

VOLUME 19.1: INSTITUTIONAL INJUSTICE: FEDERAL AND STATE: #CONGRESSTOO: A PRAGMATIC CONSTITUTIONAL APPROACH TO APPLYING THE SPEECH OR DEBATE CLAUSE IN EMPLOYMENT LITIGATION AGAINST CONGRESS

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Author: BY: BRADFORD P. MEISEL

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[*49] INTRODUCTION

The fall of 2017 witnessed a tidal wave of sexual harassment allegations against prominent men, ranging from film mogul Harvey Weinstein and television news anchor Matt Lauer to Academy Award winning actor Kevin Spacey and Judge Alex Kozinski of the U.S. Court of Appeals for the 9th Circuit. These events spawned a grassroots movement, prompting countless women to publicly accuse their former employers or supervisors of sexual assault or harassment, and file lawsuits alleging sexual assault, harassment, and discrimination. The movement, popularly known by the hashtag #MeToo, which accompanied many women's allegations of sexual harassment and assault on social media, seemingly ended the storied careers of many influential men and forced venerable institutions to grapple with the consequences of sexual harassment and discrimination.

The United States Congress was no exception. On November 20, 2017, BuzzFeed News reported that Congress settled a claim with a former legislative aide to Representative John Conyers, Jr., who claimed she was terminated for rebuffing the Congressman's sexual advances. ¹Representative Conyers, a Michigan Democrat, was the longest tenured Member of Congress, had served over two decades as Chairman or Ranking Member of the House Judiciary Committee, and was hailed by House Democratic Leader Nancy Pelosi as "an icon" of the civil rights movement. ²Despite his towering stature in national politics, Conyers resigned from Congress on December 5, 2017 amid bipartisan condemnation.

¹ Paul McLeod and Lisandra Villa, *She Said a Powerful Congressman Harassed Her. Here's Why You Didn't Hear Her Story*, BUZZFEED (Nov. 20, 2017), https://www.buzzfeed.com/paulmcleod/she-complained-that-a-powerful-congressman-harassed-her?utm_term=.wjB4g2B5o#.hrNEKnM96.

² Kelsey Tamborrino, *Pelosi Defends Conyers as 'An Icon'*, POLITICO (Nov. 26, 2017), <https://www.politico.com/story/2017/11/26/pelosi-conyers-icon-harassment-259832>.

³In the subsequent days, Arizona Republican [*50] Representative Trent Franks resigned hours after being accused of subjecting female legislative aides to a hostile work environment by asking them to carry his children on behalf of his infertile wife. ⁴Shortly thereafter, Texas Republican Representative Blake Farenthold ended his reelection bid and resigned his seat on April 6, 2018 after it was revealed that Congress settled a claim by his former communications director, who claimed she was fired for complaining about his pattern of sexually explicit comments. ⁵

These scandals brought national media attention to both a little known statute governing the rights of Congressional employees, and an often overlooked provision of the United States Constitution with the potential to preempt or hinder employment litigation against Congress. The statute in question, the Congressional Accountability Act (CAA), was enacted on January 23, 1995 by a vote of 98 to 1. The statute, which was enacted amid allegations of sexual harassment against Oregon Republican Senator Bob Packwood, who resigned under threat of expulsion in October 1995, took effect one year after its passage on January 23, 1996. ⁶The statute applies to "any employee of (A) the House of Representatives; (B) the Senate; (C) the Office of Congressional Accessibility Services; (D) the Capitol Police; (E) the Congressional Budget Office; (F) the Office of the Architect of the Capitol; (G) the Office of the Attending Physician; (H) the Office of Compliance; or (I) the Office of Technology Assessment." ⁷

The CAA seeks to provide Congressional employees with the same federal protections as private sector employees. The statute prohibits discrimination against covered employees on the basis of "race, color, religion, sex, or national origin" as defined by the Civil Rights Act of 1964, "age" as defined by the Age Discrimination in Employment Act of [*51] 1967 (ADEA), and "disability" as defined by the Americans with Disabilities Act of 1990 (ADA) and applies the Family Medical Leave Act of 1993 (FMLA) to Congressional employees. ⁸The statute also includes an anti-retaliation provision. ⁹Since quid pro quo sexual harassment constitutes sex discrimination, the staff members who allegedly

³ Domenico Montanaro and Brian Naylor, *Conyers Resigns Amid Sexual Harassment Allegations*, NATIONAL PUBLIC RADIO (Dec. 5, 2017), <https://www.npr.org/2017/12/05/567160325/conyers-resigning-amid-sexual-harassment-allegations>.

⁴ Ronald J. Hansen, *Rep. Trent Franks Says He Will Resign Immediately as Details of Allegations Emerge*, THE ARIZONA REPUBLIC (Dec. 8, 2017), <https://www.azcentral.com/story/news/politics/arizona/2017/12/08/rep-trent-franks-say-she-resign-immediately-citing-wifes-illness/935759001/>.

⁵ Abby Livingston, *U.S. Rep. Blake Farenthold Resigns From Congress*, THE TEXAS TRIBUNE (Apr. 6, 2018), <https://www.texastribune.org/2018/04/06/blake-farenthold-retire-congress/>.

⁶ Cokie Roberts, *Cokie Roberts on Politicians and Sexual Harassment*, NATIONAL PUBLIC RADIO (Nov. 15, 2017), <https://www.npr.org/2017/11/15/564272316/cokie-roberts-on-politicians-and-sexual-harassment>; Kenneth J. Cooper, *House Sends Congressional Compliance Bill to Clinton*, THE WASHINGTON POST (Jan. 18, 1995), https://www.washingtonpost.com/archive/politics/1995/01/18/house-sends-congressional-compliance-bill-to-clinton/20352b4e-0069-42dc-b414-13a5db41cc78/?utm_term=.c3dea3d54cca.

⁷ 2 U.S.C. § 1301(3) (2012).

⁸ 2 U.S.C. § 1311(a) (2010). See also, 42 U.S.C. § 2000e-2 (2010); 29 U.S.C. § 633(a) (2011); 29 U.S.C. § 791 (2010); 42 U.S.C. § 12112 (2009); 42 U.S.C. § 12113 (2015); 42 U.S.C. § 12114 (2012); 2 U.S.C. § 1312(a) (2011). See also, 29 U.S.C. § 2611 (2009); 29 U.S.C. § 2612 (2010); 29 U.S.C. § 2613 (2010); 29 U.S.C. § 2614 (2011); 29 U.S.C. § 2615 (2011).

⁹ 2 U.S.C. § 1317(a) (2017).

experienced sexual harassment while working for Representatives Conyers, Franks, and Farenthold could have brought civil actions pursuant to the CAA. ¹⁰

Although the CAA entitles employees who suffer such conduct to file civil actions against Congress, the Speech or Debate Clause of Article I of the United States Constitution presents a significant obstacle to such litigation. The Speech or Debate Clause provides that "for any [s]peech or [d]ebate [Members of the House or Representatives or the Senate] shall not be questioned in any other [p]lace." ¹¹Although the Speech or Debate Clause on its face only seems to prevent Members of Congress from being questioned about speeches and statements made on the House or Senate floor or during committee hearings, the United States Supreme Court has broadened it into an evidentiary privilege that prevents Members of Congress from being compelled to testify about or provide evidence of legislative acts and the motives for them and requires the dismissal of actions that would require them to do so.

This article proposes an approach to balancing the interests of Congress, protected by the Speech or Debate Clause of Article I of the Constitution, with the rights of Congressional employees who have suffered discrimination or retaliation prohibited by the CAA and other federal labor statutes. This article will first outline the evolution of Speech or Debate Clause jurisprudence and jurisprudence regarding the application of the Speech or Debate Clause to employment litigation against Congress. Second, this article will propose an approach that would balance the interests of Congress protected by the Speech or Debate Clause with the rights of Congressional employees whose rights have been violated. Third, this article will illustrate how the proposed approach is **[*52]** consistent with the framers' intent as well as United States Supreme Court jurisprudence.

THE EVOLUTION OF SPEECH OR DEBATE CLAUSE JURISPRUDENCE

The United States Supreme Court began to expand the scope of the Speech or Debate Clause beyond its strict textual meaning when it first interpreted the provision in 1880. In the case at hand, the plaintiff sued the Sargent-at-Arms of the House of Representatives for false imprisonment for arresting him for contempt of Congress for refusing to answer questions before a Congressional committee. ¹²The Court held that the Speech or Debate Clause barred discovery of how individual Members of Congress voted on the resolution holding the plaintiff in contempt of Congress, since the Clause applied to both oral speech and debate in the literal sense of the term as well as votes and "written reports presented" to Congress by its Members. ¹³This holding extended the clause's protections to legislative activities beyond the strict literal meaning of "speech" or "debate." ¹⁴Justice Samuel Freeman Miller wrote in his majority opinion that "...things generally done in a session of the House [or Senate] by one of its members in relation to the business before it" were subject to the Speech or Debate Clause and privileged from compelled disclosure in judicial or executive branch proceedings. ¹⁵

¹⁰ See, e.g. *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 65-66 (1986); *Xiaoyan Tang v. Citizens Bank, N.A.*, 821 F.3d 206, 215 (1st Cir. 2016); *Perez-Cordero v. Wal-Mart P. R., Inc.*, 656 F.3d 19, 26 (1st Cir. 2011).

¹¹ U.S. CONST. art. 1, § 6, cl. 1.

¹² *Kilbourn v. Thompson*, 103 U.S. 168, 168-169 (1880).

¹³ *Id.* at 203-204.

¹⁴ *Id.* at 203-04. See also *Doe v. McMillan*, 412 U.S. 306, 312-313 (1973) (holding that the act of introducing or voting on a written report on the floor of either House or in a Congressional committee is a legislative act subject to the Speech or Debate Clause).

¹⁵ See *Kilbourn*, 103 U.S. at 204.

The Supreme Court gradually expanded the applicability of the Speech or Debate Clause in a series of cases decided in the second half of the twentieth century. In a 1951 lawsuit challenging a legislative investigation into whether the plaintiff was a member of the Communist Party, the Court held that "the claim of an unworthy purpose" for a legislative act, namely harassing the plaintiff or destroying the plaintiff's reputation purely out of spite, "does not destroy the privilege" granted to Members of Congress by the Speech or Debate Clause.¹⁶ Therefore, the Court barred discovery regarding the motives behind the challenged legislative investigation.¹⁷ It follows from the Court's reasoning in *Tenney* that committing a legislative act for the purpose of furthering a criminal [*53] act such as a bribery scheme would not destroy the privilege either.¹⁸ Justice Felix Frankfurter wrote in his majority opinion that the clause "would be of little value if they [Members of Congress] could be subjected to the cost and inconvenience and distractions of a trial" based on their motives for legislative acts, since it is inconsistent "with our scheme of government for a court to inquire into the motives of legislators."¹⁹ The Court in *Tenney* also noted that the clause covers legislative activities including "introducing, debating, and voting on legislation."²⁰

In the 1966 case of *United States v. Johnson*, the Supreme Court established a test for when a cause of action must be dismissed on the sole basis of the Speech or Debate Clause regardless of its merits.²¹ In that case, Maryland Representative Thomas Francis Johnson was charged with conspiracy to defraud the United States for allegedly giving a floor speech in exchange for monetary compensation from a private citizen.²² The Court held that the indictment must be dismissed, since Representative Johnson's guilt or innocence could not be ascertained without inquiring into his motives for giving the floor speech in question and such inquiry would violate the Speech or Debate Clause.²³ Justice John Marshall Harlan II wrote in his majority opinion that the case could only have proceeded if the defendant's guilt or innocence could be adequately ascertained in a proceeding "wholly purged of elements" or evidence subject to the Speech or Debate Clause.²⁴ Based on the Court's holding in *Johnson*, if a defendant's guilt or innocence can be adequately ascertained without discovery into matters subject to the Speech or Debate Clause, the matter can proceed and any material evidence subject to the Clause would simply be excluded in the same way that evidence protected by another privilege such as spousal or attorney-client privilege is excluded.²⁵

In the 1972 case of *Gravel v. United States*, the Supreme Court held that legislative aides employed by Members' offices who act on their behalf as their "alter egos" have the same right as Members themselves to invoke the Speech or Debate Clause to refuse to testify about or provide evidence

¹⁶ *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 378-379.

²¹ *United States v. Johnson*, 383 U.S. 169, 184-185 (1966).

²² *Id.* at 170-171.

²³ *Id.* at 184-185.

²⁴ *Johnson*, 383 U.S. 169, at 185.

²⁵ *Id.*

regarding Members' legislative acts or their motivations for them. ²⁶The case arose when a federal grand jury investigating Alaska Senator Mike Gravel for allegedly reading portions of the classified [*54] Pentagon Papers to a Senate subcommittee and arranging for private publication of the papers subpoenaed one of his aides and the Senator sought to quash the subpoena. ²⁷The Court held that the subpoenaed aide was the Senator's "alter ego" since he assisted in both planning and conducting the subcommittee hearing in question and was privy to the legislative acts being investigated by the grand jury, and could testify to what legislative acts the Senator took and why he took them. ²⁸Justice Byron White, writing for the majority, justified the majority's holding by reasoning that a failure to apply the Speech or Debate Clause to legislative staff under such circumstances would render the clause "diminished and frustrated" since Members of Congress often "perform their legislative tasks" with the assistance of staff and if staff could be compelled to testify about or provide evidence of what legislative acts Members took and why they took them, all the information intended to be protected by the Speech or Debate Clause could be obtained. ²⁹However, the *Gravel* Court held that Congressional aides can only invoke the privilege to protect the Member when he or she is a defendant or target of an investigation and not for any other purpose including protecting himself or herself from prosecution, civil litigation, or public embarrassment. ³⁰

In 1975, the Court affirmed its prior holdings in *Kilbourn* and *Tenney* that the Speech or Debate Clause applies to civil as well as criminal proceedings. ³¹Chief Justice Burger reasoned that "the applicability of the [Speech or Debate] Clause to private civil actions is supported by the absoluteness of the terms 'shall not be questioned' and the sweep of the term 'in any other place.'" ³²Although the Court noted in dicta that a civil proceeding "creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks" it based its decision on the fact that adjudication of a matter in which a Member of Congress is a defendant is an exercise of power by the judicial branch over a member of the legislative branch. ³³The Court appeared to conclude that since the Clause is intended to ensure the separation of powers by protecting Members of Congress from exercises of power by the judicial or executive branch, the Clause should apply to any action in which a Member is a defendant regardless of whether it is a civil or criminal proceeding or an administrative proceeding brought by an executive branch agency. ³⁴

[*55] In 1979, the Supreme Court promulgated a standard for establishing a waiver of the Speech or Debate Clause privilege. Despite holding that Members of Congress could independently waive the privilege with regards to ongoing proceedings or investigations, the Court held that such "waiver can be found only after explicit and unequivocal renunciation of the protection" by the Member or aide and

²⁶ *Gravel v. United States*, 408 U.S. 606, 616-617 (1972).

²⁷ *Id.* at 608.

²⁸ *Id.* at 616-617.

²⁹ *Gravel*, 408 U.S. 606 at 616.

³⁰ *Id.* at 622.

³¹ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-503 (1975).

³² *Eastland*, 421 U.S. 491 at 503.

³³ *Id.*

³⁴ *Id.*

therefore a Member of Congress' decision to provide documentary evidence of legislative acts to a grand jury did not constitute a waiver of the privilege.³⁵

SPEECH OR DEBATE CLAUSE JURISPRUDENCE REGARDING CIVIL EMPLOYMENT LITIGATION BY CONGRESSIONAL EMPLOYEES

In the decades following the series of decisions that expanded the scope of the Speech or Debate Clause, courts have addressed its effect on civil employment litigation by Congressional employees. In lawsuits alleging employment discrimination by Congressional offices in violation of the Congressional Accountability Act (CAA), courts apply the framework established by the Supreme Court in for employment discrimination actions against private employers alleging violations of Title VII of the Civil Rights Act of 1964.³⁶ Under *McDonnell-Douglas*, when an employee presents a prima facie case of discrimination and the employee offers a nondiscriminatory explanation for the employment decision at issue in the litigation, the employee can only prevail by demonstrating that the offered explanation was pretext for statutorily prohibited discrimination or retaliation.³⁷ In order to demonstrate that an offered explanation is pretext for discrimination, an employee must demonstrate that it was not the actual reason for the challenged employment action.³⁸

Congressional offices have argued that the Speech or Debate Clause preempts employment actions because inquiry into whether a proffered nondiscriminatory explanation for an employment decision is pretext would require disclosure of information protected by the clause.³⁹ Such arguments have been based on the theory that if the employment decision at issue was motivated by the plaintiff's performance of tasks directly [*56] related to the legislative process such as writing floor speeches and remarks for committee hearings, drafting and proposing legislation, or advising the Member on how to vote on legislation or nominations, or assisting with the Member's oversight responsibilities, any inquiry into whether the nondiscriminatory explanation is pretext violates the Speech or Debate Clause.⁴⁰ Courts have noted that such discrimination claims must be dismissed if they cannot be adjudicated adequately without the discovery of information protected by the privilege.⁴¹ For example, in *Scott v. Office of Alexander*, a Representative's Office argued that a sex discrimination lawsuit filed by the Representative's scheduler could not proceed because the office proffered a nondiscriminatory reason for the adverse employment action by claiming the scheduler provided an inaccurate schedule of Congressional committee meetings and inquiry into the times of such meetings and whether or not the Representative attended them was precluded by the Speech or Debate Clause.⁴²

³⁵ United States v. Helstoski, 442 U.S. 477, 489 - 491 (1979).

³⁶ *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); See, e.g. *Moran v. United States Capitol Police*, 82 F.Supp.3d 117 (D. D.C. 2015) (applying the *McDonnell-Douglas* framework to actions brought pursuant to the CAA).

³⁷ *McDonnell-Douglas Corp.*, 411 U.S. at 804 (establishing burden-shifting framework for employment discrimination actions).

³⁸ *Id.*

³⁹ See, e.g., *Floyd*, 968 F. Supp. 2d at 321; *Scott*, 522 F. Supp. 2d at 267.

⁴⁰ See, *Scott*, 522 F. Supp. 2d at 271.

⁴¹ See, *Id.*

⁴² *Id.* at 270 - 271.

In the years between the Supreme Court's decision that the Speech or Debate Clause applied to employment lawsuits against Congressional employees in 1979 and the enactment of the CAA, federal courts held that the Speech or Debate Clause barred any litigation regarding employment decisions by Congressional offices if the plaintiffs' job responsibilities were in any way related to the legislative process⁴³. In *Walker v. Jones*, the U.S. Court of Appeals for the District of Columbia held that the Speech or Debate Clause did not require the dismissal of a Congressional cafeteria manager's sex discrimination lawsuit because serving food to Members of Congress and their aides cannot be "reasonably described as work that significantly informs or influences the shaping of our nation's laws."⁴⁴

By contrast, the same court held two years later that the Speech or Debate Clause required the dismissal of a race discrimination claim brought by official reporter employed by the Clerk of the House of Representatives because by reporting events that occurred on the House floor, her duties "were directly related to the due functioning of the legislative process" and any inquiry into the reasons for her dismissal would require the introduction of evidence of legislative acts since [*57] requiring production of the records the plaintiff prepared in the course of her work would indicate what legislative acts Members of Congress took⁴⁵. The Court in *Browning* contended that limiting "the scope of the Speech or Debate Clause immunity to personnel actions where the employee has discretionary input into the legislative process" unlike in *Browning* in which the plaintiff merely reported on House proceedings, "is far too restrictive a view."⁴⁶ Since the plaintiff's duties consisted of recording activities on the House floor, inquiry into her duties could reveal what House Members said and how they voted in violation of the Speech or Debate Clause.

In the 2004 case of *Bastien v. Office of Senator Ben Nighthorse Campbell*, the U.S. Court of Appeals for the Tenth Circuit overturned the U.S. District Court's dismissal of a lawsuit alleging age discrimination and retaliation by a Senator's office in violation of the CAA that was based on the Speech or Debate Clause.⁴⁷ The 10th Circuit held that because the plaintiff's job duties consisted of interfacing with constituents and conveying their opinions and comments to the Senator, her "duties were not legislative" and any inquiry into her performance of her duties would not violate the Speech or Debate Clause.⁴⁸ The holding that the plaintiff's "duties were not legislative" was predicated on the fact that she simply collected input from constituents to ensure that the Senator was aware of his constituents' opinions on various issues.⁴⁹ Although evidence that the constituents who contacted his office almost unanimously favored a piece of legislation could lead an observer to speculate that he voted in favor of the legislation as a result, such evidence does not establish that the Senator voted in favor of the legislation or why he did so since he could have chosen to ignore the wishes of his constituents and

⁴³ See, *Davis v. Passman*, 442 U.S. 228, 246 (1979) (holding in a suit against a United States Representative alleging sex discrimination by a Representative's office against a female deputy administrative assistant that Members of Congress enjoy the same protections in employment discrimination actions as they do in other civil actions such as those in *Kilbourn*, *Tenney*, and *Eastland*); *Walker v. Jones*, 733 F.2d 923, 931 (D.C. Cir. 1984).

⁴⁴ *Walker*, 733 F.2d at 931.

⁴⁵ *Browning v. Clerk, United States House of Representatives*, 789 F.2d 923, 931 (D.C. Cir. 1986).

⁴⁶ *Id.* at 929.

⁴⁷ *Bastien v. Office of Campbell*, 390 F.3d 1301, 1305 (10th Cir. 2004).

⁴⁸ *Bastien*, 390 F.3d at 1305-1306.

⁴⁹ *Id.*

oppose the legislation or support it for reasons unrelated to the wishes of his constituents such as his personal beliefs or pressure from party leadership or lobbyists.⁵⁰

In deciding *Bastien*, the 10th Circuit clarified the definition of legislative acts subject to the Speech or Debate Clause and distinguished the facts of the case at hand from *Browning*. Discovery regarding the plaintiff's duties, unlike the creation of the Congressional record, could not reveal how what legislative acts the Senator took or why he took them. The Court also held that personnel decisions are never legislative acts in [*58] and of themselves.⁵¹ The Court also cautioned that the clause "should not be, and has not been, read to make members of Congress into a special class of citizens protected from suit[s] ... arising out of any activity that could assist in the performance of their official duties" especially given that "virtually anything that a member of Congress does could be said to relate, more or less directly, to official business."⁵²

The United States Court of Appeals for the District of Columbia Circuit abrogated its prior holding in *Browning* in 2006 in its en banc decision in *Fields v. Office of Eddie Bernice Johnson*, which established a new standard for dismissal of employment actions on the basis of the Speech or Debate Clause.⁵³ The case was brought by a Representative's former Chief of Staff who claimed that her termination constituted race and sex discrimination and retaliation prohibited by the CAA.⁵⁴ The plurality opinion written by Judge A. Raymond Randolph reasoned that the clause "protects conduct that is integral to the legislative process, not a Member's legislative goals" and in order to determine if discrimination occurred it is not "necessary to inquire how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee."⁵⁵ Nevertheless, the plurality concluded "the Speech or Debate Clause," like other privileges such as attorney-client privilege, can "preclude some relevant evidence" and a claim must be dismissed if the district court determines on the basis of an affidavit by the Member or his aides that the proffered nondiscriminatory reason for the challenged employment action involves legislative acts subject to the Speech or Debate Clause.⁵⁶ Unlike the *Browning* Court, the plurality in *Fields* established a more case-specific inquiry that hinged on whether the specific claims alleged by the plaintiff could be adequately adjudicated without evidence protected by the Speech or Debate Clause, whereas the *Browning* Court based its inquiry on the employee's duties and advocated the dismissal of employment lawsuits when inquiry into the plaintiffs' job duties was likely to reveal evidence of legislative acts.⁵⁷ The *Fields* Court, unlike the *Browning* Court, refused to assume that a case would require inquiry into evidence protected by the Clause on the sole basis of the plaintiff's job duties.⁵⁸

⁵⁰ *Id.*

⁵¹ *Id.* at 1318.

⁵² *Id.* at 1306-1307.

⁵³ *Fields v. Office of Johnson*, 459 F.3d 1, 4, 17 (D.C. Cir. 2006).

⁵⁴ *Id.* at 4-5.

⁵⁵ *Id.* at 12-13.

⁵⁶ *Id.* at 14-16.

⁵⁷ *Fields*, 459 F.3d at 14-16.

⁵⁸ *Id.* at 16.

[*59] Judge Janice Rogers Brown wrote a concurrence arguing that employment lawsuits filed by Congressional employees can never be dismissed on the basis of the Speech or Debate Clause.⁵⁹ Judge Brown noted that unlike criminal cases against Members of Congress and their aides, civil lawsuits for violations of the CAA can only be filed against Congress as an institutions and not individual Members, Members' Offices, Committees, or employees and therefore Members and their aides bear "no financial risk" from potential judgments or attorneys' fees and adjudication of such lawsuits does not constitute an exercise of judicial branch or executive branch power on Members of Congress and their aides themselves.⁶⁰ Even if the CAA were amended to require Members found to have personally violated the statute to reimburse Congress for any judgments or settlements, such litigation would never constitute an exercise of judicial or executive branch power on Members of Congress since the reimbursement requirement would be an exercise of legislative branch power on its own members. She concluded that in cases in which a Member is not personally a party "the Clause functions only as a testimonial and documentary privilege [] to be asserted" in response to subpoenas and discovery orders and "when the privilege makes relevant evidence unavailable, the parties will have to present their cases as best they can" just as they would if the evidence sought was protected by attorney-client privilege.⁶¹ Under her proposed rule the Speech and Debate Clause can never be "a jurisdictional bar" in employment discrimination lawsuits by Congressional employees under any circumstances.⁶²

In *Howard v. Office of Chief Administrative Officer of United States House of Representatives*, the D.C. Circuit affirmed in part the District Court's order denying a former Congressional employee's lawsuit alleging that she was fired as a result of her race.⁶³ In *Howard*, the Office of the Chief Administrative Office of the House of Representatives (OCAO) attempted to assert the Speech or Debate Clause as a jurisdictional bar to the claim since the plaintiff interfaced with the House Committees on Appropriations and House Administration and submitted operating budgets for the committees to consider when drafting appropriations legislation and the proffered nondiscriminatory reason for her dismissal was that she inadequately performed such duties.⁶⁴ The Court appeared to endorse Judge Randolph's standard rather than Judge Brown's standard **[*60]** when it held, in an opinion written by Judge Harry Edwards and joined by Chief Judge Merrick Garland that the case could only proceed because the plaintiff could demonstrate her employer's proffered nondiscriminatory explanation for her termination was pretext "without inquiring into legislative acts."⁶⁵ The majority's conclusion that the case could proceed under Judge Randolph's standard was bolstered by the fact that the House Committees on Appropriations and House Administration were under no obligation to include any of the recommendations the plaintiff worked on in actual legislation so disclosure of such information would not establish what, if any, legislative acts were taken by the committees and their members.

Judge Brett Kavanaugh, who was elevated to the United States Supreme Court in 2018, dissented and contended that the suit should have been dismissed pursuant to the Speech or Debate Clause since the employer's proffered nondiscriminatory reason for the alleged discriminatory act involved the plaintiff's

⁵⁹ *Id.* at 29-30 (Brown, J., concurring).

⁶⁰ *Id.* at 27-29.

⁶¹ *Fields*, 459 F.3d at 32.

⁶² *Id.* at 29-30.

⁶³ *Howard v. Office of Chief Admin. Officer of United States House of Representatives*, 720 F.3d 939, 953 (D.C. Cir. 2013).

⁶⁴ *Id.* at 943, 949.

⁶⁵ *Id.* at 946-947.

performance of activities related to legislative activities. ⁶⁶Judge Kavanaugh's dissent appeared to endorse the *Browning* and *Walker* standard under which the Speech or Debate Clause required the dismissal of all employment suits by Congressional employees except for those by employees such as foodservice workers whose duties were completely unrelated to the legislative functions of Congress. Judge Kavanaugh seemed to reason that rebutting such a nondiscriminatory explanation for an adverse employment action would require discovery that could indicate how the Member voted on the legislation in question and his motives for voting the way in which he did. ⁶⁷

The United States district courts have also appeared to follow Judge Randolph's approach over Judge Brown's in the years following *Fields* by dismissing employment claims when they require inquiry into employees' performance of duties related to legislative acts. In *Scott v. Office of Alexander*, a Representative's former scheduler claimed she was demoted after resisting sexual advances from her superiors. ⁶⁸The Court dismissed the case after the Representative's office claimed that the plaintiff was demoted after making scheduling errors that caused the Representative to miss committee meetings because inquiry into whether or not this explanation was pretext would require inquiry into the Representative's attendance at committee meetings that would have violated the Speech or **[*61]** Debate Clause. ⁶⁹The Court reasoned that evidence of the schedules provided by the scheduler and their accuracy would demonstrate whether the Representative attended the meetings in question and his attendance at such meetings would constitute legislative acts protected by the Speech or Debate Clause. ⁷⁰In *Floyd v. Lee*, the Court held that Congressional employee's lawsuit alleging discrimination on the basis of a disability could proceed since the only alleged discrimination was the employing office's decision not to grant the plaintiff workplace accommodations. ⁷¹The court reasoned that the decision not to grant the plaintiff's workplace accommodations was not a legislative act and no evidence of legislative acts would be material to a proceeding challenging it as discriminatory since there was no need to inquire into the plaintiff's performance of duties related to the legislative process. ⁷²

A MIDDLE GROUND BETWEEN OF JUDGE RANDOLPH AND JUDGE BROWN'S APPROACHES UNDER WHICH DISMISSAL IS ONLY WARRANTED IF THE PROFFERED NONDISCRIMINATORY REASON FOR THE CHALLENGED EMPLOYMENT ACTION CANNOT BE REBUTTED WITHOUT EVIDENCE OF ACTUAL LEGISLATIVE ACTS COUPLED WITH A QUALIFIED PRIVILEGE FOR STAFF LEGISLATIVE WORK PRODUCT IS MOST EQUITABLE AND MOST CONSISTENT WITH THE FRAMERS' INTENT

A middle ground between of Judge Randolph's approach of only dismissing employment lawsuits against Congress if they can be adjudicated without inquiry into legislative acts and Judge Brown's approach under which employment lawsuits against Congress can never be dismissed on the basis of the Speech or Debate Clause is the most equitable and most consistent with the intent and purpose of

⁶⁶ *Howard*, 720 F.3d at 957.

⁶⁷ *Cf., Id.* at 955.

⁶⁸ *Scott*, 522 F. Supp. 2d at 265.

⁶⁹ *Id.* at 271.

⁷⁰ *Id.*

⁷¹ *Floyd*, 968 F. Supp. 2d at 321.

⁷² *Id.* at 323.

the Speech or Debate Clause. Such a middle ground could be established if Courts only dismiss such actions when the proffered nondiscriminatory reason for the challenged employment action can only be rebutted with evidence of actual legislative acts such as the way in which a Member voted on legislation, what he or she said on the floor or in a committee meeting, or a Member's actual motivations for such acts.

If the proffered nondiscriminatory reason could be rebutted with evidence of staff legislative work product such as memoranda, letters, reports, research, briefings, schedules, or recommendations prepared by a [*62] Congressional employee regarding legislation, matters of public policy, Congressional committee activities, Congressional oversight and investigations, impeachment or expulsion proceedings, nominations, or drafts of legislation, reports, statements, or speeches prepared by such an employee, the action could not be dismissed on the basis of the Speech or Debate Clause. Such staff legislative work product should be subjected to a qualified privilege rather than the absolute privilege applied to legislative acts themselves. In order to protect these interests that the Speech or Debate Clause was intended to serve, the qualified work product privilege for staff legislative work product should only be applied in lieu of absolute privilege in civil employment litigation where such evidence is almost invariably material and Members of Congress are never defendants.

The qualified privilege for Congressional employee work product related to legislative acts would only compel disclosure of the evidence in question if the District Court concludes in an in camera hearing that there was a) a substantial need for the information sought, b) the party seeking disclosure lacks alternative means of obtaining the information sought without undue hardship, and c) the party resisting disclosure cannot withhold the information sought pursuant to another evidentiary privilege unrelated to the Speech or Debate Clause, such as state secrets or attorney-client privilege. The qualified privilege would be strictly limited to the work product created by legislative aides such as drafts of potential floor speeches and memorandums recommending how a Member should vote on specific legislation and not allow for discovery of actual legislative acts such as how the Members voted on specific legislation, what they said on the floor, or Members' motivations for such legislative acts such as why they chose to vote for or against specific legislation under any circumstances in order to ensure the purpose of the Speech or Debate Clause is not undermined or frustrated. The absolute privilege would only apply to actual legislative acts such as actual votes, floor and committee speeches, and the Members' motives for such acts.

If the employee who claimed she was fired from Representative Conyers' office for rebuffing his sexual advances filed a lawsuit alleging sex discrimination and retaliation in violation of the CAA, Congress would have no ability to seek dismissal pursuant to the Speech or Debate Clause and would have to contend with the qualified privilege if Representative Conyers' office's proffered nondiscriminatory reason for her dismissal involved her performance of duties related to the legislative process such as drafting speeches for the Representative to potentially give on the House floor. If the plaintiff demonstrated a prima facie case of discrimination, Representative Conyers' office could hypothetically proffer a nondiscriminatory explanation for her dismissal by claiming that [*63] she was fired for authoring a draft of a floor speech for the Representative to give in support of single-payer health care that contained factual errors. Current doctrine would preclude any discovery of the plaintiff's draft of the speech in question or testimony from Representative Conyers and his aides regarding the draft speech's contents, the plaintiff's work on the draft speech, the circumstances surrounding it, or speech drafts written by other aides who were not fired since if they contained comparable factual errors to the plaintiff's speech

draft since it would be seen as indicating what Representative Conyers actually said on the House floor.

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Under the qualified privilege, the plaintiff would successfully demonstrate necessity since it could not be determined whether or not Representative Conyers' office's nondiscriminatory explanation for her dismissal was pretext without such discovery. She would satisfy the second prong as long as she could not obtain a copy of the drafted speeches in question from another source such as her personal computing devices or cloud or social media accounts or those belonging to other aides to Representative Conyers who expressly elected to waive the Speech or Debate Clause privilege. If the alleged factual errors concerned matters that are not known to the general public such as information shared with the Congressman by a hospital executive, the privilege would not prevent discovery into whether or not the factual assertions were in fact erroneous since the hospital executive could be deposed and would not be able to claim the privilege since he would not be a Member of Congress or Congressional aide.

In the case of the scheduler terminated from Representative Alexander's office, the qualified privilege would likely permit discovery of the communications, notes, or briefings produced regarding committee meetings. Although evidence of whether or not the committee meetings were held, what, if any, business occurred at each of them, and whether or not Representative Alexander attended them would be subject to the absolute privilege, the scheduler's work product including notes, briefings, or emails to the Representative and his other staff members would be subject to the qualified privilege. Under the qualified privilege, the scheduler would successfully demonstrate necessity since it could not be determined whether or not Representative Alexander office's nondiscriminatory explanation for her dismissal was pretext without such discovery. She would satisfy the second prong as long as she could not obtain a copy of the materials in question from another source such as her personal computing devices or cloud or social media accounts or those belonging to other aides to Representative Conyers who expressly elected [*64] to waive the Speech or Debate Clause privilege. If it is impossible to determine whether or not the scheduler was incorrect about the times of committee meetings without testimony by Members or aides regarding when the meetings actually occurred which would be subject to the absolute privilege, the case would be dismissed pursuant to the absolute privilege. Nevertheless, dismissal would not be required if since such evidence could be obtained from another source such as the public Congressional Record that Congress publishes daily, which is admissible in federal court.

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A MIDDLE GROUND BETWEEN JUDGE RANDOLPH AND JUDGE BROWN'S APPROACHES UNDER WHICH DISMISSAL IS ONLY WARRANTED IF THE PROFFERED NONDISCRIMINATORY REASON FOR THE CHALLENGED EMPLOYMENT ACTION CANNOT BE REBUTTED WITHOUT EVIDENCE OF ACTUAL LEGISLATIVE ACTS COUPLED WITH A QUALIFIED PRIVILEGE FOR STAFF LEGISLATIVE WORK PRODUCT PROTECTS THE INTERESTS THE SPEECH OR DEBATE CLAUSE WAS INTENDED TO SERVE AND IS CONSISTENT WITH THE CLAUSE'S INTENDED PURPOSE

Adopting a middle ground between Judge Randolph's and Judge Brown's approaches under which dismissal is only warranted if the proffered nondiscriminatory reason for the challenged employment action cannot be rebutted without evidence of actual legislative acts coupled with a qualified privilege for staff legislative work product ensures that the interests the Speech or Debate Clause was created to serve remain sufficiently protected.

⁷³ See, e.g., *Howard*, 720 F.3d 939 at 947; *Fields*, 459 F.3d at 14; *Scott*, 522 F. Supp. 2d at 272.

⁷⁴ *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983).

As the Supreme Court noted in *Kilbourn* and *Johnson*, the Speech or Debate Clause was inspired by a provision of the English Civil Rights Act of 1689 that prevented Members of Parliament from being arrested, charged, or questioned as a result of speeches given on the floor of either House of Parliament.⁷⁵ The English Civil Rights Act was enacted in the aftermath of both the English Civil War that was fought between 1642-1649 as a result of fraught conflict between King Charles I and Parliament over the separation of powers in Early Modern England and the religious conflict between the Catholic King James II and the predominantly Protestant Parliament that triggered the Glorious Revolution of 1688 which forced him to abdicate and flee the country⁷⁶. During the 16th and [*65] 17th Century conflicts between the Crown and Parliament, the Crown intimidated Members of Parliament by arresting and bringing criminal complaints against Members who spoke out against the ruling monarch or his or her policies.⁷⁷ In the century between the enactment of the English Civil Rights Act of 1689 and the ratification of the United States Constitution, British courts interpreted the statute to immunize Members of Parliament from prosecution or questioning for any statements given in a session of Parliament.⁷⁸ Therefore, the United States Supreme Court reasoned in 1880 that it could be reasonably inferred "that the framers of the Constitution meant the same thing [as the English Civil Rights Act has been interpreted to mean] by the use of [its] language" for the Speech or Debate Clause.⁷⁹

Although there are very few writings or recorded statements by delegates to the Constitutional Convention regarding the Speech or Debate Clause and its intended purposes, the few that have survived indicate that it was intended to prevent the type of intimidation that Members of Parliament experienced in the 16th and 17th Century in England. James Wilson, a delegate from Pennsylvania who served on the Committee on Detail that produced the initial draft of the Constitution and served as one of the inaugural Justices of the United States Supreme Court from 1789 until his death in 1798, wrote that "to enable and encourage a representative of the public[c] to discharge his public[c] trust with firmness and success, it is indispensably necessary, that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense."⁸⁰ Wilson's characterization of the purpose of the Speech or Debate Clause illustrates that the Framers intended for it to have the same purpose as the English Civil Rights Act of 1689; namely preventing the executive branch from prosecuting, arresting, or threatening to prosecute or arrest Members of Congress for speaking out against or participating in oversight or impeachment of the executive or voting against legislation favored by the executive.

Wilson's writings as well as the Federalist Papers, which were written by James Madison, Alexander Hamilton, and John Jay to rally public support for the ratification of the Constitution, also indicate that the Framers never intended for the Speech or Debate Clause to insulate the [*66] legislative branch from complete and equitable adjudication of lawsuits that would proceed unencumbered if brought against other government agencies, officials, or private individuals. In the same essay in which he explained the purpose of the Speech or Debate Clause, Wilson urged "that the conduct and proceedings of [United

⁷⁵ *Johnson*, 383 U.S. at 182; *Kilbourn*, 103 U.S. at 201-202.

⁷⁶ See e.g., *Id.*

⁷⁷ James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. LEGIS. 1, at 22 (1999).

⁷⁸ *Kilbourn*, 103 U.S. at 202.

⁷⁹ *Kilbourn*, 103 U.S. at 202

⁸⁰ James Wilson, *The Works of James Wilson*, at 421 (Robert G. McCloskey ed., 1967).

States] Representatives [and Senators] should be as open as possible to the inspection of those whom they represent, seems to be, in a republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained"⁸¹In 1788, James Madison wrote in Federalist Paper 48 that "it is agreed on all sides that" no branch of government "ought to possess, directly or indirectly, and overruling influence over the others in the administration of their respective powers".⁸²

Although Wilson's statement and Federalist Paper 48 seem to contradict the Speech or Debate Clause on their face, they demonstrate that the Framers intended for the Speech or Debate Clause to shield the minimum amount of information necessary to achieve the clause's purpose of protecting Members of Congress from politically motivated prosecutions in retaliation for statements and votes made in the course of their official Congressional duties. By writing that the "conduct and proceedings" of Congress should be open to inspection of the public at large in the same text in which he extolled the necessity of the Speech or Debate Clause, Wilson demonstrated that the Framers were concerned that Congress could abuse the Speech or Debate Clause and use it as an excuse to shield potentially unpopular or embarrassing conduct from the public.⁸³Madison's statement on the separation of powers in Federalist Paper 48 also indicates that the Framers did not intend to grant the legislative branch or Members of Congress the power to prevent the judicial branch from exercising its power under Article III to adjudicate civil lawsuits against Congress unless absolutely necessary to protect the interests the Speech or Debate Clause was intended to serve.

Although such reasoning may appear to contradict the Supreme Court's holdings in *Eastland*, *Kilbourn*, and *Tenney* which stated that the Speech or Debate Clause applies to civil as well as criminal actions, the application of the Speech or Debate Clause to civil cases is necessary and consistent with the Framers intent in select instances when courts seek to compel the disclosure of information that could expose Members of **[*67]** Congress to criminal prosecution for legislative acts.⁸⁴If a civil action requires a Member of Congress or his aides to reveal how he voted or exercised oversight or investigative authority, what reports he presented to his respective House of Congress or one of its committees, or what he said during a committee meeting or on the floor of his respective House, he could then be subject to criminal prosecution for such acts since evidence introduced in civil proceedings is admissible in criminal proceedings.⁸⁵

For example, if Representative Conyers' proffered nondiscriminatory explanation for firing his aide was that she was fired for authoring a draft of a floor speech for the Representative to give in support of single-payer health care that contained factual errors, and he was required to disclose to the court that he gave the speech in question, a politically motivated Department of Justice could open a criminal investigation into whether he gave the speech pursuant to a bribe. In such a scenario, discovery of information shielded by the Speech or Debate Clause in a civil action would have the type of consequences the Framers intended to avoid by including the clause in Article I of the Constitution.

⁸¹ Wilson, *supra* note 81, at 422.

⁸² Alexander Hamilton, John Jay & James Madison, *The Federalist Papers*, at 252 (Ian Shapiro ed., 2009).

⁸³ See Wilson, *supra* note 81, at 422.

⁸⁴ See *Eastland*, 421 U.S. at 503; *Tenney*, 341 U.S. at 377-378; *Kilbourn*, 103 U.S. at 204.

⁸⁵ See *e.g.*, *Manko v. United States*, 87 F.3d 50, 54 (2nd Cir. 1996) (holding that evidence introduced in civil proceedings is admissible in subsequent criminal proceedings).

A MIDDLE GROUND BETWEEN OF JUDGE RANDOLPH AND JUDGE BROWN'S APPROACHES UNDER WHICH DISMISSAL IS ONLY WARRANTED IF THE PROFFERED NONDISCRIMINATORY REASON FOR THE CHALLENGED EMPLOYMENT ACTION CANNOT BE REBUTTED WITHOUT EVIDENCE OF ACTUAL LEGISLATIVE ACTS COUPLED WITH A QUALIFIED PRIVILEGE FOR STAFF LEGISLATIVE WORK PRODUCT WOULD NOT REQUIRE THE DISCLOSURE OF ACTUAL LEGISLATIVE ACTS OR THE MOTIVATIONS FOR ACTUAL LEGISLATIVE ACTS

Staff legislative work product can be distinguished from evidence of actual legislative acts by the fact that a Member of Congress is under no obligation to use or act in accordance with any such staff work product in taking or deciding whether to take legislative acts. The distinction between staff legislative work product and actual legislative acts is that staff legislative work product is simply what the staff member writes or prepares for the Member such as memoranda, drafts of speeches or legislations, and recommendations regarding what legislative acts to take. A Member of Congress has the prerogative to decide how he or she wants [*68] to vote and conduct oversight and investigations, and what he or she says on the floor of his or her respective House of Congress and in committee meetings. Although his or her aides may advise him or her to take or refrain from certain legislative acts, he or she can disregard their advice and do the opposite of what they recommend whenever he or she chooses.

Even if a Member of Congress asks an aide to write a speech for him or her to give in a committee meeting or on the floor of his or her respective House, he can decide not to give the speech that was written or give an entirely different speech. Therefore, disclosure of staff work product including floor and committee speeches, summaries of investigations or research or reports prepared for introduction into the Congressional Record or presented to a committee, recommendations on how to vote, or proposed legislation for the Member to introduce, does not demonstrate that the Member took any legislative acts. For example, disclosure of Representative Conyers' fired aide's draft of the floor speech advocating for single-payer healthcare would not demonstrate that Representative Conyers gave the speech in question, nor intended to ever give it since he could have decided not to, or could have given an entirely different speech. Similarly, disclosure of notes, briefings, and schedules prepared by Representative Alexander's scheduler would not prove that committee meetings occurred or whether the Congressman participated.

Even if such evidence raises suspicion regarding what legislative acts a Member took or why he took them, such evidence would not constitute probable cause or prove beyond a preponderance of the evidence that he took them, and therefore its disclosure could never lead to politically motivated prosecutions or civil judgments for legislative acts. Nevertheless, the need to ensure that the disclosure of such information does not prompt the executive branch to launch politically motivated criminal investigations into a Member's legislative acts justifies the use of a qualified privilege to ensure that such information is not disclosed unnecessarily.

Even when a Member of Congress takes a legislative act recommended by an aide, the aide's work product recommending that act does not demonstrate why the Member took the act in question since he or she could have taken it for reasons completely unrelated to those recommended by the aide. For example, if Representative Conyers was required to produce a memorandum written by Representative Conyers' fired aide urging him to oppose the reauthorization of the Foreign Intelligence Surveillance Act (FISA) because the bill's passage would be detrimental to the United States' diplomatic relationships with its European allies, it would still be impossible to determine whether he opposed the bill for the reasons stated in the aide's memorandum. Despite [*69] the memorandum, it would remain possible that he decided to vote against the bill solely because an opinion poll showed that the majority of likely voters in his district opposed the bill. Therefore, in addition to failing to prove that a Member of Congress took any legislative acts, disclosure of staff legislative work product would not prove what motivated a Member of

Congress to take the legislative acts he did. Further, adopting the proposed approach would not compel the disclosure of evidence of actual legislative acts or the motives for any such acts, and such an approach is the most consistent with the intended purpose of the Speech or Debate Clause which would ensure that the Clause is not abused in the ways James Wilson and James Madison feared, such as enabling Members of Congress to become a class of citizens not subject to the laws they impose on their fellow citizens.

THE RELATIONSHIP BETWEEN MEMBERS OF CONGRESS AND LEGISLATIVE STAFF WAS NOT CONTEMPLATED BY THE FRAMERS

The conclusion that the proposed approach is most consistent with the intended purpose of the clause is supported by the fact that the existence of Congressional staff was not contemplated by the Framers. There is no language in Article I explicitly authorizing Congress or its members to hire staff for any purpose and does not mention the existence of Congressional staff. Congressional committees were not authorized to hire staff until 1840 when a statute was enacted to that effect, and individual Members' offices were not authorized to hire staff until statutes were enacted giving Senators and Representatives the authority to do so in 1885 and 1893. ⁸⁶Therefore, the Framers in 1787 likely never contemplated that Congress and its committees and Members would have staff assisting them with legislative responsibilities, and as a result the Speech or Debate Clause was not intended to apply to staff work product that does not conclusively indicate what legislative acts a Member took or why he or she took them, unlike aides' testimony regarding actual legislative acts taken by Members.

[*70] *A MIDDLE GROUND BETWEEN OF JUDGE RANDOLPH AND JUDGE BROWN'S APPROACHES UNDER WHICH DISMISSAL IS ONLY WARRANTED IF THE PROFFERED NONDISCRIMINATORY REASON FOR THE CHALLENGED EMPLOYMENT ACTION CANNOT BE REBUTTED WITHOUT EVIDENCE OF ACTUAL LEGISLATIVE ACTS COUPLED WITH A QUALIFIED PRIVILEGE FOR STAFF LEGISLATIVE WORK PRODUCT IS CONSISTENT WITH THE FRAMERS' INTENT SINCE EMPLOYMENT LITIGATION AGAINST CONGRESS DOES NOT INVOLVE AN EXERCISE OF JUDICIAL OR EXECUTIVE BRANCH POWER OVER MEMBERS OF CONGRESS*

Applying the proposed approach to employment lawsuits for violations of the CAA in its current form would not frustrate the purpose of the Speech or Debate Clause because Congress as a collective institution is the singular defendant in all suits brought pursuant to the CAA rather than the individual Members or their offices implicated in alleged discrimination, harassment, or retaliation. ⁸⁷Therefore, any judgements against Congressional Offices and settlements they agree to in CAA cases as well as all associated attorneys' fees are paid by Congress as opposed to the Members and offices accused of committing or participating in prohibited discrimination, harassment, or retaliation. ⁸⁸The fact that Members cannot face any personal consequences besides embarrassment as a result of employment litigation strengthens the argument that permitting such lawsuits to proceed with only a qualified privilege for staff legislative work product would frustrate the intended purpose of the Speech or Debate Clause. This is due to the fact that the Framers sought to prevent Members from exercises of executive and judicial power rather than political embarrassment and criticism which is an inevitable

⁸⁶ CQ Press, *How Congress Works*, 188, 189 (5d. ed. 2013).

⁸⁷ See 2 U.S.C. § 1415.

⁸⁸ *Id.*

product of the juxtaposition of representational democracy and freedom of speech and the press.
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Although a new statute enacted on December 20, 2018 requires Members found to have personally committed harassment or retaliation in violation of the CAA to reimburse Congress for settlements, its enactment does not weigh strongly against the adoption of the proposed approach. The statute requires Members who committed violations to reimburse Congress for the amount of the judgment or settlement within a year.⁹⁰ Although Members of Congress would have some financial exposure in [*71] CAA lawsuits if the bill is enacted, they would have less than defendants in civil lawsuits since they will not be liable for attorneys' fees under any circumstances.⁹¹ Since they could not be named as defendants in CAA lawsuits and would not have the same financial exposure of defendants in civil litigation or be required to spend time retaining and supervising defense counsel, the bill's passage would not significantly alter the analysis in favor of adopting Judge Brown's approach and the qualified privilege for staff legislative work product.

Most importantly, the fact that Members of Congress cannot be defendants in employment litigation under the CAA weighs in favor of the proposed approach since the judicial and executive branches never exercise power over Members of Congress when they are not defendants. As Chief Justice Burger noted in his majority opinion in *Eastland*, the Speech or Debate Clause applies to civil as well as criminal actions against Members of Congress because the Clause was intended to strengthen the separation of powers by protecting Members of Congress when they are subject to exercises of power by either the judicial or legislative branches as they are not part of either branch.⁹² When a Member of Congress is not a defendant in a proceeding, the adjudication of that proceeding does not constitute an exercise of judicial power over him or her. Since employment discrimination lawsuits against Members of Congress can only be brought by individual plaintiffs and not executive branch agencies such as the United States Department of Justice or the Equal Employment Opportunity Commission, the prosecution of such suits does not constitute an exercise of the executive branch's power over Members of Congress. If the Me Too Congress Act is enacted, its reimbursement requirement would not require an exercise of judicial or executive power over Members of Congress since Congress as an institution would be requiring its Members to reimburse it for damages or settlements. Such an arrangement would constitute an exercise of the legislative branch's power over the individuals who comprise the legislative branch, and thus would not have any adverse impact on the separation of powers.

[*72] A MIDDLE GROUND BETWEEN OF JUDGE RANDOLPH AND JUDGE BROWN'S APPROACHES UNDER WHICH DISMISSAL IS ONLY WARRANTED IF THE PROFFERED NONDISCRIMINATORY REASON FOR THE CHALLENGED EMPLOYMENT ACTION CANNOT BE REBUTTED WITHOUT EVIDENCE OF ACTUAL LEGISLATIVE ACTS COUPLED WITH A QUALIFIED PRIVILEGE FOR STAFF LEGISLATIVE WORK PRODUCT IS CONSISTENT WITH THE SUPREME COURT'S SPEECH OR DEBATE CLAUSE JURISPRUDENCE

Although the Supreme Court has never addressed the application of the Speech or Debate Clause to employment litigation pursuant to the CAA or the question of whether the clause protects staff legislative work product, the application of the proposed approach is consistent with the Court's Speech or Debate

⁸⁹ Brudney, *supra* note 78, at 31.

⁹⁰ Me Too Congress Act, H.R. 4396, 115th Cong. § 202 (2017).

⁹¹ *Id.*

⁹² *Eastland*, 421 U.S. at 503.

Clause jurisprudence. A detailed examination of the Court's reasoning in its series of decisions in the 1960s and 1970s that expanded the scope of the Speech or Debate Clause and established its current scope illustrates that the application of Judge Brown's approach and the qualified staff legislative work product privilege to employment lawsuits filed by current or former Congressional employees is the approach most consistent with the Court's jurisprudence.

In *Johnson*, the Court indicated that the scope of the Speech or Debate Clause should only be expanded when necessary to protect its purpose of shielding Members of Congress from politically motivated prosecutions and criminal investigations.⁹³ Justice Harlan's majority opinion reasoned that the Speech or Debate Clause "privilege will be read broadly to effectuate" the clause's purposes".⁹⁴ Justice Harlan's opinion went on to explain that "the privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney* but rather to prevent intimidation by the executive and accountability before a possible hostile judiciary" because "the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and in the context of the American system of separation of powers is the predominant thrust of the Speech or Debate Clause".⁹⁵ Justice Harlan's majority opinion indicates that the Court believed that the Speech or Debate Clause's sole purpose was to prevent politically motivated prosecutions of Members of Congress for legislative acts and its scope [*73] should only be expanded when necessary to prevent such intimidation by the executive and judicial branches.

It is evident from the *Johnson* Court's tacit endorsement of *Kilbourn* and *Tenney's* application of the Clause to civil proceedings and discussion of its origins and intended purpose that the Court believed it should only be applied to civil proceedings when necessary to avoid the disclosure of information that the executive branch could use to initiate politically motivated prosecutions of Members of Congress for legislative acts. Since testimony or the production of evidence regarding why a Member of Congress chose to engage in a legislative act (such as giving a floor speech or voting for a bill) may create evidence that a politically motivated executive branch could use to initiate a criminal investigation for crimes such as bribery and honest services wire fraud, expanding the privilege to civil proceedings which require such testimony or evidence is necessary in order to protect the interests the Clause was intended to serve. Employment discrimination, harassment, and retaliation lawsuits against Congressional offices do not necessarily require such testimony or evidence and can be permitted to proceed without frustrating the Clause's intended purpose. Further, the production of staff legislative work product would not do so since it does not demonstrate that a Member took any legislative act or a Member's motive for taking the legislative acts he or she actually took since Members are under no obligation to take action recommended by staff or take action for the reasons suggested or recommended by staff. Although an observer could use such evidence to speculate on what legislative acts a Member took or why he or she took them, such suspicions could not be proven beyond a reasonable doubt or with probable cause without evidence of the actual legislative acts or the motives for them, which would remain subject to the absolute privilege.

In *Gravel*, which expanded the Speech or Debate Clause to Congressional employees acting as Members "alter egos", the Court indicated that the Clause's scope should be limited to actual legislative

⁹³ See *Johnson*, 383 U.S. at 180.

⁹⁴ *Id.* at 180.

⁹⁵ *Id.* at 181-182.

acts and Members' motives for such acts. ⁹⁶Justice White wrote in his majority opinion that the "Clause was designed to assure a co-equal branch of the government", namely the legislative branch, "wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch" by protecting "against prosecutions that directly impinge on or threaten the legislative process". ⁹⁷Therefore, a Member of Congress "may not be made to answer - either in terms or questions or in **[*74]** terms of defending himself from prosecution-for the events that occur []" in committee meetings or on the floor of either House of Congress. ⁹⁸

Although it can be argued that the *Gravel* Court intended to shield staff legislative work product in all circumstances, it is evident that compelled disclosure of such evidence when necessary for the adjudication of employment lawsuits is consistent with the Court's reasoning. Since the *Gravel* Court's defined "legislative acts" covered by the Clause as the actual "deliberations of" acts taken by a Member to which his or her aides are privy, the proposed approach is entirely consistent with *Gravel*. ⁹⁹Further the term, the *Gravel* court defined "deliberations of" Congress rather seems to refer to the deliberations of Congress as a collective institution and those of its Houses and committees rather than the deliberations of individual Members regarding what if any legislative acts to take. ¹⁰⁰Since only Members of Congress are party to the collective deliberations of Congress and its Houses by nature of their status as the only individuals entitled to vote in Congress, Justice White's majority opinion appears to limit the Clause's scope to actual legislative acts taken by Members of Congress and their motives for such acts rather than their own deliberations regarding what if any legislative acts during which they may consult staff.

It is also evident that the *Gravel* Court only intended to grant Congressional employees the ability to invoke the Speech or Debate Clause when they are questioned about or compelled to produce evidence of actual legislative acts undertaken by Members of Congress or Members' actual motives for such acts. By stating that "the central role of the Speech or Debate Clause" would be "diminished and frustrated" if Congressional employees acting as Members' "alter egos" could not invoke the Clause since Members often "perform their legislative tasks" with the assistance of staff, the Court indicates that its holding was in response to the fact that staff privy to actual legislative acts and deliberations between Members of Congress could be compelled to testify as to what legislative acts Members took and why chose to take such acts. ¹⁰¹

Since the Court established six years earlier in *Johnson* that the Clause was intended to protect Members of Congress from politically motivated prosecutions for legislative acts, the Court's decision in *Gravel* to expand the Clause to Congressional staff in order to serve "the central role" is apparently limited to ensuring that Congressional staff are not compelled **[*75]** to disclose evidence of actual legislative acts that could be used by the executive branch to commence politically motivated prosecutions of Members of Congress. ¹⁰²Since permitting employment lawsuits filed by

⁹⁶ See *Gravel*, 408 U.S. at 616-617.

⁹⁷ *Id.* at 616.

⁹⁸ *Id.*

⁹⁹ *Id.* at 616-625.

¹⁰⁰ See *Id.*

¹⁰¹ *Gravel*, 408 U.S., at 616-617.

¹⁰² *Id.* at 616-617; *Johnson*, 383 U.S., at 181-182.

Congressional employees and compelling the production of legislative staff work product when required by such litigation would not result in the disclosure of evidence of what legislative acts a Member took or why he or she took them, adopting the proposed approach is consistent with the Court's reasoning in *Gravel*.

Although Court's holding in *United States v. Brewster*, which was decided on the same day as *Gravel*, would appear to weigh against the adoption of the proposed approach for employment litigation, a closer examination of the Court's reasoning illustrates that such an approach is entirely consistent with the Justices' interpretation of the Clause. In *Brewster*, Maryland Senator Daniel Brewster was indicted for bribery for allegedly accepting a bribe in exchange for voting in favor of a specific piece of legislation.¹⁰³The Court held that a bribery indictment against a United States Senator could not proceed if inquiry into how the Member "spoke, how he debated, how he voted, or anything he did in a chamber or in committee" was necessary "in order to make out a violation" of the statute in question.¹⁰⁴Given the Court's reasoning coupled with Chief Justice Warren Burger's statement in his majority opinion that the Clause only applies to "things generally done a session of the House [or Senate] by one of its members in relation to the business before it... or things said or done by him, as a representative [or Senator], in the exercise of the functions of that office" , it can be argued that the Court intended staff legislative work product shared with Members of Congress to be subject to the Clause.¹⁰⁵

Although the *Brewster* Court apparently considered staff legislative work product shared with Members of Congress subject to the Clause, it is evident that the application of a qualified rather than absolute privilege to such evidence in civil employment lawsuits rather than criminal proceedings is consistent with the Court's reasoning. Chief Justice Burger wrote on behalf of the majority that "we would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process."¹⁰⁶The Court also noted that the framers "wrote the [***76**] privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process."¹⁰⁷

Since the *Brewster* Court indicated that the Clause should be limited to its original meaning, which was to protect Members of Congress from prosecution for actual legislative acts, it is evident that the Court did not intend to extend the clause's protections in civil lawsuits to staff legislative work product that would not prove the occurrence of legislative acts or the actual motives behind them.¹⁰⁸Since Members are free to ignore aides' recommendations, suggestions, and prepared remarks, disclosure of staff legislative work product does not compromise the integrity of the legislative process by proving what legislative acts a Member took and why he or she took them. Subjecting staff legislative work product a qualified rather than an absolute privilege in employment litigation unlike all other types of proceedings would both protecting statements made to Members of Congress by staff and avoid an unduly and inequitably broad application of the Clause.

¹⁰³ *United States v. Brewster*, 408 U.S. 501, 503-504 (1972).

¹⁰⁴ *Id.* at 526.

¹⁰⁵ *Id.* at 512-513.

¹⁰⁶ *Brewster*, 408 U.S. at 516.

¹⁰⁷ *Id.* at 517.

¹⁰⁸ *See, Id.* at 516-517.

The proposed approach is also consistent with *Eastland*. In his majority opinion in *Eastland*, Chief Justice Burger reasoned that civil litigation "creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation" and "whether criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled."¹⁰⁹ Chief Justice Burger's reasoning in *Eastland* does not apply to employment litigation by current and former Congressional employees since pursuant to the CAA, employment lawsuits are filed against Congress as an institution rather than Members of Congress or their personal offices and therefore, the adjudication of such litigation does not constitute an exercise of power by the judicial or any other branch of the federal government over Members of Congress.

While the CAA has been amended to require Members of Congress found to have personally violated the CAA to reimburse Congress for any judgments or settlements, Members cannot be defendants in civil employment lawsuits subject exercises of power by the judicial branch. The requirement that Members of Congress reimburse Congress for judgments in certain CAA lawsuits is an exercise of power by the legislative branch over its own members rather than an exercise of power [*77] by the judicial or executive branch over Members of Congress. Although litigation may divert Members' attention from their legislative duties, such circumstances do not justify the application of the Speech or Debate Clause on their own as evidenced by the fact that sitting Members of Congress can be personally sued for anything not governed by the Speech or Debate Clause and are not entitled to any special treatment or privileges in the course of such litigation.¹¹⁰

A MIDDLE GROUND BETWEEN OF JUDGE RANDOLPH AND JUDGE BROWN'S APPROACHES UNDER WHICH DISMISSAL IS ONLY WARRANTED IF THE PROFFERED NONDISCRIMINATORY REASON FOR THE CHALLENGED EMPLOYMENT ACTION CANNOT BE REBUTTED WITHOUT EVIDENCE OF ACTUAL LEGISLATIVE ACTS COUPLED WITH A QUALIFIED PRIVILEGE FOR STAFF LEGISLATIVE WORK PRODUCT IS CONSISTENT WITH FEDERAL STATE SECRETS PRIVILEGE JURISPRUDENCE

Applying the proposed approach to employment lawsuits filed by current and former Congressional employees is consistent with the Supreme Court and United States Courts of Appeals' jurisprudence regarding State Secrets Privilege. Unlike the Speech or Debate Clause, which is expressly enumerated by the Constitution, State Secrets Privilege is a common law doctrine developed by federal courts since the United States Civil War in order to protect national security.¹¹¹

Courts have treated State Secrets Privilege as a jurisdictional bar to litigation when cases cannot be equitably adjudicated without the production of evidence subject to the privilege. In 1875, the Supreme Court held that a lawsuit against the federal government alleging breach of a contract for espionage services during the Civil War could not proceed because "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated" and "[m]uch greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

¹⁰⁹ *Eastland*, 421 U.S., at 503.

¹¹⁰ See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979); *Chastain v. Sundquist*, 833 F.2d 311, 313-314 (D.C. Cir. 1987).

¹¹¹ See, e.g., *Webster v. Doe*, 486 U.S. 592, 601-602 (1988); *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

¹¹² The Supreme Court has more recently applied the State Secrets Privilege acts as jurisdictional bar to civil actions for [*78] breach of contract when the mere existence of the alleged contract cannot be confirmed without violating the privilege ¹¹³.

Federal courts have held that State Secrets Privilege only acts as a jurisdictional bar to employment litigation by current and former federal government employees when the plaintiff's job responsibilities and work product are subject to the privilege. In *Webster v. Doe*, the Supreme Court held in a case in which a former CIA employee alleged he was fired for being gay in violation of his constitutional rights that State Secrets Privilege is not a jurisdictional bar to constitutional or statutory civil rights claims by employees of federal intelligence and national security agencies. ¹¹⁴In *Abilt v. Central Intelligence Agency*, the U.S. Court of Appeals for the 4th Circuit held that State Secrets Privilege only serves as a jurisdictional bar to civil employment lawsuits when the plaintiff's work for the federal agency in question is itself subject to the privilege and "the plaintiff cannot prove the prima facie elements of his or her claim" and the defendant cannot properly defend itself "without privileged evidence" as a result. ¹¹⁵

The holdings of the courts in cases including *Totten*, *Webster*, and *Abilt* are consistent with the application of the proposed approach to employment suits filed by current and former Congressional employees. In all three cases and their progeny, the disclosure of or testimony regarding the plaintiffs' work product would invariably reveal information regarding actual intelligence and defense operations undertaken by the United States government, which is the exact information State Secrets Privilege is intended to protect from disclosure. ¹¹⁶In many cases, the mere acknowledgement that a plaintiff was employed by or contracted for an intelligence agency such as the CIA would constitute disclosure of information the State Secrets Privilege is intended to protect, especially when his or her duties involved ongoing intelligence gathering or military operations. ¹¹⁷By contrast, disclosure of or testimony regarding Congressional aides' legislative work product would not reveal what if any legislative acts Members of Congress took or why any Member of Congress chose to take a certain legislative act since Members, which [*79] unlike staff legislative work product, is the information the Speech or Debate Clause was intended to protect from disclosure. ¹¹⁸

CONCLUSION

Federal courts should adopt the approach of eliminating the Speech or Debate Clause as a jurisdictional bar to employment lawsuits filed by current and former Congressional employees proposed by unless the proffered nondiscriminatory explanation for the challenged employment action cannot be rebutted without evidence of actual legislative acts or the actual motives for them and subjecting Congressional staff legislative work product to a qualified privilege for Congressional employee work product related to legislative acts that would compel discovery of the evidence in question if the District

¹¹² *Totten v. United States*, 92 U.S. 105, 107 (1875).

¹¹³ See, e.g. *General Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011); *Tenet v. Doe*, 544 U.S. 1, 11 (2005).

¹¹⁴ *Webster*, 486 U.S., at 604-605.

¹¹⁵ *Abilt v. Central Intelligence Agency*, 848 F.3d 305, 313-316 (4th Cir. 2017). See also, *El-Masri v. United States*, 479 F.3d 296, 308-309 (4th Cir. 2007) (holding that a civil action must be dismissed when the cause of action in question cannot be established without evidence subject to the Speech or Debate Clause).

¹¹⁶ See, *Webster*, 486 U.S., at 601-602; *Totten*, 92 U.S., at 107; *Abilt*, 848 F.3d 305, at 316.

¹¹⁷ See, e.g., *Totten*, 92 U.S., at 107.

¹¹⁸ See, e.g., *Johnson*, 383 U.S., at 181-183; *Tenney*, 341 U.S., at 373; *Kilbourn*, 103 U.S., at 201-202.

Court concludes in an in camera hearing that there a) a substantial need for the information sought; b) the party seeking disclosure lacks alternative means of obtaining the information sought without undue hardship; and c) the party resisting disclosure cannot withhold the information sought pursuant to another evidentiary privilege unrelated to the Speech or Debate Clause such as state secrets or attorney-client privilege.

Adopting this approach would protect the rights of Congressional employees without in any way frustrating or compromising the intended purpose of the Speech or Debate Clause which was to ensure that Members of Congress were never prosecuted or threatened with prosecution for legislative acts or subjected to expensive and time consuming litigation for legislative acts by a politically motivated executive or judiciary and would not overrule or contradict any prior Supreme Court decisions. Since employment lawsuits are exclusively civil proceedings and the type of discrimination, harassment, and retaliation prohibited by the applicable employment statutes does not constitute a crime, such actions will never result in the prosecution, indictment, arrest, or imprisonment of a Member of Congress. Further, since employment lawsuits are filed against Congress rather than individual Members and Congress as a collective institution is solely responsible for retaining, supervising, and compensating defense counsel in employment litigation, such litigation will not unduly distract or impose a direct financial hardship upon Members of Congress even if legislation is passed requiring those found personally responsible for actionable conduct to reimburse Congress for settlements or judgments.

[*80] Finally, since Members of Congress possess the ability to ignore the advice, analysis, or instructions of their staff and often do so, disclosure of staff legislative work product never establishes what if any legislative acts they took or why they took the legislative acts they are known to have taken. Conclusive evidence that an aide wrote a speech for a Member of Congress to give on the House floor does not in any way prove that the Member gave the speech in question or even spoke about the topic of the proposed speech. Similarly, evidence that an aide advised a Member of Congress to vote in favor of a certain bill for a specific reason does not in any way prove that the Member voted in favor of the bill or why he voted for or against it. Since the proposed approach would never compel the production of evidence regarding what if any legislative acts Members took and why they took the legislative acts they took, it would not in any way frustrate the intended purpose of the Speech or Debate Clause. In addition to protecting the intended purpose and interests served by the Speech or Debate Clause, the proposed approach would allow for the equitable adjudication of most if not all employment claims by current and former Congressional employees since unabridged production of and testimony regarding an employee's work product can usually if not always demonstrate whether or not the employer's proffered nondiscriminatory and non-retaliatory explanation for a challenged employment practice was pretext for discrimination or retaliation.

By eliminating the use of the Speech or Debate Clause as a jurisdictional bar to employment litigation and subjecting Congressional staff legislative work product to a qualified privilege in such actions, federal courts can simultaneously protect the independence of the legislative branch coveted by the framers and the rights of all Congressional employees to be free from discrimination, harassment, and retaliation on the basis of protected traits. In doing so, federal courts, which may be more inclined to adopt such an approach given the cultural shift surrounding the #MeToo movement, would ensure that federal lawmakers select their aides and advisors on the basis of their expertise rather than traits beyond their control with no bearing on their competence to shape national policy, thereby strengthening the integrity of the legislative branch championed by the framers and legal scholars for well over two centuries.

APPENDIX A

Proposed Federal Rule of Evidence

In a civil action against the United States Congress or any legislative branch office, department, or agency in which no Member of Congress is **[*81]** named as a defendant that alleges violations of a federal statute or regulation protecting the rights of Congressional employees, Congressional employees' legislative work product and testimony and evidence regarding such legislative work product is admissible and cannot be shielded from discovery if the party seeking discovery demonstrates in an in camera hearing that a) there is a substantial need for the information sought; b) the party seeking disclosure lacks alternative means of obtaining the information sought without undue hardship; and c) the party resisting disclosure cannot withhold the information sought pursuant to another evidentiary privilege unrelated to the Speech or Debate Clause such as state secrets or attorney-client privilege.

For the purpose of the rule, legislative work product is defined as memoranda, letters, reports, research, briefings, schedules, notes, or recommendations prepared by a Congressional employee regarding legislation, matters of public policy, Congressional committee activities, Congressional oversight and investigations, impeachment or expulsion proceedings, nominations, or other matters related to the operation of a Congressional office or drafts of actual or proposed legislation, reports, statements, or speeches written or edited in full or in part by such an employee.