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United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RITA BASTIEN,

Plaintiff - Appellant,

v.

No. 02-1343

THE OFFICE OF SENATOR BEN NIGHTHORSE CAMPBELL,

Defendant - Appellee,

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; AARP; NATIONAL ASIAN PACIFIC AMERICAN LEADERSHIP ASSOCIATION; AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, PROJECT ON GOVERNMENT REFORM; PUBLIC CITIZEN, INC.,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 01-WY-799-CB(OES))

John S. Evangelisti (Karen Larson, with him on the briefs), Denver, Colorado
Plaintiff - Appellant.

Jean Marie Manning, Senate Chief Counsel for Employment (Claudia A. Kostelny, with her on the brief), Office of Senate Chief Counsel for Employment, Arlington, Virginia, for Defendant - Appellee

Traci L. Lovitt, of Jones, Day, Reavis & Pogue, New York, New York (Glen D. Nager, of Jones, Day, Reavis & Pogue, Washington, D.C., with her on the briefs), for Amici Curiae American Federation of State, County and Municipal Employees, AFL-CIO, National Employment Lawyers Association, AARP, and American Association of People with Disabilities; Vincent Eng, Legal Director

National Asian Pacific American Legal Consortium, Washington, D.C., on the brief for Amicus Curiae National Asian Pacific American Legal Consortium; Larry P. Weinberg, General Counsel, American Federation of State, County and Municipal Employees, AFL-CIO, Washington, D.C.; Jenifer Bosco, Senior Staff Attorney, National Employment Lawyers Association, San Francisco, California; Andrew J. Imparato, President and CEO, American Association of People with Disabilities, Washington, D.C.

Allison M. Zieve, Public Citizen Litigation Group, Washington, D.C.; Sheila Bedi and David C. Vladeck, Institute for Public Representation, Georgetown University Law Center, Washington, D.C., on the brief for Amici Curiae Project on Government Oversight and Public Citizen, Inc.

Before SEYMOUR, BALDOCK, and HARTZ, Circuit Judges.

HARTZ, Circuit Judge.

Our Constitution's Speech or Debate Clause states that "for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The issue before us is whether

the Clause precludes Plaintiff Rita Bastien's employment-discrimination claim brought under the Congressional Accountability Act of 1995 (the CAA). Senator Nighthorse Campbell fired Plaintiff from her position on his staff. Her duties included meeting with the public to obtain information used by the Senator for both constituent services and his legislative agenda. We hold that suit is barred because the claim does not question the conduct of official Senate legislative business by Senator Campbell or his aides. We do not address, however, whether certain evidence may be inadmissible in this litigation because it concerns such conduct.

I. The Congressional Accountability Act

The CAA, 2 U.S.C. § 1301 et seq., extends the protections of 11 major workplace statutes to congressional employees. See 2 U.S.C. § 1302(a)(1)-(11). It creates the Office of Compliance (OOC), an independent office within the legislative branch. See id. § 1381. The OOC has a five-member Board of Directors, appointed jointly by the Speaker of the House, the Senate Majority Leader, and the Senate and House Minority Leaders. See id. § 1381(b). "In addition to promulgating rules for implementation of the eleven statutes, the OOC oversees a complaint procedure that provides for counseling, mediation, formal hearing and decisions by a hearing officer, and appeal to the Board of Directors." Jan Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 Harv. J. Legis. 1, 9 (1999). See generally Sandra Mazliah, *The Congressional*

Accountability Act of 1995: Meandering the Mandatory Administrative Maze, 6 Fed. Cir. B.J. 5 (1996). The CAA provides for judicial review, see 2 U.S.C. § 1407, and it allows plaintiffs to opt out of some Board proceedings and instead file suit in federal district court. See id. §§ 1404, 1408; Brudney, *supra*.

Under the CAA a plaintiff may file a complaint only against the employing office, not the individual member of Congress. See 2 U.S.C. §§ 1405(a) & 1408(b). The Office of House Employment Counsel, see id. § 1408(d), or the

Senate Chief Counsel for Employment represents the office, *Brudney, supra*, n.46; and damages are paid from funds appropriated into the OOC's Treasury account. See 1415(a). Of particular relevance to our case, the CAA explicitly retains Speech or Debate Clause immunity for members of Congress, see 1415(a) thereby avoiding any issue regarding whether Congress as a whole can waive immunity for individual members.

II. Factual and Procedural Background

Plaintiff worked for six years—from July 7, 1994, to September 4, 2000—as a Senate Aide in Senator Campbell's Englewood, Colorado, office. (On September 5, 2000, at the age of 61, she was transferred to the Senator's Colorado Springs office, where she was a District Director. On April 10, 2001, she was terminated.)

Plaintiff sued Senator Campbell's office (the Office) under the CAA on

April 30, 2001, alleging age discrimination and retaliation for discriminatory complaints. She alleged that the discrimination began several months before her transfer to Colorado Springs and continued until her termination.

The Office moved to dismiss the suit under Fed. R. Civ. P. 12(b)(1), contending that the Speech or Debate Clause barred federal subject matter jurisdiction over the case, and that the claim should be dismissed on the ground of sovereign immunity. The Office asserted that "Plaintiff's duties of meeting with constituents, gathering information for the Senator, discussing constituent suggestions and then conveying them to the Senator, constitute actions that directly relate to the due functioning of the legislative process," *Bastie v. Senator Campbell*, 209 F. Supp. 2d 1095, 1101 (D. Colo. 2002), and accordingly should be shielded from judicial scrutiny by the Speech or Debate Clause. Plaintiff responded that "her actions were political rather than legislative in nature, and that although she met with constituents to discuss certain issues, she never performed legislative functions." *Id.*

The district court granted the Office's motion to dismiss. *Id.* It held that "the Speech or Debate Clause provides immunity to Members of Congress and their aides for personnel actions taken with respect to employees whose duties are directly related to the due functioning of the legislative process[.]" *Id.* The court then found that "the majority of Plaintiff's job duties . . . were directly

the due functioning of the legislative process." *Id.* at 1104.

The court characterized Plaintiff's job responsibilities in the Englewood office as follows:

Plaintiff's interaction with constituents and her attendance at various meetings and congressional hearings on behalf of the Senator illustrate that Plaintiff's duty was not only to provide Senator Campbell with information, but to take action on behalf of the Senator and provide him with recommendations on various legislative issues and agendas.

Id. at 1105. It described her job responsibilities in the Colorado Springs office as including "gathering and conveying to Senator Campbell himself, and to the Defendant, information critical to the Senator's legislative agenda." *Id.* The court concluded that "the personnel actions taken by [the Office] against Plaintiff are afforded Speech or Debate Clause immunity." *Id.* at 1104.

Plaintiff appeals this ruling. We reverse and remand to allow the suit to proceed.

III. The Speech or Debate Clause

The first paragraph of Article I, Section 6 of the Constitution states: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They 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.

U.S.C.A. Const. art. I 6, 1. On its face the Speech or Debate Clause v

not appear to apply to a Senator's conduct with respect to his employees. appears to protect only the Senator's remarks on the Senate Floor. But the Supreme Court has long treated the Clause as constitutional shorthand for a extensive protection.

The Office contends that this protection encompasses "personnel action taken against employees whose job duties directly relate to the due function of the legislative process." Aplee. Br. at 41 (capitalization omitted). In this case, Plaintiff was such an employee, so her claim is constitutionally barred.

We disagree. As we read the Supreme Court's opinions on the Speech or Debate Clause, the Clause protects only "legislative" acts by a member of Congress or an aide, and only official, formal acts (or perhaps their functional equivalent) deserve the adjective "legislative." In particular, Plaintiff's contacts with constituents and other sources of information and opinion were not legislative in nature. Because Plaintiff's duties were not legislative and the actions allegedly taken against her were not in themselves legislative, her claim can proceed.

Our conclusion follows from a careful review of Supreme Court precedent. We now proceed to summarize the Court's opinions to establish that the Office's contentions go beyond any holding and are inconsistent with the Court's explanations of its holdings.

The Court's first pronouncement on the Clause was in *Kilbourn v. Thompson*, 103 U.S. 168 (1880). First, *Kilbourn* held that a committee investigation exceeded the constitutional powers of the House of Representatives and hence ruled invalid a House order declaring a witness in contempt for violating a subpoena duces tecum issued by the committee. It reinstated the witness's claim against the House sergeant at arms for falsely arresting him in accordance with the order. See *id.* at 170-77, 205. Then, however, the Court held that the Speech or Debate Clause protected against suit the members of Congress responsible for the order.

The Court said that "it may be reasonably inferred that the framers of the Constitution meant the same thing" as what Lord Denman had said in construing the British Parliamentary privilege from which the Clause was derived:

The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For every paper signed by the speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So if the speaker by authority of the House order an illegal act, though that authority shall exempt him from question,

his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer.

Id. at 202 (quoting *Stockdale v. Hansard*, 9 Ad. & E. 1, 112 Eng. Rep. 1112 (1839) (emphasis added)). Accordingly, the Court construed "Speech or Debate" broadly, writing:

It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.

Id. at 204 (emphasis added).

To say that "Speech or Debate in either House" is to be construed broadly is not, however, to say that it should be cast free from its mooring. In fact, it should not be, and has not been, read to make members of Congress into a special class of citizens protected from suit (or prosecution) arising out of activity that could assist in the performance of their official duties. At virtually anything that a member of Congress does could be said to relate, less directly, to official business (e.g., causing an accident when speeding attend a constituent's dinner party). And although any suit or prosecution of a member of Congress could improperly influence the member in the conduct of official duties, the Clause does not protect against all such intrusions.

Supreme Court's jurisprudence indicates that the Clause's protection is limited to the conduct of official business of the member's chamber. Other activities of members are "political" rather than "legislative," however important they may be. In other words, "Speech or Debate" has been interpreted broadly to encompass voting, issuing reports, and other formal activity, but the phrase "in either House" that immediately follows "Speech or Debate" has limited the protection to official conduct. Thus, *Kilbourn* described the protection of the Clause as limited to things generally done in a session of the House by one of its members in relation to the business before it." Id. at 204 (emphasis added). Later opinions have continued on this theme.

After *Kilbourn* the Supreme Court did not address the Speech or Debate Clause for another 70 years. The issue in *Tenney v. Brandhove*, 341 U.S. 361 (1951), was whether a civil rights claim could be brought against several state legislators for conducting a committee hearing to inquire into statements made by the plaintiff, himself a state legislator. Id. at 370-71. The Court held that Congress that enacted the civil rights legislation could not have intended to impinge on the traditional privilege of legislators expressed at the national level in the Speech or Debate Clause. Id. at 376. The Court noted that "[i]nvestigations, whether by standing or special committees, are an established part of representative government," id. at 377, and ruled against the plaintiff

because the committee investigation had not "exceeded the bounds of legislative power," id. at 378. In other words, "Speech or Debate in either House" includes questioning witnesses in committee meetings.

United States v. Johnson, 383 U.S. 169, 185 (1966), added two important glosses to the Clause. First, the Court held that the Clause protects not "legislative acts of [a] member of Congress," but also the member's "motive in performing them." Second, it held that even though the Clause may not bar a particular prosecution altogether, it could preclude use of certain evidence

Johnson, a former Congressman, had been convicted of violating and conspiring to violate the federal conflict-of-interest statute by his efforts to influence the Department of Justice to dismiss an indictment against a loan company and its officers. *Id.* at 171. One part of that effort was his delivery of a speech on the House floor favorable to the loan company. *Id.* at 172. The Court found that the proper application of the Clause required exclusion from trial of evidence relating to Johnson's floor speech, the manner of its preparation, and his motives in making it. *Id.* at 173-76. Certainly, the consideration of such evidence amounted to "questioning" a member of Congress concerning a Speech or Debate in the member's House. The Court rejected the Government's argument that the Clause "was meant to prevent only prosecutions based upon the 'content' of speech, such as libel actions, but not those founded on 'the antecedent un-

conduct of accepting or agreeing to accept a bribe.'" *Id.* at 182 (quoting *United States v. Johnson*). It also rejected the contention that the Clause "was violated because the gravamen of the count was the alleged conspiracy, not the speech." *Id.* at 184. Although affirming the Court of Appeals' reversal of Johnson's convictions, the Court remanded to permit a new trial at which the prohibited evidence would be excluded. *Id.* at 185. The Court refused to bar the prosecution altogether. In particular, in accord with Kilbourn's view of the scope of the Clause, it would not construe the Clause to provide a privilege with respect to contacts with executive agencies. The Court wrote, "[T]he attempt to influence the Department of Justice . . . in no wise related to the due functioning of the legislative process." *Id.* at 172.

Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam), reaffirmed Kilbourn in providing Speech or Debate Clause protection for issuance of congressional subpoenas—in that case, a subpoena "validated by subsequent Subcommittee ratification," *id.* at 84. The Court further stated that "legislators engaged in the sphere of legitimate legislative activity should be protected only from the consequences of litigation's results but also from the burden of defending themselves." *Id.* at 85 (internal quotation marks and citation omitted). Counsel for the committee, however, was not protected by the Clause with respect to his actions preceding issuance of the subpoena. *Id.* He had allegedly

conspired with state officials to violate Dombrowski's civil rights in obtaining records that were then subpoenaed by the committee.

Although *Powell v. McCormack*, 395 U.S. 486 (1969), is best remembered for holding that the House of Representatives improperly excluded Mr. Powell after his election in 1966, it also raised issues of Speech or Debate Clause immunity with respect to Members of the House and its employees. The Court determined that "[a]lthough this action should be dismissed against responding Congressmen [for voting for exclusion], it may be sustained against their employees." *Id.* at 550. But see *id.* at 501-02 (stating that Court need address only whether defendant House employees could be sued even if the Congressmen were protected). The Court rejected the defendant employees' attempt to distinguish the rulings against congressional employees in *Kilbourn* and *Dombrowski* on the grounds that the prior cases "concerned an affirmative act by the employee outside the House having a direct effect upon a private citizen," *id.*, at 501, and that they had involved suits for damages rather than the "assertedly greater interference with the legislative process" in *Powell*, in which the plaintiff sought disbursement of funds (salary) by the Sergeant at Arms, *id.* Otherwise, *Powell* does not appear to have broken any new ground with respect to Speech or Debate Clause protection.

The next Court opinion on the Clause, *United States v. Brewster*, 408 U.S. 1

501 (1972), is of particular importance to this case because of its elaborate

the meaning of "legislative acts." Brewster was a former Senator charged with accepting a bribe in exchange for promising to cast a particular vote. The Court overturned the dismissal of the indictment. It distinguished Johnson on the ground that there was "no need for the Government to show that [Brewster] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise." *Id.* at 526. It said that the Court stands for the proposition "that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." 408 U.S. at 512. It further stated: "A legislative act has consistently been defined as an act generally done by Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivations for those acts." *Id.*

The Court then pointed out that much of the work of Senators and Representatives does not qualify for protection:

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to

constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.

Id. (emphasis added).

The Court refused to accept what it considered an overly expansive construction of the Speech or Debate Clause. It adopted the approach of Justice Brandeis for the Court in *Long v. Ansell*, 293 U.S. 76 (1934). *Long* had received a broad interpretation of the congressional immunity from arrest provided by Article I, Section 6, because that Clause's "language is exact and leaves room for a construction which would extend the privilege beyond the terms of the grant," *id.* at 82 (quoted by Brewster, 408 U.S. at 521).

Thus, Brewster rejected the view that the Clause protects "all conduct related to the due functioning of the legislative process." Brewster, 408 U.S. at 513 (quoting Johnson, 383 U.S. at 172). The Court said that Senator Brewster had read out of context the passage quoted from Johnson and that Johnson actually had held "that only acts generally done in the course of the process of enacting legislation were protected." Brewster, 408 U.S. at 514. Contrary to Senator Brewster's argument, "[i]n no case has this Court ever treated the

as protecting all conduct relating to the legislative process. In every case before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process." *Id.* at 515-16 (footnotes omitted). The Court concluded its rejection of a "broad" reading by pointing out the dangers of an excessive expansion of Speech or Debate Clause immunity:

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. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to "relate" to the legislative process. Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility.

Id. at 516.

On the same day as *Brewster*, the Court also decided *Gravel v. United States*, 408 U.S. 606 (1972), in which it considered the Speech or Debate Clause in the context of Senator Gravel's disclosure of the Pentagon Papers. The Court took the opportunity to explain the circumstances in which members of Congress are protected by the Clause with respect to acts by their aides. It did not, however, clearly expand protection in any other dimension.

The case arose out of a subpoena to Senator Gravel's aide, Leonard S.

Rodberg, issued by a federal grand jury investigating possible criminal misconduct associated with public release of the documents. One evening Senator Gravel had convened a meeting of a Senate subcommittee he chaired, where he read portions of the Pentagon Papers and placed all 47 volumes in the public record. Rodberg had been added to the Senator's staff earlier that day and assisted in the preparation and conduct of the hearing. A number of days after the hearing, press reports indicated that Senator Gravel had arranged for a private company to publish the papers. Id. at 608-10.

The Court thought it "incontrovertible" that the Senator could not be questioned about events at the subcommittee hearing. Id. at 615. It then turned to Rodberg's involvement, stating that "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." Id. at 618. It explained that such aides must be treated as all part of the Member because "the day-to-day work of such aides is so critical to the Members' performance." Id. at 616-17. It being "literally impossible, in the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating for Members of Congress to perform their legislative tasks without the help of aides and assistants," id. at 616, it follows that to deny the aides' acts

protection of the Clause would "inevitably . . . diminish[] and frustrate[] the central role of the . . . Clause—to prevent intimidation of legislators by Executive and accountability before a possibly hostile judiciary," id. at 616. The privilege, however, belongs to the Senator, who can waive an aide's claim to protection. See id. at 622 n.13. One could say that the aide's actions are not for sound reasons of policy, as the functional equivalent of actions by the Member of Congress.

The Court discussed at some length its earlier decisions in *Kilbourn*, *Dombrowski*, and *Powell*, in which members of Congress were held to be protected by the Speech or Debate Clause while their aides were nevertheless subject to liability. The Court found those cases distinguishable because the aides had not performed legislative acts. The discussion provides a further gloss on the Court's view of what actions are "legislative" and thus protected by the Clause. The Court wrote:

The three cases reflect a decidedly jaundiced view towards extending

the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings. In Kilbourn, the Sergeant-at-Arms was executing a legislative order, the issuance of which fell within the Speech or Debate Clause; in [Dombrowski], the committee counsel was gathering information for a hearing; and in Powell, the Clerk and Doorkeeper were merely carrying out directions that were protected by the Speech or Debate Clause. In each case, protecting the rights of others may have to some extent frustrated a planned or completed legislative act; but relief could be afforded without proof

of a legislative act or the motives or purposes underlying such an act. No threat to legislative independence was posed, and Speech or Debate Clause protection did not attach.

Id. at 620-21 (emphasis added). We emphasize that the Court viewed "gather information for a hearing" in Dombrowski as not being a legislative act.

The Court further explained the meaning of "legislative act" in holding the Speech or Debate Clause afforded no protection with respect to arrangements for private publication of the Pentagon Papers. Id. at 622. Relying on earlier precedents, the Court extended the Clause's protection of republications or far as official committee reports. Id. at 623-24. The Court said that "private publication . . . was in no way essential to the deliberations of the Senate does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence." Id. at 625. Also, it appeared that "neither Congress nor the full committee ordered or authorized the publication." Id. at 626. The Court said that it did not "but conclude that the Senator's arrangements with [the private publisher] were not part and parcel of the legislative process." Id.

More broadly, said the Court: "That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." Id. at 625. It elaborated:

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is

construed to reach other matters, they must be 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. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but only when necessary to prevent indirect impairment of such deliberations.

Id. (internal quotation marks and citation omitted) (emphasis added).

Based on these general principles, the Court held that no "constitutional or other privilege . . . shields Rodberg, any more than any other witness, from jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated in the questions." Id. at 628. Then it held that a protective order

would afford ample protection for the [Speech or Debate Clause] privilege if it forbade questioning any witness, including Rodberg: (1) concerning the Senator's conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee; (2) concerning the

motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) except as it proves relevant to investigating possible third-party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing.

Id. at 628-29 (footnote omitted).

Strangely, the Court did not state that all this protection was requir

just said that the order would provide "ample protection." Id. at 628. This peculiar language may have been appropriate because some of the limitations the order could be justified on grounds other than the Speech or Debate Clause—for example, a grand jury's authority is generally limited to investigate only crime—and those other grounds provided, in the context of that case, as much protection as the Clause in certain areas.

Further hampering an understanding of the reach of the Clause under Gravel is the uncertainty regarding the scope of the protection with respect to noncriminal acts performed by the Senator's aides "in the course of their employment, in preparation for the subcommittee hearing," id. at 629. This protection is not explored in the opinion. In particular, the scope of "protection" for a hearing, which could include virtually any work by an aide, is left unspecified. Perhaps such specificity was unnecessary in that case because Rodberg had been an aide for only a few hours before the hearing. In any event, despite Gravel's expansive construction of the Clause to protect certain activities of congressional aides, it still confined protection to activity closely associated with the conduct of official legislative business.

In *Doe v. McMillan*, 412 U.S. 306 (1973), the Court considered a suit by persons allegedly defamed by a committee report publicly disseminated by the Government Printing Office. The Court held that the Speech or Debate Clause

barred the claim "insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, or from the investigator for introducing material at Committee hearings that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report." Id. at 312. Distribution of the report within Congress itself was also protected. See id. The necessity of disclosure in the report of the allegedly defamatory matter was the proper subject of inquiry under the Clause. See id. at 312-13. At the same time, however, the Court held that the Clause "does [not] immunize those who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function." Id. at 315-16. Although the Court indicated perhaps a showing could be made that some public dissemination of the material might have been necessary "in order [for Congress] to perform its legislative function," id. at 317—in which case the dissemination would be protected by the Speech or Debate Clause—it failed to provide specific guidance on how to resolve the matter on remand.

In *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), the Court clarified that the Speech or Debate Clause protects not only votes to authorize committee investigations but also issuance of subpoenas in the exercise of that authorization. Id. at 505. The Court wrote that "[i]n determining

particular activities other than literal speech or debate fall within the 'legislative sphere' we look to see whether the activities took place 'in a

the House by one of its members in relation to the business before it.'" Id. (quoting Kilbourn, 103 U.S. at 204). "The power to investigate and to do so through compulsory process plainly falls within [Gravel's] definition [of the legitimate legislative sphere]." Id. at 504. "[T]he power to investigate in the power to make laws." Id. The "investigation at issue [was] related to the furtherance of a legitimate task of Congress." Id. at 505. Not only were the Committee members immune from suit, but so was the Committee's Chief Counsel. See id. at 507.

United States v. Helstoski, 442 U.S. 477 (1979), removed any doubt that the evidence of legislative acts cannot be introduced into evidence for any purpose. Former Congressman Helstoski was prosecuted for allegedly accepting bribes in return for promising to introduce private bills granting resident status to certain aliens. The issue was the extent to which the Speech or Debate Clause required exclusion of evidence the Government sought to offer during trial. The Government "contend[ed] that the Speech or Debate Clause does not bar the introduction of evidence referring to legislative acts . . . [and] argue[d] that the Clause prohibit it from introducing evidence of discussions and correspondence which describe and refer to legislative acts if the discussions and correspondence

occur during the legislative process." Id. at 486. The Government said that it "sought to introduce such evidence to show Helstoski's motive for taking action and not to show his motive for introducing the bills." Id. Following Johnson v. Brewster, the Court largely rejected the Government's argument, stating that the precedents "leave no doubt that evidence of a legislative act of a Member may be introduced by the Government." Id. at 487. It reiterated that "[t]he Clause protects 'against inquiry into acts that occur in the regular course of the process and into the motivation for those acts.'" Id. at 489 (quoting Johnson v. U.S. at 525). It noted, however, that "[a] promise to deliver a speech, to solicit other votes at some future date is not 'speech or debate,' [nor] is a promise to introduce a bill . . . a legislative act." Id. at 490.

The most recent Supreme Court opinion on the Speech or Debate Clause was handed down a quarter-century ago. In Hutchinson v. Proxmire, 443 U.S. 111 (1979), the source of Senator Proxmire's problem was not alleged criminality but an allegedly libelous attempt at humor. The Senator's Golden Fleece Award publicized expenditures of taxpayer money he considered wasteful. Plaintiff Hutchinson received the award for his research on anger in animals. Senator Proxmire entered his comments in the Congressional Record and then referred the award in newsletters to his constituents and others. In addition, he mentioned the research in a television interview, and his aide contacted federal agencies

had supported the research. See id. at 114-17.

The Court denied Senator Proxmire the protection he sought under the Speech or Debate Clause: "A speech by Proxmire in the Senate would be wholly immune and would be available to other Members of Congress and the public in the Congressional Record. But neither the newsletters nor the press releases are 'essential to the deliberations of the Senate' and neither was part of the deliberative process." Id. at 130. The Court acknowledged that if it gave the Speech or Debate Clause "a practical rather than a strictly literal reading, it would limit the protection to utterances made within the four walls of either Chamber. Thus, we have held that committee hearings are protected, even if they occur outside the Chambers; committee reports are also protected." Id. at 124. The Court continued, "[t]he gloss going beyond a strictly literal reading . . . has not departed from the objective of protecting only legislative activities." Id. at 130. The Clause reaches only matters that are "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

the jurisdiction of either House.'" *Id.* at 126 (quoting *Gravel*, 408 U.S. at 625). This view conforms to that of Justice Joseph Story, who wrote: "[T]his privilege is strictly confined to things done in the course of parliamentary proceedings

does not cover things done beyond the place and limits of duty." J. Story, *Commentaries on the Constitution* 863 at 329 (1st ed. 1833) (Story) (quoting *Proxmire*, 443 U.S. at 126).

Even accepting Senator Proxmire's contention that newsletters and press releases "exert some influence on other votes in the Congress and therefore have a close relationship to the legislative and deliberative process," *id.* at 131, the fact that such a relationship was insufficient to trigger Speech or Debate Clause protection. It noted that in *Brewster* it "had carefully distinguished between what is 'closely related to the due functioning of the legislative process,' and what constitutes a legislative process entitled to immunity under the Clause." *Id.* (quoting *Brewster*, 408 U.S. at 512). Although Congress's informing itself through hearings is a legislative function protected by the Clause, "the transmittal of such information by individual Members in order to inform the public and other Members is not part of the legislative function or the deliberations that make up the legislative process." *Id.* at 133. "Newsletters and press releases . . . are primarily for informing those outside the legislative forum; they represent the views and opinions of a single Member. It does not disparage either their value or their importance to hold that they are not entitled to the protection of the Speech or Debate Clause." *Id.* Of particular relevance here, the Court distinguished Proxmire's activities from "congressional efforts to inform itself through committee hearings[, which]

part of the legislative function." *Id.* at 132-33 (emphasis added).

This survey of Supreme Court opinions reveals several continuing themes in the interpretation of the mandate, "for any Speech or Debate in either House [Senators and Representatives] shall not be questioned in any other Place." Const. art. I, § 6, cl. 1. First, in light of the history and undoubted purpose of the Clause, the words "Speech or Debate" have been read broadly to encompass all formal actions in the official business of Congress, including voting, conducting hearings, issuing reports, and issuing subpoenas. See, e.g., *Kilbourn*, *Terrell*, *Powell*, *Gravel*, *Doe*, and *United States Servicemen's Fund*.

Second, in recognition of the needs of a large and overburdened legislative body, the Court has extended the meaning of some terms in the Clause to include their functional equivalents. Thus, "Senators and Representatives" include those who function as their alter egos in performing legislative acts. See *Gravel*, 408 U.S. at 616-17; *Doe*, 412 U.S. at 312; *United States Servicemen's Fund*, 421 U.S. at 507. And committee hearings are deemed "in" the House even when conducted far away. See *Proxmire*, 443 U.S. at 124.

Third, an act is "questioned" not only if it is the subject of civil or criminal prosecution but even if evidence of the act is offered at a trial. See *John Helstoski*.

Fourth, and most important for this appeal, the above "broad" construction

of the Speech or Debate Clause have always been confined within the limits of formal, official proceedings. This limitation has been recognized from *Kilbourn*, 103 U.S. at 204 (describing object of Clause as "things generally done in and about the House by one of its member in relation to the business before it") to *Johnson*, 383 U.S. at 172 (attempts to influence executive agency are outside Clause's scope) to *Brewster*, 408 U.S. at 512 (the "Clause prohibits inquiry into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts"), to *Gravel*, 408 U.S. at 625 ("[i]nsofar as the Clause is construed to reach other matters [than speech or debate in either House], they must be an integral part of the deliberative

communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of legislation or with respect to other matters which the Constitution places the jurisdiction of either House"), and to Proxmire, 443 U.S. at 126 ("this privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of (quoting Story)). The expression summarizing this proposition is that the protects only "legislative," not "political," acts. See Brewster, 408 U.S.

We now turn to the specifics of the case before us.

IV. Application to this Case

As we understand the Supreme Court's jurisprudence on the Speech or Debate Clause, the immunity issue before us turns on whether Plaintiff's legislative questions "legislative" action by Senator Campbell or Plaintiff. In our view, the answer does not.

First, the alleged discriminatory acts by the Senator were not legislative acts. No official Senate action, such as a vote or a subpoena, was involved. The Senator's alleged misconduct took place "in either House" of Congress either literally or constructively (as might be the case when a subcommittee conducts hearings in the hinterlands).

Indeed, even if there had been a legislative act—say, a committee resolution—directing a discriminatory action against Plaintiff, only the vote would be protected by the Speech or Debate Clause. Plaintiff could still claim for being removed from the payroll or being mistreated by supervisors. In *Powell*, the House of Representatives in effect fired a member of its own body. Those who voted to exclude Powell were protected by the Speech or Debate Clause. But its agents—including those who handled payrolls—were subject to suit. Thus, in the case before us, Defendant—the Office of Senator Campbell—could be liable for a discriminatory action against Plaintiff even if the action was authorized or directed by immunized legislative votes.

Second, Plaintiff's discrimination claim does not require proof of any

legislative act by Senator Campbell or any member of his staff. Defendant pointed to, or even suggested, that Plaintiff would need to prove that Senator Campbell cast a particular vote, subpoenaed a witness, or took part in any official Senate or Senate committee action. What Defendant does suggest is that meetings with constituents or other members of the public—either by the Senator himself or by his aides—are legislative acts to the extent that information gathered that could affect his votes or his efforts to craft proposed legislation in support of this position. Defendant cites language in the Supreme Court's decision in *Doe, United States Servicemen's Fund*, and *Proxmire*, stating that gathering information was a legislative act. In each of these cases, however, the information gathering being addressed was in the course of formal committee action, where the committee had subpoenaed witnesses or disclosed information during a hearing. No Supreme Court opinion indicates that Speech or Debate Clause immunity extends to informal information gathering by individual members of Congress. To the contrary, Gravel summarized the nonimmunized civil complaint against the committee counsel in *Dombrowski* as "charg[ing] [him] with conspiring with Senate officials to carry out an illegal seizure of records that the Committee sought in its own proceedings," Gravel, 408 U.S. at 619—surely an information-gathering function. Gravel explained that even though "the committee counsel was gathering information for a hearing[,] . . . relief could be afforded [to t

the counsel] without proof of a legislative act or the motives or purposes underlying such an act." *Id.* at 620-21. The Court's discussions in its opinion of the importance of information gathering is for the purpose of establishing that such activity is a proper congressional function and, when conducted by a

committee, should be treated just as voting and debating legislation. To e protection to informal information gathering-either personally by a member Congress or by congressional aides-would be the equivalent of extending Spe or Debate Clause immunity to debates before local radio stations or Rotary

The only potential support for Defendant's views on this matter that v find in the Supreme Court's opinions is the statement in Gravel that a prot order "would afford ample protection for the [Speech or Debate Clause] priv if it forbade questioning any witness . . . concerning any act, in itself r performed by the Senator, or by his aides in the course of their employment preparation for the subcommittee hearing." 408 U.S. at 628-29 (emphasis ac Perhaps the Court is saying that information gathering targeted to a specif hearing is activity privileged under the Clause. But the Court failed to e the matter, and other language in Gravel, particularly the discussion of Dombrowski summarized above, strongly suggests otherwise. The issue was nc clearly presented in Gravel because the staff member who acquired the information-the Pentagon Papers-had only been hired on the day of the heari

In any event, the unexplained statement in Gravel is insufficient ground fo stretch the meaning of "Speech or Debate in either House" to include the ev task of gathering views and information from constituents and others throug informal contacts.

Aside from reliance on the Speech or Debate opinions of the Supreme Co Defendant also points to the immunity granted the President. In *Nixon v. Fitzgerald*, 457 U.S. 731(1982), the Supreme Court recognized "absolute Presidential immunity from damages liability for acts within the `outer per of his official responsibility." *Id.* at 756. Fitzgerald had been terminat Air Force position "in the context of a departmental reorganization and rec in force, in which the job was eliminated." *Id.* at 733-34. He alleged the reorganization was a ruse and that he was actually terminated in retaliatic truthful testimony before a congressional committee. See *id.* at 736. Hold the President had "the authority to prescribe reorganizations and reduction force" within the Air Force, the Court "conclude[d] that [the President's] wrongful acts lay well within the outer perimeter of his authority." *Id.* a

Fitzgerald hardly compels a conclusion that members of Congress have a absolute immunity from similar suits by their staff assistants. It is not argue that if the head of one of the three branches of government has absol immunity in personnel matters, then so do the heads of a coequal branch. 7

sure, any imposition of liability on a public official may impair that offi performance of official duties; lawsuits by former employees can consume ti and energy, and the prospect of such suits may deter the official from disc an employee whose incompetence diminishes the official's own efficiency and effectiveness. But Fitzgerald made clear that determining whether to recog absolute immunity requires balancing such interests against the interests c who have been wronged. See *id.* at 744-48. And recognition of the Preside absolute immunity derived from "[t]he President's unique status under the Constitution." *Id.* at 750 (emphasis added). The Court said that "[b]e caus singular importance of the President's duties, diversion of his energies by with private lawsuits would raise unique risks to the effective functioning government," *id.* at 751, and "the sheer prominence of the President's offic makes him "an easily identifiable target for suits for civil damages," *id.* Surely these considerations also weigh heavily in the context of high ranki executive officials, such as governors and cabinet officers; but the Court decisions giving such officials only a qualified immunity "to be inapposite 750.

Prominent as members of Congress are, the threat to the performance of their duties arising from employment litigation is nothing like what would

the President. It is worth observing that the third branch of government,

judiciary, is not entitled to absolute immunity in making employment decisions. See *Forrester v. White*, 484 U.S. 219 (1988). Moreover, Congress itself, at 1995, apparently did not believe it required such protection. It limited the CAA only insofar as the Speech or Debate Clause provided immunity, and case law at that time hardly provided much ground for reliance on the Clause in the personnel arena. A truly concerned Congress would likely have enacted specific protection in the CAA. Defendant would have a stronger argument if the cause of action here were not one created by Congress. Indeed, the absolute privilege holding in *Fitzgerald* was limited to "'implied' causes of action" that do not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President" *Fitzgerald*, 497 U.S. 147, 178 n.27.

In any event, Defendant relies solely on the Speech or Debate Clause immunity. And whatever the strength of policy arguments for granting members of Congress the same absolute immunity afforded the President, we are restricted to what the language of the Clause will bear. Instructive in this regard is Justice Brandeis' opinion for the Court in *Long v. Ansell*, 293 U.S. 76 (1934). At issue was the meaning of the clause immediately preceding the Speech or Debate Clause: "[S]enators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at t

Session of their respective Houses, and in going to and returning from the U.S. Const. art. I, § 6, cl. 1.

Senator Huey Long had been sued for libel in the District of Columbia, and a summons to answer the complaint was served on him in the District during a congressional session. The Court rejected Long's argument that the constitutional protection against arrests encompasses immunity from such a summons while he was conducting the public's business in Congress. Justice Brandeis wrote that the language of the constitutional provision protecting members of Congress from arrest "is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant." 293 U.S. at 82. Likewise, we do not read a congressional equivalent of the *Fitzgerald* privilege into the Speech or Debate Clause.

Finally, Defendant relies on *Browning v. Clerk*, 789 F.2d 923 (D.C. Cir. 1986), the one appellate opinion dismissing an employment claim because of Speech or Debate Clause immunity. The court in that case dismissed a complaint alleging racial discrimination filed by a woman fired from her position as an official reporter of the House of Representatives. The court stated that "the touchstone to determining whether the Speech or Debate Clause immunity attaches is whether the activities at issue were 'an integral part of the deliberative and communicative processes [of Congress],' *Gravel*, 408 U.S. at 625, such that

activity is legislative in character." *Id.* at 928. This observation is not controversial, coming from *Gravel's* statement that for activities other than "speech or debate in either House" to be legislative acts, "they must be 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." *Gravel*, 408 U.S. at 625.

Browning went one step further, however, in stating, "[p]ersonnel decisions are an integral part of the legislative process to the same extent that the employee's duties are an integral part of the legislative process. Thus, if the employee's duties are an integral part of the legislative process, such that

directly assisting members of Congress in the discharge of their functions personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny." *Browning*, 789 F.2d at 928-29 (citation omitted).

We hesitate to embrace this test. A personnel decision is not a "legislative act," as defined by the Supreme Court, and is therefore not entitled to immunity. The Speech or Debate Clause therefore provides protection only if legislative action must be proved to establish the claim challenging the personnel action. See *Helstoski*, 442 U.S. at 487-89. Perhaps the *Browning* test is simply another

describing this protection. After all, in *Browning* the official reporter's performance could be established only by comparing her output to what was actually said during a committee meeting. Thus, litigation of her claim would have required examination of legislative acts. See *Browning*, 789 F.2d at 929. In any event, even under the *Browning* formulation, Plaintiff here prevails, because her job duties do not satisfy the *Gravel* standard for a legislative act. Her discussions with constituents and others were not "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." *Gravel*, 408 U.S. at 625. The "communicative processes" referred to in *Gravel* are only those within Congress itself.

V. Conclusion

We hold that Plaintiff's cause of action under the CAA is not barred by the Speech or Debate Clause. We REVERSE the dismissal by the district court and REMAND for further proceedings consistent with this opinion.