



## OOB BROWN BAG LUNCH SERIES THE SPEECH OR DEBATE CLAUSE AND SOVEREIGN IMMUNITY MARCH 28, 2018

### **I. Introduction – Affirmative Defenses for Employing Offices**

The Congressional Accountability Act of 1995 (“CAA”), 2 U.S.C. §§ 1301 *et seq.*, applies thirteen federal labor and employment law statutes to all Legislative Branch employing offices and employees. However, Article I, Section 6 of the U.S. Constitution, known as the Speech or Debate Clause, provides that:

Senators and Representatives... shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, *and in going to and returning from the same, and for any Speech or Debate in either House, they shall not be questioned in any other Place.*<sup>1</sup>

The italicized text has been broadly interpreted by the Supreme Court as reflecting separation of powers concerns, and the Court’s precedent makes clear that the protections afforded by this Speech or Debate Clause apply outside the literal physical confines of the Senate and House chambers. Additionally, the Clause’s protections extend to a Member’s aide in the limited circumstances in which the aide can be said to be working as the Member’s “alter-ego.” *Gravel v. United States*, 408 U.S. 606, 616-17 (1972). Courts interpret the Speech or Debate Clause to contain three distinct privileges for those eligible to invoke its protections.<sup>2</sup> These three distinct privileges are:

- 1) An absolute bar to suit when a party seeks to predicate a protected party’s liability on conduct that is within the sphere of legitimate legislative activity;
- 2) An evidentiary privilege that bars parties in a civil suit from using information about a “legislative act” against a party protected by the Clause; and
- 3) A testimonial privilege (and in some Circuits, a non-disclosure privilege) that protects Members of Congress from being compelled to answer questions about legislative acts, even if the Member is not a party to the suit.

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<sup>1</sup> U.S. Const. art. I, § 6, cl. 1 (emphasis supplied).

<sup>2</sup> See *Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 720 F.3d 939 (D.C. Cir. 2013).

Our discussion of the Speech or Debate defenses will be structured around these three distinct privileges afforded by the Clause. While no court has directly decided the issue, it is important to keep in mind that dicta in various D.C. Circuit opinions, discussed below, suggest that the Office of Compliance, as an office of Congress, is *not* an “other Place” for purposes of the Speech or Debate Clause. This suggests that the OOC Board of Directors may consider evidence pertaining to legislative activity that a federal District Court could not – a potentially significant consideration for a plaintiff deciding on the election of remedies provided by section 404 of the CAA.<sup>3</sup>

In addition to the specific privileges afforded by the Speech or Debate Clause that are unique to the legislative context, the generally applicable doctrine of sovereign immunity provides that the federal government cannot be sued except to the degree that it consents to be sued. While the CAA waives sovereign immunity for covered employees of the legislative branch who proceed under the statute’s complaint procedure, this waiver is conditioned on the complainant’s exhaustion of the Office of Compliance’s administrative process.<sup>4</sup> Therefore, as discussed below, the doctrine of sovereign immunity may be a threshold defense to suit under certain circumstances independent of the Speech or Debate Clause.

## **II. Speech or Debate – Immunity from Suit**

The first privilege courts identify in the Speech or Debate Clause is an absolute immunity from a civil or criminal judgment against a protected party because of conduct that is “within the sphere of legitimate legislative activity.” *Howard*, 720 F.3d at 946. Unsurprisingly, given the implications of a ruling on the issue, the question of whether particular conduct is considered “legislative activity” drives much of the litigation over this privilege. To assist in this inquiry, the Supreme Court distinguishes between political, administrative, and legislative activity, with absolute immunity from suit only applying to the latter. In general, courts identify employment actions as administrative rather than legislative, and absolute immunity has barred plaintiffs from pursuing employment claims in only a small number of cases. This is consistent with the legislative intent behind the CAA, as reflected by the drafter of the statute, Senator Grassley, who writes that “the Speech and Debate Clause is not implicated by a law that is as simple as prohibiting Senators from discriminating against their employees.”<sup>5</sup>

### **1) The Scope of the Clause’s Immunity from Suit**

- a) *Kilbourn v. Thompson*, 103 U.S. 168 (1880) – In the first Supreme Court case to consider the Speech or Debate Clause, the court discusses the English origins of the provision to determine the justification behind it. The Court adopts a functional approach towards the Clause, identifying its purpose as “support[ing] the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil

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<sup>3</sup> 2 U.S.C. § 1404.

<sup>4</sup> See *Gordon v. Office of the Architect of the Capitol*, 750 F. Supp. 2d 82, 89-90 (D.D.C. 2010).

<sup>5</sup> Senator Charles Grassley with Jennifer Shaw Schmidt, *Practicing What We Preach: A Legislative History of Congressional Accountability*, 35 HARV. J. ON LEGIS. 33, 40 (1998).

or criminal.” Accordingly, the Court holds the Clause is “not to be construed strictly, but liberally,” and that the protections of the Clause extend beyond literal speech and debate and “the walls of the representatives’ chamber.” To determine whether conduct falls under the protections of the Clause, the Court in *Kilbourn* articulates the first test used to measure the scope of the Speech or Debate Clause: whether the challenged activity is one of the “things generally done in a session of the House by one of its members in relation to the business before it.” While the Court went on to refine this standard in the cases below, the principles articulated in *Kilbourn* continue to guide the Court’s Speech or Debate jurisprudence. Notably, although the Court held that Members could not be sued for an arrest order they directed from the floor of the House, the Court held that the Sergeant-at-Arms was not protected by the Speech or Debate Clause in carrying out that arrest order, implying that the extension of Speech or Debate Clause privileges beyond Members of Congress will be strictly scrutinized.

- b) *Tenney v. Brandhove*, 341 U.S. 367 (1951) – Over 70 years after the *Kilbourn* decision, the Court was again presented with the opportunity to interpret the Speech or Debate Clause. The Court affirms the principles of *Kilbourn* and holds that the Clause protects the work of Congressional committees to the same extent it protects activities conducted on the floor of the House or Senate. When asked to pass judgment on the work of Congressional committees, courts should limit themselves to a narrow inquiry as to whether the committee’s work “may fairly be deemed [to be] within its province.”
- c) *Gravel v. United States*, 408 U.S. 606 (1972) – Citing the “complexities of the modern legislative process,” the Court extends Speech or Debate Clause protection to aides and assistants of Members of Congress to the extent that their “day-to-day work... is so critical to the Members’ performance that they must be treated as the [Members’] alter egos.” This “alter-ego” test focuses on the actual functions performed by a Member’s congressional staff, not the aide’s job title, and extends Speech or Debate protection to an aide if the conduct at issue would be protected if a Member performed it him- or herself. The Court then rearticulates the standard for determining whether an activity falls under the protection of the clause, holding that conduct is protected if it is “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.” Justice Brennan in dissent interprets the specificity of this new standard for legislative activity as being more limited in scope than the standard articulated in *Kilbourn*.
- d) *Doe v. McMillan*, 412 U.S. 306 (1973) – This case clarifies that the communicative processes the Speech or Debate is intended to protect are the *internal* communications of Congress, and that the Speech or Debate Clause is a shield from inquiry into such communications. Internal communications are prioritized because, while “informing the public about the business of Congress” is “no doubt” important, only the internal communications are integral to the “deliberative process ‘by which members participate in committee and House proceedings.’” Plaintiffs in this case brought suit against the

Chairman of a House Committee for an alleged invasion of privacy caused by the publication of a Committee report including their personal information. The Court holds that the internal dissemination of a Committee report is a protected legislative act and that the suit is thus barred by the Speech or Debate Clause. Legislative acts specifically identified as falling under Speech or Debate protection include “authorizing an investigation pursuant to which [] subject materials [are] gathered, holding hearings where the materials [are] presented, preparing a report where they [are] reproduced, and authorizing the publication and distribution of that report.” However, while Members of Congress may not be sued for materials contained in a Committee report, “legislative functionaries” who assist in publishing the report are not protected by the Clause and may be liable for distributing the otherwise actionable materials to the degree they do so “beyond the reasonable requirements of the legislative function.”

- e) *McSurely v. McClellan*, 521 F.2d 1024 (D.C. Cir.), *aff’d on reh’g*, 521 F.2d 1024 (D.C. Cir. 1975) – When determining whether investigatory steps taken by a Congressional committee in preparation for issuance of a subpoena are protected by the Speech or Debate Clause, a court is to conduct a limited inquiry and ask (1) whether the investigators used lawful investigative means, and (2) whether the investigation is within the jurisdiction of Congress and the particular committee. If there is an affirmative answer to these two questions, then the “gathering of... information... in preparation for a subpoena, an investigatory hearing, or a legislative report [is] an integral part of Congress’s investigative function,” and a complaint that seeks to predicate liability on such activity must be dismissed.
- f) *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) – The Ninth Circuit holds that a Member of Congress’s direct insertion of material into the Congressional Record “may be privileged per se,” due to the “close nexus between ‘Speech or Debate in either House’ and the [Congressional] Record.”
- g) *Davis v. Passman*, 442 U.S. 228 (1979) – The Supreme Court in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971), held that a federal court may provide damages relief for violations of constitutional rights if there are “no special factors counselling hesitation in the absence of affirmative action by Congress.” In *Passman* the Court clarifies that these “special factors counselling hesitation” are co-extensive with the protections afforded by the Speech or Debate Clause. Therefore, if a plaintiff seeks damages from a Member of Congress on grounds that his or her constitutional rights have been violated, a court need only ask if the case may proceed under the Speech or Debate Clause. If the case may proceed under the Speech or Debate Clause, no independent *Bivens* analysis of “special factors counselling hesitation” is necessary.

## 2) Distinction Between Administrative and Legislative Activity

- a) *Forrester v. White*, 484 U.S. 219 (1988) – While the Court in this case is concerned with the extent of *judicial* immunity, the Speech or Debate Clause is discussed, and the decision has been influential in interpretation of *legislative* immunity as well. The Court

holds that a judge's hiring or firing of a probation officer is not an activity protected from judicial investigation, despite the officer being "essential to the very functioning of the courts," because the decision is, at heart, an "administrative decision," not a judicial determination. The case stands for the proposition that it is the conduct at issue, not the identity of the actor, which determines the extent of privilege afforded. This case is cited as strong support for the view that administrative decisions in the legislative branch, such as the hiring or firing of Congressional staffers, are similarly unprotected from judicial inquiry. *See, e.g., Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004); *Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989); *Taylor v. Duncan*, 720 F. Supp. 2d 945 (E.D. Tenn. 2010).

- b) *Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989) – A former legislative researcher for a D.C. Councilmember brought suit alleging that her termination was the result of prohibited discriminatory animus. The Councilmember argued that the legislative researcher's position was "integrally related to the due functioning of the legislative process," and thus that the case must be dismissed as a matter of legislative immunity. After discussing Supreme Court precedent on the Speech or Debate Clause and the *Forrester* case discussed above, the D.C. Circuit holds that the firing of the legislative researcher was an administrative decision, not a legislative one, and that the case may proceed. The court writes that when determining the bounds of legislative immunity, focusing on the conduct at issue— in this case, the firing of an employee – rather than the position held by that employee "forecloses the somewhat curious logic that the greater the employee's importance to the legislative process the greater should be the... legislator's freedom to violate that employee's constitutional rights."
- c) *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984) – This case provides further support for the proposition that the key consideration in determining whether an employment case is barred by the Speech or Debate Clause is the conduct at issue, not the identity of the actor. The plaintiff in this case claimed that she was terminated from her position as general manager of the Congressional food service facilities because she was a woman. The D.C. Circuit allowed her case to proceed, despite the fact that her termination was allegedly effected by a Congressional committee, holding that the termination action was fundamentally a "personnel action" concerning an "auxiliary service[] of a nonlegislative character," and that the plaintiff's case did not "center... on any vote, resolution, hearing, report, or proceeding in the House or a committee or subcommittee thereof."
- d) *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20 (1st Cir. 1992) – In this challenge to the plaintiffs' termination of employment, the First Circuit endorses the functional approach towards determinations of legislative immunity followed by the other Circuits, but adopts a unique two-part test for determining whether conduct is properly considered a legislative or an administrative action. The Court first asks whether the underlying facts on which the complained-of decision is based are "legislative facts," i.e., "generalizations concerning a policy or state of affairs." If so, the decision is legislative. If instead the facts used in the decision making are more specific, "such as those that relate to particular individuals or situations," then the decision is properly classified as

administrative. The second test probes into the “particularity of the impact of the state of action.” A legislative action will involve the “establishment of a general policy,” whereas an administrative decision “single[s] out individuals and affect[s] them differently from others” (citing *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984)).

- e) *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997) – While the disciplining and termination of legislative branch *employees* is generally considered to be administrative activity, the act of Members voting to take a disciplinary action against *other Members* is the “primary power by which legislative bodies preserve their ‘institutional integrity,’” and thus absolutely protected as a matter of legislative immunity.

### 3) Distinction Between Political and Legislative Activity

- a) *United States v. Brewster*, 408 U.S. 501 (1972) – “Members of the Congress engage in many activities *other than purely legislative activities protected by the Speech or Debate Clause*,” including, but not limited to, “legitimate ‘errands’ performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing... ‘news letters’ for constituents, news releases, and speeches delivered outside the Congress.” The Court distinguishes these activities as political, rather than legislative, and therefore holds that the Speech or Debate Clause does not foreclose inquiry into such matters. Legislative acts are only those activities that are “clearly a part” of the “due functioning” of the legislative process. The Court holds that the government’s bribery investigation against a sitting Member of Congress is not foreclosed by the Speech or Debate Clause, because a Congressman’s *promise* to act a certain way is not by itself a legislative act, even if the *conduct* the Congressman promises to perform would be considered as such. *See also United States v. Helstoski*, 442 U.S. 477, 490 (1979) (“A promise to deliver a speech, to vote, or to solicit other votes at some future date is not ‘speech or debate.’”).
- b) *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) – While the Court will construe the Speech or Debate Clause broadly to protect Congress’s *internal* communications (see the above *McMillan* case), this case reflects the Court’s skepticism that *external* communications are necessarily integral to the due functioning of the legislative process. The defendant Senator in this case referred to a scientist by name in a newsletter sent to 100,000 individuals in the Senator’s home state. This scientist was named in the newsletter as the recipient of the Senator’s “Golden Fleece Award” for being an example of “wasteful governmental spending,” and sued for defamation. The Supreme Court reverses the Court of Appeal’s holding that the Speech or Debate Clause protected statements made in the press and in newsletters, rejecting the argument that the “informing function” of Congress protected by the Clause includes more than is required for strictly legislative purposes. While the Senator’s statements are protected if part of a speech made on the floor of the Senate made public through publication in the Congressional Record, the Senator’s newsletters and press releases are not “essential to the deliberations of the Senate” and thus not protected by the Speech or Debate Clause. *See also Gravel*, 408 U.S. at 625-26 (holding that a Senator’s attempt to privately publish an official

committee report is not protected by the Speech or Debate Clause because such activity is not “essential to the deliberations of the Senate”); *Dickey v. CBS, Inc.*, 387 F. Supp. 1332 (E.D. Pa. 1975) (reading from an official committee report outside of committee chamber or House floor not protected by Speech or Debate Clause).

#### 4) “Gathering Information” Circuit Split

- a) The Supreme Court made clear in the *Doe* case discussed above that the gathering of information required for a *specific* Congressional investigation or report is a protected legislative activity under the Speech or Debate Clause. However, the high court has not had occasion to rule whether *general* information gathering, such as the relaying of constituents’ views in a Member’s home district to the Member’s Washington office, is also protected legislative activity, and a Circuit split has developed over the issue.
- b) *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004) – The plaintiff was employed at the defendant-Senator’s district office in Colorado, and brought suit under the CAA alleging her termination was the result of impermissible discriminatory animus. The plaintiff’s primary responsibilities were to interact with constituents and convey information from meetings to the Senator’s Washington, D.C. office. The defense characterized the plaintiff’s role as “critical to the Senator’s legislative agenda” and argued the suit should be dismissed because of Speech or Debate Clause immunity. After conducting a lengthy survey of Supreme Court precedent, the Tenth Circuit rejects the defense’s argument and reverses the District Court’s dismissal of the suit on Speech or Debate grounds. The Court observes that no Supreme Court opinion indicates that Speech or Debate Clause immunity extends to informal information gathering, and holds that “the everyday task of gathering views and information from constituents and others” is insufficiently related to an official legislative act to receive protection under the clause.
- c) *Virgin Islands v. Lee*, 775 F.2d 514 (3d Cir. 1985) – In contrast to the above Tenth Circuit holding, the Third Circuit in this case makes no distinction between informal and formal fact-finding, holding that “as a general matter, legislative fact-finding is entitled to the protection of legislative immunity.” The court explains that “fact-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation.” However, this immunity is limited to conversations in which legislative activity is actually discussed; to be “purportedly or apparently legislative in nature” is not enough. The trial court is to make specific factual findings as to whether a particular conversation over which immunity is asserted was actually sufficiently related to official business to receive protection. The fact that the defendant in this case asserted that his meetings and conversations were official in nature and did involve information gathering, did not preclude the court from determining whether the conversations were *in fact* legislative in nature.
- d) *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) – The Congressman involved in this case was subpoenaed by a union pension fund trustee to identify the

source of an allegedly libelous article inserted by the Congressman into the Congressional Record. The Congressman refused to be deposed, citing Speech or Debate Clause protections. In language more closely resembling *Virgin Islands* than *Bastien*, the Ninth Circuit writes that “obtaining information pertinent to potential legislation or investigation is one of the ‘things generally done in a session of the House,’” and cites “[c]onstituents... provid[ing] data to document their views when urging the Congressman to initiate or support some legislative action” as an example of such information gathering. This language strongly suggests that the information gathering activity at issue in *Bastien* would be considered a legislative act in the Ninth Circuit, and thus under the protection of the Speech or Debate Clause.

- e) *Jewish War Veterans of the U.S., Inc. v. Gates*, 506 F. Supp. 2d 30 (D.D.C. 2007) – Citing the above *Bastien*, *Virgin Islands*, and *Miller* cases as evidence of a Circuit split on the question of Speech or Debate Clause protections for informal information gathering, this D.C. District Court endorses the broader interpretation of the Clause and holds that “a Member’s gathering of information beyond the formal investigative setting is protected by the Speech or Debate Clause so long as the information is acquired in connection with or in aid of an activity that qualifies as ‘legislative’ in nature.” The dispositive question under this analysis is not the formality of the inquiry, but rather to what end the information is being gathered. Thus, information gathering that is conducted in preparation of legislation, for example, is protected by the Clause, whereas information that is gathered for political rallies, media, campaign appearances, or other matters not legislative in nature is not.
- f) *Taylor v. Duncan*, 720 F. Supp. 2d 945 (E.D. Tenn. 2010) – After surveying the case law of other Circuits, this District Court concludes that “other Circuits have... *unanimously determined the Speech or Debate Clause does not mandate dismissal in a typical employment case*” (emphasis supplied). The plaintiff-employee of a Member of Congress alleges that she was fired in violation of the Age Discrimination in Employment Act, but the defendant office seeks dismissal on grounds that the employee was fired for poor performance in her legislative activity of gathering information from constituents and conveying it to the Congressman, and that inquiry into the legitimacy of this explanation would tread into waters forbidden by the Speech or Debate Clause. The court rejects the defendant’s argument, holding that the “duty of speaking with constituents and relaying their opinions on legislative matters” to other staff members who were actually involved in researching legislative issues is not a legislative act and that to hold otherwise would be inconsistent with Supreme Court precedent “limiting Speech or Debate Clause immunity to core legislative functions.”

- 5) **Case Study: *Fields v. Office of Eddie Bernice Johnson, Employing Office, U.S. Congress*, 459 F.3d 1 (D.C. Cir. 2006)** – The D.C. Circuit ordered the consolidation of two employment discrimination cases filed against Members’ offices under the CAA and sat en banc to resolve the question of whether the Speech or Debate Clause required their dismissal. In the first case, plaintiff Beverly Fields, a former chief of staff to Representative Johnson,



alleged that she was discriminated against on the basis of her race and gender and also retaliated against by the Member's Office when she was demoted from chief of staff to administrative assistant and ultimately terminated. In the second case, plaintiff Brad Hanson alleged he was discriminated against by the Office of Senator Dayton on the basis of a perceived disability and violations of the Fair Labor Standards Act and the Family and Medical Leave Act. Four opinions were filed in the case, with no single opinion commanding a majority of the Court. Despite differences in interpretations of the Speech or Debate Clause, however, all of the justices agreed that the "Speech or Debate Clause... has [a] role to play in employment discrimination cases" and that the Clause did not require the dismissal of the two cases before the Court. This is the D.C. Circuit's most substantial look at whether the Clause requires dismissal of employment cases proceeding under the CAA, and it is thus worth looking at the opinions in detail both to understand where there is agreement among the judges and to see what issues remain unresolved.

a) Judge Randolph's plurality opinion (joined by Judges Ginsburg, Henderson, and Tatel):

The opinion to garner the most support from the D.C. Circuit sitting en banc begins by abrogating the Circuit's test set forth in *Browning* for determining whether a plaintiff's employment discrimination claim is barred by the Speech or Debate Clause. In *Browning* the Circuit had held that an employee's discrimination claim was barred by the Clause if the employee's duties were "directly related to the due functioning of the legislative process." Judge Randolph, however, writes that this focus on duties is in tension with the conduct-focused inquiry used by the Supreme Court in *Forrester*, "which accords no weight to the duties of the employee," and is over-broad in protecting conduct not covered by the Clause. Going forward, actions are only barred by the Clause if "the actions upon which a plaintiff [seeks] to predicate liability [are] 'legislative acts.'" The court will examine the parties' pleadings to make this determination. Judge Randolph determines that neither case requires dismissal under this test, because the action of taking an adverse employment action against an employee out of discriminatory animus, as alleged, is not a legislative activity. However, while the cases may proceed past this motion to dismiss stage, the Judge emphasizes that the Speech or Debate Clause may still operate to keep evidence and testimony out of the case. If this evidentiary bar prevents the plaintiff from obtaining evidence necessary to support her claim, it could provide an independent basis for dismissal. The Judge writes that in employment discrimination cases, a defendant seeking to invoke this evidentiary privilege should submit, along with evidence of its legitimate non-discriminatory reason for the adverse employment action, an affidavit "recounting facts sufficient to show that the challenged personnel decision was taken because of the plaintiff's performance of conduct protected by the Speech or Debate Clause... The affidavit must indicate into what 'legislative activity' or into what matter integral to the due functioning of the legislative process the plaintiff's suit necessarily will inquire." This evidentiary privilege will be discussed further in the next section.

b) Judge Brown's principal concurrence (joined by Judges Sentelle and Griffith): The principal concurrence takes a narrower view of the Speech or Debate Clause than the

plurality by focusing on the legal status of the named defendants in the cases, the Members' Offices. Under the CAA the Member's Office is the named defendant in an employment discrimination case, not the Member in an individual capacity. However, Judge Brown finds that the personal office of a Member is not an independent legal entity but simply an "organizational division within Congress, established for Congress's administrative convenience, analogous to a department within a large corporation." Therefore, it is ultimately Congress itself as an institution that is being sued in these two cases, and Judge Brown "see[s] no reason to conclude" that the employing office, understood in this way, may invoke the Speech or Debate Clause on behalf of a Member. In this analysis, a Member's Office may *never* assert the Speech or Debate Clause as a jurisdictional bar, *regardless* of whether the plaintiff predicates liability on a legislative act. Instead, because the Member should not be seen as a party to the case, "the Clause functions only as a testimonial and documentary privilege" in employment discrimination cases under the CAA, which may be "asserted by members and qualified aides if they are called upon to produce evidence."

- c) Judge Rogers and Judge Tatel's concurrences: Judge Rogers agrees with the plurality that "[n]either the history of the Clause nor Supreme Court precedent" suggests that the Speech or Debate Clause shields Members from liability for personnel decisions, even when such decisions are motivated by legislative considerations, and she signals that it is "tempting" to follow Judge Brown's reasoning and conclude that the CAA "allows discrimination and other claims to proceed against the Member's personal office largely unfettered by the protections afforded by the Speech or Debate Clause." She writes separately largely to emphasize that it is unnecessary to decide on the extent to which the Clause will serve as an evidentiary bar in these proceedings at the motion to dismiss stage, and would leave that issue for another day. Judge Tatel writes both to emphasize the issues on which all of the judges agree and to criticize Judge Brown's analysis. He observes that the entire en banc panel agrees that the two cases may proceed but that the trial judge on remand must determine whether particular aspects of the cases will implicate the Clause's evidentiary privilege, and he criticizes Judge Brown's analysis for focusing on the identity and status of the actor (the Member's Office) instead of the particular conduct at issue.

### **III. Speech or Debate – Evidentiary Privilege**

The second privilege inherent in the Speech or Debate Clause is an evidentiary privilege which bars a party from "revealing information as to a legislative act for use against a protected party." *Howard*, 720 F.3d at 946. Therefore, even when a plaintiff is not predicated liability on a legislative act such that the suit would be barred by the absolute immunity discussed above, the plaintiff will still be unable to introduce evidence pertaining to legislative acts to support his or her claim. This evidentiary privilege can provide an independent basis for a dismissal of a claim if the plaintiff is unable to identify any non-protected evidence to support their claim.

## 1) The Evidentiary Privilege in Employment Cases

- a) *Scott v. Office of Rodney Alexander, Member, U.S. House of Representatives*, 522 F. Supp. 2d 262 (D.D.C. 2007) – This District Court reads the above *Fields* opinion as creating a two-step framework for determining whether the Speech or Debate Clause requires dismissal of an employment discrimination/retaliation claim filed under the CAA. First, the court is to determine, based on the pleadings, whether the plaintiff’s complaint “expressly predicate[s] liability on a legislative act.” If so, the Clause acts as a jurisdictional bar and the claim must be dismissed. Second, if the claim is determined not to be expressly predicated on a legislative act, the court “must consider whether the plaintiff’s claim should be dismissed under the Clause’s ‘evidentiary privilege.’” To do this, the court must ask if, to be successful on his or her claim, the plaintiff will be required to inquire into “legislative motives or question conduct part of or integral to the legislative process.” If the court is satisfied that the complained-of conduct does not require inquiry into conduct integral to the legislative process, the case may proceed.
- b) *Fields v. Office of Eddie Bernice Johnson, Employing Office, U.S. Congress*, 459 F.3d 1 (D.C. Cir. 2006) – The plurality opinion in *Fields* specifically warns plaintiff-employees proceeding under the CAA that the *McDonnell Douglas* framework is particularly problematic in the Speech or Debate context. If the employing office explains the adverse employment decision by citing the employee’s involvement in legislative activities, the Speech or Debate Clause may act as an evidentiary bar preventing the plaintiff from inquiring into those legislative acts and obtaining evidence showing that the employer’s proffered explanation is pretextual. The D.C. Circuit will return to the issue of pretext under *McDonnell Douglas* and the Speech or Debate Clause in the *Howard* opinion discussed below.

## 2) Privilege Did Not Require Dismissal of Charges

- a) *United States v. Jefferson*, 546 F.3d 300 (4th Cir. 2008) – A mere reference to the defendant’s status as a Congressman or as a member of various Congressional committees does not run afoul of a Member’s Speech or Debate privilege. The Fourth Circuit here refuses to dismiss an indictment simply because the grand jury testimony included references to the defendant’s status and positions, finding that at no point did prosecutors question the Congressman’s staffers about his “involvement in the consideration and passage or rejection of any legislation” or “legislative acts” in general. *See also United States v. McDade*, 28 F.3d 283 (3d Cir. 1994) (holding Speech or Debate Clause does not require dismissal of case solely because defendant’s leadership positions or committee membership was mentioned in indictment).
- b) *United States v. Menendez*, 132 F. Supp. 3d 610 (D.N.J. 2015), *aff’d*, 831 F.3d 155 (3d Cir. 2016) – When a court is determining whether an act falls under the protections of the Speech or Debate Clause, to the extent the act is comprised of both legislative and non-legislative components, the “court should attempt to separate the legislative components from the non-legislative,” and, when they are inseparable, determine the “predomina[nt] purpose” of the act. Under this principle, the court holds that a meeting is not wholly

immunized from judicial inquiry just because legislative acts were discussed, if non-legislative topics were also discussed.

### 3) Privilege Required Dismissal of Charges or Claims

- a) *United States v. Johnson*, 383 U.S. 169 (1966) – This Supreme Court opinion stands for the proposition that while the Speech or Debate Clause may act to prevent the introduction of certain types of evidence, such as a speech delivered by a Member of Congress in committee, the Clause does not require dismissal of the entire case if the other party can rely on other evidence not protected by the Clause to establish its claim for relief. The United States in this case attempted to prosecute a sitting Member of Congress for allegedly receiving a bribe in connection to a speech given on the floor of the House. The Court affirmed the Circuit Court’s dismissal of the conspiracy charge on Speech or Debate grounds, holding that inquiry into a Congressman’s motivations for giving a speech on the floor of the House is forbidden by the Speech or Debate Clause, at least in circumstances where the “speech’s substance” is a critical component of the government’s case. However, the Court also held that the Government was not precluded from a new trial on the count “wholly purged of elements offensive to the Speech or Debate Clause.”
- b) *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), *abrogated by Fields*, 459 F.3d 1 (D.C. Cir. 2006) – Although the test used by the D.C. Circuit in this case for determining whether an employee’s claim is barred by the Speech or Debate Clause is explicitly set aside in *Fields*, it is likely that the outcome of this case would remain the same under the new standard, and it thus provides a useful illustration of the type of employment case that could be barred by the evidentiary privilege of the Speech or Debate Clause. The plaintiff in this case is a former Official Reporter for the U.S. House of Representatives who claims she was fired because of her race, whereas the Congressional defendants assert she was fired for “gross errors and omissions” and a “generally... low quality” of reporting. The D.C. Circuit ordered the dismissal of the case because the plaintiff’s job was “directly related to the due functioning of the legislative process,” the standard overruled in *Fields*, but applying the *Fields* two-step framework we can see that a court could reach the same conclusion under that test. The plaintiff would likely pass the first prong of the *Fields* test because the act the plaintiff is predicating liability on, the firing of an employee for an improper reason, is not a legislative action. However, because the proffered, nondiscriminatory explanation for the action would require inquiry into what was actually said on the House floor or in committee (to see whether the plaintiff’s reports in fact contained gross errors), the plaintiff’s claim would literally require inquiry into the “speech or debate” of House proceedings and thus would likely be dismissed under the *Fields* test as well.
- c) *United States v. Dowdy*, 479 F.2d 213 (4th Cir. 1973) – This case suggests that the Fourth Circuit adheres to a broad understanding of the protections afforded by the Speech or Debate Clause. The court holds that the “clause does not simply protect against inquiry into acts which are manifestly legislative...it also forbids inquiry into acts which are

*purportedly or apparently legislative, even to determine if they are legislative in fact.”* Therefore, once a court determines that a legislative function “was *apparently* being performed, the propriety and the motivation for the action taken, as well as the detail of the acts performed, are immune from judicial inquiry.” Following this principle, the Fourth Circuit reverses a number of the defendant-Congressman’s conspiracy convictions because the jury was improperly presented with evidence relating to meetings between the Congressman and various governmental officials that, despite the possible presence of an improper motive, were “apparently legislative” in character.

- 4) **Case Study: *Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 720 F.3d 939 (D.C. Cir. 2013)** – The plaintiff in this employment discrimination case alleged that she was demoted and eventually terminated on the basis of her race. While allowing the demotion claim to proceed, the District Court ruled that the termination claim could not proceed without inquiry into communications protected by the Speech or Debate Clause, and thus dismissed the termination claim because of the Clause’s evidentiary privilege. Neither party claims that the adverse employment actions are legislative acts, so the only question before the D.C. Circuit is whether the Speech or Debate Clause’s evidentiary privilege requires dismissal of the plaintiff’s claims. The employing office offered three non-discriminatory reasons for the employee’s demotion, and the parties do not dispute that the first two reasons do not implicate legislative immunity. The third explanation, however, is that Ms. Howard was demoted because she communicated her personal views on the House budget to the Committee on Appropriations rather than the views of her employer, the Office of the Chief Administrative Officer of the House of Representatives. As in the *Fields* case, the D.C. Circuit fails to reach consensus on the question of whether the plaintiff’s attempt to show that this explanation is pretext would run afoul of the Speech or Debate evidentiary privilege. In a 2-1 decision the D.C. Circuit reverses the District Court’s dismissal of the termination claim and affirms the District Court’s decision not to dismiss the demotion claim, allowing both claims to proceed.
- a) Judge Edwards majority opinion: The majority rejects the defendant’s argument that an employee should be precluded from seeking to show that a proffered explanation for an adverse employment action is pretextual once a defendant eligible to invoke the Speech or Debate Clause submits an affidavit offering a nondiscriminatory reason for the action. A plaintiff-employee may attempt to prove her allegations of pretext “provided that she does not contest her employer’s conduct of protected legislative activities and... us[es] evidence that does not implicate protected legislative matters.” Judge Edwards suggests one method the plaintiff could use to show that the explanation for the demotion is pretextual, despite the Speech or Debate Clause, would be to show that the reasons communicated by the OCAO to the plaintiff for the adverse employment action at the time they were taken are different from the reasons the OCAO offers in its affidavit. As to the termination claim, the court finds that the dispute is essentially over whether the OCAO provided the plaintiff the tools and equipment necessary to complete the task she

was asked to do, a credibility determination that “has nothing whatsoever to do with protected legislative activities.”

- b) Judge Kavanaugh dissent: The OCAO stated it terminated the plaintiff because she refused to perform a budget analysis for use by a congressional committee, an activity that “this Court has previously recognized... fall[s] squarely within the ambit of the Speech or Debate Clause.” Judge Kavanaugh writes that he does not see how it is possible for a plaintiff to “prove either she in fact adequately performed her legislative activities *or* that her performance of legislative activities was not the actual reason for the employment action without forcing the employer to produce evidence that she did not adequately perform her legislative activities and that her poor performance of legislative activities was the actual reason for the employment action.” The Speech or Debate Clause protects the defendant from being forced to produce exactly this sort of evidence. Judge Kavanaugh critiques the majority for creating a “false hope” that plaintiffs will be able to find relief in a federal forum in a case such as this, when in the “real world of trial litigation” a plaintiff “saddled with a stipulation that she was really lousy at performing her legislative duties is not a plaintiff who is likely to even get to trial, much less to win, in a discrimination case.”

#### **IV. Speech or Debate – Testimonial and Non-Disclosure Privilege**

The third and final privilege inherent in the Speech or Debate Clause is a testimonial privilege which operates to “prevent[] a protected party from being compelled to answer questions about legislative activity” either at trial or through another form of judicial interrogation, such as a deposition. *Howard*, 720 F.3d at 946. This prohibition against oral testimony is generally straightforward in application and thus has received less attention from courts in judicial opinions than the other two privileges identified in the Speech or Debate Clause discussed above. However, the question of whether this testimonial privilege also contains an implicit privilege of non-disclosure of written materials has proven controversial, and the Circuits are currently split on the issue. Given the constitutional importance of the question, it is possible the Supreme Court will address the question when an opportunity arises to do so.

- 1) *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988) – Because discovery procedures can “prove just as intrusive” to third parties as to named parties in a case, the testimonial privilege of the Speech or Debate Clause applies with equal force when a litigant wishes to obtain discovery from a legislator as a third-party witness as it would if the legislator were a named party.
- 2) *Testimonial Privilege Includes Privilege of Non-Disclosure*
  - a) *United States v. Rayburn House Office Bldg., Room 2113, Washington, D.C. 20515*, 497 F.3d 654 (D.C. Cir. 2007) – Finding Supreme Court precedent to be silent on the issue, the D.C. Circuit holds that the Speech or Debate Clause’s testimonial privilege includes the privilege to withhold from compelled disclosure written legislative materials. The court declines to delineate between oral and written communications regarding legislative

activity, and writes that this privilege is necessary to encourage frank discourse between a Member of Congress and his or her staff. This protection from compelled disclosure extends only to privileged legislative materials, not to all written materials that may be present in a Member's office. Other Circuits have explicitly rejected this holding, creating a Circuit split on the issue of whether the Speech or Debate Clause protections include a privilege of non-disclosure. *See United States v. Renzi*, 651 F.3d 1012, 1034 (9th Cir. 2011) (“[W]e cannot agree with our esteemed colleagues on the D.C. Circuit. We disagree with both *Rayburn*'s premise and its effects and thus decline to adopt its rationale.”).

- b) *Jewish War Veterans of the U.S., Inc. v. Gates*, 506 F. Supp. 2d 30 (D.D.C. 2007) – Whether written materials come into a Member of Congress's possession through the “active acquisition of information by congressional staff” or through the “passive receipt of information” is irrelevant to the question of whether the written materials fall under the Speech or Debate Clause's protections. Instead, “documents or other material that comes into the hands of congressman may be reached either in a direct suit or subpoena... only if the circumstances by which they come can be thought to fall outside ‘legislative’ acts or the legitimate legislative sphere.”
- c) *Lindley v. Life Inv'rs Ins. Co. of Am.*, No. 08-CV-379-CVE-PJC, 2009 WL 2245565 (N.D. Okla. 2009) – In this civil action against a Member of the Oklahoma State Senate, the District Court endorses an approach close to that of *Rayburn* by holding that legislative immunity allows the Senator to withhold certain documents from discovery. The Senator is allowed to withhold from discovery documents that are “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings,” including all formal actions conducted as part of official business, committee reports distributed by the Oklahoma Senate, records of votes, the Senator's floor speech and materials that went into its preparation, material introduced at committee hearings, and information gathered in the course of formal committee action. The Senator is to produce all documents requested that do not fall within this privilege, and must submit a privilege log detailing the reasons why specific documents are not discoverable “describ[ing] the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess” the claim of privilege (citing Fed. R. Civ. P. 45(d)(2)(A)).

### 3) *Testimonial Privilege Does Not Include Privilege of Non-Disclosure*

- a) *In re the Search of Elec. Commc'ns in the Account of chakafattah@gmail.com at Internet Serv. Provider Google, Inc.*, 802 F.3d 516 (3d Cir. 2015) – The federal government served Representative Fattah a subpoena for various documents contained in the Representative's personal Gmail account as part of a criminal investigation into fraud, extortion, and bribery. The Representative objected to the disclosure of some emails on the grounds that the testimonial privilege of the Speech or Debate Clause contains a privilege of non-disclosure of written materials. Breaking with the D.C Circuit's position

reflected above in *Rayburn*, the Third Circuit rejects this argument, holding that the testimonial privilege of the Clause only “prohibits hostile *questioning* regarding legislative acts in the form of testimony to a jury” (emphasis supplied), and therefore does not prohibit disclosure of privileged documents. Regarding such documents, the Clause only contains a privilege of non-*use* of the documents at trial (under the evidentiary bar privilege), not the non-*disclosure* of such materials. *See also Mayor & City Council of Balt. v. Priceline.com, Inc.*, No. MJG-08-3319, 2010 WL 11552861 (D. Md. 2010) (“[L]egislative privilege, to the extent that Plaintiffs may claim it, only immunizes *use* of legislative acts... it does not operate as a privilege of confidentiality and nondisclosure.”).

- b) *Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288 (D.P.R.), *appeal dismissed*, 876 F.2d 254 (1st Cir. 1989) – A private insurance company sued the Puerto Rico Commissioner of Insurance, asking the court to declare legislation authorizing “the creation and operation of a medical malpractice insurance syndicate unconstitutional.” As part of this lawsuit, the insurance company sought to depose the Special Advisor to the President of the Puerto Rico Senate as well as require the disclosure of four documents in his possession. The Special Advisor objected on grounds of legislative immunity. Relying on Speech or Debate Clause precedent, the District Court joins the Third Circuit approach in holding that the legislative privilege is one of evidentiary non-use, not non-disclosure, and that the Special Advisor’s documents were therefore discoverable. However, because the Special Advisor’s conduct at issue falls within the sphere of “legitimate legislative activity,” the Clause bars the deposition sought by the plaintiff because it would amount to being “questioned in any other [P]lace.”

## **V. Speech or Debate – Procedural Issues**

### **1) Whether the Office of Compliance is an “Other Place”**

- a) *Fields v. Office of Eddie Bernice Johnson, Employing Officer, U.S. Congress*, 459 F.3d 1 (D.C. Cir. 2006) – “[A] plaintiff whose suit cannot proceed in federal court by operation of the Speech or Debate Clause *still may avail himself of the Accountability Act’s administrative complaint procedure*” (emphasis supplied). This sentence appears at the end of the plurality opinion and is not essential to the resolution of the issues presented to the court, and is thus of questionable precedential value. Nevertheless, this line suggests that at least a few judges on the D.C. Circuit consider the Office of Compliance *not* to be an “other Place” for purposes of the Speech or Debate Clause, and that formal complaints filed with the Office may inquire into matters that would be protected by the Speech or Debate Clause were they proceeding in federal District Court.
- b) *Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 720 F.3d 939 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) – As discussed earlier, Judge Kavanaugh dissented in this case because he believed that the evidentiary privilege of the Speech or Debate Clause foreclosed the plaintiff’s ability to pursue her complaint in federal court. Additionally, he concludes his dissent by writing that “because the Office of Compliance process occurs within the Legislative Branch, not in an ‘other Place,’ the



Speech or Debate Clause does not pose an issue in those cases.” He thus joins the dicta quoted above in *Fields* regarding the Office of Compliance’s relation to the Speech or Debate Clause. He warns that this difference between proceedings in federal court and the OOC administrative process “creates a major real-world problem,” for a plaintiff may be “seduced...into federal court” only to find that their complaint cannot proceed as it may have had it stayed within the OOC’s processes. Judge Kavanaugh “encourage[s] counsel for would-be plaintiffs in these kinds of cases to carefully consider the difficulty of a federal court suit...before they advise clients to irrevocably bypass the Office of Compliance option, where they would not face such extraordinary hurdles to prevailing.”

- c) While the language in the above-cited opinions indicate that at least some judges on the D.C. Circuit believe that the OOC is not an “other [P]lace” for purposes of the Speech or Debate Clause, this does not address the issue of the Federal Circuit’s appellate jurisdiction over final decisions of the OOC Board.<sup>6</sup> If an OOC Board decision cited evidence that is protected by the Speech or Debate Clause, it is not clear how the Federal Circuit could review that evidence, as the Federal Circuit clearly *is* an “other Place.” This issue has not been presented in any case thus far, and indeed it appears that the Federal Circuit has not addressed the Speech or Debate Clause in a substantial manner since the passage of the CAA in 1995, so it is unclear how it would resolve this issue.

## 2) Invocation of Privilege

- a) *Gravel v. United States*, 408 U.S. 606, 622 n.13 (1972) – Because the invocation of the Speech or Debate Clause by a Member’s aide is on behalf of the Member, it follows that the Member may waive the aide’s claim of privilege.
- b) *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984) – Similar to a “pure matter of subject-matter jurisdiction,” a defendant’s Speech or Debate Clause immunity cannot be waived because of a failure to assert it at the threshold of a case.
- c) *Nixon v. Admin. of General Servs.*, 433 U.S. 425 (1977) – “[T]his Court has always assumed that the immunity conferred by the Speech or Debate Clause is available to a Member of Congress after he leaves office.”
- d) *United States v. Menendez*, 132 F. Supp. 3d 610 (D.N.J. 2015), *aff’d*, 831 F.3d 155 (3d Cir. 2016) – Testimony given by a *former* aide who has since left the employ of the Member of Congress is not foreclosed by the Speech or Debate Clause. Furthermore, a Member of Congress may not rely on the hypothetical assertion of Speech or Debate Clause protection by *another Member* to shield conduct from inquiry.

## 3) Appellate Review of Speech or Debate Decisions

- a) *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995) – A post-trial review of an order denying a claim of immunity under the Speech or Debate Clause is “insufficient to vindicate the rights that the Clause is meant to protect,” and therefore trial court rulings on Speech or Debate Clause immunity are *immediately reviewable* through an interlocutory appeal under the collateral order doctrine. Applying the same logic, the

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<sup>6</sup> 2 U.S.C. § 1407.

D.C. Circuit also holds that an order denying a claim of immunity based upon the separation of powers doctrine is immediately appealable. Additionally, the D.C. Circuit joins the Second and Third Circuits in holding that the Speech or Debate Clause does not prevent a Member of Congress from offering legislative acts in his own defense, though in doing so he or she consents to cross-examination on that testimony.

- b) *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511 (2007) – While section 412 of the CAA provides that an appeal of a decision under the statute may be taken directly to the Supreme Court when the court’s decision implicates the constitutionality of the CAA, the Court holds in this opinion that a decision on the applicability of Speech or Debate Clause privilege in an employment discrimination case is not a decision that implicates the constitutionality of the CAA. Citing the established practice of interpreting statutes to avoid constitutional difficulties, and because the CAA explicitly retains Speech or Debate Clause protections, the Court holds that “a court’s determination that jurisdiction attaches despite a claim of Speech or Debate Clause immunity is best read as a ruling on the scope of the Act, not its constitutionality.”

## **VI. Sovereign Immunity and the CAA**

While Speech or Debate privileges provide a possible affirmative defense specifically for Members’ offices and offices closely related to the legislative process, the doctrine of sovereign immunity provides a possible affirmative defense for *all* employing offices under the CAA. The doctrine of sovereign immunity provides that “[t]he United States, as sovereign, is immune from suit save as it consents to be sued.” *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Furthermore, “the terms of [the sovereign’s] consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *Id.* Sovereign immunity thus provides legislative agencies two potential defenses: (1) immunity from suit, if there has been no consent to being sued; and (2) immunity from specific forms of relief not specifically consented to. While the CAA waives the legislative branch’s sovereign immunity as to various federal labor and employment statutes, this waiver is predicated on a complainant’s successful exhaustion of the OOC’s administrative process, as discussed below.

### **1) Immunity from Suit – Scope of the CAA Waiver of Sovereign Immunity**

- a) 2 U.S.C. § 1302 – This provision of the CAA specifies that “the following laws shall apply, as prescribed by this chapter, to the legislative branch of the Federal Government,” thus waiving the legislative branch’s sovereign immunity with respect to causes of action under these laws. The laws applied by the CAA to the legislative branch include: the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. §§ 201 *et. seq.*), Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000(e) *et. seq.*), the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. §§ 12101 *et. seq.*), the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. §§ 621 *et. seq.*), the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. §§ 2611 *et. seq.*), the Occupational Safety and Health Act of 1970 (OSHAct) (29 U.S.C. §§ 651 *et. seq.*), Chapter 71 of the Federal Service Labor-Management Relations Statute (FSLMRS), the Employee Polygraph Protection Act of

1988 (EPPA) (29 U.S.C. §§ 2001 *et. seq.*), the Worker Adjustment and Retraining Notification Act (WARN Act) (29 U.S.C. §§ 2101 *et. seq.*), the Rehabilitation Act of 1973 (29 U.S.C. §§ 701 *et. seq.*), and certain veterans' employment rights under the Uniformed Services Employment and Re-employment Rights Act (USERRA) and Veterans Employment Opportunities Act (VEOA). The Genetic Information Nondiscrimination Act (GINA) also applies to covered employees in the legislative branch.

- b) *U.S. Capitol Police Bd.*, No. 01-ARB-01 (CP), 2002 WL 34461687 (OOC Board Feb. 25, 2002) – The Capitol Police argue in this dispute that an arbitrator's consideration of damages for a violation of the FLSA violates the doctrine of sovereign immunity because the CAA allows only the Office of Compliance and federal courts to entertain FLSA claims of covered legislative branch employees. The OOC Board rejects this argument, holding that because the CAA incorporates portions of the FSLMRS, including 5 U.S.C. §§ 7121-22 relating to grievance arbitration, Congress waived sovereign immunity under the CAA with respect to negotiated grievance procedures commenced under an agency's collective bargaining agreement. The Capitol Police are thus required to comply with the arbitrator's award.
- c) *Halcomb v. Office of the Senate Sergeant-at-Arms of the U.S. Senate*, 563 F. Supp. 2d 228 (D.D.C. 2008), *aff'd*, 368 F. App'x 150 (D.C. Cir. 2010) – A plaintiff “may use incidents that allegedly occurred prior to the adoption of the CAA and outside the time period allowed under the CAA to start the process for initiating claims under the Act as evidentiary background support for her actionable claims.” The Court refuses to hold that it lacks jurisdiction to decide the plaintiff's case in its entirety because some of the allegedly discriminatory acts complained of occurred before the CAA became law.

## 2) Immunity from Suit – Exhaustion of CAA Process Required for Waiver

- a) *Delfani v. U.S. Capitol Guide Bd.*, No. Civ.A. 03-0949 (RWR), 2005 WL 736644 (D.D.C. Mar. 31, 2005), *aff'd per curiam*, 198 F. App'x 9 (D.C. Cir. Sept. 22, 2006) – The timely completion of the three-step process prescribed by the CAA for aggrieved employees seeking to file a complaint in a U.S. District Court is required to establish a waiver of sovereign immunity. The three-step process consists of (1) a counseling period with the Office of Compliance, (2) mediation, and (3) election of proceeding. Because waivers of sovereign immunity must be “unequivocally expressed in statutory text,” courts will “strictly construe[]” questions of waiver “in favor of the sovereign.” The District Court dismisses the plaintiff-employee's suit because the employee first opted to file a formal complaint with the Office of Compliance before filing a complaint in the D.C. District Court, holding that the CAA unambiguously requires a plaintiff to proceed *either* in District Court or in a formal proceeding before the OOC Board, and that a plaintiff could not proceed in parallel proceedings. *See also Duncan v. Office of the Architect of the Capitol*, No. 02-AC-59, 2006 WL 6172579 (OOC Board Sept. 19, 2006) (exhaustion of administrative process similarly required for waiver of sovereign immunity when formal complaint is filed with the OOC).

- b) *Gordon v. Office of the Architect of the Capitol*, 928 F. Supp. 2d 196 (D.D.C. 2013) – The plaintiff bears the burden of establishing that the CAA’s waiver of sovereign immunity applies by showing through a preponderance of the evidence that the CAA’s three-step process has been exhausted. Because exhaustion is a question of jurisdiction, a court may “consider materials outside of the pleadings” in deciding the issue. The CAA requires a request for counseling to be made within 180 days of the “alleged violation” for the request to be considered timely.<sup>7</sup> This opinion discusses two methods of determining when this 180-day countdown begins, observing that the D.C. Circuit “has never directly addressed which rule applies” and that “trial courts in this Circuit have to this point applied both,” and ultimately endorses use of the “notification rule,” identifying it as the standard followed by the D.C. Circuit in cases involving the CAA. The notification rule begins the 180 day period for filing at the point the employment decision is “made and communicated to the employee.” This communication is held to occur only if “minimum formality” requirements are satisfied. To determine whether this minimum formality requirement has been met, (1) courts are to focus on the employer’s actions, not the employee’s subjective beliefs; (2) the action must carry official trappings, generally meaning that it was communicated in written form; and (3) the communication to the plaintiff must be made by someone with sufficient authority to render the decision definite. Applying this standard, the court holds that a conversation accidentally overheard by the plaintiff in which he learned he had not been selected for promotion lacked these minimal indices of formality because the conversation did “not reflect any intentional action by the employer to inform the plaintiff of the hiring decision.”
- c) *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699 (D.C. Cir. 2009) – Because the counseling and mediation steps of the CAA’s administrative process are confidential, courts are not able to inquire *within* the sessions to determine whether a plaintiff’s claims were exhausted during the process. To determine if a *particular* claim was exhausted, courts give great weight to the paper trail created by the OOC process. In particular, OOC documents that courts consider in determining which of a plaintiff’s claims were exhausted include the Request for Counseling form, the Notice of Invocation of Mediation, and the End of Counseling notices. Neither the CAA nor the OOC’s procedural rules require in-person attendance by the employee at the counseling or mediation sessions as long as the plaintiff was properly represented. To the extent that there is a good faith requirement on the part of the plaintiff during the administrative process, a court’s inquiry into whether this requirement was satisfied is limited to determining whether the plaintiff “so thwarted the administrative process as to preclude judicial relief.” The plaintiff’s receipt of the End of Mediation notice triggers the 30- to 90-day period for election of remedy. *See also Taylor v. Duncan*, No. 3:09-CV-318, 2011 WL 826170 (E.D. Tenn. Mar. 2, 2011) (holding that the court may *only* consider the OOC’s official notices in determining whether a plaintiff exhausted the CAA process).

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<sup>7</sup> 2 U.S.C. § 1402(a).

### 3) Immunity from Damages

- a) *Fraternal Order of Police, U.S. Capitol Police Labor Comm. v. U.S. Capitol Police*, No. 17-ARB-04, 2018 WL 950096 (OOC Board Feb. 15, 2018) – “When Congress enacted the CAA in 1995, it expressly extended the rights, protections, and responsibilities contained in section 7122 of the FSLMRS” to covered agencies and their employees. Section 7122 “explicitly authorizes the payment in grievance cases of back pay by covered Federal governmental entities.” Because the CAA incorporates these FSLMRS provisions, an “agency shall take the actions required by an arbitrator’s final award,” including the payment of back pay and reasonable attorney fees.
- b) *AFSCME Council 26*, No. 00-LMR-03, 2001 WL 36175209 (OOC Board Jan. 29, 2001) – This negotiability appeal arose over language the Union attempted to add to its collective bargaining agreement with the Office of the Architect of the Capitol (AOC) requiring the employing office to directly pay a negotiated back pay award “in the event the Office of Compliance fails to approve the award.” The AOC argued that the doctrine of sovereign immunity precluded its ability to negotiate over this demand, as there was no “clear and unequivocal statutory authority for it to make back pay payments” directly. The OOC Board ruled in favor of the AOC, holding that while AOC employees are unambiguously entitled to obtain back pay relief under the CAA, the statute requires that “only funds which are appropriated to an account of the Office in the Treasury of the United States” be used “for the payment of awards and settlements... under this chapter.” Under the doctrine of sovereign immunity “the government is not liable for monetary awards unless its immunity has been *unequivocally waived*” (emphasis supplied), and because the CAA does not explicitly allow for employing offices to make back pay awards directly, the AOC may refuse to negotiate the Union’s proposal.

### 4) Immunity from Suit – Equitable Tolling Under the CAA

- a) *Perez v. Office of Representative Sheila Jackson-Lee*, No. 04-HS-21 (CV, RP), 2005 WL 6236947 (OOC Board June 29, 2005) – Typically, in order for equitable tolling to apply, a complainant must show that she has actively pursued her judicial remedies by filing a defective pleading during the statutory period, or that she has been induced or tricked by the employing office’s misconduct into allowing the filing deadline to pass. The OOC Board quoted *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), in which the Supreme Court wrote, “Once Congress has made [a waiver of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver... We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.” The Board applied this same logic to administrative proceedings against legislative branch employing offices under the CAA, noting that *Irwin* predated the CAA by 5 years and that Congress therefore was on notice that if it

did not want to be subject to the rebuttable presumption that equitable tolling was available, it should have included clear statutory language to that effect.

- b) *Gibson v. Office of the Architect of the Capitol*, No. Civ.A.00-2424 (CKK), 2002 WL 32713321 (D.D.C. Nov. 19, 2002), *aff'd per curiam*, No. 03-5031, 2003 WL 2158073 (D.C. Cir. July 2, 2003) – Upon surveying the sparse D.C. Circuit precedent on the issue, this District Court concludes that equitable tolling does not apply to cases filed in federal court under the CAA. The court holds that it must strictly construe the statutory requirement in section 1408 that access to federal courts under the CAA is limited to litigants who have “completed counseling under section 1402,” and that to apply the equitable tolling doctrine would “extend the waiver” of sovereign immunity beyond that which Congress intended in enacting the CAA.
- c) *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699 (D.C. Cir. 2009) – Building on the logic of the above case, the D.C. Circuit holds that other equitable procedural remedies such as vicarious exhaustion are similarly not allowed to excuse non-compliance with the OOC administrative process. “Courts have ‘no authority to create equitable exceptions to jurisdictional requirements’” (quoting *Bowles v. Russell*, 551 U.S. 205, 214 (2007)).
- d) The above cases illustrate that there is currently a split between the OOC Board and the federal courts as to whether equitable doctrines such as equitable tolling apply to excuse a plaintiff’s non-compliance with the OOC administrative process. OOC Board decisions are not binding on the federal courts, and vice versa; therefore, the possibility of applying the equitable tolling doctrine currently exists for complainants in the OOC’s administrative process but not to plaintiffs who choose to file in federal court.