-complaints-are-permitted [https://perma.cc/AFJ6-NL95].

228. Aliza Shatzman, *Congress To Federal Judges: You Are Not Above the Law*, ABOVE THE L.: GOV'T (Sep. 30, 2024, at 4:42 PM), https://abovethelaw.com/2024/09/congress-to-federal-judges-you-are-not-above-the-law [https://perma.cc/M74Z-39H6].

229. *See supra* Section II.B.

230. *See* CHAI R. FELDBLUM & VICTORIA A. LIPNIC, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, U.S. EQUAL EMP. OPPORTUNITY COMM'N 25 (2016), https://www.eeoc.gov/sites/default/files/migratedfiles/eeoc/taskforce/harassment/report.pdf [https://perma.cc/NQ38-7VS2] (identifying risk factors in a workplace environment that "are the most powerful predictors of whether harassment

EEOC's Task Force on the Study of Harassment in the Workplace released a report discussing structural factors that may increase the likelihood of harassment in employment settings.[231] Specifically, the report identified twelve factors that "are the most powerful predictors of whether harassment will happen" and subsequently concluded that "the presence of one or more [of the] risk factors suggests that there may be fertile ground for harassment to occur."[232] The federal judiciary exhibits five of the EEOC's noted conditions, and often in heightened forms. As outlined by Leah Litman and Deevah Shah in their article *On Sexual Harassment in the Judiciary*, the EEOC's indicators of workplace harassment found in the federal judiciary are: (1) a significant power disparity, (2) overall isolation, (3) decentralization, (4) high-value employees, and (5) homogeneity.[233]

1. Significant Power Disparity and Isolated Workspaces

As discussed in Section II.A, there are vast power differentials between judges and their clerks built into the federal judiciary system.[234] In conjunction with this power differential and as highlighted by the EEOC, judicial clerks operate within a hierarchical structure where individual employees are generally kept isolated from other chambers, even those in the same district.[235] The EEOC states that in isolated workplaces, "[h]arassers have easy access to [isolated] individuals, and there generally are no witnesses to the harassment."[236] This isolation is magnified in the bounds of a judicial chamber. Clerks tend to work in separate offices and under the intimate supervision of a single judge.[237] Most judges keep small staffs who are generally separated from all other chambers by locked doors and from other clerks in individual offices.[238] This separation perpetuates

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will happen"); Litman & Shah, *supra* note 14, at 615–20 (discussing how several of these factors identified by the EEOC exist in the federal judiciary and function between judges and clerks).

231. FELDBLUM & LIPNIC, *supra* note 230.
232. *Id.* at 25.
233. *See* Litman & Shah, *supra* note 14, at 615–20.
234. Gertner, *supra* note 212, at 91.
235. *Id.*
236. FELDBLUM & LIPNIC, *supra* note 230, at 29.
237. *See* Litman & Huq, *supra* note 19.
238. Shatzman, *supra* note 35, at 188.

the isolation discussed by the EEOC, especially when judges may forbid their clerks from interacting with clerks of other judges in the same courthouse.[239] This breeds a culture that allows potential misconduct to thrive and where clerks have no peers to turn to for help.[240]

2. Decentralized Workplaces

In addition to federal clerks' "degree of isolation from people other than each judge's own staff," judicial culture in general is characterized by decisional and institutional independence and decentralization in governance.[241] Stated differently, in addition to clerks of different judges having limited interactions, judges themselves do not have any oversight over each other in monitoring their clerks. Judges do not interact with the clerks of other judges, and vice versa. This creates an "almost entirely decentralized" workplace in the federal judiciary.[242] One former clerk compared it to a fiefdom system, where each chamber ran on its own rules and rumors about abusive judges were never spoken about intra-judicially.[243] Therefore, judicial mistreatment of clerks is kept insulated within each judge's chambers and is unquestioned by other judges "[b]ecause each judge is allowed to run chambers as he sees fit, [and] no one question[s] the[ir] practices."[244] Coupled with the high turnover rate of law clerks every one to two years, judges have virtually unfettered

239. Former judge Alex Kozinski regularly forbade his clerks from interacting with clerks from other chambers. *Id.* at 188 n.101; *see also* Bond, *supra* note 186 (discussing former Judge Kozinski's sexual harassment of clerks by sending them sexually explicit jokes from a gag list). In the Federal Judicial Center's ethics handbook for clerks, *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks*, the judiciary instructs clerks that they are forbidden from discussing "any confidential case-related information with clerks or other judicial employees who do not work for your judge, unless your judge explicitly gives you permission to do so. This includes information about past cases or your judge's decision-making process in a particular case. This prohibition extends to appellate clerks who work for different judges on the same panel." FED. JUD. CTR., MAINTAINING THE PUBLIC TRUST: ETHICS FOR FEDERAL JUDICIAL LAW CLERKS 8 (4th ed. 2013).

240. *See* Shatzman, *supra* note 35, at 188.

241. Fogel et al., *supra* note 2, at 654.

242. *See* Litman & Shah, *supra* note 14, at 618.

243. *Id.* at 619.

244. *Id.* at 618.

discretion to treat their clerks as they see fit without the watchful eye of their colleagues.[245]

3. High-Value Employees

The EEOC has also recognized that workplaces with particularly prominent employees are at higher risk of abuse because higher management "may be reluctant to challenge the behavior of their high value employees."[246] This is clearly replicated in the federal judiciary by its disciplinary processes in which chief justices review the complaints made against the other judges in the court they preside over.[247] Chief justices may be reluctant to publicly challenge or question the behavior of the judges below them, potentially in an attempt to maintain the court's reputation, which is reflected by the data showing the extremely low percentage of complaints actually investigated.[248]

4. Homogenous Workplaces

Finally, the EEOC recorded findings that "harassment is more likely to occur when there is a lack of diversity in the workplace."[249] This is especially prevalent in the federal judiciary's clerkship hiring process. Studies show that federal law clerks tend to be white, male, and mostly from a handful of top law schools.[250] "As law students and the profession generally have diversified, judicial clerks and the judiciary haven't."[251]

Taken together, the presence of these indicators demonstrates how the federal judiciary is "an environment that is ripe for harassment and disincentivizes reporting."[252] As one scholar

245. Jaime A. Santos, *When Justice Behaves Unjustly: Addressing Sexual Harassment in the Judiciary*, 54 CT. REV. 156, 157 (2018) ("In many jurisdictions, there is significant turnover in chambers, with new clerks joining every year or two.").

246. FELDBLUM & LIPNIC, *supra* note 230, at 27.

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

248. *See* Biskupic, *supra* note 43.

249. FELDBLUM & LIPNIC, *supra* note 230, at 26.

250. *NALP Bulletin, Racial/Ethnic Representation of Class of 2019 Judicial Clerks*, NAT'L ASS'N FOR L. PLACEMENT (Feb. 2021), https://www.nalp.org/0221research [https://perma.cc/ES8Y-Z4NG]; Aliza Shatzman, *Clerkships Are a Pipeline to the Bench. We Need to Diversify Them*, BL: U.S. L. WEEK (Sep. 14, 2023, at 2:00 AM), https://news.bloomberglaw.com/us-law-week/clerkships-are-a-pipeline-to-the-bench-we-need-to-diversify-them [https://perma.cc/BBW5-4FYF].

251. Shatzman, *supra* note 250.

252. *See* Litman & Shah, *supra* note 14, at 620.

described, the federal judiciary, and especially individual judicial chambers, retain many of "the hallmarks of a workplace environment that makes harassment *more* likely, and that makes speaking up against harassment nearly impossible."[253] These common features shared across the branch illustrate how the federal judiciary's inherent structure tends to reinforce a systemic environment where judges at the top of their hierarchy may freely mistreat their clerks and staff.

D. Exemplification of the Issue

The combination of the EEOC's identified characteristics, which are to a degree unique to the federal judiciary, creates a perfect storm for clerkship abuse by judges. Taken together, the lack of judicial accountability, the extreme power disparity between judges and clerks, the emphasis on clerkship confidentiality, and the pressure to complete a clerkship regardless of the potential negative effects, all discourage clerks from bringing claims of mistreatment. Clerks are unable to hold misbehaving judges accountable, which in turn allows for these systems of abuse to thrive. In addition, legislation governing disciplinary processes for federal judges is dry, convoluted, and can be difficult to piece together. Therefore, this Section aims to illustrate how these processes work in practice and how they allow judges to avoid accountability for their misconduct. This discussion takes place through the lens of five former federal judges accused of sexual misconduct by their employees.

1. Alex Kozinski: Ninth Circuit Court of Appeals

As previously stated, former judge Alex Kozinski is one of the most prominent judges publicly revealed to be abusive to his staff and peers in the last decade. In 2017, a few brave former clerks of the judge came forward alleging severe sexual harassment they had experienced while working in Kozinski's chambers.[254] Ultimately, the number of women who came forward with their additional experiences of abuse by the judge was in the double digits.[255] These women described an array of horrific

253. Santos, *supra* note 245, at 157.
254. Crump, *supra* note 209.
255. *See* Zapotosky, *Nine More Women*, *supra* note 193.

instances where they were subjected to harassment while working as clerks, employees, and even clerks of other judges.[256]

Former Kozinski clerk Heidi Bond was repeatedly summoned to the judge's chambers alone to look at pornographic images and asked "whether [the images] turned [her] on."[257] As the judge's sole female clerk, Bond described her "endless worrying" about whether these advances would turn physical, and if they did, "if [she] would be able to say no."[258] She also recounted being shown Kozinski's "knock chart" which listed all the names of women he had had sex with while he was in college.[259] He referred to her jokingly as his slave and told her he controlled what she read, what she wrote, and when she ate, slept, and used the bathroom.[260] After particularly violent outbursts, Kozinski would approach Bond to seek assurance that she still loved him and would proceed to kiss her cheek.[261]

It took years for Bond to come forward with her mistreatment, in large part because Kozinski had engrained the idea of clerkship confidentiality so deeply into her psyche that she was terrified to even tell close friends, therapists, or family members for fear of being punished.[262] Kozinski consistently professed how clerks "owe a bond of loyalty to their judges" and told his employees that means "whatever one learned inside the Court—whether or not it was covered by the duty of confidentiality—would not be repeated on the outside, especially if it tended to demean the Court, the Justices, or fellow clerks."[263]

It is difficult to overstate the degree of Kozinski's heinous behavior. In a different instance, one former clerk came forward and described a situation at a legal reception in the presence of various other colleagues where Kozinski profusely discussed the idea of her exercising naked in the Ninth Circuit's gym.[264] Other women recounted occurrences where Kozinski approached them with unwanted "bear hug[s]," kissed them on their cheeks and lips, stared at their breasts, and impermissibly touched and

256. *Id.*
257. Bond, *supra* note 202.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *See* Zapotosky, *Prominent Appeals Court*, *supra* note 193.

pinched their legs and sides.[265] One person even recounted watching Kozinski touch a law student's breasts at a legal reception under the guise of adjusting her nametag.[266] Other women described having to listen unwillingly to Kozinski talk about having sex with his wife and how "it still work[ed]."[267] And this behavior did not end with clerks.[268] A former U.S. Court of Federal Claims judge came forward to describe a time when "Kozinksi grabbed and squeezed each of her breasts as the two drove back from an event . . . after she had told him she did not want to stop at a motel and have sex."[269] These are only a few of the many stories that women harassed by Kozinski brought forward.[270]

Kozinski resigned from the bench in 2017 and will continue to receive his full pension from the federal judiciary for the remainder of his life as mentioned in Section II.A.[271] Despite the public outcry, Kozinski did not face any further civil or criminal repercussions resulting from his actions.[272] In fact, Kozinski has since appeared before his former colleagues on the Ninth Circuit as a private attorney.[273]

2. Stephen Reinhardt: Ninth Circuit Court of Appeals

In early 2020, former Ninth Circuit clerk Olivia Warren testified before Congress and the House Judiciary Committee to recount her experience of sexual harassment while clerking for

265. Zapotsky, *Nine More Women*, *supra* note 193 (describing Kozinski giving bear hugs, kissing women on the lips, staring at breasts, pinching women's legs and sides); *see* Lithwick, *supra* note 35 (referring to Kozinski's conduct, including "kiss[es] on the cheek that always lasted a few seconds too long").

266. *See* Zapotosky, *Nine More Women*, *supra* note 193; Lithwick, *supra* note 35; Crump, *supra* note 209.

267. Zapotosky, *Nine More Women*, *supra* note 193.

268. *Id.*

269. *Id.*

270. *See* Lithwick, *supra* note 35; Zapotosky, *Prominent Appeals Court*, *supra* note 193; Crump, *supra* note 209; Zapotosky, *Nine More Women*, *supra* note 193; *see also In re* Complaint of Judicial Misconduct, 575 F.3d 279 (3d Cir. 2009) (describing the claims of misconduct brought against Kozinski in 2008).

271. *See Retiring to Avoid Consequences*, *supra* note 178.

272. *See supra* Section II.C.

273. Patricia Barnes, *He's Back. After Resigning, Federal Judge Accused of Sexual Harassment Returns as a Practitioner*, FORBES, https://www.forbes.com/sites/patriciagbarnes/2019/12/06/hes-back-after-resigning-federal-judge-accused-of-sexual-harassment-returns-as-a-practitioner [https://perma.cc/Q5LY-X3VA] (last updated Dec. 7, 2019, at 12:37 AM).

Stephen Reinhardt.[274] On the bench, Reinhardt was revered as a "liberal lion" and a champion of indigent rights.[275] But on her first day, Warren was immediately warned by an outgoing clerk to "brace [her]self for 'your grandfather's sexism.'"[276] Warren described how the judge consistently berated her for her physical appearance and her relationship with her husband; she was routinely told that she was a woman "who no man would marry."[277] He also constantly asked her to judge the applications he received for future clerks based on their physical appearance, kept a wall of photos of himself with his "pretty" clerks, and repeatedly made references to Warren's breasts.[278] After Warren testified, over seventy other former Reinhardt clerks offered public support of her testimony, many agreeing that they either experienced or witnessed similar harassing behavior on behalf of the judge.[279]

Reinhardt died while on the bench, simultaneously ending his time in the federal judiciary and Warren's clerkship.[280] Because reports of Reinhardt's abuse surfaced after his death, he did not face repercussions while alive and on the bench. Posthumously, despite Warren's testimony to Congress, Reinhardt is still regarded as one of the most prominent judges to have ever served the Ninth Circuit; his Wikipedia page[281] lists a single sentence referring to Warren's reports of sexual misconduct, and even pages for the American Civil Liberties Union[282] and the American Constitution Society[283] maintain tributes to Reinhardt for his revered time on the bench.

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274. *See Testimony of Olivia Warren*, *supra* note 3.

275. *Id.* at 13.

276. *Id.* at 4.

277. *Id.* at 7.

278. *Id.* at 6.

279. Kathryn Rubino, *70+ Former Reinhardt Clerks Come Out in Support of Sexual Harassment Accuser*, ABOVE THE L. (Feb. 21 2020, at 10:02 AM), https://abovethelaw.com/2020/02/reinhardt-clerks/2 [https://perma.cc/7AGB-WT5X].

280. *See Testimony of Olivia Warren*, *supra* note 3, at 4, 14.

281. *Stephen Reinhardt*, WIKIPEDIA, https://en.wikipedia.org/wiki/Stephen_Reinhardt [https://perma.cc/L8K6-VYQK] (last updated Jan. 28, 2025, at 2:34 PM).

282. Ben Wizner, *The Exile: In Memory of Judge Stephen Reinhardt*, ACLU (Apr. 4, 2018), https://www.aclu.org/news/civil-liberties/exile-memory-judge-stephen-reinhardt [https://perma.cc/7CCA-TWDV].

283. Erwin Chemerinsky, *Remembering Judge Stephen Reinhardt*, AM. CONST. SOC'Y (Apr. 2, 2018), https://www.acslaw.org/expertforum/remembering-judge-stephen-reinhardt [https://perma.cc/R4PW-N3M9].

3. Joshua Kindred: District of Alaska

In July 2024, District Judge Joshua Kindred resigned from the bench following an investigation into his chambers.[284] Twenty-one witnesses, which included almost all his former and current clerks, provided testimony to investigators about his creation of a hostile work environment, consistent violations of judicial ethics codes, and habit of bringing illegal drugs into his chambers.[285] Additional claims arose that Kindred sexually assaulted a former clerk on multiple occasions. The clerk described how the former judge had "kissed her and grabbed her buttocks."[286] In a second instance, the same clerk recounted the judge grabbing her while working with the judge at his temporary apartment.[287] The report on Kindred described how his clerks "suffered in silence" and were deeply reluctant to work with investigators, presumably out of fear of retaliation or reputational harm within the court.[288] This investigation also revealed he had "fomented a sexualized relationship with [a] law clerk throughout her clerkship, continued to have a sexualized relationship with her after she became an AUSA . . . and lied about it repeatedly over the course of these proceedings."[289] Kindred's inappropriate behavior from the bench did not end with his own staff. The Federal Public Defender's Office also allegedly identified "nearly two dozen criminal cases they claim Kindred had a conflict of interest due to relationships with attorney general's office prosecutors."[290] The Federal Public Defender's

284. Carrie Johnson, *Alaska Federal Judge Resigns After Investigators Say He Created a Hostile Workplace*, NPR (July 9, 2024, at 5:57 PM), https://www.npr.org/2024/07/09/g-s1-8991/joshua-kindred-judge [https://perma.cc/743Q-9K2J].

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*; *see also* Aliza Shatzman, *LAP Calls for Sweeping Reform and Real Accountability Following Resignation of Joshua Kindred*, LEGAL ACCOUNTABILITY PROJECT (July 10, 2024), https://www.legalaccountabilityproject.org/press-releases/blog-post-title-one-4hx79-82lj8-sk7nl-aarg5-prrc8-tcgfy-glm2x [https://perma.cc/H7EQ-B9CM].

289. News Release, U.S. Cts. for the Ninth Circuit, Judicial Conduct and Disability Complaint Number 22-90121 23 (July 8, 2024), https://cdn.ca9.uscourts.gov/datastore/ce9/2024/22-90121%20News%20Release%20&%20Order%20and%20Certification.pdf [https://perma.cc/B4F9-KLB9].

290. Steve Kirch, *Resigned Alaska Federal Judge Had Conflict of Interest in 23 Criminal Cases, Federal Prosecutors Say*, ALASKA'S NEWS SOURCE (July 18, 2024, at 9:21 PM), https://www.alaskasnewssource.com/2024/07/19/resigned-alaska-

investigation allegedly uncovered that "Kindred had inappropriate relations with at least three assistant U.S. Attorneys," including prosecutors that practiced before him.[291]

Kindred resigned from the court under the age of sixty-five and only after four years on the bench, so he does not receive his lifetime pension.[292]

4. Walter Smith: Western District of Texas

Former judge Walter Smith was a prominent Texas jurist, appointed by President Reagan to a new federal district court located in Waco, Texas in the early 1980s.[293] In 1998, one of Smith's clerks alleged that the federal judge cornered her in his chambers and asked her to have sex.[294] The clerk described the incident, where the judge "put his arms around [her] and kissed [her] . . . stuck his tongue down [her] throat, and he pressed himself against [her]."[295] The following day, Smith proceeded to send her flowers.[296] The clerk alerted her supervisors, and her complaint worked its way up to a regional boss who then reached out to the district court chief to complain about the incident and to discipline Smith.[297] In response, the district court chief said "[W]hat do you want me to do about it? What exactly do you want me to do about this?"[298] At the time, no further action to reprimand Smith was reported. Other complaints about Smith engaging in misconduct had been raised during his time on the bench but were similarly discarded.[299]

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federal-judge-had-conflict-interest-23-criminal-cases-federal-prosecutors-say [https://perma.cc/7JSB-NNHH].

291. *Id.*

292. *See* Ivan Pereira, *Trump-Appointed Judge Resigns Following Federal Probe into Sexual Misconduct Claims*, ABC NEWS (July 10, 2024, at 1:22 PM), https://abcnews.go.com/Politics/trump-appointed-judge-resigns-federal-probe-sexual-misconduct-claims/story?id=111786937 [https://perma.cc/SM35-VLW7] (noting that Kindred was appointed in 2020 and resigned four years later in 2024 at age 46); 28 U.S.C. § 371(a).

293. Paul J. Gately, *Embattled Waco Federal Judge Retires from Bench After 32 Years*, KWTX (Sep. 19, 2016, at 2:25 PM), https://www.kwtx.com/content/news/Embattled-Waco-federal-judge-retires-from-bench-after-32-years-394020901.html [https://perma.cc/AP63-AR64].

294. Biskupic, *supra* note 43.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. Smith had also been accused of "drinking during the court day" while he was adjudicating from the bench. *Retiring to Avoid Consequences*, *supra* note 178.

Almost two decades later, an unrelated investigation into Smith resurfaced the 1998 complaint.[300] The investigation uncovered numerous instances where Smith engaged in sexual harassment. As a result, Smith was banned from hearing new cases for a year and ordered to enroll in sensitivity training, but the lawyer who brought the case was "not satisfied with either the scope of the investigation or the penalty, so he appealed and a second investigation was launched."[301] After this second investigation was opened, Smith retired from the bench, automatically terminating any further inquiries into his past behavior.[302]

Smith was over the age of sixty-five at the time he retired and served on the bench for over ten years, so he will continue to receive $203,100 every year for the remainder of his life.[303]

5. Richard Cebull: District of Montana

Former U.S. District Chief Judge Richard Cebull was investigated after he was caught "sending a racist email about President Obama from his courthouse chambers."[304] The Judicial Council of the Ninth Circuit subsequently opened a misconduct investigation into the judge and found hundreds of inappropriate emails sent from the judge's federal account.[305] The Associated Press reported that the judge "sent emails to personal and professional contacts that showed disdain" for women and other minority groups.[306] The Council also found that "[a]pproximately the same number of emails concerned women and/or

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One such accusation included a complaint against him for appearing intoxicated during a death penalty case. Motion for Relief from Judgment at 2 n.1, United States v. Bernard, No. W-99-CR-70(2) (W.D. Tex. Nov. 30, 2017).

300. Biskupic, *supra* note 43.

301. *Id.*

302. *Id.*

303. Guillermo Conteras, *Suspended for Sexual Misconduct, Retiring Federal Judge to Get Paid for Life*, S.A. EXPRESS NEWS (Sep. 20, 2016, at 9:25 PM), https://www.expressnews.com/news/local/article/Suspended-for-sexual-misconduct-retiring-federal-9235096.php [https://perma.cc/ZG48-ZMSK].

304. Steve Benen, *Federal Judge Sent Hundreds of Racist Emails*, NBC NEWS (Jan. 20, 2014, at 7:46 AM), https://www.nbcnews.com/id/wbna54125276 [https://perma.cc/5B27-ZBEB].

305. *See id.*

306. Cebull also sent emails with hateful rhetoric toward people of color, certain religious faiths, and different sexual orientations, among others. Matt Volz, *Federal Judge Sent Hundreds of Bigoted Emails*, ASSOCIATED PRESS, https://apnews.com/events-general-news-united-states-presidential-election-0a3b4ee6fc3340b8aac612202ee264aa [https://perma.cc/3XCX-46PQ] (last updated Jan. 17, 2024, at 6:17 PM).

sexual topics and were disparaging of women."[307] The Ninth Circuit "issued a public reprimand, instructed that the judge receive no new cases for 180 days, ordered him to complete [a] new round of judicial training, and told the judge he must issue an apology that acknowledged 'the breadth of his behavior.'"[308] However, none of these punishments came to fruition because Cebull resigned the same month the findings were released.[309]

Originally, the Ninth Circuit determined that the results of the investigation were "moot" and abandoned the case because of Cebull's resignation.[310] The Ninth Circuit judge who decided to abandon the investigation was none other than Alex Kozinski, discussed above, who later resigned from the bench following his own sexual misconduct scandals.[311] However, the Ninth Circuit's Judicial Council overruled Kozinski's decision to abandon the order and went forward with the investigation, finding the hundreds of inappropriate emails that Cebull had sent during his tenure on the bench.[312] The Ninth Circuit's Judicial Council released an order in March 2013 finding Cebull in violation of ethics codes and issued a public reprimand.[313] Despite this finding, the Council did not take additional steps toward impeachment because its order found that Cebull did not violate state or federal law.[314]

Cebull was over the age of sixty-five when he retired and served on the bench for over ten years, so he will continue to receive his $174,000 salary every year for the remainder of his life.[315]

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307. John Adams, *Former Judge Violated Ethics Rules, Panel Rules*, USA TODAY, https://www.usatoday.com/story/news/nation/2014/01/17/judge-montana-cebull-racist-obama/4592315 [https://perma.cc/UBA5-4NZ2] (last updated Jan. 17, 2024, at 7:40 PM).

308. Benen, *supra* note 304.

309. *Id.*

310. Ama Sarfo, *Order Over Judge's Racist Obama Email Is Moot, 9th Circ. Says*, LAW360 (May 14, 2013, at 12:45 PM), https://www.law360.com/articles/441292/order-over-judge-s-racist-obama-email-is-moot-9th-circ-says [https://perma.cc/52QX-EF9K].

311. John S. Adams, *Federal Judge Who Sealed Cebull File Retires Amid Sexual Misconduct Allegations*, MONT. FREE PRESS (Dec. 18, 2017), https://montanafreepress.org/2017/12/18/kozinski-cebull-misconduct [https://perma.cc/79CR-NWGK].

312. *Id.*

313. *In re* Complaint of Judicial Misconduct, 751 F.3d 611, 614 (Comm. on Jud. Conduct & Disability of the Jud. Conf. of the U.S. 2014).

314. *Id.* at 624.

315. Adams, *supra* note 311.

These five examples demonstrate how the aforementioned factors identified by the EEOC (significant power disparities and isolated workspaces, decentralized workplaces, high-value employees, and homogenous workplaces) function in the federal judiciary to create an environment prone to workplace misconduct. All together, the combination of a "lack of workplace protections, lack of outside oversight over judges' dealings with clerks or training on management style, and decentralized nature of the judiciary" has allowed the judiciary to "turn[] a blind eye to judicial misconduct for decades. And law clerks—the least powerful members of the judicial branch—are typically silenced due to fear of reputational harm or retaliation, and self-interest."[316] Notably, the judges discussed in this Section are only a handful of judicial officers who have been the focus of investigations related to mistreatment of clerks and other judiciary employees. Similar stories may be found from various circuits and courts around the country. It is also worth noting that the majority of these examples are from the Ninth Circuit, which is one of the most prominent feeder courts to the Supreme Court. This is especially relevant for this Note as it underscores the relationship between feeder courts and potential clerk mistreatment.

III. THE GENDERED PIPELINE TO SUPREME COURT CLERKSHIPS

This Part discusses how the aforementioned factors described in Part I and Part II come together not only to perpetuate judicial mistreatment, but also to create a gendered pipeline to Supreme Court clerkships. Part I discussed how judicial immunity, self-policing systems, and statutory loopholes work together to insulate judges from any liability for their misbehavior. Part II discussed unique characteristics of clerkships and of the judiciary that create a workplace prone to mistreatment. This Note argues that these elements work in tandem to contribute to a gendered pipeline to clerkships at the highest level—the Supreme Court.

First, Section III.A defines "feeder courts" and discusses their critical role in creating this pipeline. When judges in these courts have reputations for harassing or mistreating their clerks, it may cause fewer women to seek clerkships in their chambers. Next, Section III.B explores the concept of "whisper

316. *See* Shatzman, *supra* note 228.

networks" as a method for women to inform other women of which judges to avoid. Fundamentally, this Section takes the position that because there are no practicable remedies offered to injured clerks, women avoid clerkship positions for certain feeder judges or courts that hold reputations in the whisper network. Women avoid these positions despite their prestige and proximity to the Supreme Court in case they experience harassment, because they would have no way to report it or seek meaningful remedies.[317] Therefore, this Note argues that because there are fewer women in these feeder court clerkships, there are fewer female clerks available to "feed" to the Supreme Court—thus creating the gendered pipeline.

A. Defining the Feeder Court Problem

The combination of judicial insulation and immunity with the inherent vulnerabilities of law clerks has created a system where abuse can transpire without repercussion. This abuse creates the most significant and sinister impact at the feeder court level.[318] This is because feeder courts are essentially stepping stones to more prestigious legal clerkships and as a result, mistreatment in such courts can be barriers to reaching these higher positions.[319] This may be reflected by the lower percentage of women who apply to such clerkships compared to their male counterparts.

Feeder courts, and feeder judges, are federal appellate courts and judges that send a disproportionately high number of clerks to clerk at the Supreme Court level.[320] Statistically, Supreme Court justices are more likely to pull their clerks from these courts or these specific judges.[321] While having a JD and

317. *See* Lithwick, *supra* note 35.

318. *See* Shatzman, *supra* note 35, at 184.

319. *See* Kaye & Gastwirth, *supra* note 38, at 418 ("Certain lower court clerkships seem to be much more reliable stepping stones to the Supreme Court. The link between particular Justices and specific lower court judges results from various interrelated factors, including personal relationships, the quality of the lower court clerkship, the reputation of the judge, and ideological congruence between judge and justice.") (internal quotations omitted).

320. *See generally* Tracey E. George et al., *Some Are More Equal Than Others: U.S. Supreme Court Clerkships*, 123 COLUM. L. REV. F. 146, 161–62 (2023).

321. Josh Blackman, *Which Circuit Judges and Circuit Courts Feed the Most SCOTUS Clerks?*, REASON: VOLOKH CONSPIRACY (Aug. 12, 2021, at 5:42 PM), https://reason.com/volokh/2021/08/12/which-circuit-judges-and-circuit-courts-feed-the-most-scotus-clerks [https://perma.cc/JU6Z-VR37].

American citizenship are the only formal requirements to be a Supreme Court clerk, over the last century, clerking at the federal circuit courts has become an informal prerequisite for applicants.[322] Hence, this additional quasi-requirement of federal appellate experience has created a feeder network of federal appellate courts.[323] This phenomenon can be best understood as Supreme Court justices "essentially outsourcing the winnowing process [of applicants] to lower court judges," coupled with the desire of these judges to send a significant number of their clerks to the Supreme Court.[324] In practice, the feeder system defines and creates the highly qualified applicant pool for Supreme Court justices. The data show that women consist of only around one-third of this applicant pool.[325]

In general, there is already a gendered pipeline for men to Supreme Court clerkships.[326] Statistically, men outnumber women in these prestigious positions (this number becomes even more disproportionate when factoring in racial considerations) even though women outnumber men in terms of law school enrollment.[327] In a study conducted of clerks from 1980 to 2020, men made up 69 percent of the Supreme Court's clerks, and "even in the most recent years, men comprised nearly 60% of [Supreme] Court clerks, while women comprised the . . . majority of law school students."[328] In the years following this study, this pattern held relatively steady: In 2021, the split was 51

322. Sarah Isgur, *The New Trend Keeping Women Out of the Country's Top Legal Ranks*, POLITICO: L. & ORD. (May 4, 2021, at 4:30 AM), https://www.politico.com/news/magazine/2021/05/04/women-supreme-court-clerkships-485249 [https://perma.cc/UJ7B-QGRF].

323. *See id.*

324. *See* Hess, *supra* note 213, at 72.

325. *Id.* at 104.

326. *See Law School Rankings by Female Enrollment (2023)*, ENJURIS, https://www.enjuris.com/students/law-school-women-enrollment-2023 [https://perma.cc/ZF3E-AM2Y] ("Women outnumbered men in law school classrooms across the United States for the eighth year in a row in 2023, according to the most recent data from the American Bar Association (ABA)."); *Profile of the Legal Profession 2024*, *supra* note 15 ("In 2016, women became a majority of law school students," and as of 2024, 56.2 percent of law students were women). *See generally* Mauro, *supra* note 7.

327. *Id.*

328. Michael T. Nietzel, *"Show Us Your Pedigree." The Elite College Pipeline to the Supreme Court*, FORBES (Feb. 6, 2023, at 9:56 AM), https://www.forbes.com/sites/michaeltnietzel/2023/02/06/show-us-your-pedigree-the-elite-college-pipeline-to-the-supreme-court [https://perma.cc/A4ZL-JHAX].

percent male and 49 percent female,[329] and then split more divergently in 2022 at 66 percent male and 34 percent female.[330] In 2023, the split was 61 percent male and 39 percent female.[331] In 2024, the split was 58 percent male and 42 percent female.[332] As of the most recent data published in 2025, the gap has narrowed slightly to 53 percent male and 47 percent female.[333] Even as representation has seemingly evened out, however, "[m]en are still overrepresented in the ranks of SCOTUS clerks, since they represented only 42% of incoming law students last year but constitute 53% of clerks."[334]

There are many reasons proposed for this disparity: men having more financial and network resources, more women foregoing the opportunity to clerk to start a family, and the possibility that "Justices who hire fewer women give more weight to certain factors that favor men," to name a few.[335] Lastly, studies show that the pool of "superfeeders," judges who send an especially high number of clerks to the Supreme Court, are all male.[336] Notable superfeeders from 2009 to 2013 include now-Supreme Court Justices Brett Kavanaugh and Neil Gorsuch, along with Merrick Garland, Alex Kozinski, Stephen Reinhardt, and J. Harvie Wilkinson, III, among others.[337] A more recent study from 2019 to 2025 showed that out of the top thirteen superfeeders, only three were women.[338]

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329. David Lat, *Supreme Court Clerk Hiring Watch: Meet the October Term 2023 SCOTUS Clerks*, ORIGINAL JURISDICTION (Aug. 31, 2023), https://davidlat.substack.com/p/supreme-court-clerk-hiring-watch-d9a [https://perma.cc/AK5V-K52U].

330. *Id.*

331. *Id.*

332. *Id.*

333. David Lat, *New SCOTUS Clerk Class Has More Women, Experience Than in 2000*, BL: U.S. L. WEEK (July 30, 2025, at 2:30 AM), https://news.bloomberglaw.com/us-law-week/new-scotus-clerk-class-has-more-women-experience-than-in-2000 [https://perma.cc/2A3U-BG69].

334. *Id.*

335. Kaye & Gastwirth, *supra* note 38, at 432; *see also* Isgur, *supra* note 322.

336. Dahlia Lithwick, *Who Feeds the Supreme Court?*, SLATE (Sep. 14, 2015, at 10:36 AM), https://slate.com/news-and-politics/2015/09/supreme-court-feeder-judges-men-and-few-women-send-law-clerks-to-scotus.html [https://perma.cc/HK4R-ZQW8].

337. David R. Stras, *Secret Agents: Using Law Clerks Effectively*, 98 MARQ. L. REV. 151, 157 (2014).

338. *See* Lat, *supra* note 329; *see also* Avalon Zoppo, *These Judges Feed the Most Law Clerks to the U.S. Supreme Court*, NAT'L L.J. (July 19, 2023), https://www.law.com/nationallawjournal/2023/07/19/katsas-sutton-top-list-of-judges-who-feed-most-law-clerks-to-supreme-court [https://perma.cc/N8ZU-9QYZ].

In addition to these factors, the gender disparity in clerks at the feeder court level is a significant factor contributing to the gender disparity at the Supreme Court level. Even before clerks go through feeder courts to get to the Supreme Court, the pipeline first travels through a very small number of schools.[339] Studies have shown that even when looking at the nation's most elite law schools responsible for consistently producing the highest number of Supreme Court clerks, there is a stark difference between the percentages of female students who go on to clerk at feeder courts compared to male students.[340] In a study from 1989 to 2005, research showed that 30 to 40 percent of major law review officers at these schools were women and 40 percent of the total student population who went on to federal appellate clerkships in general were women. Despite these numbers, only 32 percent of the clerks from these schools that went specifically to feeder court clerkships, which pave the way to the Supreme Court, were women.[341] "These figures establish that women at elite law schools do not flow through the pipeline . . . at the same rate as men and that the differential flow into the feeder clerkships is especially pronounced."[342]

B. The Feeder Court, the Whisper Network, and the Discouragement of Women to Seek Feeder Court Positions

While a variety of factors create the gendered pipeline to Supreme Court clerkships, this Note argues that a significant contributor is sexual harassment at the feeder court level. And because there are virtually no remedies offered to clerks who experience these injuries, this causes women to avoid clerkship positions at the feeder court level despite the valuable opportunities they may bring.[343] Academics have noted the issue of

339. *See* Kaye & Gastwirth, *supra* note 38, at 417 ("The Supreme Court applicant pool comprises only a small fraction of all the federal clerks, dominated by courts of appeals' clerks from the feeder schools."); George et al., *supra* note 320, at 148; Adam Feldman, *The Ultimate Guide to Supreme Court Clerk Pipelines*, LEGALYTICS (Sep. 11, 2025), https://legalytics.substack.com/p/the-ultimate-guide-to-supreme-court [https://perma.cc/7R7X-BYTB].

340. *See* Kaye & Gastwirth, *supra* note 38, at 414–20.

341. *Id.*

342. *Id.* at 432–33.

343. *See* Lithwick, *supra* note 35 (describing Dahlia Lithwick's personal experiences with Kozinski and her "thinking about those who opted not to apply for clerkships with him, sidestepping an opportunity to get within close range of a coveted

"female prospective clerks avoiding misbehaving judges [and] thereby missing out on valuable job opportunities."[344] These valuable job opportunities are most notably Supreme Court clerkships. In turn, this Note argues this dynamic perpetuates the gendered pipeline because men, who are at significantly less risk of harassment, will secure those clerkships instead and thus be on a clearer path to Supreme Court clerking opportunities.[345]

Supreme Court clerkship. Like others who have now come forward, [she] had told young female law students not to clerk for him."); *Clerkships: Ending Discrimination & Promoting Equity*, PEOPLE'S PARITY PROJECT, https://peoplesparity.org/our-work/past-campaigns/legal-profession/clerkships [https://perma.cc/8LAB-GBRR] ("Clerking for Judge Kozinski was viewed as a path to a Supreme Court clerkship, but many women were forced to choose not to apply to work for him because of his widely known harassment [and] because no one intervened . . . . [N]o student should ever have to opt out of applying to a clerkship, giving up an important educational and professional opportunity, because powerful judges are known to harass or discriminate against them."); *see also* Emily Peck, *Brett Kavanaugh Liked Female Clerks Who Looked A 'Certain Way,' Yale Student Was Told*, HUFFPOST, https://www.huffpost.com/entry/yale-student-brett-kavanaugh-clerkship-look_n_5ba2f051e4b0181540d9e2bb [https://perma.cc/ZG6K-EZPP] (last updated Sep. 20, 2018) (describing how a student "heard rumors about Kozinski" before his abuse was made public and "had ruled out a clerkship with him" as a result); Stephanie Kirchgaessner & Jessica Glenza, *'No Accident' Brett Kavanaugh's Female Law Clerks 'Looked Like Models', Yale Professor Told Students*, GUARDIAN: NEWS (Sep. 20, 2018, at 10:16 AM), https://www.theguardian.com/us-news/2018/sep/20/brett-kavanaugh-supreme-court-yale-amy-chua [https://perma.cc/58X2-CCDE] (describing how a student "decided not to pursue a clerkship with Kavanaugh" despite his status as "a powerful member of the judiciary who had a formal role in vetting clerks who served in the US supreme court" because she was so "put off" by hearing that Kavanaugh considered looks in his clerkship selection process).

344. *See* Shatzman, *supra* note 35, at 184 n.83 (describing Dahlia Lithwick's article, *see* Lithwick, *supra* note 35); *id.* at 184 ("For prospective clerks, the fear of harassment may cause members of marginalized groups to opt out of clerking entirely. Because clerking opens many professional doors for young attorneys, deciding not to clerk can have long-term negative ramifications—including reputational and financial repercussions—for one's career . . . . Those who refrain from applying to these judges therefore foreclose themselves from valuable opportunities.").

345. *See* The Women's Initiative, *Gender Matters: Women Disproportionately Report Sexual Harassment in Male-Dominated Industries*, CTR. FOR AM. PROGRESS (Aug. 6, 2018), https://www.americanprogress.org/article/gender-matters [https://perma.cc/33BH-LPH6]; *see also* Aliza Shatzman, *Yale Law School Bars Students from Accessing Information About Abusive Judges*, ABOVE THE L. (Jan. 14, 2025, at 10:45 AM), https://abovethelaw.com/2025/01/yale-law-school-bars-students-from-accessing-information-about-abusive-judges [https://perma.cc/VZF6-ETE3] ("Women are both particularly vulnerable to workplace sexual harassment and are significantly underrepresented among judicial clerks.").

1. Feeder Judges May Harass, Victimize, and Mistreat Their Clerks

As previously stated, there have been numerous reported instances of high-profile judges, considered to be feeders of the Supreme Court, committing egregious acts of sexual misconduct against their clerks.[346] "Some judges with reputations for abusive behavior are feeder judges to prestigious legal jobs or higher-level clerkships," often operating as an "open secret" among federal courts.[347] These "open secrets" remain secrets because there are no real remedies for clerks who have been mistreated, and there is generally no information distributed to clerks on what to do if they suffer an injury at the hands of the judge.[348] The prevalence of such "open secrets" operates in conjunction with the underlying foundation of clerkship confidentiality, discussed above in Section II.B.

2. The Whisper Network

Thus, the "whisper network" is created.[349] This "informal, secretive, fear-infused process of backdoor information-sharing" between clerks about judges and courts functions to instruct clerks on how to avoid abuse—namely, by who and in what courts.[350] One central driver of the whisper network is that law schools, who students entrust for guidance throughout the initial clerkship application process, are not dependable in fully informing their students about judges to avoid.[351] The number of clerks a school produces bolsters such school's public reputation, strengthens relationships between faculty and high-powered judges, and adds prestige to their clerkship program, thus attracting the nation's top students.[352] Law school rankings also depend on how many students a school can send to clerk.[353] Even if law schools record student feedback about misbehaving judges, they are not required by the ABA to report any such

346. *See supra* Section II.D.
347. Shatzman, *supra* note 35, at 179, 184.
348. *See* Green, *supra* note 48, at 374.
349. *See* Shatzman, *supra* note 1, at 113.
350. *Id.*
351. *See* Shatzman, *supra* note 35, at 198–200.
352. *Id.* at 199–201.
353. *Id.* at 199–200.

information.[354] Therefore, "[l]aw schools are incentivized to convince students to clerk," regardless of whether such schools expect a judge to abuse their students.[355] This issue was exemplified by Yale Law School in 2025, when the school expressly prohibited student organizations from joining databases containing candid information on what judges to avoid working for.[356] This instance reflects the general idea that clerks can only rely on other clerks for accurate, thorough information on which judges or courts to avoid.[357]

Therefore, clerks must often rely on fellow legal actors with information about judges or courts with abusive tendencies to become fully informed before applying or accepting a clerkship in those chambers.[358] However, if a clerk speaks out against a judge and accuses them of mistreatment, it poses an immense risk to that clerk's career. As a result, this sensitive information is largely shared anonymously to avoid creating enemies in the judiciary and experiencing long-term reputational harm. "Law clerks 'whisper' because they have been taught to be fearful: This pervasive terror about incurring the wrath of a judge is partially a legal-community construct."[359] The whisper network thus functions as a tool for clerks to use to be informed on which judges and courts should be avoided.[360]

3. Women Are Discouraged From Clerking with Feeder Judges That Have Reputations for Mistreating Their Clerks

The whisper network can be the source of information that instructs women to avoid seeking, applying, or accepting clerkships at high-powered feeder courts in fear of facing abuse from the bench.[361] "Those with information about judges who

354. *Id.* at 199.
355. *See* Shatzman, *supra* note 1, at 130.
356. *See* Shatzman, *supra* note 345.
357. *See, e.g.*, *id.*
358. *See* Shatzman, *supra* note 1, at 142–45.
359. *Id.* at 125.
360. *Id.*
361. *See* Lithwick, *supra* note 35 ("Like others who have now come forward, I had told young female law students not to clerk for [Kozinski]."). *See generally* Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. CHI. LEGAL F. 273, 284 (discussing whisper networks in general and how they "enable women to share their accounts of sexual violation with select insiders. The content of the information (and often, the existence of the network itself) remains secret—at least

mistreat their clerks—either current or former clerks speaking from personal experience or law school administrators—may, but do not always, share information with prospective applicants."[362] For example, a former Ninth Circuit clerk recounted how "Judge Kozinski's behavior was no secret" when she worked there, and even though she "did not clerk for him or even work in the same city as he did, his conduct was a frequent topic of discussion amongst [her] peers. [She] had heard about Judge Kozinski's harassment *even before [she] started applying for clerkships*."[363] One former Yale law student wrote that while in school, "everyone knew, and women didn't apply to clerk for Judge Kozinski despite his prestige and connections to the Supreme Court. [She] always felt the men who took their places were traitors."[364] One professor said that she "told countless female law students that [she] would never write them a letter of recommendation for a clerkship with him . . . [because she] didn't want them ever to be at risk of being sexually harassed by him."[365]

Clerks informed through the whisper network who choose to refrain from these opportunities are simultaneously foreclosing themselves from valuable opportunities later on at the Supreme Court.[366] As scholar Aliza Shatzman noted on this interplay, "[f]or prospective clerks, the fear of harassment may cause members of marginalized groups to opt out of clerking entirely. Because clerking opens many professional doors for young attorneys, deciding not to clerk can have long-term negative ramifications . . . for one's career."[367] In the Kozinski context, "[f]emale law students lost career opportunities as they chose not to

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to the extent outsiders are not privy to it, as is generally the intent of those within the network.").

362. Shatzman, *supra* note 1, at 125.

363. Claire Madill, *Blind Justices*, SLATE (Dec. 15, 2017, at 12:35 PM), https://slate.com/news-and-politics/2017/12/how-the-supreme-court-justices-abetted-judge-alex-kozinskis-inappropriate-behavior.html [https://perma.cc/4HZ4-4MXZ] (emphasis added).

364. Amanda Taub, *The #MeToo Moment: How One Harasser Can Rob a Generation of Women*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/us/how-one-harasser-can-rob-a-generation-of-women.html [https://perma.cc/PKJ5-8VMA].

365. Nancy Rapoport, *There Are Likely Several More Stories to Come*, NANCY RAPOPORT'S BLOG (Dec. 9, 2017), https://nancyrapoports.blog/2017/12/09/there-are-likely-several-more-stories-to-come [https://perma.cc/H3WK-ALKX].

366. *See* Shatzman, *supra* note 35, at 184, 200.

367. *Id.* at 184.

apply for clerkships in his chambers and professors steered them elsewhere."[368]

It is helpful to review data that puts these concepts into the context of real-life cases of judicial misconduct. As mentioned, the two largest feeder courts are the D.C. Circuit Court and the Ninth Circuit, the latter making up the majority of the western United States, including California, Alaska, and Hawai'i.[369] Over the lifespan of the Rehnquist Court, the D.C. Circuit contributed 36 percent of all Supreme Court clerks.[370] The Ninth Circuit was the next-closest contributor, feeding the Supreme Court 19 percent of its clerks during that time.[371] The D.C. Circuit and Ninth Circuit have retained their dominance through the Roberts Court as well. From 2005 until 2017, the D.C. Circuit fed the Supreme Court around 35 percent of its clerks.[372] The Ninth Circuit contributed nearly 15 percent of the clerks.[373] Coincidentally, two of the most significant sexual abuse scandals in the federal judiciary involved legal giants on the Ninth Circuit bench: former federal judges Alex Kozinski and Stephen Reinhardt.[374] Kozinski and Reinhardt were considered two of the

368. *How Can We Challenge Sexual Harassment in the Federal Judiciary?*, KATZ BANKS KUMIN (Jan. 9, 2018), https://katzbanks.com/employment-law-blog/how-can-we-challenge-sexual-harassment-federal-judiciary [https://perma.cc/B47A-X3Y7].

369. *Ninth Circuit U.S. Court of Appeals Case Law*, JUSTIA: U.S. L., https://law.justia.com/cases/federal/appellate-courts/ca9 [https://perma.cc/E9UA-X4JZ]; ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 81 (2006) (determining that 36 percent of all Supreme Court clerks in the Rehnquist Court came from the D.C. Circuit, with the next highest feeder being the Ninth Circuit). Notably, the Ninth Circuit has nearly three times the number of judges, demonstrating the D.C. Circuit's prominence. *Id.*

370. WARD & WEIDEN, *supra* note 369, at 81 tbl. 2.8; *see also* Kaye & Gastwirth, *supra* note 38, at 417 n.27.

371. *See* sources cited *supra* note 370.

372. According to data from the National Law Journal, the U.S. Court of Appeals for the D.C. Circuit saw roughly 170 of their clerks land positions at the Supreme Court out of a total 487 from the beginning of the Roberts era in 2005 until the article's publication in 2017. Ross Todd, *Reinhardt, a Prolific SCOTUS Feeder Judge, Tells Clerks 'Don't Count on Me'*, LAW.COM: RECORDER (Dec. 14, 2017, at 11:25 PM), https://www.law.com/therecorder/2017/12/14/reinhardt-a-prolific-scotus-feeder-judge-tells-clerks-dont-count-on-me [https://perma.cc/SKQ4-ZSU5].

373. *Id.* ("Among federal circuit courts, the U.S. Court of Appeals for the Ninth Circuit has sent the second-highest number of clerks on to the U.S. Supreme Court during the tenure of Chief Justice John Roberts, according to the NLJ's data. Of the total 487 Supreme Court clerks for the period, more than 70, or nearly or 15 percent, came from the Ninth Circuit.").

374. *See supra* Part II.D.

most influential feeder court judges throughout the judiciary before they each left the bench.[375]

Before his resignation—prompted by the allegations of egregious sexual abuse against generations of clerks—Kozinski was one of the leading Supreme Court feeders by number. In fact, according to a 2014 study, Kozinski had sent the highest number of clerks to the Supreme Court and often boasted or published work expressing his pride in this accomplishment.[376] From 2007 to 2017, "30 percent of the clerks (12 out of 40) hired by Justice Anthony Kennedy [were] former Kozinski clerks."[377] In 2004, 2006, and 2014, there were four different former Kozinski clerks working on the Supreme Court.[378] This number becomes "astounding . . . considering that federal appellate judges get only four clerks each year."[379] It was a commonly understood fact that "if you [wanted] to get to the Supreme Court, one of the best ways to improve your chances [was] to clerk for Judge Kozinski. The Supreme Court justices rely on a select few appellate court judges to feed them their best clerks. Judge Kozinski [was] one of them."[380]

Simultaneously, Kozinski operated his chambers predicated on the "open secret" of his gross sexual harassment of his clerks and other judicial employees.[381] While data on the gender breakdown of clerks who served for Kozinski and other feeder courts are largely unreported, former clerks have testified that the judge "had an unusually large number of clerks leave partway through their term because the work environment was unbearable."[382] Since Kozinski was such a legal giant during his time on the bench, even acting as chief justice at one point, the clerks who have come forward about his abusive patterns have given

375. *See* Stras, *supra* note 337, at 157 tbl.3 (noting Kozinski and Reinhardt in a table connoting "Top Feeder Judges to the U.S. Supreme Court, October Term 2009 to October Term 2013"); Todd, *supra* note 372 (discussing Reinhardt and Kozinski as members of the top twenty feeder judges in the country, with Reinhardt sending eighteen clerks to the Supreme Court from 2005 to 2017 and Kozinski sending twenty-four; Kozinski noted that "his record of placing clerks was a point of pride and that, if one looked at a longer period of time, he'd likely top the NLJ's list of feeder judges, instead of ranking No. 4 . . . ."); Hess, *supra* note 213, at 100 (including Kozinski and Reinhardt among the top eleven feeder judges from 2010 to 2014).

376. *See* Hess, *supra* note 213, at 71.

377. *See* Madill, *supra* note 363.

378. *Id.*

379. *Id.*

380. *Id.*

381. *See* Lithwick, *supra* note 35.

382. Letter from Heidi S. Bond, *supra* note 222.

detailed descriptions of the fear they felt while disclosing.[383] In addition, these clerks have expressed how their experience of abuse in Kozinski's feeder court completely altered their perception of the judiciary as a whole.[384] Despite having opportunities to clerk at the Supreme Court, the abuse his victims experienced from the feeder judge motivated some to leave the legal field entirely.[385] One former clerk recounted how she informed Kozinski that she no longer had an interest in clerking at the Supreme Court.[386] Refusing to comply with these wishes, Kozinski arranged an interview for her with Justice O'Connor against the former clerk's protests.[387] She explained how "the thought of spending another year with someone who could wield ultimate power over [her] sounded like a nightmare."[388]

In addition to Kozinski, only a handful of federal appellate judges had sent more clerks to the Supreme Court than Reinhardt before his death.[389] From 2005 to 2017, Reinhardt placed "two clerks each with Justice Stephen Breyer and Justice Elena Kagan, three with Justice Ruth Bader Ginsburg, four with Justice Sonia Sotomayor, and two with Justice Anthony Kennedy."[390] In breaking down the (albeit limited) data on the gender makeup of Reinhardt clerks, however, roughly 73 percent of the clerks he sent to the Supreme Court were male.[391] This could indicate a disillusionment with the legal field and with Supreme Court clerkships by female law clerks after their time clerking for Reinhardt, as former Kozinski clerks have testified to similarly experiencing.[392]

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383. *See, e.g.*, Bond, *supra* note 202.
384. *See id.*
385. *See id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. Todd, *supra* note 372.
390. *Id.*
391. *See id.* ("13 of the 18 Reinhardt clerks who have gone on to serve at the high court were men.").
392. Former Kozinski clerks have expressed their desire to leave the legal field following their time working in his chambers. *See, e.g.*, Bond, *supra* note 202 (discussing how Bond wanted to forego an opportunity to clerk at the Supreme Court after her Kozinski clerkship). While the allegations against Reinhardt are not as extreme as those against Kozinski, it is still plausible that many women no longer wanted to pursue additional clerkships following their time in Reinhardt's chambers. In her testimony to the House Judiciary Committee about Reinhardt's mistreatment, Olivia Warren noted that "others who have similarly experienced harassment are leaving the profession or changing their goals in ways that deprive all of us of the valuable contributions they could have provided to the law had they not

These situations are just two examples of how feeder courts contribute to the already prevalent gendered pipeline to prestigious Supreme Court clerkships.[393] Female clerks who are informed through "whisper networks" of abusive judges are at a greater risk of turning down future job opportunities that would undoubtedly create a path to clerking at the country's highest court.

IV. PROPOSED REMEDIES

The most common solution proposed to address the issues this Note explores is to extend Title VII, either by amending the original statute or through the Judiciary Accountability Act (JAA).[394] While extending Title VII seems like a straightforward answer to these problems, it would still be a deficient solution for reasons described below in Section IV.A. Therefore, this Note offers three other solutions that would create meaningful change for clerks and other judiciary employees who are currently unable to seek remedies when injured by judges.

First, Section IV.B argues the federal judiciary should change its faulty dispute resolution systems and create a national, uniform, and anonymous process for employees to discreetly report judicial wrongdoing without fear of retaliation. The federal judiciary should also make complaints about federal judges public as an additional deterrent to mistreatment. Second, Section IV.C recommends a shift back to the Carter-era practice of appointing federal judges on a merit-based evaluation, rather than the current system based on word-of-mouth, relationship-based recommendations from members of Congress. Third, Section IV.D advocates for the enactment of legislation introduced in May 2025 titled the Transparency and

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been harassed." *Testimony of Olivia Warren*, *supra* note 3, at 18. In addition, seventy-two former Reinhardt clerks signed a letter following Warren's testimony, including many who "experienced or witnessed conduct in chambers that [they] would call sexist, workplace bullying or mistreatment." Debra Cassens Weiss, *Over 70 Former Reinhardt Clerks Urge Judiciary to Change Reporting Procedures and Training*, ABA J. (Feb. 21, 2020, at 12:04 PM), https://www.abajournal.com/news/article/former-reinhardt-clerks-urge-judiciary-to-change-reporting-procedures-and-training [https://perma.cc/J77X-YLCZ]. Based on this testimony, coupled with data showing Reinhardt sent predominately men to the Supreme Court, this Note infers that it is possible women who clerked for Reinhardt chose to forego future clerkships or legal opportunities after concluding their clerkships.

393. *See* Hess, *supra* note 213, at 79.

394. *See* Green, *supra* note 48, at 412.

Responsibility in Upholding Standards in the Judiciary Act (TRUST). This legislation would prevent judges from resigning or retiring from the bench to circumvent investigations into their misconduct and ensures investigations continue after such status changes take place.

A. Title VII and the Judiciary Accountability Act

The most frequently proposed solution for the issues this Note explores is to extend Title VII to federal judiciary employees. This extension can take place either by amending the original statute or by passing the JAA. This legislation, originally introduced by the House and Senate Judiciary Committees in 2021 and reintroduced in 2024, would extend Title VII to the federal judiciary, giving clerks and other employees the statutory right to bring claims for workplace harassment, discrimination, and retaliation.[395] The JAA would mirror the existing Congressional Accountability Act.[396] Additionally, the statute would amend the current statutory definition of "judicial misconduct" to include discrimination and retaliation.[397] This legislation would also establish a Commission on Judicial Integrity to oversee such claims and "oversee a workplace misconduct prevention program."[398] The Commission would work to standardize Employee Dispute Resolution plans and implement a universal misconduct prevention policy.[399] Finally, the JAA would require "the judiciary to collect and report data on workplace culture, the outcomes of judicial complaints, and diversity in hiring."[400]

Even though extending Title VII on its own or by enacting the JAA would carry valuable benefits, it is likely a nonstarter. If Title VII was extended to the judiciary, it would only apply to judges in their positions as employers rather than judges.[401]

395. *Id.*; Judiciary Accountability Act of 2021, S. 2553, 117th Cong. (2021); Judiciary Accountability Act, H.R. 4827, 117th Cong. (2021); Judiciary Accountability Act, S. 5168, 118th Cong. (2024); Judiciary Accountability Act, H.R. 9674, 118th Cong. (2024).

396. Jackie Speier & Ally Coll, *All Rise: It's Time for the Judiciary to Live by the Anti-Discrimination Laws It Enforces*, ROLL CALL: OPINION (Aug. 17, 2021, at 6:00 AM), https://www.rollcall.com/2021/08/17/all-rise-its-time-for-the-judiciary-to-live-by-the-anti-discrimination-laws-it-enforces [https://perma.cc/4UYP-N7TX].

397. S. 2553 § 8(a).

398. *Id.* § 4(f); *see also* Green, *supra* note 48, at 411.

399. S. 2553 § 5(d).

400. *See* Shatzman, *supra* note 1, at 15.

401. *See generally* 42 U.S.C. §§ 2000e(b), 2000e-16(a).

This distinction is critical because of the historically broad definition of judicial act, and the judiciary's tendency to excuse a judge's behavior as a judicial act, regardless of its relationship to the judge's adjudicatory role.[402] As previously established, courts grant judges broad leeway in showing how their actions were taken in connection to their official judicial capacity. Courts are quick to find anything merely resembling a judicial function to be protected by absolute judicial immunity rather than an action taken by a judge in their employer capacity.[403]

In addition, the judiciary itself—specifically judges—have been vocal in their opposition to the JAA's enactment. When Congress originally introduced the JAA in July 2021, it was promptly met with backlash. The Secretary of the Judicial Conference of the United States wrote in a letter to Congress that the JAA "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 . . . ."[404] In addition, the letter accused the bill of "interfer[ing] with the internal governance of the Third Branch" and imposing "intrusive requirements on Judicial Conference procedures."[405] In the months following the JAA's introduction, Chief Justice John Roberts affirmed these critiques in his 2021 Year-End Report on the Federal Judiciary.[406] Throughout the nine-page report, the Chief Justice stressed the need for courts to have ample institutional independence to manage their own internal affairs.[407] Essentially, he "politely told Congress" that ensuring "judges live up to their ethical responsibilities" and "creating a harassment-free workplace" is "work that judges can do on their own."[408]

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402. *See supra* Section I.A.

403. *See id.*

404. Letter from Roslynn R. Mauskopf, Sec'y, Jud. Conf. of the U.S., to Henry C. "Hank" Johnson, Jr., Chairman, H. Comm. on the Judiciary (Aug. 25, 2021), https://www.uscourts.gov/sites/default/files/house_letter_jaa.pdf [https://perma.cc/M3BV-X7CF].

405. *See, e.g.*, *id.*

406. *See* JOHN ROBERTS, 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1, 4–5 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf [https://perma.cc/GE3M-3334].

407. *See generally id.*

408. Robert Barnes, *Roberts Says Federal Judiciary Has Some Issues but Doesn't Need Congressional Intervention*, WASH. POST: CTS. & L. (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/W2BZ-GR34].

Ultimately, while extending Title VII is a great idea in theory, in practice, it would likely fail in creating significant change or protections for clerks. Judges would remain largely insulated from Title VII's reach by virtue of their wide-ranging judicial immunity. In addition, it would be difficult for the JAA to make meaningful change if the judiciary itself expressly detests its provisions. Therefore, it would be more productive to focus reform efforts elsewhere.

B. Replacing the Faulty Employee Dispute Resolution System

A key first step to fixing the federal judiciary system would be to conduct an overhaul of the current EDR. As described in previous sections, this system fails for the same reasons the Judicial Conduct and Disability Act fails: Both processes rely on judges to hold their coworkers accountable and scrutinize one another's actions, which is an uncomfortable and unpreferred task that most courts avoid by dismissing the complaint or suggesting the misbehaving judge resign from the bench so the investigation can automatically end.[409] Both processes also require copies of the complaint to be immediately made available to the misbehaving judge themselves, immediately putting clerks at risk of retaliation for the act of filing the complaint itself.[410]

To cure this failure, the federal judiciary should institute a centralized, uniform system across the government branch that establishes a neutral third party evaluator of claims brought against judges. If the federal judiciary insists it must be exempt from Title VII for reasons of judicial independence, it must at least create a system where clerks can voice their complaints and be confident that they will be heard. Claims against judges should be made anonymously to avoid retaliation against clerks and to hopefully reduce the anxieties felt by clerks surrounding the reporting process. True anonymity may be difficult to achieve since there are so few clerks working for a judge at a time.[411] However, guaranteeing confidentiality and anonymity

409. *See supra* Section I.B.

410. *See supra* Section I.B.

411. Federal judges typically only have two to three clerks, while Supreme Court Justices are authorized to have between three and four clerks per term. *See Judicial Clerkships*, ST. LOUIS UNIV. SCH. OF L.: OFF. OF CAREER SERVS.,

would be an improvement from the current system in which clerks are unsure what information is being dispersed and thus avoid making claims altogether to avoid this risk. Additionally, having a neutral third party oversee claims rather than other judges would increase the likelihood of judicial accountability. The historical reliance on self-policing within the judiciary fails to create any accountability for judges and does not protect clerks at all.[412]

In addition to a centralized complaint system, the Legal Accountability Project has urged the judiciary to create an accompanying centralized clerkship database with the goal of "democratiz[ing] information about judges and ensur[ing] that law students and alumni have as much information about as many judges as possible before making important career decisions."[413] The Legal Accountability Project currently operates their own database where clerks are encouraged to offer candid information on judges they have experience with.[414] In its first three years, thousands of students joined the database and have left a wealth of reviews about judges to help guide applicants through the clerkship application process.[415] While a select few law schools have followed suit and instituted their own clerkship databases, creating a database at the federal level modeled after the Legal Accountability Project would address the issues embedded in the federal clerkship institution on a more comprehensive and widespread level. It would also be especially helpful

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https://www.slu.edu/law/career-services/for-students/judicial-clerkships.php [https://perma.cc/9ZYC-S3FT] ("In the federal court system, each of the nearly 600 district court judges is authorized to hire two law clerks. Circuit court judges (federal appellate level) are generally allowed three."); *Supreme Court Procedures*, U.S. CTS.: ABOUT THE FED. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures [https://perma.cc/G2AB-5CJJ] ("Each Justice is permitted to have between three and four law clerks per Court term.").

412. *See* Berens & Shiffman, *supra* note 103; *supra* Section I.A (noting how judicial immunity and isolation from political pressures factor into holding judges accountable).

413. *See* Shatzman, *supra* note 1, at 142.

414. *See* Shatzman, *supra* note 345 (The Legal Accountability Project operates "an award-winning national clerkships database, a repository of nearly 1,500 candid post-clerkship surveys submitted by former judicial law clerks nationwide about more than 1,000 federal and state judges.").

415. Press Release, Legal Accountability Project, The Legal Accountability Project Celebrates Our Third Anniversary (June 2, 2025), https://www.legalaccountabilityproject.org/press-releases/blog-post-title-one-4hx79-82lj8-sk7nl-aarg5-prrc8-tcgfy-glm2x-jfrba-zymbc-3w3wy-bssnh-rgax3-jblh7-5yafw-25phy-cys22-g936a-z99mz-kwfds-y558g-9neg7-t7hp5 [https://perma.cc/X5GW-YFAT].

because the nature of the clerkship process ensures many candidates apply and accept positions across the country away from their law schools, and schools may have less data on judges geographically removed from their campuses.[416]

This proposed database would be limited to verified former clerks, alumni, and students.[417] It would also focus on asking questions that go beyond the standard post-graduate surveys sent to law school graduates. Instead, the database would specifically inquire about judicial mistreatment and also how and if judges provide feedback to clerks, the kinds of educational enrichment clerks receive, hours, vacations, judicial temperament, and so on.[418] This database would reduce a clerk's dependence upon their law schools—who are incentivized to promote clerkships—and upon the informal "whisper network," which may not offer reliable information to potential clerks.[419] Finally, this proposed database could also allow for submissions to be made anonymously to protect the submitter's identity and reduce the risk of retaliatory action against them by members of the judiciary. A database of this nature would provide a trustworthy source of information for prospective clerks on judges that operate unsafe chambers, untainted by considerations like law school image. In a field of work so rooted in secrecy and confidentiality, a database of this nature would be a source of meaningful, candid information for prospective clerks and allow them to make more informed decisions on who to clerk for after law school and beyond.

C. Carter-Era Merit Appointment System

One proposed solution to the issue of harassment in the judiciary focuses on the *source* of the issue: the judges themselves. The current mechanism for selecting and appointing federal

416. The nature of the clerkship application process today typically prompts students to apply for positions across the country, not just to the judges around a student's law school. *See* Ruggero J. Aldisert et al., *Rat Race: Insider Advice on Landing Judicial Clerkships*, 122 DICK. L. REV. 117, 119, 126 (2017) ("According to one career services office, the average applicant sends his materials to sixty-five judges. It is not atypical for a qualified applicant to apply to over 150 judges.").

417. This verification process would avoid situations wherein a judge could make an account, find a negative comment from a former clerk, determine which clerk authored said comment, and jeopardize that clerk's career. *See* Shatzman, *supra* note 1, at 143.

418. *Id.*

419. *Id.*

judges is deeply flawed for a variety of reasons. Under Article III of the Constitution, the president possesses the authority to nominate a candidate for district and appellate courts, which the Senate is asked to confirm.[420] The president nominates a candidate based on recommendations the executive branch receives from senators.[421] There is no formal process for how senators choose judicial candidates to present to the president.[422] The process for how the president decides who to nominate for openings on the federal bench should be fundamentally altered—specifically, in changing how senators nominate judicial candidates.

The selection of federal judges "is a very local exercise" that gives "home-state senators" representing the state where the appointment is located power to block confirmations of nominees they object to.[423] Due to this authority, presidents exert extra effort consulting with these senators in determining nominees for federal judicial appointments.[424] The authority of these home-state senators is so apparent that these actors "expect the President to nominate the person the Senator has recommended" or, at minimum, choose a candidate from a preapproved shortlist.[425] This process is inherently tinged with partisan motivations because the president tends to give preference to home-state senators of their own party over those of the opposing political affiliation.[426]

In essence, the real problem lies in the informal process in which senators choose who to recommend to the president. Senators decide who to recommend for the bench through an ad hoc system where each senator decides on their own how to select their favored candidates.[427] Some senators take it upon themselves to conduct extensive research on the legal actors in their respective states and recommend who they believe is the most experienced, qualified candidate.[428] However, other senators take an informal approach and choose members of their political

420. U.S. CONST. art. II, § 2; *id.* art. III, § 1.

421. *See Judgeship Appointments by President*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president [https://perma.cc/6ZMQ-ZVR6].

422. *Id.*

423. Rachel Brand, *A Practical Look at Federal Judicial Selection*, ADVOCATE, Winter 2010, at 82.

424. *Id.*

425. *Id.*

426. *Id.* at 82–83.

427. *Id.* at 83.

428. *Id.*

network whom they believe will further their political agendas from the bench.[429] Or some senators nominate candidates simply because they run in the same social circle.[430] A former President George W. Bush employee who assisted in the President's judicial selection process explained: "[A]n individual candidate might be recommended to the President because he is the state bar chairman, because of her political influence in the state, or even because he was the Senator's law-school roommate."[431]

Federal judges should be nominated to serve on the country's highest courts because of their experience, intellect, character, and legal approach. Earning a nomination should not be based on which candidates have the best networks or social connections. It should also not depend on the amount of political clout a judge possesses in a state or region. This can lead to underqualified and inexperienced judges on the federal bench and judges with poor character traits that may go on to become abusive bosses.[432] Therefore, the selection of judicial nominees should be based on a formalized, merit-based selection process in order to prevent dangerous judges from taking the bench. By selecting judges specifically by merit, nominations focus "on the qualifications of judges rather than on political or personal criteria or one's networks of connection."[433] One legal scholar summarized the benefits of this system:

> Merit selection addresses several important problems. Candidates for judicial office who lack basic knowledge of the law are unlikely to be appointed in merit selection states. Similarly, *individuals with reputations for being intemperate or abusive may be weeded out* during the vetting process that accompanies merit selection. Judicial candidates who have

429. *See, e.g.*, Tierney Sneed & Lauren Fox, *Democrats Will Face Headwinds in Final Push to Confirm Biden Judges*, CNN: POL., https://www.cnn.com/2024/11/11/politics/biden-senate-democrats-judicial-nominees/index.html [https://perma.cc/B9G6-63RN] (last updated Nov. 11, 2024, at 3:39 PM).

430. *See* Brand, *supra* note 423, at 83.

431. *Id.*

432. *See* Jack D'Aurora, *Step Up if Your Last Name 'Brown' or 'O'Neill'? Skill Not Needed to Be a Judge*, COLUMBUS DISPATCH (Oct. 12, 2022, at 5:35 AM), https://www.dispatch.com/story/opinion/columns/guest/2022/10/12/politics-inexperience-taking-over-the-court-benches-opinion-columbus-amy-coney-barrett-judges-ohio/69552188007 [https://perma.cc/25YF-A8CQ].

433. Arrington, *supra* note 47, at 1152.

> poor ethics might also be identified and excluded. Most importantly, if a merit selection process works well, the influence of political insiders may be reduced.[434]

While merit selection has received criticism at the state level, the same concerns generally do not translate to the federal judiciary. For instance, common criticisms of merit selection focus on how the process is largely conducted outside the public eye and takes away a judge's democratic accountability as they are no longer vulnerable to removal through the election process. But these concerns are inapplicable at the federal level. First, judges are not elected to the federal bench to begin with. Second, the current recommendation system for federal judges is done entirely behind closed doors and as equally out of the public eye as the proposed merit-selection process.

While in office, President Carter created a U.S. Circuit Court Judge Nominating Commission.[435] This commission's mission statement was to "recommend for nomination as circuit judges persons whose character, experience, ability, and commitment to equal justice under law, fully qualify them to serve in the federal judiciary."[436] The commission was required to include "members of both sexes, members of minority groups, and approximately equal numbers of lawyers and nonlawyers" in order to ensure a diverse selection group.[437] No practicing judges were allowed to be on the commission overviewing the candidates.[438] Carter presided over the country's largest judicial expansion and, using this system, filled the federal bench with more women and people of color than ever before.[439]

The commission's goals specifically focused on nominating judicial candidates that "possess, and have reputations for, integrity and good character," whose "demeanor, character, and personality indicate that they would exhibit judicial temperament if appointed to [a federal court]," and finally, that they

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434. Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 473 (2004) (emphasis added).

435. Exec. Order No. 11972, 42 Fed. Reg. 9659 (Feb. 14, 1977).

436. *Id.*

437. *Id.*

438. *See id.*

439. Jess Krochtengel, *How Jimmy Carter Transformed the Federal Bench*, LAW360: PULSE (Jan. 2, 2025, at 1:00 PM), https://www.law360.com/pulse/articles/1586495/how-jimmy-carter-transformed-the-federal-bench [https://perma.cc/52SL-QRRF].

"possess, and have demonstrated, outstanding legal ability and commitment to equal justice under law."[440] Throughout the commission's existence under President Carter, out of the 262 federal judges appointed to the bench, 15 percent were women and another 15 percent were Black, Hispanic, or Latino, which was "a record-breaking level of diversity at the time."[441] Using the merit system, President Carter appointed more female judges to the bench than all prior administrations combined.[442] As former Supreme Court Justice Ruth Bader Ginsburg put it, President Carter's commission emphasized merit and integrity in selecting judges rather than maintaining the "old boys' network" that had previously made up the federal judiciary.[443]

This history is important in the context of current issues related to sexual harassment in the judiciary. Reverting to this system could change the future makeup of the judiciary itself and prevent the appointment of dangerous judges. Dedicating genuine efforts toward establishing a nominee's character and legal competency would undoubtedly require ensuring they maintained safe, professional, and harassment-free offices in the past. It could also increase the likelihood that the judge maintains a safe environment in the future. President Carter's commission was revoked and replaced by a different appointment system by President Reagan in 1978, yet many states have since put in place merit-based systems that mirror the goals and actions of the original nominating commission.[444] As of 2014, twenty-two states and the District of Columbia have employed a commission-based appointment process to select nominees for their state supreme courts.[445]

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440. Exec. Order No. 11972, 42 Fed. Reg. 9659, §§ 4(2), (4), (5) (Feb. 14, 1977).

441. *See* Arrington, *supra* note 47, at 1152.

442. Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281, 288 (1995).

443. *Id.*

444. *Compare* Exec. Order No. 12305, 46 Fed. Reg. 25421 (May 5, 1981) (revoking Executive Order No. 12059 and terminating the United States Circuit Judge Nominating Commission), *with Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/judicial-selection-map [https://perma.cc/NBM7-9C5Z] (last updated Aug. 20, 2024), *and State-by-State Summary of Judicial Selection*, USLEGAL, https://courts.uslegal.com/selection-of-judges/state-by-state-summary-of-judicial-selection [https://perma.cc/VBR4-ASKG].

445. MALIA REDDICK & REBECCA LOVE KOURLIS, CHOOSING JUDGES: JUDICIAL NOMINATING COMMISSIONS AND THE SELECTION OF SUPREME COURT JUSTICES 2 (2014).

Colorado has one of the most robust merit-based systems of these states, reflective of the Carter-era commission practice, to select and evaluate judges.[446] Each time a vacancy arises on a Colorado state court, a judicial nominating commission evaluates potential nominees' "legal qualifications, experience, integrity, impartiality, temperament, and public service."[447] These commissions have minimum requirements for diversity, an even mix of political parties, and include both attorneys and non-attorneys.[448] Each of Colorado's twenty-two judicial districts has commissions for county and district court positions, and Colorado has a statewide commission to fill vacancies on the state court of appeals and the state supreme court.[449]

In addition, after judges are elected, they are subject to routine evaluations by a judicial performance commission.[450] These commissions are tasked with evaluating each judge and determining whether they meet or fail to meet judicial performance standards, and these decisions are published for the public to review.[451] The judicial performance commissions base their evaluations in large part on "[s]urveys of people who have had contact with the judge. This may include attorneys, people who have appeared before the judge, jurors, witnesses, court staff, police officers, and probation officers."[452] Colorado citizens then have the opportunity every two years in retention elections to decide whether their state judges should remain on the bench based on these published evaluations.[453] In the two years preceding this Note, reports released by the Colorado Commission on Judicial Discipline indicated there were three claims filed for

446. *See Explainer: How Are Judges Selected in Colorado?*, COLO. JUD. INST., [hereinafter *Explainer*], https://coloradojudicialinstitute.org/what-we-do/public-education/explainer-how-are-judges-selected-in-colorado.html [https://perma.cc/ACD8-Z3RL]; *see also* COLO. CONST. art. VI.

447. *Explainer*, *supra* note 446.

448. *Judicial Nominating Commissions*, COLO. JUD. BRANCH: SUP. CT., https://www.coloradojudicial.gov/supreme-court/judicial-nominating-commissions [https://perma.cc/53E7-WCEL]; *see also* COLO. CONST. art. VI.

449. *Judicial Nominating Commissions*, *supra* note 448.

450. COLO. REV. STAT. §§ 13-5.5-101–13-5.5-116 (2025); *Explainer: How Are Judges Evaluated in Colorado and Why Are They on the Ballot?*, COLO. JUD. INST., [hereinafter *Explainer: Evaluated*], https://coloradojudicialinstitute.org/what-we-do/public-education/explainer-how-are-judges-evaluated-in-colorado-and-why-are-they-on-the-ballot.html [https://perma.cc/52LH-89R6].

451. *Explainer: Evaluated*, *supra* note 450.

452. *Id.*

453. *See id.*

"Harassment/Inappropriate Behavior" against Colorado state judges in 2022[454] and only two claims for the same in 2023.[455]

The federal judiciary should implement a system that is similar in structure and performance to Colorado's merit-based judicial evaluation system. One of the most significant drivers of mistreatment in the federal judiciary is the fact that there are essentially no remedies for law clerks when they experience abuse.[456] When clerks or other employees file grievances against judges, the complaint is essentially directly referred back to either the judge at issue or other judges in the same or neighboring courts through the judiciary's "judges policing judges" system.[457] But if a Colorado-type process was instituted at the federal level, judges would be routinely evaluated by third parties on their legal performance as well as their "temperament . . . integrity, ability to communicate, [and] administration of their courtroom."[458]

These evaluations are conducted in large part based on surveys from employees surrounding the judge.[459] Therefore, clerks would be offered the opportunity on a routine basis to provide honest feedback on their judges. Further, clerks could anonymously disclose judicial abuse or harassment without fear of retaliation from the judge and would feel safer knowing an external source would be evaluating their claim, rather than a fellow judge. Finally, the performance committee's evaluations would deter judges from acting out, due to the risk of receiving a poor performance grade and losing their seat on the bench in a retention election.

Reverting to the Carter-era practice of appointing federal judges based on merit rather than network connections could eliminate a substantial amount of harassment in the judiciary. This solution addresses the issue of abusive judges at the source; instead of nominating judges to the bench based on their political connections, this process focuses on nominating candidates for their intelligence, hard work, honesty, and fairness. It could thereby eliminate risks of appointing dangerous judges to the bench who lack the moral integrity to serve on the federal

454. COLO. COMM'N ON JUD. DISCIPLINE, 2022 ANNUAL REPORT 12 (2022).
455. COLO. COMM'N ON JUD. DISCIPLINE, 2023 ANNUAL REPORT 12 (2023).
456. *See supra* Section I.C.
457. *See* Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–352.
458. *Explainer: Evaluated*, *supra* note 450.
459. *See id.*

judiciary and may put their employees at risk of abuse. Presidents should only nominate federal judges who have been thoroughly evaluated and assessed by a nonpartisan committee, rather than base their nominations on the current ad hoc senatorial process. If the federal judiciary were to make this change, Colorado's merit-based appointment and evaluation systems should be adopted. These processes ensure initially that quality judges are appointed to the bench and continue to hold judges accountable through routine performance evaluations and retention elections.[460] Right now, no such accountability exists for federal judges.

D. Transparency and Responsibility in Upholding Standards in the Judiciary Act

Finally, this Note advocates for enactment of the Transparency and Responsibility in Upholding Standards in the Judiciary Act (TRUST). This legislation specifically targets the practice described in the JCDA's section 352(b), in which judges may retire or resign from the bench to end any ongoing investigations of their conduct. The sponsor of this two-page bill stated its purpose is to ensure that "pending misconduct complaints will still be fully investigated even if a federal judge resigns, retires, or passes away while under investigation."[461] To effectuate this, the bill states that the "resignation, retirement from office under chapter 17, or death of a judge who is the subject of a complaint under section 351 shall not be grounds"[462] for dismissing a complaint, ending an investigation, or otherwise concluding that action on the complaint is no longer necessary.[463]

This bill would be particularly effective because even if Title VII was extended, under the JCDA judges would still have the option to end their own investigation by changing their status. If passed, however, TRUST ensures that misconduct is addressed even if judges remove themselves from the bench. As a result, misconduct claims would still be subject to a full

460. *See id.*

461. Press Release, Congressman Johnson Introduces TRUST Act to Hold Judges Accountable for Misconduct (May 1, 2025), https://hankjohnson.house.gov/media-center/press-releases/congressman-johnson-introduces-trust-act-hold-judges-accountable [https://perma.cc/XL7J-WBY9].

462. TRUST Act, H.R. 3150, 119th Cong. (2025).

463. *Id.*

investigation, and the judge would not be able to circumvent potential repercussions through section 352(b)'s loophole.

CONCLUSION

The federal judiciary has systemic issues leading to potential clerkship mistreatment, and the repercussions flow all the way to the Supreme Court. Law clerks are perpetually at risk of becoming victims of abuse at the hands of the judges they serve with no legal recourse. Because of the stark power disparity between federal judges and clerks, and the influence judges have on a clerk's career, clerks face unique pressure when coming forward with claims of misconduct.[464] Furthermore, without the protections of Title VII, clerks must rely on faulty internal reporting processes designed to protect the very judges they seek to report. Likewise, if a clerk is brave enough to bring a claim against a judge, they risk potentially career-ending retaliation in a system built for them to lose.

When clerks are victimized at the feeder court level by powerful judges trusted by the Supreme Court, such mistreatment is even less likely to be reported.[465] Instead, women depend on informal "whisper networks" to learn which judges have abusive tendencies and avoid seeking, applying for, and accepting jobs in those courts.[466] When fewer women clerk at these feeder courts, it creates a smaller pool of female clerks for Supreme Court Justices to choose from—thereby creating a gendered pipeline to clerkships at the highest echelon of law. This argument is supported by a review of the clerkship demographic statistics at the Supreme Court in recent years: The percentage of male clerks has continued to consistently outnumber women despite women holding the majority of law school spots.

To combat the gendered pipeline's perpetuation, this Note suggests various solutions to help remedy these deep-seated issues. First, the federal judiciary should overhaul the current dispute resolution process and offer a meaningful review process to clerks who come forward with complaints. Second, the federal judiciary should revert back to merit-based appointments of federal judges, rather than the current informal recommendation process. Finally, Congress should adopt the TRUST Act. This

464. *See supra* Part II.
465. *See supra* Section III.A.
466. *See supra* Section III.B.

legislation would close the loophole left open by sections 351 and 352 of the JCDA and prevent judges from skirting investigations into potential misconduct by leaving the bench.[467]

The gendered pipeline to Supreme Court clerkships may not directly impact every judge or every clerk, but it harms the federal judiciary as a whole. "When judges—the literal arbiters of justice within American society—are able to elude oversight of their own potential misconduct, it puts the legitimacy of the judiciary and the rule of law in jeopardy."[468] Allowing judges to function above the very laws they are tasked with interpreting delegitimizes and compromises our entire justice system. Additionally, the gendered pipeline causes the legal industry to lose valuable contributions and role modelship from women who forego opportunities to clerk at the Supreme Court, or those who choose to leave the profession entirely after experiencing mistreatment.[469] While the solutions this Note presents will not completely fix the fundamental issues that contribute to the gendered pipeline, they would each take significant steps in the right direction to make the federal judiciary a safer place for female clerks to work.

> *"It should not take a groundswell of support, for clerks' claims to be taken seriously. Clerks should never be left wondering, was what happened to me during my clerkship serious enough?"*
>
> — Aliza Shatzman[470]

467. *See supra* Section IV.A.

468. *See* Martinez, *supra* note 182, at 953.

469. *See Testimony of Olivia Warren*, *supra* note 3, at 18 (discussing how women leaving the legal profession after clerking for misbehaving judges "deprive[s] all of us of the valuable contributions they could have provided to the law had they not been harassed.").

470. Shatzman, *supra* note 35, at 255.