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NOTES

IS CONGRESS HOLDING ITSELF TO ACCOUNT? ADDRESSING CONGRESS'S SEXUAL HARASSMENT PROBLEM AND THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995 REFORM ACT

*Christina C. Hopke**

It's a boy's club I think that a lot of things are just understood and you've got to play by the rules and keep quiet about it. That's just kind of the mentality, from my experience. And so, I feel like the feedback that was given to me was: If I wouldn't stay quiet and fall in line, then my career was over. . . . I was told right away that I would be, quote-unquote, "blackballed" if I came forward. . . . That's exactly what happened.

—Lauren Greene, former aide to former Representative Blake Farenthold (R-Texas), on the effect of coming forward with claims of sexual harassment and discrimination against her former boss; a decision that led to the "implo[sion]" of her entire political career after five years of "climbing the Capitol Hill ladder."¹

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1 Rachael Bade, *A Congressman's Accuser: Blackballed and Baby-Sitting for Cash*, POLITICO (Dec. 4, 2017), <https://www.politico.com/story/2017/12/04/blake-farenthold-sexual-harass-greene-278869> (quoting Lauren Greene).

INTRODUCTION

Nearly half of working women in the United States say they have experienced harassment in the workplace.² Research also shows that women in male-dominated work environments are sexually harassed more than women in gender-balanced or in female-dominated work environments.³ Congress certainly cannot be described as a female-dominated or even a gender-balanced work environment. Of the 535 elected representatives of the 115th Congress, only 110 positions were held by women—just twenty-one percent.⁴ Among congressional staffers, while it appears that roughly half of the total positions are filled by women, there is a vast disparity between the number of women in positions of authority as opposed to the number of men holding those positions⁵: men dominate in positions of authority,⁶ while women are overwhelmingly represented in administrative or constituent-services positions.⁷ In terms of both elected officials and the staff they hire, it is evident that there is either an imbalance of female presence altogether or that there is an imbalance of female power even when women are present, as the female staff hired are most often constrained to low-level positions. The combination of this imbalance of the sexes, the unique environment of power surrounding the halls of Congress, and the vital role that congressional employment plays for young professionals striving to achieve a career in national politics, fosters a culture in which harassment can easily occur, remain unreported, and go systematically unpunished.

2 Carrie Dann, *NBC/WSJ Poll: Nearly Half of Working Women Say They've Experienced Harassment*, NBC NEWS (Oct. 30, 2017), <https://www.nbcnews.com/politics/first-read/nbc-wsj-poll-nearly-half-working-women-say-they-ve-n815376>.

3 Jennifer L. Berdahl, *The Sexual Harassment of Uppity Women*, 92 J. APPLIED PSYCHOL. 425, 427 (2007).

4 *Women in Congress 2018*, CTR. FOR AM. WOMEN & POL., <http://www.cawp.rutgers.edu/women-us-congress-2018> (last visited Nov. 17, 2018). The number of female representatives rose to a record-breaking 127 women after the November 2018 elections ushered in a historic 116th Congress. Rachel Cohen et al., *116th Congress Breaks Records for Women, Minority Lawmakers*, HILL (Jan. 9, 2019), <https://thehill.com/homenews/house/424449-116th-congress-breaks-records-for-women-minority-lawmakers>. Even still, female representation in the House and Senate comprises less than twenty-five percent of our federal representatives. *Id.*

5 *Among Senior Capitol Hill Staffers, Men Still Outnumber Women*, NAT'L J., <https://www.nationaljournal.com/s/627930/among-senior-capitol-hill-staffers-men-still-outnumber-women> (last visited Nov. 17, 2018); Casey Burgat, *Among House Staff, Women Are Well Represented. Just Not in the Senior Positions.*, WASH. POST (June 20, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/20/among-house-staff-women-are-well-represented-just-not-in-the-senior-positions/?utm_term=.7c0c42411f9a.

6 Examples of positions with high levels of authority include chiefs of staff, deputy chiefs of staff, legislative directors, and legislative correspondents. Burgat, *supra* note 6.

7 Examples of positions with low or no authority are office managers, schedulers, constituent service representatives, and congressional aides. *Id.* Just thirty-three percent of chief of staff positions, the highest position in congressional staffing, are held by women. *Id.* Meanwhile ninety-five percent of the lowest position in congressional staffing, office manager positions, are held by women. *Id.*

Since the ‘me too’ Movement’s infiltration into the congressional workplace, various members of Congress have been quoted in their belief that “as Members of Congress we must hold ourselves to a higher standard.”⁸ Yet the deluge of sexual harassment claims pouring out from past and present congressional employees makes clear that Congress has not been holding itself to a higher standard.⁹ Leaving aside the question of whether elected representatives should be held to a higher standard than the general public, Congress has set that bar for itself, and the American people should expect its members to meet it. There were quick calls to reform the Congressional Accountability Act of 1995 (“CAA”)¹⁰ following the wave of public allegations of harassment occurring in Congress.¹¹ In response, both houses passed their own reform bills and then spent months trying to negotiate between the two.¹² Finally, more than a year later, the public received an answer from its representatives as to how they expected to live up to a “higher standard”: the

8 Press Release, Comm. on House Admin., House Passes Resolution Mandating Anti-Harassment, Anti-Discrimination Training Requirements (Nov. 29, 2017), <https://cha.house.gov/press-release/house-passes-resolution-mandating-anti-harassment-anti-discrimination-training>; see also Jessica Taylor, *Under Fire for Alleged Sexual Harassment, Texas Rep. Blake Farenthold Resigns*, NPR (Apr. 6, 2018), <https://www.npr.org/2018/04/06/600343808/under-fire-for-alleged-sexual-harassment-texas-rep-blake-farenthold-resigns>.

9 Letter from 1500 Former Congressional Staff, to the Speaker & Minority Leader of the U.S. House of Representatives, the Majority and Minority Leaders of the U.S. Senate, the Chairman & Ranking Member of the Senate Comm. on Rules & Admin. & the Chairman & Ranking Member of the Comm. on House Admin. (Nov. 13, 2017), <https://drive.google.com/file/d/1qO5r8yJ3USjWb9tZamBgjn5KtJMTDQ8I/view> [hereinafter Letter from 1500 Former Congressional Staff]; see also Anna Kain, Opinion, *I’m Sharing My #MeToo Story Because Congress Is Broken, and We Have to Fix It*, WASH. POST (May 7, 2018), https://www.washingtonpost.com/opinions/congress—your-metoo-moment-is-now/2018/05/07/286eac10-48b1-11e8-8b5a-3b1697adcc2a_story.html?noredirect=on&utm_term=.901a6ebe6be7; MJ Lee et al., *‘Nothing About It Felt Right’: More than 50 People Describe Sexual Harassment on Capitol Hill*, CNN (Nov. 14, 2017), <https://www.cnn.com/2017/11/14/politics/sexual-harassment-congress/index.html>.

10 The CAA outlines the employment laws that apply to Congress and includes prohibitions on sex discrimination and sexual harassment. See *infra* Part III for detailed discussion of the CAA.

11 See Karen Handel & Jackie Walorski, Opinion, *Congress Needs to Take the Lead on Fighting Sexual Harassment in the Workplace*, HILL (Nov. 30, 2017), <https://thehill.com/blogs/congress-blog/politics/362563-congress-needs-to-take-the-lead-on-fighting-sexual-harassment-in>; MJ Lee & Sunlen Serfaty, *Growing Calls for Reforms to Sexual Harassment Policies in Congress*, CNN (Nov. 7, 2017), <https://www.cnn.com/2017/11/07/politics/sexual-harassment-congress-policy/index.html>; see also Letter from 1500 Former Congressional Staff, *supra* note 9.

12 Leigh Ann Caldwell, *Time Is Running out for a Divided Congress to Finish Its #MeToo Legislation*, NBC NEWS (July 27, 2018), <https://www.nbcnews.com/politics/congress/time-running-out-divided-congress-finish-its-metoo-legislation-n894966>; Frida Garza, *The House and the Senate Can’t Agree on Whose Proposed Sexual Harassment Reform Is Better*, JEZEBEL (July 27, 2018), <https://theslot.jezebel.com/the-house-and-the-senate-cant-agree-on-whose-proposed-s-1827920773>.

Congressional Accountability Act of 1995 Reform Act (“Reform Act”).¹³ Yet, it is not clear that the reform amounts to true accountability. The Reform Act is considered by many to be only “an important step” in the right direction—not a resounding victory.¹⁴ It represents a watered-down version of what the House had hoped to accomplish,¹⁵ and falls short of the reform needed to really ensure that Congress holds itself to a higher standard when it comes to preventing and correcting sex discrimination and harassment within its halls.

This Note explores how the CAA contributed to the underreporting of the sexual harassment occurring in Congress and evaluates both the original proposals offered by the House and Senate to reform the CAA and the Reform Act in its final form. Part I will offer brief background information on the ‘me too’ Movement and the specific allegations of harassment against individuals in Congress. Part II will explore the issue of underreporting when it comes to instances of sexual harassment, with a particular focus on reporting considerations of professional women such as those employed in the legislature. Part III gives an overview of Title VII, the basic framework for making a formal complaint for sexual harassment or discrimination that occurs in the employment setting. Part III then largely focuses on the CAA and how it modified the procedure required to bring claims of sexual harassment or discrimination occurring within the congressional context. Part IV is broken into three Sections. Section IV.A describes the major components of the initial House and Senate reform bills and how they compare to one another and to the Reform Act. Section IV.B covers the major components of the Reform Act. Section IV.C then explores the ways in which the Reform Act falls short of what victims of sexual harassment on Capitol Hill deserve and fails to meet Congress’s promise to hold itself to a higher standard.

I. ‘ME TOO’: THE NATIONAL MOVEMENT EXPOSES CONGRESS’S SEXUAL HARASSMENT PROBLEM

Though it did not garner national attention until 2017, the ‘me too’ Movement was founded in 2006 to build a community for survivors of sexual violence, particularly for women and girls of color in low-income communities.¹⁶ The Movement garnered national attention due to a viral hashtag

13 Pub. L. No. 115-397, 132 Stat. 5297 (2018) (to be codified in scattered sections of 2 U.S.C.).

14 Li Zhou, *Congress’s Recently Passed Sexual Harassment Bill, Explained*, Vox (Dec. 20, 2018), <https://www.vox.com/2018/12/20/18138377/congress-sexual-harassment-bill> (acknowledging that lawmakers and advocates believe the law is just the beginning and there is “still more work to be done”); see also Kelsey Snell, *Congress to Make Members Pay Out of Pocket for Sexual Harassment Settlements*, NPR (Dec. 12, 2018), <https://www.npr.org/2018/12/12/676209258/congress-to-make-members-pay-out-of-pocket-for-sexual-harassment-settlements> (noting that the law “falls short of the sweeping changes” that were hoped for).

15 See Snell, *supra* note 14.

16 *History & Vision*, METOO., <https://metoomvmt.org/about/> (last visited Nov. 21, 2018). Though the Movement’s purpose is to build community, founder Tarana Burke

born in the wake of successive allegations of sexual harassment against high-profile men in Hollywood in October 2017, including claims against Harvey Weinstein and Roy Price.¹⁷ With just one tweet, actress Alyssa Milano elevated the grassroots ‘me too’ Movement to a national platform.¹⁸ Before the end of the month, public allegations were brought forward against dozens more men: actors, CEOs, celebrities, directors, publishers, photographers, and journalists.¹⁹ In November 2017, the wave of ‘me too’ allegations reached politics, first with Senate candidate Roy Moore²⁰ and then with Sen-

can trace the spark of ‘me too’ to a single encounter she had with one young girl more than a decade ago at a youth camp at which she was working. *The Inception*, METOO., <https://metoomvmt.org/the-inception/> (last visited Nov. 21, 2018).

17 See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=lede-package-region®ion=top-news&WT.nav=top-news>; John Koblin, *Roy Price Quits Amazon Studios After Sexual Harassment Claim*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/business/media/roy-price-amazon-studios.html>. Some historical accounts of the ‘me too’ Movement also consider the forced resignation of Fox News’s Bill O’Reilly in April 2017 to be an integral first step for the Movement. See *Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017*, VOX, <https://www.vox.com/a/sexual-harassment-assault-allegations-list/> (last updated Jan. 9, 2019) (documenting a compilation of influential people accused of sexual misconduct since O’Reilly’s forced resignation). Many timelines do not include the earlier case of sexual harassment brought by former Fox & Friends host Gretchen Carlson against Fox News surrounding the conduct of Roger Ailes and Steve Doocy, yet the impact of the case on preparing the public stage onto which the ‘me too’ Movement entered should not be discounted. See Gretchen Carlson, *Opinion, To Succeed, #MeToo Must Target America’s Laws, Not Just a Few Powerful Men*, USA TODAY (Sept. 25, 2018), <https://www.usatoday.com/story/opinion/voices/2018/09/25/me-too-anniversary-women-sexual-harassment-gretchen-carlson-column/1381126002/>; Judd Legum, *The Forgotten Sexual Harassment Scandal at Fox News*, THINK PROGRESS (Apr. 24, 2017) <https://thinkprogress.org/the-forgotten-sexual-harassment-scandal-at-fox-news-5f7e8ccb5083/>. For what is thus far the most complete compilation of allegations and their subsequent impact throughout the “year of reckoning” after the Weinstein allegations, see Lisa Ryan, *Our Year of Reckoning: An Exhaustive Timeline*, CUT (Oct. 5, 2018), <https://www.thecut.com/2018/10/sexual-harassment-harvey-weinstein-allegations.html>.

18 See Sarah Spellings, *#MeToo Hashtag Shows Just How Common Sexual Assault and Harassment Are*, CUT (Oct. 16, 2017), <https://www.thecut.com/2017/10/metoo-shows-prevalence-of-sexual-harassment.html>; Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976. Milano’s tweet—“If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”—received 35,000 responses on just the first day. Spellings, *supra*.

19 Ryan, *supra* note 17.

20 See Stephanie McCrummen et al., *Woman Says Roy Moore Initiated Sexual Encounter When She Was 14, He Was 32*, WASH. POST (Nov. 9, 2017), https://www.washingtonpost.com/investigations/woman-says-roy-moore-initiated-sexual-encounter-when-she-was-14-he-was-32/2017/11/09/1f495878-c293-11e7-afe9-4f60b5a6c4a0_story.html?noredirect=ON&utm_term=.580c79aaa460.

ator Al Franken.²¹ In the year that followed, public allegations were made against eleven U.S. representatives and against the chiefs of staff for two additional representatives.²² In both claims against the chiefs of staff, the respective representatives were accused of failing to take any action to address the sexual harassment despite having knowledge of the conduct.²³ Not only were claims made against representatives by congressional staff or members of the public, allegations of sexual harassment were also brought forward against unidentified congressmen by four congresswomen.²⁴ While three of the congresswomen no longer served in Congress, the harassment occurred while they were in office.²⁵ Beyond allegations directed at specific members of Congress or particular members of their staff, dozens more allegations have been made by staffers declining to publicly identify the perpetrators by name.²⁶ These staffers disclosed that incidents of harassment occurred at the hands of both members of Congress and their senior aides.²⁷

Despite these many allegations, it is difficult to get a sense of how frequently sexual harassment occurs on the Hill. The best resource available to get even a tentative feel for the frequency at which sexual harassment occurs within the halls of Congress seems to be the annual reports produced by the

21 See Dartunorro Clark, *Al Franken Accused of Forcibly Kissing, Gropping Leeann Tweeden*, NBC NEWS (Nov. 16, 2017), <https://www.nbcnews.com/politics/congress/sen-al-franken-accused-forcibly-kissing-groping-woman-n821381>; Meghan Keneally, *Sen. Al Franken's Accusers and Their Allegations Against Him*, ABC NEWS (Dec. 6, 2017), <https://abcnews.go.com/US/sen-al-frankens-accusers-accusations-made/story?id=51406862>. It is also important to note that public allegations by congressional employees of sexual harassment perpetrated by congressmen predate the 'me too' Movement; for example, there were allegations against Representative Mark Foley in 2006, Representative Eric Massa in 2010, and Representative Blake Farenthold in 2015. See Erin Bacon, *Predatory Behavior: The Dark Side of Capitol Hill*, ROLL CALL (Feb. 2, 2017), <https://www.rollcall.com/news/predatory-behavior-capitol-hill-sexual-harassment>.

22 See Ann Gerhart & Danielle Rindler, *How #MeToo Has Changed the D.C. Power Structure—So Far*, WASH. POST (Sept. 26, 2018), https://www.washingtonpost.com/graphics/2018/politics/how-metoo-has-changed-the-dc-power-structure/?utm_term=.d4ab5436c98e.

23 See *id.*; see also Elise Viebeck, *Conn. Congresswoman Kept Aide on Staff for 3 Months After She Learned of Threat Allegation*, WASH. POST (Mar. 29, 2018), https://www.washingtonpost.com/powerpost/conn-congresswoman-kept-aide-on-staff-3-months-after-she-learned-of-threat-allegation/2018/03/29/5af5b11c-2311-11e8-94da-ebf9d112159c_story.html?utm_term=.6cb508501d74.

24 Associated Press, *Congresswomen Say They've Been Repeatedly Sexual Harassed by Colleagues*, FORTUNE (Nov. 3, 2017), <http://fortune.com/2017/11/03/sexual-harassment-congress/>.

25 *Id.*

26 See Lee et al., *supra* note 9. Fear of retaliation is often the most prominent reason why accusers remain anonymous; for a discussion of why this concern is particularly significant when allegations are made against a political figure, see *infra* Part II. Many of the staffers declining to publicly name their perpetrators have also remained anonymous themselves for fear of retaliation and repercussions. See Lee et al., *supra* note 9.

27 See Lee et al., *supra* note 9.

Office of Compliance (OOC).²⁸ These reports provide breakdowns of how many allegations of sexual harassment and discrimination are occurring each calendar year. The OOC reports for 2017 and 2016 indicate that seventeen and nineteen congressional employees initiated claims of sexual harassment and discrimination in each of those years, respectively.²⁹ These annual numbers should be concerning all on their own, however, they are even more alarming because of the well-known problem of underreporting when it comes to sexual misconduct.³⁰ The likelihood that the OOC reports significantly underrepresent the actual occurrence of harassment on the Hill is underscored by the findings of a CQ Roll Call survey of congressional staff in July 2016. The survey found that forty percent of female respondents believed sexual harassment to be a problem on Capitol Hill.³¹ One in six of the respondents reported being personally victimized during her employment by the legislature.³² Based on the number of female staffers employed by Congress and these survey results, it is quite likely that the OOC reports grossly understate the number of sexual harassment incidents occurring within the halls of Congress.³³

28 The Office of Compliance is the legislative office established under the CAA to enforce workplace protections for congressional employees.

29 U.S. CONG. OFFICE OF COMPLIANCE, FY2017 ANNUAL REPORT: STATE OF THE CONGRESSIONAL WORKPLACE 11 (2017); U.S. CONG. OFFICE OF COMPLIANCE, FY2016 ANNUAL REPORT: STATE OF THE CONGRESSIONAL WORKPLACE 18 (2016) [hereinafter 2016 STATE OF THE CONGRESSIONAL WORKPLACE]. Though the 2015 Report does not identify how many claims were initiated for sexual harassment and discrimination specifically, forty-nine claims were initiated that year for Title VII and discrimination allegations, which would include allegations of sexual harassment and discrimination. U.S. CONG. OFFICE OF COMPLIANCE, FY2015 ANNUAL REPORT: STATE OF THE CONGRESSIONAL WORKPLACE 19 (2015). The 2014 Report identifies that sixty information requests were made for concerns of sexual harassment and discrimination that year, and that twenty-six claims were actually initiated for sexual harassment and discrimination allegations in 2014. U.S. CONG. OFFICE OF COMPLIANCE, FY2014 ANNUAL REPORT: STATE OF THE CONGRESSIONAL WORKPLACE 21, 24 (2014) [hereinafter 2014 STATE OF THE CONGRESSIONAL WORKPLACE]. Title VII and discrimination concerns composed almost fifty percent of the general information requests received by the OOC in 2013, and thirty-seven claims were initiated for allegations of sexual harassment and discrimination that year. U.S. CONG. OFFICE OF COMPLIANCE, FY2013 ANNUAL REPORT: STATE OF THE CONGRESSIONAL WORKPLACE 20, 24 (2013). The reports for the last several years also consistently indicate that claims of harassment and discrimination under Title VII and other discrimination statutes are frequently the most common workplace violations for which the OOC receives requests for general information and for which proceedings are initiated (as compared to the other workplace statutes that the OOC is charged with enforcing under the CAA).

30 See *infra* Part II.

31 Bacon, *supra* note 21.

32 *Id.*

33 If nearly half of congressional staffing positions are filled by women (disregarding the disparity in men holding a significant proportion of positions of authority as opposed to women), then there are some 7000 or so women employed by Congress. See Burgat, *supra* note 5; see also *Among Senior Capitol Hill Staffers, Men Still Outnumber Women*, *supra* note 5. If one out of every six women is personally subjected to sexual harassment and discrimi-

While the nation began to question the CAA reporting procedure for congressional employees in the fall of 2017, a significant number of congressional staffers, either current or former, also spoke out against the pre-Reform Act reporting process. Less than one month after ‘me too’ arrived on the national scene, more than 1500 former congressional staff came together to sign a single letter encouraging Congress to take action and make meaningful change.³⁴ The signatories were not necessarily individuals representing themselves as survivors of sexual harassment or discrimination during their employment with the legislature. Rather, those who signed the letter were individuals urging reform due to a recognition that the problem of harassment is significant and the process for bringing claims forward under the CAA was “inadequate” and may have “actually [been] discourag[ing] victims” from coming forward.³⁵ This adds to the conclusion that the OOC reports fail to capture the depth of Congress’s harassment problem: if so few actual reports are being made while so many current or former staffers report having experienced harassment, and many more criticize the inadequacy of the pre-Reform Act reporting process, then it would be a severe mistake to accept the OOC reported numbers of harassment allegations at face value.

II. THE REPORTING PROBLEM: WHY SOME VICTIMS CHOOSE NOT TO REPORT

Victims of sexual violence and harassment may have a renewed sense that they are not alone as a result of the ‘me too’ Movement. This sense of support, however, does not necessarily result in an automatic increase in the number of reports being made of the sexual misconduct that is occurring. Underreporting is a well-known epidemic when it comes to sexual misconduct.³⁶ Though this theme is not at all particular to sexual misconduct in the employment setting, this Part focuses solely on underreporting of sexual misconduct in the workplace in light of the scope of this Note.

“[T]he least common response to harassment is . . . to take some formal action, either to report the harassment internally or file a formal legal complaint.”³⁷ In many cases, victims of harassment in the workplace do not com-

nation as per the findings of the CQ Roll Call survey, then the recent reports should reflect a number closer to 1000 or more claims of sexual harassment experienced by the congressional staffers polled in 2016. See Bacon, *supra* note 21.

34 Letter from 1500 Former Congressional Staff, *supra* note 9.

35 *Id.*

36 Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, in 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 484 (Julian Barling & Cary L. Cooper eds., 2008) (citing various works discussing underreporting).

37 *Preventing Sexual Harassment in the Congressional Workplace: Examining Reforms to the Congressional Accountability Act: Hearing Before the Comm. on H. Admin.*, 115th Cong. 8 (2017) [hereinafter *Preventing Sexual Harassment Hearing*] (statement of Victoria A. Lipnic, Acting Chair, U.S. Equal Employment Opportunity Commission).

plain or formally confront the harasser.³⁸ Less than a third of people harassed at work will report it to a supervisor, and less than fifteen percent will file a formal complaint.³⁹ There are myriad reasons why victims of sex discrimination and harassment in the workplace might not report the misconduct. An initial obstacle to reporting is that victims must first know their rights in order to know that those rights have been violated. Victims must also know or have access to information on the procedure for making a complaint. Even when a victim knows how to make a claim, they might choose not to report out of fear of being blamed for the incident or not being believed.⁴⁰ There is also fear that, once reported, an employer will be indifferent to the harassment, will frame the problem as the victim being oversensitive, or, even worse, that the employer will be hostile to the victim's report.⁴¹ Further, victims might not report due to fear of retaliation from the employer and also from the harasser themselves.⁴² Essentially, victims risk that reporting the conduct will make the problem worse. Victims also fear that complaints will not be kept confidential.⁴³ Where confidentiality is in question, victims may fear facing a lack of support from coworkers, or even backlash from them for disrupting the workplace environment.⁴⁴

Additionally, it is not uncommon for victims to put up with certain conduct in the moment, either because they do not know how to respond or because they feel little choice but to accept the behavior after weighing the above concerns.⁴⁵ Victims also might not come to recognize the incident as sexual harassment until confiding in others, hearing stories of others who experienced similar conduct, or looking back on the incident later.⁴⁶

Beyond these considerations which may be shared by all victims of workplace misconduct, the setting of Capitol Hill adds compounding factors to the underreporting that surrounds sexual misconduct in the workplace.

38 See CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 15 (2016).

39 See Claire Cain Miller, *It's Not Just Fox: Why Women Don't Report Sexual Harassment*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/upshot/its-not-just-fox-why-women-dont-report-sexual-harassment.html>.

40 See Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83, 87 (2005).

41 See *id.* at 87, 100–01.

42 See *id.* at 87; Heather McLaughlin et al., *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC'Y 333, 346 (2017). "People worry a great deal about retaliation when they bring forth these kinds of claims." Bacon, *supra* note 21 (quoting federal employment lawyer Richard Salzman).

43 See Marshall, *supra* note 40, at 87.

44 "[W]hen a complaint is made, often times [the] complainant becomes an outsider, a troublemaker . . ." *Id.* (alterations in original) (quoting Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69, 80 (2000); see also McLaughlin et al., *supra* note 42, at 348–49 (describing how refusing to engage in misogynistic culture, even short of actually making a report of harassment, can cause one to be seen as a poor team player).

45 See, e.g., Marshall, *supra* note 40, at 101.

46 Russell A. Jackson, *Into the Light*, INTERNAL AUDITOR, June 2018, at 20, 22.

Congress is the place where young political minds go to try to make a difference:

In every building, down every hallway, and behind every door in Congress are good, honest, people—often young people—working long hours for little pay in hopes of making our country and the world fairer and more just. And they have chosen to do so for and with you. It is impossible to describe how meaningful it is to work there.⁴⁷

Legislative staffers entering the workforce for the first time are a “particularly vulnerable population.”⁴⁸ In particular, they face unique considerations of loyalty and allegiance to the office and the congressperson for whom they work,⁴⁹ the party to which their boss belongs,⁵⁰ and to the country as a whole.⁵¹ Beyond this is an awareness that staffer positions are the basic training ground for those desiring to pursue a political career.⁵² “[I]n every instance, [their] current jobs and future careers in politics [are] integrally tied to [their] willingness to stay quiet.”⁵³ “There is a sense that going forward with an allegation . . . would be completely the end of any career working for anybody on the Hill—and it undoubtedly would be.”⁵⁴

47 Letter from Former Congressional Staffers, to the Speaker & Minority Leader of the U.S. House of Representatives and the Majority & Minority Leaders of the U.S. Senate (Sept. 20, 2018), https://www.aclu.org/sites/default/files/field_document/letter_from_former_hill_staffers_who_are_survivors_of_harassment_and_assault-final_9-20-18.pdf [hereinafter Letter Regarding Harassment, Discrimination, and Reform in Congress].

48 *Preventing Sexual Harassment Hearing*, *supra* note 37, at 20 (statement of Susan Tsui Grundmann, Executive Director, Congressional Office of Compliance); *see also* Kain, *supra* note 10 (“As a 24-year-old in my first professional job, I mistook survival for complicity and suffering for weakness.”).

49 Kain, *supra* note 9.

50 Bacon, *supra* note 21.

51 “The halls of Congress are filled with wide-eyed young people who are excited and honored to serve in that exalted place.” Kain, *supra* note 9. “We are former congressional staffers who, like so many before us and since, arrived on Capitol Hill with big dreams and excited to be a part of the improbable story of America.” Letter Regarding Harassment, Discrimination, and Reform in Congress, *supra* note 47.

52 Lee et al., *supra* note 9 (“‘A lot of it has to do with being in a place where people who have power try to exert it to get what they want.’ . . . [S]ome women tolerate the advances or even reciprocate them . . . believing that it is one way to climb the ladder. . . . ‘If a part of getting ahead on Capitol Hill is playing ball with whatever douchebag—then whatever.’”).

53 Letter Regarding Harassment, Discrimination, and Reform in Congress, *supra* note 47; *see also* Bacon, *supra* note 21 (“[P]eople working on Capitol Hill know that making a complaint ‘is career-ending.’” (quoting D.C. employment lawyer Debra Katz who represents congressional aides in sexual harassment cases)).

54 Michelle Ye Hee Lee & Elise Viebeck, *How Congress Plays by Different Rules on Sexual Harassment and Misconduct*, WASH. POST (Oct. 27, 2017), https://www.washingtonpost.com/politics/how-congress-plays-by-different-rules-on-sexual-harassment-and-misconduct/2017/10/26/2b9a8412-b80c-11e7-9e58-e6288544af98_story.html (quoting D.C. employment lawyer Debra Katz); *see also* Bade, *supra* note 1 (reporting on the consequences for former aide Lauren Greene, whose political career “imploded” after she reported the harassment and discrimination of her boss—former Representative Blake Farenthold; as a

A legislative employee might also be concerned about their exposure in bringing a claim forward, both financially and socially.⁵⁵ If an employee feels that they are unable to bear the burden of possible litigation without assistance in the process of investigating or prosecuting the claim, then it will be difficult for them to decide to bring the claim forward.⁵⁶ Under the CAA, aggrieved employees were not provided counsel; thus, if an employee wanted representation in their claim against a powerful perpetrator, this added to the already significant burden victims had to bear. Whether, and to what extent, the Reform Act addresses this particular consideration is discussed in Part IV of this Note. In addition to the costs associated with obtaining representation, employees might also factor in the social costs unique to making these kinds of allegations against public figures. The social costs seem likely to be magnified when combined with the lifelong ramifications reporting can have on one's political career.⁵⁷

Ultimately, there are many considerations that weigh against a victim's consideration to bring their claim forward, some of which are unique to the setting of working in the legislature. Beyond the underreporting of workplace sexual misconduct across all employment sectors, legislative employees face additional concerns that make it more likely that underreporting is at least equally as common in the congressional setting as compared to other employment sectors, if not more so. There is "no doubt that sexual harassment is underreported in Congress, just as all workplace infractions are underreported in Congress."⁵⁸ The discouraging hurdle of trying to navigate the reporting process for congressional employees under the CAA was itself a part of this problem: "Few staffers seem[ed] aware of their rights or the harassment reporting process."⁵⁹ Employment attorneys in D.C. who work with congressional employees bringing harassment and discrimination cases agree that the lack of awareness of workplace rights and the reporting process is concerning: "A lot of people are confused about it. We'll get calls from people who work down on the Hill, and they're not all that clear as to what they should be doing."⁶⁰ The CQ Roll Call survey found that ninety percent of

result, Greene's political career is over, she has found work only through temporary jobs and babysitting on the side and has had to depend on family for support while applying to "dozens, if not more than a hundred, jobs in communications").

55 See *Preventing Sexual Harassment Hearing*, *supra* note 37, at 20 (statement of Susan Tsui Grundmann, Executive Director, Office of Compliance).

56 See Lee & Viebeck, *supra* note 54.

57 *Id.*; see also Bade, *supra* note 1 (highlighting Lauren Greene's personal experience with a struggling career after reporting due to the political and social ramifications).

58 Lee & Viebeck, *supra* note 54 (quoting CEO of the Congressional Management Foundation Brad Fitch). The Congressional Management Foundation is a nonprofit organization that aims to help lawmakers and staff make their offices more transparent, accountable, and effective by strengthening connections with constituents. *About CMF*, CONG. MGMT. FOUND., <http://www.congressfoundation.org/about-cmf> (last visited Nov. 21, 2018).

59 Lee & Viebeck, *supra* note 54.

60 *Id.* (quoting D.C. employment lawyer Alan Lescht).

staffers were unaware of the Office of Compliance, the legislative office charged with enforcing workplace protections for congressional employees.⁶¹ The original CAA procedure required that an aggrieved employee go through the OOC in order to make any kind of claim, either administrative or judicial—thus, an employee who did not know that the OOC existed was an employee completely unable to vindicate any violation of their workplace rights, including being subjected to harassing or discriminatory conduct.

III. ILLEGALITY OF SEX DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORKPLACE: TITLE VII, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND HOW CONGRESS PLAYS BY DIFFERENT RULES

Sex discrimination in the workplace was made illegal by Title VII of the Civil Rights Act of 1964.⁶² Title VII made it unlawful for an employer (1) “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex;” or (2) “to limit, segregate, or classify employees or applicants . . . in any way which would . . . adversely affect” an employee or applicant as a result of their sex.⁶³ The bill was initially intended to address racial discrimination in employment. Indeed, the word “sex” was actually added by Senator Howard W. Smith of Virginia in an attempt to block passage of the bill.⁶⁴ Though the ploy clearly did not prevent passage of the bill, it does help to explain why—despite the inclusion of sex in Title VII—sexual harassment was not recognized as a cause of action under Title VII until over twenty years later in *Meritor Savings Bank v. Vinson*.⁶⁵ In *Meritor*, the Supreme Court finally made clear that claims of harassment were cognizable under Title VII.⁶⁶ Even still, workplace sexual harassment claims were rare until 1991.⁶⁷

61 Bacon, *supra* note 21.

62 Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-16 (2012)).

63 42 U.S.C. § 2000e-2.

64 BETH K. WHITTENBURY, INVESTIGATING THE WORKPLACE HARASSMENT CLAIM 2 (2012).

65 477 U.S. 57 (1986).

66 *Id.* at 65–67.

67 WHITTENBURY, *supra* note 64, at 2. Some scholars correlate this timeline to the claims of sexual harassment by Anita Hill against then-nominee to the U.S. Supreme Court, Clarence Thomas. *Id.* Still, accounts of women’s experience with workplace sexual harassment were recognized much earlier. See, e.g., LIN FARLEY, SEXUAL SHAREDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB (1978); ANNA-MARIA MARSHALL, CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERYDAY LIFE 36 (2005) (documenting the initial inclusion of sexual harassment as a political issue within national women’s organizations in the 1970s). Of course, it would be incomplete not to mention Catharine MacKinnon’s contribution to the development of sexual harassment law as well. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

Sexual harassment law developed into two different types of cognizable claims: hostile environment and quid pro quo.⁶⁸ A hostile environment claim requires that some sexual conduct occurred,⁶⁹ such conduct was unwelcome, and that the conduct was so severe or pervasive as to create a hostile working environment.⁷⁰ A quid pro quo claim requires that some sexual conduct occurred, such conduct was unwelcome, and that failure to submit to the conduct was used as a basis for an employment decision affecting the individual's employment status.⁷¹ Employees covered by the law⁷² have the choice of pursuing a claim internally under their company's policies and procedures or making a claim to the U.S. Equal Employment Opportunity Commission ("EEOC"), the executive agency charged with enforcing workplace protections for executive employees as well as other public and private employees.⁷³ However, none of the protections of Title VII initially applied to Congress or any employee under its authority⁷⁴: when enacting Title VII, Congress exempted itself from the statute's workplace protections.

The EEOC was created as part of Title VII.⁷⁵ The EEOC's procedure for handling claims of sexual harassment or discrimination requires an aggrieved employee to file a "charge of discrimination" within 180 days of the harassing or discriminatory conduct.⁷⁶ The EEOC will then notify the employer of the claim. The EEOC may request that the parties engage in mediation, but mediation is strictly voluntary; it will only occur if all parties consent to participate.⁷⁷ Where mediation does not occur or does not resolve the charge, the EEOC will engage in investigation of the charge.⁷⁸ Investigation can include conducting interviews and collecting documents from the employer; where employers do not cooperate, the EEOC has subpoena power to ensure their compliance.⁷⁹ After concluding its investiga-

68 Quid pro quo is Latin for "something for something."

69 This conduct can be either differential treatment based on sex or conduct that is sexual in nature. WHITTENBURY, *supra* note 64, at 3.

70 *Id.*; see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

71 WHITTENBURY, *supra* note 64, at 8. A variety of actions can constitute the necessary "employment decision," including "hiring/firing, promotion/demotion, change of shift assignment, change of job description, change of job location, change in benefits, change in compensation, [and] significant change of work area." *Id.* at 9.

72 Most employees working for an employer with fifteen or more employees will be covered by Title VII's sex discrimination protection. *About EEOC: Overview*, EEOC, <https://www.eeoc.gov/eeoc/index.cfm> (last visited Nov. 30, 2018). This includes employees of the federal government except for employees of the legislative branch. *Id.*

73 42 U.S.C. § 2000e-5 (2012).

74 *Id.* § 2000e(b).

75 *Id.* § 2000e-4.

76 *Employees & Applicants: Time Limits for Filing a Charge*, EEOC, <https://www.eeoc.gov/employees/timeliness.cfm> (last visited Nov. 30, 2018).

77 *About EEOC: Questions and Answers About Mediation*, EEOC, <https://www.eeoc.gov/eeoc/mediation/qanda.cfm> (last visited Nov. 30, 2018).

78 *Employees & Applicants: What You Can Expect After You File a Charge*, EEOC, <https://www.eeoc.gov/employees/process.cfm> (last visited Nov. 30, 2018).

79 *Id.*

tion, if the EEOC does not determine that there was harassment or discrimination in violation of Title VII, they will provide the employee a “notice of right to sue.”⁸⁰ This notice is required before a suit can be filed in court.⁸¹ Where the EEOC determines that a violation occurred, the Agency will attempt to reach a settlement with the employer.⁸² If no settlement can be reached, the Agency will determine whether the EEOC or the Department of Justice should file a lawsuit against the employer. Should the EEOC decline to file a suit at this point, the employee receives notice, giving them the right to initiate a suit in court.⁸³ The EEOC received nearly 30,000 charges containing an allegation of workplace harassment in 2015 alone.⁸⁴

A. *The Congressional Accountability Act of 1995: What It Meant for Congressional Employees Experiencing Sexual Harassment or Discrimination*

The idea that the rulemakers must themselves be bound by the rules they make is a central tenet of any democratic republic.⁸⁵ This traditional principle has been instilled in American society ever since the founding era,⁸⁶ and Americans continue to carry with them a strong sense that no one should be above the law.⁸⁷ Despite this belief, Congress has sometimes

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Preventing Sexual Harassment Hearing*, *supra* note 37, at 8 (statement of Victoria A. Lipnic, Acting Chair, U.S. Equal Employment Opportunity Commission).

85 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 379 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690); Andrew Lintott, *Aristotle and Democracy*, 42 *CLASSICAL Q.* 114, 122 (1992) (referencing a number of Aristotle’s works); *see also* Charles Grassley & Jennifer Shaw Schmidt, *Essay, Practicing What We Preach: A Legislative History of Congressional Accountability*, 35 *HARV. J. ON LEGIS.* 33, 35 (1998) (“This is a democracy, and therefore, we make laws for the people, and we, too, must follow these laws.”).

86 *THE FEDERALIST* NO. 57, at 352–53 (James Madison) (Clinton Rossiter ed., 1961) (“I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America, a spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty. Such will be the relation between the House of Representatives and their constituents.”).

87 *See* Gerald D. Skoning, *Opinion, How Congress Puts Itself Above the Law*, *WALL ST. J.* (Apr. 15, 2013), <https://www.wsj.com/articles/SB10001424127887324504704578413182814140480>.

exempted itself from the laws it makes to govern either the public, the executive branch, or both.⁸⁸ During the early 1990s, this tendency encountered heightened criticism,⁸⁹ which culminated in the passing of the Congressional Accountability Act of 1995 (“CAA”).⁹⁰ The CAA was the very first law passed by the 104th Congress and was seen as a “long overdue restoration of the Framers’ intent that Congress should apply to itself the laws it prescribes for the people.”⁹¹

The CAA originally made eleven different federal civil rights and employment laws applicable to Congress and its various support organizations.⁹² Of particular relevance for discussing sex discrimination and harassment is the application of Title VII of the Civil Rights Act of 1964.⁹³ The CAA also established the Office of Compliance (OOC) to serve as an independent legislative office charged with executing the CAA.⁹⁴ The OOC includes a Board of Directors, which consists of five individuals jointly appointed by the Speaker of the House of Representatives, the Majority Leader of the Senate, and the Minority Leaders of both the House of Representatives and the Senate.⁹⁵ The CAA provides for appointment of various other positions, including an Executive Director, Deputy Executive Directors, General Counsel, and other staff by either the Chair or the Executive Director.⁹⁶ In 2017, the OOC was comprised of approximately twenty individuals, not including the five members of the Board of Directors.⁹⁷

The heart of the CAA is the administrative and judicial dispute resolution procedures it established through which the laws made applicable to Congress were to be enforced. Until the Reform Act, these procedures provided the sole means by which any congressional employee could bring a claim under the applicable federal laws against an employing office—including a claim of workplace sex discrimination or harassment under Title VII.⁹⁸

88 See Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 106, 112 (1995). Congress continues to exempt itself from various laws. See, e.g., 5 U.S.C. § 551(1)(A) (2012); see also Skoning, *supra* note 87.

89 Bruff, *supra* note 88, at 107.

90 Pub. L. No. 104-1, 109 Stat. 3 (1995) (codified as amended in scattered titles of the U.S. Code).

91 James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. ON LEGIS. 1, 1–2 (1999). Two senators even quoted portions of *The Federalist No. 57* during floor debate. *Id.* at 2 n.4.

92 Grassley & Schmidt, *supra* note 85, at 35. Two additional laws have since been added to those applied to Congress via the CAA. U.S. CONG. OFFICE OF COMPLIANCE, CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, at iii (2016).

93 2 U.S.C. § 1302(a)(2) (2012).

94 *Id.* § 1381.

95 *Id.* § 1381(b).

96 *Id.* § 1382.

97 See *Preventing Sexual Harassment Hearing*, *supra* note 37, at 18 (statement of Susan Tsui Grundmann, Executive Director, Congressional Office of Compliance).

98 2 U.S.C. § 1401.

To initiate a claim with the OOC, an employee was required to request counseling within 180 days of the alleged violation.⁹⁹ The counseling period lasted thirty days unless the employee and the OOC agreed to reduce the time period.¹⁰⁰ During the counseling period, the OOC provided the employee with “all relevant information with respect to the rights of the employee.”¹⁰¹ To move forward with a claim after counseling, an employee had fifteen days from the conclusion of the counseling period to request that the OOC initiate mediation.¹⁰² Mediation consisted of meetings, either jointly or separately, between an OOC-appointed mediator, the employee, and the employing office.¹⁰³ The mediation period lasted for thirty days unless an extension was jointly requested by both parties.¹⁰⁴ All mediation was deemed “strictly confidential” with the threat of sanctions against anyone who violated this confidentiality.¹⁰⁵

If a dispute was not resolved during the mediation process, the employee was required to wait an additional thirty days after the mediation period before taking any further action.¹⁰⁶ This became known as the “cooling off period.”¹⁰⁷ After the cooling off period, the employee had sixty days to proceed in one of two ways: the employee could file an administrative complaint with the OOC or file a civil action in federal court.¹⁰⁸ If an employee elected to proceed through an administrative complaint, the OOC appointed a hearing officer who had the authority to dismiss claims deemed frivolous prior to a hearing or to conduct a confidential hearing for claims not dismissed and to issue a decision as to whether a violation occurred in those cases.¹⁰⁹ Either the employee or the employing office could appeal the decision of the hearing officer to the Board of Directors within thirty days of

99 *Id.* § 1402(a).

100 *Id.*

101 *Id.* “Counseling” for the purposes of the CAA should not be confused with what people often think of as psychological or other professional counseling to resolve personal issues. The counseling period would be more aptly thought of as an informative period in which the OOC intends to provide the employee with all the information necessary for deciding how to proceed.

102 *Id.* § 1403. If an employee does not request a mediation period, they are not permitted to pursue either of the remedial processes available under the CAA: filing an administrative complaint with the OOC or filing a civil action in federal court. *Id.*

103 *Id.*

104 *Id.*

105 *Id.* § 1416.

106 *Id.* § 1404.

107 Rachael Bade & Elana Schor, *Capitol Hill’s Sexual Harassment Policy ‘Toothless,’ ‘a Joke,’* POLITICO (Oct. 27, 2017), <https://www.politico.com/story/2017/10/27/capitol-hill-sexual-harassment-policies-victims-244224>; Clio Chang, *Congress Has Its Own Sexual Harassment Problem*, SPLINTER (Oct. 25, 2017), <https://splinternews.com/congress-has-its-own-sexual-harassment-problem-1819779198>.

108 2 U.S.C. § 1404.

109 *Id.* § 1405.

entry of the decision by the officer.¹¹⁰ A final decision by the Board was appealable exclusively to the U.S. Court of Appeals for the Federal Circuit and a petition for review to initiate that appeal had to be filed within ninety days of the Board's decision.¹¹¹ An employee who chose to forgo any administrative proceedings upon completion of the cooling off period could instead file a civil complaint in federal district court.¹¹² Throughout the entire process under the CAA, the employing office received representation from the Office of House Employment Counsel or the Office of Senate Chief Counsel for Employment (depending on which house the office was a part of) in addition to any private representation obtained by the individual whose conduct was being investigated.¹¹³ Meanwhile, the OOC provided counseling to the employee but did not serve as counsel; in fact, employees were provided no counsel or representation, not even throughout the first three stages of the administrative process, despite these periods being mandatory steps that, if not taken, barred an employee from seeking administrative or civil remedy.¹¹⁴

Any settlement reached prior to the cooling off period or throughout the administrative procedure required approval by the OOC Executive Director in order to be implemented.¹¹⁵ Further, any settlements or awards issued pursuant to the CAA were paid from a fund appropriated to the U.S. Treasury, not from the funds of any individual employing office or member of Congress.¹¹⁶ The funds paid out of this account for any settlement or award on a claim against a member of Congress were not reimbursed by those members, and there was no required public reporting connecting any such payments to the particular employing office responsible for the payout. The public had no way to obtain information on the amount of public funds being paid out by particular employing offices, nor information on which offices resolved any claims via settlements.

In 1995 the CAA constituted significant progress when compared to a total congressional exemption from the purview of Title VII.¹¹⁷ However, it

110 *Id.* § 1406. The Board does not review decisions of hearing officers de novo, but instead will only set aside the decision if it was arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law or the required procedures, or unsupported by substantial evidence. *Id.*

111 *Id.* § 1407. Similarly, the Federal Circuit does not review decisions of the Board de novo; the court uses the same standard as the Board uses in its review of hearing officers. *Id.*

112 *Id.* § 1408.

113 *Preventing Sexual Harassment in the Congressional Workplace: Hearing Before the Comm. on H. Admin.*, 115th Cong. 1–2 (2017) (written testimony of Gloria J. Lett, Counsel, Office of House Employment Counsel).

114 *Id.*

115 2 U.S.C. § 1414.

116 *Id.* § 1415.

117 See Bruff, *supra* note 88, at 157; Grassley & Schmidt, *supra* note 85, at 34; James T. O'Reilly, *Collision in the Congress: Congressional Accountability, Workplace Conflict, and the Separation of Powers*, 5 GEO. MASON L. REV. 1, 8 (1996).

seems that those who believed that the CAA would truly construct a system of accountability for congressional sexual harassment and discrimination likely found themselves severely disappointed by the CAA when looking back through the lens of awareness brought about by the ‘me too’ Movement. Rather than create accountability, the CAA constructed a structure that allowed the accused to hide behind procedural shadows and failed to provide true accountability to victims or the public at large.

IV. TIME’S UP FOR CONGRESS¹¹⁸: CONGRESS’S RESPONSE IN THE WAKE OF ‘ME TOO’

“Congress has been quick to respond forcefully when harassment becomes an issue in both the public and private sectors. . . . But putting its own house in order has been a different story”¹¹⁹ Even after the ‘me too’ Movement facilitated a heightened awareness that Congress suffers from a “[s]exual [h]arassment [p]roblem,”¹²⁰ it took over a year before the country received any substantial progress.

Quick on the heels of the Movement’s rise, each house passed their own simple resolutions requiring antiharassment training for members of the House and Senate and their staff.¹²¹ The House resolution also requires each of its offices to post notice of the rights and protections afforded to employees.¹²² The most promising part of these resolutions was the speed with which the houses acted: the House resolution was introduced on November 28, 2017, and passed a day later; the Senate resolution was introduced and passed on November 9, 2017.¹²³ Such rapid response indicated Congress’s recognition that action was needed, and that it was needed

118 TIME’S UP, <https://www.timesupnow.com/home> (last visited Nov. 20, 2018). TIME’S UP is an organization that works with advocates to address workplace inequality, because, in their words: “The clock has run out on sexual assault, harassment and inequality in the workplace. It’s time to do something about it.” *Id.*

119 Bacon, *supra* note 21.

120 Chang, *supra* note 107; Lee et al., *supra* note 9.

121 H.R. Res. 630, 115th Cong. (2017) (enacted); S. Res. 330, 115th Cong. (2017) (enacted). It is worth noting that the OOC has been recommending a mandatory training requirement to Congress since 1996. Bacon, *supra* note 21. Various annual reports by the OOC contain this express recommendation of a mandatory training requirement. *See, e.g.*, 2016 STATE OF THE CONGRESSIONAL WORKPLACE, *supra* note 29, at 25; 2014 STATE OF THE CONGRESSIONAL WORKPLACE, *supra* note 29, at 30; U.S. CONG. OFFICE OF COMPLIANCE, FY2012 ANNUAL REPORT: STATE OF THE CONGRESSIONAL WORKPLACE 35 (2012). Despite the annual recommendation, and the past efforts of various members of Congress to pass legislation requiring such training, these 2017 resolutions were the first implementation of any requirement of antiharassment training within the legislature. *See* Bade & Schor, *supra* note 107.

122 H.R. Res. 630.

123 *H. Res. 630: Actions Overview*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-resolution/630/actions?q=%7B%22search%22%3A%5B%22h.res+630%22%5D%7D> (last visited Nov. 30, 2018); *S. Res. 330: Actions Overview*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-resolution/330/actions?q=%7B%22search%22%3A%5B%22s.es.+330%22%5D%7D&r=1> (last visited Nov. 30, 2018).

quickly. However, these simple resolutions amounted to little in the grand scheme of expected reform for a few reasons. First, simple resolutions do not have the force of law.¹²⁴ They are nonbinding and provide for no clear repercussions if the congressional offices fail to comply.¹²⁵ Second, these resolutions only apply to the offices within the House and Senate—they impose no requirements on other departments and support agencies that fall under the legislative branch: the Library of Congress (which includes the Congressional Research Service), the Capitol Police, the Architect of the Capitol, the Congressional Budget Office, and the General Accountability Office.¹²⁶ And finally, the training requirement itself did nothing to modify the archaic administrative process required to bring a claim under the CAA. So, while the training requirements were a step in the right direction, the resolutions exclude many congressional employees from any protection they may offer, and whether they offer much protection at all is questionable absent any clear enforcement mechanism.

The House passed a second simple resolution several months later, on February 6, 2018.¹²⁷ This resolution requires each House office to adopt internal antiharassment and antidiscrimination policies and—perhaps most importantly—established the House Office of Employee Advocacy to “provid[e] legal assistance and consultation to covered employees of the House under the Congressional Accountability Act of 1995 regarding the procedures of such Act”¹²⁸ This means that House employees now have access to legal representation for any claim brought through the administrative processes; the assistance and representation does not extend to employees who pursue a claim by filing a civil action and does not cover legislative employees employed outside of the House.¹²⁹ This legislation is subject to

124 See *Legislative Process: Legislation, Laws, and Acts*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm#4 (last visited Nov. 30, 2018); *The Legislative Process: Bills & Resolutions*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/the-legislative-process/bills-resolutions> (last visited Nov. 30, 2018).

125 The House resolution does provide that “[t]he Committee on House Administration shall consider additional mechanisms to ensure compliance with the training requirement.” H.R. Res. 630, § 1(e). Meanwhile, the Senate resolution provides for a process by which the Secretary of the Senate will publish a list of offices that have certified completion of the training on the public website thirty days after the first day of each Congress. S. Res. 330, § 5. Neither of these, in and of themselves, provides for any punitive actions that can be taken against noncompliant offices.

126 H.R. Res. 630 specifically applies to “each Member . . . , officer, and employee of the House of Representatives.” H.R. Res. 630, § 1(a)(1). The resolution further specifies that “employee” does include interns, fellows, and detailees from other government offices while serving in a House office. *Id.* § 1(a)(2). Likewise, the Senate resolution mandates training for “[s]enators and officers, employees, and interns of, and detailees to the Senate.” S. Res. 330.

127 H.R. Res. 724, 115th Cong. (2018) (enacted). This is the same day on which the House passed its most notable bill to reform the CAA as a whole. See *infra* note 131.

128 H.R. Res. 724.

129 *Id.* § 2(b)–(c).

the above-noted limitations of simple resolutions—however, it is a significant piece of legislation, as it is the first that extends any legal representation to congressional employees bringing claims of sexual harassment or discrimination. The ramifications of this resolution will be further highlighted below when discussing their relation to the Reform Act as a whole.

Beyond the resolutions, a number of bills to formally amend the CAA or individual components of it were proposed in both houses in response to the ‘me too’ Movement.¹³⁰ Only two of these many bills gained any traction after they were introduced: House Bill 4924, which passed the House just one day after it was introduced on February 5, 2018,¹³¹ and Senate Bill 2952, which passed the Senate the same day it was introduced on May 24, 2018.¹³² In the months that followed, both bills sat before the opposite houses awaiting further action while negotiations between the houses were reportedly taking place without much success.¹³³ The struggle to obtain a compromise between the two bills resulted from the several significant ways in which they differed.¹³⁴ Victim-focused advocates tried to exact pressure on the House to

130 Proposed bills that were referred to committee within the respective houses but otherwise made no progress in advancing through committee include the following: S. 3453, 115th Cong. (2018); S. 2872, 115th Cong. (2018); S. 2401, 115th Cong. (2018); H.R. 4822, 115th Cong. (2018); H.R. 4690, 115th Cong. (2017); S. 2236, 115th Cong. (2017); H.R. 4615, 115th Cong. (2017); H.R. 4540, 115th Cong. (2017); H.R. 4522, 115th Cong. (2017); H.R. 4503, 115th Cong. (2017); H.R. 4497, 115th Cong. (2017); H.R. 4494, 115th Cong. (2017); H.R. 4484, 115th Cong. (2017); H.R. 4481, 115th Cong. (2017); H.R. 4458, 115th Cong. (2017); S. 2159, 115th Cong. (2017); H.R. 4396, 115th Cong. (2017); H.R. 4393, 115th Cong. (2017); H.R. 4195, 115th Cong. (2017); and H.R. 4155, 115th Cong. (2017). Information on these bills regarding their date of introduction, referral to particular committees, and lack of subsequent progress can be found using the congressional legislation tracker on <https://www.congress.gov/>.

131 Congressional Accountability Act of 1995 Reform Act, H.R. 4924, 115th Cong. (2018); *H.R. 4924: Actions Overview*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/4924/actions?q=%7B%22search%22%3A%5B%22H.R.%3E+4924%22%5D%7D&r=1> (last visited Nov. 30, 2018).

132 Congressional Accountability Act of 1995 Reform Act, S. 2952, 115th Cong. (2018); *S. 2952: Actions Overview*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/2952/actions?q=%7B%22search%22%3A%5B%22S.+2952%22%5D%7D&r=1> (last visited Nov. 30, 2018).

133 See Caldwell, *supra* note 12; Garza, *supra* note 12; Elana Schor & Heather Caygle, *Congress Dawdles as #MeToo Scandals Rage On*, POLITICO (Aug. 11, 2018), <https://www.politico.com/story/2018/08/11/congress-sexual-harassment-metoo-scandals-773309>; Sunlen Serfaty, *Capitol Hill’s Sexual Harassment Bill Fight Not Expected to Be Resolved Before Election Day*, CNN (Sept. 12, 2018), <https://www.cnn.com/2018/09/12/politics/sexual-harassment-legislation/index.html>; Sunlen Serfaty & Clare Floran, ‘*Time Is Running Out*’: *Former Hill Staffers Urge Congress to Pass Stalled Sexual Harassment Legislation*, CNN (Nov. 13, 2018), <https://www.cnn.com/2018/11/13/politics/congress-metoo-sexual-harassment-legislation/index.html>.

134 Kelsey Snell, *Time Is Running Short for Congress’ Sexual Harassment Bill*, NPR (Dec. 10, 2018), <https://www.npr.org/2018/12/10/675382699/lawmakers-hope-to-reach-compromise-on-overhaul-of-sexual-harassment-claims-system> (“The chambers struggled to resolve

stand by what they considered to be its much stronger proposal.¹³⁵ As time continued to pass with little to no evidence of progress, it became increasingly concerning that the differences between the bills might prevent the passage of a reform bill altogether.¹³⁶ However, less than a month before the end of the congressional session, a new bill was introduced in the Senate: Senate Bill 3749.¹³⁷ The bill passed both houses the same day it was introduced.¹³⁸ Senate Bill 3749 was presented to the President a week later, and on December 21, 2018, President Trump signed into law the Congressional Accountability Act of 1995 Reform Act (“Reform Act”).¹³⁹ The significant substance of the new law and whether it was worth the wait is the subject of the following three Sections.

A. *Ground Zero: The Reform Act’s Predecessors*

The two bills that passed their respective houses during the early wave of reform efforts—House Bill 4924 and Senate Bill 2952—comprised the fundamental building blocks for Senate Bill 3749. Not only did the two original bills contain a number of provisions that were identical or nearly identical to one another, but some of those same provisions also constitute parts of the compromise represented by the Reform Act. As such, it is worth addressing some of these provisions as well as some of the major differences between House Bill 4924 and Senate Bill 2952 that caused the months of negotiation preceding the Reform Act.

Certain elements that were consistent across both the House and Senate bills and are now enshrined in the Reform Act. These include provisions renaming the Office of Compliance to the Office of Congressional Workplace Rights (“Office”)¹⁴⁰ and extending protection to interns, fellows, and detailees—none of whom were covered by the CAA.¹⁴¹ Also present in both bills and now in the Reform Act is the new possibility of alternative work arrangements for the aggrieved employee throughout the course of proceed-

major issues like who will pay for future settlements with accusers, who should conduct the investigations and how much information should be made public.”).

135 Schor & Caygle, *supra* note 133.

136 See Sunlen Serfaty, *Ethics Committee Urges Congress to Pass Long-Stalled Sexual Harassment Legislation*, CNN (Nov. 20, 2018), <https://www.cnn.com/2018/11/20/politics/sexual-harassment-legislation-congress/index.html>; Snell, *supra* note 134.

137 Elise Viebeck, *Congress Sends Trump Bill to Make Lawmakers Liable for Harassment Settlements*, WASH. POST (Dec. 13, 2018), https://www.washingtonpost.com/powerpost/congress-sends-trump-bill-to-make-lawmakers-liable-for-harassment-settlements/2018/12/13/cbccdc5fc-fef6-11e8-83c0-b06139e540e5_story.html?noredirect=ON&utm_term=.913949c46645; S. 3749: *Actions Overview*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/3749/actions> (last visited Jan. 31, 2019).

138 S. 3749: *Actions Overview*, *supra* note 137.

139 Pub. L. No. 115-397, 132 Stat. 5297 (2018) (to be codified in scattered sections of 2 U.S.C.).

140 S. 3749, 115th Cong. § 308 (2018) (enacted); S. 2952, 115th Cong. § 308 (2018); H.R. 4924, 115th Cong. § 305 (2018).

141 S. 3749, § 302; S. 2952, § 302; H.R. 4924, § 301.

ings; the provision specifically provides that these accommodations can be requested by the employee but the employing office is *not required* to permit remote work, a paid leave of absence, or other workplace adjustments.¹⁴² Further, the Reform Act preserved from both bills a host of administrative, reporting, and educational requirements, including the following: (1) that any claim of a violation perpetrated by a member or by senior staff of an employing office that results in an award, settlement, or a final disposition must be referred to the ethics committee of the respective house;¹⁴³ (2) that the Office implement a record retention policy and conduct a climate survey every two years;¹⁴⁴ and (3) that all employing offices not covered by the existing resolutions provide training and education programs for their employees.¹⁴⁵ The Reform Act also carried through an important reporting requirement from the bills requiring the Office to publish annual reports of any payouts made; the reports must indicate the employing office involved, the amount of the payment, the provision violated, and—where the violation was perpetrated by a member or former member—whether the member is in compliance with the reimbursement requirements.¹⁴⁶ This reporting requirement is partially retroactive; while the Reform Act provides that the Office must issue a report on all past payments made using public funds, it specifically bans the report from identifying any particular congressional office connected with those payouts.¹⁴⁷

Despite these similarities shared by the original bills and preserved in the Reform Act, several key differences distinguished the House and Senate bills from one another. These differences provide important context for understanding the compromise represented by the Reform Act. First, the House bill was the only one of the proposals in which there were no counseling or mediation requirements as part of the administrative procedure, doing away with two stages that were mandatory under the CAA and were highly criticized when the process came into the public spotlight following

142 See S. 3749, § 113 (“At the request of a covered employee who files a claim . . . the employing office *may* permit the covered employee to carry out the employee’s responsibilities from a remote location If, in the determination of the covered employee’s employing office, a covered employee who makes a request . . . cannot carry out the employee’s responsibilities from a remote location . . . the employing office *may* . . . grant a paid leave of absence . . . or . . . make another workplace adjustment” (emphasis added)); see also S. 2952, § 113; H.R. 4924, § 113.

143 S. 3749, § 112; S. 2952, § 112; H.R. 4924, § 112.

144 S. 3749, §§ 202–203; S. 2952, §§ 202–203; H.R. 4924, §§ 202–203.

145 S. 3749, § 306; S. 2952, § 306; H.R. 4924, § 304. “Employing office” includes the Office of Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment. 2 U.S.C. § 1301 (2012) (definition not amended by the Reform Act). The offices of the House and Senate are specifically excluded from this provision. S. 3749, § 306. This exemption is presumably because the passage of each houses’ respective resolutions was deemed sufficient to enforce this requirement against the House and Senate.

146 S. 3749, § 201; S. 2952, § 201; H.R. 4924, § 201.

147 S. 3749, § 201.

the ‘me too’ Movement.¹⁴⁸ The original Senate Bill 2952 did away with a counseling period but left mediation as a required default; mediation would be implemented unless either party opted out within ten business days from the date the claim was filed.¹⁴⁹ On this issue, the Reform Act reflects the House bill in eliminating both mandated stages altogether; neither are needed in order to proceed with a claim.¹⁵⁰

With respect to another significant component of House Bill 4924, however, the Reform Act did not preserve the House’s proposal: providing for a new, automatic independent investigation to be completed at the beginning of the complaint process. Under House Bill 4924, the filing of a claim by an employee would have triggered an investigation by the Office in which it would have the power to issue subpoenas and carry out discovery to evaluate the claims; this investigatory power would have given the OOC authority much more similar to that of the EEOC.¹⁵¹ Upon completion of this investigation, the House bill would have required the Office to provide a report indicating a finding of either (1) reasonable cause to believe a violation occurred, (2) no reasonable cause to believe a violation occurred, or (3) an inability to determine whether or not there was reasonable cause to believe a violation occurred.¹⁵² A finding of no reasonable cause would have given the employee the right to file a civil action.¹⁵³ Where the finding was one of reasonable cause or an inability to determine whether there was reasonable cause, a formal hearing would have been conducted.¹⁵⁴ The Reform Act does not contain any such investigative component. Instead, the Reform Act more closely aligns with the Senate’s proposal in the original Senate Bill 2952 with regard to the administrative process. The Senate’s original bill provided for a formal hearing only if requested by the employee, which had to be done within ninety days of either the end of mediation or the date on which a party opted out of mediation.¹⁵⁵ Where an employee opted out of mediation but failed to timely request a formal hearing, they presumably had no other option of resolving the claim other than filing a civil action in court.

Another central difference between the bills was that Senate Bill 2952 included a new provision in which a confidential advisor would be appointed to employees in order to inform them of their rights, to consult with them regarding the responsibilities of the Office, and to discuss the relative merits

148 Lee & Viebeck, *supra* note 54; Letter from 1500 Former Congressional Staff, *supra* note 9 (expressing concern that the “excessive” waiting periods imposed under the CAA might “actually discourage victims” from coming forward); Letter Regarding Harassment, Discrimination, and Reform in Congress, *supra* note 47 (describing the dispute resolution process under the CAA as “antiquated, unfair, and traumatizing”).

149 S. 2952, § 103.

150 S. 3749, §§ 101–102.

151 H.R. 4924, § 103; *see also Employees & Applicants: What You Can Expect After You File a Charge*, *supra* note 78.

152 H.R. 4924, § 103.

153 *Id.*

154 *Id.*

155 S. 2952, 115th Cong. § 104 (2018).

of securing private counsel, designating a nonattorney representative, or proceeding without representation.¹⁵⁶ However, the confidential advisor would not have been permitted to “provide legal advice to, or act as the designated representative for” employees.¹⁵⁷ This provision was preserved in the compromise of the Reform Act, but it only applies to allegations involving Senate employing offices, because the House provides for full legal representation to House employees through its previously passed resolution.¹⁵⁸

Finally, the bills differed significantly in the member reimbursement requirements they provided. While each did provide for reimbursement of funds paid out for claims brought against a member, the Senate’s bill provided for greater protection of members against this liability through several limitations on the requirement.¹⁵⁹ These limitations were largely incorporated into the Reform Act and will be detailed further in the following subsection.

*B. Senate Bill 3749: What Does the Reform Act
Mean for Congressional Staff?*

The compromise of Senate Bill 3749 has been met with praise for the simple fact that it significantly improves the antiquated process that the CAA required.¹⁶⁰ After exploring the major elements of the law in this subsection, however, the final subsection of this Note will outline why it is an overstatement to consider the Reform Act a true triumph.

Under the Reform Act, an aggrieved employee has the same 180 days to file a claim as under the original CAA.¹⁶¹ Upon filing a claim, there is no mandatory counseling stage for the employee. The Reform Act requires the Office to intake the claim, notify the employing office, and, where the violation is alleged against a member of Congress, give notice of the possibility that the individual may be required to provide reimbursement for any award or settlement that results.¹⁶² Unlike the House’s original bill, there is no initial investigation of the claim. Instead, the Reform Act provides for a “preliminary review” by a hearing officer designated by the Office.¹⁶³ This review does not seem to give the Office full investigatory power over the claim—it

156 *Id.* § 204.

157 *Id.*

158 H.R. Res. 724, 115th Cong. § 2 (2018) (enacted).

159 S. 2952, § 111; H.R. 4924, § 111.

160 *See Statement from Congress Too and the Purple Campaign on Passage of Sexual Harassment Reform Bill*, CONGRESS TOO (Dec. 2018), <https://www.congresstoo.org/bill-passage-state-ment>; *see also* Ariel E. Solomon, *#MeToo Legislation: Did Congress Just Put Its Money Where Its Mouth Is?*, N.Y. L.J. (Jan. 16, 2019), <https://www.law.com/newyorklawjournal/2019/01/16/metoo-legislation-did-congress-just-put-its-money-where-its-mouth-is/>; Zhou, *supra* note 14.

161 Congressional Accountability Act of 1995 Reform Act, Pub. L. No. 115-397, § 102, 132 Stat. 5297, 5301 (2018) (to be codified at 2 U.S.C. § 1402).

162 *Id.*

163 *Id.* § 103.

requires the hearing officer to assess only whether the basic claim criteria are met: whether the claimant is a covered employee, whether the office involved is an employing office under the Reform Act, and whether the individual has met all the necessary filing deadlines. The review must also identify the potential for settlement, the relief sought by the claimant, and the factual and legal issues involved in the claim; however, the review does not require any collection or assessment of evidence or testimony in order to investigate the identified issues.¹⁶⁴ The hearing officer provides a report based on the preliminary review to both the employee and the employing office. From there, it is up to the employee to *request* a formal hearing if they so desire—an employee has only ten days from the date that the preliminary review report is released to make such request.¹⁶⁵ Any formal hearing that does occur proceeds under the same method as under the original CAA; the Reform Act did not amend the formal hearing process itself.

The Reform Act also does away with any required mediation period, including the opt-out provision from the Senate's original bill. However, the Reform Act does provide for mediation when either party requests it and the other party agrees.¹⁶⁶ The refusal of a party to engage in mediation is specifically banned from being considered during any later procedures under the Reform Act.¹⁶⁷ Once an employee makes it past the preliminary review, it seems the only options for resolving the claim are to request a formal hearing within the ten-day period, to request mediation, or to file a civil action. Employees may only file a civil action when they timely filed a claim with the Office but have not submitted a request for a formal hearing; filing a civil action terminates any further administrative procedures under the Office.¹⁶⁸

An additional feat of the Reform Act is its reimbursement requirement.¹⁶⁹ However, the triumph is lessened by several extra protections afforded to members of Congress that were not part of the House's original proposal; rather, these protections largely came from Senate Bill 2952. The Reform Act provides for reimbursement of compensatory damages resulting from violations committed by a member for any award or settlement connected with a claim.¹⁷⁰ There are, however, significant limitations on the

164 *Id.*

165 *Id.* Where the hearing officer determines that the employee has not stated a claim for which relief can be granted, they become ineligible for a formal hearing under the administrative procedure. Instead, the employee is left only with the option of filing a civil claim. *Id.* It does not appear that there is any process through which an employee can appeal or challenge a hearing officer's preliminary review conclusion.

166 *Id.* § 104.

167 *Id.*

168 *Id.* § 101. The employee must file a civil action within seventy days of having filed a claim with the Office. *Id.*

169 "Reimbursement" means that any funds awarded to a claimant or given through a settlement agreement are still dispersed from the Treasury and then the member of Congress is required to pay back the Treasury for that payment. This is likely done so as not to delay receipt of payment by the claimant. *See Viebeck, supra* note 137.

170 Congressional Accountability Act of 1995 Reform Act § 111.

applicability of this requirement. First, reimbursement is only required for an award if there is a separate finding by the hearing officer or the court that, not only did the violation occur, but that the violation was committed personally by the member.¹⁷¹ Second, reimbursement is only required for the amount of compensatory damages awarded, not for funds dispersed to cover a claimant's award for anything further, such as attorneys' fees or costs.¹⁷² Third, the award is subject to a \$300,000 cap.¹⁷³ Finally, reimbursement is only required for harassment violations—the Act does not require reimbursement for other sex-based discrimination.¹⁷⁴ Regarding funds dispersed in connection with a settlement agreement—as opposed to an award—there is an additional limitation under which funds may not be reimbursed to the Treasury fund: for any settlement agreement involving a violation by a senator, reimbursement by that senator will not be required unless the Senate Select Committee on Ethics through its own investigation of the claim that an actual violation occurred.¹⁷⁵ If the Committee does not determine that an actual violation occurred, it seems that the senator is not responsible for reimbursing the Treasury for money dispersed pursuant to that settlement agreement.

A final significant change incorporated in the Reform Act is the confidential advisor provision proposed in the Senate's original bill.¹⁷⁶ This provision is meant to balance the unequal footing of employees as compared to employing offices, which are provided legal representation for any claim brought against them. However, the Reform Act specifically prohibits the advisor from acting as a designated representative for any covered employee.¹⁷⁷ The advisor is allowed to inform the employee about their rights and assist the employee in understanding the procedures available to them and the significance of those procedures. Moreover, the advisor may consult with the employee regarding the relative merits of securing private counsel, designating a nonattorney representative, or proceeding without representation. The advisor may also advise and consult with the employee about the factual allegations that support the employee's claim and the rela-

171 *Id.*

172 Attorneys' fees and costs may be awarded to prevailing plaintiffs in claims. Punitive damages cannot be awarded. 2 U.S.C. § 1361(c) (2012). This provision of the original CAA was not amended by the Reform Act.

173 Congressional Accountability Act of 1995 Reform Act § 111. This is done by language in the Reform Act that limits the reimbursement requirement to compensatory damages "as would be available if awarded under section 1977A(b)(3) of the Revised Statutes (42 U.S.C. 1981a(b)(3))." The text of the Reform Act itself does not specify the monetary cap. *Id.*

174 *Id.* The Reform Act does provide for reimbursement for "intimidation, reprisal, or discrimination" but only where it is taken as a retaliatory measure against an employee who first files a claim alleging a harassment violation. *Id.*

175 *Id.* § 112.

176 *Id.* § 204.

177 *Id.*

tive merits of the procedural options available to the employee.¹⁷⁸ The employee must request to be assigned a confidential advisor within 180 days from the date of the violation.

C. Accountability: Does the Reform Act Live Up to Congress's Promise to Victims and the Public?

The Reform Act represents vast improvement for congressional employees in very real and significant ways. But the Reform Act also fails to follow through on the promise of “accountability” for both aggrieved employees and the public at large.

First, the “preliminary review” process is a sadly diluted remnant of the investigatory procedure proposed in the House’s original bill. The House bill crafted a congressional procedure to investigate claims in a manner much more similar to those experienced by employees within the executive branch and the private sector when bringing a claim to the EEOC. The absence of a real investigation to collect and consider statements and evidence while it is most readily available is a disservice to employees. Additionally, it seems possible that the bare-bones preliminary review—as opposed to a thorough initial investigation—risks communicating to employees that their claims are not being taken seriously. The preliminary review requires very little actual review. Then, once the report is complete, an employee found to have satisfied the criteria has only ten days to decide how to proceed with the case. Failing to request a formal hearing within those ten days means that the employee’s only options to resolve the claim are to request mediation or to file a civil suit; for employees unable to afford representation in court, this seems as though it might force them into mediation—a result deemed antiquated under the original CAA. Obviously, there must be certain deadlines by which employees need to decide the next steps in pursuing their claim, but a ten-day period to weigh the important decision as to how to proceed in a sensitive claim—one that is not only deeply personal but also significantly impactful on one’s career—seems an unnecessarily short window that fails to account for the weight of the decision.¹⁷⁹

Second, the Reform Act does not deliver as much as promised when it comes to requiring reimbursement for payments related to claims against members of Congress themselves. It is not entirely clear how a hearing officer or court would find in favor of an employee in a claim against a member without also finding that the member committed the violation alleged, and yet the Reform Act only requires reimbursement by members when there is separate finding of responsibility beyond what is needed in claims against those who are not members of Congress. It is too early to tell if this additional hurdle will serve to protect members from reimbursement requirements, but it nonetheless speaks to the begrudging way that the Sen-

¹⁷⁸ *Id.*

¹⁷⁹ Even the Senate’s original bill provided for a ninety-day window in which an employee could request a formal hearing. S. 2952, 115th Cong. § 104 (2018).

ate views financial accountability for member misconduct; this provision requiring a separate finding was not part of the House's original bill. Additionally, the Act incorporates other financial protections that seem out of place in an "accountability" law: both the provisions that members need only reimburse compensatory damages and that the reimbursement has a maximum cap signify that members will accept financial accountability only to a certain degree. Perhaps one of the most egregious protections reserved for senators alone is the provision requiring reimbursement for settlement payments only when the Senate Select Committee on Ethics makes its own finding that a senator personally committed an actual violation. This means that a senator who enters a settlement agreement with an employee may escape financial accountability and once again pass the burden for their misconduct on to the public if the ethics committee does not make a finding that a violation occurred. This provision is even more concerning if resolution of these claims tracks the pattern of resolution within the legal field as a whole: with resolution predominately occurring through settlement agreements. The Reform Act fails to ensure that elected officials cannot escape repaying the public in full for damages paid in response to their own misconduct.

A third aspect of the Reform Act that fails to secure true accountability for aggrieved employees is the inadequate compromise of providing employees a "confidential advisor" instead of legal counsel. The criticism of this component of the CAA was that it is unfair for employing offices and members of Congress to receive government-provided representation while employees are forced to walk through the process without representation unless they can afford to hire their own. Not only does providing a confidential advisor fail to counter this inequality, but it could also risk that employees will be rightfully confused by being provided a lawyer to confidentially discuss the claim with them and to provide legal advice, but somehow not actually serve as their legal representative. Further, what might be the most concerning aspect of this provision is the inconsistent treatment that it produces. Recall that the House proved itself to be committed to remedying the unfairness of the CAA for its employees when it passed the resolution providing legal representation for House employees during the administrative proceedings. The Senate's unwillingness to provide representation to all congressional employees in the Reform Act creates an odd disparity in the rights of congressional staff. Not only does it leave many congressional employees without actual legal representation should they come forward with a claim, but it also generates confusion because the rights of an employee will depend on their employing office rather than being consistent across all congressional employees.¹⁸⁰

Other subtle failures also abound within the Reform Act. While the Reform Act requires a disclosure of past payouts for violations, it does not allow the public to obtain information on which House or Senate offices

180 See Kate Irby, *House Aides Will Have More Protection than Senate Aides in Sexual Harassment Bill*, McCLATCHY (Dec. 12, 2018), <https://www.mcclatchydc.com/news/politics-government/congress/article223014250.html>.

were involved in those past payments.¹⁸¹ In fact, it specifically prohibits this disclosure.¹⁸² While it might be appropriate to be sensitive to the notion that the offices did not contemplate that those settlements and awards would be made public at the time the claim was resolved, it is quite undemocratic for elected officials and their staff to claim entitlement to confidentiality when using public funds to make payments in cases of wrongdoing. In a democratic society where representatives are elected, members of the public have a right to know about such conduct and any related payouts in order to make informed decisions when casting their vote. The public interest must outweigh any expected secrecy on the part of the offices.¹⁸³

Finally, the Reform Act is imperfect not just for what it addresses inadequately, but also for what it fails to address entirely. The Reform Act does not make clear to employees what, if anything, they are permitted to share publicly regarding their claims. If mediation does occur, any information shared during such procedure is confidential.¹⁸⁴ Beyond this, however, employees have no guidance on what they can publicly disclose regarding their claims. Additionally, the Reform Act does not address whether nondisclosure agreements (“NDAs”) can be used or are required in settlement agreements with legislative employees. The availability of NDAs means that a significant number of claims could be resolved without the public having any knowledge of them—resulting in no accountability.¹⁸⁵

The Reform Act should have clarified for employees what they are permitted to disclose and whether an NDA can be requested or even required of them, and when. Further, the best practice would be to prohibit NDAs from being required of or even requested of a victim, and would only allow such agreements where an aggrieved employee freely requests it. Employees who have just made a claim of harassment or discrimination against an employing office might feel immense pressure to agree to an NDA if asked. Even if there is a review process in which a third party tries to assess the voluntariness of an employee’s agreement to an NDA, the risk that such review might not entirely prevent involuntary NDAs could be avoided by permitting NDAs only where the victim makes the request for it. Permitting NDAs only when it is

181 Congressional Accountability Act of 1995 Reform Act § 201(b)(2).

182 *Id.* (“Nothing in paragraph (1)(B) may be construed to require *or permit* the Office of Congressional Workplace Rights to report the account of any specific office of the House of Representatives or Senate as the source of funds used for an award or settlement.” (emphasis added)).

183 Some may argue that disclosure of past settlements and awards will inaccurately inform the public because the settlements in particular do not necessarily represent meritorious claims of harassment and discrimination. This might be true, yet it does not evade the fact that those congressional offices used *public* funds to make the payment. Offices can make their own defenses of why settlements were paid out, but the public ultimately has a right to know where their money is going and where it has gone in the past.

184 2 U.S.C. § 1416 (2012).

185 Lauren Greene was forced to sign a nondisclosure agreement as part of the settlement of her claim against former Representative Farenthold. Bade, *supra* note 1; Snell, *supra* note 134.

requested by a victim would best serve the interest of the victim by allowing them to determine the scope of public knowledge of the claim rather than the employing office. Even where a nondisclosure agreement is requested by the victim, the employing office should not be able to make use of such NDA to evade public reporting requirements. The lack of clarity regarding confidentiality and NDAs in the Reform Act is concerning with regard to protecting the rights of aggrieved employees and the rights of the public to have knowledge of misconduct occurring at the hands of its public servants.¹⁸⁶

CONCLUSION

In the wake of the ‘me too’ Movement, nearly eighty percent of women say they are more likely to speak out in the future if they experience sex discrimination or harassment.¹⁸⁷ As a result of the Movement, countless victims of harassment throughout the country have been emboldened to speak out, to family, friends, or to the public. A significant number of congressional staffers specifically called out Congress’s own harassment problem, which was being exacerbated by an antiquated process that was uniquely required only of congressional employees. After persistent pressure from victims and the public to remedy this “institution-protect[ing] process,”¹⁸⁸ Congress passed the Congressional Accountability Act of 1995 Reform Act. The Reform Act is certainly progress, though it falls short of the reform that many victims and advocates hoped for—and it certainly fails to rise to the level of accountability that victims and members of the public deserve. Only time will tell if the promises of additional progress will be met. And only if more change comes will Congress be able to truly say that it holds itself to a higher standard. Until then, the Reform Act will at least make the process of shedding light on sexual harassment and discrimination more bearable for the brave victims who refuse to stay quiet.

186 Many congressional interns are made to sign NDAs when starting their position. These documents contain no disclaimer that the NDA does not waive the right to make a complaint for harassment or discrimination. That interns will perceive these agreements as waiving their rights under the Reform Act is just one example of the harm that seems likely to result from the Reform Act’s silence on this issue. Rachel Wolfe, *Exclusive: Congress Requires Many Unpaid Interns to Sign Nondisclosure Agreements*, Vox (Mar. 5, 2018), <https://www.vox.com/2018/3/5/17066728/exclusive-congress-requires-many-unpaid-interns-to-sign-nondisclosure-agreements>.

187 Dann, *supra* note 2.

188 Lee & Viebeck, *supra* note 54 (quoting U.S. Representative Jackie Speier).