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The Honorable Henry C. “Hank” Johnson, Jr.
Chairman
Subcommittee on Courts, Intellectual Property, and the Internet
House Judiciary Committee [or House Committee on the Judiciary]
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Darrell Issa
Ranking Member
Subcommittee on Courts, Intellectual Property, and the Internet
House Judiciary Committee [or House Committee on the Judiciary]
2142 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Johnson, Ranking Member Issa, and members of the subcommittee,

I write respectfully to offer my view of Congress’s power under Article I of the Constitution to enact a federal statute that regulates sexual harassment and related forms of misconduct within the federal judiciary. I believe such a statute is comfortably within Congress’s authority, and I explain why in this letter.

As I understand it, the question of congressional power is sparked by the Judiciary Accountability Act, H.R. 4827, introduced on July 29, 2021. In a letter dated August 25, 2021, Hon. Rosalynn Mauskopf, Secretary of the Judicial Conference, argues that such new legislation “interferes with the internal governance of the Third Branch.”¹ This language gestures toward a constitutional argument, although it can be construed also as a policy concern. Similarly, in his 2021 letter to the federal judiciary, Chief Justice Roberts wrote that “courts also require ample institutional independence” because “[t]he Judiciary’s power to manage its own internal affairs

¹ Letter from Hon. Rosalynn Mauskopf, Secretary of the Judicial Conference, to Hon. Henry ‘Hank’ C. Johnson, Jr. (Aug. 25, 2021), <https://www.uscourts.gov/news/2021/08/25/judiciary-informs-congress-its-opposition-bill>.

insulates courts from inappropriate political interference.”² Neither Judge Mauskopf nor Chief Justice Roberts makes an explicitly *constitutional* argument. Nevertheless, Article III of the Constitution obviously looms in the background in both instances.

To aid in the committee’s deliberations about the Judiciary Accountability Act, I make three points. First, the source of Congress’s power in respect to the judiciary’s administration is the ‘horizontal’ component of the Necessary and Proper Clause of Article I—which gives Congress power to legislate the form and operation of other branches of government.³ Second, the judiciary is defined in Article III of the Constitution to benefit from specific forms of constitutional protection. The Constitution protects individual judges from certain kinds of improper influence; it does not protect the institutional functioning of the judiciary as a whole from legislative regulation and change. Even in respect to the core judicial task of adjudication, moreover, Congress exercises a very high degree of control over outcomes through its ability to alter the rule of decision applicable in pending cases. Finally, Congress has historically exercised extensive control over the judiciary at the institutional level. It would be an abrupt and unwarranted departure from historical practice to conclude that the Judiciary Accountability Act lies beyond constitutional bounds.

A. Congress’s Power Over Judicial Administration

There is no doubt that the Constitution vests Congress with wide authority respecting the existence and structure of the federal judiciary below the apex Supreme Court. Diverging from the British practice,⁴ Article 1, Section 8 specifically deposits in Congress the power to “constitute Tribunals inferior to the supreme Court.”⁵ Under these clauses, “Congress judges whether there will be inferior courts, their structure, and how they will function under the Supreme Court.”⁶

Article I authorizes Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [Article I] Powers,” and further to “make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁷ The second part of this clause is called the “horizontal” component of the Necessary and Proper

² Hon. John Roberts, *2021 Year-End Report on the Federal Judiciary* 1 (2021), <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf>.

³ See U.S. Const. art. 1, §8, cl.18.

⁴ Akhil Reed Amar, *America's Constitution: A Biography* 111 (2005).

⁵ U.S. Const. art. I, § 8, cl. 9; see also *id.* art. III, § 1, cl. 1 (vesting the “judicial Power” in “such inferior Courts as the Congress may from time to time ordain and establish”).

⁶ Saikrishna Bangalore Prakash, *Congress As Elephant*, 104 Va. L. Rev. 797, 826–27 (2018).

⁷ U.S. Const. art. I, §8, cl. 18.

Clause.⁸ As a leading historical treatment of the Article III suggests, this “horizontal” power “gives Congress considerable power” over the structure and operation of the federal courts.⁹

The leading decision glossing the Necessary and Proper Clause remains *McCulloch v. Maryland*, upholding the Bank of the United States.¹⁰ Although it does not involve the scope of congressional power over the judiciary’s operation, *McCulloch* is widely understood as “a canonical statement about the scope of Congress’s powers under the Necessary and Proper Clause.”¹¹ The Court described Congress’s power in broad and deferential terms, rejecting the idea that a law must be “indispensable.”¹² In Chief Justice John Marshall’s most canonical formulation, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”¹³

Since *McCulloch*, the Court itself has repeatedly underscored the “large discretion as to the means that may be employed in executing a given power” created under the Necessary and Proper Clause.¹⁴ That Clause, the Court said almost a century ago, allows Congress to “adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution.”¹⁵ The same remains so today. More recently, it has confirmed the “broad” character of the horizontal legislative authority.¹⁶

The sweep of the horizontal element of the Necessary and Proper Clause specifically in relation to the Supreme Court was addressed in 1838 by the Taney Court:

It was necessarily left to the legislative power to organize the Supreme Court No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power; leaving the details to congress, in whom was vested,

⁸ See William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of “The Sweeping Clause,”* 36 Ohio St. L.J. 788 (1975).

⁹ Caleb Nelson, *Sovereign Immunity As A Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1629 (2002) (focusing on the power “to specify the types of writs that federal courts can use and the restrictions to which those writs are subject”).

¹⁰ 17 U.S. (4 Wheat.) 316, 413 (1819).

¹¹ William Baude, *Sharing the Necessary and Proper Clause*, 128 Harv. L. Rev. F. 39, 42 (2014).

¹² 17 U.S. at 411, 413.

¹³ *Id.* at 421.

¹⁴ *The Lottery Case*, 188 U.S. 321, 355 (1903).

¹⁵ *James Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924).

¹⁶ *United States v. Kebodeaux*, 570 U.S. 387, 394 (2013); see also *United States v. Comstock*, 560 U.S. 126, 134 (2010) (describing the test for Congress’s exercise of its necessary and proper power as “whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power”); see also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012) (underscoring “very deferential” judicial approach to the Clause).

by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own.¹⁷

Modern scholars concur. Speaking to the horizontal component of the Necessary and Proper Clause, Dean John Manning of Harvard Law School has explained that “as long as Congress acts constitutionally, the clause gives it express priority over the coordinate branches as implementer-in-chief.”¹⁸ In a similar vein, Prof. William van Alstyne explained that the Necessary and Proper Clause “assigns to Congress alone the responsibility to say by law what additional authority, if any, the ... courts are to have beyond that core of powers that are literally indispensable.”¹⁹

In sum, the express text of the Constitution gives Congress very wide discretion over the structure and functioning of the federal courts—at least absent some express constraint on such power. The next question, therefore, is whether any such constraint exists under Article III of the Constitution.

B. The Judiciary’s Immunities from External Influence under Article III

No express or implied limit constrains Congress’s regulation of sexual harassment within the judiciary. This conclusion follows from both constitutional text and precedent alike. Let us consider each of these in turn.

First, the text of Article III embodies the Framers’ choice as to how judicial independence is realized. There are many ways to protect judicial independence.²⁰ Not all are to be found in the Constitution. The autonomy of the courts is defended by protections focused on the individual, and not the institution. To begin, Article III provides federal judges with tenure during “good [b]ehaviour”²¹ to protect them from removal outside the impeachment process. Next, they are protected from reductions in (non-inflation adjusted) salary.²² By selecting these measures only, the Framers deliberately opted not to protect the judiciary in other ways. There is no good reason to

¹⁷ *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838) (citation omitted).

¹⁸ John F. Manning, *The Supreme Court, 2013 Term--Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 64 (2014); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 67 (1994) (“In as clear a textual commitment as possible, it is Congress that is granted the power to determine the means for specifying *how* powers—and again, *all powers*—in the federal government are to be exercised.”).

¹⁹ Van Alstyne, *supra* note 8, at 794.

²⁰ Aziz Z. Huq, *Why Judicial Independence Fails*, 115 Nw. U. L. Rev. 1055, 1098 (2021).

²¹ U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

²² U.S. CONST., Art. III, § 1. (entitling judges to “Compensation, which shall not be diminished during their Continuance in Office.”). *But see* *United States v. Hatter*, 532 U.S. 557, 571 (2001) (holding that “the Compensation Clause does not forbid Congress to enact a law imposing a nondiscriminatory tax (including an increase in rates or a change in conditions) upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect”)

read the Framers' express choice of good behavior and salary protection as inviting a wide-ranging, free-floating inquiry into other, unrelated measures to advance judicial independence.

The inclusion of the term “good behavior” in the text of Article III further confirms that there is no constitutional bar on the statutory regulation of federal judges in respect to sexual harassment. That language “clearly was not [the same as] life tenure.”²³ In addition to criminal acts,²⁴ English authorities picked out abuse of office, nonuse of office, and refusal to exercise an office as acts for which removal was allowed.²⁵ Then-judge Ruth Bader Ginsburg offered in 1980 the following list of conduct that fell short of good behavior:

[F]inancial misdeeds or irregularities (for example, borrowing from the court's till); “intemperate use of ardent spirits” (sometimes described more bluntly as “habitual drunkenness”); tyrannous treatment of counsel; income tax evasion; and fabrication of per diem expenses. Exotic or singular items also appear in the catalogue; for example, plotting with Spain to seduce Kentucky from the Union, and serving simultaneously as active judge and baseball arbiter. Finally, not least of the offenses, one judge (only one) was accused of ignorance of the law.²⁶

In short, the use of the term “good behavior” in Article III signals that even federal judges—who, again, are by no means the only persons covered by the Judicial Accountability Act—have no general license under the Constitution to engage in improper behavior: Indeed, they may be removed for such acts.

The second relevant source of authority comprises the previous decisions of the Supreme Court. That tribunal's precedents do indicate certain red lines that Congress cannot constitutionally cross. None of these are implicated here. And while these cases identify some elements of the Constitution's text that raise difficult questions of interpretation in respect to congressional power, none are at stake here.²⁷ Indeed, the relevant precedent demonstrates that

²³ Saikrishna Prakash and Steven D. Smith, *How to Remove A Federal Judge*, 116 Yale L.J. 72, 90 (2006).

²⁴ *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir. 1974) (“Protection of tenure is not a license to commit crime or a forgiveness of crimes committed before taking office.”).

²⁵ The relevant English precedent includes *Henry v. Barkley*, (1596) 79 Eng. Rep. 1223, 1224 (K.B.), and *R v. Bailiffs of Ipswich*, (1706) 91 Eng. Rep. 378 (K.B); see also Saikrishna Prakash and Steven D. Smith, *(Mis)understanding Good-Behavior Tenure*, 116 Yale L.J. 159, 162 (2006) (“A judge who decided cases based on bribes she received or by peering at a crystal ball would be guilty of misbehavior because such means of resolving cases were not permissible or acceptable.”).

²⁶ Hon. Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges the John R. Coen Lecture Series University of Colorado School of Law*, 55 U. Colo. L. Rev. 1, 5 (1983).

²⁷ For instance, Article III identifies categories of cases and controversies in which the Supreme Court “shall have original Jurisdiction,” and directs that “[i]n all other cases” the Court “shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations, as the Congress shall make.” U.S. Const. art. III, §§ 1-2. There has long been a lively debate about what Congress can do under this so-called Exceptions Clause. The classic treatment is Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1364 (1953). A recent

Congress has broad power even when it comes to the core Article III duty of adjudication. This suggests that legislative power in respect to more peripheral questions (as here) raises no problem under Article III.

In other cases, the Supreme Court has held that Congress cannot reopen damages judgments entered by the federal courts.²⁸ To allow legislators to do so, the Court has explained, would impermissibly contravene the Court’s power to enter final judgments in cases and controversies.²⁹ It would thereby permit legislators to assume the judicial power.³⁰ And courts, not Congress, must have the last word on the meaning of the Constitution.³¹

Yet even in respect to adjudication—which is the core task of the Article III judiciary—the Court has allowed Congress a broad leeway to act.³² In *Bank Markazi v. Petersen*, the Court upheld provisions of the Iran Threat Reduction and Syria Human Rights Act of 2012 stating that the “financial assets that are identified in ... *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518” would be available “to satisfy any judgment ... awarded against Iran for damages for personal injury or death caused by” acts of terrorism.³³ The Court validated the law as consistent with the “independent Judiciary” established by Article III, even though it altered the outcome of a pending case.³⁴ Then, in *Patchak v. Zinke*, the Court upheld a statute that singled out and authorized a Department of the Interior decision to take certain land into trust, and then directed the federal courts to dismiss all suits related to the land in question.³⁵

Decisions such as *Bank Markazi* and *Patchak* demonstrate the breadth of Congress’s power to regulate the work of the federal courts *even in respect to the core adjudicative work of those tribunals*. They support, a fortiori, Congress’s power to regulate matters peripheral to adjudication—such as sexual harassment and its ilk within the judiciary workplace.

summary of the literature is Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 Va. L. Rev. 1043, 1065-68 (2010).

²⁸ *E.g.*, *Plaut v. Spendthrift Farm*, 514 U.S. 211, 240 (1995).

²⁹ *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 150 (2015) (citing *Plaut* for the finality principle); *Gundy v. United States*, 139 S. Ct. 2116, 2142 & n.77 (2019) (Gorsuch, J., dissenting) (same).

³⁰ *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (“The separation of powers, among other things, prevents Congress from exercising the judicial power.” (citing *Plaut*)).

³¹ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

³² *See* Huq, note 20, at 1065-76 (discussing doctrine on Article III independence).

³³ 22 U.S.C. § 8772(a)(1)(C), (b); *Bank Markazi v. Peterson*, 578 U.S. --, 136 S. Ct. 1310 (2016).

³⁴ *Bank Markazi*, 136 S. Ct. at 1322

³⁵ 138 S. Ct. 897, 910 (2018) (Thomas J., plurality op.).

C. The Historical Record of Legislative Regulation of the Judiciary

The historical usage of constitutional power is an important source for understanding the scope of Congress’s horizontal power to regulate the operations of the federal court.³⁶ The breadth of congressional control over judicial operations is amply confirmed by the history of legislation directing the manner in which federal courts carry out their core mission, and manage their own operations. The leading examples here concern the kinds of process that federal judges would use to hale litigants into court and to conduct litigation. But the historical record concerns elements of judicial operation that are *closer* to the core judicial responsibility to decide cases and controversies. If Congress can lawfully cut to the heart of the adjudicative function—and it plainly can—it is hard to understand why it would lack the lesser, constitutionally peripheral, power to regulate personnel matters and workplace conduct.

The first Congress understood itself to have broad authority to decide on basic questions of federal-court process.³⁷ In 1789 and 1792, for example, Congress enacted statutes that required federal courts to use state procedures in common-law cases.³⁸ In 1792, Congress also enacted a statute authorizing the federal courts (both the Supreme Court and lower federal courts) to issue their own rules.³⁹ Congress would have had no power to enact these laws if the federal courts had a monopoly under Article III to enact their own rules and regulate their own manner of organizing adjudication. Yet all these measures were and are utterly uncontroversial applications of the horizontal Necessary and Proper power in relation to the Article III judiciary.⁴⁰ Congress has also enacted statutes determining, *inter alia*, what constitutes a quorum on the Court,⁴¹ the date on which the Court's term begins,⁴² and the time to file a petition for a writ of certiorari.⁴³ It has also provided for the temporary suspension of judges, with certification to the House of Representatives for possible impeachment proceedings.⁴⁴

³⁶ See, e.g., Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 526-36 (2003) (discussing the eighteenth-century expectation that constitutional meaning would become fixed through practical construction); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 910 (1985) (same).

³⁷ See Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 509-35 (1971).

³⁸ Judiciary Act of 1789, ch. 20, §14, 1 Stat. 73, 81-82, 93-94; Process Act of 1792, ch. 36, §2, 1 Stat. 275, 276.

³⁹ 1 Stat. 275-79.

⁴⁰ For a judicial endorsement of these measures, see *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

⁴¹ 28 U.S.C. § 1 (2012).

⁴² *Id.* § 2.

⁴³ *Id.* § 2101(c).

⁴⁴ 28 U.S.C.A. § 372; see also *Hastings v. Judicial Conference of U.S.*, 829 F.2d 91 (D.C. Cir. 1987) (finding authorization for sanctions in cases of “conduct prejudicial to the effective and expeditious administration of the business of the courts” was not overbroad), *cert. denied* 485 U.S. 1014 (1988).

More pertinent here, legislative control over the personnel-related functioning of the federal courts has been extensive since the beginning of the Republic. From the 1790s, Congress tasked each Justice with not one but two judicial roles: acting as a Justice and also riding “circuit,” serving as the intermediate federal court between the federal trial courts and the Supreme Court.⁴⁵ It imposed specific administrative responsibilities on the Chief Justice reaching far beyond judicial management.⁴⁶ And it compelled circuit judges (and so Supreme Court Justices) to serve as pension commissioners to determine whether veterans were disabled.⁴⁷ The decision to permit federal judges to hire law clerks, moreover, is one that rests with Congress. Indeed, early efforts to enable law-clerk hiring met with fierce opposition: In 1850, Rep. David K. Carter of Ohio scornfully suggested that the justices seeking appropriations for clerks were asking Congress “that they might be furnished with auxiliary brains, to do their thinking...which now, God knows, they did not do.”⁴⁸ Hence, Congress authorized Supreme Court Justices to hire stenographic clerks only in 1886,⁴⁹ and then permitted law clerks in 1919.⁵⁰ Court of appeals judges were first authorized to hire law clerks in 1930.⁵¹ Federal district court judges were first allowed to hire law clerks only in 1936.⁵² Congress has never been under any compulsion to allow clerk hiring: It has always set the terms for such hiring (including statutory specification of the tasks to be executed). Congress therefore has ample authority to create a structure that those clerks, and other judicial employees, have a workplace free of harassment or abuse.

Many of the legislative powers that Congress has already exercised present a far greater risk of what Chief Justice Roberts called “inappropriate political interference” than the Judiciary Accountability Act. Yet they are all constitutional. Therefore, the risk of inappropriate legislation in the abstract is simply not enough to precipitate an Article III objection. Instead, the history of statutory regulation of judicial administration demonstrates that the present legislation is in the heartland of Article I power.

* * *

In conclusion, I am aware of no decisive authority or judicial decision suggesting that Congress lacks power to enact the Judiciary Accountability Act, or a like measure, under the broad aegis of the Necessary and Proper Clause. Neither text nor precedent support a pertinent limit on Congress’s capacity here. To the contrary, it may well be that the proposed measure is a needful

⁴⁵ Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74-75.

⁴⁶ Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 246, 250 (ex officio member of board of assay for coins); *see also* Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186 (ex officio member of committee to decide when to purchase federal debt).

⁴⁷ Invalid Pension Act of 1792, ch. 11, § 2, 1 Stat. 243, 244.

⁴⁸ Cong. Globe, 31st Cong., 1st Sess. 351 (1850).

⁴⁹ Act of Aug. 4, 1886, ch. 902, 24 Stat. 253, 254

⁵⁰ Act of July 19, 1919, ch. 24, 41 Stat. 209, 209.

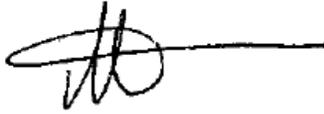
⁵¹ Act of June 17, 1930, ch. 509, 46 Stat. 774.

⁵² Act of Feb. 17, 1936, ch. 75, 49 Stat. 1140.

step in restoring public confidence in our nation's judiciary, especially among young people who enter law school and who may seek employment in federal judicial institutions.

I would be happy to answer any questions you have, and can be reached at your disposal at huq@uchicago.edu.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized initial 'A' followed by a horizontal line extending to the right.

Aziz Huq
Frank and Bernice J. Greenberg Professor of
Law